FILED
JAN 05, 2016
Court of Appeals
Division III
State of Washington

No. 33170-9-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ROCKY HENSLEY,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give a jury unanimity instruction.

2. The trial court erred by imposing discretionary costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Hensley denied his constitutional right to a unanimous jury verdict where the State relied on three criminal acts as a basis for conviction on a single count and a *Petrich* instruction on jury unanimity was not given?

2. Should the discretionary costs be stricken from the Judgment and Sentence where it was clearly the intent of the sentencing court to impose only the mandatory costs and it was only due to erroneous advice from counsel that discretionary costs were imposed?

C. STATEMENT OF THE CASE

Mr. Hensley was charged and convicted by a jury of fourth degree assault for assaulting Garrett Fordmeir, a mental health aid at Lourdes Counseling Center. CP 71-72, 101. The Second Amended Information stated that Mr. Hensley "did intentionally assault Garrett Fordmeir, a human being, by hitting, pushing, or spitting upon him . . ." CP 71-72.

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Mr. Fordmeir testified that on the morning of the date of the incident Mr. Hensley was being disruptive by not following directions, threatening staff members, yelling vulgarities and making sexually provocative statements to Mr. Fordmeir. At one point he patted Fordmeir's buttocks. RP 62-63. As a result of this continuing behavior, he was placed in isolation in the "Quiet Room." RP 62.

Mr. Hensley continued yelling and was banging on the door of the "Quiet Room," so Fordmeir and several other staff members decided to take Mr. Hensley back to his own room. When they let go of Mr. Hensley after they got him back to his room, he punched Fordmeir three times in the face. RP 64. Fordmeir and other staff were then able to restrain Mr. Hensley and pin him against the corner of the room. RP 65, 72-73. Mr. Hensley then spit in Fordmeir's face. RP 65.

The jury was not given an instruction on jury unanimity. CP 81-97. During deliberations, the jury sent out a written inquiry asking "Are we also to consider the bottom patting and spitting in Mr. Fordmeir's face in the assault charge?" CP 99. The Court's written response stated, "You must rely on your collective memories of the evidence presented and the instructions of the Court." CP 99.

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At sentencing, the Court indicated it wanted to impose only the mandatory costs for the Legal Financial Obligation (LFO), but asked for guidance from counsel as to what costs were mandatory. RP 193. Counsel informed the Court that the following costs were mandatory: $41 witness fees, $250 jury demand, $60 sheriff service fees, $200 filing fee, and $500 crime victim assessment fee. The Court also imposed a $500 fine. RP 193-94, CP 16-17, 23.

This appeal followed. CP 108.

D. ARGUMENT

1. Mr. Hensley was denied his constitutional right to a unanimous jury verdict because the State relied on three criminal acts on a single count as a basis for conviction and a *Petrich* instruction on jury unanimity was not given.

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The State may, in its discretion, elect the act upon which it will rely for conviction. *Id*. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on

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one criminal act will be assured. *Id*. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement. *Id*. The failure to follow one of the above options violates the defendant's State constitutional right to a unanimous jury verdict and his United States constitutional right to a jury trial. *State v. Beasley*, 126 Wn.App. 670, 682, 109 P.3d 849 (2005), citing *State v. Badda*, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); U.S. Const. amend. 6; Wash. Const. art. 1, § 22.

An alleged *Petrich* error may be raised for the first time on appeal. *State v. Watkins*, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006); *State v. Holland*, 77 Wn.App. 420, 424, 891 P.2d 49, rev. denied, 127 Wn.2d 1008, 898 P.2d 308 (1995). When determining whether a unanimity instruction is required, the court must answer three inquiries: (1) what must be proved under the statute? (2) what does the evidence disclose? and (3) does the evidence disclose more than one violation? *State v. Russell*, 69 Wn.App. 237, 249, 848 P.2d 743 (1993).

Here, the State presented evidence of three different acts by Mr. Hensley, constituting fourth degree assault as the jury was instructed,[1] that

[1] The jury was instructed: "An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to

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did not occur simultaneously. Those three acts were the bottom patting, the punching, and the spitting. The jury was not given a *Petrich* instruction on jury unanimity. CP 81-97. While the prosecutor focused mainly on the punching in her closing argument, it is obvious from the written inquiry that at least some of the jurors were considering the bottom patting and the spitting as the assaultive acts. See RP 180-84, CP 99. As in the cases cited above, there is no way to assure that all members of the jury were relying on the same act when voting to convict Mr. Hensley. Therefore, since there was no assurance the jury verdict was unanimous, the verdict must be reversed.

2. <u>The discretionary costs should be stricken from the Judgment and Sentence because it was clearly the intent of the sentencing court to impose only the mandatory costs and it was only due to misadvice from counsel that discretionary costs were imposed</u>.

"[T]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made

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the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive. An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted. Instruction #5, CP 89.

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an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (2015).

Here, the Court made the proper inquiry and was informed by counsel that Mr. Hensley was on Social Security Disability. The Court indicated it wanted to impose only the mandatory costs for the Legal Financial Obligation (LFO), but asked for guidance from counsel as to what costs were mandatory. RP 193. Counsel informed the Court the following costs were mandatory: $41 witness fees, $250 jury demand, $60 sheriff service fees, $200 filing fee, and $500 crime victim assessment fee. The court also imposed a $500 fine. RP 193-94, CP 16-17, 23.

The Court was misinformed as to what costs are mandatory. The only statutory mandated LFO's are the $500 victim Assessment fee, the $200 criminal filing fee, and the $100 DNA fee, for a total of $800. *State v. Kuster*, 175 Wn. App. 420, 424-25, 306 P.3d 1022 (2013). The other fees are all discretionary. RCW 10.01.160. Since it is clear from the record that the Court's intent was to impose only the mandatory fees, all other costs should be stricken from the judgment and sentence.

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E. CONCLUSION

For the reasons stated the conviction should be reversed, or in the alternative, the discretionary costs should be stricken from the judgment and sentence or the case remanded with instructions to do the same.

Respectfully submitted January 5, 2016,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on January 5, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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