NO. 31672-6-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. DAVID P. BOLTON, Appellant.	)	MOTION ON THE MERITS (Franklin County No. 12-1-50433-3)

I. Identity of Moving Party:

The State of Washington, Respondent, by Shawn P. Sant, Franklin County Prosecuting Attorney, by and through Teresa Chen, Deputy Prosecuting Attorney, asks for the relief designated in Part II.

II. Statement of Relief Sought:

Respondent respectfully requests that the Court of Appeals, Division III, affirm the conviction of Appellant by jury trial in the above-entitled case. The case should be remanded for imposition of a definite term of community custody of 12 months.

III. Facts Relevant to Motion:

The Defendant David Bolton was charged with custodial assault and convicted as charged after a jury trial. CP 4, 19, 36-37.

On July 18, 2012, the Defendant was an inmate at Coyote Ridge Correctional Center (CRCC). RP 33-34. Gary Ford is a correctional unit supervisor at CRCC who has worked for the Department of Corrections (DOC) for thirty two years. RP 25. He observed the Defendant instructing another inmate (a designated and paid "pusher") to push the Defendant's wheelchair from A-pod to B-pod. RP 25, 33-35. At CRCC, for a number of security reasons, inmates are instructed that they may not cross the red lines between units without an officer's permission. RP 30-33. There are 256 offenders in a unit and only three corrections officers. RP 27. The divisions between sections create areas for different purposes, e.g. hygiene, meals, recreation, education, and work. RP 31-32. They also separate inmates who do not get along. RP 33. And the separation gives the few officers some space to escape in an emergency. RP 31-32.

Mr. Ford asked the Defendant why he had crossed pods and requested the pusher to remove the Defendant. RP 34-35. While

still in B-pod, the Defendant began to complain about people in A-pod, which drew the attention of 30-40 inmates in the B-pod. RP 35. Mr. Ford removed the Defendant from the pod and into a hallway and asked the Defendant what he was doing. RP 35-36. The Defendant complained that the officer in his pod had not ordered him a sack lunch. RP 36, 48-49. He had missed the main lunch service during a medical visit. *Id.*; RP 43. Mr. Ford asked the Defendant to be patient, pointing out that the officer was very busy at the moment. *Id.* In accordance with procedure, the officer would need to verify that the Defendant had actually missed a meal, before ordering a meal. RP 37. The Defendant "started going off on" Mr. Ford. RP 36. The disturbance was drawing the attention of inmates from both pods, so Mr. Ford asked the pusher to take the Defendant to Mr. Ford's office. *Id.*

In the office, the Defendant became verbally abusive and rose from his chair. RP 37-38, 51-52. Mr. Ford advised him to sit down. RP 38. The Defendant remained standing a few minutes. RP 38, 51-52. When Mr. Ford asked to see the Defendant's ID, the Defendant told Mr. Ford to come get it, and Mr. Ford knew that the Defendant intended to assault him. RP 37-38, 41-42, 45-46,

52. When the Defendant took a swing at the officer, Mr. Ford managed to block the swing. RP 38, 46.

In closing argument, the prosecutor noted that the Defendant placed Mr. Ford in the apparent threat of harm both when he stood up from his wheelchair and when he told Mr. Ford to come take the ID card for himself. RP 71. The defense attorney acknowledged that "not very much of the evidence is in dispute" except the Defendant's intention. RP 73. She argued that the Defendant swung reactively only. RP 76.

At sentencing, defense counsel asked the court to consider waiving all but the mandatory fine. RP 92. She argued that the Defendant was sick and was expected to be incarcerated into 2021 when he would be over 60 years old. *Id.* The Defendant argued that he had other debts (legal financial obligations or LFO's) of approximately $5000 and expected it would take him forty years to pay off this small debt. *Id.* After finding that the defendant is an adult who is not disabled, but who has the present and future ability to pay fines (CP 7), the Honorable Salvador Mendoza imposed legal financial obligations of $1713.72 (CP 8), which includes mandatory and discretionary elements.

The court imposed a community custody term of 12 months or the period of early release, whichever is longer. CP 11.

Respondent respectfully requests that the Court of Appeals, Division III, affirm the conviction of Appellant by jury trial in the above-entitled case. Pursuant to Rule of Appellate Procedure 18.14(e), this motion is made on the grounds that the issues on appeal are clearly controlled by settled law, are factual and supported by the evidence, or are matters of judicial discretion and the decision is clearly within the discretion of the trial court.

IV. Grounds for Relief and Argument:

A. THERE WAS NO INSTRUCTIONAL ERROR REQUIRING REVERSAL.

The Defendant alleges that the absence of a *Petrich* instruction is reversible error. *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). A *Petrich* instruction (11 Wash. Prac. WPIC 4.25) is used when there are several distinct criminal acts which have been alleged. The WPIC instructs the jury that it must unanimously agree as which act has

been proved. There was no *Petrich* instruction in this case.

However, in this case where the offense is a brief encounter with acts comprising a continuing course of conduct, there is no requirement for any special instruction. In that situation, a jury is required to be unanimous in its determination that the conduct occurred, but not that any specific act occurred. 13 Wash. Prac. Sec. 4603.

In *State v. Crane*, 116 Wn.2d 315, 324, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991), the defendant was convicted of second degree murder for the death of a three year old child. *State v. Crane*, 116 Wn.2d at 324. The court of appeals reversed the murder on unanimity grounds, finding that the state did not elect which act of assault was the basis for the murder. *State v. Crane*, 116 Wn.2d at 324, 326-27. The dissent, however, noted that the child died as a result of continuous beatings occurring over several days. *State v. Crane*, 116 Wn.2d at 327. The Washington Supreme Court agreed with the dissent's theory and reversed the reversal, finding that no unanimity instruction was required where the acts comprised "continuous conduct." *State v. Crane*, 116 Wn.2d at 330.

Moreover, the court found harmless error where the only evidence of a fatal assault was in the two hour period of continuous assault immediately preceding the child's death. *State v. Crane*, 116 Wn.2d at 331. The *Crane* court held that the "continuous conduct" exception applied to acts committed in the "small time frame" of a two hour span. *State v. Crane*, 116 Wn.2d at 330. Error will be deemed harmless if a rational trier of fact could have found each incident beyond a reasonable doubt. *State v. Crane*, 116 Wn.2d at 325; *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

In *State v. Stockmyer*, 83 Wn. App. 77, 80, 920 P.2d 1201 (1996), the defendant Stockmyer shot and killed one man and assaulted another. "While conceding that the entire incident took place in a 'matter of seconds,'" the defendant argued that the jury was not unanimous as to the act which constituted the assault on the second victim. *State v. Stockmyer*, 83 Wn. App. at 85. He argued the jury could have found that he struck the victim on the head with the gun or that he pointed it at the victim.

The *Petrich* case itself detailed that "[u]nder appropriate facts, a continuing course of conduct may form the basis for one charge." *State v. Petrich*, 101 Wn.2d at 571. "[F]acts must be

evaluated in a common sense manner," considering whether the victim was the same and whether the acts occurred in the same time frame and place. *Id.*

In the instant case, the assault on Mr. Ford occurred within a matter of minutes. The Defendant stood, he sat, he told Mr. Ford to come take the ID for himself, and then he swung at him. There was one victim, one time frame, and one location. For our purposes, the facts are on point with those in *Stockmyer.* In that case, the defendant was verbally abusive, increasingly confrontational and profane, he struck the victim with a gun, and then threatened him with it. *State v. Stockmyer*, 83 Wn. App. at 79-80. From a common sense point of view, these acts are one continuing course of conduct. And, as the *Stockmyer* court held:

> Applying *Crane's* continuing course of conduct analysis here, we find no reversible error. The jury was unanimous in its determination that an assault occurred. No special unanimity instruction was required.

State v. Stockmyer, 83 Wn. App. at 87-88.

In the same way, here there was no reversible error, no need for special unanimity instructions.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The Defendant challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay. The record provides sufficient evidence for the court's finding and sentence.

The judge heard argument from defense regarding the Defendant's age, health, and minimal debt. RP 92. The judge was aware of the Defendant's criminal history, which was printed in the judgment. CP 6. The Defendant testified that he has lived with diabetes since his childhood. RP 50. That condition that did not prevent the judge in his murder case from imposing, as the Defendant himself reported, over $5000 in LFO's. RP 92. The judge also observed the Defendant's health and fitness at trial. He heard the Defendant's testimony, an intelligent attempt to rationalize the offense, shift blame, and seek sympathy from the jury. That record indicates that the Defendant is not burdened by language, citizenship, or competency barriers.

The court found that the Defendant was an adult who was able to work and pay his fines at a rate of $100/mo. In addition to

mandatory costs, the court imposed a little over a thousand dollars in discretionary costs. CP 8. Considering the small amount of fines imposed and the reasonable payment schedule, the court had sufficient evidence of the Defendant's ability to pay the ordered costs.

The Defendant asks to strike finding 2.5, which is on page four of each J&S (CP 7), arguing that this would be consistent with the holding in *Bertrand*. Appellant's Brief at 13. Because, unlike *Bertrand*, there is evidence on the record demonstrating the Defendant's ability to pay, there is no cause to strike the supported finding. The Defendant's request to strike the court's factual finding must be denied. The finding is supported in the record; and the trial court deserves discretion on factual matters.

The Defendant not only asks to strike the factual finding, but also to strike the imposition of costs. Appellant's Brief at 14. This remedy is not supported in law.

In *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), the sentencing court made a finding that the defendant Bertrand had the present or future ability to pay. The court of appeals found no evidence in the record to support the finding and,

therefore, held that the finding was clearly erroneous. *State v. Bertrand*, 165 Wn. App. at 404. However, the court also noted that the question was not ripe under *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991). *State v. Bertrand*, 165 Wn. App. at 405. The court held that until such a future determination could be made, the Department of Corrections could not begin to collect on the LFO's. *State v. Bertrand*, 165 Wn. App. at 405.

Note that even if the finding were without basis in the record (which is not the case here), the Defendant's request to strike not just the finding but also the imposition of fines is not the holding in *Bertrand*. Rather the *Bertrand* court struck the finding, but affirmed the imposition of LFO's, noting that the proper time to address the question is "when the government seeks to collect the obligation." *State v. Bertrand*, 165 Wn. App. at 405, *citing State v. Baldwin*, 63 Wn. App. at 310.

The Defendant asserts that the court did not balance his financial resources and the nature of the burden of the LFO's. Brief of Appellant at 15-16; *see also* RCW 10.01.160. The court certainly did consider the Defendant's employability (his age,

health, and ability to work). The court was also aware of the Defendant's other debt from other legal financial obligations. The record also demonstrates that the Defendant is competent and without language or citizenship difficulties.

This record is sufficient to sustain the finding that the Defendant has the present and future ability to pay $100 a month. The court did not abuse its discretion in imposing the legal financial obligations.

C. THE COURT'S VARIABLE IMPOSITION OF COMMUNITY CUSTODY IS NO LONGER PERMITTED UNDER THE MOST RECENT CASE LAW.

The Defendant challenges the community custody provision. The State concedes error on this point. The Defendant's term of community custody should be for a definite term of 12 months.

The confusion stems from an old case which gave us the "Brooks notation." In the case of *In re Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009), the defendant Brooks was sentenced to 120 months confinement and 18-36 months community custody. He sought review, arguing the combined punishment of confinement and supervision exceeded the ten-year statutory

maximum. *Id.* The Washington Supreme Court held that the sentence was lawful, but should be amended to clarify that the combined term of confinement plus supervision should not exceed the maximum term. *In re Brooks*, 166 Wn.2d at 673, 675.

The so-called *Brooks* notation is no longer valid following amendments to the statute. Since *Brooks*, the Washington Supreme Court has revisited this issued twice. In *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011), the court decided that for defendants sentenced before certain statutory amendments took effect, ***the Department of Corrections***, not the courts, shall recalculate the term of community custody and set a specific length for the term of community custody. *State v. Franklin*, 172 Wn.2d at 840-41.

However, for defendants sentenced after July 26, 2009, it will be ***the trial court***, not the Department of Corrections, which shall reduce the term of community custody to avoid a sentence in excess of the statutory maximum. *State v. Boyd*, 172 Wn.2d 470, 473, 275 P.3d 321 (2012).

This Court in *State v. Winborne*, 167 Wn. App. 320, 323-26, 273 P.3d 454 (2012) recognized that the so-called "*Brooks*

notation," which provided for a term of community custody that was variable in nature, only addressed issues presented under then-existing law. Amendments to the SRA produced a different result. *State v. Winborne*, 167 Wn. App. at 326. The term of community custody should be determinative, and not flexible or dependent upon the defendant's earned early release or good time. *State v. Winborne*, 167 Wn. App. at 329-30, *citing State v. Hale*, 94 Wn. App. 53, 971 P.2d 88 (1999); *In re Sentencing of Jones*, 129 Wn. App. 626, 627-28, 120 P.3d 84 (2005).

The Defendant Bolton was convicted and sentenced after 2009. *Brooks* does not control. *Winborne* and *Boyd* control.

The Defendant's statutory maximum term is 5 years (or 60 months). CP 6. There is no possibility that his sentence of 12 months and a day (CP 11) plus the statutory community custody term of 12 months (CP 11; RCW 9.94A.701(3)(a)) will exceed the 60 month limit. Therefore, the judgment should simply impose a term of 12 months community custody *without regard for early release*. The sentence should be remanded for a definite term of 12 months of community custody.

V. Conclusion:

Respondent requests that the Appellant's conviction should be affirmed, but the matter should remanded for imposition of a definite term of 12 months of community custody.

Dated this 28th day of January, 2014.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: Teresa Chen
Teresa Chen,
WSBA 31762
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 28th day of January, 2014, a copy

of the foregoing was delivered to David Bolton DOC #626915, Appellant, 1313 North 13th Avenue, Walla Walla, WA 99362 by depositing in the mail of the United States of America a properly stamped and addressed envelope; and to David Gasch, opposing counsel, gaschlaw@msn.com by email per agreement of the parties pursuant to GR30(b)(4).

Signed and sworn to before me this 28th day of January, 2014.

Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2014

adi

FRANKLIN COUNTY PROSECUTOR

January 28, 2014 - 11:43 AM

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Trial Court County: ____ - Superior Court # 12-1-50433-3

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- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
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