

65214-1

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COA NO. 65214-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES O. WIGGIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred in instructing the jury that it needed to be unanimous in order to answer the special verdict form.

2. The judgment and sentence contains a clerical error regarding imposition of a community custody condition.

Issues Pertaining to Assignments of Error

1. Is vacature of the deadly weapon enhancement required because the court wrongly instructed the jury that it needed to be unanimous in order to answer the special verdict form?

2. Where the court intended to not impose a condition of community custody but failed to strike it from the written judgment and sentence, is remand required for nunc pro tunc correction of the judgment and sentence to reflect the court's intention?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged James Wiggin with first degree robbery with a special allegation that he was armed with a deadly weapon. CP 112-13. A jury found Wiggin guilty and returned a special verdict that he was armed with a deadly weapon. CP 86, 87. The trial court imposed 116 months confinement and an extra 24 months for the deadly weapon enhancement.

CP 14, 17. The court also imposed a term of community custody. CP 18. This appeal follows. CP 1-13.

2. Trial

According to Macy's loss prevention officer Brandon Smith, Wiggin took a pair of pants, a scarf and perfume without paying for them. 6RP¹ 56, 59, 61, 63-64, 84-85. Wiggin left the Macy's store through the south entrance. 6RP 66. Smith identified himself as a loss prevention officer. 6RP 68. The two were two or three feet away from each other. 6RP 69. According to Smith, Wiggin took a knife out of his pocket, flipped the knife into an open position, and "held it up a little bit." 6RP 68, 75. Smith testified the blade was pointed at him. 6RP 68, 71-72. Smith backed up and said he was going to call the police. 6RP 69. Wiggin uttered a profanity and said "Try and stop me." 6RP 69. Smith told him to drop the knife. 6RP 70. Wiggin turned and left the area with the knife in his hand. 6RP 69-70.

Smith did not ask any of the customers who witnessed the incident outside the store to leave their contact information. 6RP 92-93. As a

¹ The verbatim report of proceedings is references as follows: 1RP 1/19/10; 2RP - 2/5/10; 3RP - 3/4/10; 4RP - 3/12/10 (morning session); 5RP - 3/12/10 (afternoon session); 6RP - 3/16/10; 3/17/10; 3/18/10 and 3/24/10 (three consecutively paginated volumes).

result, the police did not have any witnesses to back up Smith's version of events. 6RP 136.

The store had many security cameras. 6RP 58-59, 76-80, 86-87. Smith claimed no camera was pointed at the south entrance that day. 6RP 96, 99. The defense impeached Smith with the fact that he destroyed the security tape that could have backed up his version of events that took place inside the store. 6RP 89-91, 96-98.

A police officer responding to the 911 call located Wiggin nearby. 6RP 102-03. Wiggin told the officer he did not take anything. 6RP 103. The officer asked where the knife was. 6RP 103. Wiggin said he did not have one. 6RP 103. Police located a knife a few feet from a nearby pathway. 6RP 104, 106, 108.

At trial, Wiggin admitted he shoplifted the pants and a pair of sunglasses. 6RP 166-67, 179-80, 184. He explained he carried the knife in general because he was homeless. 6RP 159.² He also used the knife as a tool to defeat security devices on items he intended to shoplift. 6RP 182-83, 225.

Wiggin denied stealing the perfume, explaining he already had it in his possession. 6RP 189-90, 213. He also denied stealing the scarf. 6RP 141, 222. The defense offered a transit photo card issued earlier that day,

² The blade of the folding knife was longer than three inches. 6RP 155-56.

which Wiggin said showed him wearing the scarf claimed by Smith to have been stolen from Macy's. 6RP 159-62.

Wiggin testified that he decided to leave the store after noticing Smith watching him. 6RP 192. He pulled his knife out of his pocket to collapse the blade as he approached the door. 6RP 193, 197-98.³ Wiggin did not want the blade to be open in the event of physical confrontation with Smith. 6RP 197, 226. He collapsed the blade with one hand and tucked it into his jeans pocket by the time he was at the door. 6RP 200. Wiggin described and demonstrated how he was able to flip the blade closed with one hand using centrifugal force. 6RP 156-58.⁴

Wiggin further testified that Smith ran to the door and told him to throw his knife on the ground. 6RP 203. Wiggin told Smith that he did not do anything. 6RP 203. Smith indicated Wiggin had stolen the pants. 6RP 203. Wiggin began to pull his knife out, in a closed position, but then put it back in his pocket. 6RP 203, 239. Wiggin testified he took the closed knife out because Smith told him to take it out and throw it on the

³ Smith said he never saw Wiggin taking the knife out of his pocket before he left the store. 6RP 242.

⁴ Detective Ross Adams testified that Wiggin used a flourishing motion during an investigative interview in describing how he closed the knife, which was consistent with a movement made to open the blade. 6RP 136-38. On the stand, Adams recommended using two hands to close the knife and demonstrated he did not know how to close the knife with one hand. 6RP 137-38.

ground. 6RP 203-04, 229. He put the knife back in his pocket because he decided not to comply and intended to leave. 6RP 204; Ex. 22⁵ at 7. Wiggin maintained he never flipped the knife open at Smith. 6RP 203.

Wiggin uttered profanities and used insulting language to Smith during the outside confrontation, which angered Smith. 6RP 204. Wiggin had earlier embarrassed Smith inside the store by confronting him about his inartful surveillance. 6RP 186-89. As Wiggin was leaving across the parking lot, he heard Smith, who was on the phone with 911, say that Wiggin had brandished a knife. 6RP 205. Wiggin turned around and denied pulling a knife on him. 6RP 206.

Wiggin continued on his way and threw the knife down because he did not want to invite police to shoot him when they arrived. 6RP 208. He forcefully flung it down, which may have caused the blade to come open. 6RP 208, 238-39. On the stand, Wiggin denied brandishing a knife at Smith, threatening him in any way or using any force to get away. 6RP 209, 216-17. Wiggin also maintained video footage of the events inside and outside the store would back up his version of events and show Smith had lied. 6RP 222, 227; Ex. 22 at 23-24.

⁵ Ex. 22 is the redacted transcript version of Detective Adams' investigative interview of Wiggin. 6RP 235.

3. Jury Instructions

The "to convict" instruction for first degree robbery required the jury to unanimously find, among other elements, that "in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon" or "displayed what appeared to be a firearm or other deadly weapon." CP 97 (Instruction 7). For purposes of the "to convict" instruction, the court defined "deadly weapon" as "any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 102 (Instruction 11). The jury also received lesser offense instructions on third degree theft. CP 104-06.

The court gave the following special verdict instruction:

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 of First Degree Robbery.

For purposes of the special verdict form, a person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime,

including the location of the weapon at the time of the crime, the type of weapon.

A knife having a blade longer than three inches is a deadly weapon.

CP 111 (Instruction 18).

The court also instructed the jury as to how they were to deliberate on the deadly weapon allegation for purposes of a special verdict:

You will also be given a special verdict form for the crime of First Degree Robbery. If you find the defendant not guilty of First Degree Robbery, or if after full and careful consideration of the evidence you cannot agree on that crime, then do not use the special verdict form. If you find the defendant guilty of First Degree Robbery, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.* In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 110 (Instruction 17) (emphasis added).

The jury answered the special verdict form "yes." CP 86.

C. ARGUMENT

1. THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICT REQUIRES VACATURE OF THE DEADLY WEAPON ENHANCEMENT.

Instruction 17 incorrectly required unanimity for the jury's special verdict on whether Wiggin was armed with a deadly weapon at the time of the offense. CP 110. The sentencing enhancement should be vacated.

Instruction 17, which stated all 12 jurors must agree on an answer to the special verdict, was an incorrect statement of the law. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). An instruction containing the same improper requirement was given in Bashaw. Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). A unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Id. at 146 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

The State proposed this erroneous instruction. Supp CP __ (sub no. 19, Plaintiff's Proposed Jury Instructions, 3/16/10). Defense counsel did not object to this instruction⁶ but the error can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). The defendant in Bashaw did not object to this instruction⁷ but the Supreme Court still reversed after applying the harmless error test applicable to constitutional error. Bashaw, 169 Wn.2d at 147-48.

⁶ 6RP 247, 249-50. An agreed change to Instruction 17 was only in reference to the first two sentences of the instruction, not the unanimity portion of the instruction. 6RP 169-71, 175.

⁷ State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In order to hold that a jury instruction error was harmless, the reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. As in Bashaw, "[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Id.

The State may argue the error was harmless beyond a reasonable doubt because the jury unanimously found Wiggin was armed with a deadly weapon or what appeared to be a deadly weapon as part of the general verdict on first degree robbery. CP 87, 97-98. As required by law, the jury was instructed it had to be unanimous in order to return a general verdict. CP 97-98, 109; see Bashaw, 169 Wn.2d at 145 n.5 (general verdicts in criminal cases must be unanimous to convict or acquit (citing Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980))).

The general verdict in this case does now show the erroneous unanimity requirement for the special verdict was harmless beyond a reasonable doubt. The deliberative process is different when the jury is given the option of not returning a unanimous verdict.

Given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. As articulated by the Bashaw Court, "We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless." Id. at 147-48.

The same holds true here. A knife with a blade longer than three inches is a deadly weapon as a matter of law, but the issue of whether Wiggin was *armed* with that weapon for purposes of the special verdict was debatable based on the conflicting evidence presented at trial. CP 111. A rational juror could find Wiggin's testimony about the manner in which he handled the knife did not support the special verdict finding. CP 111; 6RP 156-58, 193, 197-98, 200, 203-04, 226, 229, 239. Moreover, Smith's

failure to preserve video footage and anger and embarrassment at being insultingly confronted by Wiggin provided a basis to doubt Smith's credibility. 6RP 186-89, 204. That jurors reached a general unanimous verdict that Wiggin was armed with a deadly weapon when forced to do so by the court's instruction does not mean the jury would have returned a unanimous special verdict that Wiggin was armed with a deadly weapon had it not been forced to do so by the court's erroneous instruction.

Jurors could have returned a unanimous general verdict because of the pressures associated with the need for unanimity but may not have reached unanimity on the special verdict had they not been required to do so. "[W]hen unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result." Bashaw, 169 Wn.2d at 147-48. The sentencing enhancement should be vacated. Id. at 148.

2. THE JUDGMENT AND SENTENCE NEEDS TO BE CORRECTED TO REFLECT THE ACTUAL INTENTION OF THE TRIAL COURT NOT TO IMPOSE A DRUG-RELATED CONDITION OF COMMUNITY CUSTODY.

At the sentencing hearing, the prosecutor recommended as a condition of community custody that Wiggin "not possess or consume controlled substances without a valid prescription." 6RP 313. Defense counsel told the court "Since there is no indication that drugs or alcohol

had anything to do with this offense, I would ask the Court to not to [sic] impose that condition." 6RP 316. The court addressed defense counsel's request, stating, "Ms. Mann has a point. I don't recall any evidence in the case of drugs or alcohol being involved, and I think that the case law is such that there needs to be some evidence or some substance involvement before I can impose that as a condition or if I should impose that as a condition. That is a very valid point." 6RP 318.

The court, however, did not strike preprinted language in the written judgment and sentence that states "While on community custody, the defendant shall . . . (4) not consume or possess controlled substances except pursuant to lawfully issued prescriptions." CP 18. The trial court's oral remarks show it did not intend to impose this condition of community custody. The remedy is remand for nunc pro tunc entry of a corrected sentence that removes this condition.

A nunc pro tunc order "records judicial acts done at a former time which were not then carried into the record." State v. Hendrickson, 165 Wn.2d 474, 478, 198 P.3d 1029 (2009) (quoting State v. Petrich, 94 Wn.2d 291, 296, 616 P.2d 1219 (1980)). "A nunc pro tunc order allows a court to date a record reflecting its action back to the time the action in fact occurred." Hendrickson, 165 Wn.2d at 478.

RCW 9.94A.703(2) provides "Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to: . . . (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions[.]"

The record shows the court intended to waive this condition. 6RP 313, 316, 318. The boilerplate language in the pre-printed judgment and sentence, however, was not stricken to reflect the court's intention on this point. "[W]here the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order." Hendrickson, 165 Wn.2d at 479. The error should be corrected nunc pro tunc.

It is true that the court later said "you will follow the usual community custody conditions." 6RP 321. This must be read in context with the court's specific remark indicating it would not impose the drug-related condition because drugs had nothing to do with the offense. 6RP 318. The judgment and sentence should be corrected to express the court's intention to waive the drug-related condition.

D. CONCLUSION

For the reasons stated, Wiggin respectfully requests that this Court vacate the deadly weapon enhancement and remand for correction of the challenged drug-related portion of community custody.

DATED this 25th day of October 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65214-0-1
)	
JAMES WIGGIN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF OCTOBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

[X] JAMES WIGGIN
DOC NO. 730559
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF OCTOBER 2010.

x *Patrick Mayovsky*

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