No. 92605-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ZYION DONTICE HOUSTON-SCONIERS,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

Court of Appeals No. No. 45374-6-II (consolidated case)
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 12-1-04161-1
The John Hickman, Judge

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2. Can apprehension and fear experienced by a person at whom a gun is pointed still be inferred, if there is testimony from that person that she did not in fact feel apprehension and fear?

3. Did the Court of Appeals relieve the State of its constitutional burden proving beyond a reasonable doubt that Zyion Houston-Sconiers was armed with a firearm when he conspired to commit robbery, where the nature of the offense of conspiracy is an agreement, and there is no rational connection between an agreement and a firearm?

4. Can the State prove a nexus between a firearm and a crime where the nature of the crime is a mental state and not a physical act?

5. Is reversal and remand for further proceedings required because the automatic decline statute violates the Eighth Amendment and due process and the holdings to the contrary in Boot are no longer good law, and because any sentencing scheme that fails to consider the differences between adults and juveniles in imposing a sentence violates the State and Federal constitutional due process protections and prohibitions against cruel and unusual punishment?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Following a joint trial with co-defendant Treson Roberts, a

jury found Zyion Dontice Houston-Sconiers guilty of six counts of first degree robbery (RCW 9A.56.190, .200), one count of second degree assault (RCW 9A.36.021), one count of conspiracy to commit first degree robbery (RCW 9A.28.040), and one count of unlawful possession of a firearm (RCW 9.41.040), all arising from three incidents occurring on the night of October 31, 2012. (CP 1-4, 17-22, 206-21; RP 2370-72) The jury also found that Houston-Sconiers was armed with a firearm during commission of five of the six robberies, the assault and the conspiracy. (RP 2370-72, CP 206-21)

At sentencing, the prosecutor requested that the trial court impose an exceptional sentence downward. Because of the manner in which Houston-Sconiers was charged, a standard range sentence followed by seven consecutive firearm enhancements would result in a term of confinement that even the prosecutor thought was excessive, given the nature of the crimes and the fact that Houston-Sconiers was just 17 years old at the time of the offenses. (CP 225-27; RP 2386-87, 2390) Houston-Sconiers was facing a standard range sentence of 501-543 months (41.75-45.25 years), with 372 of those months (31 years) to be served as "flat time." (CP 227, 236, 263-64; RP 2390) The prosecutor

recommended that the court impose no time for the crimes themselves, and impose just the mandatory firearm sentence enhancements, for a total term of confinement of 372 months. (RP 2386, 2390; CP 228) The trial court adopted the State's recommendation, and imposed a term of confinement of 372 months (31 years). (RP 2403; CP 230-31, 239)

Houston-Sconiers timely appealed. (CP 247) The Court of Appeals rejected all of his claimed errors, and affirmed his convictions and sentence.

B. SUBSTANTIVE FACTS

Brothers Andrew and Steven Donnelly were trick-or-treating in Tacoma's North End on Halloween night of 2012. (RP 988, 1124, 1125) Then 19-year-old Andrew was dressed in a graduation gown and red devil mask, and 13-year-old Steven was dressed as a ninja.[1] (RP 348, 986, 988, 989, 1122, 1124) Around 9:30 PM, three young men approached them on the street. (RP 468, 991, 345) The young men wore dark hoodies and one had a bandana around his mouth. (RP 922, 1130, 1131) Andrew thought one of the men also wore a white hockey mask, but Steven did not

[1] To avoid confusion, Andrew and Steven Donnelly will be referred to by their first names. No disrespect is intended.

remember any of the young men wearing a mask. (RP 1004, 1130)

One young man held a silver gun, which he pointed at Steven then demanded their bags of candy. (RP 993, 1131, 1132, 1133) The young men grabbed Andrew's bag and Steven's backpack, then the young men ran away. (RP 354, 993, 996-97, 1334-35) The young men also took Andrew's red devil mask. (RP 1000, 1138, 354) Andrew and Steven then walked to their grandparents' house and called the police. (RP 998, 345)

A short time later, 15-year-old friends Destinae Peterson-Mims, Axsaulis Guice, Edward Bradley, and Isaiah Greene were also trick-or-treating in the North End, when they were approached by three young men. (RP 770, 773, 774, 775, 814, 815, 818, 866, 867-68, 870, 949, 950, 954, 955) The young men wore dark clothing and hoods over their heads, and their faces were covered by a white mask, a red mask, and a bandana. (RP 780, 804, 819, 820, 832, 835, 871, 955-56, 957) One young man pointed a silver gun at the friends, and said "this is a robbery." (RP 785-86, 820, 822-23, 829, 870, 872, 954, 957) The young man demanded their bags of candy and cellular phones. (RP 786) Peterson-Mims relinquished her pillow case and Bradley relinquished his backpack, but Guice hid her candy bag and walked away. (RP 786, 822-23,

821, 837, 869, 873, 958-59) The young men took the bags and ran away. (RP 786, 837, 876) The friends did not call the police, but later Peterson-Mims' parents called 911 to report the incident. (RP 857, 922)

At 10:24 PM, Officer Rodney Halfhill responded to a 911 call from James Wright reporting another robbery in the area. (RP 1067, 1071) Wright told Officer Halfhill that the suspects ran in a southerly direction, so the Officer immediately called dispatch and requested that officers set up a containment operation in the area. (RP 1067, 1069, 1071) Then he took a statement from Wright, who said he had been walking through the adjacent apartment complex and talking on his cellular phone, when he was approached by four or five young black men. (RP 1073) The young men demanded Wright's cellular phone, so he handed it to them. (RP 1073) He noticed the young men were wearing dark clothing, and one wore a white hockey mask and held a silver gun. (RP 1073)

Several officers responded to the area to set up a containment operation. (RP 363, 669, 903) Because the suspects fled on foot, police also deployed a K9 tracking team. (RP 364, 728, 734) The tracking dog led officers down an alley, and to a Cadillac parked on the back lawn of residence. (RP 738) The

officers shone flashlights inside the Cadillac, and saw several people inside. (RP 738-39) The officers ordered the occupants to come out of the car, and they complied. (RP 740)

Five young African-American males exited the Cadillac and were taken into custody. (RP 741) Those young men were Zyion Houston-Sconiers, Treson Roberts, Zion Johnson, LeShawn Alexander, and Amancio Tolbert. (RP 370, 670, 907, 1562)

The owner of the property, Dorothy Worthey, came outside to see what was going on. (RP 1155, 1228-29) Worthey told the officers they could search the Cadillac, which belonged to her son and had been parked in the yard for some time because it needed to be repaired. (RP 1156, 1171, 1186, 1224, 1229, 1231) Inside the Cadillac, police found several cellular phones, two backpacks, a red devil mask, a white hockey mask in the glove box, and a silver handgun under the front passenger seat. (RP 530, 537-38, 539, 542, 545, 547, 553, 559-60, 592-93, 1152, 1154, 1158) Andrew and Steven identified one of the backpacks found in the car as the one taken from Steven that night. (RP 996, 1137)

All charges filed against LeShawn Alexander were dismissed, and he was granted immunity so that he could testify as a State's witness. (RP 80, 1518, 1532-33) According to Alexander,

he met up with Houston-Sconiers, Johnson, Tolbert and Roberts on Halloween night, and they smoked marijuana and drank vodka together. (RP 38-39) Eventually, Alexander and Tolbert left to go buy some food. (RP 1441, 1442-43) Before the group split up, Alexander noticed that Houston-Sconiers had a white hockey mask. (RP 1447) When they met up again later, Roberts had a red devil mask. (RP 1448)

According to Alexander, Roberts and Houston-Sconiers ran down an alley, then returned with a cellular phone. (RP 1451) Later, as the group walked through an apartment complex, they saw a man talking on a cellular phone. (RP 1452) According to Alexander, Houston-Sconiers and Roberts ran up to the man, and Houston-Sconiers pointed a silver gun at him and demanded his phone. (RP 1454) The man gave them the phone, then they all ran down an alley and to the Cadillac. (RP 1456, 1457-58) They got inside, and started eating candy from a backpack that Johnson was carrying. (RP 1457-58, 1459) The police arrived soon after and arrested the group. (RP 1464)

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III. ARGUMENT & AUTHORITIES

A. BY HOLDING THAT THE JURY COULD PRESUME THAT GUICE FELT FEAR AND APPREHENSION EVEN THOUGH HER TESTIMONY SHOWED SHE DID NOT, THE COURT OF APPEALS RELIEVED THE STATE OF ITS CONSTITUTIONAL BURDEN OF PROVING ALL OF THE ELEMENTS OF ASSAULT.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits 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 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080

(1996).

The State charged Houston-Sconiers with second degree assault of Axsaulis Guice, pursuant to RCW 9A.36.021(1)(c).[2] (CP 17) Because assault is not defined by the criminal statutes, courts use the common law definition. *See* State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263 (1988). Here, jury instruction 33 stated:

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and **which in fact creates in another a reasonable apprehension and imminent fear of bodily injury** even though the actor did not actually intend to inflict bodily injury.

(CP 183, emphasis added).

Guice testified that she and her friends were crossing the street when they were approached by a group of young men. (RP 819) The men first asked for directions, then one of them held out a gun, said "this is a stickup" and asked for "everything." (RP 820-21) Guice testified that she "froze" and hid her bag of candy at her side. (RP 821) She stood still for a "couple of seconds," then walked away without giving the men her bag of candy. (RP 821, 844, 846) She said she thought the incident was "unbelievable."

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[2] RCW 9A.36.021 states, in relevant part: (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . Assaults another with a deadly weapon[.]

(RP 826) She did not testify that she was scared or frightened, or that she believed that the young men might hurt her. In fact, the only thing she testified she feared was having to call the police. (RP 856, 860) And the officer who eventually responded to this incident described Guice's demeanor as calm. (RP 899, 900)

Guice simply hid her bag of candy and walked away. These are not the actions of someone who was, in fact, afraid for her safety. But the Court of Appeals ignored this evidence (see Opinion at 23-24), and instead relied on the principle that "[a]pprehension and fear experienced by a person at whom a gun is pointed may be inferred[.]" State v. Stewart, 73 Wn.2d 701, 705, 440 P.2d 815 (1968) (citing State v. Miller, 71 Wn.2d 139, 142, 426 P.2d 986 (1967)). But this inference cannot apply where, as here, there is direct evidence contradicting it.

No reasonable juror could conclude that Guice felt a "reasonable apprehension and imminent fear of bodily injury." The State therefore failed to prove that Houston-Sconiers' committed a second degree assault, and this conviction and its firearm sentence enhancement must both be reversed and dismissed.[3]

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[3] If an offense is vacated, the associated firearms enhancement must also be vacated. See State v. Davis, 177 Wn. App. 454, 465 fn.10, 311 P.3d 1278 (2013).

B. BY HOLDING THAT AN AGREEMENT TO USE A FIREARM IN THE FUTURE PROVIDES A PHYSICAL NEXUS BETWEEN THE FIREARM AND THE CRIME OF CONSPIRACY, THE COURT OF APPEALS RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT HOUSTON-SCONIERS WAS ARMED WITH A FIREARM DURING THE COMMISSION OF THAT OFFENSE.

The State charged Houston-Sconiers in count X with conspiracy to commit robbery, and alleged that he was armed with a firearm when he committed this crime.[4] (RP 21-22) A person is potentially subject to a deadly weapon enhancement if armed with a firearm while committing a crime. RCW 9.94A.533(3), (4). "A person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." State v. Eckenrode, 159 Wn.2d 488, 492-93, 150 P.3d 1116 (2007) (citing State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). But there must also be a "nexus between the defendant, the crime, and the weapon." State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007); State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006).

Accordingly, the jury was instructed that, in order to find that

[4] When reviewing a challenge to the sufficiency of the evidence on a weapon enhancement, the court views the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found beyond a reasonable doubt that the defendant was armed at the time of the offense. State v. Speece, 56 Wn. App. 412, 417, 783 P.2d 1108 (1989).

Houston-Sconiers was armed with a firearm:

> [t]he State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. **The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider**, among other factors, **the nature of the crime** and the circumstances surrounding the commission of the crime[.]

(CP 195, emphasis added)

The State does not have to produce direct evidence of a defendant's intent to use the firearm to further the charged crime, so long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant. Easterlin, 159 Wn.2d at 210. The weapon must have some rational connection to the charged crime. State v. Holt, 119 Wn. App. 712, 728, 82 P.3d 688 (2004). There were no facts presented in this case from which a juror could infer a connection between the gun and the crime of conspiracy.

A person is guilty of conspiracy "when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040(1). Conspiracy is

an inchoate crime that focuses on "the conspiratorial agreement, not the specific criminal object or objects." State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000). The conspiracy exists independent of any crimes actually committed pursuant to the agreement or conspiracy. State v. Varnell, 162 Wn.2d 165, 170, 170 P.3d 24 (2007). Thus, the "nature of the crime" of conspiracy is the agreement, or the meeting of the minds, not the crime discussed or agreed upon.

The Court of Appeals ignored this requirement, however, and held that because the conspiracy involved an agreement to eventually use a firearm, the crime and the firearm were connected and Houston-Sconiers was armed. (See Opinion at 25-27) The Court of Appeals was wrong. Even if the participants discussed or agreed to use a firearm during the commission of a future crime, that does not make any of them "armed with a firearm" for the purposes of that discussion or agreement. The firearm may have been "available for use" for the eventual agreed upon crime, but it cannot logically be "available for use" in furtherance of the actual agreement.

The state may argue that possession or use of the firearm to commit the crimes was a substantial step in furtherance of the

agreement, and therefore proves a connection between the conspiracy and the firearm. This would be incorrect, however, as proof of a substantial step is required simply to ensure that the State does not punish mere words or hyperbole.[5] This factual requirement does not change the nature of the crime.

Rather, "'[t]he gist of the crime is the confederation or combination of minds.'" State v. Dent, 123 Wn.2d 467, 475, 869 P.2d 392 (1994) (quoting State v. Casarez–Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987) (quoting Marino v. United States, 91 F.2d 691, 693-98, 113 A.L R. 975 (9th Cir.1937))). But a confederation of minds cannot be armed with a firearm. There is simply no rational connection between the firearm and the agreement.[6] This firearm sentence enhancement should be stricken.

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[5] The purpose of the "substantial step" requirement is to "manifest 'that the conspiracy is at work,' and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." State v. Dent, 123 Wn.2d 467, 475, 869 P.2d 392 (1994) (quoting Yates v. United States, 354 U.S. 298, 334, 77 S. Ct. 1064, 1085, 1 L. Ed. 2d 1356 (1957) (internal quotation marks omitted)).

[6] Under this interpretation, a defendant's procurement of a gun as a step in furtherance of the agreement, or use of gun in commission of the agreed upon crime, would not necessarily go unpunished. The State could still charge a defendant, as it did in this case, with unlawful possession of a firearm and/or allege as a sentence enhancement that the defendant was armed with a firearm during the commission of the agreed-upon offense.

C. REVERSAL AND REMAND IS REQUIRED UNDER MLLER V. ALABAMA[7] BECAUSE HOUSTON-SCONIERS WAS TRIED AS AN ADULT WITHOUT A DECLINE HEARING AND NO CONSIDERATION WAS GIVEN AT SENTENCING TO THE FACT THAT HE WAS A JUVENILE AT THE TIME THE OFFENSES WERE COMMITTED.

Houston-Sconiers was 17 years old at the time of the alleged crimes, but was charged and tried in adult court without the benefit of a decline hearing, under RCW 13.04.030(1)(e)(v)(A). (CP 1-4, 17-22) The trial court imposed no time for the substantive crimes, but was given no discretion and was bound by statute to sentence Houston-Sconiers to seven statutorily mandated, flat-time, consecutive sentencing enhancements, totaling 372 months (31 years) of incarceration. (RP 2403; CP 230-31, 239)

Houston-Sconiers' 31-year sentence, imposed without the benefit of a decline hearing and without any consideration of his youth at the time he committed the offense, is both cruel and unusual a violation of his due process rights.

The Eighth Amendment to the United States Constitution bars cruel and unusual punishment, and article 1, § 14 of the Washington State Constitution bars cruel punishment. Furthermore, the federal constitution and the state constitution both guarantee that citizens shall not be deprived of "life, liberty or

[7] Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

property without due process of law." U.S. Constitution, amd. V, amd. XIV; Wash. Const. art. 1, § 3.[8]

Pursuant to RAP 10.1(g)(2), Houston-Sconiers hereby incorporates by reference the arguments and authorities in co-petitioner Treson Roberts' and amicus' briefing addressing these constitutional violations.[9] The claimed errors and prejudice discussed in the parties' briefing applies equally to Houston-Sconiers in his case.

Furthermore, in rejecting this argument below, the Court of Appeals states that Houston-Sconiers failed to show that his punishment is cruel and unusual or that the gravity of the offenses is grossly disproportionate to his sentence. (See Opinion at 7, 9) The Court's view that Houston-Sconiers' sentence is not disproportionate is baffling. Houston-Sconiers will be 48 years old when he is released from prison, after serving 372 months in confinement.

Although Houston-Sconiers' crimes resulted in no physical

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[8] Although not raised below, the Court should exercise its discretion to consider whether auto-decline violates article 1, § 14 and article 1, § 3 of the Washington Constitution. *See, e.g.*, Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 36-37, 42 P.3d 1265 (2002) (considering issue raised for the first time in Supreme Court because issue was of "public importance" and its consideration would serve the "interest of judicial economy").

[9] RAP 10.1(g)(2) allows a party in a consolidated case to "adopt by reference any part of the brief of another" party.

injury to a single victim and he took property of low value (candy and a cellular telephone), he will serve significantly more time than a fully-formed adult who commits, for example, intentional first degree murder. The high end of the standard range sentence for first degree murder is 320 months,[10] and a convicted murder is eligible for good-time credit and so could serve as little as 213 months (just under 18 years).[11] But because Houston-Sconiers' term consists entirely of consecutive firearm enhancements, he is ineligible for any good-time credit and must serve his entire 372 months confined in prison. See RCW 9.94A.533(4)(e); RCW 9.94A.729(2).

How Houston-Sconiers' 31-year sentence could be seen as anything other than disproportionate, and anything other than cruel and unusual punishment for a juvenile who has not had the benefit of a decline hearing, is simply outrageous. Moreover, as eloquently articulated by the dissent in this case:

> Imprisoning an offender until he dies ... alters the remainder of his life "'by a forfeiture that is irrevocable.'"
>
> Sentencing a 17 year old to 31 years' imprisonment ... works a similar forfeiture. Walking

[10] This is the high end of the standard range for an offender with an offender score of zero. See RCW 9.94A.510, .515.

[11] An offender serving a standard range term may earn up to one-third off of his or her sentence for good behavior. RCWA 9.94A.728; RCWA 9.94A.729.

> out of prison as a 48 year old, Houston-Sconiers will have lost his richest years for experience and for growth, the years with the time and the reasons to find one's footing, the years with the most scope to shape one's future. The loss of those years is as irrevocable and as potentially deadening as is the loss of the remaining years in a life sentence.

State v. Houston-Sconiers, 191 Wn. App. 436, 454, 365 P.3d 177 (2015) (Bjorgen, J., dissenting) (quoting Miller, 132 S. Ct. at 2466).

RCW 13.04.030 violates state and federal prohibitions against cruel punishment, and violates state and federal due process protections. Houston-Sconiers' convictions in adult court and his 31-year sentence should be vacated.

IV. CONCLUSION

The Court of Appeals incorrectly found, despite testimony to the contrary, that the jury could presume that Guice felt fear and apprehension from the mere fact that a gun was pointed at her, and thereby relieved the State of its burden of proving all essential elements of the crime of assault. The Court of Appeals also relieved the State of its burden of proof when it found sufficient evidence that Houston-Sconiers was armed with a firearm when he conspired to commit robbery, because the nature of that offense concerns what a person thinks, says and agrees to, not what actions a person subsequently performs. And one's thoughts,

words and agreements cannot possess a firearm. Houston-Sconiers therefore respectfully requests that this Court reverse the Court of Appeals.

DATED: August 31, 2016

Stephanie Cunningham

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CERTIFICATE OF MAILING

I certify that on 08/31/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Zyion D. Houston-Sconiers #368944, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

Stephanie Cunningham

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Attached for filing is the Supplemental Brief of Petitioner Zyion Houston-Sconiers.

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