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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. LEIF BUCK, Appellant.	)))))))))	No. 39445-0-III OPINION PUBLISHED IN PART

LAWRENCE-BERREY, C.J. — Leif Buck appeals after a jury convicted him of interfering with the reporting of domestic violence, fourth degree assault, and failure to register as a sex offender. He argues the trial court violated his right to a unanimous jury verdict on the interfering charge by permitting the jury to consider three different means for committing the offense. We disagree and conclude that the offense is not an alternative means crime. In doing so, we depart from *State v. Nonog*, 145 Wn. App. 802, 187 P.3d 335 (2008), *aff'd on other grounds*, 169 Wn.2d 220, 237 P.3d 250 (2010), which did not have the benefit of later decisions such as *State v. Sandholm*, 184 Wn.2d 726, 364 P.3d 87 (2015).

FACTS

Background

For several years, Leif Buck lived with A.H., the mother of his two children. Possibly because of mental illness, Buck began acting aggressively toward her and saying strange things, so the couple stopped living together.

One day, Buck insisted that A.H. sign a document giving him shared custody of their children. The next day, while visiting Buck, A.H. told him custody would need to be decided in court. In response, Buck lunged toward her and, while holding her down, threatened to kill her for taking their children from him. Buck proceeded to drag A.H. across the floor. A.H. told him to stop and threatened to call 911. Buck then reached into her pocket, took her phone, and put it in his pocket. Buck refused to return the phone. After some time, A.H. said she would drive to the sheriff's office instead. Buck let her leave.

The State charged Buck with fourth degree assault, interfering with the reporting of domestic violence, and failure to register as a sex offender.

Jury Instruction and Argument

After the parties presented their cases, the trial court instructed the jury on the law, including the interference charge. In relevant part, the instruction stated:

INSTRUCTION NO. 10

> To convict the defendant of the crime of interference with the reporting of a domestic violence offense, as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> . . . .
>
> (3) *That the defendant prevented or attempted to prevent* [*A.H.*] *from calling a 911 emergency communication system, or obtaining medical assistance, or making a report to any law enforcement officer*.

Clerk's Papers (CP) at 63 (emphasis added).

The State argued that Buck committed the offense both by preventing A.H. from calling 911 and by preventing her from going to the sheriff's office. The jury entered guilty verdicts on all charges.

Buck appeals.

ANALYSIS

JURY UNANIMITY AND INTERFERING WITH THE REPORTING OF DOMESTIC VIOLENCE

Buck argues the trial court violated his right to a unanimous jury verdict by instructing the jury on three means of committing interfering with the reporting of domestic violence when there was evidence of only one means. The State responds that the crime is not an alternative means crime. We agree with the State.

Criminal defendants have the right to a unanimous jury verdict. WASH. CONST. art. I, § 21. While defendants do not have the categorical right to express unanimity for alternative means convictions, express unanimity is required when one means lacks evidentiary support. *State v. Woodlyn*, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017). If the court instructs the jury on one or more alternative means that are not supported by sufficient evidence, the jury must provide a particularized expression of unanimity as to the supported means. *Id.* When "it is 'impossible to *rule out the possibility* the jury relied on a charge unsupported by sufficient evidence,'" the court must reverse the general verdict. *Id.* (quoting *State v. Wright*, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009)).

The parties agree that if the offense is an alternative means crime, Buck's right to a unanimous jury verdict was violated because there was no evidence A.H. tried to obtain medical assistance. For this reason, we must determine whether interfering with the reporting of domestic violence is an alternative means crime.

Alternative means crimes are "ones that provide that the proscribed criminal conduct may be proved in a variety of ways." *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Because the legislature has not outlined what constitutes an alternative means crime, courts determine the prerequisites. *State v. Lindsey*, 177 Wn. App. 233, 240, 311 P.3d 61 (2013). There is no bright-line rule for deciding this issue. *Id.*

A statute that lists the methods of committing a crime in the disjunctive, on its own, is not sufficient to support its characterization as an alternative means crime. *Id.* at 240-41. However, "a statute divided into subparts is more likely to be found to designate alternative means." *Id.* at 241.

The key inquiry is whether the statute describes "distinct acts that amount to the same crime." *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010) (emphasis omitted). "The more varied the criminal conduct, the more likely the statute describes alternative means." *Sandholm*, 184 Wn.2d at 734. If the nuances between the criminal conduct are minor, the more likely the alternatives are "merely facets of the same criminal conduct." *Id.* With these standards in mind, we now examine the statute.

RCW 9A.36.150 makes it unlawful to interfere with the reporting of domestic violence. The relevant portion of RCW 9A.36.150 provides:

> (1) A person commits the crime of interfering with the reporting of domestic violence if the person:
>
> . . . .
>
> (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.

The *Sandholm* court clarified that the alternative means analysis must focus on the criminal conduct. In this case, the criminal conduct described by the statute is a defendant preventing or attempting to prevent a victim or a witness from reporting

domestic violence. There are *no* nuances in the criminal conduct, not even minor, that differ based on how a person seeks to report the conduct. For this reason, interfering with the reporting of domestic violence is not an alternative means crime.

Our decision today conflicts with *Nonog*, 145 Wn. App. 802. There, Division One of our court observed, "Interference [with the reporting of domestic violence] is culpable only when a victim or witness is trying to report the crime to a particular entity." *Id.* at 813. The *Nonog* court concluded, "because the statute does not criminalize all acts that might appear to constitute interfering," the offense must be considered an alternative means crime. *Id.* *Nonog*'s alternative means analysis focused on what entity a victim or witness tried to report domestic violence to. But reporting domestic violence is not the conduct made criminal by the statute. With the benefit of *Sandholm*—which requires an alternative means analysis to focus on the criminal conduct—we depart from *Nonog*.

We conclude that because interfering with the reporting of domestic violence is not an alternative means crime, the trial court did not deny Buck his right to a unanimous jury verdict.

Affirm.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

SENTENCING ISSUES

Buck raises well-settled issues related to his sentence. We now discuss the sentence the trial court imposed.

In addition to incarceration, the trial court imposed 12 months of community custody. As conditions of community custody, the court required Buck to complete mental health and chemical dependency evaluations, and follow the treatment plans. The court did not make a finding that substance abuse contributed to the offense. The court also did not make a finding that Buck was suffering from a mental health condition.

The court imposed these conditions in order to discover whether substances or mental health were a factor in the incident:

> But the idea of community custody, which is a form of probation, really appeals to me because that's the place where you can get that help at no expense to you. That's the place where the community can be protected because you're not only under supervision, but they're making sure you're doing those things that can improve your life.
>
> *If drugs are a part of it, we'll figure out that they won't be.* They'll be tested and everything else to be sure. *If there's mental health issues,*

> *they'll be sure that you're in personal counseling addressing any needs you have in mental health.* If it's [an] anger management problem or domestic violence problem, we'll be sure that you're in treatment so that those don't happen again. That's really why we're here—so it doesn't happen again.

Rep. of Proc. at 426-27 (emphasis added).

In addition, the court issued a no-contact order (NCO) prohibiting Buck from directly or indirectly contacting A.H. for five years and imposed a $500 victim penalty assessment (VPA) along with $171 in restitution.

Sentencing conditions are reviewed for abuse of discretion. *State v. Munoz-Rivera*, 190 Wn. App. 870, 890, 361 P.3d 182 (2015). A trial court abuses its discretion when the decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Buck's challenge to the NCO

Buck argues, and the State concedes, that the NCO unreasonably interferes with Buck's fundamental right to parent.

Conditions that interfere with the fundamental right to parent "must be sensitively imposed" and "reasonably necessary to accomplish the essential needs of the State." *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). These rules apply to no-contact orders along with their scope and duration. *State v. Peters*, 10 Wn. App. 2d 574, 584, 455 P.3d 141 (2019). A crime-related prohibition interfering with a fundamental right

must be narrowly drawn with no reasonable alternative to achieve the State's interest. *State v. McGuire*, 12 Wn. App. 2d 88, 95, 456 P.3d 1193 (2020).

In *McGuire*, the court considered a no-contact order that prohibited the defendant's contact with his former girlfriend. *Id.* The order did not provide any exceptions for maintaining contact with their child. *Id.* The court held that the scope of the no-contact order violated McGuire's right to parent because the prohibition on direct and indirect contact through the court or counsel was not narrowly drawn. *See id.* at 95-96.

Here, the NCO prohibits Buck from directly or indirectly contacting A.H. Indirect contact is necessary to arrange visitations, whether supervised or not. We remand for the trial court to fashion an NCO that is narrowly drawn so as not to unreasonably interfere with Buck's fundamental right to parent. Because discretion will be involved, a limited resentencing is required.

Buck's challenge to the ordered mental health/chemical dependency evaluations and treatments

Buck challenges the requirement of his sentence that he undergo mental health and chemical dependency evaluations, and comply with recommended treatments. He argues the trial court failed to enter appropriate findings that would permit it to order such evaluations and treatments. The State responds that the trial court intended and had the

authority to impose these conditions in relation to Buck's misdemeanor sentences. We agree with the State.

Courts have broad discretion to impose sentencing conditions in connection with misdemeanors, which are not subject to the same requirements as RCW 9.94B.080. *State v. Deskins*, 180 Wn.2d 68, 78, 322 P.3d 780 (2014). "Misdemeanor sentencing courts have the discretion to issue suspended sentences or to impose sentences and conditions with 'carrot-and-stick incentive[s]' to promote rehabilitation, a goal of nonfelony sentencing." *Harris v. Charles*, 171 Wn.2d 455, 465, 256 P.3d 328 (2011) (alteration in original) (quoting *Wahleithner v. Thompson*, 134 Wn. App. 931, 941, 143 P.3d 321 (2006)).

We remand for the trial court to revise these conditions so their imposition clearly relates only to Buck's misdemeanor convictions.

Buck's other sentencing challenges

Buck additionally challenges the trial court's imposition of the VPA and interest on the ordered restitution. The State does not oppose these challenges. We therefore order the VPA to be struck and permit the trial court to consider whether to waive interest on restitution.

Affirm the convictions and remand for resentencing related to NCO, to correct the community custody conditions, to strike the VPA, and to consider whether to waive restitution interest.

Lawrence-Berrey, C.J.

WE CONCUR:

Staab, J.

Cooney, J.