72803-2

FILED
August 17, 2015
Court of Appeals
Division I
State of Washington

No. 72803-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRANDON PAMON,

Appellant.

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

BRIEF OF APPELLANT

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Washington Statutes

A. ASSIGNMENTS OF ERROR

1. Mr. Pamon's article I, section 21 right to a unanimous jury was violated.

2. The trial court erred when it prohibited Mr. Pamon from possessing or consuming marijuana as a condition of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal defendants have a constitutional right to a unanimous jury verdict. When the State alleges a defendant committed attempted first degree robbery by two alternative means, reversal is required if each of the means is not supported by substantial evidence. Where the State argued that Mr. Pamon was guilty of attempted first degree robbery because a deadly weapon was involved or because bodily injury was inflicted, and substantial evidence does not support a finding that bodily injury was inflicted, is reversal required?

2. In order for a court to lawfully impose a crime-related prohibition, the record must show that the conduct to be prohibited contributed to the offense. Where the trial court prohibited Mr. Pamon from possessing or consuming marijuana as a condition of community custody but the evidence at trial did not demonstrate that use of

marijuana contributed to the attempted robbery, must the condition be stricken?

C. STATEMENT OF THE CASE

Geoffrey Vincent was walking home early one morning when he was grabbed from behind and thrown to the ground. 10/9/14 RP 32. A juvenile, K.M., had attacked Mr. Vincent and was hitting him. 10/9/14 RP 32. Although Mr. Vincent could see very little while being struck, he felt that there were two people hitting him and going through his pockets once he was on the ground. 10/9/14 RP 33.

Mr. Vincent quickly realized that K.M. was holding a knife, and pulled a pocketknife out of his pocket to fight back. 10/9/14 RP 34. Mr. Vincent stuck the pocketknife in K.M.'s thigh, causing both individuals to back away from him and allowing Mr. Vincent to return to his feet. 10/9/14 RP 34, 37.

Mr. Vincent saw two young men about ten feet from him, and a young woman a little further away. 10/9/14 RP 37-38. K.M. began to approach Mr. Vincent, while the other young man, later identified as Brandon Pamon, started backing away. 10/9/14 RP 39, 45.

K.M. moved his knife in Mr. Vincent's direction, and although Mr. Vincent attempted to block it with his own knife, K.M. stabbed Mr. Vincent in the chest, injuring his heart. 10/9/14 RP 40; 10/13/14 RP 109. At that point, Mr. Pamon, K.M., and the young woman ran away. 10/9/14 RP 47. Mr. Vincent was taken to the hospital and recovered after undergoing surgery. 10/9/14 RP 55; 10/13/14 RP 114.

The State charged Mr. Pamon with assault in the first degree and attempted robbery in the first degree, and alleged a deadly weapon enhancement as to both counts. CP 11-12. A jury acquitted Mr. Pamon of the first degree assault charge but convicted him of the first degree attempted robbery charge. CP 49-50. It also found that Mr. Pamon was not armed with a deadly weapon during the commission of the attempted robbery. CP 51. The trial court sentenced Mr. Pamon to the high end of the standard range, 76.5 months of imprisonment, with 18 months of community custody. CP 59-60. As a condition of community custody, the trial court prohibited Mr. Pamon from possessing or consuming marijuana. CP 64.

D. ARGUMENT

1. Reversal is required because Mr. Pamon was denied his right to a unanimous jury.

a. Mr. Pamon had a constitutional right to a unanimous jury verdict as to the means by which he was alleged to have committed attempted first degree robbery.

Criminal defendants are guaranteed the right to a unanimous jury under article I, section 21. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). "This right includes the right to an expressly unanimous *verdict*." *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (emphasis in original). When a defendant is charged with an alternative means crime, he has a right to a unanimous jury verdict as to the means by which he was alleged to have committed the crime. *Owens*, 180 Wn.2d at 95; *State v. Green*, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980).

First degree robbery is an alternative means crime. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 534, 309 P.3d 498 (2013). Under the relevant portion of RCW 9A.56.200, an individual may be convicted of robbery in the first degree if:

> (a) In the commission of a robbery or immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

…

(iii) inflicts bodily injury.

The information alleged Mr. Pamon committed attempted first degree robbery in one of these two ways, and the jury was instructed accordingly. CP 12, 36. However, the jurors were not required to enter a special verdict indicating which of the alternatives was found. *See State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987) ("an instruction on jury unanimity as to the alternative method found is preferable").

Where there are alternative means of committing a crime and the jury is instructed on both, "either (1) substantial evidence must support each alternative means on which evidence or argument has been presented, or (2) evidence and argument must have only been presented on one means." *State v. Lobe*, 140 Wn. App. 897, 905, 167 P.3d 627 (2007); *see also State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). Because the State argued Mr. Pamon was guilty of attempted first degree robbery both because K.M. had a knife during the commission of the offense and because the men inflicted bodily

harm on Mr. Vincent, substantial evidence must support each alternative means. *See* 10/14/15 RP 42.

b. The State's allegation that bodily injury was inflicted is not supported by substantial evidence.

The State did not present substantial evidence that Mr. Vincent sustained bodily injury during the commission of the attempted robbery. "Bodily injury" is defined as "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110. While the defendant need not *intend* to cause the injury, the victim must sustain some injury. *See State v. Decker*, 127 Wn. App. 427, 432, 111 P.3d 286 (2005) (the defendant's grabbing of the victim's arm did not qualify as injury where it caused no bruising).

While two witnesses testified about marks on Mr. Vincent's face, other witnesses described only that he appeared "pale" or "roughed up." 10/9/14 RP 6, 87; 10/13/14 RP 88, 106. A photograph of Mr. Vincent admitted into evidence appears to show some blood on his face, but it is unclear whether the blood is from an injury sustained during the attempted robbery or was transferred to his face from the chest wound he sustained during the subsequent assault committed by K.M. Ex. 27. No evidence

was presented about exactly what injuries Mr. Vincent allegedly sustained to his face during the attempted robbery. Instead, the State's presentation to the jury was focused on K.M.'s use of the knife during the robbery and the subsequent assault.[1]

The limited testimony about marks on Mr. Vincent's face did not rise to the level of substantial evidence. Because the jury was presented with both alternative means, and there is no special verdict form showing that the jury relied on the weapon alternative, reversal is required. Only the deadly weapon alternative may be presented to the jury on remand. *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997).

2. The trial court erred when it prohibited Mr. Pamon from possessing or consuming marijuana as a condition of community custody, where marijuana did not contribute to the offense.

At sentencing, the trial court imposed a community custody condition prohibiting Mr. Pamon from possessing or consuming marijuana. CP 64. The court's authority to impose sentencing conditions is derived entirely from statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293

[1] The State did not allege the subsequent stabbing by K.M. satisfied the bodily injury alternative, and Mr. Pamon was acquitted of the assault charge and deadly weapon enhancement under the State's accomplice liability theory. 10/14/14 RP 42; CP 49.

(1980). A defendant is entitled to challenge an erroneous sentencing condition for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A challenge to a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

When a trial court imposes conditions of community custody, it must adhere to the limitations provided in RCW 9.94A.703. While a court may not generally order a defendant to refrain from engaging in otherwise lawful behavior, a court is permitted to order a defendant to "[c]omply with any crime-related prohibitions" under RCW 9.94A.703(3)(f). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). In order to justify a crime-related prohibition, the court must find and the record must show that the conduct to be prohibited "contributed to the offense." *State v. Julian*, 102 Wn. App. 296, 305, 9 P.3d 851 (2000).

The only exception to the general rule regarding crime-related prohibition is the consumption of *alcohol*, which the

court may prohibit regardless of whether it contributed to the offense. RCW 9.94A.703(3)(e); *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). This is the only discretionary condition set forth in RCW 9.94A.703(3) that a court is authorized to impose that is not inherently crime-related. *State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 65 (1998), *overruled in part on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). There is no such provision pertaining to the consumption of marijuana.

It is legal to possess and consume marijuana in Washington State. *See* RCW 69.50.4013 (possession, by person twenty-one years of age or older, of usable marijuana not exceeding those set forth in RCW 69.50.4013(3) is not a violation of any provision of Washington state law). Thus, any prohibition must be crime related. RCW 9.94A.703(3)(f); *Riles*, 135 Wn.2d at 349-50.

The only evidence presented about marijuana at trial was testimony from C.H., the young woman standing near Mr. Pamon when Mr. Vincent was stabbed. C.H. stated she used marijuana "a lot" and that she, Mr. Pamon, and K.M. decided to

smoke that night. 10/13/14 RP 21, 25. However, C.H. only described her own marijuana use that evening, and did not testify she saw Mr. Pamon smoking. 10/13/14 RP 25. She also said she overheard K.M., but not Mr. Pamon, talk about obtaining marijuana. 10/13/14 RP 26. Other than C.H.'s vague testimony related to her own use and K.M.'s statement, there was no mention of marijuana at trial. This is not sufficient for a finding that marijuana use contributed to the attempted robbery.

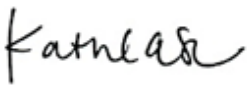
The court acted without statutory authority when it imposed a condition of community custody that prohibited Mr. Pamon from possessing or consuming marijuana because this prohibition was not crime-related. RCW 9.94A.030(10); RCW 9.94A.703(3)(f); *Julian*, 102 Wn. App, at 305. The condition of community custody prohibiting him from possessing or consuming marijuana must be stricken from the judgment and sentence. *See Riles*, 135 Wn.2d at 350; CP 64.

E. CONCLUSION

This Court should reverse Mr. Pamon's conviction because he was denied his constitutional right to a unanimous jury verdict. In the alternative, the Court should strike the community custody condition prohibiting Mr. Pamon from possessing or consuming marijuana.

DATED this 17th of August, 2015.

Respectfully submitted,



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KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. BRANDON PAMON, Appellant.	)))))))))	NO. 72803-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] BRANDON PAMON 332632 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF AUGUST, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710