

NO. 28932-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ELDIO RIZO,

Appellant.

FILED
Jan 29, 2013
Court of Appeals
Division III
State of Washington

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

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY.

Mr. Rizo's convictions for robbery and assault were not supported by adequate evidence. The multiple convictions for the same conduct violate the constitutional protections from double jeopardy. The jury was improperly instructed regarding the elements of assault. Furthermore, his life sentence should be stricken because the evidence establishing his criminal history was improperly admitted and the procedures employed by the sentencing court violated equal protection and the constitutional right to trial by jury.

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE
MR. RIZO GUILTY OF ROBBERY AND ASSAULT
AS CHARGED.

Because the evidence in support of the allegation Mr. Rizo had, displayed or fired a gun was inconsistent and conflicting, it was insufficient to establish proof beyond a reasonable doubt of the elements of either first degree robbery or assault and where the theft occurred peaceably, any force was used at a later time, after they had left the store and were passing through the parking lot to their car, the facts do not establish robbery.

i. Evidence was insufficient to establish appellant used a "gun."

Mr. Rizo acknowledged he was present when Ms. Pina stole items from Sears, but denied having, displaying or firing a gun in support of her

unlawful efforts. RP 148-50, 462-74. Although the State's witnesses testified they believed they saw a weapon and heard shots fired, the overwhelming amount of contradictory evidence in the form of surveillance video and other witnesses precluded a finding of proof beyond reasonable doubt.

Mr. Englund, upon whose testimony the State's case was based, became excited as soon as he saw signs of potential theft, felt an adrenaline rush, and was described as hysterical after the incident. RP 175, 195, 212-13, 292. Mr. Englund was simply in not a state of mind conducive to either taking or relating particularly accurate observations. As a result significant differences were identified in his description of what he thought he saw. RP 200-08, 214-17.

Detective Levesque agreed the video surveillance failed to show what if anything Mr. Rizo might have taken from his waistband after he left the Sears store. RP 336. Ms. Pina, who was closer to Mr. Rizo than anyone and indicated she never saw a gun or knife. RP 414. In light of the significant gaps in the evidence, it was not possible for a reasonable jury to find, beyond a reasonable doubt, that the State had proven Mr. Rizo had a gun or that he fired it at the loss prevention officers. His convictions for first degree robbery and first degree assault based upon that supposition should be reversed.

ii. The property was peacefully taken and any use of force occurred only after leaving the store and robbery is not established. Force that is used to affect an escape after property is peaceably taken does not satisfy the force element of robbery under Washington's transactional view. State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005). Mr. Rizo and Ms. Pina had exited the Sears store and under our transactional approach, the crime of theft was complete when Ms. Pina reached the parking lot outside the store. In the effort to avoid a subsequent detention, after he had already successfully reached a place of temporary safety, that Mr. Rizo allegedly used a firearm. RP 228.

Force must occur prior the perpetrators arrival at a place of temporary safety. Because the theft was completed when Ms. Pina exited the Sears and walked on past Mr. Cardenas into the parking lot, are insufficient to support a conviction for robbery.

2. THE TRIAL COURT'S CONFLICTING INSTRUCTIONS REGARDING THE MENTAL STATE REQUIRED FOR FIRST DEGREE ASSAULT REQUIRE REVERSAL.

First degree assault requires proof that the accused acted "with intent to inflict great bodily harm." RCW 9A.36.011(1)(a). The *mens rea* of first-degree assault is that specific intent to inflict great bodily harm. State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994). In defining the common law forms of assault for the jury, however, it was instructed that

an assault occurs “even though the actor did not actually intend to inflict bodily injury.” CP 45. This contradicted the requirements of the statute and placed in constitutional doubt the verdict which resulted because jury instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984).

By telling the jury at one point that the specific intent to inflict great bodily injury was required, and then telling the jury in the following instruction that it was irrelevant if the defendant intended to inflict any bodily injury at all, the verdict fails to ensure the jury has concluded, beyond a reasonable doubt, that all the elements of first degree assault were established. Mr. Rizo challenged each and every aspect of the State’s case with regard to the assault allegation and that includes the absence of any intent on his part to inflict great bodily injury. By instructing the jury separately that no such intent was required to commit an assault, Mr. Rizo’s right to due process of law and a jury verdict on all the elements of the offense has not been violated.

The State argues this error fails to satisfy the manifest constitutional error standard of RAP 2.5, however, the right to a jury determination on all the elements of the offense is at the core of the guarantees of the Sixth and Fourteenth Amendments and the

corresponding provisions of the Washington Constitution. WA Const Art 1, sec 22. The prejudice in this case flows directly from the absence of any assurance the jury applied the more specific *mens rea* required for first degree assault. Mr. Rizo challenged every aspect of the State's case with regard to the assault allegation and the evidence raised several areas of particular concern, not the least of which was the speculation regarding the trajectory of any shots which were allegedly fired. By separately instructing the jury that the specific intent to inflict great bodily injury was not required where the evidence was conflicting and disputed, Mr. Rizo was materially prejudiced by the error.

3. THE PROCEDURES USED TO FIND PRIOR STRIKE OFFENSES VIOLATE THE CONSTITUTIONAL RIGHT TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT.

Mr. Rizo continues to maintain the determination of prior offenses by the judge, not jury, based on a preponderance of the evidence violates his right to due process of law and a jury trial.

The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'"

Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147

L.Ed.2d 435 (2000). Two more recent United States Supreme Court

opinions cast further doubt on the constitutionality of having a trial judge,

rather than the jury, decide whether prior convictions are proven by a preponderance of the evidence. See Southern Union Co. v. United States, ___ U.S. ___, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012) (extending Apprendi to criminal fines); Oregon v. Ice, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 318 (2009) (holding a jury must decide if a defendant convicted of multiple offenses should be sentenced to consecutive sentences). As with the setting of fines in Southern Union, the State was historically required to prove the defendant was the person who was previously convicted of statutorily qualifying offenses. State v. McKague, 159 Wn.App. 489, 528, 246 P.3d 558 (2011), aff'd, 172 Wn.2d 802 (2011) (Quinn-Britnall, J., concurring in part and dissenting in part).

These principles should apply to all facts that increase the maximum penalty faced by the defendant even if the fact is labeled a “sentencing factor” by the legislature. Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007); see also Specht v. Patterson, 386 U.S. 605, 609-11, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). Because facts that increase a defendant’s maximum sentence, including prior convictions, are effectively elements of a greater crime, they should be found by the jury beyond a reasonable doubt. Southern Union, supra. Mr. Rizo disputed identity with regard to the prior offenses

and was entitled to determination by jury, upon proof beyond a reasonable doubt, before his sentence was increased to life without parole.

C. CONCLUSION.

Mr. Rizo requests this Court order his sentence of life in prison be stricken and the case remanded for resentencing on the lesser offenses supported by the evidence.

DATED this 29th day of January 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donnan", written over a horizontal line.

David L. Donnan (WSBA 19271)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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v.)	NO. 28932-0-III
)	
ELODIO RIZO,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DAVID BRIAN TREFRY ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	<input type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERY <input checked="" type="checkbox"/> E-MAIL BY AGREEMENT VIA COA PORTAL
--	---

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JANUARY, 2013.

X _____ 