

SUPREME COURT OF WASHINGTON

State v. Davis

182 Wash. 2d 222 (2014) · Decided December 24, 2014

OPINION

FAIRHURST, J.

Fairhurst, J. ¶1 In November 2009, Maurice Clemmons shot and killed four Lakewood police officers. Clemmons contacted Eddie Lee Davis and Letrecia Nelson shortly after the murders, and based on their actions following that contact, Davis and Nelson were convicted of rendering criminal assistance and possession of a stolen firearm. Davis was also convicted of unlawful possession of that firearm.

This opinion, which has four votes, would hold that the State presented sufficient evidence to support the firearm possession convictions. However, that is not the opinion of the majority. On the second issue, the court, with eight votes, finds that the trial court's imposition of an exceptional sentence as to Davis's and Nelson's convictions for rendering criminal assistance is not legally justified.

Thus, the result of the three opinions of the court is to reverse the Court of Appeals and remand for further proceedings. FACTUAL BACKGROUND AND PROCEDURAL HISTORY ¶2 The facts of the murders are notorious and undisputed.

On Sunday, November 29, 2009, Clemmons entered a coffee shop just before 8:00 a.m. with two handguns and began shooting at four Lakewood police officers, fatally wounding three. The fourth officer struggled with Clemmons *225and shot Clemmons once in the side, but Clemmons wrested the fourth officer's gun from him, fatally shot him, and left with the stolen gun.

A Seattle police officer shot and killed Clemmons on December 1, 2009 when Clemmons attempted to draw the stolen gun on the officer. ¶3 This case concerns the events of November 29, 2009 that occurred after Clemmons left the coffee shop.¹ There was some conflicting evidence at trial, but based on the nature of the issues presented for review, the evidence is taken in the light most favorable to the State, as discussed below.

More specific discussion of the events is included in our analysis where relevant. ¶4 Clemmons fled the coffee shop in a pickup truck driven by another. After abandoning the truck, Clemmons went to Davis's home, requested a ride to a house in Auburn, and said he had been shot while killing four police officers. ¶5 Davis drove Clemmons to the Auburn house, which was Nelson's home.

Clemmons banged on the window and then knocked on the door, saying he had been shot. Nelson let Clemmons inside, along with Davis. Clemmons told Nelson he had killed four police officers, been shot in the process, and stolen one officer's gun. At Clemmons' request, he was given fresh clothing and help treating his gunshot wound. Nelson put some clothes and the stolen gun in a shopping bag that was left on a counter.

Just before leaving, Clemmons asked where the gun was and Davis replied that it was in the bag on the counter and gave the bag to Clemmons. ¶6 Davis and Nelson were convicted of first degree rendering criminal assistance and possession of a stolen firearm. Davis was also convicted of second degree unlawful possession of a firearm.

The jury found by special verdict *226the aggravating factor that "[t]he offense involved a destructive and foreseeable impact on persons other than the victim," and the trial court imposed exceptional sentences for the rendering criminal assistance convictions.² RCW 9.94A.535(3)(r).³ ¶7 Both Davis and Nelson argue that the State did not present sufficient evidence to support the jury's determination that they possessed the stolen gun.

Both also argue that their exceptional sentences for rendering criminal assistance are not legally or factually justified. We granted Davis's and Nelson's petitions for review. *State v. Davis*, 179 Wn.2d 1014, 318 P.3d 280 (2014).

We denied the State's cross petition. ISSUES ¶8 I. Does sufficient evidence support Davis's and Nelson's convictions relating to possession of a firearm? ¶9 II. Are the exceptional sentences for rendering criminal assistance factually and legally justified? ANALYSIS I. The State presented sufficient evidence of firearm possession ¶10 The firearm at issue here is the gun Clemmons stole from one of the officers he shot and killed.

Davis and Nelson argue the evidence presented at trial showed, at most, their proximity to and momentary handling of the stolen gun and so the evidence is insufficient to support the essential element of possession for their convictions for possessing a *227stolen firearm, RCW 9A.56.310, and Davis's conviction for unlawful possession of a firearm, RCW 9.41.040(2)(a).

We disagree. ¶11 Our review on a challenge to the sufficiency of the evidence supporting a criminal conviction is highly deferential to the jury's decision, and we do not consider "questions of credibility, persuasiveness, and conflicting testimony." *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). [T]he test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006) (citations omitted). 112 A person actually possesses something that is in his or her physical

custody and constructively possesses something that is not in his or her physical custody but is still within his or her “dominion and control.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

For either type, “[t]o establish possession the prosecution must prove more than a passing control; it must prove actual control.” *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). The length of time in itself does not determine whether control is actual or passing; whether one has actual control over the item at issue depends on the totality of the circumstances presented.

Id. at 802. ¶13 The evidence at trial, construed most strongly in the State’s favor, is sufficient to support a holding that both Nelson and Davis had actual control over and constructively possessed the stolen gun. When Clemmons arrived at Nelson’s home, he had a bleeding gunshot wound and lay down on the living room floor. Nelson provided some alcohol or peroxide, and another person, not Davis or Nelson, *228helped Clemmons clean and treat the wound.

Clemmons also changed his shirt. In the meantime, Nelson retrieved a shopping bag and put the stolen gun inside it. Clemmons was at Nelson’s home for about 15 minutes. Just before leaving, Clemmons asked Davis, “ ‘Where’s the gun?’ ” or “ ‘Where is the gun at?’ ” 14 Verbatim Report of Proceedings at 1555. Davis responded, “ ‘It’s in the bag.’ ” *Id.* Davis then handed Clemmons the bag on the counter containing clothes and the stolen gun.

114 In light of the totality of the circumstances and our deferential standard of review, the State presented sufficient evidence to support a finding that Clemmons temporarily relinquished control over the stolen gun to Davis and Nelson while his wound was treated and he changed clothes. There was no testimony that Clemmons made any specific requests or orders as to what should be done with the stolen gun while he was at Nelson’s home, and he did not even know where the gun was until he was ready to leave about 15 minutes later.

It is reasonable to infer that someone else decided what to do with the gun and that the decision-makers were Nelson and Davis because Nelson retrieved the shopping bag and put the gun inside it and Davis immediately responded when Clemmons asked where the gun was. Furthermore, both Nelson and Davis retained the ability to take further actions as to the gun until the time Davis gave it back to Clemmons because they knew where it was and Clemmons did not.

That is actual control sufficient to establish constructive possession.⁴ We would affirm Davis’s conviction for second degree unlawful possession of a firearm and Davis’s and Nelson’s convictions for possession of a stolen firearm. *229II. Davis’s and Nelson’s exceptional sentences are not legally justified ¶15 Davis and Nelson were given exceptional sentences for their rendering criminal assistance convictions based on the aggravating factor, found by the jury, that those crimes “involved a destructive and foreseeable impact on persons other than the victim.” RCW 9.94A.535(3)(r).

Exceptional sentences are intended to impose additional punishment where the particular offense at issue causes more damage than that contemplated by the statute defining the offense. In that situation, the standard penalty for the offense is insufficient and an exceptional sentence based on a statutory aggravating factor found by the jury remedies that insufficiency.

State v. Stubbs, 170 Wn.2d 117, 124-25, 240 P.3d 143 (2010); RCW 9.94A.535. We review the meaning and applicability of a statutory aggravating factor as a matter of law. Stubbs, 170 Wn.2d at 123-24; RCW 9.94A.585(4)(a).

We hold that the aggravating factor at issue cannot apply to rendering criminal assistance, so the exceptional sentences imposed on Davis and Nelson are not legally justified. A. The general public is the victim of the crime of rendering criminal assistance ¶16 The State alleged and the jury found that Davis's and Nelson's rendering criminal assistance to Clemmons "involved a destructive and foreseeable impact on persons other than the victim." RCW 9.94A.535(3)(r).

The State argues those other persons are the families of the police officers Clemmons killed. To determine whether this aggravating factor applies, we first consider who the victim of rendering criminal assistance is, and we begin with the statute defining the offense: [A] person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he or she knows has committed a crime... he or she: *230(1) Harbors or conceals such person; or (2) Warns such person of impending discovery or apprehension; or (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or (6) Provides such person with a weapon.

RCW 9A.76.050. The degree of the offense depends on the underlying crime. RCW 9A.76.070(1),.080(1),.090(1). ¶17 Based on this plain language, rendering criminal assistance arises from actions intended to help an offender escape apprehension or prosecution and not from actions intended to cause or actually causing direct injury⁵ to any person. Only one of the alternative means by which one can render criminal assistance, RCW 9A.76.050(4), even contemplates actions taken against a third party, and the harm contemplated by the statute is still the harm created by helping the offender, not by harming the third party.

Clearly, rendering criminal assistance is a crime because it undermines the ability of the government to perform its duties to apprehend and prosecute offenders. The government cannot be the victim of rendering criminal assistance because it apprehends and prosecutes offenders not on its own behalf, but for the sole benefit of the people. Wash. Const, art. I, § 1.

There is no other possible particular victim based on the plain language of the statute. We hold that the *231 victim of rendering criminal assistance is the general public. B. RCW 9.94A.535(3)(r) does not apply to the crime of rendering criminal assistance as a matter of law ¶18 RCW 9.94A.535(3)(r) applies where there is “a destructive and foreseeable impact on persons other than the victim.” (Emphasis added.)

Because rendering criminal assistance victimizes the general public, every member of the public is part of the victim class. There is no “other.” ¶19 The State would have us hold that for crimes whose victim is the general public, RCW 9.94A.535(3)(r)’s reference to “other than the victim” actually refers to a particular person within the community or to a particular segment of the general public.

The statute simply does not say that. While this court has issued opinions discussing “community impact” on a particular segment of the general public as an aggravating factor, those opinions predate RCW 9.94A-.535(3)(r). *State v. Jackson*, 150 Wn.2d 251, 274, 76 P.3d 217 (2003); *State v. Johnson*, 124 Wn.2d 57, 73-76, 873 P.2d 514 (1994). If the legislature had intended RCW 9.94A.535(3)(r) to apply wherever the impact of an offense is unusually substantial as to a particular portion of the general public, it could have referenced the general public or the community in the statutory language.

It did not. We also note that our opinions in *Jackson* and *Johnson* involved offenses with clear, particular victims or intended victims — first degree murder and assault in the course of a drive-by shooting, respectively — so are materially distinguishable anyway. ¶20 The State contends that because every criminal offense is an offense against the general public, the approach we adopt today would mean RCW 9.94A.535(3)(r) could never apply to any crime.

It is true that what makes a wrongful act criminal, rather than merely tortious, is the legislature’s determination that the act is injurious to the public as a whole. E.g., 22 C.J.S. Criminal Law § 2 (2006). That does not mean we must ignore the obvious fact that *232 some criminal offenses have particular victims, while others do not — rendering criminal assistance does not. ¶21 Finally, the State argues that in setting the standard range sentence for first degree rendering of criminal assistance, the legislature contemplated one murder, not four, and that “ [t]he murder of a law enforcement officer has a greater detrimental impact on the public’s sense of security” than would the murder of a civilian.

Suppl. Br. of Resp’t at 23. Those arguments might have force as applied to other statutory aggravating factors or aggravating factors the legislature might consider enacting, but they have no relevance to the aggravating factor at issue here.

We will not affirm an exceptional sentence unless it is legally justified by the aggravating factor actually charged and found by the jury. CONCLUSION ¶22 We would hold that the State

introduced sufficient evidence at trial to support Davis's and Nelson's convictions for possession of a stolen firearm and Davis's conviction for second degree unlawful possession of a firearm, but that is not the decision of the court.

We do hold the aggravating factor in RCW 9.94A.535(3)(r) cannot justify an exceptional sentence for rendering criminal assistance as a matter of law. The result of the three opinions of the court is to reverse the Court of Appeals and remand for further proceedings. C. Johnson, González, and Gordon McCloud, JJ., concur. Another individual, Douglas Davis, was present during many of these events but is not a party to this case on review.

In this opinion, "Davis" refers to petitioner Eddie Lee Davis. The Court of Appeals reversed the application of this aggravating factor to the other charges and the application of another aggravating factor as to all charges.

We do not review those holdings. While several of the statutes at issue have been amended since the time of the offenses, none of those amendments are material to our decision, so we cite the current versions. We need not decide whether Nelson or Davis also had actual possession of the stolen gun, but we note that is a closer question because the evidence does not indicate that either Nelson or Davis physically handled the gun for more than a brief moment.

For purposes of the Sentencing Reform Act of 1981, chapter 9.94A RCW, the term " '[v]ictim' " is defined as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged," RCW 9.94A.030C53), "[u]nless the context clearly requires otherwise," RCW 9.94A.030.

In the context of RCW 9.94A.535(3)(r), the standard definition makes clear sense' — the victim of the offense is injured as a direct result of the crime, while persons other than the victim suffer a destructive impact caused by the crime in an indirect but foreseeable way.