SUPREME COURT NO. 98055-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GERALD LOCKET HATFIELD, JR.,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Hatfield, No. 77512-0-I, filed December 2, 2019 (unpublished).

C. ADDITIONAL ISSUES PRESENTED FOR REVIEW

The State objects to consideration of the grounds for review set out in section E(5) of the petition, which are issues raised in Hatfield's pro se briefing below and are not supported by analysis in the petition. The State also objects to consideration of matters outside the record referred to in that pro se briefing.

If this Court accepts review of this case, the State seeks cross-review of the following alternative arguments the State raised in the Court of Appeals, which were rejected by that court:

1. Hatfield claims his right to jury unanimity was violated as to the burglary conviction because unlawful entry and unlawful remaining are alternative means of committing burglary and he claims there was insufficient evidence of unlawful entry. The Court of Appeals held that there was sufficient evidence of unlawful entry.

As an alternative ground to affirm, the State renews its argument that unlawful entry and unlawful remaining are not alternative means of committing burglary.

2. Hatfield claims his right to jury unanimity was violated as to the burglary conviction because the trial court did not instruct the jury that unanimity was required as to the victim assaulted. The Court of Appeals held that unanimity should have been required but the error was harmless because any rational juror would have concluded that both victims were assaulted. As an alternative ground to affirm, the State renews its argument that unanimity as to the victim assaulted during the burglary was not required.

3. Hatfield claims that references at trial to a statement made by one of the victims when he handed over a shell casing to police violated the confrontation clause. The Court of Appeals held that there was a confrontation violation but the error was harmless. As alternative grounds to affirm, the State renews its argument that the confrontation clause claim was not preserved because Hatfield did not object to the testimony on that basis. The State also renews its argument that the statement was not testimonial so it did not fall within the confrontation clause.

D. STATEMENT OF THE CASE

The defendant, Gerald Hatfield, was convicted after a jury trial of burglary in the first degree (RCW 9A.52.020) and robbery in the first degree (RCW 9A.56.200), both with firearm enhancements (RCW 9.94A.533(3)). CP 229-32, 288-29; RP 2612.[1] The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 4-9.

The State asserted that Hatfield should be sentenced as a persistent offender pursuant to RCW 9.94A.570. CP 4; RP 2648-49. Each of his current convictions constitutes a most serious offense as defined by RCW 9.94A.030(33). His prior convictions for most serious offenses were his 1986 convictions of ten counts of first degree robbery and his 1996 conviction of assault in the second degree with sexual motivation. CP 296-97, 407-08. The court concluded that Hatfield qualified as a persistent offender and imposed a life sentence. CP 292; RP 2677.

The Court of Appeals affirmed the convictions and sentence in a unanimous unpublished opinion. State v. Hatfield, 77512-0-I (Wash. Ct. App. December 2, 2019) (unpublished).

[1] The Report of Proceedings is in sixteen volumes, consecutively paginated, and will be referred to in this brief by page number only.

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Hatfield in his petition for review, with the exception of the issues raised only in Hatfield's pro se pleading, which are addressed below. If review is accepted, the State seeks cross-review of alternative arguments it raised in the Court of Appeals. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review. However, in the interests of justice and full consideration of the issues, if review is granted it should include review of the alternative arguments raised by the State in the Court of Appeals. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. THE TERM "ENTERS OR REMAINS UNLAWFULLY" DOES NOT CREATE ALTERNATIVE MEANS OF COMMITTING BURGLARY.

Hatfield contends unlawful entry and unlawful remaining are alternative means of committing burglary and there was insufficient evidence of unlawful entry, violating his right to jury unanimity. The Court of Appeals held that there was sufficient evidence of unlawful

entry, so there was no unanimity violation. Hatfield, slip op. at 32. While the Court of Appeals was correct that there was sufficient evidence of unlawful entry, as an alternative ground to affirm, the State renews its argument that unlawful entry and unlawful remaining are not alternative means of committing burglary.

Criminal defendants have a right to a unanimous verdict. WASH. CONST. art. I, § 21; State v. Armstrong, 188 Wn.2d 333, 340, 394 P.3d 373 (2017). Where alternative means of committing a crime are alleged, unanimity as to the means is not required if substantial evidence supports each alternative means submitted to the jury. Armstrong, 188 Wn.2d at 340; State v. Whitney, 108 Wn.2d 506, 507-12, 739 P.2d 1150 (1987).

One element of burglary in the first degree is that the defendant "enters or remains unlawfully in a building." RCW 9A.52.020(1). "Enters or remains unlawfully" is defined as a single term in that chapter's definitional statute, in relevant part:

> (2) "Enters or remains unlawfully." A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.
>
> A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. ….

RCW 9A.52.010(2).[2] The trial court here did not require the jury to be unanimous as to unlawful entry or remaining. See CP 250 (Instruction 14, burglary elements).

Whether the term "enters or remains unlawfully" creates alternative means is a matter of judicial interpretation based on analysis of the language of the statute defining the crime. State v. Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). Use of the disjunctive "or" in the statutory language does not establish that it has created alternative means. Id. at 734; State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014). The statutory analysis focuses on "whether each alleged alternative describes '*distinct acts* that amount to the same crime.'" Sandholm, 184 Wn.2d at 734 (quoting State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)) (emphasis in original). The more varied the described conduct, the more likely it constitutes alternative means. Sandholm, 184 Wn.2d at 734-35; Owens, 180 Wn.2d at 97.

The burglary statutes all use the term "enters or remains unlawfully" and those four words are defined as a single term in the RCW burglary chapter's definitional statute, RCW 9A.52.010. The

[2] The omitted portion of the statute relates to "unimproved and apparently unused land" and does not affect the alternative means analysis. RCW 9A.52.010(2).

acts described do not vary significantly – they contemplate the single act of being in a building unlawfully. The legislature's definition of the words as a unitary term in a separate statute indicates that the words do not create alternative means. A statutory (or common law) definition does not create alternative means. Owens, 180 Wn.2d at 96; State v. Smith, 159 Wn.2d 778, 785, 154 P.3d 873 (2007).

A number of cases in the Court of Appeals have stated that the element of burglary that the defendant "enters or remains unlawfully" sets out alternative means of committing the crime.[3] This Court should reject that conclusion because the statutory language and application of this Court's precedent relating to alternative means supports the opposite conclusion.

In State v. Klimes, the Court of Appeals addressed a burglary that allegedly occurred in a business open to the public. 117 Wn. App. 758, 73 P.3d 416 (2003). The court noted that no published decision had previously addressed the issue of whether "enters or remains unlawfully" is a single means or alternative

[3] The cases discussed in this section of this brief address charges of first degree burglary, residential burglary and second degree burglary. The language relevant to this issue is identical in all three statutes. RCW 9A.52.020(1), .025(1), .030(1).

means, but that previous cases had "consistently construed 'enters unlawfully' and 'remains unlawfully' as separate acts. Id. at 765. Relying on the observation in these cases that in some instances a person may enter lawfully but remain unlawfully, so the two alternatives would be factually distinct, the Court in Klimes held that these were alternative means that were repugnant under the facts of that case. Id. at 760, 768.

Two years later, the Court explicitly retreated from Klimes in State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005). The Court in Allen assumed that "enters or remains unlawfully" set out alternative means but concluded that they were not repugnant to one another, so unanimity as to one alternative was not required in order to convict. Id. at 132-35. The Court reversed the conviction because the prosecutor urged the jury to convict if it found the defendant had entered a public area of a building with the intent to steal, which is an incorrect statement of the law. Id. at 137.

In three subsequent cases, the Court of Appeals again was presented with the argument that the phrase "enters or remains unlawfully" establishes alternative means that are repugnant, which would require jury unanimity on one of the means. State v. Gonzalez, 133 Wn. App. 236, 148 P.3d 1046 (2006); State v.

Spencer, 128 Wn. App. 132, 114 P.3d 1222 (2005); State v. Howard, 127 Wn. App. 862, 113 P.3d 511 (2005). In rejecting that argument, the Court in each case assumed that unlawful entry and remaining unlawfully were alternative means. Gonzalez, 133 Wn. App. at 243-44; Spencer, 128 Wn. App. at 141; Howard, 127 Wn. App. at 872-77. In each case, because there was substantial evidence of both alternatives, the court was not required to directly address the issue of whether they were alternative means in order to affirm the convictions.[4] Gonzalez, 133 Wn. App. at 243-44; Spencer, 128 Wn. App. at 143; Howard, 127 Wn. App. at 877.

If this Court concludes that there is insufficient evidence of unlawful entry in this case, it must reach the issue of whether "enters or remains unlawfully" establishes alternative means. If they are not alternative means, the uncontested proof that Hatfield remained unlawfully satisfied this element of first degree burglary.

[4] In State v. Sony, on which Hatfield relied below, the statement that "enters or remains unlawfully" constitutes alternative means was dictum; the issue in that case was whether another element of the crime included alternative means. 184 Wn. App. 496, 500, 337 P.3d 397 (2014). The court in Sony cited Gonzalez, supra, for its conclusion, but Gonzalez was not directly presented with this issue either, as noted here.

2. AS TO THE ASSAULT ELEMENT OF FIRST DEGREE BURGLARY, JURY UNANIMITY AS TO THE VICTIM ASSAULTED IS NOT REQUIRED.

There was evidence at trial that Hatfield assaulted two men during this incident and Hatfield claims that the jury should have been instructed that it must be unanimous as to the person who was assaulted in order to convict under that alternative means. Hatfield, slip op. at 32-33. The Court of Appeals held that unanimity should have been required but the error was harmless because any rational juror would have concluded that both victims were assaulted. Id. at 35-36. As an alternative ground to affirm, the State renews its argument that unanimity as to the victim assaulted during the burglary was not required. The argument that unanimity is required as to the victim assaulted during a burglary is at odds with Washington law regarding unanimity, as set out in State v. Armstrong, supra.

This Court has rejected the argument that acts that may constitute separate crimes cannot constitute alternative means of committing one offense. State v. Whitney, 108 Wn.2d 506, 510-11, 739 P.2d 1150 (1987). This Court also has held that the existence of two possible victims of a crime may itself constitute alternative

means of committing the crime as to which unanimity is not required. State v. Lee, 128 Wn.2d 151, 158-59, 904 P.2d 1143 (1995). *See also* State v. Huin, 185 Wn. App. 1023, 2015 WL 213639 (2015) (unpublished opinion cited only for its persuasive value pursuant to GR 14.1) (unanimity is required only "where several acts are alleged, any one of which could constitute the crime charged" and does not apply where the State relies on several acts as probative of a discrete element).

In determining whether a unanimity instruction is required, the question is whether the evidence proves only one violation of the statute. State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990). If so, even if the evidence shows alternative means by which the defendant may have participated, a general verdict necessarily reflects unanimous agreement as to that violation. Id. at 657 & n.7.

This Court in Armstrong held that if there is substantial evidence of each alternative means included in the to-convict instruction, there is no requirement of unanimity as to the means proven, even where the means are entirely distinct crimes. 188 Wn.2d at 342-44. In Armstrong, the defendant was charged with felony violation of a no contact order and two alternative means

were presented: that the violation constituted an assault, or that the defendant had twice previously been convicted for violating a court order. Id. at 338. The jury was instructed that it need not be unanimous as to the means committed in order to convict. Id. The Court affirmed the conviction, describing the issue as a straightforward application of existing law. Id. at 340. The Court noted that any suggestion that unanimity is required when the means are distinct crimes, for example, was disavowed in State v. Whitney, supra. Armstrong, 188 Wn.2d at 342-43.

To convict Hatfield of first degree burglary, the jury was instructed that it must find that Hatfield (or an accomplice) entered or remained unlawfully in a building with intent to commit a crime against a person or property therein and, as to element 3, "That in so entering or while in the building or in immediate flight from the building the defendant was armed with a deadly weapon or assaulted a person." CP 250. Elements 1 and 2 of the burglary to-convict instruction establish that a burglary had been committed.[5]

Element 3 of that burglary to-convict instruction comprises the circumstances that would elevate the crime to first degree

[5] Elements 1 and 2 constitute second degree burglary under RCW 9A.52.030.

burglary. CP 250; *compare* RCW 9A.52.030 (second degree burglary) and RCW 9A.52.025 (residential burglary) *with* RCW 9A.52.020 (first degree burglary). There were three sets of facts that supported the alternative means in element 3: that Hatfield was armed with a deadly weapon, that he assaulted Diaz, or that he assaulted Boggs. All three sets of facts fit within the course of a single incident of burglary.

Armstrong emphatically affirmed that unanimity is not required as to alternative means if each alternative means is supported by sufficient evidence, even where the means are entirely distinct crimes. 188 Wn.2d at 342-44. Thus, unanimity was not required as to the victim of the assault upon which the jury may have relied to find element 3 was proven.

This Court recognizes a continuing conduct exception to the requirement of unanimity as well. Under that analysis, unanimity is not required as to each act occurring during one continuing offense. State v. Crane, 116 Wn.2d 315, 324-26, 804 P.2d 10 (1991) (unanimity was not required as to multiple assaults on one victim occurring over a two-hour incident); State v. Stockmyer, 83 Wn. App. 77, 85-88, 920 P.2d 1201 (1996) (unanimity not required as to

two distinct assaults on one victim during brief incident). If the assaults in this case cannot be considered alternative means of satisfying element 3 of the first degree burglary charge here, the assaults both occurred within a continuing course of conduct – the burglary, which lasted just a few minutes. Under the continuing conduct exception, unanimity was not required.

3. THE ALLEGED CONFRONTATION VIOLATION WAS NOT PRESERVED FOR REVIEW AND THE STATEMENT AT ISSUE WAS NOT TESTIMONIAL.

Hatfield claims that the trial court erred in admitting Adrian Diaz's statement that Diaz had found the shell casing (later matched to the gun found in Hatfield's car) because the statement was inadmissible hearsay and its admission violated Hatfield's right to confrontation. The Court of Appeals held that the testimony violated the confrontation clause but the error was harmless. Hatfield, slip op. at 24, 28-30. The State agrees that any error was harmless but renews its argument that the confrontation clause claim was not preserved because Hatfield did not object on that basis, and its argument that Diaz's statement was not testimonial.

Hatfield made no confrontation clause objection to any of the testimony regarding statements of Diaz about the shell casing, so

he has waived that claim. A confrontation clause objection may not be raised for the first time on appeal. State v. Burns, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). The Court of Appeals erred in concluding that a reference to the confrontation clause in Hatfield's motion to exclude the shell casing was sufficient to preserve a confrontation objection to trial testimony as to statements made by Diaz when he gave the casing to police. Hatfield, slip op. at 23.

In any event, no confrontation violation occurred because the statement was not testimonial. The confrontation clause of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court explicitly limited the reach of the confrontation clause to testimonial statements. Id. at 68. The Court deferred any effort to set out a comprehensive definition of "testimonial," holding only that at a minimum it includes prior testimony and police interrogations. Id.

In Davis v. Washington, the Court further defined which police interrogations produce testimonial statements, holding that statements are testimonial when the circumstances objectively

indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Later the Court noted that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony" and so is outside the scope of the confrontation clause. Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 1152-55, 1166-67, 179 L. Ed. 2d 93 (2011).

The statement of Diaz that he found the shell casing in his bedroom was not testimonial. It was not in response to interrogation and was not made with a primary purpose of creating a substitute for trial testimony. The statement simply provided his explanation for why he handed over the shell casing to police.

4. THE ISSUES RAISED IN HATFIELD'S PRO SE PLEADING SHOULD NOT BE CONSIDERED.

The State objects to consideration of the grounds for the petition for review set out in Issues 8-10 (and section E(5)) of the petition, which were raised by Hatfield in his pro se briefing in the

Court of Appeals. These proffered grounds for review are not supported by analysis as required by court rule. The State also objects to consideration of matters outside the record referred to in Hatfield's pleading in the Court of Appeals.

Issues 8-10 in the petition for review were not raised in the Brief of Appellant in the Court of Appeals. That Court did not ask counsel to file additional briefing addressing those issues pursuant to RAP 10.10(f) and neither counsel did brief these issues. With respect to each of these issues, the petition for review cites general legal principles but includes no legal analysis or argument explaining why review is warranted, as required by RAP 13.4(c)(7). These potential issues should not be considered as they have not been properly presented.

Further, Hatfield's pro se pleading alleged facts outside the record regarding the presentation of Stephen Dillenburg's testimony. Hatfield, supra, slip op. at 41. Grounds for review that include allegations premised on matters outside the record should be rejected in this direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The proper avenue for review of such issues is a personal restraint petition. Id.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issues identified in Sections C and E(1)-E(3), supra.

DATED this 30th day of January, 2020.

Respectfully submitted,

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