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NO. 37242-1-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

EDWARD CRUZ,

Appellant.

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

The Honorable Carrie Runge, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There is insufficient evidence to sustain appellant Edward Cruz's conviction for third degree assault of a health care provider.

2a. The trial court erroneously ordered community supervision fees in the judgment and sentence, contrary to the court's stated intent at sentencing.

2b. The judgment and sentence fails to specify legal financial obligations (LFOs) may not be satisfied by supplemental security income.

Issues Pertaining to Assignments of Error

1. Must Cruz's conviction for third degree assault of a health care provider be dismissed for insufficient evidence, where the prosecution failed to prove the essential element that the complaining witness was a health care provide, as defined by RCW 9A.36.031(1)(i)?

2. Is remand necessary for the trial court to correct two clerical errors related to LFOs in the judgment and sentence?

B. STATEMENT OF THE CASE

Richland police responded to Columbia Park on July 3, 2019, in the mid-afternoon. 1RP 9.¹ They had received reports that a man had entered the river and disappeared. 1RP 9. They searched the shoreline and found Cruz's pants with his identification. 1RP 9-10. The police requested help from dive rescue and the Richland Fire Department. 1RP 10.

Richland firefighter Chris Willette, among others, responded to the water rescue call. 2RP 3-4. At Cruz's bench trial, Willette agreed he was a "certified emergency medical technician" (EMT) and his certification was valid on July 3, 2019. 2RP 3. He did not specify the title or statute under which he was certified, or that he was certified in Washington, specifically. See 2RP 3-8.

Responders eventually spotted Cruz on the far side of the river. 1RP 10; 2RP 4. They were transported across to Cruz in a civilian boat. 1RP 11. Willette and Officer Erik Noren both noted Cruz was intoxicated and did not want to get in the boat.

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – October 7 & December 10, 2019; 2RP – October 8, 2019.

1RP 11, 13; 2RP 4-5. They eventually coaxed Cruz into the boat and took him back across the river. 1RP 11.

Back at Columbia Park, EMTs were waiting in an ambulance to do a health and welfare check on Cruz. 1RP 12. Cruz was not in any trouble at that point. 1RP 12. As the group walked to the ambulance, Cruz shoved Willette from behind “completely out of the blue.” 1RP 13; see also 2RP 5. Willette fell to the dock and dropped his rope rescue bag in the water. 1RP 6. Willette was uninjured. 2RP 6.

Police arrested Cruz at the scene. 1RP 14. The prosecution charged Cruz with third degree assault of a “nurse, physician, or health care provider who was performing his nursing or health care duties at the time of the assault,” pursuant to RCW 9A.36.031(1)(i). CP 1.

At Cruz’s bench trial, defense counsel argued in closing that the prosecution failed to prove Willette was certified under Title 18 RCW, as required by case law and the third degree assault statute. 2RP 9. The prosecution claimed in rebuttal, “he certified that he is a certified emergency medical technician by the State of Washington,” asserting “we looked at it, pulled his

certification so that's why it was charged under this statute.”
2RP 9. But no certification was presented at trial. 2RP 8.

The trial court found Cruz guilty. 2RP 10-11. The court acknowledged the third degree assault statute requires proof the assaulted health care provider “is certified under RCW 18.71 or 18.73.” 2RP 10. But the court believed the prosecution established this through Willette’s testimony that he was certified as an EMT on the relevant date and he responded to a water rescue in Benton County. 2RP 10.

The court sentenced Cruz to 9 months in confinement—the bottom of the standard range—and 12 months of community custody. 1RP 27; CP 8-9. The court stated its intent at sentencing to waive all discretionary LFOs. 1RP 27-28. Cruz timely appealed. CP 31.

C. ARGUMENT

1. There is insufficient evidence to sustain Cruz’s conviction for third degree assault of a health care provider, necessitating dismissal with prejudice.

The prosecution failed to prove Cruz assaulted a health care provider, as defined by RCW 9A.36.031(1)(i), an essential element of the charged third degree assault. Where there is

insufficient evidence to sustain Cruz's conviction, it must be reversed and the charge dismissed with prejudice.

In every criminal prosecution, due process requires the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing the evidence in the light most favorable to the prosecution. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

“[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” Id. at 16. Such inferences must “logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.” Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911). When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

The prosecution charged Cruz under RCW 9A.36.031(1)(i), third degree assault of a nurse, physician, or healthcare provider. CP 1, 6. RCW 9A.36.031(1)(i) specifies: “For purposes of this subsection: . . . ‘health care provider’ means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.” “The victim’s status as a health care provider is an essential element of the crime.” State v. Gray, 124 Wn. App. 322, 325, 102 P.3d 814 (2005).

In Gray, Gray was convicted of third degree assault of a health care provider. 124 Wn. App. at 324. The prosecution alleged Gray bit a nursing assistant’s hand while Gray was a patient in the intensive care unit. Id. This Court held the prosecution failed to prove the nursing assistant was a health care provider as defined by RCW 9A.36.031(1)(i).² Id. at 324-25.

The nursing assistant in Gray testified she was certified by the State of Washington. Id. at 325. But, this Court explained,

² At the time, the relevant provision was codified at RCW 9A.36.031(1)(h). It was recodified at subsection (1)(i) in 2005. Laws of 2005, ch. 458, § 1.

there was no testimony she was certified under Title 18 RCW. Id. The prosecution produced no testimony on the statutory scheme under which she was certified. Id. Nor was there any evidence the hospital was licensed under chapter 70.41 RCW. Id. This Court concluded, under the circumstances, “the State failed to establish by any evidence the essential element of the crime charged that the victim was a health care provider under the charging statute.” Id.

Willette’s testimony regarding his status as an EMT is nearly identical to the deficient testimony in Gray. Willette testified he is a “Firefighter/EMT with the City of Richland.” 2RP 3. He agreed he was a “certified emergency medical technician” and that certification was valid on the date in question. 2RP 3. The prosecution introduced no other evidence regarding Willette’s certification. 2RP 3-8 (Willette’s testimony); see also 1RP 10 (Officer Noren, “You would have to clarify with him. I don’t know any certifications.”).

Gray holds evidence only that the health care provider is “certified” in insufficient to meet the statutory definition. Like in Gray, Willette did not testify he was certified or regulated under

Title 18 RCW, or any other statutory scheme. Nor did he even testify he was certified by the State of Washington, as the nursing assistant did in Gray. It is not a given that a “certified” EMT is certified under Title 18 RCW. See RCW 18.73.030(12) (defining an EMT as a person authorized to render emergency medical care pursuant to 18.73.081, but also as a person supervised by an approved medical program director under RCW 35.21.930). As a decision of this Court, Gray controls here.

In rebuttal argument, the prosecution claimed, “we looked at it, pulled his certification so that’s why it was charged under this statute.” 2RP 9. But the prosecution’s argument is not evidence. In fact, it is misconduct for the prosecution to refer to “facts” outside the record. See, e.g., State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) (“[A] prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.”); State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (“Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record.”). No certification was presented at trial and Willette

never testified he was certified under Title 18 RCW. The prosecution's rebuttal argument, unsupported by the record, cannot save its case.

The plain language of the third degree assault statute requires proof that the health care provider is certified or regulated under Title 18 RCW. The prosecution presented no such evidence. The prosecution therefore failed to prove the essential element that Willette was a health care provider as defined by RCW 9A.36.031(1)(i). This Court should reverse Cruz's conviction and remand with instructions to dismiss the charge with prejudice. Hickman, 135 Wn.2d at 99.

2. Alternatively, remand is appropriate for the trial court to correct errors in the judgment and sentence.

Cruz qualified for and was represented by appointed counsel from the time of arraignment. CP 33. At sentencing, defense counsel informed the court Cruz was indigent, explaining, "[h]e hasn't worked for some time." 1RP 21. Defense counsel also noted Cruz receives supplemental security income (SSI) for a disability related to post-traumatic stress disorder. 1RP 28; see also CP 30 (Cruz stating the same).

Given Cruz’s indigency, the trial court waived all discretionary LFOs: “I will impose only the mandatory costs to include the \$500 crime victim assessment for a total of \$500 in legal financial obligations.” 1RP 27-28; see also CP 11 (ordering only \$500 victim assessment).

- a. *The judgment and sentence erroneously included community supervision fees.*

Despite the trial court’s stated intent to waive all discretionary fees, the judgment and sentence orders: “While on community custody, the defendant shall: . . . (7) pay supervision fees as determined by [the Department of Corrections (DOC)].” CP 10. RCW 9.94A.703(2) provides, “*unless waived by the court*, as part of any term of community custody, the court shall order an offender to: (d) Pay supervision fees as determined by the department.” (Emphasis added.) Division One of this Court recently held, “[s]ince the supervision fees are waivable by the trial court they are discretionary LFOs.” State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020).

This Court should therefore remand for the community supervision fees to be stricken from the judgment and sentence,

where they are waivable and the trial court did not intend to impose any fees beyond the \$500 victim penalty assessment. Id. (striking supervision fee where trial court appeared to have inadvertently imposed it, finding Dillon indigent and waiving all other discretionary LFOs); see also In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (remand for correction of clerical error is the appropriate remedy).

- b. *The judgment and sentence must also specify the remaining LFOs may not be satisfied by Cruz's supplemental security income.*

The record establishes Cruz receives SSI for a disability. 1RP 28; CP 30. Federal law prohibits social security benefits from being used to satisfy LFOs. 42 U.S.C. § 407(a); State v. Catling, 193 Wn.2d 252, 260, 438 P.3d 1174 (2019). This Court should remand for the trial court to amend to judgment and sentence to specify the \$500 victim penalty assessment may not be satisfied out of any funds subject to 42 U.S.C. § 407(a). Catling, 193 Wn.2d at 266.

D. CONCLUSION

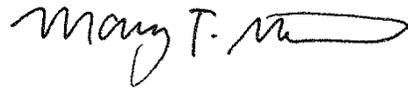
For the reasons discussed above, this Court should reverse Cruz's third degree assault conviction and remand for dismissal of

the charge with prejudice. Alternatively, this Court should remand for correction of the two clerical errors in the judgment and sentence.

DATED this 29th day of June, 2020.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Mary T. Swift", with a stylized flourish at the end.

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