No. 44258-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARTIN IVIE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finlay

APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR AND BRIEF

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence was presented to establish beyond a reasonable doubt that Mr. Ivie was guilty of first-degree assault.

2. The trial court's failure to require a unanimous verdict violated Article I, § 21 and Article I, § 22 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant's constitutional right to due process is violated when a conviction is based upon insufficient evidence. In this case the State failed to present sufficient evidence that Mr. Ivie had the prerequisite intent to assault either Deputy Reed or Sergeant Adams. Was Mr. Ivie's right to due process violated when he was convicted of two counts of assault in the first degree absent intent?

2. Article I, § 21 and § 22 together provide the right to a unanimous jury in all criminal trials. This requires that in cases in which the jury is presented with multiple acts, which could each support the charged offense, either the State must elect which act it wishes the jury to rely on or the court must instruct the jury that it must unanimously agree upon the act or acts that establish the crime. Where the trial court found the State presented evidence of two potential acts

constituting theft in the second degree did the court's failure to provide a unanimity instruction deny Mr. Ivie his right to a unanimous jury?

C. STATEMENT OF THE CASE

On February 9, 2012 Deputy Reed received a report of a downed maple tree in the area of Dow Mountain Road. He suspected illegal harvesting of maple wood. 06/27/12RP 68. The terrain in the area is extremely rugged and the road is often only wide enough for one vehicle. 06/27/12RP 86. Deputy Reed decided to "stake out" the area. It was dark enough out and that he used night vision goggles. 06/27/12RP 69, 73; 07/03/12RP 586. A few minutes after 8 o'clock pm a small pick-up truck pulled up and a subject, later identified as Mr. Ivie, exited the vehicle. He removed a box and a chainsaw from the back of the truck. 06/27/12RP 75, 77. Mr. Ivie did not remove any wood from the area the day or evening of the incident. 07/03/12RP 578. He did testify to removing wood from the site earlier in the week. *Id.* Deputy Reed never saw Mr. Ivie cut down the maple or start up the chainsaw. 06/27/12RP 123.

Deputy Reed requested that dispatch send another officer to assist him. 06/27/12RP 76. Deputy Reed then revealed himself, pulled his gun and told Mr. Ivie to get on the ground. *Id* at 82. Mr. Ivie

refused and stated that he would like to go home first to drop off his dog and his truck to avoid either being impounded. 06/27/12RP 82; 06/29/12RP 485-86; 07/03/12 585. There was also testimony that the dog received care for a wound following the incident. 06/29/12RP 485-86.

Mr. Ivie proceeded to get into his pick-up truck and drive off. As he made his way down the hill Deputy Reed chased after the truck. 06/27/12RP 86. Deputy Reed reported Sergeant Adams, the responding officer that Mr. Ivie was in his truck and headed towards him. *Id.* According to Deputy Reed he was in the middle of the road shining a flashlight straight ahead when Mr. Ivie, with his high beams illuminated, drove directly towards him forcing him to jump out of the way of the truck. 06/27/12RP 90-93.

Mr. Ivie did not see Deputy Reed in the middle of the road and he was not purposefully headed back in Reed's direction. 07/03/12RP 587, 617, 620. Mr. Ivie's never saw Reed close to his truck. 07/03/12RP 593. Mr. Ivie was driving in four-wheel low at approximately 20 miles per hour. 07/03/12RP 587-88. Mr. Ivie had no intention to assault Deputy Reed on the night of the incident, nor did he intend to inflict great bodily harm upon him. 07/03/12RP 593.

Sergeant Adams drove into the area with his lights on but his siren off. 06/28/12RP 278. He had some difficulty finding Deputy Reed's location. 06/28/12RP 279-81. Deputy Reed told Sergeant Adams over the radio that Mr. Ivie was headed in his direction. Sergeant Adams parked his patrol car and got out of the vehicle with his rifle and placed a bullet in the chamber. 06/28/12RP 288, 293.

Sergeant Adams got back into his patrol car and followed Mr. Ivie's truck passing Deputy Reed who was standing on the side of the road. 06/28/12RP 296-97, 350. Adams feared he would lose the vehicle. 06/28/12RP 301. When the truck stopped Sergeant Adams parked about twenty feet behind it and got out of his patrol car with his rifle. 06/28/12RP 307.

Sergeant Adams approached the car with his rifle and light pointed at the driver's side window while issuing orders to get out of the car and on the ground. He was working himself up an embankment and when driver the truck began moving turned towards him. 06/28/12RP 312. Sergeant Adams then shot Mr. Ivie four times through the driver's side window. 06/28/12RP 317. The truck straightened out and went down the embankment and into the trees. 06/28/12RP 318.

Mr. Ivie thought that the patrol car might have been chasing another suspect. 07/03/12RP 90. When he arrived near the embankment Mr. Ivie saw a vehicle and was unsure if it was a police car. Moments before being shot multiple times, Mr. Ivie's dog barked and alerted him to a figure on the driver's side of his truck. 07/03/12RP 592-93. Mr. Ivie never saw Sergeant Adams in front of his truck, and he did not intend to assault him. 07/03/12RP 593-94.

D. ARGUMENT

1. Mr. Ivie's right to due process was violated when the State presented insufficient evidence to establish all the elements for two convictions of assault in the first-degree.

a. A conviction must be supported by sufficient evidence to establish beyond a reasonable doubt every essential element of the crime charged.

The State bears the burden of presenting sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. Amend. XIV; Wash. Const. Art. I § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in

the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1970).

> b. Insufficient evidence was presented to establish beyond a reasonable doubt that Mr. Ivie had the prerequisite intent to commit assault in the first degree.

Mr. Ivie was convicted of two separate counts of assault in the first degree. CP 5. RCW 9A.36.011(1)(a) provides in part:

> A person is guilty of assault in the first degree if he or she, with *intent* to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.

Assault is a specific intent crime and requires proof of the specific intent to cause assault. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.2d 438 (2009). The term "assault" encompasses the concept of a knowing, willful, or purposeful act, rather than an unknowing act. *State v. Hopper*, 118 Wn.2d 151, 158, 822 P.2d 775 (1992); *State v. Esters*, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996); *State v. Allen*, 67 Wn. App. 824, 826 840 P.2d 905 (1992).

The State need only show an intention to touch or strike, not specifically the intent to injure. *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). In this case the State proved neither the intention to strike or to specific intent to injure. The State failed to prove that Mr. Ivie intentionally assaulted Deputy Reed or Sergeant Adams. Mr. Ivie's clear intention was to go home and to secure his truck and his dog before being detained. 06/27/12RP 82; 06/29/12RP 485-86; 07/03/12RP 585. Although this behavior amounts to evading it does not provide the prerequisite intent to prove assault in the first-degree.

Intent may not be inferred from equivocal evidence as it "relieves the State of its burden to prove all the elements." *State v. Vasquez*, __ P.3d __, WL 3864265, ¶ 13 (July 25, 2013). The incident took place on a remote dirt road on an extremely dark night in February. 06/27/12RP 73, 86; 07/03/12RP 586. Dark enough that Deputy Reed used night vision goggles while "staking out" the maple tree. 06/27/12RP 69, 73. Mr. Ivie did not see Deputy Reed anywhere close to his vehicle after leaving the scene of the maple tree. 07/03/12RP 587, 593, 617, 620. Without the ability to even see Deputy Reed due to the dark conditions, it is evident that Mr. Ivie attempting to aim his truck at the officer. In fact, Mr. Ivie testified he did not intend

to assault or inflict great bodily harm on Deputy Reed. 07/03/12RP 593.

The State also failed to show sufficient evidence that Mr. Ivie intended to assault Sergeant Adams. Mr. Ivie did not see Sergeant Adams by his truck. 07/03/12RP 592-93. Similarly, Mr. Ivie was unable to see Sergeant Adams and only became aware of the officer's presence outside of his patrol car moments before he was shot in the head and back. *Id.* The fact that the bullets that were fired from the driver's side of Mr. Ivie's truck and not from directly in front of it, demonstrates that Sergeant Adams was not in danger of being struck by Mr. Ivie. 07/03/12RP 592-93. Mr. Ivie repeatedly testified that he wanted to take his dog home and did not intend to strike or injure either officer. 06/27/12RP 82; 06/29/12RP 485-86; 07/03/12 585.

c. The proper remedy is reversal of the convictions based on insufficient evidence.

A conviction based on insufficient evidence must be reversed and the charge dismissed. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). To retry Mr. Ivie for the same conduct would violate the federal and state constitutional prohibitions against double jeopardy. U.S. Const. Amend. V; Wash Const. art 1 § 9; *Burks v. United States*,

437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Ivie intentionally assaulted Deputy Reed or Sergeant Adams his convictions for first-degree assault must be reversed and the charges dismissed.

2. Mr. Ivie was denied his right to a unanimous jury.

a. The State of Washington requires a unanimous jury in criminal cases.

The Washington Constitution requires a unanimous jury verdict in criminal matters. Article I, § 21; Article I, §22. When the State presents evidence of several acts which could form the basis of one charged count, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). By requiring a unanimous verdict on one criminal act, the court protects a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). The constitutional error resulting from the failure to either elect the incident relied upon for conviction or to properly instruct the jury is harmless only if the

reviewing court is satisfied beyond a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06.

Mr. Ivie was convicted of theft in the second degree contrary to RCW 9A.56.040(1) and the jury was given the following instruction:

> To convict the defendant of the crime of theft in the second degree as charged in Count I, each of the following elements of the crime must be proven beyond a reasonable doubt:
> 1. That on or about February 9, 2012, the defendant wrongfully obtained or exerted unauthorized control over the property of another or the value thereof; and
> 2. That the property exceeded $750.00 in value;
> 3. That the defendant intended to deprive the other person of the property; and
> 4. That this act occurred in Mason County, Washington.

CP 75.

The jury was not instructed that it must unanimously agree on the act constituting the theft. The evidence presented two possible acts, which could have constituted theft, one being the act earlier in the week and the other being Mr. Ivie's conduct on the date of the incident. 07/03/12RP 578. Mr. Ivie's testimony that he removed wood from the area earlier that week is not contemporaneous enough to bear the burden of proving the crime of theft on or about February 9, 2012 beyond a reasonable doubt. Additionally the State failed to prove beyond a reasonable doubt that Mr. Ivie's actions on the date of the

incident constituted theft because they failed to provide sufficient evidence that he ever possessed any of the wood. 06/27/12RP 123.

By electing to premise the theft prosecution solely on acts that occurred on February 9, 2012 and not those testified to by Mr. Ivie the conviction cannot be upheld on any acts other those occurring on the date listed in the "to convict" instruction.

b. The failure to protect Mr. Ivie's right to a unanimous jury requires reversal of his conviction.

Where the prosecution fails to elect which act it wishes the jury to rely upon, and the jury is not instructed that it must unanimously agree on which act supports the charge, the resulting error "is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt." *Kitchen*, 110 Wn.2d at 411 (citing *State v. Loehner*, 42 Wn.App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield concurring), *review denied*, 105 Wn.2d 1011 (1986)).

> This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. This standard best ensures that when constitutional error occurs, a conviction will not be upheld unless the error is harmless beyond a reasonable doubt.

(Internal citations omitted.) *Kitchen*, 110 Wn.2d at 411-12.

Here a rational jury could have had a reasonable doubt as to whether or not Mr. Ivie committed theft on the night of the incident. That doubt alone indicates the prejudice that arose from the failure to insist upon jury unanimity. Therefore, the absence of a unanimity instruction requires reversal.

E. CONCLUSION

For the foregoing reasons, Mr. Ivie respectfully requests this Court order all convictions reversed and the charges dismissed with prejudice.

DATED this 7th day of August 2013.

Respectfully submitted,

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Washington Appellate Project
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. MARTIN IVIE, Appellant.	)))))))))	NO. 44258-2-II

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