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No. 36070-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

CALEB JOEL STANLEY,

Appellant.

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

CORRECTED OPENING BRIEF OF APPELLANT

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* The opening brief was filed on December 20, 2018. This corrected brief was filed to conform the electronic signature on p. 15 to the requirements of GR 30. No substantive changes have been made.

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A. ASSIGNMENTS OF ERROR

1. Caleb Stanley's constitutional right to a unanimous jury verdict was violated because the State did not present sufficient evidence to prove both alternative means of committing assault in the second degree, as charged and presented to the jury.

2. The trial court wrongfully imposed \$600 in discretionary legal financial obligations on Mr. Stanley, an indigent defendant.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In order to safeguard the state constitutional right to a unanimous jury verdict, the State must present sufficient evidence to prove beyond a reasonable doubt each alternative means of committing the crime that it presents to the jury. If sufficient evidence does not support each relied-upon alternative, the conviction must be reversed unless the reviewing court can conclude the jury based its verdict on the alternative for which there was sufficient evidence. Here, the jury was presented with two alternative means of committing assault in the second degree, but each of those alternatives was not supported by sufficient evidence. Must the conviction be reversed where it is impossible to conclude that the jury relied unanimously on a sufficiently proved alternative in reaching its verdict?

2. Under the current statutory framework, discretionary legal financial obligations may not be imposed on indigent defendants such as Mr. Stanley. LAWS OF 2018, ch. 269, § 6(3); RCW 10.01.160(3). Here, the sentencing court imposed a DNA fee, a booking fee, an attorney reimbursement fee, and court costs, despite finding Mr. Stanley indigent. Because these costs cannot be imposed on indigent defendants, the discretionary costs should be stricken.

C. STATEMENT OF THE CASE

One evening during mid-September 2017, Nikia Gabriel was driving his godfather's Escalade through the streets of Colville. RP 141-43. Gabriel's godfather, Jacob Level, had given Gabriel strict instructions about how to treat the car – the younger man was to fill up the Escalade at the gas station, then immediately bring the car home to the apartment building where Gabriel and Level were neighbors. RP 164-66.

Caleb Stanley had known Gabriel and Level for years. RP 145, 174-75. Stanley saw Gabriel filling up the Escalade at the gas station and walked over to him. RP 142. "Nice ride," said Stanley. He asked Gabriel to take him for a ride and to wait for him while Stanley ran into the gas station's convenience store. Id. Gabriel continued to pump gas

until Stanley returned with a few beers. Id. When the gas tank was filled, Stanley cleared the passenger seat of its “stuff,” sat in the car, and asked Gabriel again for a ride. Id.

Gabriel reminded Stanley that he had never agreed to give him a ride, but claimed Stanley grabbed a blue wrench that was sitting amongst the clutter in the passenger area. RP 144. Gabriel recalled Stanley saying that if Gabriel didn’t give him a ride, then Stanley would take his ride. RP 144. Gabriel responded that Stanley should discuss this with the actual owner, and proposed driving to Level’s apartment, where they went. Id.

Gabriel commented that Stanley never asked to go anywhere in particular in the car; rather, Stanley repeatedly asked whether the Escalade was for sale, and how much Level would charge him for the car. RP 145, 160. Gabriel actually thought that Stanley might be “joking or drunk,” considering the way he was acting. RP 145.

Once the men reached the apartment building, Gabriel ran upstairs to inform Level that Stanley was still sitting outside in the car. RP 146, 174. Level came running down the stairs, and an argument ensued. RP 174. Level immediately began shouting at Stanley, using a

variety of colorful phrases. RP 146, 174.¹ Level grabbed Stanley to remove him from the car, and Stanley defended himself by grasping Level's hair. RP 147-48, 175-76. Stanley then sprayed "bear mace" at Level. Id. Gabriel pulled Stanley out of the car and put him into a choke hold. RP 147-48, 175-76. Gabriel and Stanley fell to the ground, and Stanley hit Gabriel in the face with the can of mace. RP 148. Stanley ran from the scene, leaving behind his shoes and the can of mace. RP 148.²

The State charged Stanley with one count of extortion in the first degree, two counts of assault in the second degree, and one count of resisting arrest. CP 1-3.³

At trial, the jury was instructed on two alternative means of committing the crime of assault in the second degree. In the to-convict instructions as to each alleged victim, the jury was informed it could find Stanley guilty if it found beyond a reasonable doubt that, (1)

¹ Level recalled yelling at Stanley, "Get the F- out of my vehicle!" RP 174. Gabriel recalled Level yelling, "You need to get the hell out of my vehicle." RP 146.

² A citizen 911-call later that night claimed that Stanley appeared on porch of his ex-girlfriend's mother, attempting to use her hose, apparently to wash himself off. RP 217-18. Stanley left without incident, but his belt, socks, and the holster from the mace were recovered from this outdoor porch. RP 116.

³ The State alleged that Stanley attempted to prevent officers from arresting him several days later, when he was arrested in his home. CP 4.

Stanley assaulted Nikia Gabriel (or Jacob Level) (a) “With intent to commit extortion and/or theft of a motor vehicle; and/or (b) “With intent to inflict bodily harm administered to Nikia Gabriel (or Jacob Level) a destructive or noxious substance.”⁴ CP 25, 27. The jury was instructed it need not be unanimous as to which alternative was proved beyond a reasonable doubt as long as each juror found that at least one alternative was proved. Id.

The jury found Stanley guilty of second degree assault as to both Gabriel and Level, as well as resisting arrest. CP 50, 52, 54. The jury acquitted Stanley of extortion. CP 49. There was no special verdict form indicating which of the alternative means of committing assault the jury relied upon.

⁴ A copy of the to-convict instruction for Nikia Gabriel is attached as an appendix. Stanley does not challenge his conviction for resisting arrest.

D. ARGUMENT

1. Mr. Stanley’s constitutional right to jury unanimity was violated because each alternative means presented to the jury was not supported by sufficient evidence.

- a. In order to preserve Mr. Stanley’s constitutional right to jury unanimity, the State was required to present evidence sufficient to prove each of the two alternative means beyond a reasonable doubt.

Criminal defendants in Washington have a state constitutional right to a unanimous jury verdict. State v. Woodlyn, 188 Wn.2d 157, 162, 392 P.3d 1062 (2017); State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); Const. art. I, § 21. The right to jury unanimity may include the right to a unanimous determination as to the *means* of committing the crime if the defendant is charged with and the jury is instructed on more than one alternative means. Woodlyn, 188 Wn.2d at 164; Owens, 180 Wn.2d at 95. Express jury unanimity as to each means presented to the jury is required unless the State presents sufficient evidence to prove each means beyond a reasonable doubt. Id.

An alternative means crime is one by which the criminal conduct may be proved in a variety of ways. Owens, 180 Wn.2d at 96. An alternative means statute describes conduct that “var[ies] significantly” among the various alternatives. Id. at 97.

It is well established that assault in the second degree is an alternative means crime. State v. Fuller, 185 Wn.2d 30, 34, 367 P.3d 1057 (2016). “The second degree assault statute, RCW 9A.36.021, articulates a single criminal offense” with “seven separate subsections defining how the offense may be committed.” State v. Gomez, 426 P.3d 787, 796 (2018), quoting Fuller, 184 Wn.2d at 34. Two alternative means of committing the offense are: (d) “with intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance;” or (e) “with intent to commit a felony, assaults another.” RCW 9A.36.021(1)(d), (e).⁵

Here, the jury was instructed on two distinct alternative means of committing assault in the second degree; the jury instructions essentially followed RCW 9A.36.021(1)(d) and (e). The jury was instructed it could find Stanley guilty of assault if it found either that he (1) administered a “destructive or noxious substance” with intent to inflict bodily harm; or that (2) he assaulted the men “with intent to commit a felony.” CP 25, 27. The jury was expressly instructed it

⁵ For clarity, the alternative means will be referred to as (d) “destructive or noxious substance,” and (e) “intent to commit a felony.” Stanley did not challenge below, nor does he on appeal, the sufficiency of mace as a poison or destructive or noxious substance. RCW 9A.36.021(d).

need not be unanimous as to which means it relied upon. Id. Thus, in order to preserve Stanley’s constitutional right to a unanimous jury verdict, the State was required to present sufficient evidence to prove each of these alternatives beyond a reasonable doubt. Woodlyn, 188 Wn.2d at 164; Owens, 180 Wn.2d at 95.

- b. The State did not present sufficient evidence to prove beyond a reasonable doubt that Stanley “intended to commit a felony,” because the State did not prove extortion or theft of a motor vehicle.

One of the alternative means presented to the jury was that Stanley “intended to commit a felony.” RCW 9A.36.021(1)(e). The only felonies the jury was instructed on were extortion and theft of a motor vehicle. CP 25, 27. The jury was further instructed that “Extortion and theft of a motor vehicle are felony crimes.” CP 36 (Instruction No. 21).

In order to safeguard Stanley’s constitutional right to a unanimous jury verdict, the State was therefore required to prove beyond a reasonable doubt all of the essential elements of the “intent to commit a felony” alternative, by proof of the crime of intent to commit extortion or theft of a motor vehicle. CP 25, 27.

The evidence was not sufficient to prove beyond a reasonable doubt that Stanley intended to commit either extortion or theft of a motor vehicle. First, one of the alternative means the jury was instructed to consider was that Stanley acted “with intent to commit extortion.” CP 25 (1)(a). The jury indicated the insufficiency of this alternative with its “not guilty” verdict as to count one. CP 49. Further, regardless of the acquittal, the alternative of extortion (or intent to commit extortion) was not supported by sufficient evidence. See Woodlyn, 188 Wn.2d at 164. There was a lack of evidence presented that Stanley “knowingly obtained or attempted to obtain property or services” by threat, or that any “such threat communicated, directly or indirectly, an intent to cause bodily injury in the future to the person threatened...” CP 24.

Although Gabriel testified that Stanley picked up a wrench after cleaning up the clutter on the passenger seat of the Escalade, Gabriel had no recollection of Stanley holding the wrench during the car ride. RP 146-47. When asked specifically about the wrench, Gabriel said that Stanley “probably set it down,” but that Gabriel “wasn’t really paying attention.” Id. The lack of evidence presented to support the extortion alternative explains the acquittal on count one; it also

indicates that in order to convict Stanley of the assaults, there needed to be sufficient evidence presented of the other alternative means under the “commit a felony” prong. Woodlyn, 188 Wn.2d at 164.

The only other felony the State alleged against Stanley was theft of a motor vehicle, although he was not charged with this – or its attempt – as a separate offense. The jury was instructed that a person commits a theft by wrongfully obtaining or exerting “unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.” CP 39. The State argued in the alternative that Stanley “was in the process of attempting to steal the vehicle when he – when confronted by Mr. Level.” RP 288. The State acknowledged that Stanley was sitting in the Escalade with no keys, waiting to speak with Jacob Level, and that Stanley may have “misunderstood the situation.” RP 283. However, the State urged the jury to find Stanley intended to steal the Escalade, and in furtherance of this attempt, committed the assaults. RP 289 (“Assaulting someone while you are in the mind of committing this crime would be sufficient”).

However, for the reasons discussed regarding the extortion alternative, the evidence at trial showed no indication of unauthorized

control or intent to take the vehicle. Indeed, the State's own witness, Mr. Gabriel, testified that Stanley sat in the passenger seat and asked repeatedly to purchase the car. RP 145, 159. Gabriel conceded that Stanley never asked him to drive anywhere but his original destination, and said he thought Stanley might be intoxicated or joking around. RP 145, 159. No facts were presented to support "unauthorized control" or "intent to deprive."

The State charged Stanley with no other felony; therefore, it was the State's burden to prove each "intent to commit a felony" alternative beyond a reasonable doubt, short of a particularized expression of jury unanimity. Woodlyn, 188 Wn.2d at 164.

The question on review is similar to that raised in Woodlyn: "[I]f the jury is instructed on one or more alternative means that is not supported by sufficient evidence, a 'particularized expression' of jury unanimity as to the supported means is required." 188 Wn.2d at 164. "The purpose of this requirement is to ensure that when a verdict might be based on more than one alternative, the verdict is adequately supported." Id.; Owens, 180 Wn.2d at 95; State v. Wright, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009); see State v. Green, 94 Wn.2d

216, 220, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Because there was insufficient evidence presented that Stanley intended to commit extortion and/or theft of a motor vehicle – which is clear from the acquittal on count 1 – the “intent to commit a felony” alternative means was not supported by sufficient evidence.

- c. The conviction must be reversed the jury may have relied upon the improper alternative in reaching its verdict

“A general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence.” Woodlyn, 188 Wn.2d at 165 (citing State v. Arndt, 87 Wn.2d 374, 377-78, 553 P.2d 1328 (1976)). A reviewing court must reverse a general verdict unless it can “rule out the possibility the jury relied on a charge unsupported by sufficient evidence.” Woodlyn, 188 Wn.2d at 165 (quoting Wright, 165 Wn.2d at 803 n.12 (emphasis original)).

Here, the to-convict instructions expressly informed the jury that it could rely upon both alternative means. CP 25, 27. Without a special verdict form, this Court cannot conclude the jury reached a unanimous verdict on a sufficiently proved alternative; indeed, this Court cannot “rule out the possibility” the jury relied on a charge

unsupported by sufficient evidence. Woodlyn, 188 Wn.2d at 165. Mr. Stanley's assault convictions must be reversed and the case remanded for a new trial on only the noxious substance prong. See id.

2. Applying *State v. Ramirez*, this Court should order \$600.00 in discretionary legal financial obligations imposed against Mr. Stanley stricken.

Since the laws on legal financial obligations changed last year, it is categorically impermissible to impose discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). At this time, the previously mandatory \$200 filing fee cannot be imposed on indigent defendants. Id., ch. 269, § 17(2)(h). It is also improper to impose the \$100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. Id., ch. 269, § 18.

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. State v. Ramirez, 426 P.3d 714, 722-23 (2018). In other words, that the statute was not in effect at time of the trial court's decision to impose legal financial obligations does not matter. Id. Applying the change in the law, our Supreme Court in Ramirez ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee. Id.

Stanley has already been determined to be indigent. RP 341; CP 78-79. The trial court imposed a \$200 fee for court costs (filing fee) and a \$100 DNA fee against him. CP 62-63. The court also imposed an additional \$300 in discretionary court costs, comprised of a \$50 booking fee and \$250 for court-appointed counsel. Id. As in Ramirez, the change the law applies to this case because it is on direct appeal and is not final. Accordingly, this Court should strike the \$600 in discretionary fees. Ramirez, 426 P.3d 714.

Because Stanley's DNA sample was previously collected, the DNA fee is no longer mandatory under RCW 43.43.7541, and is merely discretionary. CP 58. Under the current statute, discretionary fees may not be imposed on indigent defendants such as Stanley. RCW 10.01.160(3). Therefore, the sentencing court lacked the authority to impose the DNA fee, the filing fee, or the court costs, or any other discretionary cost, and they should be stricken.

E. CONCLUSION

Because the jury was instructed on an alternative means that was not supported by sufficient evidence, the assault convictions must be reversed and the case remanded for a new trial. In addition, all discretionary legal financial obligations should be stricken.

Respectfully submitted this 28th day of December, 2018.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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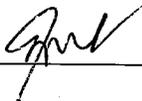
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)	
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)	
v.)	NO. 36070-9-III
)	
CALEB STANLEY,)	
)	
APPELLANT.)	

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