

65847-6

65847-6

NO. 65847-6-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

TERR MACMILLAN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Terr MacMillen was convicted of Assault in the Second Degree with a Deadly Weapon Enhancement. MacMillen claims under that the jury was improperly instructed that an acquittal on the Deadly Weapon Enhancement had to be unanimous as in State v. Bashaw.

The same instruction as in Bashaw was used here. However, the instruction did not increase the statutory maximum as in Bashaw. Furthermore, any error was harmless beyond a reasonable doubt where the jury returned a general verdict finding the assault was committed by means of a deadly weapon. Thus, the enhancement should be upheld.

MacMillen also claims that the trial court erred in imposing a condition of a substance abuse evaluation and treatment. However, MacMillen did not contest at the trial court that he had a substance abuse issue meriting the condition.

II. ISSUES

Was the jury improperly instructed that the special verdict of acquittal on the deadly weapon enhancement had to be unanimous?

Was any error instructing the jury regarding unanimity harmless beyond a reasonable doubt where the jury's general verdict also found the existence of a deadly weapon beyond a reasonable doubt?

Did the trial court err in including a condition of substance abuse treatment and compliance, where the defendant did not contest the determination?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On May 7, 2010, Terr MacMillan was charged with Robbery in the First Degree, Assault in the Second Degree and Harassment by Threats to kill Tracie Elliott, alleged to have occurred April 30, 2010. CP 1-2. The charges were alleged to be domestic violence. CP 1-2.

On June 10, 2010, the information was amended to include a Deadly Weapon allegation on the Assault in the Second Degree and a charge of Tampering with a witness alleged to have occurred on the same day as the original charges. CP 7-8.

On July 26, 2010, the case proceeded to trial. 1 RP 1, 3.¹

¹ The State will refer to the verbatim report of proceedings as follows:

"1 RP" July 26, 2010 – Jury Selection

"2 RP" July 26 & 27, 2010 - Motions, Testimony

"3 RP" July 28 & 29, 2010 – Testimony, Closing, Sentencing & Verdicts.

On July 29, 2010, the jury returned verdicts of guilty on the charges of Assault in the Second Degree and Tampering with a witness. CP 75, 76, 3 RP 85-6. The jury found MacMillen not guilty of Robbery in the First Degree. CP 74, 3 RP 96. The jury was unable to reach a verdict on the charge of Felony Harassment and the judge determined that after adequate time the jury was unable to reach a decision and declared a mistrial as to that count. 3 RP 88-91. The jury also returned special verdicts finding that the assault was against a family or household member and that MacMillen was armed with a deadly weapon at the time of the offense. CP 77, 78.

On August 4, 2010, MacMillen was sentenced to 75 months in prison, which included 12 months for the deadly weapon enhancement on the Assault in the Second Degree. CP 85-6.

On August 5, 2010, MacMillen timely filed a notice of appeal. CP 94.

2. Summary of Trial Testimony

Tracie Elliott testified that she had been in a romantic relationship with Terr MacMillan that started in the fall of 2009. 2 RP 31-2. The relationship ended in April of 2010. 2 RP 33. Before the relationship ended, she had MacMillen store furniture, clothing and other personal property. 2 RP 33. She did not know where he had

stored the property. 2 RP 33-4. They talked about her getting the property back for a few weeks before she eventually got the keys from MacMillen. 2 RP 33-4. Elliott found out where her property was from the parents of MacMillen's roommate, the Shelmans. 2 RP 34-5. She picked up some property the first day she went, but went back another day to get property stored in a trailer full of boxes. 2 RP 35.

Elliott went back with her friend Brandon the next day, April 30th, in her Chevrolet Tahoe to get the rest of her property. 2 RP 36. Elliott went to the trailer and saw some of her property mixed with MacMillen's. 2 RP 37-8. When she was there MacMillen drove up quickly in his car and stopped in front of Elliott's SUV. 2 RP 39-40. Elliott got in her SUV and locked the doors. 2 RP 40.

MacMillen got a sword out of the back seat of his car and ran up to the passenger side of the SUV. 2 RP 40. With one swing of the sword, he shattered the window. 2 RP 40. Elliott grabbed the keys and tried to get out the driver's door. 2 RP 41. MacMillen dove through the window at Elliott. 2 RP 41. MacMillen was angry and seething like he was out of breath. 2 RP 41. He grabbed the keys from Elliott and struck her in the head. 2 RP 41. Elliott was able to get out the door and attempted to flee. 2 RP 42.

Elliott was unable to get away because MacMillen struck her with the sword on the hip making her fall to the ground. 2 RP 42. MacMillen hit her with the sword and told her he was going to kill her. 2 RP 43. MacMillen was taking full swings with sword but was hitting her with the flat side of the sword. 2 RP 44. When MacMillen went toward the storage container, Elliott ran toward Mr. Shelman who was on a tractor. 2 RP 44-5. MacMillen came toward her and grabbed her, but she was able to pull away and tried to flee. 2 RP 45. She was unable to run because her leg hurt too much. 2 RP 45. The last time Elliott saw MacMilen was near his car and the SUV holding Elliott's purse and the sword. 2 RP 46. Elliott went to the Shelman's house where she saw Brandon and Mrs. Shelman. 2 RP 47. Mrs. Shelman received a phone call and Elliott heard MacMillen's voice on the phone. 2 RP 47-8. Elliott identified a number of photographs of her injuries and the damage to her vehicle. 2 RP 48-60. The photographs were admitted. 2 RP 60. Elliott admitted having one prior felony conviction for a crime of dishonesty and one misdemeanor conviction for the crime of dishonesty of theft in the third degree. 2 RP 63-4. She identified MacMillen in court. 2 RP 64.

Marie Shelman testified. 2 RP 87. Mrs. Shelman lived in Cape Horn with her husband, Max Shelman, on a 20 acre property.

2 RP 87-8. One of her fifty year old daughters was friends with Terr MacMillen. 2 RP 87. They let MacMillen store things on the property. 2 RP 88. Mrs. Shelman got a phone call from MacMillen after an incident happened with Tracie Elliott when the police were called. 2 RP 88-9. In the phone call, MacMillen asked Mrs. Shelman to go out and tell Tracie that she would have to change her story. 2 RP 89.

Brandon Gasho's mother was friends with Tracie Elliott. 2 RP 135. Gasho testified that he helped Tracie pick up some property from Cape Horn in April of 2010. 2 RP 135-6. Gasho was with Elliott on April 30th, when Elliott went to the storage container to get her property. 2 RP 137. Elliott got into her SUV to back it up and Terr MacMillen came speeding up in his car. 2 RP 138. MacMillen went to punch the window on Elliott's SUV, then stopped and returned to his car. 2 RP 138. Gasho was about fifty feet away. 2 RP 138. Gasho saw MacMillen get something long, skinny, and blue and silver and stabbed it through the window, breaking it. 2 RP 139-40. Gasho thought it appeared to be a pipe. 2 RP 145. Gasho saw MacMillen climb into the window and Gasho heard Elliott yelling. 2 RP 140. Gasho saw them coming around the back of the SUV and saw MacMillen strike Elliott with what he had struck the window with. 2 RP 140. Gasho ran to the house where he was at, but they did not

answer, so he ran to a neighbor's house and called 911. 2 RP 140. When Gasho came back, Elliott came stumbling towards him on one leg and MacMillen was about twenty feet behind her. 2 RP 141. MacMillen came within about five or six feet and was yelling at Gasho and Elliott. 2 RP 141. Then MacMillen returned to the vehicles, went into the woods and was gone. 2 RP 141. Gasho noticed that Elliott was limping and saw bruises that she had on her leg. 2 RP 144.

Max Shelman testified that he was eighty-two years-old and lived with his seventy-nine year-old wife on a 20 acre property in Cape Horn. 2 RP 94, 114-5. Mr. Shelman allowed Terr MacMillen to store a storage container and couple of trailers on the property. 2 RP 94-5, 104-5. Tracie Elliott talked to Mr. Shelman about some things stored on the property. 2 RP 95. Elliott came to the property to pick up some things. 2 RP 96. She took one of the trailers that McMillen had stored on the property. 2 RP 105. A day or two later, Elliott came back to get more of her property when MacMillen showed up. 2 RP 96-7. When MacMillen showed up, Mr. Shelman was hauling dirt on his tractor. 2 RP 97. MacMillen drove up in his car and stopped in front of Elliott's SUV. 2 RP 98-9. Mr. Shelman was driving his tractor and saw MacMillen get out of his vehicle and break

the window on Elliott's vehicle. 2 RP 99. MacMillen had something in his hand, which Mr. Shelman thought was a stick. 2 RP 99.

Mr. Shelman drove on with his tractor, dumped his load and headed back. 2 RP 100. When Mr. Shelman got near, he saw MacMillen trying to pull Elliott towards the storage shed by her arm. 2 RP 100. Mr. Shelman stopped and got off the tractor. 2 RP 101. Elliott asked Mr. Shelman for help, and he told MacMillen to knock it off or he would find himself in jail and to let go of her. 2 RP 101. Mr. Shelman did not see where MacMillen went, but Elliott asked Mr. Shelman where she could hide and went ahead of the tractor. 2 RP 101-2. It had been about ten or fifteen minutes since he had observed MacMillen break the window on the car. 2 RP 102. Mr. Shelman could tell that Elliott was nervous and wanted to get away. 2 RP 102-3. Shortly after that, the police arrived. 2 RP 104.

Deputy Fred Harrison of the Skagit County Sheriff's Office testified. 2 RP 116. Officer Harrison responded to the Cape Horn Road location on April 30, 2010, and contacted Tracie Elliott. 2 RP 116-7. Harrison contacted Elliott behind the house near a carport. 2 RP 117. Elliott was breathing heavily, crying and in pain. 2 RP 118. Elliott was favoring one of her legs. 2 RP 119. Harrison testified that Elliott told him that Terr MacMillen had assaulted her and hit her with

a sword. 2 RP 119. Harrison got a search warrant to look through MacMillen's car which was still on the scene. 2 RP 120-1. Harrison located a sword sheath in the vehicle. 2 RP 122-3, 127. The sheath was located on the passenger side leaning against the console. 2 RP 128. Harrison also looked around the property to try to find a purse, keys and sword, but was unable to do so. 2 RP 129-30, 132. Harrison took photographs of bruising on Elliott's left thigh. 2 RP 130.

Sergeant Greg Adams testified that he was working on April 30, 2010, and responded to the Cape Horn Road location of the incident. 2 RP 149. When Adams arrived, he saw Tracie Elliott about five yards from the house. 2 RP 150. Adams described that Elliott was trembling, crying, had blood on her lower lip and appeared she could not control herself. 2 RP 150. She spoke with Deputy Harrison. 2 RP 151. Adams went and saw where the SUV and car were located and described that they were almost touching. 2 RP 151. Adams tried to check the area around the vehicles and the woods but could not find anyone. 2 RP 151-2. Adams found one of the electronic keys to the SUV on the ground about twenty feet away from the vehicle. 2 RP 152.

Deputy Jason Moses also testified. 2 RP 153. Moses responded to the Cape Horn Road address as well. 2 RP 153-4.

Moses first contacted Brandon Gasho. 2 RP 154. Gasho was standing in the driveway leading to where two vehicles were located. 2 RP 155. Moses saw that the SUV had a completely broken passenger window. 2 RP 155. Moses assisted in trying to find someone, but was unable. 2 RP 155-6. Moses was also involved in a canine track, which did not locate anyone. 2 RP 167. Moses testified as to number of photographs which he took. 2 RP 156-66. The photographs were admitted. 2 RP 164. Moses observed dirt on Elliott's clothing. 2 RP 166.

Terr MacMillen testified on his own behalf. 2 RP 173. MacMillen was in a relationship with Elliott which ended in early April, 2010. 2 RP 174. MacMillen was seeing another woman. 2 RP 174-5. MacMillen did store Elliott's property at the Shelman property in a storage container. 2 RP 175. MacMillen said that he also had a small trailer on the property which had tools. 2 RP 176-7. MacMillen gave Elliott the keys to the storage container to get her property. 2 RP 177. MacMillen testified that he was called by Mrs. Shellman and told that Elliott had taken his small trailer. 2 RP 179.

MacMillen testified that on April 30th, he was again called by Mrs. Shelman and told that Elliott was back for the storage container. 2 RP 181. MacMillen got a car from Mrs. Shelman's daughter and

drove up to stop Elliott and find out where his trailer was. 2 RP 181. MacMillen admitted he pulled in front of the SUV when he arrived. 2 RP 182. MacMillen said Elliott got into the SUV and MacMillen walked up to her and asked her what she was doing. 2 RP 182. MacMillen claimed that Elliott tried to start up her car and “was going to leave, run me over.” 2 RP 182. MacMillen testified that the storage unit was open with his items on the ground and he “just couldn’t believe it.” 2 RP 182.

MacMillen claimed he walked back towards his car and picked up “this stick, walked back over, knocked the window out and climbed in the window.” 2 RP 182-3. MacMillen claimed that he opened the door, they both fell out and he picked her up. 2 RP 183. He said Elliott told him his property was all gone and that she didn’t have anything. 2 RP 183. At that point MacMillen swatted her with what he claimed was the stick. 2 RP 183-4. MacMillen claimed that the stick was what his grandmother would call a switch. 2 RP 184. MacMillen said at that point Mr. Shelman told him to settle down and he let go of Elliott. 2 RP 183. MacMillen said that Elliott started limping away and he was yelling at her. 2 RP 183. MacMillen testified the storage unit had half of what it should have and that his trailer was missing. 2 RP 183. He testified: “I was mad, I was really

mad.” 2 RP 183. He claimed that he heard someone say that the Sheriff was coming and that he fled because he had a misdemeanor warrant and “didn’t want to get in any more trouble or go to jail” so he just walked out the back side of the property. 2 RP 183-4. MacMillen denied striking Elliott with a pipe or sword, taking her purse or keys or threatening to kill her. 2 RP 185-7. MacMillen claimed that his intent when he called back to Shelmans was to tell Elliott to tell the truth. 3 RP 10.

MacMillen admitted on direct examination that he had four misdemeanor convictions for crimes of dishonesty of theft and possession of stolen property. 2 RP 187-8. He also admitted to having convictions for eight felony crimes of dishonesty of theft and possession of stolen property. 2 RP 188. He volunteered that his convictions were as a result of a midlife crisis. 2 RP 188.

On cross-examination, MacMillen testified that had not reported Elliott to the police for the theft of the trailer with the \$30,000 worth of tools. 2 RP 190. MacMillen acknowledged that he stopped his car in front of Elliott’s SUV rather than beside it. 2 RP 181. MacMillen also admitted to trying to open the door to Elliott’s SUV before smashing in the window. 2 RP 192-3. MacMillen admitted that he climbed in to get Elliott. 2 RP 193. He denied taking the keys

from her and again only indicated that he struck her one time with a stick. 2 RP 194-5. MacMillen denied knowing that the sword sheath was in the car, but also volunteered that “Sherry Grard has lots of oriental stuff.” 2 RP 196.²

3. Jury Instructions

The trial court provided an instruction regarding completing the special verdict form reads as follows:

You will also be given special verdict forms. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms 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 forms. In order to answer the special verdict forms “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 72. Except for one typographical change, this was the instruction proposed by the State. CP 140. This matches the standard language of the pattern instruction. WPIC 160.00. The jury was also given a specific definition as to the term deadly weapon as defined in the special verdict form.

² Although there was an objection made at the time, there was never a ruling on the objection and the answer was not stricken.

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 in Count II.

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 or an accomplice. 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 and the type of weapon.

If one person is armed with a deadly weapon, all accomplices are deemed to be so armed, even if only one deadly weapon is involved.

A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

CP 67-8. This is the standard language from the pattern instructions.

WPIC 2.07. This was the instruction proposed by the State except for the fact that the State had specifically proposed adding a sword to the definition. CP 116-7.

The jury was also instructed on assault in the second degree by use of a deadly weapon. CP 58 (Instruction No. 15). For the purpose of that verdict the jury was provided a separate deadly weapon definition. CP 56. That instruction read:

Deadly weapon also means any weapon, device, instrument, substance or article including a vehicle, which under the circumstances in which it was used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 56 (Instruction No. 13).

The defense accepted the State's proposed instructions except for three jury instructions regarding reasonable doubt and the defense of property claim. CP 10-12.

4. Sentencing.

The trial court noted that MacMillen's criminal history was extensive and included a prior conviction for Possession of Controlled Substance. 3 RP 77. The trial court opined that his criminal history was consistent with someone with a substance abuse problem. 3 RP 78. The trial court ordered conditions of community custody to include "Appendix A" which contains the requirement that MacMillen obtain a substance abuse evaluation and comply with recommended

treatment. 3 RP 80-1, CP 93. MacMillen did not object to the condition.

IV. ARGUMENT

1. **The rule from Bashaw, that a unanimous jury decision is not required to increase the maximum allowable sentence is not applicable to a statutory deadly weapon enhancement.**

The jury in the present case was given a deadly weapon enhancement instruction that required that in order to find that the deadly weapon was not proven, it had to be unanimous. The instruction read:

...Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "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 72. Logically, if the jury was not unanimous, it would not have been able to complete the verdict form.

The Supreme Court in State v. Bashaw determined that 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. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010). In Bashaw the defendant was

convicted of three counts of delivery of a controlled substance, and was found to have committed each offense within 1,000 feet of a school bus stop which resulted in doubling of the maximum sentence. The majority in Bashaw expressed concern that the sentence doubled the maximum sentence. The same type of problem had occurred in State v. Goldberg cited in Bashaw.

The rule we adopted in Goldberg and reaffirm today serves several important policies. First, we have previously noted that “[a] second trial exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses.” State v. Labanowski, 117 Wn.2d 405, 420, 816 P.2d 26 (1991). The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant’s “ ‘valued right’ to have the charges resolved by a particular tribunal.” State v. Wright, 165 Wn.2d 783, 792-93, 203 P.3d 1027 (2009) (internal quotation marks omitted) (quoting Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, 72

P.3d 1083, it is not required to find the *absence* of such a special finding.

State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010).

The same considerations for that resulted in the increase in the maximum sentence under Bashaw do not necessarily apply to the deadly weapon enhancement in the present case. Here the determination of the enhancement does not double the statutory maximum as in Bashaw or result in life imprisonment as in Goldberg. Although judicial economy and finality may weigh in favor of finding that the enhancement cannot be retried, where the legislature has provided for particular enhancements, this Court should consider permitting retrial on the enhancement and not apply the automatic acquittal of the enhancement provided by Bashaw.

However, in the present case, the error was also harmless beyond a reasonable doubt because of the jury's verdict on the count of Assault in the Second Degree by use of a deadly weapon.

2. The jury instruction applying the deadly weapon enhancement was harmless beyond a reasonable doubt.

In addition to the deadly weapon enhancement finding by the jury, there was also a determination that the defendant was guilty of Assault in the Second Degree by a Deadly Weapon.

The jury was also instructed on assault in the second degree by use of a deadly weapon. CP 58. For the purpose of that verdict the jury was provided a separate deadly weapon definition. CP 56.

A jury is presumed to follow the jury instructions. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010); State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Nothing indicates that the jury did not do so as to the Assault in the Second Degree.

By the general verdict reached, the jury would had to have determined unanimously that the defendant assaulted Elliott with a deadly weapon. The jury could not have held as MacMillen claimed, that he used a stick, like a switch his grandmother had, was a deadly weapon. The jury must have believed Elliott that a sword was used.

In State v. Bashaw, 169 Wash. 2d 133, 137, 234 P.3d 195, 197 (2010) the defendant was convicted of three counts of delivery of a controlled substance, and was found to have committed each offense within 1,000 feet of a school bus stop which resulted in doubling of the maximum sentence. The school bus stop enhancement was thus making a determination that was not based upon an element of the underlying offense.

The court in Bashaw still evaluated the error to determine if it was harmless beyond a reasonable doubt.

In order to hold that a jury instruction error was harmless, “we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’ ” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). ...

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative. There, the jury initially answered “no” to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered “yes.” *Id.* at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so.

State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010).³

As opposed to Bashaw and Goldberg where the flawed deliberative process shows little about the decision the jury would have reached, here we also have the jury’s determination as to the general verdict.

Any instruction error on the special verdict of the deadly weapon enhancement was harmless by beyond a reasonable doubt.

3. The trial court properly imposed a substance abuse evaluation and follow-up treatment as a condition of

³ It should be noted that the three justice dissents in Bashaw would have determined that the instructional error was harmless. State v. Bashaw, 169 Wn.2d 133, 152, 234 P.3d 195 (2010) (Madsen, dissenting).

community custody where MacMillen did not contest the trial court's determination that he was a person with a substance abuse issue.

The trial court noted that MacMillen's criminal history suggested someone with a substance abuse problem. He had one single controlled substance related conviction, but multiple other felony convictions.

The trial court ordered conditions of community custody to include "Appendix A" which contains the requirement that MacMillen obtain a substance abuse evaluation and comply with recommended treatment. 3 RP 80-1, CP 93.

RCW 9.94A.703(3)(d) permits conditions which are "reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety to the community." Although nothing in the present offense suggested a substance abuse issue, MacMillen did not contest inclusion of that condition as a result of his history. Therefore, the trial court properly included that condition.

MacMillen claims that his trial counsel was ineffective in failing to contest the determination of the trial court. However, MacMillen had already received a low-end type of sentence from the trial court and may have tactically decided to accept that trial court decision.

Furthermore, MacMillen may possibly have a substance abuse issue and the trial court's determination may have been correct. MacMillen cannot establish the decision was not tactical nor that he was prejudiced. State v. MacFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1998), State v. Aho, 137 WN.2d 736, 745, 975 P.2d 512 (1999).

V. CONCLUSION

The deadly weapon enhancement determination should be upheld because, if there was any error, it was harmless beyond a reasonable doubt. The trial court also did not improperly impose a substance abuse condition of community custody. The judgment and sentence must be affirmed.

DATED this 11 day of April, 2011.

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