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NO. 51815-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN TIMMONS,

Appellant.

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

The Honorable Bernard Veljacic, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's conviction for third degree assault.

2. The $200 "criminal filing fee" imposed by the trial court should be stricken under the Supreme Court's recent decision in State v. Ramirez.[1]

3. The $250 "jury demand fee" imposed by the trial court at sentencing should be stricken under Ramirez.

4. The $100 Domestic Violence (DV) penalty assessment imposed by the trial court under RCW 10.99.080 should be stricken under Ramirez.

5. The $100 DNA fee imposed by the trial court should be stricken under Ramirez.

Issues Pertaining to Assignments of Error

1. Third degree assault requires use of "a weapon or other instrument or thing likely to produce bodily harm." Although a stationary object does not meet this definition, the State relied on such an object -- drywall which fell from the ceiling striking the complaining witness in the head -- to prove this crime. Must this Court reverse appellant's conviction for third degree assault?

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[1] State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

2. Under the Supreme Court's decision in Ramirez, should the $200 criminal filing fee, $250 jury demand fee, $100 DV penalty assessment, and $100 DNA fee be stricken from appellant's judgment and sentence because he was indigent at the time of sentencing?

B. STATEMENT OF THE CASE

1. Procedural History.

The Clark County prosecutor charged appellant Stephen Timmons by amended information with eleven felony counts, including: four counts of violation of no contact order;[2] and one count each of second degree burglary,[3] second degree assault,[4] residential burglary,[5] first degree malicious mischief,[6] third degree assault,[7] felony harassment,[8] and felony

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[2] The State alleged the court order violations in counts 3, 9, 10, and 11 were respectively committed against Rebecca Andrews on October 6, 2016, between October 20-24, 2016, between October 25-31, 2016, and between November 1-16, 2016. CP 25-28.

[3] Alleged to have been committed against Rebecca Andrews on October 6, 2016.

[4] Alleged to have been committed against Rebecca Andrews on October 6, 2016.

[5] Alleged to have been committed against Rebecca Andrews on October 20, 2016.

[6] Alleged to have been committed against Rebecca Andrews on October 20, 2016.

[7] Alleged to have been committed against Dan McPherson on October 20, 2016.

[8] Alleged to have been committed against Rebecca Andrews between October 20 and November 16, 2016.

stalking.[9] The State further alleged that except for the third degree assault, each offense was committed against Rebecca Andrews, a family or household member. CP 25-28; RP[10] 14-16.

The State moved mid-trial to dismiss the violation of no contact order charges in counts 10 and 11 on the basis that it could not prove Timmons was in Washington State when he sent the text messages at issue. CP 64; RP 360-61. A jury found Timmons guilty on the remaining counts as charged. CP 159-68. The jury also returned special verdict forms for each count involving Andrews, finding that each offense was committed by one family or household member against another. CP 169; RP 667-70.

At sentencing, the trial court vacated the violation of no contact order charges in counts 3 and 9, concluding that they merged with the felony stalking conviction. CP 186; RP 677, 684. The trial court sentenced Timmons to a total concurrent standard range prison sentence of 96 months for each of the 7 remaining convictions. The trial court also imposed 18 months of community custody. CP 183-98.

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[9] Alleged to have been committed against Rebecca Andrews between October 6 and November 16, 2016.

[10] This brief refers to the consecutively paginated verbatim report of proceedings of February 5, 26, 27, 28; March 1; and April 23, 2018 as "RP".

The court ordered that Timmons pay $1,150 in legal financial obligations including the $500 crime victim assessment, a $100 DNA database fee, a $200 criminal filing fee, a $250 jury demand fee, and a $100 Domestic Violence assessment fee. CP 188-89.

As part of his notice of appeal, Timmons submitted declarations indicating he had no source of income, owned no real property, was not the beneficiary of a trust fund, and was unemployed. CP 199-204. The superior court found Timmons to be indigent and ruled that he was entitled to counsel on appeal at public expense. CP 205-06.

Timmons timely appeals. CP 198.

2. Trial Testimony.

Timmons and Rebecca Andrews never married and had no children together. RP 118-19. They were in a romantic and loving relationship for over 20 years, however. RP 118, 192. Timmons mother had given them money which they used as a down payment to purchase a house. RP 200. Andrews considered the house to be both hers and Timmons's. RP 130, 137-38.

Timmons and Andrews had a very peaceful relationship until about 2016 when Timmons began using methamphetamine regularly. RP 193-94, 201-04, 215-16, 550. In 2016, Andrews obtained a no contact order

against Timmons, which prohibited him from accessing the home he shared with Andrews. RP 119, 123-24, 278-79, 306-07.

In the early morning hours of October 6, 2016, Andrews went outside with her dog. RP 124-25. She noticed the laundry room window was open and someone hunched up against the door. RP 126, 203-04. Timmons's exited the laundry room, knocked Andrews down, and started hitting and stunning her with a stun gun. RP 126-29, 136, 205-06, 209, 550-52.

Andrews' neighbors woke up when she began screaming. RP 221-23, 234. They could hear the sound of a taser and Andrews' yelling for help. RP 221-23, 234-25. Neither saw Timmons in the yard. RP 227, 238. Paul Trent however saw Timmons leave the house early that morning with an object in his back pocket. Trent assumed the object was Timmons's personal property from the house. RP 363-65.

Timmons eventually left, and Andrews called 911. RP 131, 156, 552. Police looked for, but did not locate, Timmons. RP 243, 279.

Andrews was treated at the hospital later the same day for injuries stemming from the incident. RP 263-67, 270. Andrews suffered a laceration to her head that was closed with four staples. RP 132-33, 208, 268-69, 274-76. Andrews had no fractures and no chest injuries. RP 136, 268-69.

Two weeks later, on October 20, Andrews received a telephone call from Timmons. RP 164-66. Timmons told Andrews she had better rescue her cats from the house because he had just flooded and damaged it. RP 164-66. During the call, Timmons also told Andrews that he would kill her. RP 168-69.

Andrews called police and went to the house with them. RP 289, 309, 312-13, 322-23. Police did not see any evidence of forced entry and did not locate Timmons at the house. RP 288, 289, 293-94, 312, 319.

Inside the house they saw that the television, toilet, sink, and bathroom fixtures were smashed. RP 171-72, 290, 312-12. Water was running into the upstairs floor from a hose that had been turned on and put through a window. RP 172, 288-90, 293, 313, 323-24, 326. While inside the house a piece of drywall fell from the ceiling, striking police officer Dan McPherson on the head. RP 296-97, 314-15, 324-25. McPherson was diagnosed with a concussion. RP 317-18. Andrews spent $10,000 repairing the damage to the house, including removing the ceiling. RP 172-74.

Andrews received another call from Timmons on October 22. RP 175. Timmons threatened to shoot Andrews, cut off her fingers, and set her on fire. RP 175. Timmons made other threats to kill Andrews and her family during several telephone calls and text messages between October

20 and November 16. RP 177-78, 181, 185, 383-91, 413-14. Andrews explained that she believed all the threats Timmons had made toward her. RP 188.

On November 3, 2016 a man identifying himself as Timmons called the Washougal Police Department and asked to speak with a police officer. RP 109, 112-13, 328-30, 343. The man explained that he wanted Andrews charged with fraud because she was claiming disability while continuing to work at a tavern. RP 110-11. The man explained that he would turn himself in to police once he saw Andrews name on the criminal docket. RP 110. He explained that if police did not take care of the matter, he would take justice into his own hands. RP 111. Because police had never spoke with Timmons previously, officers admitted they did not recognize his voice and acknowledged someone could have called pretending to be Timmons. RP 108-14, 331.

Andrews acknowledged that she received disability payments for hip and knee replacements. RP 163. She also acknowledged that despite receiving disability payments she simultaneously "kind of help[ed] out sometimes" at a local tavern. RP 163-64. In fact, Andrews was at the tavern when she received the telephone call from Timmons on October 22. RP 165.

Following Timmons arrest, Washougal police officer, Perry Houts, interviewed him on November 16. RP 336, 343-44. During the interview, Timmons acknowledged using a stun gun on Andrews on October 6 and placing a hose inside the house on October 20. RP 347-49, 352, 373. Timmons denied causing Andrews' head laceration however, explaining that she had hit her head on the sliding glass door. RP 347-48.

Timmons explained to Houts that he wanted to make Andrews feel unsafe and acknowledged leaving messages saying that he would kill her and her family. RP 349, 370, 374-75. Timmons denied having a rifle, however. RP 349. As Timmons explained, he believed Andrews was committing fraud and wanted her to be held responsible for her actions. RP 350, 370. Timmons expressed that Andrews had taken advantage of him financially, mentally, and emotionally. RP 347.

A search of Timmons cell phone showed outgoing text messages aligned with ones received on Andrews phone. RP 379, 382, 385-91, 400, 411, 413-14.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN TIMMONS'S CONVICTION FOR THIRD DEGREE ASSAULT

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a

reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Timmons was charged with Assault in the Third Degree under RCW 9A.36.031, which provides:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
>
> . . . .
>
> (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm . . . .

RCW 9A.36.031(1)(d); CP 26.

Following the State's case-in-chief, Timmons moved to dismiss the third degree assault count. RP 433. In response, the prosecuting attorney explained it was only moving forward on the criminal negligence prong of third degree assault under RCW 9A.36.031(1)(d), and did not intend to argue Timmons was guilty of third degree assault under the alternatively

charged prong of RCW 9A.36.031(1)(g).[11] The State maintained the evidence was sufficient for third degree assault, explaining:

> So on that element, the State's position is not so much that a piece of sheetrock is an instrument or a thing likely to produce bodily harm. It's that a second story is a thing that's likely to produce bodily harm.

RP 440. The trial court subsequently dismissed Timmons motion to dismiss the third degree assault count. RP 441-42.

The court instructed the jury generally, "A person commits the crime of Assault in the Third Degree when he or she with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." CP 37 (instruction 29). The third degree assault to-convict instruction required each of the following elements to be proved beyond a reasonable doubt:

> (1) That on or about October 20, 2016, the defendant caused bodily harm to Dan McPherson;
>
> (2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;
>
> (3) That the defendant acted with criminal negligence; and

---

[11] The third amended information alleged that Timmons "with criminal negligence, caused bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; and/or did intentionally assault a law enforcement office or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, to wit: OFFICER DAN MCPHERSON; contrary to Revised Code of Washington 9A.36.031(1)(d) and/or 9A.36.031(1)(g)." CP 26.

(4) That this act occurred in the State of Washington.

CP 38 (instruction 30).

During closing argument, the prosecuting attorney explained that the third degree assault count was based on "not the drywall, itself" but the structural integrity of a house with a flooded second floor. RP 629. Defense counsel argued the third degree assault merely involved a falling piece of drywall and therefore did not constitute use of a weapon or "a thing or an instrument[.]" RP 650-51.

As an initial matter, the object which fell and struck McPherson on the head was a single piece of drywall, not an entire flooded second floor. Moreover, whether the "instrument or thing likely to produce harm" is characterized as a piece of drywall or a flooded second floor, the evidence is insufficient to sustain the third degree assault because either item is a stationary object which is not inherently likely to cause bodily injury. Based on the Supreme Court's opinion in State v. Marohl, 170 Wn.2d 691, 246 P.3d 177 (2010), the drywall at issue in this case does not qualify, as "a weapon or other instrument or thing likely to produce bodily harm."

In Marohl, the defendant and victim were involved in a struggle in a casino. The defendant placed the victim in a chokehold and caused the victim to hit the ground, scraping and bruising his face and breaking his prosthetic arm. Marohl, 170 Wn.2d at 694-696. The defendant was

convicted of Assault in the Third Degree and he appealed, claiming the floor was not an "instrument or thing likely to produce bodily harm." Id. at 694.

The Supreme Court agreed. After noting the absence of any statutory definition for "instrument or thing," the Court turned to the dictionary, defining "instrument" as a "utensil" or "implement" and defining "thing" as "an entity that can be apprehended or known as having existence in space or time," "an inanimate object," or "whatever may be possessed or owned or be the object of a right distinguished from person." Id. at 699 (quoting Webster's Third New Int'l Dictionary 1172, 2376 (2002)). The Court found that a floor is a thing and can be an instrument. Id.

The determinative question, then, was whether a floor was an instrument or thing "likely to produce bodily harm," as required under RCW 9A.36.031(1)(d). Id. Examining the dictionary definition of "likely," the Court held that "[o]nly assaults perpetrated with an object likely to produce harm by its nature or by circumstances fall within the subsection's purview." Id.

Moreover, the Court found a further limitation. Noting that the more general words "instrument" and "thing" followed the more specific word "weapon" in the statute, the Court construed the general words

according to the specific. Id. at 699-700. Thus, "an 'instrument or thing likely to produce bodily harm' under RCW 9A.36.031(1)(d) must be similar to a weapon[,]" meaning "an instrument of offensive or defensive combat: something to fight with." Id. at 700 (citing Webster's, supra, at 2589).

Regarding the circumstances in Marohl's case, the Court ruled:

> Where the defendant causes the victim to impact the floor and makes no effort to proactively use the floor to injure the victim, the defendant has not used the floor like a weapon because he had not used it as an "instrument of . . . combat" or "something to fight with." The language of RCW 9A.36.031(1)(d) does not include the casino floor within the meaning of instrument or thing because, under the circumstances of this case, it was not likely to produce harm and it was not used as a weapon.

Id. at 700.

The Supreme Court noted its decision was consistent with that from some other jurisdictions, including cases where the defendant repeatedly struck the victim's head against the pavement. Id. at 700 n.3 (citing cases from Florida and Louisiana). The Court also distinguished decisions from jurisdictions holding that a stationary object could be a weapon. First, in those cases, the defendant "took hold of the victim's head and repeatedly struck it against the ground." Id. at 702. Second, there were key distinctions in the language of the foreign statutes, evincing a broader intent in those states to elevate assaults involving injuries

sustained on a stationary object. Id.

A similar result was reached by Division Three in State v. Shepard, 167 Wn. App. 887, 275 P.3d 654 (2012). There, Shepard pushed his ex-girlfriend twice which caused her to strike several pieces of furniture, and caused bruising to her face, head, and body. Shepard was charged with third degree assault requiring the State to prove that Shepard, acting with criminal negligence, caused "bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." Shepard, 167 Wn. App. at 889 (quoting RCW 9A.36.031(1)(d)).

Relying on Marohl, the Court of Appeals noted that while Shepard "brutally" pushed his ex-girlfriend, he did not pick up any of the furniture "or any other object or instrumentality" and deliberately beat his ex-girlfriend against it or otherwise strike her with it. Id. at 890. The Court of Appeals therefore concluded the evidence was insufficient to support the conviction for third degree assault because the furniture had to be excluded from the definition of "instrument or thing likely to produce bodily harm". Id.

Marohl and Shepard control the outcome here. While the drywall which fell on McPherson is a "thing" that could be an "instrument," it does not qualify under Washington's assault statute as an "instrument or thing likely to produce bodily harm" because drywall is a stationary object

that is not similar to a weapon; i.e., it is not for combat or fighting. As in Marohl and Shepard, here Timmons made no effort to proactively use the drywall to injure McPherson. To be sure, the facts of this case are even more attenuated then what transpired in Marohl and Shepard. Here Timmons was not even involved in a struggle with McPherson prior to the drywall striking his head. Therefore, the evidence is insufficient to sustain Timmons's conviction for third degree assault. This Court should reverse and vacate Timmons third degree assault conviction. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (insufficient evidence requires dismissal with prejudice).

2. THE DISCRETIONARY LFOs AND DNA FEE IMPOSED BY THE TRIAL COURT SHOULD BE STRICKEN BECAUSE TIMMONS WAS INDIGENT AT THE TIME OF SENTENCING.

Timmons is indigent under the applicable statutory criteria. Therefore, the $200 criminal filing fee, $250 jury demand fee, and $100 DV fee, all of which are discretionary, should be stricken from Timmons' judgment and sentence under the recent Ramirez decision.

In Ramirez, the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and

applies prospectively to cases pending on appeal. Ramirez, 426 P.3d at 718, 721-23.

HB 1783 amended "the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is *indigent at the time of sentencing* as defined in RCW 10.101.010(3)(a) through (c)." Ramirez, 426 P.3d at 721 (citing LAWS OF 2018, ch. 269, § 6(3)) (emphasis added); see also RCW 10.64.015 ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).").

HB 1783 "also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the $200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17." Ramirez, 426 P.3d at 722. Thus, HB 1783 establishes that the $200 criminal filing fee is no longer mandatory if the defendant is indigent. Accordingly, the Ramirez court struck the fee due to indigency. Ramirez, 426 P.3d at 723.

Although not explicitly addressed by Ramirez, the jury fee statute, RCW 10.46.190, was also amended by HB 1783. LAWS OF 2018, ch. 269, § 9. RCW 10.46.190 now reads, "Every person convicted of a crime or held of bail to keep the peace may be liable to all the costs of the

proceedings against him or her, including, when tried by a jury . . . a jury fee as provided for in civil actions for which judgment shall be rendered." LAWS OF 2018, ch. 269, § 9. RCW 10.46.190 was also amended to include the proviso that the "court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." LAWS OF 2018, ch. 269, § 9. Thus, applying Ramirez's reasoning to the jury fee statute, it is clear that RCW 10.46.190 is a discretionary obligation that may not be imposed on an indigent defendant. Cf. Ramirez, 426 P.3d at 722-23.

In Timmons' judgment and sentence, both the criminal filing fee and the jury fee were imposed. CP 188-89. Yet Timmons also qualified for a public defender following a determination of indigency and finding that "Payment for expenses of this appointment is authorized under contract with the Office of Public Defense." CP 205-06. Thus, the record indicates Timmons is indigent under RCW 10.101.010(3). Because HB 1783 applies prospectively to his case and because HB 1783 "conclusively establishes that courts do not have discretion" to impose certain fees against those who are indigent, the sentencing court lacked authority to impose the criminal filing fee and jury fee. Ramirez, 426 P.3d at 723.

Accordingly, the criminal filing fee and jury fee should be stricken from Timmons' judgment and sentence.

Although not explicitly addressed by Ramirez, RCW 10.99.080(1) provides,

> All superior courts . . . may impose a penalty of one hundred dollars, plus an additional fifteen dollars on any person convicted of a crime involving domestic violence; in no case shall a penalty assessment exceed one hundred fifteen dollars on any person convicted of a crime involving domestic violence. The assessment shall be in addition to, and shall not supersede, any other penalty, restitution, fines, or costs provided by law.

(Emphasis added.)

"This [use of 'may' and 'shall' in a statute] indicates that the Legislature intended the two words to have different meanings: 'may' being directory while 'shall' being mandatory. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)) (modification of quote by Krall).

RCW 10.99.080(1) states a court "may" impose a DV penalty assessment and therefore constitutes a discretionary LFO. Id. HB 1783 amended the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Laws of 2018, ch. 269, § 6(3). Because the DV penalty assessment is a discretionary LFO, and because

Timmons is indigent, under Ramirez it too should be stricken from his judgment and sentence.

Finally, this Court should also strike the DNA fee under House Bill 1783 and Ramirez. RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was amended under House Bill 1783.

The statute now provides that

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*

RCW 43.43.7541 (emphasis added); Laws of 2018, ch. 269, § 18.

Timmons has prior criminal history as set forth in the judgement and sentence. CP 194-95. Clearly, the State has previously collected his DNA. See State v. Maling, ___ Wn. App. ___, ___ P.3d ___, 2018 WL 6630313 (December 18, 2018), *3 (striking $100 DNA fee based on Maling's indigence and because "Mr. Maling's lengthy felony record indicates a DNA fee has previously been collected."). Because Timmons's case is not yet final, the new statute applies. Ramirez, 426 P.3d at 718, 721-23. As a result, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. Thus, the DNA fee should also be stricken.

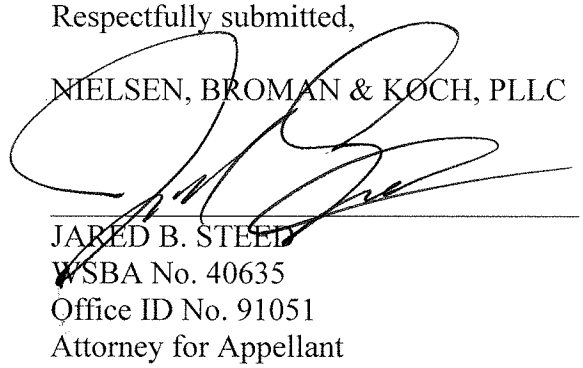
D. CONCLUSION

For the reasons stated, Timmons conviction for third degree assault must be reversed and dismissed due to insufficient evidence. At the very least, discretionary LFOs imposed in the judgment and sentence must be stricken based on indigency.

DATED this 14th day of January, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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