FILED
May 27, 2014
Court of Appeals
Division I
State of Washington

No. 90293-3
Court of Appeals No. 69543-6-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY D. NGUYEN,

Petitioner.

FILED
MAY 30 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce E. Heller

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Zachary D. Nguyen, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Nguyen requests this Court grant review of the unpublished decision of the Court of Appeals, No. 69543-6-I (April 28, 2014). Mr. Nguyen was convicted of burglary in the first degree, attempted robbery in the first degree, and assault in the second degree with a deadly weapon, all with a firearm enhancement. On appeal, the court accepted the State's concession that the assault conviction merged into the attempted robbery but ruled a unanimity instruction on the "substantial step" for attempted robbery was not required because the evidence indicated a continuing course of conduct. A copy of the decision is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

The constitutional right to trial by jury requires jury unanimity beyond a reasonable doubt of every essential element of the crime charged. Where the offense is an attempt crime, the "substantial step" element lacks meaning until the facts of the particular case are considered. Here, the jury was instructed the State was required to prove beyond a reasonable doubt the defendant "did an act that was a substantial step"

toward the commission of robbery in the first degree, but it was not instructed on its duty to unanimously agree on the specific act and the State did not elect which act it was relying upon for a conviction. Does the Court of Appeals ruling that a unanimity instruction was not required because the evidence indicated a continuing course of conduct raise an issue that is unsettled by decisions of this Court or by decisions of the Court of Appeals regarding unanimity and attempt crimes, raise a significant question of law under the state and federal constitutions, and involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

Seventeen-year old Philip Maxie was home alone when M.M. and B.C., two girls whom he knew slightly, came to his house. 8/20/12 RP 80-81. While they were chatting at the front door, three men with bandanas over their faces entered the house through a back door. 8/20/12 RP 86-87. One man was holding a pistol and told Philip to get on the ground. 8/20/12 RP 84, 87. He complied and was immediately struck on the back of his head with the weapon. 8/20/12 RP 85, 87, 92. Philip got up and ran to a neighbor's house and called 911. 8/20/12 RP 93.

Mr. Nguyen was charged with burglary in the first degree, robbery in the first degree by infliction of bodily injury, and assault in the second

degree with a deadly weapon. CP 13-15. Following a jury trial, the jury was instructed on burglary in the first degree, robbery in the first degree by infliction of bodily injury, attempted robbery in the first degree, and assault in the second degree with a deadly weapon, all with a firearm enhancement. CP 50-69 (Instructions No. 11-29). The jury returned guilty verdicts on burglary in the first degree, attempted robbery in the first degree, and assault in the second degree, and special verdicts that he was armed with a firearm during the commission of the offenses. CP 74-80.

On appeal, Mr. Nguyen argued 1) the conviction for assault merged into the conviction for attempted robbery, and 2) the trial court erroneously failed to instruct the jury regarding its duty to unanimously agree as to which act constituted the "substantial step" toward commission of attempted robbery. Br. of App. at 7-22. The State conceded that the conviction for assault merged into the conviction for attempted robbery. Br. of Resp. at 5-12. The Court of Appeals accepted the State's concession on merger, but ruled a unanimity instruction was not required because the evidence indicated a continuing course of conduct. Opinion at 2-7. Accordingly, the court vacated the assault conviction and affirmed the convictions for burglary and attempted robbery. Opinion at 10.

E. ARGUMENT

The Court of Appeals' ruling that a unanimity instruction was unnecessary for attempted robbery when the evidence established a continuing course of conduct raises an issue that is unsettled by decisions of this Court or by decisions of the Court of Appeals, raises a significant issue under the state and federal constitutions, and involves an issue of substantial public interest.

The federal constitutional right to trial by jury and the state constitutional right to conviction only upon a unanimous jury verdict require jury unanimity on all essential elements of the crime charged. U.S. Const. amend. VI; Wash. Const. art. I, § 21; *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). When the evidence indicates several distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury it must unanimously agree that the same act has been proven beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); *Camarillo*, 115 Wn.2d at 64; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to follow either alternative is an error of constitutional magnitude due to the possibility some jurors may have relied on one act while other jurors relied on another, in violation of a defendant's right to a unanimous jury.

State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009); *Coleman*, 159 Wn.2d at 511-12.

Here, the State did not elect which act or acts it was relying upon to establish a "substantial step" for the inchoate offense of attempted robbery in the first degree. Nonetheless, the Court of Appeals ruled an election was not necessary because the evidence indicated a continuing course of conduct. Opinion at 6-7. In so ruling, the court relied on *State v. Handran*, in which the defendant was convicted of burglary by entering a dwelling with intent to commit a crime against a person or property therein, based on evidence he broke into his ex-wife's apartment while she was asleep, held her down on her bed, kissed her, offered her money, and hit her in the face. 113 Wn.2d 11, 12-13, 775 P.2d 453 (1989). At the time of the offense, case law held that jury instructions in a burglary prosecution must specify and define the intended crime to be in the dwelling. 113 Wn.2d at 13. On appeal, the defendant argued, *inter alia*, that the court erroneously failed to instruct the jury that it must unanimously agree which act constituted the element of assault. *Id.* at 17. The Court disagreed, and held a unanimity instruction is not required where the evidence indicated a continuing course of conduct. *Id.*

Handran is not controlling here. Where the offense is an attempt crime, "[t]he 'substantial step' element is ... a 'placeholder' in the statute

defining attempt, lacking meaning until the facts of the particular case are considered." *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007) (citing *In re Personal Restraint of Orange*, 152 Wn.2d 795, 818, 100 P.3d 291 (2004). The lack of meaning is illustrated by *State v. Beals*, in which the defendant was convicted of attempted robbery in the first degree robbery and assault in the second degree, based on evidence that he hit the victim in the head with a hammer, demanded money, and threatened to kill the victim if he did not comply. 100 Wn. App. 189, 191-92, 997 P.2d 941 (2000). On appeal, the defendant argued, *inter alia*, the assault merged into the robbery. 100 Wn. App. at 193. The court disagreed, and stated:

> The attempt to commit first degree robbery required only a single substantial step, and **could have been** satisfied by proof of something far less than second degree assault (e.g., merely "displaying" what appears to be a deadly weapon). ... [A]ll that was required to satisfy the elements of attempted first degree robbery was a substantial step, which **may or may not have** included actual injury to the victim.

Id. at 193-94 (emphasis added). Without an election, there is no assurance of jury unanimity, and reviewing courts must simply guess at what evidence the jury relied upon to find the "substantial step" element of an attempt crime.

The court's reliance on *Handran* is misplaced because that case does not address the unique nature of an attempt offense. The court's

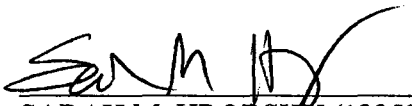
ruling raises an issue that is unsettled by decisions of this Court or by decisions of the Court of Appeals regarding unanimity and attempt crimes, raises an issue of significant question of law under the state and federal constitutions, and involves an issue of substantial interest that should be determined by this Court. Pursuant to RAP 13.4(b)(3), and (4), this Court should accept review.

F. CONCLUSION

For the foregoing reasons, Mr. Nguyen requests this Court accept review of the Court of Appeals decision in this case.

DATED this 21st day of May 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 69543-6-I
Respondent,	)	DIVISION ONE
v.	)	
ZACHARY DANIEL NGUYEN,	)	UNPUBLISHED
Appellant.	)	FILED: April 28, 2014

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 APR 28 AM 11:09

Cox, J. – Zachary Nguyen appeals his judgment and sentence entered after his convictions for first degree burglary, attempted first degree robbery, and second degree assault. The State properly concedes that the assault conviction must be vacated under the merger doctrine, and we accept this concession. But a unanimity jury instruction was not required because the evidence indicates an ongoing course of conduct. Nguyen makes additional claims in his Statement of Additional Grounds, but none have merit.

We vacate the assault conviction and remand for resentencing. We affirm the other two convictions.

In 2011, Philip Maxie had a party at his home while his parents were out of town. M.M. and B.C. attended this party.

The next day M.M. and B.C. were with Nguyen and three other males. The group went to Maxie's home, and M.M. and B.C. knocked on the door.

While M.M. and B.C. were talking with Maxie, three of the males, including Nguyen, entered the home.

Maxie testified that a male with a gun told him to "get on the ground." He heard the gun click but no shot was fired. The male then hit him with the gun. Maxie was eventually able to run to a neighbor's home and call for help.

M.M. and B.C. testified that Nguyen hit Maxie with the gun.

After the incident, Maxie told the prosecutor that nothing was missing from the home. M.M. testified that the three males were mad because "they didn't get anything out of the house." Maxie's mother testified that when she returned to her home after being out of town, she discovered that she was missing property.

By amended information, the State charged Nguyen with first degree burglary, first degree robbery, and second degree assault, each with firearm enhancements. The jury was instructed on these charges along with the lesser-included offense of first degree attempted robbery.

The jury convicted Nguyen of first degree burglary, attempted first degree robbery, and second degree assault. It also found that Nguyen was armed with a firearm for these convictions.

Nguyen appeals.

MERGER DOCTRINE

Nguyen argues that his conviction for second degree assault "violated the prohibition against double jeopardy, when the assault merged into the attempted robbery conviction." The State concedes this point, and we accept the concession.

"The guaranty against double jeopardy protects against multiple punishments for the same offense."[1] A determination of whether a defendant's double jeopardy rights were violated turns on whether the legislature intended to authorize multiple punishments for the crimes at issue.[2] "If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended."[3]

For double jeopardy claims, a court engages in a "three-part test" to determine the legislature's intent:

> First, the court searches the criminal statutes involved for any express or implicit legislative intent. Second, if the legislative intent is unclear, the court turns to the "same evidence" Blockburger test, which asks if the crimes are the same in law and in fact. Third, the merger doctrine may be an aid in determining legislative intent.[4]

Here, the parties concentrate only on the third part of this test—the merger doctrine. Thus, we focus our analysis on this doctrine.

Under the merger doctrine, "when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature

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[1] State v. Esparza, 135 Wn. App. 54, 59, 143 P.3d 612 (2006).

[2] Id.

[3] State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

[4] State v. Chesnokov, 175 Wn. App. 345, 349, 305 P.3d 1103 (2013) (citing State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008); State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); Freeman, 153 Wn.2d at 772-73).

intended to punish both offenses through a greater sentence for the greater crime."[5]

There is an exception to this doctrine. Even if two convictions appear to be for the same offense or for charges that would merge, "if there is an independent purpose or effect to each, they may be punished as separate offenses."[6]

In State v. Zumwalt, a consolidated case within State v. Freeman, the supreme court considered whether Zumwalt's convictions for first degree robbery and second degree assault merged.[7] There, Zumwalt punched the victim in the face and robbed her.[8] The robbery charge was based on the infliction of bodily injury, and the assault charge was based on the reckless infliction of bodily harm.[9]

First, the supreme court looked to the statutes and concluded that there is "no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery."[10] Then, the court noted that in order to prove first degree robbery as charged and proved by the State, the State had to prove that Zumwalt committed an assault in

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[5] Freeman, 153 Wn.2d at 772-73.

[6] Id. at 773.

[7] 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

[8] Id.

[9] State v. Zumwalt, 119 Wn. App. 126, 131-32, 82 P.3d 672 (2003).

[10] Freeman, 153 Wn.2d at 776.

furtherance of the robbery.[11] Accordingly, the court concluded that the merger doctrine applied.[12] Finally, the court determined that because there was no evidence in the record that the violence used to complete the robbery had some independent purpose or effect, the exception to merger did not apply.[13]

Here, as the State properly concedes, Nguyen's convictions for attempted first degree robbery and second degree assault violate double jeopardy. As charged and proved, Nguyen was guilty of attempted first degree robbery because he inflicted bodily injury on Maxie. The State was required to prove that Nguyen engaged in conduct amounting to second degree assault in order to elevate his attempted robbery conviction to the first degree. Additionally, the evidence at trial established that the assault on Maxie had no purpose other than to further the attempted robbery.

Because the second degree assault conviction merges with the attempted first degree robbery conviction, the proper remedy is to vacate the assault conviction and remand for resentencing.[14]

UNANIMITY JURY INSTRUCTION

Nguyen next argues that his constitutional rights were violated because the jury instructions failed to require unanimity as to what act constituted the

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[11] Id. at 778.

[12] Id.

[13] Id. at 779.

[14] See State v. Portrey, 102 Wn. App. 898, 906-07, 10 P.3d 481 (2000); Freeman, 153 Wn.2d at 774-76.

"substantial step" toward the commission of attempted robbery in the first degree. We disagree.

Criminal defendants have a right to a unanimous jury verdict.[15] Where the State alleges multiple acts and any one of them could constitute the crime charged, the jury must be unanimous as to which act or incident constitutes the crime.[16] The constitutional requirement of unanimity is assured by either (1) requiring the State to elect the act upon which it will rely for conviction, or (2) instructing the jury that it must be unanimous that the same criminal act has been proved beyond a reasonable doubt.[17] The instruction is based on State v. Petrich and its progeny.[18]

The Petrich rule applies "only where the State presents evidence of 'several distinct acts.'"[19] It does not apply where the evidence indicates a "'continuing course of conduct.'"[20] To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner.[21] Courts may consider whether the acts occurred at different times or

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[15] State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing U.S. CONST. amend. 6; CONST. art. 1, § 22).

[16] Id. at 411.

[17] State v. Barrington, 52 Wn. App. 478, 480, 761 P.2d 632 (1988).

[18] 101 Wn.2d 566, 683 P.2d 173 (1984).

[19] State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (internal quotation marks omitted) (quoting Petrich, 101 Wn.2d at 571).

[20] Id. (quoting Petrich, 101 Wn.2d at 571).

[21] Id

places, whether they involved the same victim, and whether in each act the defendant intended to secure the same objective.[22]

Here, viewing the evidence in a commonsense manner, it shows a series of acts that intended to achieve the objective of taking property from the Maxie home. Moreover, these acts occurred during a short timeframe and involved the same victim. Because the evidence indicates an ongoing course of conduct, the Petrich rule does not apply.

Nguyen does not explain how the State presented evidence of "'several distinct acts,' each of which could be the basis for a criminal charge."[23] Instead, he argues that "the prosecutor never elected which act or acts it was relying upon to establish a 'substantial step' for the inchoate offense." But the prosecutor did not need to make such an election because, as just discussed, the evidence indicates a continuing course of conduct. A unanimity instruction was not required "because there [was] no danger that some jurors would have found the occurrence of one crime while other jurors found the occurrence of a different crime."[24]

STATEMENT OF ADDITIONAL GROUNDS

Nguyen raises a number of issues in his statement of additional grounds. None are persuasive.

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[22] State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

[23] Petrich, 101 Wn.2d at 571.

[24] State v. Simonson, 91 Wn. App. 874, 884, 960 P.2d 955 (1998).

First, Nguyen argues that the prosecutor committed misconduct because she expressed a personal opinion about the credibility of two of the State's witnesses. To establish a prosecutorial misconduct claim, the State must show misconduct and resulting prejudice.[25] "Counsel are permitted latitude to argue the facts in evidence and reasonable inferences."[26] Additionally, "counsel may comment on a witness' veracity as long as he does not express it as a personal opinion and does not argue facts beyond the record."[27]

Here, there was no misconduct. The prosecutor did not give her personal opinion about the witnesses. Rather, she was explaining the circumstances of the pre-trial interviews with the witnesses, which was part of the witnesses' testimony. Thus, this argument fails.

Second, Nguyen asserts that a witness testified about an unrelated incident in this case, which violated an order in limine. Nguyen does not specifically identify the "unrelated incident" in his brief, but the part of the record he cites references a prior conviction. A review of the witness's testimony shows that the witness did not actually discuss any unrelated incident. The witness asked for clarification of a question during cross-examination without revealing any unrelated incident. Thus, this argument is not persuasive.

Third, Nguyen contends that his right to due process was violated because one juror saw him in shackles, and the trial court did not conduct "an

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[25] State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

[26] Id.

[27] Id. at 510-11.

inquisition to detect if the jury pool was tainted by the juror." After a court recess during the voir dire process, an officer informed the court that "Juror No. 7 was sitting outside the courtroom and saw Mr. Nguyen brought up in restraints." The trial court decided that the proper remedy was to dismiss Juror No. 7. Counsel agreed with this remedy.

Nguyen cites no authority to support his assertion that an "inquisition" of the jury pool was necessary. Moreover, "Passing glimpses of a defendant in restraints are insufficient on their own to find the existence of prejudice."[28] For these reasons, this argument fails.

Fourth, Nguyen claims his counsel was ineffective because he failed to move for a mistrial after the juror saw him in restraints or to request an "inquisition" of the jury pool. But, given the previous discussion, Nguyen is not able to show that his counsel's performance fell below an objective standard of reasonableness and that this prejudiced his trial.[29] Thus, this claim also fails.

Fifth, Nguyen argues that a unanimity jury instruction should have been given at trial. We need not address this argument as it is adequately addressed in his appellate counsel's brief.[30]

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[28] In re Crace, 157 Wn. App. 81, 103, 236 P.3d 914 (2010), reversed on other grounds, 174 Wn.2d 835, 280 P.3d 1102 (2012).

[29] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[30] See, e.g., State v. Gomez, 152 Wn. App. 751, 754, 217 P.3d 391 (2009) (refusing to review a defendant's statement of additional grounds because he raised no new issues).

We vacate the assault conviction and remand for resentencing. We affirm the other two convictions.

COX, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69543-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrea Vitalich, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

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Date: May 27, 2014