

Supreme Court No. 91577-6
Court of Appeals No. 71311-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID EARL WOODLYN,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. SUMMARY OF APPEAL

Washington's constitution guarantees the right to a unanimous jury verdict in a criminal case. In order to safeguard that right, when the jury is instructed on more than one alternative means of committing the crime, but the evidence is insufficient to prove one of the means beyond a reasonable doubt, the record must contain a "particularized expression of jury unanimity" demonstrating the jury unanimously agreed on a means that was supported by sufficient evidence.

In this case, one of the alternative means presented to the jury was not supported by proof beyond a reasonable doubt. The conviction must be reversed because the record does not contain a particularized expression of jury unanimity. There is no special verdict form indicating which alternative means the jury relied upon. The jury was affirmatively instructed it need not be unanimous as to the means, suggesting it did not reach unanimous agreement on *either* of the means. Because the Court cannot conclude the jury unanimously agreed on the only alternative means that was supported by sufficient evidence, it should reverse the Court of Appeals, and reverse David Woodlyn's conviction.

B. ISSUE PRESENTED

Must the conviction be reversed where the jury was instructed on an alternative means that was not supported by sufficient evidence, and the record contains no particularized expression demonstrating the jury unanimously agreed on a means that was supported by sufficient evidence?

C. STATEMENT OF THE CASE

Woodlyn was charged with one count of second degree theft. CP 1-2. The State alleged Woodlyn stole money from Dora Kjellerson, an elderly woman for whom he did yard work. RP 719-22. Woodlyn cashed several checks on Kjellerson's bank account. Kjellerson signed the checks and Woodlyn wrote in his name and the dollar amounts. RP 648-49, 676, 746-51. One day, Woodlyn accompanied Kjellerson to the bank to withdraw money from her account. A bank employee called the police. RP 684-85. Kjellerson told the officer that Woodlyn needed money for mowing the grass. RP 687-90.

The information set forth two alternative means of committing the crime. The State alleged that, with the intent to deprive Kjellerson of United States currency, Woodlyn: (1) "did wrongfully obtain and exert unauthorized control over such property belonging to Dora

Kjellerson”; and (2) “did obtain control over such property belonging to Dora Kjellerson, by color and aid of deception.” CP 1.

The jury was instructed on both alternative means. The to-convict instruction stated the jury could find Woodlyn guilty if it found that, with an intent to deprive another of property, he either (1) “wrongfully obtained the property of another”; or (2) “by color or aid of deception, obtained control over property of another.” CP 72. The jury was expressly instructed it need not be unanimous as to which alternative means was proved beyond a reasonable doubt. CP 72-73.

The jury found Woodlyn guilty of second degree theft by general verdict. CP 87. There was no special verdict form indicating which of the two alternative means the jury relied upon.

Woodlyn appealed, arguing his conviction must be reversed because the jury was not instructed it must be unanimous as to which alternative means it was relying upon, and the State did not present sufficient evidence to prove one of the alternatives beyond a reasonable doubt. Woodlyn argued the evidence was insufficient to prove he “wrongfully obtained” the property because Kjellerson gave Woodlyn permission to cash the checks, that is, she consented to the taking. The State conceded, and the Court of Appeals agreed, that the State had not

presented sufficient evidence to prove the “wrongfully obtains” alternative. Slip Op. at 6. Yet the Court of Appeals affirmed. The court held the error was harmless because the State did not argue or otherwise attempt to prove the “wrongfully obtains” alternative. Slip Op. at 8-10.

Woodlyn petitioned for review and this Court granted the petition. The State filed a motion to dismiss review as improvidently granted. The State withdrew its initial concession of error and argued the evidence was sufficient to prove the “wrongfully obtains” alternative means. The Court denied the State’s motion to dismiss.

D. ARGUMENT

The error in instructing the jury on an alternative means not supported by sufficient evidence requires reversal because the record does not affirmatively demonstrate the jury reached unanimous agreement on either of the means.

- 1. When the jury is instructed on alternative means of committing the crime and one of the means is not supported by proof beyond a reasonable doubt, the record must contain a particularized expression of jury unanimity.*

Criminal defendants in Washington have a state constitutional right to a unanimous jury verdict. State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); Const. art. I, § 21.

The constitutional right to jury unanimity applies to alternative means of committing the crime. Owens, 180 Wn.2d at 95; State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

In order to safeguard the constitutional right to jury unanimity, when the jury is instructed on multiple alternative means, it may return a general verdict only if the evidence is sufficient to prove each means beyond a reasonable doubt. Owens, 180 Wn.2d at 95. This rule is well-established and long-standing in Washington and is mandated by the constitutional right to jury unanimity. See id. (“when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required”); State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (“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.”); State v. Wright, 165 Wn.2d 783, 802-03, 302 P.3d 1027 (2009) (defendant not entitled to “express verdict” on alternative means where sufficient evidence supports each charged alternative); State v. Linehan, 147 Wn.2d 638, 645, 56 P.3d 542 (2002) (“jury unanimity as to the means used to commit the crime is not required if there is substantial evidence to

support each of the alternative means charged”); State v. Fortune, 128 Wn.2d 464, 467, 909 P.2d 930 (1996) (“if sufficient evidence supports each alternative means of a charged crime, jurors can give a general verdict on that crime without giving express jury unanimity on which alternative means was employed by the defendant”); Ortega-Martinez, 124 Wn.2d at 707-08 (“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”); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) (express jury unanimity not required as to means by which crime committed “so long as substantial evidence supports each alternative means”); State v. Whitney, 108 Wn.2d 506, 507-08, 739 P.2d 1150 (1987) (no error to instruct jury on two alternative means where both were supported by sufficient evidence); State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982), abrogated on other grounds by State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015) (“where a single offense is committable in more than one way, it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single crime charged, provided there is substantial evidence to support each of the means charged”);

State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976) (guilty verdict need not express unanimity as to the means by which the crime was committed, “provided there is substantial evidence to support each of the means charged”); State v. Talbott, 199 Wash. 431, 437-38, 91 P.2d 1020 (1939) (no error for jury to return general verdict where both alternative means were supported by sufficient evidence); State v. Pettit, 74 Wash. 510, 520, 133 P. 1014 (1913) (same).

The test for determining whether the evidence was sufficient to prove each alternative means is set forth in State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) and mandated by the Due Process Clause—whether a rational finder of fact could have found the essential facts beyond a reasonable doubt. Franco, 96 Wn.2d at 823.

If the evidence is insufficient to prove one of the alternative means, it is error to instruct the jury on that alternative. Linehan, 147 Wn.2d at 653 (“Before the jury can be instructed on and allowed to consider the various ways of committing a crime, there must be sufficient evidence to support the instructions.”); State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993) (“it is error to give an instruction which is not supported by the evidence”).

A corollary to the rule that the jury may return a general verdict only if each means is supported by sufficient evidence, is the rule that if the evidence is *not* sufficient to prove one of the alternatives, the record must contain a “particularized expression of jury unanimity.” Owens, 180 Wn.2d at 95; Fortune, 128 Wn.2d at 467; Ortega-Martinez, 124 Wn.2d at 707-08.

A particularized expression of jury unanimity is necessary to ensure the reviewing court that the jury reached unanimous agreement on a means that was supported by sufficient evidence. Without such an expression in the record, the court cannot be sure the jury was unanimous concerning guilt for the single crime charged. Arndt, 87 Wn.2d at 377; see also Carol A. Beier, Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas, 44 Washburn L.J. 275, 299 (Winter 2005) (if we do not insist on assurance that each juror’s vote was supported by a means for which there was sufficient evidence, “[w]e have no guarantee that the jury was unanimous at the level of factual generality that matters most of all: guilt v. innocence”). In other words, without a particularized expression of jury unanimity in the record, the court cannot be sure the constitutional right to jury unanimity was not violated.

Where there is no particularized expression of jury unanimity in the record, the error in instructing the jury on an alternative means that is not supported by sufficient evidence requires reversal. Owens, 180 Wn.2d at 95; Fortune, 128 Wn.2d at 467; Ortega-Martinez, 124 Wn.2d at 707-08.

This Court has consistently reversed a criminal conviction where the jury entered only a general verdict and the evidence was insufficient to prove one of the alternative means beyond a reasonable doubt. See State v. Garcia, 179 Wn2d 828, 836, 318 P.3d 266 (2014) (reversing conviction “because there is insufficient evidence to support each alternative means of kidnapping in the jury instructions”); State v. Ramos, 163 Wn.2d 654, 660, 184 P.3d 1256 (2008) (conviction reversed where one alternative means held invalid on appeal and record did not establish that jury was unanimous as to valid alternative); State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993) (reversing conviction where evidence was insufficient to support one alternative means and “[t]he verdict form did not identify which alternative means of theft the jury found defendant committed”); State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970), abrogated on other grounds by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976) (reversing conviction where jury was

instructed on alternative means that was not supported by sufficient evidence); cf. State v. Mitchell, 29 Wn.2d 468, 484, 188 P.2d 88 (1947) (reversing conviction where one alternative submitted to jury was erroneous as a matter of law and court could not say, given general verdict, that jury based its verdict on proper alternative).

In several cases (including Woodlyn's), the Court of Appeals has departed from this case law and affirmed a criminal conviction where the evidence was insufficient to prove an alternative means contained in the jury instructions, even though the record did not contain a particularized expression of jury unanimity. See, e.g., State v. Witherspoon, 171 Wn. App. 271, 286-87, 286 P.3d 996 (2012), aff'd on other grounds, 180 Wn.2d 875, 329 P.3d 888 (2014) (affirming conviction where evidence was insufficient to prove one of three alternative means in jury instruction because prosecutor "did not argue or attempt to prove" alternative that was not supported by the evidence); State v. Fleming, 140 Wn. App. 132, 137, 170 P.3d 50 (2007) (holding error harmless where State presented substantial evidence of only one means); State v. Rivas, 97 Wn. App. 349, 353-54, 984 P.2d 432 (1999), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) (affirming conviction because

evidence was presented as to only one means and prosecutor discussed only that means in closing argument); State v. Chiarello, 66 Wn. App. 241, 244, 831 P.2d 1119 (1992) (affirming conviction where defendant admitted only alternative means that was supported by sufficient evidence); cf. State v. Allen, 127 Wn. App. 125, 132-35, 110 P.3d 849 (2005) (conviction overturned where court could not be certain jury relied on one means because evidence of two means was presented).

These cases do not adequately safeguard the constitutional right to jury unanimity because they permit a conviction to stand where the record is not adequate to conclude with certainty that the jury actually reached unanimous agreement on an alternative means that was supported by sufficient evidence. These cases are inconsistent with this Court's case law and should not be followed.

2. *Woodlyn's conviction must be reversed because the record contains no particularized expression of jury unanimity.*

When the jury is instructed on an alternative means that is not supported by sufficient evidence, the conviction must be reversed if the record does not contain a particularized expression of jury unanimity because the Court may not substitute its judgment for that of the jury. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). A

particularized expression of unanimity is necessary because the reviewing court cannot say, as a matter of law, that the jury based its verdict on the proper alternative. Mitchell, 29 Wn.2d at 484. The question is whether the jury *actually reached unanimous agreement* on the proper alternative. This must be apparent in the record.

In Stein, the defendant was charged with murder under two alternative theories—conspiracy and accomplice liability—and the jury was instructed on both alternatives. Stein, 144 Wn.2d at 241. The Court held the conspiracy theory was invalid as a matter of law. Id. at 245-46. The Court reversed the conviction because there was no special verdict form showing which theory the jury relied upon. Id. at 243. The Court explained,

When a defendant is convicted under alternative theories, one acceptable and the other based on an erroneous instruction, this court has not been willing to substitute its judgment for that of the jury by inferring that the verdict was reached under the correct instruction.

Id. at 247. The jury is presumed to follow all of the instructions, even those that are erroneous. Id.

Although Stein did not involve alternative means, its reasoning applies equally to an alternative means case. When the jury is instructed on an alternative means that is not supported by sufficient

evidence, the instruction is erroneous. Linehan, 147 Wn.2d at 653; Benn, 120 Wn.2d at 654. The jury is presumed to follow the instruction, even though erroneous. Stein, 144 Wn.2d at 247. In the absence of a particularized expression of jury unanimity, the reviewing court may not infer the jury relied upon the correct instruction. Id. The court may not substitute its own judgment for that of the jury. Id.

Express jury unanimity generally means a special verdict form. See Stein, 144 Wn.2d at 243 (“Because there was no special verdict form to enable the jury to clarify the basis for conviction, it is unclear which set of instructions the jury relied on in reaching its decision to convict”); Green, 94 Wn.2d at 232 (“absent a separate unanimous verdict on each of the two critical elements of aggravated murder in the first degree, it is impossible to determine whether the jury found unanimously that he committed either rape or kidnapping or both”).

A special verdict form or its equivalent is necessary because any ambiguity in the jury’s verdict must be resolved in favor of the defendant under the rule of lenity. State v. Kier, 164 Wn.2d 798, 811, 194 P.3d 212 (2008). The conviction must be reversed “if it is impossible *to rule out the possibility* the jury relied on a charge unsupported by sufficient evidence.” Wright, 165 Wn.2d at 803 n.12.

In Kier the defendant was convicted of robbery and assault arising out of a carjacking involving two victims. Id. at 801. The question was whether the jury found the assault was committed against one victim and the robbery against a different victim. If committed against the same victim, the two convictions would merge. To determine the basis for the jury's verdict, the Court took a "hard look" at how the case was presented. Id. at 808. The Court examined the evidence, the jury instructions, and the prosecutor's closing argument. Id. at 812-13. The to-convict instruction for the robbery did not specify a victim, and the jury heard evidence describing both men as victims of the robbery. At the same time, in closing argument, the prosecutor discussed the robbery only in terms of one victim and the assault only in terms of the other victim. Id. at 808-11. The Court concluded the verdict was ambiguous because the evidence and instructions allowed the jury to consider one of the men as a victim of both the robbery and the assault, notwithstanding the State's closing argument. Id. at 814.

Applying those principles here, to ascertain the basis of the jury's verdict in the absence of a special verdict form in an alternative means case, the Court must take a "hard look" at how the case was presented to the jury. Id. at 808. If the evidence, instructions, or

prosecutor's argument allowed the jury to base its verdict on an alternative means that was not supported by sufficient evidence, the verdict is ambiguous. See id. at 814. The conviction must be reversed.

- a. The evidence presented allowed the jury to base its verdict on an alternative means that was not supported by proof beyond a reasonable doubt.

When the jury is instructed on an alternative means, the jury may naturally assume the trial court believes the evidence is sufficient to sustain a verdict on that alternative, even if it is not. "If the judge tells a jury that they may find the defendant guilty on a theory that is factually unsupported (in effect committing an error of law), the jurors understandably might believe that there must be evidence to support that theory." Commonwealth v. Plunkett, 422 Mass. 634, 639-40, 664 N.E.2d 833 (1996). The jury is presumed to follow the court's instructions even when they are erroneous. Stein, 144 Wn.2d at 247. Convictions are regularly reversed for insufficiency of the evidence. This demonstrates that juries make mistakes in deciding whether evidence is sufficient to sustain a guilty verdict.

In rejecting the federal approach to harmless error analysis in alternative means cases, this Court agreed we cannot assume the jury based its verdict on the correct alternative when it is instructed on

another alternative that is not supported by sufficient evidence. In Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), the United States Supreme Court held a general guilty verdict satisfies the Due Process Clause of the Fifth Amendment notwithstanding an absence of unanimity on an underlying means supported by sufficient evidence. The Griffin Court concluded that in such a scenario, the jurors will have obviously rejected the theory for which there was insufficient evidentiary support. Id. at 59-60.

In Ortega-Martinez, this Court rejected that hypothesis. The Court explained, “Since Griffin addressed the requirements imposed by the federal constitution, it does not erode the protections afforded by our state constitution.” Ortega-Martinez, 124 Wn.2d at 708. Instead, “[t]he Washington Constitution provides greater protection of the jury trial right, requiring reversal if it is impossible *to rule out the possibility* the jury relied on a charge unsupported by sufficient evidence.” Wright, 165 Wn.2d at 803 n.12.

In this case, the evidence presented allowed the jury to base its verdict on an alternative means that was not supported by sufficient evidence. The jury could have concluded Woodlyn “wrongfully obtained” Kjellerson’s property, even though she gave him permission

to write the checks. The jury could have found Woodlyn “wrongfully obtained” the property by deceiving Kjellerson into believing she was giving him money to mow her lawn. The deputy prosecutor encouraged the jury to find the theft occurred not because Kjellerson did not consent to the taking but because she signed the checks “under false pretenses.” RP 793. Thus, the jury could have erroneously concluded that taking money with consent but “under false pretenses” is equivalent to taking money without consent. The nature of the evidence presented does not allow the Court to rule out the possibility the jury relied upon the improper alternative.

- b. The jury instructions make it likely the jury did not reach unanimous agreement on either of the means.

In this case, the jury was expressly instructed it *need not reach unanimous agreement* on the means. CP 72-73. This is the standard WPIC instruction. See 11 Wash. Practice, Pattern Jury Instructions Criminal WPIC 4.23 (3d Ed, 2014). The instruction is commonly given in criminal cases involving alternative means.

When the jury is not instructed it must be unanimous as to the means, it is possible the jury will arrive at a compromise verdict. People v. Olsson, 56 Mich. App. 500, 506, 224 N.W.2d 691 (1974). It

is possible some jurors will find the defendant guilty of one alternative, and the remaining jurors will find him guilty of the other alternative. Such a verdict would not be unanimous. Id.

When the jury is affirmatively instructed it *need not reach unanimous agreement*, the situation is even more problematic. In such cases, including Woodlyn's, the jury is even more unlikely to reach unanimous agreement. An instruction that tells the jury they need not be unanimous as to the means "relieves the jury from seriously confronting the question whether they agree that any factual requirement" of the alternative means has been proved beyond a reasonable doubt, "so long as each juror is willing to pick one theory or another." State v. Boots, 308 Or. 371, 375, 780 P.2d 725 (1989).

In this case, the jury was instructed it need not be unanimous on the alternative means. Thus, the jury instructions do not allow the Court to rule out the possibility that the jury did not reach unanimous agreement as to the only means supported by sufficient evidence.

- c. The prosecutor's closing argument allowed the jury to return a verdict that was not unanimous as to the means.

In some cases, the prosecutor's closing argument may support an inference regarding the basis for the jury's verdict. If the prosecutor

clearly elects one alternative means and *clearly disavows* the other, this may support an inference that the jury relied upon the means selected by the prosecutor.

In multiple acts cases, where the question is whether the jury reached unanimous agreement on a single criminal act, this Court requires the prosecutor's election to be eminently clear. State v. Carson, 184 Wn.2d 207, 227-28, 228 n.15, 357 P.3d 1064 (2015). The prosecutor must do more than merely discuss or "emphasize" the preferred act. The prosecutor must tell the jury that is the *only* act it may rely upon. Id. The State must "in some way disclaim its intention to rely on other acts." Id.

In order to ensure jury unanimity in an alternative means case, the prosecutor's election should be no less clear.

Moreover, the prosecutor's closing argument may not be considered in isolation. Kier, 164 Wn.2d at 813-14. If the evidence and jury instructions allowed the jury to base its verdict on an alternative means that is not supported by sufficient evidence, the jury verdict is ambiguous, notwithstanding the State's closing argument. Id.

Here, the prosecutor did not clearly elect an alternative means in closing argument. The prosecutor discussed and emphasized the theft

by deception alternative but did not clearly disavow the “wrongfully obtains” alternative. RP 791-93. Any “election” by the prosecutor was not sufficiently clear. Carson, 184 Wn.2d at 227-28.

The evidence and jury instructions allowed the jury to rely on the alternative that was not supported by sufficient evidence, notwithstanding the prosecutor’s argument. The verdict is ambiguous. Kier, 164 Wn.2d at 813-14. The conviction must be reversed.

E. CONCLUSION

The jury was instructed on an alternative means that was not supported by proof beyond a reasonable doubt. This Court cannot be sure the jury reached unanimous agreement on the proper alternative. Therefore, the conviction must be reversed.

Respectfully submitted this 30th day of September, 2016.

s/ Maureen M. Cyr

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 91577-6
v.)	
)	
DAVID WOODLYN,)	
)	
Petitioner.)	

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