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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36284-1-III

STATE OF WASHINGTON, Respondent,

v.

ALYN JAMES SCHWINGE, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Alyn Schwinge was convicted of two offenses arising from a domestic dispute and his subsequent flight from police. Because the evidence was insufficient to establish that the deputies who signaled Schwinge to stop were in uniform, the conviction for attempting to elude a pursuing police officer must be reversed. Alternatively, erroneously imposed legal financial obligations (“LFOs”) should be stricken.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The evidence at trial was insufficient to establish the essential element that the officer who signaled Schwinge to stop was in uniform.

ASSIGNMENT OF ERROR NO. 2: Due to Schwinge’s lack of assets and indigency, certain LFOs must be stricken from the judgment and sentence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the State’s failure to elicit testimony that the officer who signaled Schwinge to stop was in uniform at the time is fatal to an essential element of attempting to elude.

ISSUE NO. 2: Whether, in light of Schwinge’s indigency, the criminal filing fee and the discretionary domestic violence assessment should be stricken from the judgment and sentence.

IV. STATEMENT OF THE CASE

The State charged Alyn Schwinge with two counts of second degree assault with a domestic violence designation as well as a deadly weapon enhancement, alleging that the acts occurred on or between September 1, 2017 and October 31, 2017. It also charged him with attempting to elude a pursuing police vehicle on or between September 27 and September 28, 2017. CP 37. The matter proceeded to a jury trial.

At trial, Kcarsidy¹ Tyler testified that she had been in a relationship with Schwinge and they had a child together. RP 33. According to Tyler, their relationship ended in late September 2017 because Schwinge believed she was unfaithful. RP 33.

The first altercation Tyler described took place on the night of September 27, 2017. RP 34. She testified that they had been sleeping in a

¹ The spelling of Ms. Tyler’s name is not consistent in the record. No witness list was filed naming her. The verbatim reports of proceeding identify her as “Carsity Tyler,” but the domestic violence no-contact order entered in the case identifies her as “Kcarsidy Rose Tyler.” CP 86. Based on the assumption that the no-contact order, which includes her date of birth and is forwarded to law enforcement, sets forth the correct spelling, this brief will adopt the spelling “Kcarsidy” as set forth in the order.

camp trailer when Schwinge clicked his knife open and jumped on her, holding the knife to her throat and telling her he was going to kill her. RP 35. She described the knife as his “Gerber knife” and said that he broke the skin on her neck slightly. RP 36-37. The testimony is unclear how she freed herself, but eventually Tyler was able to get her phone and called her mother, telling her to come and bring her pistol. RP 39.

After Tyler’s mother arrived from the adjoining property, she went back toward her own house and Tyler followed her, as did Schwinge. RP 40-42. Eventually Schwinge left and Tyler claimed she told her mother about the incident with the knife. RP 42. Tyler’s mother called law enforcement but reported that she did it based upon seeing knife wounds on her daughter. RP 43, 70.

Before police arrived, Schwinge returned to the mother’s property and was filling up water containers. RP 43. When the officer arrived, Schwinge locked himself in a car and took off. RP 44, 72. The officer followed him, along with a second officer who was just arriving. RP 73. Deputy Edward Gunnyon testified that he arrived in response to a disorderly assault call and saw Tyler, her mother, and Schwinge standing by the front door. RP 88. He first contacted the mother, who was whispering and saying she did not want him to hear. RP 89-90. A few

seconds later, Tyler walked up and said Schwinge was assaulting her by sticking a knife up to her throat. RP 90-91.

When Tyler approached Gunnyon, Schwinge walked toward a car that was parked out front. RP 91. Initially, he did not start the car but simply sat in it. RP 92. After Gunnyon concluded his initial conversation with Tyler and her mother, he approached Schwinge in the car. RP 92-93. As he walked up, the car started. RP 93. Gunnyon knocked on the window and told Schwinge to turn off the car and talk to him, but Schwinge answered that he did not want to. RP 93. Gunnyon attempted to open the car door but found that it was locked. RP 93. When he repeated his request that Schwinge turn off the car and talk to him, Schwinge did a brodie² and took off in the car. RP 93-94.

Seeing another deputy arriving, Gunnyon got on the radio and told him to stop the car. RP 76, 94. Schwinge evaded the arriving car by taking an alternate driveway. RP 77, 94. The deputies pursued a short distance, about 100 yards, with lights and sirens on, until Schwinge's car became high centered and he abandoned it. RP 78, 95-96. Due to thick

² Gunnyon did not elaborate further as to his meaning. According to one online source, to "pull a brodie" is to spin a doughnut in a car. <https://www.waywordradio.org/pull-a-brodie/> (last visited Jan. 2., 2019).

brush providing cover, the deputies could not get through and did not locate Schwinge at that time. RP 97.

Both deputies testified about the events that occurred that evening. RP 74, 86. Neither was asked, and neither testified, whether they were wearing uniforms at the time, nor did either describe department practices concerning uniforms that the jury could have inferred were being followed at the time. RP 74-80, 86-105.

The trial testimony concerning the second count of assault was somewhat confusing. Tyler testified that within 2 weeks leading up to the September 27 incident, several other assaults occurred. RP 53. First, she stated Schwinge hit her in the head with the handle of another knife while holding it by the blade. RP 45-46. Another time he was doing something with the knife on her hand while she was saying "Don't," and he caused her to bleed. RP 47. She displayed a scar on her arm that she identified as coming from one of the knives. RP 48-49. The State also introduced a photograph of a scar between the thumb and forefinger of her left hand that Tyler attributed to Schwinge hitting her with one of the knives and cutting her. RP 50. On cross-examination, defense counsel elicited that she did not say anything about Schwinge holding a knife to her throat in the written statement she gave on September 27. RP 56-57. Instead, at

that time, she said that he was running the blade up and down her arm. RP 59.

During a break in the State's case, the trial court inquired whether anyone would be requesting a *Petrich* instruction in light of the testimony. RP 82-83. The State indicated that it could offer one. RP 83. However, no unanimity instruction was ultimately proffered, and the defense did not object or except to the failure to give a unanimity instruction. CP 45-68, RP 111-22. However, in closing, the State elected to rely upon the cut to Tyler's arm to establish the first count of assault and on the September 27 incident when she alleged he held a knife to her throat to establish count 2. RP 146-47.

The jury acquitted Schwinge on the second count of assault but convicted of the first count as well as attempting to elude a police officer. RP 168, CP 68-70. It found that he used a deadly weapon and that he and Tyler belonged to the same family or household. RP 168, CP 71-72.

At sentencing, the State asserted that Schwinge had an offender score of "2" based upon a prior theft conviction from Oregon. RP 170-71. Acknowledging that the offenses were not legally comparable, the State alleged that the Oregon conviction was factually comparable to a Washington conviction for first degree theft. RP 170. The trial court

found the offenses factually comparable based upon the statement in the plea of guilty that “on or about November 8, 2007 I unlawfully knowingly committed theft of tools (inaudible) value of \$20,000 or more.” RP 173. Accordingly, it found that Schwinge’s standard range on the assault charge was 12+ to 14 months, and the standard range on the attempting to elude charge was 2-5 months. RP 173, CP 77.

The court imposed a high end sentence of 14 months on count 1 and added 12 months for the deadly weapon enhancement. CP 78. The court did not inquire into Schwinge’s assets and debts or his education and employment history, but Schwinge volunteered in allocution that he had a “lot of job opportunities” and hoped to be able to get back to work. RP 172. The court also made no express findings as to Schwinge’s ability to pay legal financial obligations (“LFOs”) but it imposed a \$100 domestic violence assessment and a \$200 criminal filing fee in addition to a \$500 victim assessment and a \$100 DNA collection fee. CP 80. On the next day, the court found Schwinge to be indigent for appeal purposes based upon an affidavit declaring that he had no income in the past 12 months, had \$5000 in debt, and supported 3 dependent children. CP 91, 92-93.

Schwinge now appeals. CP 94.

V. ARGUMENT

One error requires reversal of Schwinge's attempting to elude conviction and one error affects the sentence. Because the State failed to elicit any evidence at trial that the officers involved in the pursuit of Schwinge's car were uniformed, the evidence is insufficient to establish an essential element of the charge. As to the sentence, the trial court erred in imposing the criminal filing fee and the discretionary domestic violence assessment when Schwinge was indigent and the court did not inquire in to the required factors to determine whether Schwinge had the ability to pay them.

1. Insufficient evidence supports the conviction for attempting to elude a pursuing police vehicle because the State failed to elicit any evidence that the deputies involved were in uniform.

The Due Process clause prohibits a conviction without proof of all essential elements of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). If the State fails to present sufficient evidence to support a conviction at trial, double jeopardy prohibits retrial. *Burks v. U.S.*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

In a challenge to the sufficiency of the evidence, the reviewing court considers all of the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). Circumstantial evidence is as reliable as direct evidence and the reviewing court defers to the trier of fact on questions of credibility, resolving conflicting evidence, and persuasiveness. *State v. A.T.P.-R.*, 132 Wn. App. 181, 184-85, 130 P.3d 877 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter. *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n*, 151 Wn. App. 788, 807, 214 P.3d 938 (2009), *affirmed on other grounds*, 173 Wn.2d 608, 268 P.3d 929 (2012).

To prove Schwinge attempted to elude a pursuing police vehicle, the State was required to prove that he was given a visual or audible signal to stop the vehicle by a uniformed officer. RCW 46.61.024(1); *State v. Hudson*, 85 Wn. App. 401, 403, 932 P.2d 714 (1997); *State v. Fussell*, 84 Wn. App. 126, 925 P.2d 642 (1996). The requirement that the officer be uniformed is mandatory. *Hudson*, 85 Wn. App. at 403.

Hudson and *Fussell* control the outcome in this case. In *Fussell*, a Division III case, no person testified that either of the sheriff's deputies

involved were in uniform. 84 Wn. App. at 127. There, the State presented proof that the deputies were in a marked patrol car, that they activated the car's overhead lights, and that the defendant realized the deputies were law enforcement officers. *Id.* at 128-29. The *Fussell* court held that the evidence was insufficient to infer beyond a reasonable doubt that either deputy was in uniform. *Id.* Similarly, in *Hudson*, Division I followed *Fussell* and held that evidence that officers in a marked patrol vehicle activated their lights and sirens was insufficient to establish that the officers were in uniform. 85 Wn. App. at 404-05.

Here, the State's failure to elicit testimony that either deputy involved was in uniform was insufficient to establish an essential element of the charge under *Hudson* and *Fussell*. According, the attempting to elude conviction must be reversed and dismissed, and the case remanded for resentencing. *Hudson*, 85 Wn. App. at 405.

2. The criminal filing fee and the domestic violence assessment should be stricken from the judgment and sentence due to Schwinge's indigency.

Trial courts may not impose discretionary legal financial obligations unless a defendant has the likely present or future ability to pay them. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344

P.3d 680 (2015). To make this determination, the trial court must make an individualized inquiry into a defendant's ability to pay discretionary LFOs before imposing them, and the inquiry must, at a minimum, consider the effects of incarceration and other debts, as well as whether the defendant meets the GR 34 standard for indigency. *Blazina*, 182 Wn.2d at 838-39.

Recently-enacted House Bill 1783 applies to Schwinge's case because it became effective while his appeal was pending. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Under House Bill 1783, trial courts may not impose the \$200 criminal filing fee on defendants who are indigent under RCW 10.101.010(3)(a)-(c). *Ramirez*, 191 Wn.2d at 747; RCW 36.18.020(2)(h).

Here, the record reflects that Schwinge earned no income in the twelve months prior to his conviction. CP 91. This places him below 125% of the federally established poverty level for 2008 and renders him indigent within the meaning of RCW 10.101.010(3)(c). Accordingly, his lack of income prohibits imposition of the criminal filing fee under House Bill 1783.

Additionally, the \$100 domestic violence assessment, authorized under RCW 10.99.080, is discretionary. The statute provides that the court "may" impose the assessment but does not require it. RCW

10.99.080(1); *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) (legislative use of word “may” is directory while “shall” is mandatory). As a discretionary LFO, it may not be imposed without an inquiry and finding that the defendant has the present or likely future ability to pay it. *Blazina*, 132 Wn.2d at 838; *Ramirez*, 191 Wn.2d at 738-39.

Here, the trial court imposed the domestic violence assessment without finding Schwinge had the ability to pay it or conducting an adequate inquiry in his ability to pay it. CP 80-81; RP 172-73; *Ramirez*, 192 Wn.2d at 744 (describing requirements of adequate *Blazina* inquiry). Imposition of discretionary LFOs without an individualized inquiry is an abuse of the court’s discretion. *Ramirez*, 192 Wn.2d at 741. The trial court here did not inquire into Schwinge’s present employment and past work experience, income, assets and other financial resources, monthly expenses, or other debts. *See id.* at 744. Accordingly, the inquiry was insufficient to support the assessment and it should be stricken.

3. Appellate costs should not be imposed if Schwinge does not prevail on appeal.

Pursuant to this court’s General Court Order dated June 10, 2016 and RAP 14.2, appellate costs should not be imposed herein. Schwinge’s

report as to continued indigency is filed contemporaneously with this brief. He was previously found indigent for appeal, and the presumption of indigency continues throughout. RAP 15.2(f). He has fully complied with the General Order and remains unable to pay, having few assets, nominal income, and substantial debt, and he was receiving public assistance before his imprisonment. A cost award is, therefore, inappropriate.

VI. CONCLUSION

For the foregoing reasons, Schwinge respectfully request that the court REVERSE and DISMISS the conviction for attempting to elude a pursuing police officer and REMAND the case for resentencing; or, in the alternative, to STRIKE the \$200 criminal filing fee and the \$100 domestic violence assessment from the judgment and sentence.

RESPECTFULLY SUBMITTED this 3 day of January, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhardt", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 3 day of January, 2019 in Kennewick, Washington.



Andrea Burkhart

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