

FILED
JUNE 14, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 29716-1-III
)	
Respondent,)	
)	
v.)	
)	
LORENZO R. RAMOS,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Brown, J. • Lorenzo R. Ramos appeals his second degree assault and first degree robbery convictions. He contends (1) the charges should have been severed, (2) the limited use of an uncertified interpreter was unconstitutional, (3) the court erred in instructing on jury unanimity concerning the absence of a firearm enhancement, and (4) the evidence is insufficient to support his convictions. We affirm.

FACTS

In late 2009, Mr. Ramos briefly lived with Jose Orozco and his family in Othello. On December 19, while Mr. Orozco was asleep, Mr. Ramos entered the room and told

Mr. Orozco he was going to kill him. Mr. Ramos then grabbed a rifle and Mr. Orozco grabbed one as well. Mr. Ramos struck Mr. Orozco in the forehead with the rifle and knocked him down. He then stepped on Mr. Orozco's throat. Mr. Orozco related Mr. Ramos also pointed the rifle at him and tried to chamber a cartridge, but the round did not feed into the chamber.

Mr. Orozco's son, Christopher, responded to his father's cries for help and saw Mr. Ramos on top of him. Christopher¹ removed Mr. Ramos from Mr. Orozco and kicked him out of the house. Christopher said a few minutes passed between Mr. Ramos leaving his dad's room and when Mr. Ramos left the house. Mr. Ramos got into a tan Ford Explorer and tried to leave, but he got stuck in the snow. A member of the Orozco family called police. Christopher told police what had happened. Deputy Collin Hyer was one of the responding officers. He saw Mr. Orozco had blood on his face and a lump on the side of his head. Christopher gave the officers Mr. Ramos' alien registration card to help identify him.

That same morning, Levi Meseberg was hunting geese in a field with a group including his father, Mike Meseberg, and Nick Anderson. Levi² left the field in his father's 2004 silver Chevy Silverado pickup to run an errand. When Levi returned to the

¹ Christopher is referred to by his first name to avoid confusion with his father; no disrespect is intended.

² Levi is referred to by his first name to avoid confusion with his father; no disrespect is intended.

No. 29716-1-III
State v. Ramos

field, he saw an older Ford F-150 pickup stuck in a ditch. Helping out, Levi recognized the F-150 as belonging to Mr. Anderson. Mr. Ramos was in the F-150. Levi called Mr.

Anderson and asked if anyone should have his vehicle. Because he does not speak Spanish and Mr. Anderson does, Levi handed the phone to Mr. Ramos to call Mr. Anderson to see what the conversation was about and turned his back to Mr. Ramos and a conversation ensued in Spanish. After they hung up, Levi got the phone back and attempted to call Mr. Anderson. When turning back around, Mr. Ramos had pulled a pistol that looked like a .22 handgun. Levi was at arm's length from Mr. Ramos. Mr. Ramos gestured for Levi to step back and he did.

Mr. Ramos then drove away in Mike Meseberg's Silverado pickup. Levi called the police. Deputy Hyer responded to a location about a mile or one mile and one-half from the Orozco residence. Levi gave police a description of the man who took his father's Silverado pickup. Deputy Hyer showed Levi Mr. Ramos' identification card and Levi confirmed it was the man who had taken the truck. Later that day, Deputy Hyer completed a stolen vehicle report regarding Mike Meseberg's Silverado pickup.

Around 9:00 p.m., Officer Michelle Peters of the Parma, Idaho Police Department got a call from a man asking her to come to his location. On arrival, she saw a Hispanic male standing behind a silver Chevrolet pickup. The man had apparently been asking for directions, but the reporting party believed a problem existed. Officer Peters talked to the man, who turned out to be Mr. Ramos, for about 10 minutes. As she was talking to Mr. Ramos, she learned the truck was reported stolen and several officers assisted in arresting

him. Sergeant Jared George of the Wilder, Idaho Police Department took care of towing arrangements. While inventorying the vehicle, he found a .22 handgun in the console with a live round in the chamber and papers bearing Mike Meseberg's name.

Mr. Ramos was charged with second degree assault with a firearm enhancement, first degree robbery with a firearm enhancement, and theft of a motor vehicle. Mr. Ramos unsuccessfully moved to sever the assault charges just before trial.

Frank Rojas was introduced as an interpreter for trial. Mr. Rojas informed the court he had not yet received certification because he was still waiting to take the required ethics class. Over defense concerns regarding his lack of certification, the court "accepted [Mr. Rojas] as a certified interpreter" explaining, "[H]e'll be interpreting for the witness." Report of Proceedings (RP) (Jan. 12, 2011) at 54. Mr. Rojas interpreted solely while Mr. Orozco testified. At all times, Mr. Ramos was assisted by Jeremy Chambers, who is a certified interpreter with his oath on file.

Testimony at trial presented the above facts. Additionally, Mr. Orozco related the incident with Mr. Ramos had caused him pain on his forehead, throat, and arms. He still had pain at the time of trial, more than one year later. Photographs of Mr. Orozco's face taken the morning of the incident were admitted and shown to the jury.

After the State rested, the defense unsuccessfully renewed its motion to sever. The defense moved to dismiss for insufficiency of the evidence as to all counts. The court

No. 29716-1-III
State v. Ramos

denied the motion except for the second degree assault firearm enhancement. The defense called no witnesses and rested. The jury found Mr. Ramos guilty of second degree assault, first degree robbery with a firearm enhancement, and theft of a motor vehicle. The court sentenced Mr. Ramos to standard range concurrent sentences. Mr. Ramos appealed.

ANALYSIS

A. Severance

The issue is whether the trial court erred by denying Mr. Ramos' motion to sever the charge of assault concerning Mr. Orozco from the charges of robbery and theft involving the Mesebergs. Mr. Ramos contends the counts should have been severed because he was prejudiced by their joinder.

CrR 4.3(a)(2) permits two or more offenses to be joined in a single charging document when the offenses "[a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." Mr. Ramos does not dispute the offenses were based on a connected series of acts. "Offenses properly joined under CrR 4.3(a), however, may be severed if 'the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.'"

State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (quoting CrR 4.4(b)).

We review a trial court's denial of a motion to sever counts for abuse of discretion.

No. 29716-1-III
State v. Ramos

State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). The defendant has the burden of proving such abuse by demonstrating that a trial involving multiple offenses would be so manifestly prejudicial as to outweigh the concern for judicial economy.

Bythrow, 114 Wn.2d at 718. Joinder carries the potential for prejudice if (1) the defendant may have to present separate, possibly conflicting, defenses; (2) the jury may infer guilt on one charge from evidence of another charge; or (3) the cumulative evidence may lead to a guilty verdict on all charges when, if considered separately, the evidence would not support every charge. *Id.* On the other hand, prejudice is mitigated by (1) the strength of the evidence on each count, (2) the clarity of the separate defenses, (3) instructions directing the jury to consider each count separately, and (4) the admissibility of the evidence of one charge in a separate trial of the other charge. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Here, the court heard argument regarding the potential for prejudice and the mitigating factors. It discussed the statutes, the alleged facts, and the factors at length on the record. The events took place in one day; Mr. Ramos took Mike Meseberg's vehicle after the vehicle he attempted to flee the Orozco residence in became stuck in the snow; the incident with the Mesebergs took place in close proximity to the incident with Mr. Orozco; and much of the testimony would have been admissible in both trials, had two been held. The trial court determined severance was not proper. Additionally, the court

No. 29716-1-III
State v. Ramos

instructed the jury to consider each count separately. Given all, we conclude the trial court did not abuse its discretion in denying the motion.

B. Interpreter

The issue is whether the trial court erred by allowing an uncertified interpreter to interpret during the trial. Mr. Ramos contends he was denied his constitutional right to a qualified interpreter.

“The appointment of an interpreter is a matter within the discretion of the trial court to be disturbed only upon a showing of abuse.” *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999) (internal quotation marks omitted). “Under this standard of review, appellate courts have typically upheld trial court decisions concerning the use of interpreters.” *Id.* (Although this standard originated in cases dealing with whether or not to use an interpreter at all, the State points our attention to a Ninth Circuit case implying that the standard applies more broadly.). “The use of interpreters in the courtroom is a matter within the trial court’s discretion, and that a trial court’s ruling on such a matter will be reversed only for clear error [E]ven the more fundamental question of whether an interpreter is necessary has been consigned to the ‘wide discretion’ of the trial court.” *United States v. Mayans*, 17 F.3d 1174, 1179 (9th Cir.

1994) (citations omitted).

Under Washington law, the right of a defendant in a criminal case to have an interpreter is derived from the Sixth Amendment right to confront witnesses, have a fair trial, and be present at one's own trial. *Gonzales-Morales*, 138 Wn.2d at 379. This right is also codified in statute. RCW 2.43.010. RCW 2.43.030(1)(b) and (2) require that when an interpreter is not certified by the administrative office of the courts, the court must find good cause for using that interpreter and satisfy itself on the record the proposed interpreter is competent. Specifically, the court has to satisfy itself on the record that the interpreter "has read, understands, and will abide by the code of ethics for language interpreters." RCW 2.43.030(2)(b).

Preliminarily, the State argues Mr. Ramos did not preserve the issue for appeal because he did not actually object at trial. Defense counsel said, "[W]ith respect to the interpreter's pending certification. He indicated that he has not yet passed the ethics portion, which I'm no expert, but it's my understanding that that is a required portion in order to gain certification. He hasn't yet even taken it. So I am not entirely comfortable with his acceptance by the court." RP (Jan. 12, 2011) at 54-55. Nonetheless, it is apparent from the record that Mr. Ramos was objecting and review is appropriate. *State v. Pham*, 75 Wn. App. 626, 632, 879 P.2d 321 (1994). And the State acknowledges it "was probably a misstatement" for the court to "accept [Mr. Rojas] as 'certified.'" Br. of

No. 29716-1-III
State v. Ramos

Resp't at 13. The State allows the court "may have made an imperfect inquiry as to the statutory obligation to follow the 'code of ethics.'" Br. of Resp't at 15.

Even so, based on the record, it appears as though Mr. Ramos was at all times assisted by another interpreter, Mr. Chambers, who is indisputably certified. Given these circumstances, it does not appear Mr. Ramos' right to a qualified interpreter was in any way violated.

C. Unanimity Instruction

The issue is whether the trial court erred by requiring unanimous agreement in order to answer "no," to the firearm enhancement.

We review challenged jury instructions de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Mr. Ramos did not object at trial to the jury instruction requiring unanimous agreement at trial. "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), which requires that timely and well-stated objections be made to instructions given or refused "in order that the trial court may have the opportunity to correct any error." *Id.* at 686 (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)).

To overcome the general rule of RAP 2.5(a) and raise an error for the first time on appeal, an appellant must first demonstrate that the error is “truly of constitutional dimension.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). We will not assume an error is of constitutional magnitude; rather, the appellant must identify the constitutional error. *Id.*

Mr. Ramos has not identified a constitutional provision violated by the court’s instructions. Nor has he claimed a violation of any recognized constitutional right. Even if a claimed error is of constitutional magnitude, an appellate court must then determine whether the error was manifest. *Id.* at 99. “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). “To demonstrate actual prejudice there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935).

Mr. Ramos relies solely on *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). In *Bashaw*, our Supreme Court held the instruction requiring all 12 jurors to unanimously agree to find absence of the special finding on an answer to the special verdict was an incorrect statement of the law. *Id.* at 147. But, the court did not address whether the erroneous instruction challenged for the first time on appeal presented a manifest error

No. 29716-1-III
State v. Ramos

affecting a constitutional right under RAP 2.5(a)(3). Although the *Bashaw* court applied constitutional harmless error analysis, it did not actually cite a constitutional basis for its underlying decision. This court has rejected bare reliance on *Bashaw* in reviewing this instructional error issue when raised for the first time on appeal. See *State v. Guzman Nunez*, 160 Wn. App. 150, 162-63, 248 P.3d 103, review granted, 172 Wn.2d 1004 (2011). Mr. Ramos fails to show practical and identifiable consequences in the trial of his case. Accordingly, we decline to review Mr. Ramos' instructional challenge for failure to show manifest constitutional error.

D. Evidence Sufficiency

The issue is whether sufficient evidence supports Mr. Ramos' convictions for second degree assault and first degree robbery in violation of his constitutional due process right to have every element proved beyond a reasonable doubt. Due process requires the State to prove every element of the crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const., art. I, § 3.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068

No. 29716-1-III
State v. Ramos

(1992). An insufficiency claim admits the truth of the State's evidence and requires that all reasonable inferences be drawn in the State's favor and interpreted most strongly against the defendant. *Id.* In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Circumstantial evidence is equally as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To prove second degree assault, the State had to show, beyond a reasonable doubt, that Mr. Ramos intentionally assaulted another and thereby recklessly inflicted substantial bodily harm or assaulted another with a deadly weapon. RCW 9A.36.021(1)(a), (c).

“‘Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(b).

Mr. Ramos claims no evidence shows Mr. Orozco suffered a substantial loss or impairment of function of the body or any fracture and no evidence of substantial disfigurement. But Mr. Orozco testified about the multiple injuries he suffered as a result of the attack as well as residual pain, over a year later. He testified to lack of shoulder strength as a result of the attack. Several other witnesses testified about Mr. Orozco's

injuries and photographs of him were admitted for the jury.

Considering the entire record, the evidence, when viewed in the light most favorable to the State and with all reasonable inferences drawn in the State's favor and interpreted most strongly against Mr. Ramos, permitted the jury to find Mr. Orozco's injury involved a temporary but substantial disfigurement, or a temporary but substantial loss or impairment of the function of the body. Moreover, Mr. Ramos used a rifle in his assault, which is an alternative element to substantial bodily harm in the second degree assault statute. Accordingly, the evidence was sufficient to support a conviction of second degree assault.

To prove first degree robbery, the State had to show, beyond a reasonable doubt that, armed with a deadly weapon, Mr. Ramos unlawfully took Mike Meseberg's vehicle from Levi against his will by use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.200, .190.

Mr. Ramos claims his taking of Mike Meseberg's truck was not against Levi's will by use or threatened use of immediate force, violence, or fear of injury. He claims no evidence shows Levi felt force or fear; rather, Levi testified that he was angered by the gun. But as the State responds, Levi testified Mr. Ramos pulled a gun on him at arm's length and pointed it at him. The testimony showed in pointing the gun at Levi, Mr. Ramos gestured for Levi to step back, and for that reason Levi did step back, allowing

No. 29716-1-III
State v. Ramos

Mr. Ramos to take his father's truck.

Considering the entire record, the evidence, when viewed in the light most favorable to the State and with all reasonable inferences drawn in the State's favor and interpreted most strongly against Mr. Ramos, permitted the jury to find that Mr. Ramos' taking of Mike Meseberg's truck was indeed against Levi's will by use or threatened use of immediate force, violence, or fear of injury. Accordingly, the evidence sufficiently supports Mr. Ramos' conviction of first degree robbery beyond a reasonable doubt.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Korsmo, C.J.

Sweeney, J.

No. 29716-1-III
State v. Ramos