

FILED

29545-1-III

AUG 19 2011

COURT OF APPEALS

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY LUCIOUS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
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(509) 477-3662

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The court instructed the jury regarding counts three through six on two alternative means for the commission of second degree assault that were not both supported by the evidence and thereby denied Mr. Lucious his right to trial by unanimous jury.
2. The trial court erred in instructing the jury it had to be unanimous to answer “no” to the special verdicts.
3. The court erred by finding Mr. Lucious had previously been convicted of two “most serious” offenses.
4. The court erred by sentencing Mr. Lucious to life in prison without possibility of release.
5. Mr. Lucious’ life sentence without possibility of release is unconstitutional.

II.

ISSUES PRESENTED

- A. WAS THERE AN ERROR BECAUSE ONE OF TWO ALTERNATIVE MEANS ON THE CHARGE OF

SECOND DEGREE ASSAULT WAS NOT SUPPORTED
WITH SUBSTANTIAL EVIDENCE?

- B. CAN THE DEFENDANT RAISE ISSUES OF SPECIAL
VERDICT FORM STRUCTURE FOR THE FIRST TIME
ON APPEAL?
- C. DOES THIS COURT ISSUE ADVISORY OPINIONS?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's
version of the case.

IV.

ARGUMENT

- A. THE FACT THAT COUNTS 4, 5 AND 6 DID
NOT HAVE SUBSTANTIAL EVIDENCE ON
ONE OF TWO ALTERNATIVE MEANS IS
HARMLESS ERROR BECAUSE THE SPECIAL
VERDICTS MAKE IT VERY CLEAR WHAT
THEORY THE JURY USED.

The defendant argues that the second degree assault charges
involving the defendant were entered in error because the jury instructions

for counts 3, 4, 5 and 6 contained alternative means of committing the crime and there was no evidence supporting one of the alternatives.

When alternative means are charged, "...in order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented." *Smith, supra* at 783.

The defendant acknowledges that a positive special verdict can supply the needed evidence as to which of two alternative means the jury used. Brf. of App. 8. The defendant cites to *State v. Nicholson*, 119 Wn. App. 855, 84 P.3d 877 (2003), *overruled on other grounds by, State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007)).

The court in *State v. Bland*, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), *overruled on other grounds by, State v. Smith*, 159 Wn.2d 778, 782, 154 P.3d 873 (2007), also noted that a special verdict could substitute for missing evidence on one alternative in an alternative means case. This is the situation in this case. The jury returned "yes" verdicts on the special verdict forms for each count of Second Degree Assault. The special verdict question for the jury was whether the defendant was armed with a firearm. Since the first alternative of the second degree assault charges required proof of recklessly inflicting substantial bodily harm, two of the second assault verdicts had substantial evidence on both alternatives as the

victims in counts, 1 and 2 were shot. The four assault counts contested by the defendant are three, four, five and six.

The defendant argues that the “substantial bodily harm” alternative was not proven for count three because while the victim, Marquetta Scales stated she was knocked out by someone other than the defendant, she was not treated at the hospital and there was no testimony that the “knocking out” amounted to substantial bodily harm. Brf. of App. 7. A complete search of the instructions reveals no element of going to a hospital. As for the identity of the person who struck her, she stated: “Mike Mike.” RP 264. Ms. Scales further testified that she saw “Mike Mike” on one side of the car she was in and the defendant on the other side of the car with a gun. RP 265. The defendant was tapping on the window of the car with the gun. RP 266.

This evidence was sufficient for a rational jury to decide that the accomplice [Mike Mike] knocked the victim out. The testimony was that Ms. Scales was “out” to the point that friends carried her to the car where she began to revive. RP 265.

As to counts four, five and six, the State agrees that there was not substantial evidence to support the substantial bodily harm alternative but only the firearm alternative of second degree assault. As was noted previously, the defendant agrees that the special verdict forms supply

proof of what basis the jury used to convict on counts four, five and six. Because of the existence of the special verdict forms providing direct evidence that the jury decided using the deadly weapon alternative, there was no error.

B. THE DEFENDANT CANNOT RAISE THE ISSUE OF DEFECTIVE SPECIAL VERDICT FORMS FOR THE FIRST TIME ON APPEAL.

The defendant attacks the special verdicts claiming that they required jury unanimity to answer “no.” This court will not review this issue for the first time on appeal. *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103, *petition for review filed*, No. 85789-0 (Wash. Mar. 25, 2011).

C. THE DEFENDANT CANNOT ASK THIS COURT TO ISSUE A DECISION BASED ON WHAT THE DEFENDANT WOULD LIKE THE LAW TO BE.

For his third assignment of error, the defendant essentially asks this court for an advisory opinion. The defendant acknowledges that no error has occurred on the issue of life imprisonment with the possibility of parole. “Herein, the trial court made the correct ruling under existing law....” Brf. of App. 20. “However ... that law could change any day, even while this appeal is still pending.

“We do not give advisory opinions.” *State v. Grabinski*, 33 Wn.2d 603, 206 P.2d 1022 (1949).

It is not clear exactly why the defendant would argue an issue that the defendant admits is correct as it is. The argument appears a hope that existing law will change before this case is mandated. Despite the admission that there was no error on the part of the trial court, the defendant still asks for this court to reverse his sentence. This request coming with hopeful/wishful thinking as its basis. This argument should be rejected.

V. CONCLUSION

For the reasons stated above, the convictions of the defendant should be affirmed.

Dated this 19th day of August, 2011.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578

Deputy Prosecuting Attorney
Attorney for Respondent

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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DIVISION III
STATE OF WASHINGTON
By _____

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 29545-1-III
v.)	
)	CERTIFICATE OF MAILING
TIMOTHY LUCIOUS,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on August 19, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

Susan M. Gasch
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PO Box 30339
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and to:

Timothy Lucious
DOC #808658
1313 North 13th Ave.
Walla Walla WA 99362

8/19/2011
(Date)

Spokane, WA
(Place)


(Signature)