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NO. 69172-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RANDALL WHITE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A defendant may not request a jury instruction and then, after the instruction is given, complain on appeal that it is constitutionally infirm. Here, White requested that the jury be instructed on the lesser offense of unlawful display of a weapon, and, he proposed the very instruction given to the jury. White's proposed instruction included alternative means for committing the crime. Is White barred by the invited error doctrine from now claiming that there was insufficient evidence to support his conviction on both alternative means?

2. The use of "or" within the same subsection of a statute does not automatically create alternative means. Unlawful display of a weapon prohibits the use of a weapon "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." Here, does the disjunctive language simply define the prohibited use of the weapon? Alternatively, would treating the disjunctive language as alternative means create the disfavored "means within a means" scenario?"

3. Where a single offense may be committed in more than one way, substantial evidence must support each alternative

means. Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find each alternative means charged beyond a reasonable doubt. Witnesses testified that after assaulting the victim earlier in the evening and fleeing when she called 911, White later returned to the victim's home where he held a knife in his hand while he 1) stood over the victim, 2) repeatedly yelled in her face while asking what she told the police, and 3) gestured at her with the knife. Viewing the evidence in the light most favorable to the State, could any rational trier of fact find beyond a reasonable doubt that White displayed a weapon in a manner that manifested an intent to intimidate another?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Randall White was charged by Amended Information with two counts of assault in the second degree-domestic violence. CP 25-26. Count I alleged assault with a deadly weapon and Count II assault by strangulation. CP 25-26. Both counts alleged the aggravating factors that White committed the crimes against a family or household member and while

knowing that the victim was pregnant. CP 25-26. Count I also alleged that White was armed with a deadly weapon during the commission of that assault. CP 26.

During trial, the State moved to amend Count II, assault in the second degree by strangulation, to assault in the second degree by suffocation. 3RP¹ 325. The court denied the request, but allowed the State to amend Count II to the lesser-degree offense of assault in the fourth degree in the Second Amended Information. CP 54-55. White asked that the jury be instructed on the lesser offense of unlawful display of a weapon for Count I; the court granted his request and instructed the jury pursuant to the instructions offered by White. 3RP 390, 403; CP 34-35, 74-75. The named victim on all counts was Ericka Peak. CP 54-55.

A jury trial found White not guilty of assault in the second degree, guilty of the lesser offense of unlawful display of a weapon, and guilty of assault in the fourth degree. 4RP 472; CP 46, 48-49. The jury found that White was not armed with a deadly weapon for Count I. 4RP 473; CP 47. The jury found that White and Peak

¹ There are 4 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (July 3 and 5, 2012); 2RP (July 9, 2012); 3RP (July 10, 2012); and 4RP (July 11 and 20, 2012).

were members of the same family or household at the time of the crimes for Counts I and II. 4RP 473; CP 50-51.

The trial court imposed a suspended sentence of 364 days on both counts and ordered White to serve 115 days, or credit for time already served on both counts. 4RP 491, 499; CP 91-93.

2. SUBSTANTIVE FACTS.

On March 26, 2012, Randall White and Ericka Peak had been in a dating relationship for five and a half months. 2RP 176. Peak was five and a half months pregnant with her and White's child. 2RP 176. White lived in Peak's home in Bellevue, Washington. 2RP 175. On that day, police twice responded to Peak's home in response to domestic violence calls. 2RP 215-16, 222.

In the early evening, White was watching a music video and drinking alcohol; he drank approximately five shots within a two-hour period. 2RP 177. White wanted to cash Peak's unemployment check to purchase beer and cigarettes. 2RP 178. White got upset when Peak wanted to make sure that the money would be replaced before the rent was due in a few days. 2RP 178. White started to get "really upset" and turned up the

music on the television. 2RP 178. After Peak turned down the volume, White threatened to pull the TV off the stand. 2RP 178. When White went to grab the TV, Peak pulled him back. 2RP 179. White turned around and placed his arm over Peak's face, obstructing her breathing. 2RP 179.

White then went into the kitchen, where he started to make himself something to eat. 2RP 180. After White appeared to calm down, Peak told White she did not want him to treat her that way in her home. 2RP 180. Peak told White that he should call his mother or grandmother to have them buy him a ticket so he could return to Texas. 2RP 180. White slapped Peak on the side of her face and spit in her face. 2RP 180.

Peak called 911 at approximately 6:30 p.m. 2RP 181, 215-16. While Peak was talking on the phone with the 911 operator, White grabbed Peak's cell phone away from her, hung up the phone, and ran down the street with Peak's cell phone. 2RP 181-83; Ex. 1 (911 recording).²

Peak met with Bellevue Police Officer Curtis McIvor. 2RP 183. Peak was crying, upset, and had a visible red mark on her face where she had been slapped. 2RP 217-18. McIvor

² The State filed a Second Supplemental Designation of Clerk's Papers to include this exhibit as part of the appellate record.

returned with Peak to her home where she told Mclvor what had happened while other officers searched the area for White. 2RP 185-86, 219. Mclvor left after approximately thirty minutes. 2RP 186.

Several hours later, White returned from a neighborhood bar where he had continued drinking; he knocked on Peak's door and Peak opened the door for him. 2RP 187, 189, 222; 3RP 360. White asked Peak what she had told the police officers and started to get upset again. 2RP 187. White repeatedly asked Peak what she had told the police and whether the police had taken any photos. 2RP 189-90. At the same time, White went into the kitchen where he started throwing away food. 2RP 190, 197. After approximately fifteen minutes of repeatedly asking Peak what she had told police, White pulled out a folding knife and opened it. 2RP 189-90. White first used the knife to open food packages and cut himself while doing so. 2RP 190. White then returned to the living room where Peak was sitting down. 2RP 190. White approached Peak and stood above her. 2RP 190-92; 3RP 314. Standing two to three feet away from Peak, White yelled in her face while holding onto the knife and gesturing at Peak with the knife. 2RP 190-92; 3RP 314. While holding the knife, White yelled at

Peak “What did you say to the fucking cops?” and “Tell me every fucking word you told to the cops.” 2RP 191-92; 3RP 313. Peak asked White “over and over” to “please put [the knife] away, you’re scaring me.” 2RP 201. Peak testified that White put the knife down “a second” before police entered her home. 2RP 192-94.

Unbeknownst to White or Peak, police officers had again been dispatched to Peak’s home and were standing outside. 3RP 309. From inside the home, officers could hear White yelling and Peak “crying and whimpering.” 2RP 223; 3RP 266-67. Through the window, Officer Mclvor saw White standing above Peak, crouched down and yelling in her face. 2RP 223. Due to an obstructed view through the window, Mclvor could not see White’s hands. 3RP 253.

As police entered Peak’s home, White stood up from a crouched position and pinned Peak against the wall. 2RP 224-25; 3RP 271. Officers were again unable to see White’s hands because his hands were between his body and Peak’s body while he held Peak against the wall. 3RP 292. After White refused to release Peak, Mclvor deployed his taser on White. 2RP 225. White fell to the ground and was handcuffed; when officers rolled

him over, they discovered the open knife underneath him where his hands had just been. 2RP 228; 3RP 277.

C. ARGUMENT

1. WHITE INVITED THE ERROR HE ALLEGES BECAUSE HE PROPOSED THE JURY INSTRUCTION THAT HE NOW CLAIMS CAUSED ERROR.

White contends that the jury instruction he proposed led to error. This argument should be barred from review, because White invited the error he now complains of by proposing the jury instruction that he now claims caused error.

- a. Relevant Facts.

For the first time on appeal, White argues that the “to convict” instruction for unlawful display of a weapon contained alternative means, and insufficient evidence supported one of the alternative means. However, White proposed the instruction that the trial court gave to the jury. 3RP 403; CP 35, 74.

White was charged by the State in Count I of the Second Amended Information with assault in the second degree-domestic violence for assault with a deadly weapon. CP 54. During trial,

White requested that the jury be instructed on the lesser offense of unlawful display of a weapon. 3RP 390; CP 34-35. Over the State's objection, the trial court instructed the jury on the lesser offense. 3RP 390, 403. The court instructed the jury using the following instructions proposed by White:

A person commits the crime of unlawfully displaying a weapon when he or she carries, exhibits, displays, or draws a knife, in a manner, under circumstances, and at a time and place that manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

CP 34, 75.

To convict the defendant of the crime of unlawfully displaying a weapon, each of the following elements of the crime must be proved beyond a reasonable doubt:

(2) That the defendant displayed the weapon 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 35, 74.³

³ The court removed the word "intentionally" from White's proposed instruction, but otherwise made no other changes to the instruction as proposed by White. CP 35, 74. White agreed with the court that the word "intentionally" should be removed from the instruction, explaining "I just went through and added it because I thought it would be clear, but then now I'm realizing that it's actually not necessary..." 3RP 403.

b. The Appellate Review White Seeks Is Barred Because White Invited The Error He Now Complains Of.

Under the doctrine of invited error, a party may not create an error at trial and then complain of it on appeal. State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999). More specifically, a party may not request an instruction and later complain on appeal that the requested instruction was given. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). Even a manifest error affecting a constitutional right may not be raised for the first time on appeal when the error was invited by the party seeking review. Studd, 137 Wn.2d at 546-47. The Washington State Supreme Court has acknowledged that, while the doctrine of invited error is a strict rule that is strictly applied, “we have rejected the opportunity to adopt a more flexible approach.” Id. at 547.

Henderson, Studd, and City of Seattle v. Patu all control the present case, each holding, that despite potential errors of constitutional magnitude, review was improper because the defendants invited the error they complained of on appeal. Henderson, 114 Wn.2d 867; Studd, 137 Wn.2d 533; Patu, 147 Wn.2d 717, 58 P.3d 273 (2002). In Henderson, the defendant proposed, and the trial court gave, jury instructions that violated the

defendant's due process rights by omitting an essential element of the crime charged. 114 Wn.2d at 868-70. The court refused to allow the defendant to raise this issue for the first time on appeal because the error was made at the defendant's invitation. Id. at 870.

In Studd, the court found that defendants in murder prosecutions had invited error by requesting erroneous jury instructions on self-defense even though the error was of constitutional magnitude and therefore presumed prejudicial. 137 Wn.2d at 533. In Patu, the "to convict" instruction omitted an essential element of the crime charged; despite the constitutional magnitude of the error, Patu was not entitled to reversal because the trial court had adopted the instruction proposed by his counsel. 147 Wn.2d at 721.

Here, like the defendants in Studd, Henderson, and Patu, White requested the very jury instruction that he now claims resulted in error. Because any error is invited, it is barred from review. To allow otherwise, White would benefit from the very error that he invited through his proposed instruction.

2. THE LANGUAGE IN RCW 9.41.270, "MANIFESTED AN INTENT TO INTIMIDATE ANOTHER OR WARRANTED ALARM FOR THE SAFETY OF OTHER PERSONS" DOES NOT CREATE ALTERNATIVE MEANS.

White claims that the jury was instructed on two alternative means of committing unlawful display of a weapon. This argument should be rejected. Although the statute uses the term "or," the disjunctive language does not create alternative means.

a. Relevant Facts.

The statute defining what is prohibited as an unlawful display of a weapon provides in relevant part:

- (1) It shall be unlawful for any person 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.*

RCW 9.41.270 (emphasis added).

Here, the "to convict" jury instruction for unlawful display of a weapon states in relative part:

- 1) That on or about March 26, 2012, the defendant displayed a knife;
- 2) That the defendant displayed the weapon 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.

b. The Challenged Language In RCW 9.41.270 Does Not Create Alternative Means.

The use of “or” within the same subsection of a statute does not automatically create alternative means. State v. Al-Hamdani, 109 Wn. App. 599, 36 P.3d 1103 (2001) (citing State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999)). Similarly, definitions do not create alternative means. Laico, 97 Wn. App. at 763. Nor do statutory alternatives that may be characterized as a “means within a means” create alternative means for purposes of triggering the need for jury unanimity. State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

In In re Jeffries, our Supreme Court held that, where alternative ways of accomplishing some result were described in each subpart of a special verdict, the ways did not constitute alternative means. 110 Wn.2d 326, 338-40, 752 P.2d 1338, cert. denied, 488 U.S. 948 (1988). In Jeffries, the special verdict contained the aggravating circumstances:

- (a) That the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime; or
- (b) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant;

Id. at 338.

On collateral review, Jeffries argued that the jury must unanimously agree on the alternative ways that the special verdict could be satisfied within each subpart. Id. at 339-40. Specifically, Jeffries claimed that the jury was required to agree unanimously on the ways described in subpart “a” that he had committed the murder either “to conceal the commission of a crime,” or “to protect the identity of a person committing a crime,” or “to conceal the identity of a person committing the crime.” Id. The court rejected Jeffries’ claim that unanimity was required within each subpart because that would create “means within means.” Id. at 339.

Similarly, in Al-Hamdani, the defendant argued that language in the same subpart of the rape in the second degree statute created alternative means. 109 Wn. App. at 602-03. Al-Hamdani claimed that alternative means were created within the following subpart, “when the victim is incapable of consent by

reason of being *physically helpless* or *mentally incapacitated*.” 109 Wn. App. at 602-03. This Court rejected Al-Hamdani’s claim that the statute created alternative means. Id. at 604-05. In its analysis of alternative means, this Court distinguished these facts from cases where alternative means were contained in different subparts of the statute. 109 Wn. App. at 607.

Likewise, definitions do not create alternative means. Laico, 97 Wn. App. at 763 (the three definitions of “great bodily harm” are merely definitional and do not create alternative means for assault in the first degree); see also State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001) (definitions of “threat” do not constitute alternative means for intimidating a witness); State v. Garvin, 28 Wn. App. 82, 86, 621 P.2d 215 (1980) (the definitions of “threat” for purposes of the extortion statute do not create alternative elements to the crime but merely define an element of the crime).

Here, the statutory language, “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” does not create alternative means; rather, the language describes or defines the weapon’s use that is unlawful. Notably, like Jeffries and Al-Hamdani, the challenged language is

contained in the same subpart of the statute, not separated in a manner indicating an intent to create alternative means. Jeffries, 110 Wn.2d 326; Al-Hamdani, 109 Wn. App. 599. Requiring jury unanimity here would create the same “means within means” scenario rejected in Jeffries.

White cites Arndt and Berlin to support his claim that the challenged language creates alternative means. State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976); State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). White’s analysis is simply inapplicable to the present issue before this Court. The tests from Arndt and Berlin are used to determine whether a single offense has alternative means or *constitutes multiple offenses*. The tests do not address the present issue before this Court: whether a single offense has alternative means or whether only one means is defined within the statute. As a result, the courts’ analysis in Arndt and Berlin contributes nothing to this Court’s present determination.⁴

⁴ White also cites State v. Hurchalla and State v. Baggett to support his argument that the challenged language creates alternative means. Hurchalla, 75 Wn. App. 417, 877 P.2d 1293 (1994); Baggett, 103 Wn. App. 564, 13 P.3d 659 (2000). Although both cases refer to the language as “alternative means,” the courts do so while analyzing whether an instruction on the lesser offense of unlawful display was proper, given the charged crimes. Neither of these cases addresses or resolves the present issue before this Court.

3. SUFFICIENT EVIDENCE SUPPORTS THAT WHITE DISPLAYED A KNIFE IN A MANNER THAT “MANIFESTED AN INTENT TO INTIMIDATE ANOTHER.”

White contends that the State did not present sufficient proof to support each alternative means for the crime of unlawful display of a weapon. Specifically, White claims that insufficient proof was presented that he displayed a weapon in a manner that “manifests an intent to intimidate another.” White makes this assertion by relying on only selected portions of the record. Because White’s claim is based on an inaccurate representation of the facts and because the State presented sufficient direct and circumstantial evidence that White manifested an intent to intimidate another, it fails.

In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the crime charged; however, unanimity is not required as to the means by which the crime was committed, so long as substantial evidence supports each alternative means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

The evidence is sufficient if, “after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). In challenging the sufficiency of the evidence, the appellant admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it. State v. McNeal, 145 Wn.2d 352, 360, 37 P.3d 280 (2002). Circumstantial and direct evidence have equal weight. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

White’s claim that the knife was not displayed in a manner that “manifested an intent to intimidate another” is misplaced based on the evidence that White stood over Peaks, while grasping a knife and gesturing with that knife, at the same time that he yelled obscenities and questions in Peak’s face. The record shows that within hours of assaulting Peak and taking her phone while she was speaking with a 911 operator, White returned to Peak’s home. 2RP 181, 187; Ex. 1. Immediately upon returning, White began to interrogate Peak on the details of her conversations with the police.

2RP 187. While angry and continuing to question Peak, White started to throw away food in the kitchen, littering food over the sink and floor areas. 2RP 190, 197. White then grabbed his knife and used it to open food packages. 2RP 190. After cutting himself with the knife, White carried the open knife with him into the living room where Peak was seated. 2RP 190-92. White stood over Peak and crouched down to yell in her face. 2RP 190-92. While doing so, White continued to hold the knife in his hand and gestured with the knife at Peak. 2RP 190-92; 3RP 314. While the knife was in his hand, White yelled "What did you say to the fucking cops?" and "Tell me every fucking word you told to the cops." 2RP 191-92; 3RP 313.

Viewing that evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that White displayed the knife in a manner that "manifested an intent to intimidate another." Because sufficient evidence supports both alternative means of unlawful display of a weapon, White's claim should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm White's conviction and sentence.

DATED this 9 day of May, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. RANDALL WHITE, Cause No. 69172-4 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of May, 2013

A handwritten signature in black ink, consisting of a large, stylized initial 'E' followed by a long, horizontal, wavy line that tapers to the right.

Name
Done in Seattle, Washington