

NO. 65313-0-I

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

REC'D
OCT 29 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

LEONARD HAYWOOD, JR.,

Appellant.

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

The Honorable Catherine Shaffer, Judge
The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by failing to vacate the uncharged special verdict.

Issue Pertaining to Assignment of Error

As it indicated on a special verdict form, the jury found the appellant was armed with a firearm during commission of the crime. But the jury should not have been asked to make this determination because the State did not seek the firearm sentencing enhancement. Must this Court remand the appellant's case with an order instructing the trial court to vacate the special verdict?

B. STATEMENT OF THE CASE¹

The King County prosecutor charged Leonard Haywood, Jr. with first degree robbery. CP 1. The State alleged Haywood pulled a gun on Gary Pierce in the parking lot of the Skyway Park Bowl and drove away in Pierce's car. CP 2-4. The State relied on display of the gun to charge first degree robbery but did not allege a firearm enhancement. CP 1; RCW 9A.56.200(1)(a)(ii); RCW 9.94A.533(3)(a).

¹ This brief refers to the verbatim report as follows: 1RP – 11/5/09; 2RP – 11/12/09; 3RP – 11/17/09; 4RP – 11/18/09 and 11/20/09; 5RP – 11/19/09; 6RP – 2/23/10; 7RP – 2/24/10; 8RP – 3/1/10; 9RP – 3/2/10; 10RP – 3/3/10; 11RP – 3/4/10; 12RP – 3/8/10; 13RP – 3/9/10; 14RP – 4/8/10; 15RP – 4/9/10; and 16RP – 4/13/10.

At Haywood's trial, Pierce, his friend Josh Robbins, and Haywood's friend Crecencio Woods placed Haywood at the bowling alley. 1RP 103; 2RP 30-31, 81-83, 230-31.

Haywood, however, asserted mistaken identity, and in support of his theory demonstrated Pierce and Robbins were less than certain when they chose his photograph from a montage shown them by police. 2RP 82-84, 230-31, 236-37; 3RP 35-36, 127. Haywood also established that Pierce's montage identification was not reliable because he had already seen pictures of Haywood that were stored on a cell phone Woods dropped at the scene. 3RP 35, 131-32, 173. Haywood argued Woods implicated him out of fear that Woods would invalidate an immunity agreement if he did not parrot his original statement, which Woods only made based on a mistaken belief that Haywood blamed Woods. 2RP 27-29; 3RP 170. This trial ended in a mistrial after the jurors were unable to return a unanimous verdict. CP 80-82.

A second trial occurred four months later. Pierce and Robbins again implicated Haywood and appeared even more certain in their identifications than at the first trial. 10RP 73-76, 82-83, 110, 129-31; 12RP 39-43, 45-47. Woods, in contrast, testified Haywood was not at the bowling alley and did not drive away in Pierce's car. 11RP 37-38, 44, 64, 80-81, 85-86, 90, 93.

Haywood's expert witness, Dr. Geoffrey Loftus, testified as to the potential pitfalls of eyewitness identification. 12RP 68-72, 75-79, 112-19. He cautioned that even where an identification turns out to be wrong, a witness's confidence could increase over time as police and the State repeatedly validate the inaccurate identification. 12RP 128-29; 13RP 20-21. Haywood also emphasized the lack of physical evidence linking him to the car, which police recovered a week after the robbery. 9RP 115-16; 13RP 26.

The jury convicted Haywood as charged. CP 136. It also answered "yes" to a question asking whether Haywood was armed with a firearm during the commission of the crime. CP 140.

The State later pointed out it did not allege a firearm enhancement in the information. The State therefore informed the court it would be unfair to impose the 60-month enhancement. 15RP 1-3; see also 16RP 11 (prosecutor and court's discussion at sentencing). The court agreed not to impose the enhancement and sentenced Haywood within the standard range. 16RP 11. The judgment and sentence does not mention the special verdict. CP 142-50.

C. ARGUMENT

THE TRIAL COURT SHOULD VACATE THE SPECIAL VERDICT.

The state may not try a defendant for an uncharged offense. Wash. Const. art. I, § 22; State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982). This prohibition also applies to sentence enhancements. See State v. Recuenco, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008) (sentence enhancement must be set forth in the information, and harmless error analysis cannot apply to uphold uncharged enhancements); State v. Theroff, 95 Wn.2d 385, 392-93, 622 P.2d 1240 (1980) (notice of intent to seek enhanced penalty must be set forth in the information). The remedy for an uncharged enhancement is vacation. Recuenco, 163 Wn.2d at 442; see State v. Park, 88 Wn. App. 910, 915, 946 P.2d 1231 (1997) (“verdict” itself may be vacated).

The State conceded Haywood could not be sentenced based on the firearm special verdict, and the court agreed. The verdict, however, was not vacated. This was error.

Cases addressing double jeopardy are instructive in this regard. As such cases make clear, an additional conviction, even without an accompanying sentence, can constitute “punishment” sufficient to trigger double jeopardy protections. State v. Womac, 160 Wn.2d 643, 656-58,

160 P.3d 40 (2007); see State v. Calle, 125 Wn.2d 769, 774, 888 P.2d 155 (1995) (“Conviction . . . , even without imposition of sentence, carries an unmistakable onus which has a punitive effect”) (quoting State v. Johnson, 92 Wn.2d 671, 679, 600 P.2d 1249 (1979), cert. dismissed, 446 U.S. 948 (1980)); see also State v. Turner, 169 Wn.2d 448, 466, 238 P.3d 461 (2010) (conditional vacation of convictions violates double jeopardy).

Haywood’s case is analogous to these double jeopardy cases because the State’s first degree robbery charge required proof he displayed what *appeared* to be a firearm, but not necessarily a firearm. CP 122. The jury’s finding that Haywood was armed, with an actual firearm, produces stigma similar to additional convictions. Moreover, the special verdict is tangibly detrimental to Haywood. After one firearm enhancement, RCW 9.94A.533 requires later firearm enhancements to be doubled. RCW 9A.44.533(3)(d). Mr. Haywood has no previous firearm enhancements. CP 148.

The trial court’s agreement not to impose an enhancement is insufficient to remove the taint created by the special verdict. This Court should remand for vacation of the verdict.

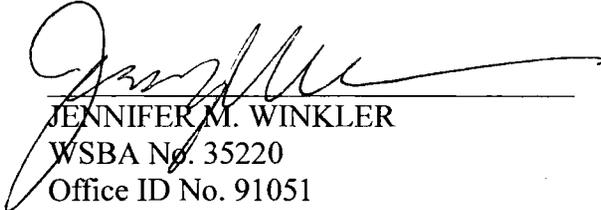
D. CONCLUSION

This Court should remand with an order directing the trial court to vacate the special verdict.

DATED this 29th day of October, 2010.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	COA NO. 65313-0-1
)	
LEONARD HAYWOOD,)	
)	
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 29TH 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] LEONARD HAYWOOD
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COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*