

FILED

SEP 29 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

28927-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES A. MOORE, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

---

APPELLANT'S BRIEF

---

Julia A. Dooris  
Attorney for Appellant

GEMBERLING & DOORIS, P.S.  
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(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence exists to support both alternative means of vehicular assault.
2. The trial court erred by ordering restitution.

B. ISSUES

1. Where insufficient evidence exists for both alternative means, does the court err by entering a conviction?
2. Does the trial court err by ordering restitution when the State fails to introduce any evidence other than a statement from the victim of amounts paid?

C. STATEMENT OF THE CASE

On March 28, 2008, James, A. Moore, a 28-year-old, was out with his friends and his girlfriend Erika Brooks. (RP 335) Over the course of 4-5 hours, he estimated he had 3-4 drinks. (RP 335) As he drove Ms. Brooks home, he unsuccessfully tried to negotiate a turn in the road and was involved in a crash that rolled the car and damaged a nearby house. (RP 285-86; 307)

A blood sample that was tested twice indicated that Mr. Moore's blood alcohol level was .097 and .099. (RP 189) Mr. Moore was charged with vehicular assault. (CP 215)

The Information charged:

On or about March 26, 2008, in the State of Washington, you operated or drove a motor vehicle and within two hours after driving, you had an alcohol concentration of 0.08 or higher as shown by analysis of your breath or blood; and/or while you were under the influence of or affected by intoxicating liquor or any drug; and/or while you were under the combined influence of or affected by intoxicating liquor and any drug; and/or you operated or drove a motor vehicle in a reckless manner, and this caused substantial bodily harm to another, Erika L. Brooks

(CP 215)

During trial, Yakima County Sheriff Deputy Justin Mallonee testified that on the night of the accident, Mr. Moore admitted that he was upset about the argument with his girlfriend, and "hit the gas and missed the corner . . . ." (RP 138) Yakima County Reserve Deputy Sheriff Jeff Nelson testified, over objection, that Mr. Moore told Deputy Mallonee that he "accelerated, smashed the gas, lost control as he was coming up Crusher Canyon around the corner, which resulted in the collision." (RP 307)

Mr. Moore testified that his car was traveling approximately 40 miles per hour at the time of the collision, and that the posted speed limit

was 35 miles per hour. (RP 339) Mr. Moore also stated that he was unable to remember the actual collision, but he always slows down for that corner. (RP 340) Mr. Moore agreed that given the damage to the house, the car was likely going “pretty fast.” (RP 340) Mr. Moore also testified that he did not clearly remember how fast he was driving, nor whether he braked or not. (RP 348) No skid marks were evident on the roadway. (RP 275)

The to-convict instruction provided two alternative means to convict Mr. Moore of vehicular assault:

To convict the defendant of the crime of Vehicular Assault, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 26, 2008, the defendant operated or drove a vehicle;
- (2) That the defendant's vehicle operation or driving proximately caused substantial bodily harm to another person.
- (3) That at the time the defendant
  - (a) operated or drove the vehicle in a reckless manner; or
  - (b) was under the influence of intoxicating liquor; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that (1), (2) and (4), and either elements (3)(a) or (3)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of

these elements, then it will be your duty to return a verdict of not guilty.

(CP 167)

The instructions defined “reckless” as:

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

(CP 169)

The jury found Mr. Moore guilty. (CP 158) Mr. Moore filed a motion in arrest of judgment, which was denied. (CP 147)

As part of the judgment and sentence, the court ordered Mr. Moore to pay restitution “distributed as follows \$9,396.70 to [Farmers] Insurance and \$1,000.00 to Shannon and/or Edward Tyler subject to modification.”

(CP 26)

During the sentencing hearing, the State informed the court that Shannon’s insurance company had paid \$9,396.70 for repairs to the house. (2/12/10 RP 72) The court stated that it would need documentation from the insurance company to order restitution. (2/12/10 RP 74) The State provided the court with “the victim’s restitution estimate” that indicated Ms. Tyler’s homeowner’s insurance paid \$9,396.70. (2/12/10 RP 75) Over objection, the court ordered Mr. Moore to pay \$9,396.70 in restitution. (2/12/20 RP 77-78)

Mr. Moore appeals.

#### D. ARGUMENT

##### 1. INSUFFICIENT EVIDENCE EXISTS TO SUPPORT BOTH ALTERNATIVE MEANS OF COMMITTING VEHICULAR ASSAULT.

A claim of insufficient evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. *State v. Wilson*, 71 Wn. App. 880, 891, 863 P.2d 116 (1993). In determining whether sufficient evidence supports a conviction, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). Under this standard, we resolve all inferences in favor of the State. *State v. Smith*, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985).

- (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
  - (a) In a reckless manner and causes substantial bodily harm to another; or
  - (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
  - (c) With disregard for the safety of others and causes substantial bodily harm to another.

RCW 46.61.522(1) .

In order to prove vehicular assault, the State was required to show that Mr. Moore either drove in a reckless manner or under the influence of an intoxicant or drug, and that conduct was the proximate cause of another party's serious bodily injury. RCW 46.61.522(1); *State v. Hursh*, 7 Wn. App. 242, 246, 890 P.2d 1066 (1995).

A fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt. Const. art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 607 P.2d 304 (1980). It is well established, however, that when the crime charged can be committed by more than one means, the defendant does not have a right to a unanimous jury determination as to the alleged means used to carry out the charged crime or crimes, should the jury be instructed on more than one of those means. *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). In other words, the right to a unanimous jury verdict includes the right to jury unanimity on the means by which the defendant committed the crime. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

When the State fails to elect between alternative means, instructions that require unanimity on the same means of committing the criminal act are not required if there is substantial evidence supporting

each alternative means presented to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). If the sufficiency of the evidence test is met with respect to each means of committing the crime, the conviction will be affirmed because the court will infer that the jury based its decision on a unanimous finding. *Id.* at 707-08, 881 P.2d 231. Consequently, when reviewing an alternative means case, courts must determine whether any rational trier of fact could find each incident beyond a reasonable doubt. *Id.* at 708.

In this case, the State failed to prove beyond a reasonable doubt the alternative means that Mr. Moore was driving in a rash or heedless manner, indifferent to the consequences. Police officers testified that Mr. Moore said he was fighting with his girlfriend, and hit the gas as he rounded the turn. But the State failed to introduce any evidence that Mr. Moore was in fact accelerating to a dangerous speed, intentionally trying to accelerate out of anger, or to scare his girlfriend. Instead, Mr. Moore gave the only estimate of speed, and he said he was going five miles per hour over the limit, but simply did not make the turn. Mr. Moore also said that he always slowed for that corner, but could not remember if he braked, or any other details leading up to collision, on that night.

Nor does the resulting damage to house indicate, *per se*, that Mr. Moore was driving recklessly. The State failed to introduce evidence that

the turn was constructed in such a way that any driver missing the turn was not simply momentarily distracted, but instead was driving in a heedless, reckless manner. The State did not introduce any expert testimony to establish the speed of the car or at what point it left the roadway. Because the State failed to establish this evidence, insufficient evidence exists to support both means of committing vehicular assault, and the conviction should be dismissed.

2. THE TRIAL COURT ERRED BY ORDERING MR. MOORE TO PAY \$11,396.70 IN RESTITUTION.

“When restitution is ordered, a trial court determining the amount of restitution may either rely on a defendant’s admission or acknowledgment of the amount of restitution or it may determine the amount by a preponderance of evidence.” *State v. Hunsicker*, 129 Wn.2d 554, 558-559, 919 P.2d 79 (1996) *citing State v. Ryan*, 78 Wn. App. 758, 761, 899 P.2d 825 (1995). “If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence.” *State v. Griffith*, 164 Wn.2d 960, 965-966, 195 P.3d 506 (2008) *citing State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

“[T]he power to impose restitution derives entirely from the statute.” *State v. Woods*, 90 Wn. App. 904, 905, 953 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998) *citing State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). In determining the restitution amount, the sentencing court may rely on no more information than the defendant admits or acknowledges through the plea agreement, or that the State proved at trial or the time of sentencing. *State v. Dedonado*, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000) *citing State v. Woods*, 90 Wn. App. at 907. “Where a defendant disputes material facts for purposes of restitution, the sentencing court must either not consider those facts or grant an evidentiary hearing where the State must prove the restitution amount by a preponderance of the evidence.” *Id.*

In this case, the State provided simply the victim’s estimate of her damages. While the court stated it would require documentation, it ultimately decided to award damages based solely upon the victim’s documentation. This does not meet the preponderance of the evidence standard. Mr. Moore did not acknowledge that he owed these sums, nor was any evidence introduced that this amount was in fact a proper expense, directly related to the crime. The restitution award, based upon the victim’s estimate, should be vacated.

E. CONCLUSION

In the absence of sufficient evidence supporting the alternative means of reckless driving resulting in bodily harm of vehicular assault, the court should vacate the conviction.

Additionally, in the absence of a preponderance of evidence reflecting actual amounts expended and proof the expenditures were related to the conviction, the court should vacate the restitution award and remand for an evidentiary hearing.

Dated this 20th day of September, 2010.

GEMBERLING & DOORIS, P.S.

A handwritten signature in black ink, appearing to read "Julia A. Dooris". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the right.

Julia A. Dooris #22907  
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 28927-3-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JAMES A. MOORE,	)	
	)	
Appellant.	)	

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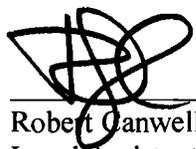
I certify under penalty of perjury under the laws of the State of Washington that on September 20, 2010, I served a copy of Appellant's Brief in this matter by email on the attorney for the respondent:

Kevin Eilmes  
kevin.eilmes@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on September 20, 2010, I mailed copies of Appellant's Brief in this matter to:

James A. Moore  
261-A Dottie Dr.  
Selah, WA 98942

Signed at Tacoma, Washington on September 20, 2010.



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Robert Canwell  
Legal Assistant