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

STATE OF WASHINGTON,	)	No. 30505-8-III
Respondent,	)	
v.	)	
PAUL GENE DANIELS,	)	UNPUBLISHED OPINION
Appellant.	)	

Siddoway, A.C.J. — Paul Daniels appeals his conviction of second degree burglary. He contends that the crime can be committed by alternative means—with intent to commit a crime against property, or with intent to commit a crime against a person—and that he was denied his right to a unanimous verdict where the court failed to give a unanimity instruction and there was insufficient evidence to prove intent to commit a crime against a person. Because the burglary statute's requirement of intent does not create alternative means, we affirm his conviction. We exercise our discretion to address his second assignment of error, to an unauthorized imposition of jury costs. Because the costs imposed exceed the statutorily authorized jury fee, we remand for correction of that

part of his judgment and sentence.

FACTS AND PROCEDURAL BACKGROUND

Upon arriving at work one April morning in 2010, employees of Hertz Equipment Rental noticed that its storage cabinets had been pried open with a crowbar or screwdriver. A truck door had also been pried open and items were missing from the truck, including tools. The Hertz establishment is surrounded by a chain link fence. In back, the fence had been pulled up. There were signs on the ground that someone had gone underneath it.

Hertz employees called police, who were not able to obtain fingerprints from the pried truck. They were able to get information from neighboring property owners, however. Matt Hebert, who lived nearby, reported having seen three or four people standing next to a pickup truck outside the Hertz property early the prior morning. A short time later, he noticed that the truck was still there but the people were gone. Surveillance cameras for a movie theater whose parking lot was adjacent to the back fence of the Hertz property were directed toward its lot, and on the morning of the crime captured a parked truck for approximately five minutes shortly after one o'clock. The surveillance video did not capture the fenced area. The footage did not show anyone getting out of the truck and it could not be determined how many people were inside. There was no video of the truck leaving.

A description of the truck contained in the surveillance video was passed along to officers. One officer was familiar with the truck and its owner, Paul Daniels, from prior encounters. She passed the information along to investigating Officer Donald Moody. Officer Moody went to the Daniels residence two days after the crime to speak with Paul Daniels.

On arriving at the Daniels residence, Officer Moody noticed the truck that had been recalled by the other officer, and that it had a black tool rack, split sun roof, and other features of the truck in the surveillance video. During the course of the interview, Mr. Daniels admitted that he had gone into the rental yard to take some gas from one of the vehicles but claimed to know nothing about the tools.

The State charged Mr. Daniels with second degree burglary, charging that "on or about April 14, 2010, with intent to commit a crime against a person or property therein, [he] did enter or remain unlawfully in a building." Clerk's Papers (CP) at 3. At trial, the to-convict instruction included, as an element of second degree burglary:

> That the entering or remaining was with intent to commit a crime against a person or property therein.

CP at 41.

A jury found Mr. Daniels guilty. The court imposed 52 months of confinement and costs, including jury fees of $1,035.50 as "a cost of impaneling the jury" and

additional "jury costs" of $147.50 related to the bailiff. Report of Proceedings (Nov. 16, 2010) at 11; CP at 133-35. Mr. Daniels appealed.

ANALYSIS

Mr. Daniels raises two issues on appeal: first, he argues that his right to a unanimous verdict was denied because there was insufficient evidence to support a finding of intent to commit a crime against a person, and the trial court neither instructed the jury that it must reach unanimous agreement as to his intent or return a special verdict specifying the means relied upon. Second, he argues that the trial court erred in assessing jury costs against him. We address his assignments of error in turn.

I

In Washington, criminal defendants have a constitutional right to a unanimous jury verdict. Wash. Const. art. I, § 21. A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Alternative means statutes identify a single crime and provide more than one means of committing that crime. *State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). If the legislature has defined a crime to include an element that may be established by alternative means, then the jury must only be unanimous that the defendant committed the crime in one or another of the alternative ways provided by the legislature. *Schad v. Arizona*, 501 U.S. 624, 632, 645, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991); *Williams*, 136 Wn. App. at 497-98 (citing *Kitchen*, 110 Wn.2d at 410). The State is not required to elect a means nor does the jury need to be instructed that it must agree on the means if substantial evidence supports each. *Kitchen*, 110 Wn.2d at 410. Unanimity and proof beyond a reasonable doubt are safeguarded by substantial evidence review; we test whether the evidence was sufficient to prove each of the alternative means because we cannot know the means that individual jurors relied upon. *See State v. Arndt*, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976).

Initially, then, we reject Mr. Daniels' argument that for alternative means crimes, the jury must be instructed that it needs to reach unanimous agreement as to the means or return a special verdict form specifying the means relied upon. Br. of Appellant at 4-5. *Cf. Petrich*, 101 Wn.2d at 572 (instruction required where State presents evidence of multiple acts and offers each as a sufficient basis for conviction). *State v. Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 231 (1994), upon which Mr. Daniels relies for his

argument that the verdict must be express as to means, does not hold otherwise. With respect to alternative means crimes, *Ortega-Martinez holds* that "a particularized expression of unanimity as to the means by which the defendant committed the crime is *unnecessary* to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." *Id.* at 707-08 (emphasis added).

Mr. Daniels also argues that his conviction fails the substantial evidence review required for alternative means crimes because there was no evidence of his intent to commit a crime against a person. We reject his premise that second degree burglary is an alternative means crime in the respect he urges.

The legislature has not statutorily defined alternative means crimes, nor specified which crimes are alternative means crimes. This is left to judicial determination. "'[T]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits.'" *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (alteration in original) (quoting *State v. Klimes*, 117 Wn. App. 758, 769, 73 P.3d 416 (2003)).

RCW 9A.52.030(1)[1] provides:

A person is guilty of burglary in the second degree if, with intent to commit

[1] We quote the current version of RCW 9A.52.030, which was amended by Laws of 2011, chapter 336, section 370 to make the language gender neutral.

> a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

Mr. Daniels primarily relies on *State v. Tresenriter*, 101 Wn. App. 486, 494-95, 4 P.3d 145, 14 P.3d 788 (2000) for the proposition that "with intent to commit a crime against a person" and "with intent to commit a crime against property" are alternative means of committing burglary in the second degree. In *Tresenriter*, the amended information narrowly charged that the defendant entered or remained unlawfully with "'intent to commit a crime against a person therein.'" *Id.* at 490 (emphasis omitted). Yet the jury instruction stated that he entered or remained unlawfully "'with the intent to commit a crime against a person or property therein.'" *Id.* (emphasis omitted). The evidence presented at trial supported only a property crime at the premises, and Tresenriter argued on appeal that the charging document had been defective. *Id.* at 490-91. The appellate court agreed that the charging document was inadequate to give Tresenriter notice of the crime charged and dismissed the charge. *Id.* at 492-93. In doing so, the court accepted Tresenriter's characterization of "intent to commit a crime against a person" as an alternative means, without analysis.

"In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881

P.2d 986 (1994); *accord Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (quoting *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue)). Because the court in *Tresenriter* merely accepted intent as provable by alternative means without discussion, it cannot control here.

Rather, this case is controlled by settled Washington law that the specific crime or crimes intended to be committed inside burglarized premises is not an element of burglary that must be included in the information, the jury instructions, or the trial court's findings and conclusions. *State v. Bergeron*, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985). "It is sufficient if the jury is instructed . . . in the language of the burglary statutes"—as it was in this case. *Id.*; *see* CP at 41. Under our burglary statutes, the intent necessary to constitute the crime charged, which due process requires to be proved beyond a reasonable doubt, is "the intent to commit a crime against a person or property in the burglarized premises." *Bergeron*, 105 Wn.2d at 16. The evidence was sufficient to prove that intent here.

II

Mr. Daniels' second assignment of error is to the trial court imposing, as part of his sentence, the costs of impaneling the jury and bailiff expenses. The State agrees that the court should have imposed only $250 as a jury demand fee but argues that because

Mr. Daniels did not object in the trial court, he cannot raise the issue on appeal. RAP 2.5(a). It also contends that the judgment and sentence is not final with respect to the jury costs and, since the State has apparently not yet attempted to collect the challenged costs, Mr. Daniels is not yet "aggrieved" such that he can seek review. RAP 2.2(a)(1), 3.1.

Mr. Daniels' challenge is not precluded by RAP 2.5(a), as illegal or erroneous sentences can be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A justification for the rule is that it brings sentences in conformity and compliance with existing statutes and prevents widely varying sentences to stand for no reason other than failure of counsel to object in the trial court. *Ford*, 137 Wn.2d at 477 (quoting *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993)). If the sentencing court exceeded its statutory authority, the remedy is a reversal of the erroneous portion of the sentence imposed. *State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980), *overruled by statute on other grounds as stated in State v. Barr*, 99 Wn.2d 75, 658 P.2d 1247 (1983).

Chapter 10.01 RCW permits the trial court to impose costs on a convicted defendant and provides that costs are "limited to expenses specially incurred by the state in prosecuting the defendant" and "cannot include expenses inherent in providing a

constitutionally guaranteed jury trial." RCW 10.01.160(1), (2). RCW 10.46.190 provides that a person convicted of a crime shall be liable for the costs of the proceedings against him, including a "jury fee as provided for in civil actions for which judgment shall be rendered and collected." Finally, RCW 36.18.016(3)(b) provides that "[u]pon conviction in criminal cases a jury demand charge of one hundred twenty-five dollars for a jury of six, or two hundred fifty dollars for a jury of twelve may be imposed as costs under RCW 10.46.190." *See also State v. Earls*, 51 Wn. App. 192, 197-98, 752 P.2d 402 (1988) (while the compensation paid jurors cannot be recouped, the jury fee can), *abrogated on other grounds by State v. Hartz*, 65 Wn. App. 351, 355, 828 P.2d 618 (1992).

The State argues that the proper procedure for Mr. Daniels to challenge unauthorized costs is by petition for remission,[2] not appeal, because the judgment for costs is not final under RAP 2.2(a)(1) nor is Mr. Daniels an aggrieved party under RAP 3.1. As to these rules, it is correct.

RAP 2.2(a)(1) allows for direct appeal as a matter of right of the "final judgment entered in any action or proceeding, regardless of whether the judgment reserves for

[2] "A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs." RCW 10.01.160(4). The procedure affords sufficient protection from an abuse of the trial court's discretion to satisfy constitutional requirements. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

future determination an award of attorney fees or costs." A final judgment is one that settles all the issues in a case. *In re Det. of Turay*, 139 Wn.2d 379, 392, 986 P.2d 790 (1999). An obligation to pay legal financial obligations (LFOs) included in a judgment and sentence is not final under RAP 2.2(a)(1) because the obligation is conditional and subject to modification or waiver. *State v. Smits*, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009). The initial obligation to pay costs is predicated on a determination that the defendant has or will have the ability to pay, which can only be examined when the government seeks to collect the obligation. *Id.* at 523-24. The imposition of jury costs on Mr. Daniels is therefore not appealable under RAP 2.2(a)(1).

Similarly, Mr. Daniels is not an aggrieved party within the meaning of RAP 3.1, which provides that "[o]nly an aggrieved party may seek review by the appellate court." An aggrieved party must have a present substantial interest in the subject matter of the appeal and must be aggrieved "'in a legal sense.'" *State v. Mahone*, 98 Wn. App. 342, 347-48, 989 P.2d 583 (1999) (quoting *State ex rel. Simeon v. Superior Court*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944)). The aggrieved party's personal right or pecuniary interests must have been affected. *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003); *see also Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 704, 176 P.3d 536 (2008) (defining "aggrieved" as "'a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation'" (internal

quotation marks omitted) (quoting *State v. G.A.H.*, 133 Wn. App. 576, 574, 137 P.3d 66 (2006))), *aff'd on other grounds sub nom. Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010). Just as a judgment is not final as to costs that are subject to remission, a defendant obliged by the judgment to pay LFOs is not aggrieved until the State seeks to enforce payment and contemporaneously determines ability to pay. *Smits*, 152 Wn. App. at 525 (quoting *Mahone*, 98 Wn. App. at 347-48).

Nevertheless, RAP 1.2(c) allows us to "waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c)." In *State v. Hathaway*, 161 Wn. App. 634, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011), Division Two of this court chose to address the merits of a jury fee where the appeal raised additional issues, even though the State had not yet sought to enforce the defendant's legal financial obligations. It reasoned that review of the jury fee would facilitate justice and likely conserve future judicial resources. *Id*. at 652. We reach the same conclusion here. We waive the limitations of RAP 2.2(a)(1) and 3.1 and hold that the trial court lacked authority to impose the cost of impaneling a jury and bailiff's costs.

We affirm Mr. Daniels' conviction but remand for modification of the judgment and sentence consistent with this opinion.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, A.C.J.

WE CONCUR:

_____ _____
Brown, J. Kulik, J.