No. 93605-6

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Court of Appeals
Division I
State of Washington

NO. 73333-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARCO B. WENCES,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the court error in admitting the defendant's post-Miranda statements?

2. Did the trial court improperly impose a firearm sentencing enhancement based on the jury's verdict?

II. STATEMENT OF THE CASE

On September 12, 2003, Everett Police officers arrested the defendant. On December 16, 2003, the State charged the defendant with one count of possession of a controlled substance, with intent to manufacture or deliver while armed with a firearm. A hearing under CrR 3.5 was heard on July 2, 2004. July trial began on February 22, 2005. After a two day trial, the jury convicted the defendant as charged. Sentencing was scheduled for April 8, 2005. The defendant failed to appear but his trial counsel advised the court the defendant's wife had begun labor so he was unable to attend the hearing. The sentencing was reset to April 22, 2005. The defendant again failed to appear for his sentencing hearing and a warrant issued for his arrest. Approximately 10 years later, the defendant appeared subject to the warrant. He was sentenced on March 23, 2015. At sentencing the prosecutor recommended 100 months, 64 months plus 36 months for the firearm

enhancement. The defendant through his attorney joined in the recommendation for 100 months indicating that it was a lengthy time, but that it took into consideration another pending charge that he would be resolving. The defendant also told the court that he had been in California for the last 10 years. He said he had a lucrative bee keeping business there. He told the court he made good money and would be able to go back to beekeeping when released from custody. CP 30-31, 88; 7/2/04 RP 1-36; 2/22/05 RP 78[1]; 4/8/05 RP 2; 3/25/15 RP 3-7.

1. Testimony At CrR 3.5 Hearing.

On July 2, 2004, the court heard testimony from Officer Bosman of the Everett Police Department regarding statements made to him by the defendant. Officer Bosman testified that he contacted the defendant after obtaining a warrant for the defendant and the car associated with the defendant, a white Toyota Corolla. Officer Bosman and other Everett officers conducted a traffic stop of the defendant while he was driving the Corolla. The defendant was removed from the vehicle and detained pursuant to the

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[1] For purposes of clarity, this brief refers to the verbatim reports by date except the two reports from 2/22/05 shall be distinguished as follows: 2/22/05 RP- Supp (proceedings prior to jury selection); 2/22/05 RP (proceedings after jury selection).

warrant. Officer Bosman told the defendant why he was detaining him. Officer Bosman testified that at that point in time he advised the defendant of his basic rights. He said he advised the defendant of his right to remain silent and his right to an attorney. He asked the defendant if there was a gun in the car and the defendant responded that there was one under the seat, but it did not belong to him. Officer Bosman also asked the defendant if there were any drugs in the car. Officer Bosman then placed the defendant in the backseat of his patrol car and searched the Corolla. After searching the Corolla, Officer Bosman placed the defendant under arrest and advised him of his Constitutional rights by reading them to him verbatim from his issued Miranda card. Officer Bosman did not make any threats or promises to get the defendant to waive his rights and the defendant appeared to understand his rights and was voluntarily conversing with Officer Bosman. This second conversation took place in Officer Bosman's patrol car as he was driving the defendant to jail. 7/2/04 RP 6-10; 18-19; 22.

The defendant also testified at the CrR 3.5 hearing. The defendant said that Officer Bosman advised him of his rights off the top of his head. He said Officer Bosman told him he had the right to remain silent, he had the right to an attorney and that anything

he said could be used against. He said he was told this before Officer Bosman searched the Corolla the defendant was driving. The defendant testified that he had requested an attorney and did not answer any questions. 7/2/04 RP 24-25; 27-28.

The court suppressed the statements made prior to the defendant being advised of his complete constitutional rights by the officer reading them verbatim from his issued Miranda card. The court allowed the statements made by the defendant after Officer Bosman read the rights and waiver to him from his issued Miranda card. 7/2/04 RP 37.

2. Testimony At Trial.

At trial, the jury heard testimony from Officer Bosman, Officer Woods, and Officer Braley of the Everett Police Department. They also heard testimony from Dr. Person, a forensic chemist with the Washington State Patrol crime laboratory and Evan Thompson, a firearm and tool mark examiner for the Washington State Patrol crime laboratory. The defendant also testified. 2/22/05 RP 3, 8, 67; 2/23/05 RP 6, 26, 42.

Officer Bosman testified that at that time he had approximately 19 years of experience in law enforcement. He was a member of the ACT team and had specialized in the investigation

of narcotics related offenses. Prior to September 12, 2003, Officer Bosman had obtained a warrant to seize and search the defendant and a white Toyota Corolla associated with him. He contacted the defendant on September 12, 2003 at about 9:00 p.m.. The defendant was the driver and sole occupant of the white Toyota Corolla. 2/22/05 RP 8-15, 59.

Officer Bosman contacted the defendant and had him step from his vehicle. He advised the defendant that he had a warrant for him and his vehicle. Officer Bosman moved the defendant to his patrol vehicle. Officer Bosman searched the defendant's person and found a large amount of cash on his person. The defendant had $220 in his left pants pocket and $1,050 and a watch in his right rear pants pocket. Officer Bosman then searched the Toyota. He found $1,335 in cash loose under the driver's seat. Laying on top of the money he also found a small semi-automatic firearm. In the glove box he found a stereo face plate that had some coins, some straws, and a little plastic baggy with an unknown substance in it. This item was sent to the Washington State Patrol crime laboratory for testing. Officer Bosman also found a backpack on the front passenger seat. The backpack contained many separately packaged items of suspected controlled

substances, empty baggies, a digital scale, and an electronic organizer. Officer Bosman also found 2 cellular phones in the vehicle. In the trunk of the vehicle he found a glass bong of the type commonly used to smoke marijuana. 2/22/05 RP 15-33.

Also found in the Toyota were a large number of papers in the defendant's name including receipts for work on the Toyota and Washington State Employment Security receipts. There were also letter addressed to the defendant and other correspondence to his wife or regarding his child. These documents were found in the driver's door pocket and the glove box. Officer Bosman also testified on cross-examination that during their surveillance operation, the defendant was the only person seen driving the Toyota. 2/22/05 RP 35-36, 38, 72-77.

The jury heard that the defendant admitted to Officer Bosman post-Miranda warnings that the gun found in the car was his and that it had been given to him by Julie and Fernandez for his protection. When asked about the large amounts of cash on his person and in the car, the defendant said he had just withdrawn $1,000 from his Bank of America account. The defendant admitted to selling illegal drugs and said "It's better than working." and "I can make more money selling dope." The defendant told Officer

Bosman that he smokes marijuana but does not use any other drugs. 2/22/14 RP 34-35.

The jury also heard from Dr. Person, a forensic scientist with the Washington State Patrol Crime Laboratory. He testified to testing two of six items sent to him as suspected controlled substances. The first item he tested was State's exhibit 1 in this case. He identified the contents of the baggie as a chemical called dimethyl xylophone. He testified that they see this chemical a lot in the controlled substance case work mixed with methamphetamine. The second item he tested was State's exhibit 3. He identified the contents of that baggie as containing methamphetamine. The contents weighed 27.6 grams, or just short of an ounce. He only tested these two items. He testified that at the time the items were sent to the crime lab for testing, they were understaffed and had a policy of only testing items until they were able to identify a controlled substance. 2/23/05 6-7; 12-17.

Evan Thompson testified that he was a firearm and tool mark examiner for the Washington State Patrol Crime Laboratory. He had received specialized training through the FBI as well as having a degree in biology form Anderson University. He testified regarding the firearm that was found in the defendant's car on top

of the money. He tested the firearm and found it to be operational. He demonstrated to the jury how this particular firearm functioned showing them the different parts, how to place a magazine in the magazine well, pull back the slide and releasing it to strip a round off the top of the magazine and placing it in the chamber of the gun. Then all that is needed is to pull the trigger to fire the gun. 2/23/05 RP 26-36.

3. Jury Instructions.

The defendant did not object or except any of the court's instructions to the jury except the court not providing the defendant's proposed unwitting possession instruction. 2/23/05 RP 51-52.

III. ARGUMENT

1. The Defendant Cannot Establish Manifest Error Because The Record Is Incomplete.

A party's objection or argument preserves an issue only if the party actually raises that particular issue before the trial court. Cotton v. Kronenberg, 111 Wn. App. 258, 273, 44 P.3d 878 (2002).

As a general rule, appellate courts will not consider issues raised for the first time on appeal. However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right". RAP 2.5(a); State v. McFarland, 127 Wn.2d

322, 332-33, 899 P.2d 1251, 1255 (1995). The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. McFarland, 127 Wn.2d at 333.

Here, the record is incomplete. In deciding whether an improper two-part interrogation took place, the court is to take into consideration subjective evidence, such as an officer's testimony. Hickman, 157 Wn. App. At 775. Because the issue was not raised below, the testimony of the officer as to his reason for giving the partial warnings is not available. Furthermore, the defendant testified that he was advised of more rights than the officer remembered giving him. The court did not enter findings with regard to the defendant's testimony. Had the court been alerted to the issue at the trial level, it could and likely would have entered finding specific to that issue.

2. Even If The Court Found The Record Was Sufficient, It Was Not An Improper Two-Part Interrogation.

A trial court must suppress post-warning confessions obtained during a deliberate two-step interrogation where the midstream Miranda[2] warning, in light of the objective facts and circumstances, did not effectively apprise the suspect of his rights. United States v. Williams, 435 F.3d 1148, 1157 (9th Cir. 2006).

Absent deliberately coercive or improper tactics in obtaining the initial statement, subsequent administration of Miranda warnings ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. Oregon v. Elstad, 470 U.S. 298, 314, 105 S.Ct. 1285, 1296, 84 L.Ed.2d 222 (1985).

The first step is to determine whether a two-step interrogation process was used as a deliberate strategy to circumvent the requirement of Miranda warnings. Only if it was a deliberate strategy is it necessary to determine if the "midstream" Miranda warnings were effective. In determining whether police deliberately withheld the Miranda warnings, the court must consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 1612, 16 L. Ed.2d 694, 10 A.L.R.3d 974 (1966).

step interrogation procedure was used to undermine the Miranda warning. State v. Hickman, 157 Wn. App. 767, 775, 238 P.3d 1240 (2010). If the court finds no deliberateness, the admissibility of post-warning statements is governed by Elstad, which holds that post-warning statements are admissible if voluntary. Elstad, 470 U.S. at 318. To determine if the "midstream" Miranda warnings were effective the court looks at the following factors:

> [1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second, [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions treated the second round as continuous with the first.

Missouri v. Seibert, 542 U.S. 600, 617, 124 S.Ct. 2601, 2613, 159 L.Ed.2d 643 (2004).

Applied to this case, the only factor that arguably exists is the continuity of police personnel. Officer Bosman asked the two pre-arrest questions after he partially advised the defendant of his rights. He searched the vehicle. Then, he was the officer who questioned the defendant after placing him under arrest, and fully advising him of his constitutional rights.

The content does not overlap. Prior to being placed under arrest, the defendant said that there was a gun in the car but it did

not belong to him. After he was fully advised of his constitutional rights, the defendant admitted the gun was his and that it had been given to him by Julie and Fernandez for his protection. Prior to being placed under arrest, the defendant did not make any statements about the large amounts of cash on his person and in the vehicle. The defendant did tell Officer Bosman there was just "ice" in the car during prior to the search of the vehicle. After the search and being fully advised of his rights the defendant admitted to selling illegal drugs explaining that "It's better than working." and "I can make more money selling dope." The defendant also told Officer Bosman that he smokes marijuana but does not use any other drugs. 2/22/14 RP 34-35.

There was a clear break in timing and location between the two interrogations. Officer Bosman asked the defendant the first set of questions right after contacting him and walking him back to his patrol car and before he searched the vehicle. After searching the vehicle, he placed the defendant under arrest and fully advised him of his constitutional rights by reading them verbatim from his pre-printed card. Officer Bosman indicated he spoke with the defendant this second time while he was driving him to jail. There is no indication in the record that Officer Bosman referred to the

defendant's prior answers while questioning him on the way to the jail. The defendant answers were different. There is no indication that Officer Bosman attempted to use his earlier answers to further the interrogation. It appears he did not comment on the early answers at all.

There is no indication that Officer Bosman was deliberately attempting to circumvent the requirement of providing Miranda warnings. He remembered advising the defendant he had the right to remain silent and that he had the right to an attorney. The defendant remembered that he also advised him that anything he said could be used against him. Officer Bosman asked two general questions before beginning his search of the vehicle. There is nothing in the record to suggest he referenced or attempted to build on the answers he received to those general questions when he questioned the defendant after placing him under arrest and properly advising him of his constitutional rights.

3. The Court Properly Imposed The Firearm Enhancement.

The defendant was convicted by jury verdict in 2005. This court has found that Recuenco III does not apply retroactively to cases that were final when it was announced. In re Scott, 173 Wn.2d at 919-20. Because this defendant voluntarily absconded

from justice for approximately 10 years, he now seeks the benefit of Recuenco III with regard to the firearm enhancement applied at sentencing. State v. Recuenco (Recuenco III), 163 Wn.2d 428, 180 P.3d 1276 (2008).

Defendants' Sixth Amendment right to a jury trial includes the right to a jury finding of guilt beyond a reasonable doubt for every element of a crime with which they are charged. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In Blakely, the United States Supreme Court held that any fact that increases a sentence beyond the standard range must be based solely on the facts reflected in the jury verdict or admitted by the defendant. Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

In this case, the jury was given special verdict form for a deadly weapon enhancement, and they returned an answer in the affirmative. The State provided notice in the information it would seek a firearm enhancement. This notice does not control in cases where a deadly weapon special verdict form is submitted to the jury. However, when the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding. State v. Williams-Walker, 167 Wn.2d 889,

899, 225 P.3d 913, 918 (2010). In this case, the jury instructions provided the basis for imposing the firearm enhancement.

The jury was instructed: "For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime. A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." Court's Instr. # 15, CP 50. This instruction was the only definition of deadly weapon provided to the jury. Therefore, if the jury followed the instructions, as jurors are presumed to do, the jury found the defendant was armed with a "pistol, revolver, or any other firearm." State v. Willis, 67 Wn.2d 681, 409 P.2d 669 (1966). Justice Stephens opined that exactly the circumstances of this case could occur in her concurring opinion in In re Scott;

> Consider, for example, a case similar to this one but where the law post-Recuenco III applies. The information (which the court considers) charges a firearm enhancement; the special verdict form (which the court also considers) reflects a deadly weapon finding. If we look at nothing else, a judgment and sentence imposing a firearm enhancement reveals a facial invalidity. But, what if the jury instructions relating to the special verdict form tell the jury it should give an affirmative answer on the special verdict form only if it finds the defendant armed with the charged firearm? In other words, under the law explained to the jury, a deadly weapon verdict reflected a firearm finding.

> Without an ability to consider the jury instructions in conjunction with the charging document and the special verdict form, a court reviewing the judgment and sentence is unable to confirm the absence of any facial invalidity. This makes no sense. After all, courts often ascertain the meaning of special verdict forms in light of the instructions given to the jury.

In re Scott, 173 Wn.2d 911, 921-22, 271 P.3d 218, 223-24 (Stephens, J. concurring, 2012). "[T]he best rule is to view the verdict in light of the instructions and the record to see if the clear intent of the jury can be established." Meenach v. Triple E Meats, Inc., 39 Wn. App. 635, 638, 694 P.2d 1125, 1127 (1985). A court may view a verdict in light of the jury instructions and trial evidence. McRae v. Tahitian, LLC, 181 Wn. App. 638, 645, 326 P.3d 821, 824 (2014). "This latter interpretation follows logically from the instruction given with the special verdict." State v. Davis, 35 Wn. App. 506, 509, 667 P.2d 1117(1983) aff'd, 101 Wn.2d 654, 682 P.2d 883 (1984).

This case is unlike prior cases were the information alleged a firearm enhancement but the jury was only instructed on a deadly weapon enhancement or provided with both a definition of deadly weapon and firearm before reaching a verdict of armed with a deadly weapon. Here, the information specified the firearm enhancement, the only weapon the jury received evidence about

was a firearm, the evidence included expert testimony of the operability of the firearm, the only definition provided to the jury of a deadly weapon was that it was a firearm. The only interpretation that follows logically from the information, evidence and instructions is that the jury verdict was a finding that the defendant was armed with a firearm, supporting the court's sentence.

IV. CONCLUSION

For the forgoing reasons the State asks the court to affirm the defendant's conviction and sentence.

Respectfully submitted on February 17, 2016.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. MARCO BAILON WENCES, Appellant.	No. 73333-8-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 17th day of February, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF RESPONDENT-CROSS-APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer Winkler, Nielsen, Broman & Koch, winklerj@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of February, 2016, at the Snohomish County Office.

Diane K. Kremenich
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