NO. 30801-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SIFA TUTU,

Appellant.

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

APPELLANT'S OPENING BRIEF

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2. The court lacked statutory authority to impose court costs without sufficient proof that the costs were actually incurred.

3. The court's imposition of unproven costs violated Tutu's right to due process of law.

4. The court's imposition of discretionary costs even though it found Tutu unable to pay violated his right to due process of law.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When the prosecution alleges that two alternative acts could constitute the charged offense, it must prove both acts occurred unless the jury's verdict shows that it unanimously agreed to base its verdict on an act that has been sufficiently proved. Here, there was no special verdict form or court instruction directing the jury that its verdict must be based on unanimous agreement of a single act. The State argued either of two acts sufficed to prove the charged crime, but one act was not supported by sufficient evidence. Did the State fail to meet its due

process obligation to prove every element of the charged crime and was Tutu denied his right to a unanimous jury verdict?

2. The court's authority to order that a convicted offender pay court costs that were specifically incurred to prosecute the offense of conviction requires sufficient evidence proving the costs were actually incurred. The court ordered Tutu pay over $7000 in discretionary court costs without evidence showing how the costs were incurred. Was there sufficient evidence to order Tutu to pay these court fees?

3. The right to due process and equal protection of the laws prohibits the court from imposing discretionary court costs upon a finding that the person is unable to afford the costs. The court found Tutu was unable to afford to pay court costs. Did the court impermissibly impose these costs upon a person who it found unable to pay?

C. STATEMENT OF THE CASE.

Sifa Tutu was charged with a single count of rape of a child in the first degree. CP 11. The court did not instruct the jury that its verdict must be based on unanimous agreement that a single act was proven beyond a reasonable doubt. CP 14-30. The prosecutor argued to the jury that it could base its finding on either of two incidents based on

the claim that Tutu put his finger in S.B.'s vagina or "his penis in her butt." RP 320.[1] The prosecutor explained, "Ladies and gentlemen, those are both considered rape." RP 320.

The only testimony alleging Tutu put his penis in S.B.'s "butt" came from S.B. at trial. Her prior statements to others involved being touched in a "private area." RP 186. At trial, S.B. said that Tutu put his finger "inside and outside" her private area. RP 254. Then, the prosecutor asked if she had been touched elsewhere. S.B. stated Tutu touched her with his private part "in the butt." RP 255. She said it felt "bad" but did not otherwise describe it. RP 255-56. The prosecutor asked no further questions to elicit more details about this second incident. RP 255-56. S.B. had no visible injuries. RP 286.

This conduct occurred in a bedroom S.B. shared with her then-seven-year-old sister Elizabeth, as well as S.B.'s toddler brother. RP 268. S.B. was six years old at the time. RP 252. Elizabeth said she saw Tutu touching S.B. "on her privates." RP 268, 273. She believed S.B. was "all asleep" at the time but S.B. later told Elizabeth she was "half

[1] The trial transcripts are contained in three consecutively paginated volumes referred to herein as "RP." Any transcripts from other dates are referenced by the date of proceeding.

asleep." RP 275-76. When S.B.'s aunt asked S.B. if she had been inappropriately touched, S.B. pointed to her crotch and said she had been touched there. RP 186. S.B. did not tell her aunt what object touched her. RP 188. S.B. told her father Ernest B. that Tutu had put his finger in her vagina and she did not describe other acts to him. RP 282-83. Ernest took S.B. to the doctor and the doctor did not find any physical injuries or issues of note. RP 285-86. S.B. told a child interviewer employed by the prosecutor's office that Tutu was "touching" her "on the private part." Ex. 1 RP at 10-13. She did not describe being touched inside her buttocks. Id. Tutu told a detective that he touched S.B.'s vagina with his finger but did nothing else; at trial Tutu did not recall making this statement and denied the incident. Ex. 11 RP at 9; RP 309, 312-13.

The court's instructions to the jury did not contain a unanimity instruction. CP 13-40. The prosecutor told the jury several times that Tutu could be convicted based on either of two acts, alleging that he "put his finger in her vagina and penetrated her anus and raped her." RP 322; see also RP 319, 320.

The jury delivered a general verdict finding Tutu guilty of one count of rape of a child in the first degree. CP 31. It did not provide any type of special verdict indicating the basis of its conviction. CP 31.

The court imposed a standard range sentence of 103 months to life. CP 42-43. It also imposed over $8000 in legal financial obligations. CP 40-41, 48. Pertinent facts are discussed in further detail in the relevant argument sections below.

D. ARGUMENT.

1. **The multiple acts underlying the allegation of rape denied Tutu his right to have a unanimous jury verdict based on sufficient proof of the charged crime**

a. The constitution requires that the jury must unanimously find the State proved the specific act underlying the conviction.

Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. 5, 14; Wash. Const. art. I, §§ 3, 21, 22. For evidence to be legally sufficient, a "modicum of evidence" on an essential element is "simply inadequate." Jackson v. Virginia, 443 U.S. 307, 320, 99 S.

Ct. 2781, 61 L. Ed. 2d 560 (1979). "[I]t could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." Id.

The "due process command" of the constitution demands the reviewing court ask whether upon "the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 324. Rational inferences may be premised on "the record evidence adduced at trial" but may not be premised on speculation. Id.

The right to a unanimous jury verdict demands the jury verdict reflect a unanimous finding of the act or acts underlying the charged offense. See Apprendi v. New Jersey, 530 U.S. 466, 498, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (Scalia, J., concurring) (charges must be proved "beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens"); Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ("longstanding tenet" of criminal law jurisprudence is "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" (quoting 4 W. Blackstone, Commentaries on the Laws of England, 343 (1769)).

In Washington, the state constitutional right to a trial by jury "provides greater protection for jury trials than the federal constitution." State v. Williams-Walker, 167 Wn.2d 887, 895-96, 225 P.3d 913 (2010); Wash. Const. art. I, §§ 21, 22. The jury's verdict must explicitly authorize the punishment imposed. 167 Wn.2d at 900. Punishment sought by the State "must not only be alleged, it also must be authorized by the jury" in its verdict. Id.

b. The failure to give a unanimity instruction to the jury is presumed prejudicial when more than one act could constitute the charged offense and the State does not unambiguously elect.

In addition to the requirement that a conviction must be based on proof, beyond a reasonable doubt, of each essential element, the right to jury unanimity requires the jury unanimously agree upon the act that constitutes the charged offense. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). To ensure jury unanimity, either the prosecution must elect the act on which it relies or the court must instruct the jury to unanimously agree that at least one particular act constituting the charged crime has been proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; see also State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). "By requiring a unanimous verdict on

one criminal act, we protect 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); see also State v. Parra, 96 Wn.App. 95, 102, 977 P.2d 1272 (1999) ("we must presume that the State's inexplicable failure to request a unanimity instruction was reversible error unless no rational juror could have had a reasonable doubt as to either act establishing the crime").

For example, in Coleman there was neither an election nor unanimity instruction even though the complaining witness testified about different acts that could constitute the charged offense of child molestation. 159 Wn.2d at 512. Although there was evidence of multiple acts, the complainant had not consistently alleged one of these occurred. Id. at 514. The prosecution claimed it elected to rely on a different act by focusing on the other act, but the Court found no clear election occurred. Id. Based on the potential that the jurors did not unanimously agree as to the particular act underlying the conviction, the Supreme Court held, "Reversal is required because this was a multiple acts case, prejudice is presumed, and there is a risk of a lack of unanimity on all the elements" absent a unanimity instruction. Id. at 515.

c. Without sufficient proof of the two alleged acts and without a unanimity instruction, Tutu was denied due process of law and a unanimous jury verdict.

If the prosecution had proved two separate acts of rape, those could be separately punished even though they occurred close in time. State v. Tili, 139 Wn.2d 107, 117, 985 P.2d 365, 370 (1999). "Any penetration, however slight," of "the vagina or anus" constitutes the sexual intercourse required for rape. RCW 9A.44.010(1).

However, the touching of the complainant's "butt" does not constitute the actual penetration of her anus required to prove rape occured . State v. A.M., 163 Wn.App. 414, 421, 260 P.3d 229 (2011). Touching the buttocks, even the butt cheeks, is not the legal equivalent of penetration of the anus. Id.

In A.M., the complainant said the defendant had "put his weiner . . . in my butt." 163 Wn.2d at 417. When pressed for details he said it was "almost inside" and he felt something "round, hard, and cold" Id. at 417-18. The Court of Appeals explained that the buttocks and anus are not the same and do not constitute a single sexual organ under this statute. Id. at 421. Penetration of the buttocks alone is not sufficient to be sexual intercourse. Id.

The prosecution encouraged the jury to convict Tutu for rape based on the allegation he penetrated S.B.'s anus but there was no testimony supporting this claim. RP 319, 320, 322. S.B. initially claimed the offense occurred when she was "touched" in "my private spot." RP 186. At trial, S.B. alleged that in addition to putting his finger in her vagina, Tutu turned her around and put his penis "in my butt." RP 255. She never described being penetrated in her anus and there was not medical testimony indicating she suffered any injuries consistent with such penetration. RP 285-86. S.B.'s sister never described such an incident occurring even though S.B.'s sister was watching the incident. RP 268. S.B.'s sister did not describe S.B. being flipped around or penetrated from behind. RP 268. The prosecutor insisted to the jury that both acts established the charged crime and it could use either one to convict Tutu. RP 319, 320, 322.

The jury was not instructed it must unanimously agree that both acts were proven. While S.B. consistently but ambiguously said she was touched in her private part, and Tutu had told a detective he put his finger in her vagina, there was no corroboration or even plausible

evidence of having had a penis in her anus. RP 254; Ex. 1 RP at 13[2] (complainant tells child interviewer she was touched "underneath her underwear" without any mention of penile penetration of buttocks).

Courts have forgiven the failure to instruct the jury on the constitutional requirement of unanimity only when the events constituting a course of conduct have been adequately proven and are rationally supported by the evidence. Petrich, 101 Wn.2d at 571; see State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) (multiple incidents of assault occurring over two-hour period constituted continuing course of conduct). Here, the State urged the jury to convict Tutu based on the complainant's claim during trial that Tutu touched her "butt" with his penis, but this evidence did not establish the penetration of her anus as required to prove rape. A.M., 163 Wn.App. at 421. Furthermore, there was not substantial evidence showing that any such incident occurred, since S.B. had never described being touched in this manner on her buttocks in several prior conversations, including a formal discussion with a child interview specialist, and S.B.'s sister did not describe seeing these actions. It would violate due

[2] A transcript of Ex. 1 was prepared and submitted to the Court.

process and the right to a unanimous verdict for some members of the jury to convict Tutu based on this second allegation.

d. Reversal is required.

Double jeopardy bars retrial for allegations that are not adequately proven. Burks v. United States, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). The prosecution alleged Tutu committed rape by a means of sexual intercourse that requires penetration of the anus but did not present sufficient proof of the necessary act. RP 322. The prosecution is barred from prosecuting Tutu for this claim when it was not proven beyond a reasonable doubt.

If the error in the case merely had been the failure to instruct the jury that it must unanimously agree on the act that was proven beyond a reasonable doubt, prejudice would be presumed, reversal required, and a new trial permitted based on the risk of a lack of unanimity of the act underlying the charge. Coleman, 159 Wn.2d at 515; Petrich, 101 Wn.2d at 573. Because the prosecution charged Tutu with a single offense and sought a verdict based on acts that were not sufficiently proven, the double jeopardy clause prohibits retrial.

2. **The court's imposition of over $7000 in "costs" without proof of how these costs were incurred violates Tutu's right to due process of law**

a. Principles of due process bar the court from imposing sentence based on factual claims that are not proven by reliable evidence.

Due process requires the State bear the burden of proof at sentencing. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); U.S. Const. amend. 14; Const. art. I, § 3. Because the prosecution bears the burden of proof at sentencing, it must present reliable evidence supporting the sentence requested. Id.; see also State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) ("It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.").

The fundamental requirements of due process bar the court from imposing a prison term based on prior criminal history unless there is proof of criminal history beyond mere allegation. Hunley, 175 Wn.2d 901, 909-10; Mendoza, 165 Wn.2d at 920. Hunley and Mendoza involved "nearly identical" facts. 175 Wn.2d at 913. In both cases, the sentencing court relied on a statement the prosecutor presented the court with a list asserting the defendant's criminal history. Id. The list

included the name of the crime and its date "but did not include any other documentation to verify the convictions." Id. Neither defendant objected. Id. The Supreme Court held in both cases that a list of criminal history did not constitute adequate proof of criminal history. Hunley, 175 Wn.2d at 913; Mendoza, 165 Wn.2d at 925. Even though the defendant had not explicitly objected to the standard range calculation, the court ruled that the prosecution's burden of proof at sentencing "was rooted in principles of due process" and controls the necessity of proof prior to sentencing. Hunley, 175 Wn.2d at 913-15.

Tutu had no prior criminal history, so the prosecution did not need to present evidence seeking a higher sentence as in Hunley or Mendoza. However, the court ordered that Tutu's sentence must include paying over $7000 in non-mandatory court costs. In order to impose such costs as part of Tutu's sentence, the court was required to afford Tutu his right to due process of law and could not impose punishment based on mere allegation.

b. The sentencing court's imposition of costs and fines constitutes punishment that must comply with the requirements of due process.

The sentencing court's authority to impose financial costs derives from its authority to impose a sentence as punishment "as

provided" in the Sentencing Reform Act. RCW 9.94A.505(1), (4); see also RCW 9.94A.760 (1) ("Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence."); RCW 10.01.160 ("Costs may be imposed only upon a convicted defendant").

If financial obligations are based on facts not found by the jury, the Sixth Amendment bars the court from imposing such financial penalty. Southern Union Co. v. United States, _ U.S. _, 132 S. Ct. 2344, 2356, 183 L. Ed. 2d 318 (2012). Similarly, the right to due process of law prevents the court from imposing financial obligations absent reliable evidence of the basis of the expenses and their relationship to the case.

When imposing court-ordered financial obligations, the judge had not received evidence establishing the basis for those costs. No one even mentioned these legal financial obligations at the sentencing hearing. The judgment and sentence does not contain a court finding that such costs were proven. Instead, the judgment and sentence references additional costs being ordered as "see attached." The "attached" document is a list containing notes of funds and abbreviations. One item is "special costs reimbursement" of $4248.54.

CP 48. Another item is $2100 for attorney fees but a note on the bottom of the page says "Atty 1400." CP 48. There is no documentation listing the costs to the sheriff or witnesses but fees are imposed for actions related to them. CP 48. These discrepancies and ambiguities were never explained. The total for this unexplained tally is $7005.66. CP 48.

This list was attached to the end of the judgment and sentence after Tutu signed the document, it was not mentioned during the sentencing hearing, and there is no evidence in the record that Tutu ever saw this list or was given an opportunity to contest it. CP 47-48.

The sentence imposed upon Tutu requires him to pay substantial fines and fees without explanation and absent reliable proof that these costs were incurred. The cost worksheet attached to the judgment and sentence is a mere allegation of costs, but Hunley and Mendoza explain that mere allegations are insufficient to impose punishment and do not meet the State's burden of proof. Just as criminal history must be proven by reliable evidence such as a certified copy of a judgment and sentence, punishment imposed in the form of legal financial obligations must be supported by available documentation. The mere allegation of costs contained in a list with scribbled notes is insufficient to meet the requirements of due process. This process of imposing substantial

financial penalties is inadequate and an unconstitutional deprivation of due process.

c. Unsupported costs should be stricken from the judgment and sentence.

Tutu's punishment included the imposition of costs, fees, and mandatory assessments due to his conviction imposed without reliable evidence. These unproven costs must be stricken from the judgment and sentence.

3. **The court impermissibly imposed discretionary court costs even though it concluded Tutu was unable to pay these fees**

When a court requires an indigent defendant to reimburse the state for authorized costs, it must also expressly find the defendant has the financial ability to pay the costs imposed. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). Imposing costs without finding the accused has the ability to pay would violate equal protection by imposing extra punishment on a defendant due to his poverty. Fuller, 417 U.S. at 48 n.9 ("an order to repay can be entered only when a convicted person is financially able").

The court imposed over $7000 in court costs, in addition to a $500 fine, $500 mandatory victim penalty assessment, and $100 DNA collection fee. CP 40-41, 48. Yet the court did not check the available box on the judgment and sentence form to indicate "that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 40. By failing to check this box, the court indicated it found Tutu lacked the ability to pay such costs. Cf. State v. Jasper, 174 Wn.2d 96, 124, 271 P.3d 876 (2012) (even though judge uses "preprinted form," reviewing court assumes judge accurately completed the form and complied with its requirements); State v. Baldwin, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991) amended, 837 P.2d 646 (1992) ("the court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard."). The record supported the court's finding of Tutu's inability to pay because Tutu testified that he fled to the United States from his native country Sudan several years earlier to escape a war where he was taken from his family and forced to be a solider as a young child. RP 296, 298-301. There was no evidence that he was employed, able to work, or had any resources.

Yet the court ordered Tutu pay over $8100 in legal financial obligations, with compounding interest from the date of entry of the judgment until payment in full, notwithstanding Tutu's inability to pay. CP 40-41, 45. It violates due process to impose such fees when a person is unable to pay. Fuller, 417 U.S. at 48 n.9

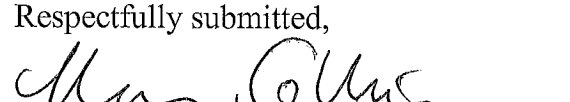
The nonmandatory legal financial obligations should be stricken because it violates due process and is contrary to the court's statutory authority to impose substantial costs on a person who is unable to afford to pay.

E. CONCLUSION.

For the reasons stated above, Sifa Tutu respectfully asks this Court to reverse his conviction as it was not supported by the evidence or proved to a unanimous jury. Alternatively, he asks this Court to strike the unproven legal financial penalties from the judgment and sentence.

DATED this 21st day of March 2013.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30801-4-III
	)	
SIFA TUTU,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF MARCH, 2013.

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