

No. 95374-1

NO. 74733-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR THOMAS,

Appellant.

FILED
Mar 27, 2017
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDALL
THE HONORABLE HOLLIS R. HILL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. To preserve an issue for appellate review a defendant must object at trial or prove manifest error affecting a constitutional right. Thomas asserts that the trial court lacked statutory authority to empanel a jury to decide the question of whether he was armed with a firearm during the commission of the crime after the original jury failed to reach a verdict as to the enhancement. Does Thomas's failure to raise the issue below bar appellate review?

2. If this Court considers the issue despite Thomas's failure to preserve it, should it conclude that controlling statutes, court rules, and case law authorized the trial court to empanel a second jury to decide the enhancement?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Appellant Arthur Thomas with assault in the first degree for attacking and shooting a bank security guard. CP 35. The State further alleged that Thomas was armed with a firearm during the assault. Id. After a trial, the jury was unable to agree as to the first-degree assault charge, but found Thomas guilty of the lesser-included offense of second-degree assault. CP 109-10; 10/29/15 RP

3-20. The jury was unable to agree on the firearm enhancement and left the special verdict form blank. CP 111; 10/29/15 RP 20.

The court empaneled a second jury to consider solely whether Thomas was armed with a firearm at the time of the second-degree assault. CP 132; 11/6/15 RP 42-43; 12/1/15 RP 11, 13. The jury unanimously determined that he was. CP 123.

The trial court imposed a standard range sentence totaling 42 months in custody and 18 months of community custody. CP 146-47. Thomas timely appeals. CP 153, 166.

2. SUBSTANTIVE FACTS

Bruce Golphenee worked as a uniformed and armed security guard at the Bank of America at 23rd and Jackson in Seattle, Washington. 12/3/15 RP 51-53. On July 24, 2014, he was on duty at the bank when Thomas approached him from behind and hit him on the side of his face with a backpack. Id. at 58-59. Thomas then began repeatedly punching Golphenee in the face. Id. at 59. During the struggle to free himself from Thomas, Golphenee's fibia was fractured. Id.

As Golphenee tried to defend against Thomas's continued assault, he felt Thomas reach for Golphenee's holstered firearm. 12/3/15 RP 60. When he realized that Thomas had his hand on the

grip of the gun and that the holster was unsnapped, Golphenee reacted by grabbing the gun and firing two rounds toward the ceiling. Id. at 60-61. The firearm was a six-shot revolver, and Golphenee's goal was to discharge all six rounds safely and to disarm the weapon before Thomas could gain control of it. Id.

At one point, Thomas managed to place his finger on the trigger of the firearm and discharge a round, which struck Golphenee's hand. 12/3/15 RP 61. The two men became separated when Thomas gained control of the firearm. Id. at 62. Thomas fired the gun directly at Golphenee, striking him in the back and causing internal injuries. Id. As Golphenee lay wounded on the ground, Thomas shot himself non-fatally in the face and jaw. Id. at 62-66. Golphenee underwent several surgeries for his injuries and ultimately had a finger amputated. Id. at 71-73, 75.

C. **ARGUMENT**

AFTER THE FIRST JURY FAILED TO UNANIMOUSLY AGREE AS TO THE FIREARM ENHANCEMENT, THE TRIAL COURT PROPERLY EMPANELED A SECOND JURY TO CONSIDER THE QUESTION.

Thomas argues that the trial court lacked statutory authority to empanel a second jury to address the firearm enhancement after the first jury was unable to unanimously agree. Because Thomas failed to raise this issue below, it is waived. In any event, his claim is incorrect.

Although Thomas objected to a second trial on the firearm enhancement, he argued only that the original jury's lack of unanimity constituted an implied acquittal and that double jeopardy and due process prohibited the question from being posed a second time. CP 153; 10/29/15 RP 30-43. Thomas did not argue that the court lacked statutory authority to empanel a jury to return a special verdict relating to the firearm enhancement.

Under RAP 2.5, except as to issues of manifest error affecting a constitutional right, an appellate court will not consider an issue or theory not raised in the trial court. RAP 2.5; State v. Lynn, 67 Wn. App. 339, 835 P.2d 251(1992). No manifest constitutional error has been implicated or asserted here, and Thomas's failure to object below bars appellate review. State v. Toney, 149 Wn. App. 787, 798, 205 P.3d 944 (2009); State v. Nguyen, 134 Wn. App. 863, 870, n.13, 142 P.3d 1117 (2006).¹

In the event this Court considers Thomas's argument for the first time on review, it must be rejected. The Sentencing Reform Act ("SRA") has always outlined a procedure authorizing a jury to make a

¹ In Nguyen, the defendant argued for the first time on appeal that there was no procedure under Washington law to submit a firearm enhancement to the jury. 134 Wn. App. at 869-70. This Court agreed with the State that Nguyen had failed to preserve the issue for appeal, but nonetheless exercised its discretion to address the issue. Id. at 870, n.13. In Toney, the court refused to consider the issue because the defendant had failed to object below. 149 Wn. App. at 798.

firearm enhancement finding. Thomas's argument to the contrary ignores relevant statutory provisions, court rules, and controlling precedent.

The legislature fixes the penalties and punishment for criminal offenses. State v. Nunez, 174 Wn.2d 707, 711, 285 P.3d 21 (2012); State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986). The legislature has enacted certain factors that increase a defendant's sentence. One of those is the possession of a firearm during the commission of a crime. RCW 9.94A.533(3). A jury must unanimously find beyond a reasonable doubt any fact that increases a defendant's sentence, including a firearm enhancement. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 313-14, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Recuenco, 154 Wn.2d 156, 162, 110 P.3d 188 (2005) (Recuenco I). Moreover, a jury must unanimously agree in order to acquit the defendant of a firearm enhancement. Nunez, 174 Wn.2d at 715.

Washington law explicitly permits a jury to consider a firearm enhancement. Nguyen, 134 Wn. App. at 870-71. Specifically, RCW 9.94A.825 provides that if there is a jury trial, the jury shall determine whether the defendant was armed with a deadly weapon at the time of the crime. The statute defines the term "deadly weapon" to include a

“pistol, revolver, or any other firearm.” Since a deadly weapon includes a firearm, it follows that the jury may be asked whether the defendant was armed with a deadly weapon that was a firearm. Nguyen, 134 Wn. App. at 870.

Further, Washington courts have long recognized that when a defendant has a constitutional right to a jury trial, a jury may be empaneled regardless of whether procedures for empaneling the jury have been specifically incorporated into a particular statute. Nguyen, 134 Wn. App. at 870; see also State v. Thomas, 166 Wn.2d 380, 208 P.3d 1107 (2009) (recognizing that the power to empanel a jury solely for the purpose of deciding an aggravating factor is part of the court’s power to hear cases required to be tried by jury).

Additionally, the court rules provide the trial court with the inherent authority to empanel a jury in the absence of contrary legislative intent. “The power to empanel a jury to hear aggravating factors is a court-mandated component of the power to hear cases ‘required to be tried by a jury.’” Thomas, 166 Wn.2d at 393 (quoting CrR 6.1(a)). The court rules also specify that a trial court may submit special interrogatories to juries to make special findings “which may be required or authorized by law.” CrR 6.16(b).

Finally, the legislature has also enacted RCW 2.28.150, which provides that “if the course of the proceeding is not pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.”

Therefore, the deadly weapon statute explicitly authorized the trial court to empanel a jury to decide the firearm enhancement in this case. Moreover, even if RCW 9.94A.825 did not explicitly authorize a jury trial, because Thomas had a constitutional right to a jury determination of the enhancement, RCW 2.28.150, CrR 6.1(a), and CrR 6.16(b) authorized the trial court to empanel a jury to decide it.

Thomas cites to State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007) and State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) in support of his argument that the court lacked statutory authority to empanel a jury to consider the firearm enhancement. However, in those cases, the court was construing the exceptional sentencing scheme of RCW 9.94A.535, and held only that the trial court does not have authority to adopt a *different* sentencing procedure when the current statutory procedure has been found unconstitutional. In contrast here, the firearm enhancement statute has always authorized a jury finding.

Prior to Blakely, supra, RCW 9.94A.535 explicitly directed the trial court to make factual findings relating to aggravating factors for exceptional sentences, and did not include any provision allowing a jury to make such a finding. After Blakely rendered judicial fact-finding unconstitutional, the Washington Supreme Court in Hughes concluded that the statute did not authorize the trial court to empanel a jury on remand because to do so “would be contrary to the explicit language of the statute.” 154 Wn.2d at 149. Similarly, in Pillatos, the court concluded that because the statute explicitly assigned such factual findings to the trial court, it did not authorize the trial court to empanel a jury to decide the question at all, whether on remand or otherwise. 159 Wn.2d at 469-70.

To the contrary here, RCW 9.94A.825 explicitly directs that the jury be asked by special verdict whether the defendant was armed with a deadly weapon, and includes firearms within the definition of “deadly weapon.” And in State v. Recuenco, the Washington Supreme Court rejected the defendant’s post-Blakely argument that there was no statutory procedure by which a jury could return a firearm special verdict, stating, “We hold that a procedure did and does exist whereby the jury can be asked to make a firearm finding.” 163 Wn.2d 428, 437-39, 180 P.3d 1276 (2008) (Recuenco II).

This case does not involve a situation where a legislatively-created procedure directing the judge to make factual findings is found unconstitutional, and the court is later asked to imply a jury procedure “from whole cloth.” See State v. Davis, 163 Wn.2d 606, 613, 184 P.3d 639 (2008) (contrasting statutes that are silent or ambiguous as to procedure with the exceptional sentencing statute’s explicit directive of judicial fact-finding). Instead, the deadly weapon enhancement statute has always authorized a jury finding. Recuenco II, 163 Wn.2d at 439. Thus, Pillatos and Hughes do not limit a trial court’s ability to empanel a jury to determine a firearm enhancement.²

Furthermore, this Court has previously determined that where the jury was erroneously instructed as to the firearm special verdict form (necessitating reversal of the firearm enhancement) the trial court may empanel a jury upon remand to consider the enhancement again. State v. Reyes-Brooks, 165 Wn. App. 193, 202, 267 P.3d 465 (2011).³

² Thomas also points out that Pillatos relied on State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980). But in Martin, the statute explicitly required the “same jury” to determine the sentencing issue as had determined the defendant’s guilt. Thus like Pillatos, the Martin court concluded that empaneling a second jury was prohibited by the explicit language of the statute. 94 Wn.2d at 8. No such prohibitory language appears in the deadly weapon statute.

³ After the Washington Supreme Court concluded in Nunez, *supra*, that the alleged instructional error in Reyes-Brooks was not error after all, this Court merely affirmed Reyes-Brooks’ conviction in an unpublished opinion on remand. State v. Reyes-Brooks, 2012 WL 5477830, 171 Wn. App. 1028 (2012).

In an effort to discredit Reyes-Brooks, Thomas asserts that the court relied solely on the language of the Blakely-fix statute, which, he argues, does not apply to firearm enhancements. Brf. of App. at 6-7. But Thomas's characterization of Reyes-Brooks is inaccurate. Rather than relying on the text of the post-Blakely legislation, Reyes-Brooks found persuasive the reasoning in Thomas, supra, which involved aggravating factors under RCW 10.95. Reyes-Brooks, 165 Wn. App. at 202-03. And, as noted above, Thomas relied on CrR 6.1(a) and the constitutional right to a jury trial for its conclusion that the trial court could empanel a jury solely to consider aggravating factors on remand. Thomas, 166 Wn.2d at 393.

Moreover, the court in Reyes-Brooks took care to distinguish between the firearm enhancement aggravator at issue and the exceptional sentencing provisions addressed by the legislature post-Blakely. Specifically, Reyes-Brooks noted that by their terms, the Blakely-fix statutes "only apply to certain aggravating factors." 165 Wn. App. at 206. However, the court looked to the statements of intent issued by the legislature when passing the amendments to the exceptional sentencing scheme:

The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances *in all cases* that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.

Reyes-Brooks, 165 Wn. App. at 206 (quoting LAWS OF 2007, ch. 205, § 1) (emphasis in original). Reyes-Brooks concluded that this legislative statement “expresses a guiding public policy applicable to sentence enhancements generally.” Id. at 206. Thus, Thomas’s claim that Reyes-Brooks incorrectly premised its holding entirely on the text of the post-Blakely amendments to the SRA is simply incorrect. Reyes-Brooks supports the conclusion that the jury was properly empaneled to decide the firearm enhancement in this case.

Finally, the Washington Supreme Court’s recent holding in Nunez, supra, that a jury must unanimously agree in order to reject a firearm enhancement, is further support that retrial here was proper. Implicit in the court’s conclusion that non-unanimity does not equal an acquittal is the assumption that the enhancement can be retried. Indeed, the Nunez court specifically noted that retrial of aggravating factors outside the death penalty context is permissible. Nunez, 174 Wn.2d at 717-18.

Thomas does not argue on appeal that principles of double jeopardy barred his retrial on the firearm enhancement, nor could he. See e.g., State v. Ervin, 158 Wn.2d 746, 757, 147 P.3d 567 (2006) (when the record establishes jurors were unable to agree, no acquittal operates to terminate jeopardy); Nunez, 174 Wn.2d at 717-18 (except for death penalty cases, the State’s failure to prove an aggravating

circumstance beyond a reasonable doubt does not preclude retrial of that circumstance at a new proceeding).

Instead, Thomas argues only that the court lacked statutory authority to empanel a second jury to decide the enhancement following the original jury's inability to unanimously reach a decision. However, Thomas does not assert that the court lacked the ability to empanel a jury in the first instance, and he makes no reasoned effort to explain why, if the court originally had such authority, it lost it following the jurors' inability to agree.

In sum, the Washington Legislature has established a specific procedure that allows a jury to determine the existence of a firearm enhancement, whether together initially with the underlying crime or following a jury's inability to render a unanimous decision. Moreover, when the defendant has a constitutional right to a jury finding, in the absence of statutory language to the contrary, a jury may be empaneled regardless of whether there is a specific statutory procedure by which to do so. There being no contrary legislation with respect to firearm enhancements, the court's act of empaneling the second jury here was proper.

D. CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm Thomas's conviction and sentence.

DATED this 22nd day of March, 2017.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at winklerj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Arthur Idowu Thomas, Cause No. 74733-9, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 27th day of March, 2017.

W Brame

Name:

Done in Seattle, Washington