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JUL 12 2011

King County Prosecutor
Appellate Unit

COA NO. 66594-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

DELVONN HECKARD,

Appellant.

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

The Honorable Beth Andrus, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a unanimous jury verdict.

2. The trial court erred in failing to enter written findings and conclusions in compliance with CrR 3.5.

3. The trial court erred in failing to enter written findings and conclusions in compliance with CrR 3.6.

Issues Pertaining to Assignments of Error

1. Was appellant's right to jury unanimity violated where there was insufficient evidence to prove an alternative means of committing second degree burglary?

2. Did the court err in failing to enter written findings of fact and conclusions of law following a hearing under CrR 3.5 and 3.6?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Delvonn¹ Heckard with second degree burglary, alleging he and Shawn Hall "on or about April 5, 2010, did enter and remain unlawfully in a building . . . with intent to commit a crime against a person or property therein[.]" CP 1. A jury returned a general verdict of guilty. CP 45. The court imposed a prison-based Special Drug Offender

¹ Mr. Heckard spells his first name this way. RP 293, 323.

Sentencing Alternative of 29.75 months confinement followed by an equal term of community custody. CP 140. This appeal follows. CP 146.

2. Trial

On the evening of April 5, 2010, Nate Mottle, a tenant in an apartment building located in the Capitol Hill area of Seattle, heard loud noises coming from the downstairs laundry room. RP² 215, 217-18. The laundry room was accessible through a separate entrance from the outside of the building. RP 165-66, 216, 234. Mottle went to the laundry room and noticed a sign taped to the door that read "Out of Order." RP 219. The laundry room door, which was normally locked, would not open with a key. RP 216-17, 219-20. Mottle opened it with his shoulder. 219-20. Upon entering, he saw water everywhere and an overturned washing machine. RP 220.

Mottle also saw two men, later identified as Shawn Hall and Heckard, inside the laundry room. RP 220. Heckard was near the door while Hall (described as the "white guy") was in a smaller storage room located within the laundry room. RP 220-21. The storage room was normally locked. RP 221.

² The verbatim report of proceedings is referenced as follows: RP (two consecutively paginated volumes) - 11/9/10, 11/10/10, 11/15/10, 11/16/10 and 1/14/11.

Mottle asked what they were doing. RP 221. Heckard said someone had given them permission to fix the machine. RP 221-22. Mottle left the room and called the landlord. RP 222. Hall and Heckard remained inside. RP 224-25. The landlord told Mottle over the phone that he had not given permission for anyone to work in the laundry room. RP 223. Mottle heard more banging noises in the laundry room as he waited for the landlord to arrive. RP 225-26.

Responding to Mottle's call, Thomas McPherson, the apartment building manager, looked inside the laundry room and saw two people bending over the ground. RP 254. Neither Heckard nor Hall said anything to McPherson. RP 256. McPherson closed the door and called 911. RP 255.

No tenant had requested maintenance for the laundry room and McPherson was unaware of any maintenance order placed by anyone else. RP 248, 260. McPherson had lost his keys two weeks earlier. RP 252.

Heckard and Hall emerged from the room shortly after cracking the door open to look outside. RP 226-27. Mottle walked forward and told them to wait because police had been called. RP 227. Mottle, who worked as a Westlake Center security guard at the time, drew his gun when the men continued to walk toward him. RP 217, 227-28, 233-35. Heckard then pulled up his over-the-shoulder bag and said in a nervous

voice "no need for that, I'm packing too." RP 227-28, 230. Mottle saw Heckard reach into the bag as if to pull something out. RP 229. Mottle assumed he had a weapon but did not see one. RP 237. Heckard did not reach into his pocket. RP 238. After Mottle chambered his gun, the two men hesitated and then kept going up the stairs from the laundry room. RP 227, 230. Neither Heckard nor Hall acted with a sense of urgency after being told police had been called. RP 239.

McPherson confronted the men and asked what they were doing. RP 256. Heckard replied they were paid to fix a washing machine. RP 257. When Heckard showed him the keys, McPherson grabbed them upon recognizing them as the ones he had lost earlier. RP 257-58. Heckard and Hall calmly stood in front of the building until police showed up. RP 227, 239.

Seattle police officers Hairston and Jones arrived. RP 152-55. Hairston asked Heckard if he had any weapons. RP 160. Heckard responded he had a BB or pellet gun in his back pocket. RP 160-61. Hairston retrieved a BB gun as well as a kitchen steak knife from Heckard's pocket. RP 161, 196. The BB gun was made of plastic and looked similar to a real gun. RP 180. Heckard said he received it from a nephew because someone was after him. RP 201. There were no BB's in the magazine or gun. RP 179, 184-85.

Hairston also found a crack pipe on Heckard. RP 189-90, 203. She maintained Heckard did not appear to be under the influence of drugs. RP 203. When Hairston asked what happened, Heckard said a person who lived in the apartment building named "Richard" had asked him to clean up the laundry room and fix a leak for \$50. RP 162-63. He was going to give a portion of that money to Hall. RP 162. There was no tenant named Richard in the building. RP 197-98.

A search of Heckard's person turned up \$8.50 in quarters, one penny, and 13 one-dollar bills. RP 164. Hall had \$6.50 in quarters in his pocket. RP 270. A sign on the laundry room door that read "Out of order, sorry" was written in black marker and taped to the door with black electrical tape. RP 166, 168-69. A black marker and electrical tape were found in Hall's backpack. RP 176, 191, 270.

Heckard denied to Hairston that he took anything from the laundry room. RP 204. When informed he was being arrested for burglary, Heckard said "but I have keys." RP 181.

As part of the investigation, Hairston saw a substantial amount of water on the laundry room floor and water dripping from the ceiling. RP 166-67. The washer was flipped over and its coin box opened. RP 167, 171. The hot water tube connected to back of washer had been cut. RP 167, 172.

Hairston also saw a pair of garden shears lying on the floor of the laundry room with a bent blade. RP 170, 177. The storage room inside the laundry room held gardening and maintenance supplies. RP 167. There were pry marks on the door lock. RP 167-68, 173-74. One of the officers said the garden shears could be used to pry open a door. RP 274-75. The steak knife found on Heckard could also be used as a pry tool. RP 203.

Heckard, testifying in his own defense, told the jury he was a crack addict. RP 330. On the day in question, Heckard had smoked crack with Hall near the downtown convention center. RP 324. Heckard suggested they go to the apartment building to smoke more because he becomes paranoid about being seen after taking a hit. RP 324. Heckard had found the keys in the laundry room door two weeks earlier. RP 324-25. Heckard had smoked crack there before, both outside the laundry room and inside when the door was ajar. RP 325-26.

Heckard admitted entering the laundry room without permission. RP 340. He smoked crack in the room. RP 330. He was tweaking and could not stay still. RP 330-31. Heckard left to buy more crack. RP 332. When he came back, the laundry room was in shambles, there were quarters on the floor, and water was everywhere. RP 332. Heckard

became angry with Hall. RP 333. He accepted quarters from Hall, knowing they were stolen. RP 338, 340.

According to Heckard, Mottle showed up right after Heckard returned. RP 333. Heckard told him they were hired to work in the room. RP 335-36. He lied because he was afraid of being accused of a crime. RP 336. Heckard did not do anything with the knife he had in his back pocket. RP 328, 332. He had nothing to do with making the sign placed on the door. RP 328-29. When McPherson looked inside the room, Hall said they needed to get out of there. RP 334. Heckard did not make much of an effort to get away because he was tweaking. RP 335. Heckard said he could conceal being high from others. RP 338.

Shawn Hall, who had already pleaded guilty to committing a burglary in connection with this event, testified for the defense. RP 297-98. Hall's plea agreement stated "I did this together with Delvonn Ray Heckard." RP 298. On the stand, Hall implied he did not actually agree with this statement, saying his lawyer wrote it. RP 299, 312.

Hall testified he met Heckard in downtown Seattle and the two got high on crack cocaine. RP 299. They went to the Capitol Hill apartment with the plan to smoke more crack in the laundry room. RP 299-300. After smoking crack in the laundry room, Heckard went outside. RP 301, 321. At that point, Hall broke into the washing machine. RP 301, 315.

He said he did so because he was high on drugs. RP 303. Hall made the "out of order" sign and put it up after Heckard left the room. RP 302-03, 307. Hall cut the hose on the back of the washer and tipped the machine over to get the quarters out. RP 301. He shut the door to the laundry room so that no one could see what was happening. RP 307.

Heckard then came back. RP 301. Heckard was freaking out, upset and angry after discovering what Hall had done. RP 302, 310-11. Hall wedged a tool into the laundry room door to keep it closed because he was "worried somebody might see what was going on." RP 302, 308. Hall gave some quarters from the machine to Heckard. RP 303. Hall was picking up quarters when Mottle, the tenant, came in. RP 310.

C. ARGUMENT

1. VIOLATION OF THE RIGHT TO AN EXPRESSLY UNANIMOUS VERDICT REQUIRES REVERSAL OF THE BURGLARY CONVICTION.

Burglary may be committed by the alternative means of entering or remaining unlawfully with the intent to commit a crime against "property" or with the intent to commit a crime against "a person." There was insufficient evidence to support a finding of intent to commit a crime against a person. As a result, the trial court needed to either instruct the jury that it must reach unanimous agreement as to the means or issue a special verdict form specifying the means relied upon. Reversal of the

conviction is required because in the absence of these measures, there was no particularized expression of jury unanimity on each of the alternative means of proving the offense.

In criminal prosecutions, the accused has a constitutional right to a unanimous jury verdict. U.S. Const., amend. VI; Wash. Const., art. 1, § 22. "This right includes the right to an expressly unanimous *verdict*." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). It is well established a unanimity error amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995), abrogated on other grounds, State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005).

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007); see, e.g., State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) ("RCW 9A.46.110(1)(a) provides alternative means of committing the crime of stalking: intentionally and repeatedly harassing or repeatedly following

another person."); State v. Roche, 75 Wn. App. 500, 511, 878 P.2d 497 (1994) (robbery is an alternative means crime under RCW 9A.56.190: taking property "from the person of another" or "in his presence.").

The crime of burglary may be committed by two alternative means: entering or remaining unlawfully with the intent to commit a crime against (1) "property" or (2) "a person."³ State v. Tresenriter, 101 Wn. App. 486, 490-92, 4 P.3d 145 (2000) (reversal required where the information charged only one means of committing the crime of burglary, i.e., with intent to commit a crime against a person, but failed to set forth the alternative means on which the jury was instructed, i.e., with intent to commit a crime against property).

The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged. Ortega-Martinez, 124 Wn.2d at 707. "If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a

³ RCW 9A.52.030(1) provides "A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling."

unanimous finding as to the means." Id. at 707–08. "[I]f the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." Id. at 708.

The sufficient (substantial) evidence test⁴ is satisfied only if the reviewing court is convinced "a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." In re Detention of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006) (quoting State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)).

Here, the "to convict" instruction for burglary included the element "That the entering or remaining was with intent to commit a crime against a person or property therein[.]" CP 50 (Instruction 9). The "to convict" instruction thus presented the jury with the option of convicting on two alternative means: crime against a person or crime against property. Tresenriter, 101 Wn. App. at 490-92.

There was sufficient evidence to support a finding of guilt that Heckard entered or remained with the intent to commit a crime against "property." There was, however, insufficient evidence to support a

⁴ In conducting alternative means analyses, the terms "substantial evidence" and "sufficient evidence" are used interchangeably. See Ortega-Martinez, 124 Wn.2d at 708 (sufficient evidence). Whatever the label, the test is the same.

finding of guilt on the alternative means that Heckard entered or remained with the intent to commit a crime against "a person."

A person "acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 51. (Instruction 11). "The intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991). Consistent with RCW 9A.52.040, the jury was permitted to infer "A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein." CP 51 (Instruction 12). This non-binding inference did not alter the fact-finding process. State v. Drum, 168 Wn.2d 23, 38, 225 P.3d 237 (2010). The trier of fact considers all evidence on the issue of intent, regardless of whether the inference instruction is given. State v. Brunson, 128 Wn.2d 98, 106, 109-10, 905 P.2d 346 (1995).

Coins were taken from the washing machine. RP 167, 171. Heckard and Hall had a substantial amount of quarters in their possession. RP 164, 270. The only reasonable inference to be drawn from the evidence is that Heckard and Hall entered or remained in the laundry room for the purpose of obtaining the quarters from the washing machine. That

is a crime against property. The laundry room had its own entrance, separate from the entrance to the building where tenants lived. RP 165-66, 216, 234. They did not seek to enter the part of the building where tenants lived. After entering the laundry room, they put a sign on the laundry room door to keep people out. RP 166, 168-69, 219. They were not lying in wait to pounce upon unsuspecting tenants. They sought to avoid interaction with others.

Heckard had an unloaded BB gun and a steak knife in his pocket. RP 161, 179, 184-85, 196. Heckard never displayed a weapon or what appeared to be a weapon when Mottle and the apartment manager looked into the laundry room. RP 237, 256. When confronted by Mottle after they left the laundry room, Heckard implied he had a gun and reached into his bag. RP 227-230. He implied he had a weapon only when Mottle blocked his escape after leaving the premises. RP 217, 227-28, 233-35. The only reasonable inference is that Heckard was trying to effectuate his escape from the property crime that had been committed. Looking at all the evidence in the light most favorable to the State, no rational trier of fact could find beyond a reasonable doubt that Heckard entered or remained in the laundry room with the intent to commit a crime against a person.

In determining whether the right to a unanimous jury verdict has been protected, "[t]he test is whether sufficient evidence exists to support each of the alternative means presented to the jury." State v. Kinchen, 92 Wn. App. 442, 451, 963 P.2d 928 (1998). "If the evidence is insufficient to support any one of the means submitted to the jury, the conviction will be reversed." Kinchen, 92 Wn. App. at 451.

There is insufficient evidence to conclude Heckard committed the crime of burglary based on the alternative means of entering with the intent to commit a crime against a person. There was no jury unanimity instruction on alternative means or a special verdict specifying which of the alternative means the jury found. "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." Kintz, 169 Wn.2d at 552 (citing Ortega-Martinez, 124 Wn.2d at 708). The conviction must be reversed.

2. THE TRIAL COURT ERRED IN FAILING TO ENTER ADEQUATE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5 AND 3.6.

After a hearing to determine the admissibility of a defendant's statements, the trial court must enter written findings of undisputed and disputed facts, conclusions as to the disputed facts, and the conclusion as to whether the statement is admissible along with reasons therefore. CrR

3.5(c). These findings and conclusions are not an empty formality — they are mandatory. State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The same is true of the court's findings and conclusions after an evidentiary hearing on a pretrial suppression motion. CrR 3.6(b); State v. Tagas, 121 Wn. App. 872, 875, 90 P.3d 1088 (2004); State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992). The trial court and the prevailing party share the responsibility to see that appropriate written findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996); State v. Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995).

The trial court held a combined CrR 3.5/3.6 hearing to determine whether Heckard's statements to police were admissible and whether evidence should be suppressed. RP 10-63, 91-111. The court found Heckard's statements admissible and denied the motion to suppress. RP 122-33. The court did not enter written findings of fact and conclusions of law. This is error.

The primary purpose of requiring findings is to allow the appellate court to fully review the questions raised on appeal. State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984). Written findings are essential to permit meaningful and accurate appellate review because the appellate court neither retries factual issues nor substitutes its judgment for that of

the trial court. State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995); State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996).

Equally important, written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." Smith, 68 Wn. App. at 209. Oral findings, no matter how detailed, are not a suitable substitute for the written findings. "A court's oral opinion is not a finding of fact." State v. Hescocock, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time rendered and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (quoting State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). "An appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Head, 136 Wn.2d at 624.

The ordinary remedy for an initial failure to enter written findings and conclusion is remand for proper entry. Id. at 623. Findings and conclusions may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. State v. Hillman, 66 Wn. App. 770, 773-74,

832 P.2d 1369 (1992). Heckard reserves the right to challenge any written findings and conclusions entered after the filing of this brief.

D. CONCLUSION

Heckard requests that this Court reverse the conviction. If this Court declines to reverse, then remand is appropriate for written findings and conclusions to be entered as required by CrR 3.5 and CrR 3.6

DATED this 12th day of July 2011

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66594-4-III
)	
DELVONN HECKARD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF JULY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DELVONN HECKARD
DOC NO. 956810
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 98331

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF JULY, 2011.

x *Patrick Mayovsky*

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