

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

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| STATE OF WASHINGTON, |) | No. 65699-6-I |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | |
| |) | |
| LOUIS GUSWALTER PARKER, |) | UNPUBLISHED OPINION |
| |) | |
| Appellant. |) | FILED: August 13, 2012 |
| |) | |

Ellington, J. — Louis “Bart” Parker was convicted of murder and unlawful possession of a firearm. We accept the State’s concession that the prohibition against double jeopardy requires that Parker’s additional conviction for second degree felony murder be unconditionally vacated. In all other respects, we affirm.

BACKGROUND

Parker and Markasha Monroe began dating in 2008. Their relationship was characterized by jealousy and violence.

On August 5, 2009, Parker spent the night with Monroe in a house she shared with four other people. Around noon the following day, the other people heard wrestling or thumping sounds coming from Monroe’s room. They heard her say, “Bart, stop, don’t.”¹ A gunshot followed.

¹ Report of Proceedings (RP) (June 14, 2010) at 19.

When Monroe's housemates tried to enter her room, the door was locked. They saw Parker outside, running from the house. A few minutes later, Parker returned, climbed through the bedroom window, opened the locked door and allowed the others to enter. They found Monroe mortally wounded and called the police. Parker fled. Monroe never regained consciousness and died four days later from a single gunshot wound to her head.

Parker told Monroe's housemates he "didn't do it."² He later told someone else that he was playing with the gun and it went off when Monroe tried to take it. He was arrested three days after the shooting.

The State charged Parker alternatively with intentional murder in the second degree and felony murder in the second degree and unlawful possession of a firearm. For purposes of a sentence enhancement, the State also alleged Parker had been armed with a firearm when he committed the murder. The jury found Parker guilty as charged.

At sentencing, Parker asked the court to dismiss the felony murder conviction to avoid double jeopardy. The court declined to dismiss the conviction but entered judgment only on intentional murder and unlawful possession of a firearm. The court imposed standard range sentences, plus a 60-month firearm enhancement.

DISCUSSION

Jury Selection

By statute, a person is not competent to serve on a jury if he or she "[h]as been convicted of a felony and has not had his or her civil rights restored."³ During voir dire,

² Id. at 29.

³ RCW 2.36.070(5).

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one member of the venire disclosed a past felony conviction from Wisconsin. The court asked

the prospective juror if he had had his rights restored. The man did not know, but said he never affirmatively acted to have them restored, had received no official documentation of restoration, and had “avoided voting for years, because I understood I lost that privilege.”⁴ Over Parker’s objection that the decision was premature, the court disqualified the man.

We review challenges concerning juror selection for abuse of discretion.⁵ “Where the selection process is in substantial compliance with the statutes, the defendant must show prejudice. If there has been a material departure from the statutes, prejudice will be presumed.”⁶

Parker cites authority from Wisconsin suggesting that the prospective juror was in fact qualified to serve.⁷ But this information was not presented to the trial court, and although Parker objected that the court lacked a sufficient record to rule on the matter, he offered no plan for resolving the qualification issues. Thus, the only information available to the court indicated that the prospective juror’s civil rights had not been restored and he was therefore disqualified by statute. There was no abuse of discretion or material departure from the statute.

Prosecutorial Misconduct

Parker next contends the prosecutor committed reversible misconduct in closing argument.

⁴ RP (June 1, 2010) at 3.

⁵ State v. Tingdale, 117 Wn.2d 595, 599, 817 P.2d 850 (1991).

⁶ Id. at 600.

⁷ See State v. Mendoza, 227 Wis.2d 838, 851-52, 596 N.W.2d 736 (1999) (a person’s civil rights are restored automatically when the terms of sentence are satisfied).

To prevail on a claim of prosecutorial misconduct, Parker must show the conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.⁸ A defendant is prejudiced if there is a substantial likelihood that the misconduct affected the jury's verdict.⁹ Failure to object waives the issue unless the conduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."¹⁰

During her argument, the prosecutor remarked, "The word verdict means to speak the truth."¹¹ Washington courts have found error in similar arguments. In State v. Anderson, Division Two of this court explained:

The prosecutor's repeated requests that the jury "declare the truth," . . . were improper. A jury's job is not to "solve" a case. It is not, as the State claims, to "declare what happened on the day in question." Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.^[12]

The prosecutor's argument here was brief and not emphasized. But if it was improper, we discern no prejudice.

The Anderson court wrote that "examining this improper argument in the context of jury instructions that clearly lay out the jury's actual duties and of thorough discussion of the evidence by both counsel during argument, we find that Anderson has not demonstrated that there is a substantial likelihood that this misconduct, to which the

⁸ State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

⁹ Id. at 718-19.

¹⁰ Id. at 719.

¹¹ RP (June 16, 2010) at 45.

¹² 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), rev. denied, 170 Wn.2d 1002, 245 P.3d 226 (2010) (citation omitted).

defendant timely objected, affected the verdict.”¹³

Similarly here, the jury was properly instructed about the presumption of innocence, the State’s burden to prove every element of each crime beyond a reasonable doubt, the nature of that burden, the jury’s role as the sole judges of credibility, and the fact that counsel’s arguments are not evidence. The prosecutor and defense counsel thoroughly reviewed the evidence during closing argument. Not only has Parker not shown prejudice, his failure to object below requires him to meet the additional burden of showing that any prejudice could not have been cured by a timely instruction. This he cannot do. A new trial is not warranted.

Special Verdict

The court instructed the jury that it must be unanimous to answer whether the State proved the facts necessary to support a sentencing enhancement.¹⁴ Parker contends that under State v. Bashaw, such an instruction was error.¹⁵ But our Supreme Court recently overruled Bashaw and expressly upheld an instruction identical to the one given here.¹⁶ There was no error.

Double Jeopardy

Parker contends the court violated the prohibition against double jeopardy by

¹³ Id.

¹⁴ In pertinent part, the jury was instructed, “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.’” Clerk’s Papers at 198.

¹⁵ 169 Wn.2d 133, 234 P.3d 195 (2010).

¹⁶ State v. Nunez, No. 85789-0, slip. op at 12 (Wash. June 7, 2012).

refusing to dismiss his felony murder conviction. He argues the two convictions for intentional and felony murder unconstitutionally subjected him to multiple punishments for the same act.¹⁷ Citing our Supreme Court's decision in State v. Turner,¹⁸ Parker argues the court was required to unconditionally vacate the felony murder conviction. The State concedes that a written order vacating the conviction is appropriate. Accordingly, we remand for such an order.

Offender Score

Parker next contends the court miscalculated his offender score by doubling his juvenile conviction for attempted second degree robbery. We disagree.

The court determined that Parker's offender score was 10 for purposes of sentencing on the murder conviction. This calculation was based in part on several juvenile adjudications, including one for attempted robbery in the second degree to which the court assigned two points.

The rules for calculating offender scores are set out in RCW 9.94A.525. Where the current conviction is for a violent offense, the court counts two points for each juvenile violent felony conviction.¹⁹ Second degree robbery is a violent felony.²⁰ A juvenile conviction for that offense is therefore scored as two points.

Parker argues, however, that because he was adjudicated guilty only of *attempted*

¹⁷ See North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (double jeopardy provisions bar multiple punishments for the same offense).

¹⁸ 169 Wn.2d 448, 465-66, 238 P.3d 461 (2010) (imposition of separate convictions for second degree murder and felony murder for the same act violates double jeopardy).

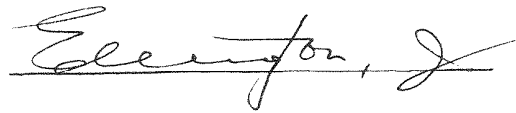
¹⁹ RCW 9.94A.525(9).

²⁰ RCW 9.94A.030(54)(a)(xi).

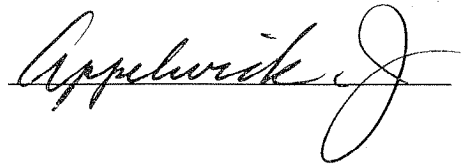
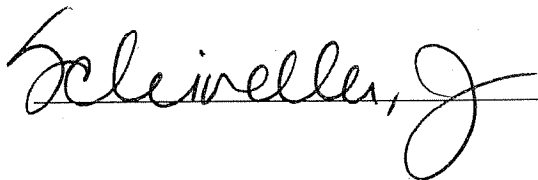
robbery in the second degree, the conviction should not count as two points. But the scoring statute clearly provides that courts must “[s]core prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.”²¹ Thus, the score for a juvenile conviction for attempted second degree robbery is two. The court made no error.

CONCLUSION

We remand for an order unconditionally vacating the felony murder conviction, and otherwise affirm.



WE CONCUR:



²¹ RCW 9.94A.525(4).