

NO. 69172-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RANDALL WHITE,

Appellant.

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

The Honorable Kimberly Prochnau, Judge

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 evidence was insufficient to support one of the alternative means of committing the offense of unlawful display of a weapon.

Issues Pertaining to Assignments Of Error

1. Was the jury instructed on two alternative means of committing the offense of unlawful display of a weapon?

2. Where the jury was instructed on both alternative means of committing the offense of unlawful display of a weapon was appellant's right to jury unanimity violated where there was insufficient evidence to prove one of the alternative means?

B. STATEMENT OF THE CASE

1. Procedural Facts

On March 29, 2012, the King County Prosecutor charged appellant Randall White with two counts of second degree assault. CP 1-5. Count I alleged White assaulted Ericka Peak with a knife. CP 1. Count II alleged White assaulted Peak by strangulation. CP 1-2. Both counts contained a domestic violence allegation. Id.

On July 9, 2012, an amended information was filed alleging the aggravating factor that White knew Peak was pregnant when he committed the two second degree assaults, and alleging White was armed with a deadly weapon in Count I. CP 25-26.

On July 11, 2012, a second amended information was filed. CP 54-55. The amended information retained Count I as previously alleged but replaced Count II with a fourth degree assault charge. Id.

A jury trial was held. The jury was instructed on second degree assault as charged in Count I, and fourth degree assault as charged in Count II. CP 56-86. At the defense request the jury was also instructed that unlawful display of weapon was a lesser included offense to Count I. RP 391-403; CP 73-75.

The jury acquitted White of the second degree assault charge in Count I but found him guilty of the lesser included offense of unlawful display of a weapon. CP 46, 48. The jury also found White guilty of the fourth degree assault charge alleged in Count II. CP 49. By special verdict the jury found White and Peak were members of the same household when both crimes were committed for purposes of the domestic violence allegations. CP 50-51.

White was sentenced to 364 days on each offense. CP 91-93. The sentences were ordered to run concurrent but were suspended. White was ordered to serve 115 days, and was placed on unsupervised probation. Id.

2. Substantive Facts

Ericka Peak and White lived together. Peak was pregnant with their child. RP 174-174. On March 26, 2012, White was drinking and watching videos in the house he and Peak shared. RP 177. At some point White told Peak he wanted to buy cigarettes and beer with money from Peak's unemployment check. Peak was willing to give White the money but she insisted he pay it back in a few days because she needed the money to pay the rent. RP 178.

Peak testified that an argument ensued over the use of the money from Peaks' check. RP 178. White became agitated and turned up the television's volume. When Peak turned the volume down White started to pull the television off its stand. RP 178. Peak pulled White away from the television, and White hit Peak. White also tried to turn Peak around and in the process his arm went over her face, which obstructed her breathing for a "split second." RP 179.

Because of the altercation Peak told White he needed to leave. She suggested he call his mother or grandmother for a ticket to go back to

Texas. RP 180. White told Peak not to talk about his grandmother. He then spit in her face and slapped her. Id.

Peak called 911. RP 181. White grabbed Peak's phone from her while she was talking to the 911 operator and he left the house on foot with the phone. RP 183. Peak unsuccessfully tried to follow White. As Peak was returning home she ran into Bellevue police officer Curtis McIvor who was responding to Peaks' 911 call. RP 183, 215-217. Peak told McIvor that she and White had been drinking and White hit her, spit in her face, and struck her in the stomach. RP 184, 218. McIvor helped Peak secure the house, and after spending about 45 minutes with Peak he left. RP 186, 221.

A few hours later White returned. RP 193. White knocked on the door and Peak noticed he had calmed down so she let him inside. RP 187. White told Peak he was going to keep the battery to her phone until he got back to Texas and they argued about what she told police. Id.

At some point White went into the kitchen to get something to eat. RP 187, 189. He then began throwing food away. RP 189. Peak said White grabbed a small folding knife he had gotten from his father and used it to rip open food packages. RP 190, 199. White cut himself with the knife so he went into the bathroom to get a cotton ball. RP 190.

When White came out of the bathroom he went into the living room where Peak was sitting. He stood about 2 to 3 feet from her and started to yell at her asking her again what she had told the police. RP 190-193. White still had the knife in his hand but was holding it down by his side. RP 190, 201. He did not threaten Peak with the knife, go at her with the knife, or assault her with the knife. RP 199-203. Nonetheless, Peak was nervous and scared so she told White to put the knife down. RP 191, 193, 201. In response White put the knife on the floor. RP 192, 201. Later, Peak told police White made “gestures” with the knife while they were arguing. RP 314.

While White and Peak argued, someone called police. About 7 police officers responded to the call. McIvor, who had spoken with Peak about the earlier incident, said he looked into the house and saw White crouched down and yelling at Peak. McIvor said he also heard Peak say something about being hit so he and the other officers went inside. RP 223-224. Officer Mathew Trizuto, who was standing next to McIvor, heard yelling from inside the house but he could not make out what anyone inside was saying nor could he see inside the house. RP 267, 271, 281.

When the police went inside the house they saw that White had Peak up against a wall. RP 225, 271. McIvor said he yelled at White to

back away but White did not respond so McIvor tasered White twice. RP 193, 225-227, 224, 287. White stiffened, fell onto a metal coffee table, was kned by Trizuto while on the floor, and eventually handcuffed. 226, 254, 288. Police saw the knife on the floor. RP 250.

White testified that he first came to the area when his was in the Navy and stationed in Bremerton. RP 341-342. When he returned in 2011 he met Peak. RP 343.

White admitted that on the day of the incident he was drinking and became intoxicated. RP 344. When he came back to the house after he left following Peak's 911 call, he knocked on the door and Peak let him inside. RP 344, 358. He and Peak decided he would spend the night and then leave for Texas so they could have a brief separation. RP 345, 359.

White went into the kitchen to get something to eat. While looking through the refrigerator he noticed food that had gone bad. He got his father's knife, which was given to him a few weeks earlier by his stepmother, and used it to open food packages to see if the food had spoiled and needed to be thrown away. RP 345. Peak got angry because she thought White was throwing good food away. RP 345, 347. While opening the packages White cut himself. RP 357.

After dealing with the cut, White went into the living room where Peak was sitting. He still had the knife in his hand. RP 347-348. They

argued and when Peak made a comment about the knife he was still holding he put the knife down on the floor. RP 348, 365. Shortly after he put the knife down police burst through the doors and tasered him. RP 348-349. The next thing he remembered was going to the hospital. Id.

C. ARGUMENT

VIOLATION OF WHITE'S RIGHT TO AN EXPRESSLY UNANIMOUS VERDICT REQUIRES REVERSAL OF THE UNLAWFUL DISPLAY OF A WEAPON CONVICTION.

Under RCW 9.41.270(1), the offense of unlawful display of weapon is committed if a person carries, exhibits, displays or draws a weapon, including a knife, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons. The jury was instructed consistent with the statute. Under both the statute and the instruction there are two alternative means for committing the offense: (1) manifesting an intent to intimidate another and (2) warranting alarm for the safety of other persons. There was sufficient evidence to support the conviction based on the alternative means of warrants alarm for the safety of other persons. There was insufficient evidence to support a finding of the alternative means of manifests an intent to intimidate another.

Because there was insufficient evidence on an alternative means 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 White's unlawful display of a weapon 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.

- a. The Jury Was Instructed On Two Alternative Means To Convict White Of The Crime Of Unlawful Display Of A Weapon.

The jury was instructed on the lesser included offense of unlawful display of a weapon. RCW 9.41.270(1), the unlawful display of a weapon statute, provides:

It shall be unlawful for anyone to carry, exhibit, display or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons. (emphasis added).

The "to convict" instruction required the State to prove, in part, that White "displayed the weapon [a knife] in a manner, under circumstances, and at a time and place that manifested an intent to intimidate another or warranted alarm for the safety of other persons[.]" CP 74 (emphasis added). The "to convict" instruction presented the jury with the option of convicting on two alternative means: (1) manifests an

intent to intimidate another and (2) warrants alarm for the safety of other persons.

"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).

Legislative intent determines whether a statute sets forth alternative means. In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006). There is no bright-line rule. State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). But legislative intent may be determined by considering "(1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; and (4) whether the acts may inhere in the same transaction." State v. Berlin, 133 Wn.2d 541, 552-53, 947 P.2d 700 (1997) (citing State v. Arndt, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976)).

Under the factors identified in Arndt, manifesting an intent to intimidate another and warrants alarm for the safety of other persons are alternative means of committing the crime of unlawful display of a weapon under RCW 9.41.270(1). First, both exist under the same title

(Weapons apparently capable of producing bodily harm--Unlawful carrying or handling"). See, Berlin, 133 Wn.2d at 553 (title test supported alternative means analysis where second degree intentional murder and felony murder under RCW 9A.32.050(1) existed under the same title of "Murder in the Second Degree").

Second, there is a ready connection between displaying a weapon in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or warrants alarm for the safety of other persons. Both means recognize a weapon can be displayed in a way that causes reasonable apprehension, fear, or alarm in another person. State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), affd., 125 Wn.2d 707, 887 P.2d 396 (1995).

Third, the different means are not repugnant to each other. "The varying ways by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other." Arndt, 87 Wn.2d at 383. Displaying a weapon in a manner that manifests an intent to intimidate another does not disprove displaying a weapon that warrants alarm for the safety of other persons or visa versa.

Fourth, prohibited acts inhere in the same transaction when one may simultaneously satisfy the elements of both proposed alternatives. Halgren, 156 Wn.2d at 810. Here, there is no barrier to simultaneously

displaying a weapon in a manner that manifests an intent to intimidate another, and displaying a weapon in a manner that warrants alarm for the safety of other persons.

An analysis of the factors show that displaying a weapon in a manner that manifests an intent to intimidate another and displaying a weapon in a manner that warrants alarm for the safety of other persons are alternative means because they are "two factual alternatives provided by statute." Halgren, 156 Wn.2d at 810. This conclusion accords with other cases where courts have found alternative means in a criminal statute.¹ Moreover Washington courts have implicitly, if not explicitly, recognized the two alternative means of committing the offense. See, State v.

¹ 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."); State v. Holt, 119 Wn. App. 712, 718, 82 P.3d 688 (2004) (under former RCW 9A.41.040(1)(b), "[s]econd degree unlawful possession of a firearm is an alternative means offense committed when a convicted felon (1) owns, (2) possesses, or (3) controls a firearm."), overruled on other grounds, State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005); State v. Nonog, 145 Wn. App. 802, 812-13, 187 P.3d 335 (2008) (crime of interfering with reporting of domestic violence contains three alternative means under RCW 9A.36.150(1)(b): " Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official."), aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010); State v. Strohm, 75 Wn. App. 301, 305, 307, 309, 879 P.2d 962 (1994) (offense of leading organized crime under RCW 9A.82.060(1)(a) may be committed by alternative means of "Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity;" trafficking in stolen property under RCW 9A.82.050(2) can be committed by eight alternative means: "A person who knowingly [1] initiates, [2] organizes, [3] plans, [4] finances, [5] directs, [6] manages, or [7] supervises the theft of property for sale to others, or [8] who knowingly traffics in stolen property[.]").

Hurchalla, 75 Wn. App. 417, 421, 877 P.2d 1293 (1994), overruled on other grounds State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) (“Hurchalla's proposed instruction on the lesser included offense incorporated both means of committing unlawful display of a weapon, i.e., ‘manifests an intent to intimidate’ another and ‘warrants alarm for the safety of other[s].’”) (emphasis added); see also, State v. Baggett, 103 Wn. App. 564, 570, 13 P.3d 659, review denied, 143 Wn.2d 1011 (2001) (“In other words, he believes that the facts limit the State to proving the following offenses, which relate to a single victim: (1) second degree assault, or (2) the unlawful display of a firearm by the alternative means set forth in RCW 9.41.270(1), i.e., by displaying a weapon to intimidate another person.”) (emphasis added).

b. There Is Insufficient Evidence To Support The Alternative Means Of Manifests An Intent To Intimidate Another.

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).

Where, as here, there are no jury unanimity instruction on alternative means or a special verdict specifying which of the alternative means the jury found, a verdict of guilt on a single charge will only be

upheld if sufficient evidence supports each alternative means. State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010). "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 unanimous finding as to the means." Ortega-Martinez, 124 Wn.2d at 707-708. But "if 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 evidence test 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." Halgren, 156 Wn.2d at 811 (quoting State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)).

The evidence in the light most favorable to the State showed that when White returned he went into the kitchen and used a small folding knife to open food packages. RP 190, 199. While opening the packages White cut himself. He went to the bathroom to take care of the cut. He then went into the living room where Peak was sitting still holding the knife. RP 190. White stood over Peaks and started yelling at her while holding the knife to his side. RP 190, 201. Peak told White to put the

knife down because it made her scared and nervous. RP 191-193. In response White set the knife on the floor. RP 192-202. After White set the knife on the floor police came in and subdued White. RP 193, 202.

Under the circumstances the evidence was arguably sufficient to prove White displayed the knife in a manner that warranted alarm for the safety of other persons (Peak). See, State v. Baggett, 103 Wn. App. at 570 (“A defendant can display a weapon in a manner that warrants safety concerns whether one person is present or one hundred persons are present.”); see also, State v. Spencer, 75 Wn. App. 118, 126 n. 7, 876 P.2d 939, review denied, 125 Wn.2d 1015 (1995) (the word “warrants” implies circumstances that would cause alarm in a reasonable person). It was, however, insufficient to show the alternative means of manifests an intent to intimidate another (Peak).

In State v. Maciolek, 101 Wn.2d 259, 676 P.2d 996 (1984), the issue was the constitutionality of the same unlawful display of a weapons statute, and a similar Seattle City Ordinance. Although the issue in Maciolek was different than the issue here, the decision is instructive because in reaching its decision the Maciolek Court interpreted the statute.

Maciolek involved three consolidated cases. In one a doctor refused to give Maciolek a prescription for Percodan. Maciolek became angry and pulled back his jacket to show the doctor he had a handgun. The

doctor was frightened and immediately wrote the prescription. In another juvenile fired his BB gun at two children and took one of their bicycles. In the third case a juvenile got into an argument with a woman and chased her with a knife. Maciolek, 101 Wn.2d at 261-62, 676 P.2d 996.

The Court held, as applied, the manifests an intent to intimidate language of the statute was not unconstitutionally vague because the statute proscribes “the use of a weapon that threatens another” and in each case the conduct fell within the hard core of the statute. Maciolek, 101 Wn.2d at 269. “Clearly, the average person would know what conduct is proscribed by the two enactments: using a weapon to threaten another.” Id. at 265 (emphasis added).

When Peak told White the knife made her nervous and scared he put the knife on the floor. White never lunged at Peak with the knife, threatened her with the knife, pointed the knife at her, or assaulted her with the knife. RP 199-203. And, while police testified Peak told them White made “gestures” with the knife the record is devoid of any evidence of what those gestures were or what Peak meant by “gestures.” On this record it is unclear which alternative means the jury relied on, and the evidence was insufficient to support the verdict on the alternative means of manifesting an intent to intimidate another.

D. CONCLUSION

White's convictions for unlawful display of a weapon must be reversed because sufficient evidence does not support all of the alternative means contained in the "to convict" instruction. Kintz, 169 Wn.2d 537, at 552; Ortega-Martinez, 124 Wn.2d at 708.

DATED this 26 day of February, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 69172-4-1
)	
RANDALL WHITE,)	
)	
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 27TH DAY OF FEBRUARY, 2013, 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 AND/OR EMAIL.

[X] RANDALL WHITE
1203 15TH AVE NE, APT. 304
SEATTLE, WA 98125

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF FEBRUARY, 2013.

x Patrick Mayovsky

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