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JUN 12, 2013

Court of Appeals
Division III
State of Washington

NO.30945-2-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

JORGE ENRIQUE RODRIGUEZ

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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A. COUNTERSTATEMENT OF THE ISSUES

- 1. When a defendant introduces evidence into the record which was not mentioned by the State in their charging document, is that evidence a separate and distinct act, and does it violate the Appellant's right to unanimity?**
- 2. Did the record support the trial court's finding regarding legal financial obligations and does such a finding have any impact on the defendant's rights such that the court need consider striking it?**

B. COUNTERSTATEMENT OF THE CASE

In September of 2011 Diana Houck and Jorge Rodriguez, the Appellant, lived together at 115 North 7th, Pasco. The Appellant owned the house. (RP at 48). Around September 9, 2011, the Appellant was arrested and charged for domestic violence assault. A domestic violence protection order was put into place prohibiting the Appellant from contacting Ms. Houck. The Appellant signed the order (PLF 3).

During this time period the Appellant had a conversation with the protected party where she wanted to bail him out. He told her not to do so. (RP at 54). Instead, a neighbor bailed him out of a jail. (RP at 54). At that time he arranged a civil standby with

Officer Eric Fox. (RP at 19). Officer Fox told the Appellant that if the protected party moved, and if the order did not specify that address, he could then move back in legally. (RP at 22).

On September 25, 2011, Officer Randy Roach responded to a domestic violence call in Pasco, Washington. Officer Roach contacted a woman Ms. Houck, who was very upset. (RP at 13-14.) Following this, Officer Roach proceeded to 115 North 7th Avenue and entered the residence. Inside Officer Roach located the Appellant and placed him under arrest. (RP at 15). Charges were then filed alleging Felony Violation of a No Contact Order by the Appellant. (CP at 76-77). The Defendant was convicted and sentenced for violation of a no contact order. Part of that sentence included fines and fees. (CP at 9-21).

C. RESPONSE TO ARGUMENT

- 1. The Appellant's constitutional right to unanimity was not violated as the additional act mentioned was brought up by the Appellant and constituted a continuing course of conduct with the charged violation.**

The Appellant's constitutional right was not implicated in the present case because the State never attempted to introduce

evidence a multiple instances of conduct. To the extent such evidence came into the record, it represented a continuous course of conduct which did not pose any danger to the Appellant's unanimity rights.

In Washington State, a unanimous jury verdict is required to find a defendant guilty of a criminal act. State v. Stephens, 93 Wash.2d 186, 190, 607 P.2d 304 (1980). Washington courts have indicated that when a case involves multiple distinct criminal acts, "jury unanimity must be protected." State v. Petrich, 101 Wash.2d 566, 572, 683 P.2d 173 (1984). To this end, the Court has articulated a rule in situations where such a danger arises:

[w]here the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident. However, this rule applies only where the State presents evidence of 'several distinct acts.' It does not apply where the evidence indicates a 'continuing course of conduct.'"

State v. Handran, 113 Wash.2d 11, 17, 775 P.2d 453 (1989)

(citations omitted).

As Handran states, such a rule is applied where the "State presents evidence of several distinct acts." Id. The State did not

offer such evidence in the present case. The State offered evidence that the Appellant was found at an address where he was prohibited from being by a domestic violence protection order. At no time did the State offer evidence of additional acts which violated the no contact order by verbally contacting the protected party. Once the State rested, the Appellant took the stand and begin to give his explanation as to why he returned to the prohibited address. During that confusing and contradictory explanation, the Appellant said the protected party had wanted to bail him out after his arrest but that *he told her* not to do so. (RP at 54). He clarified on cross that he had spoken to her around the time of his release (after the NCO had been entered) and told her not to bail him out. (RP at 65).

The remainder of the Appellant's explanation argued that he knew about and respected the no contact order, but thought it did not cover the home where he and the protected party had been residing because the protected party had moved out. (RP 53-56). This explanation is directly contradicted by his casual indications that he had spoken with the protected party after the order was in place. This contradictory evidence was raised by the Appellant.

The Appellant attempts affirmatively introduce evidence, and then argue that such evidence prejudiced him by endangering the jury's unanimity. Attempting to take advantage of your own testimony or error to gain an advantage is addressed by the doctrine of invited error:

Invited error results when a party's own action during trial creates error, which may not thereafter be complained of on appeal... The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take the action that that party later challenges on appeal.

15A KARL B. TEGLAND, WASH.PRAC. § 88.4 (2012-13 ed.) (citations omitted).

Although the doctrine of invited error may not apply in this case, because the court did not take action, the same logic applies. The Defendant chose to take the stand and attempt to explain his actions. In the course of his attempt to explain that he did not knowingly violate the order, he admitted to violating it on more than one occasion by speaking with the victim. The State clarified the statement on cross examination but was not party to bringing it into evidence.

The State did mention the other occasion which violated the

no contact order during its closing argument. This argument simply responded to the Appellant's testimony and general defense. As indicated in the Appellant's closing, he claimed to have respected the provision of the order and that his ignorance was the cause of his violation:

Mr. Rodriguez had his day in day in court. He came here. He wanted to tell his story. He wanted to explain to you folks exactly what occurred on all of these occasions and he has done that. He told you that the violation of a no contact order on his residence he did not know that it was on his residence. That he felt he was not to have any contact with Diana Houck. He explained as embarrassing as it could be that he does not read well, that he doesn't read much at all.

RP at 94. This message was the theme of his case from opening statements all the way through testimony and closing. He raised the claim that he followed the part of the order he understood.

The fact that he violated the order in another more obvious manner is *direct rebuttal* for this argument. It would be unfair to allow the Appellant to make such a contrary argument when the evidence offered from his own lips contradicts such a claim. If the Appellant was willing to speak to the protected party in contravention of the order, it cuts deeply against the idea that he

would only violate the order if he did not understand it. The State has the right to argue in contradiction of a defendant's theory of the case during its closing argument. The State properly did so in this case.

In any event, even if the court finds the State offered the evidence in question, such evidence is properly viewed as a continuing course of conduct and not as separate and distinct acts. A continuing course of conduct may be charged as one count in an indictment. State v. Crane, 116 Wash.2d 315, 326, 804 P.2d 10 (1991). The court makes a "commonsense" review of the facts to decide whether the conduct constitutes one continuing act. State v. Fiallo-Lopez, 78 Wash.App. 717, 724, 899 P.2d 1294 (1995).

In the current case the Appellant testified that he spoke with the protected party and she wanted to bail him out of jail but he told her not to because of the domestic violence protection order. (RP at 65). After bailing out of jail on September 12, 2011, he immediately went to the residence where the victim was located with a police officer and had further contact with her. (RP at 20-21). At some point during that contact she agreed to move out of

the residence to make way for him. (RP at 22). Following that contact the Appellant moved back into the residence listed on the protection order. (RP at 67-68). He was in the residence on September 25 when the police arrested him. (RP at 15).

These communications between the Appellant and the protected party represent a continuing course of conduct whereby he reclaimed their residence for himself in violation of the no contact order. Each of these contacts involved the same victim (residing at the same residence), the same no contact order, and occurred around the same time period.

The Appellant argues that the contacts with the protected party did not have the same ultimate purpose. This operates on the assumption that the Appellant's conduct was motivated simply by his wish to go home and save his dogs. As the jury decided, this story is not reasonable or credible. The Appellant contacted the protected party to continue to exert control over her and to reclaim their home for himself. This is the only reasonable explanation of the Appellant's continuing need to maintain contact with the protected party while a Simple Assault DV charge was pending.

2. The trial court correctly imposed the legal financial obligations which were supported by the record.

The finding of the court concerning the defendant's ability to pay has no impact on the defendant's rights; it does not need to be reviewed by the appellate court. By statute, the victim penalty assessment and biological sample fee may be collected without any finding concerning the defendant's ability to pay. The sole issue in this case, raised for the first time on appeal, concerns the collection of \$2276.75 in legal financial obligations. Appellant challenges the trial court's finding that he has the current or future ability to pay legal financial obligations. This challenge does not need to be considered, because it has no impact on the Appellant's rights or obligations.

The Appellant claims that the court may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. The court did not abuse its discretion when it made the finding that the Appellant had the ability to pay legal financial obligations. RCW 10.01.160 requires the trial court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will

impose.” However, the sentencing court is not required to consider the Appellant’s financial resources when it imposed mandatory legal financial obligations. When sentencing a defendant for a felony, the court must impose a mandatory \$500 victim penalty assessment. RCW 7.68.035(1)(a). The defendant’s ability to pay is irrelevant. State v. Curry, 62 Wn.App. 676, 683, 814 P.2d 1252 (1991) *affirmed*, 118 Wn.2d 911, 829 P.2d 166 (1992). Like the victim penalty assessment, the felony sentence must include a DNA collection fee of \$100, without regard for the defendant’s individual financial circumstances. RCW 43.43.7541 State v. Thompson, 153 Wn.App. 325, 223 P.3d 1165 (2009). For mandatory legal financial obligations, the time to examine the defendant’s ability to pay is when the State seeks to collect the financial obligation. State v. Baldwin, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991). The defendant would not be an aggrieved party until the State seeks to enforce the payment of the financial obligations. A defendant would then be given an opportunity to show that he has not willfully failed to pay those financial obligations prior to being incarcerated. RCW 9.94A.6333. The Appellant could petition the court at any time to remit or modify

legal financial obligations due to hardship. RCW 10.01.160(4). Because adequate safeguards exist to prevent indigent defendants from being incarcerated for failing to pay, the imposition of the mandatory financial obligations would raise no constitutional concerns. State v. Cook, 146 Wn.App. 24, 27, 189 P.3d 811 (2008).

Once these obligations have been imposed, collection is governed by RCW 9.94A.760. The sentencing court should “set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligations.” RCW 9.94A.760(1). The trial court in the instant case did not set a minimum monthly amount to be paid by the Appellant towards satisfying the legal financial obligations. The Department of Corrections is authorized to collect these amounts during the period of supervision. RCW 9.94A.760(8). To determine the appropriateness of the payment schedule, the Department may require the defendant to provide information under oath concerning his assets and earning capabilities. RCW 9.94A.760(7)(a).

The imposition of non-mandatory legal financial obligations, such as court costs and recoupment for appointed counsel,

requires the sentencing court to consider the defendant's financial resources. RCW 10.01.160(3). However, formal findings are not required. State v. Baldwin, 63 Wn.App. at 310. The record at sentencing must merely be sufficient to review whether the trial court considered the financial resources of the defendant and the nature of the burden that would be imposed by the financial obligations. State v. Bertrand, 165 Wn.App. 393, 404, 267 P.3d 511 (2011)

The Supreme Court held the statutory provisions as set out in RCW 10.01.160 satisfy constitutional requirements. The court rejected any requirement for specific findings regarding a defendant's ability to pay.

According to the statute, the imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.

Curry, 118 Wn.2d at 916 Curry went on to consider the validity of victim penalty assessments. Unlike RCW 10.01.160, the statute on

victim assessments does not contain any provision for consideration of indigence. The court nonetheless held that the statute was constitutionally valid:

[T]here are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants. Under [former] RCW 9.94A.200, a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a no willful violation more leniently. . .thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

Curry, 118 Wn.2d at 918 (citations omitted). Under Curry, neither the imposition nor the collection of the victim penalty assessment depends on a prior showing of ability to pay. Rather, the proper time for consideration of indigence is at a sanctions hearing. If the lack of payment is not willful, sanctions may not include incarceration. The statutes governing the biological sample are substantially identical to that governing the victim assessment, so the same reasoning should apply to those fees as well.

In Baldwin, Division One applied the holding of Curry. The trial court had imposed \$85.00 in court costs and \$500.00 for recoupment of attorney fees. With regard to the \$85.00 in court

costs, the court held that Curry was dispositive as to their validity. Baldwin, 63 Wn.App. at 308-09. The \$500.00 attorney fee assessment, however, implicated the defendant's constitutional right to counsel. The court still held that the assessment was valid without a specific finding of ability to pay. Under RCW 10.01.160, the court was required to consider the defendant's financial resources. The record showed that the court had done so. Consequently, the imposition of the \$500.00 assessment was not an abuse of discretion. Baldwin, 63 Wn.App. at 311-12.

In Bertrand, Division Two purported to apply the court's holding in Baldwin, but its analysis is murky. The trial court in Bertrand imposed \$4,304.00 in "legal financial obligations." The opinion does not specify the nature of these "obligations." The record indicated that the defendant was disabled. There was apparently no other information in the record concerning the defendant's ability to pay. Bertrand, 165 Wn.App. at 398.

Division Two analyzed this situation as follows:

Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for us to review whether the "trial court judge took into account the financial resources of the defendant and the

nature of the burden” imposed by LFOs under the clearly erroneous standard. Baldwin, 63 Wn.App. at 312. The record here does not show that the trial court took into account Bertrand’s financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before us on appeal contains no evidence to support the trial court’s finding... that [the defendant] has the present or future ability to pay LFOs. Therefore, we hold that the trial court’s judgment and sentence finding was clearly erroneous.

Bertrand, 165 Wn.App. at 617.

In following this analysis, Division Two appears to have applied Bertrand out of context. The quoted language from Baldwin is based on RCW 10.01.160, which governs imposition of court costs. Baldwin applied this requirement to attorney fees as well. *Id.* At 310. In Bertrand, however, the court applied this analysis to “legal financial obligations,” without specifying their nature.

If the obligations at issue consisted solely of court costs and attorney fees, the court was correct. RCW 10.01.160(4) requires a trial court to “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” If, however, the holding of *Bertrand* is extended beyond this context, it is wrong. Statutes involving other kinds of legal

financial obligations do not usually contain similar requirements. In particular, there is no such requirement in the statutes governing biological samples.

After the Bertrand court overturned the finding concerning ability to pay, it went on to consider the appropriate remedy. It cited the following language from Baldwin:

[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation. . . . The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship.] Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant time.

Bertrand, 165 Wn.App. at 405, quoting Baldwin, 63 Wn.App. at 310-11. Based on this language, the Bertrand court concluded:

Although the trial court ordered [the defendant] to begin paying her LFOs within 60 days of the judgment and sentence, our reversal of the trial court's judgment and sentence finding [of ability to pay] forecloses the ability of the Department of Corrections to begin collecting LFOs from Bertrand until after a future determination of her ability to pay. Thus, because Bertrand can apply for remission of her LFOs when the State initiates collections, we do not further address her LFO challenge.

Bertrand, 165 Wn.App. 393 at 405.

This conclusion miss-states the analysis of Baldwin. That case discussed two ways in which a defendant's ability to pay is considered at the time of collection. First, the defendant cannot be incarcerated for non-willful failure to pay. Second, the defendant may petition for a remission of costs. Baldwin, 63 Wn.App. at 310-11; see Curry, 118 Wn.2d at 917-18 (discussing safeguards for indigent defendants who fail to pay crime victim assessments).

Both of these remedies, however, require an affirmative showing by the defendant. At a violation hearing, the defendant bears the burden of showing that his failure to pay was not willful. State v. Woodward, 116 Wn.App. 697, 703-04, 67 P.3d 530 (2003). Similarly, a petition for remission of costs should be granted only on an affirmative showing of manifest hardship. RCW 10.01.160. thus, contrary to what *Bertrand* says, nothing in *Baldwin* requires an affirmation showing of ability to pay before financial obligations can be collected.

Any such holding would essentially negate the Supreme Court's analysis in Curry. There, the court held that both court costs and the victim penalty assessment could be imposed without any specific finding of the defendant's ability to pay. Curry, 1218

Wn.2d at 916-17. Under Bertrand, however, the obligations cannot be collected without such a finding. What purpose is served by imposing legal financial obligations if nothing can be done to collect them?

In short, the trial court's finding concerning ability to pay is, in the context of this case, of no legal significance. That finding has no impact on either the court's ability to impose the obligations or the Clerk's ability to collect them. If the defendant is unable to pay after he is released, he can seek modification of the payment schedule. His ability to do so is not affected by the finding in the judgment and sentence. Since the finding has no effect, no purpose would be served by striking it.

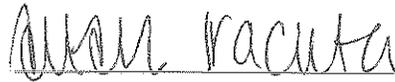
In any event, even if the finding of ability to pay is open to challenge, it is adequately supported by the record. In the instant case the record clearly indicated that the Appellant owned a house and had the financial ability to care for himself and others. This was a sufficient review by the court that supports his finding the Appellant had the ability to pay his financial legal obligations in the future. In contrast the defendant in Bertrand, 165 Wn.App. at 517, was disabled. There is no basis to strike the legal financial

obligations from the Appellant's sentence. The Appellant was found to be indigent at the time of sentencing when the court appointed appellant counsel. At the time of sentencing, the Appellant was in custody and about to begin a prison sentence. At the time of payment, he would be out of custody and capable of obtaining employment. Considering the record as a whole, the trial court's finding of ability to pay is not clearly erroneous. The court decision should be reviewed for an abuse of discretion and clearly there was no abuse in imposing the courts costs in the instant case.

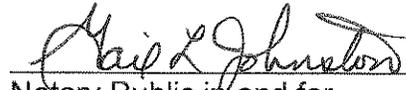
D. CONCLUSION

The Appellant seeks to introduce additional examples of his violation of the no contact order, and then claim prejudice because those examples compromised jury unanimity. This precedent would allow defendants to create their own retrial. A defendant need only introduce the evidence, hoping it helps their cause, if not, the defendant is still benefited because it has compromised jury unanimity and a new trial ensues. This result is neither logical or equitable. On the basis of the arguments set forth herein, it is respectfully requested that the decision of the Superior Court for

the United States of America a properly stamped and addressed envelope and to Susan Marie Gasch, opposing counsel, gaschlaw@msn.com by email per agreement of the parties pursuant to GR30(b)(4).



Signed and sworn to before me this 12th day of June, 2013.



Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2014

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