

No. 318656
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

MYKEL T. STRASSER, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF SPOKANE
COUNTY
HONORABLE GREGORY SYPOLT

BRIEF OF APPELLANT

Tracy Scott Collins
Attorney for Appellant
1312 N. Monroe
Spokane, Washington 99201
(509)326-1020

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I. APPELLANT'S ASSIGNMENTS OF ERROR

- A. The trial court committed reversible error when it instructed the jury on deadly weapons enhancement over the objection of counsel and sentenced including the deadly weapons enhancement.
- B. The State committed prosecutorial misconduct when it argued facts not in evidence and unconstitutionally shifted the burden of proof onto the Appellant.
- C. The trial court committed reversible error when it allowed the use of the controversial Washington Pattern Jury Instruction 401 including the bracketed "abiding belief in the truth of the crime charged language"

II. ISSUES

- A. Whether the trial court committed reversible error by instructing the jury on the deadly weapons enhancement over the objection of counsel ?
- B. Whether the State committed prosecutorial misconduct by arguing facts not in evidence and unconstitutionally shifting the burden of proof to the Appellant ?
- C. Whether the combination of Washington Pattern Jury Instruction 401's language regarding "abiding belief" and argument by the State violated the Appellant's right to a fair trial ?

III. STATEMENT OF THE CASE

On June 10, 2013, Mykel Strasser's second trial for first degree burglary, armed with a baseball bat, a deadly weapon, first degree robbery, armed with same baseball bat, a deadly weapon, began. RP 21. A retrial of the same case that resulted in a hung jury in February, 2013. Mr. Strasser's defense throughout both trials was he was not present at the robbery. RP 6, February 25, 2013, pretrial motions.

By November 3, 2011, Mykel Strasser and Sean Mustard had been friends approximately two and a half to three years. RP 258. On November 3, 2011, around 11:00 P.M., Mr. Strasser was accused of breaking down Mr. Mustard's door along with four unknown men and entering the house. RP 123. Mr. Mustard kept an aluminum baseball bat immediately next to the front door for "protection". RP 130, 275. One of the men grabbed the bat as they entered the house. RP 275. It was not

Mr Strasser. RP 275. Several things were taken from Mr. Mustard's bedroom. RP 127, 154. Mr. Mustard's mother, his step father, a neighbor and Mr. Mustard claimed at trial they were witnesses to the robbery and that Michael Strasser was there taking things from the bedroom. There was no indication that anyone was struck or injured in a physical manner.

At the beginning of the trial the court adopted the pretrial rulings from the February trial. RP 1. Those rulings had been made on February 25, 2013, and are the subject of a transcript that was provided later to this court. RP, February 25, 2014, Pretrial Motions. The subject of those motions, substantially, pertained to several issues regarding ER 404(b) evidence. RP 4, 9, pretrial motions. Between approximately November 3rd, 2011, and roughly six months before the date of the alleged robbery, Mr. Strasser and the alleged victim in the trial, Mr. Sean Mustard, had smoked marijuana together on occasion, and went to a party at a friend of Mr. Strasser's. At that party one or

the other of them had stolen a laptop computer and an Ipod. RP 10, 11, pretrial motions. To use the State's own words, the "victim" believed that theft was the primary motive for the robbery six months later at his house. RP 11-12, pretrial motions. The State claimed during the motions that getting back the laptop and the Ipod stolen in the earlier theft was the motive for the robbery at issue. RP 13, pretrial motions. Out of the blue, the court sua sponte asked "Is there an identity issue here." RP 14, pretrial motions. The State, realizing what it had just been handed, responded enthusiastically "Apparently there is, your honor". RP 13, pretrial motions. The defense, as stated above, was always Mr. Strasser was not there at the robbery. Defense counsel agreed to let in the both the previous theft of the laptop and the marijuana paraphernalia under 404(b), prior bad acts. RP 15-16 pretrial motions, and RP 2-3,7.

The State argued from the opening statement that the robbery was some sort of "vendetta". RP 110. That "[t]hey

smoked marijuana together, stole together, and that Mr. Strasser took a laptop and Ipod from a party. RP 109. The State even anticipated the defense in his opening statement, “You’re going to hear from the defense that says that Mr. Strasser was not a part of this, that this didn’t happen”. RP 111. In addition, “The defense may call witnesses. The defense may call the defendant’s mother. And you’ll get to assess whether she’s biased in trying to protect, understandably so, trying to protect her son.” RP 113.

During the trial the State brought up the theft at the party with Mr. Strasser of the laptop and ipod in testimony with the alleged victim Mr. Mustard. RP 263. Mr. Mustard testified that Mr. Strasser contacted him about picking up some of his property and that Mr. Strasser was angry. RP 268. When asked why Mr. Strasser was angry at him, Mr. Mustard said “I don’t know”. RP 268. Later, the prosecutor tried to get Mr. Mustard to mention the Laptop and Ipod as a basis for a vendetta again,

but Mr. Mustard did not bite, and said, in effect, I don't know why they broke into my house. RP 297.

Based upon this foundation, the State argued in closing that there was "a couple of possibilities" as motive for this robbery. RP 360. "And the State would submit it doesn't matter which one you believe", that Mykel stole the laptop and when his friends found out he tried to blame it on Mr. Mustard. So this robbery resulted from the effort by Mr. Strasser to cover the fact that he was the one to actually take the laptop, or Mr. Mustard stole the laptop and Mr. Strasser committed this robbery to get it back. RP 360-361. "Either way ladies and gentleman, it doesn't matter which version under the law. You don't get to take matters into your own hands." RP 361.

During the trial the subject of Mr. Mustard's bat came up with all the witnesses. Karin Mustard, Sean Mustard's mother, testified that she was "threatened by the baseball bat" when one of the guys who came with Mr. Strasser lifted it and she thought

he was going to smash her flat screen monitor. RP 124-125.

She also testified, without objection to speculation, that she saw Mr. Strasser hold the bat up to hit Mr. Mustard, but that the neighbor stepped between them. RP 129. This was after Mr. Strasser had left the house. RP 131. According to Ms. Mustard, Mr. Strasser had the bat while inside the house but he did not “brandish” it. RP 131. Mr. Moses, Mr. Mustard’s step father testified that there was a big kid standing in front of the computer and that he had a bat. RP 155. The neighbor, Ms. Hilde-Thomas, testified that she saw Mr. Strasser come out the front door with “something in his hand” and that Mr. Mustard was behind him. RP 196. She did not know if it was a bat, or a stick, or a baton. RP 197. She said Mr. Strasser “kind of raised it” like he was going to hit someone with it but he didn’t hit anybody. RP 197. In response to further pressure from the prosecutor, she testified that “he [Mr. Strasser] had gone like this with whatever he had in his hand, he raised his hand. He

didn't raise it up to his head or anything but he raised it instead of his arm." RP 199. Mr. Mustard testified that as Mr. Strasser was leaving the house he charged at Mr. Mustard with the bat "like he was going to hit me with it" and Mr. Mustard stepped out of the way. RP 280. Later he described the same conduct saying that Mr. Strasser "fast stepped" toward him "flinching" the bat. RP 282. No testimony established that Mr. Mustard's bat had been raised to strike anything or to threaten anyone with a beating. The bat was not brought into the house by Mr. Strasser or any of the men claimed to have accompanied him.

At the conclusion of evidence defense counsel objected giving a weapons enhancement instruction to the jury, particularly number nineteen in the court's packet. RP 336-337, 352. The trial court decided to instruct the jury on the weapons enhancement over that objection. RP 338.

On June 13, 2013, Mr. Strasser was found guilty on all counts including two weapons enhancements. RP 388

IV. ARGUMENT

A. Standard of Review

Abuse of Discretion on all evidentiary issues. State v. Gallagher, 112 Wn. App. 601, 609, 51 P.3d 100 (2002).

B. There was no Basis Upon Which to Instruct they Jury on the Weapons Enhancement for the bat.

In order for a weapons enhancement to be appropriately charged and instructed and submitted to a jury, if the weapon alleged is not a firearm, the weapon must have the capacity to inflict death and, from the manner in which it was used, is likely to produce or may easily and readily produce death. RCW 9.94A.825. A bat is not a deadly weapon per se. “. . . thus the inherent capacity and the circumstances in which it is used determine whether a weapon is deadly. State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). More than mere possession is required where the weapon is neither a firearm or

an explosive. In re Personal Restraint of Martinez, 171 Wn.2d 354, 366, 256 P.3d 277 (2011). The Supreme Court has specifically disapproved of the approach that an implement that has the mere potential of causing great bodily harm is a deadly weapon. Martinez, supra at 368 n.6, State v. Gamboa, 137 Wn. App. 650, 154 P.3d 312 (2007).

In looking at the facts set forth above relating to the bat in this case there is very scant evidence that the bat was a part of this alleged robbery. It belonged to the alleged victims, it was never raised over anyone as if to strike and it was not used as a means to procure any of the items that were taken. The court committed reversible error by instructing the jury on the weapons enhancement and in sentencing Mr. Strasser to two weapons enhancements for the bat. Mr. Strasser respectfully request this court recognize this error, dismiss the weapons enhancements and remand the case for new trial or re-sentencing.

C.. The State Committed Prosecutorial Misconduct by Arguing Facts not in the Record and Shifting the Burden of Proof to the Defendant During Oral Argument.

In order to prove prosecutorial misconduct a defendant must prove both the prosecutor's conduct was improper and that it deprived the defendant of a fair trial. State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553 (2009). Where no objection was made at the time of the alleged misconduct, a defendant must show that there is a substantial likelihood that the misconduct affected the jury's verdict, and that the misconduct was so flagrant that no instruction could have cured the resulting prejudice. Jackson, supra at 883

In this case the State mentioned the witnesses the defense would call in his opening statement, and said that Mr. Strasser's

mother would not be credible because she wanted to protect her son. He went on to say the defense in the case would be that this didn't happen. Finally, and throughout the proceedings, the state constructed a motive by repeatedly telling the court, and then the jury, that this burglary was about the laptop and an Ipod, but failed to produce any testimony at trial to substantiate these claims. He even argued specifically that Mr. Strasser's efforts to cover up his own theft of the laptop was the motive for the robbery. RP 360.

By arguing in the manner the State effectively shifted the burden to Mr. Strasser to produce witnesses and to put on a specific defense. In addition, the prosecutor attained the admission of objectionable evidence under 404(b), created a motive for the crime that was not later supported by the evidence, and effectively argued to the jury on more than one occasion that retrieval of the laptop was the motive for the robbery. Mr. Strasser respectfully requests the Court reverse

and remand the case for a new trial based on prosecutorial misconduct.

D. The Inclusion of the Bracket Language regarding
“Abiding Belief in the Truth of the Crime Charged”
in WPIC 401 Deprived the Appellant of a Fair
Trial.

Washington Pattern Jury Instruction 401, when including the bracketed material reads thus:

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. (If, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt.)

In State v, Emery, 174 Wn.2d 741, 760, 278 P.2d 653 (2012), and State v, Berube, 286 P.3d 402, 411 (2012), both courts determined that the State's argument that a jury's job is to search for the truth is impermissible. The bracketed material in WPIC 401 inexorably connects the concepts of truth and being satisfied beyond a reasonable doubt. To argue or distinguish otherwise is to defy all logic. "If . . . you have an abiding belief in the truth of the crime charged you are satisfied beyond a reasonable doubt". The State in this case confined its argument to reasonableness of the evidence, but how can a juror be

expected to not equate reasonableness with his or her abiding belief in the truth of the crime charged when they are desperately searching for a definition for “reasonable doubt”, and the bracketed material gives them the only clear explanation.

Based on the courts including the bracketed material in the final jury instructions, and the danger of infusing the search for truth into the jury deliberations, Appellant respectfully requests this Court reverse the conviction and remand for new trial.

IV. CONCLUSION

Based on the foregoing, Mykel Strasser respectfully requests this Court reverse the convictions for robbery in the first degree and burglary in the first degree with the attendant weapons enhancement and remand for a new trial.

Respectfully Submitted this 2nd, day of December, 2014.



TRACY SCOTT COLLINS, WSBA 20839
Attorney for Appellant