Supreme Court No. 94589-6

No. 74123-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

O'KEITH McGILL,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

O'Keith McGill, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. McGill appealed his King County Superior Court convictions for assault in the second degree and burglary in the first degree, in the context of a domestic violence relationship. The Court of Appeals affirmed these convictions in an unpublished decision, on April 17, 2017. Appendix. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

When evidence of multiple criminal acts is introduced to support a single conviction, either the State must elect one act, or the court must instruct the jury on unanimity. Where the State introduced evidence of two separate burglaries, but the court failed to give a unanimity instruction to ensure jury unanimity in the conviction, did the court's failure to instruct the jury on unanimity violate Mr. McGill's constitutional right to a unanimous verdict, and was the Court of Appeals affirmance therefore in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

D. STATEMENT OF THE CASE

O'Keith McGill was a regular overnight guest at the Tyee Apartments on Aurora Avenue in Shoreline for over a year before the

incidents of January 23, 2015. RP 153, 255-56. An older veteran named Jim Kershaw lived in Apartment 6, and Mr. Kershaw permitted Mr. McGill and other homeless individuals to stay at his apartment for periods of time. RP 151-52, 270-71.[1]

On January 23, 2015, Mr. McGill arrived at Mr. Kershaw's front door during a period when he was no longer a welcome guest at the apartment. RP 160. Mr. McGill came to the apartment window, and then to the front door. RP 160, 196, 272. Mr. McGill had several bags with him, and asked Mr. Kershaw if he could store his bags in the apartment, as usual. Id.

When Mr. Kershaw said he was no longer welcome, Mr. McGill pushed past Mr. Kershaw, through the front door of the apartment. RP 162, 199. Once inside, Mr. McGill saw there were others sitting in the apartment eating dinner with Mr. Kershaw, including several men and Emilee Piirainen. Ms. Piirainen, also a member of the homeless community in the area, a self-described heroin user, was briefly involved with Mr. McGill. RP 192-93, 196.

[1] Mr. McGill described Mr. Kershaw as "a kindhearted man. RP 270. Mr. Kershaw said that Mr. McGill had been "like a brother" to him, and that they had a "fantastic relationship." RP 153.

Once Mr. McGill was inside the apartment, he heard Ms. Piirainen telling Mr. Kershaw not to let him in, and he became angry. RP 196-99. Mr. McGill and Ted Bishop, another man in the apartment, engaged in a physical struggle, both falling into the coffee table. RP 162. When Mr. McGill stood up to gather his bags, he was suddenly hit over the head with a wine bottle. RP 274-76. Mr. McGill was disoriented and bleeding from a serious head-wound, uncertain who had hit him with the bottle, but suspecting it was Mr. Bishop. RP 275 ("I saw stars. I was pissed off").

In his enraged state, Mr. McGill assaulted Ms. Piirainen, before running out the front door to look for Mr. Bishop. RP 276. Mr. McGill then ran around the back of the apartment building. RP 279-80. He located the back porch of Mr. Kershaw's apartment and threw a cinder block through the sliding glass door. RP 280. When Mr. McGill entered the apartment again through the broken door, he was unable to find Mr. Bishop, who had already fled the area. RP 90-91. Instead, Mr. McGill located Ms. Piirainen, who was still in the bedroom. RP 202. Mr. McGill, still suffering from a serious head wound, assaulted Ms. Piirainen again, resulting in substantial bodily harm. RP 201-03, 256, 281-82, 287.

Mr. McGill was charged with one count of burglary in the first degree and one count of assault in the second degree, as domestic violence

offenses. RCW 9A.52.020; RCW 9A.36.021(1)(a); RCW 10.99.020. The jury found Mr. McGill guilty as charged.

Mr. McGill appealed, arguing the evidence showed two distinct acts of unlawful entry and the court failed to give a unanimity instruction. On April 17, 2017, the Court of Appeals affirmed his convictions. Appendix.

He seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

1. Mr. McGill was denied his right to a unanimous verdict when the court failed to instruct the jury it had to be unanimous as to the act constituting the burglary.

a. A defendant may only be convicted by a unanimous jury.

A criminal defendant has a constitutional right to a jury trial and a corresponding constitutional right that the jury be unanimous as to its verdict. Const. art. I, § 22; U.S. Const. Am. V, XIV; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Thus, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

To ensure jury unanimity where the State charges one count of criminal conduct and presents evidence of more than one criminal act, the State must either elect a single act upon which it will rely for conviction, or the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 569, 683 P.3d 173 (1984). Mr. McGill raised the unanimity issue for the first time on appeal. RAP 2.5(a).

b. The State never elected the act upon which it relied for the burglary, nor did the trial court instruct the jury on unanimity, as is required.

The State introduced evidence of two separate alleged burglaries, based upon Mr. McGill's two entries, without electing which one the jury should rely upon

First, Mr. McGill appeared at the front window and asked Mr. Kershaw if he could store his luggage at the apartment. RP 160-62, 272-76. After being denied entry, Mr. McGill allegedly pushed past Mr. Kershaw and entered through the front door, later arguing with Ms. Piirainen, then assaulting her. RP 162-65, 182, 201-03.

The second entry into the residence was distinct from the first in time, manner, and intent. After Mr. Bishop hit Mr. McGill over the head with a wine bottle, Mr. McGill began to bleed profusely. RP 83-84, 90-91, 104-05, 165, 185, 203, 274-76. Angry and disoriented from his head-

wound, Mr. McGill walked around to the rear of the apartment building, looking for Mr. Bishop. He soon found the back patio. RP 178-80.

McGill estimates it took approximately a minute and a half to walk around the building to the back. Mr. McGill lifted a cinder block from the patio and hurled it through the unit's sliding glass door. RP 166, 182, 202. Once inside the apartment this second time, he looked for Bishop in order to avenge his head-wound, but located only Ms. Piirainen. RP 90-91. When Mr. McGill did not find Mr. Bishop, he took out his anger on the Ms. Piirainen, assaulting her again. RP 178-80, 202.

This second entry into the apartment was separate and distinct from the first. Indeed, both the State and the complaining witness described the acts as separate. RP 202 ("And he was coming in the back door this time, only he had broken through it ... [a]nd this time he was telling me that I owed him money suddenly.") (emphasis provided). In testifying about the events following the glass door shattering, Ms. Piirainen stated, "He was just beating me up again." Importantly, she did not describe this as a continuation of the first entry into the residence, or even a continuation of the first assault. Likewise, in closing argument, the prosecutor argued that Mr. McGill returned to the residence and entered it "again," or "re-entered" it. RP 303, 309-11.

Given the State's proof and the closing argument by the prosecutor which failed to elect the act which constituted the burglary, a Petrich instruction was required. The court did not provide such an instruction. CP 24-47. The failure to so instruct the jury was error.

c. The two acts of burglary presented by the State were not a continuous course of conduct; therefore, the Court of Appeals decision should be reviewed by this Court.

The Petrich rule applies when the State presents evidence of "'several distinct acts.'" State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989), quoting Petrich, 101 Wn.2d at 571. It does not apply when the evidence indicates a "'continuous course of conduct.'" Id. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Handran, 113 Wn.2d at 17; State v. Doogan, 82 Wn. App. 185, 191, 917 P.2d 155 (1996). When the evidence involves conduct at different times and places, it tends to show several distinct acts. Handran, 113 Wn.2d at 17, citing Petrich, 101 Wn.2d at 571. However, when the evidence shows that a defendant engaged in a series of actions intended to achieve the same objective, the inference is those actions constituted a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

As discussed above, here the State alleged two distinct unlawful entries, separate from one another. The first was the entry during which Mr. McGill allegedly pushed past Mr. Kershaw in the front doorway, with the intent to store his luggage. RP 160-62, 272-76. The second was the entry through the sliding glass door in the back, while attempting to find and assault Mr. Bishop. RP 166, 182, 202. This was a separate alleged entry, with a different method and a different motivation. Whereas in the first entry through the front door, Mr. McGill's alleged intent was to assault Ms. Piirainen, during the entry through the patio, Mr. McGill sought retribution against Mr. Bishop for hitting him over the head.

In addition to the intent being independent, the timing of each incident was distinct. Finally, the place of each incident further breaks up the continuity of the incidents. This was not a continuous course of conduct, but two distinct acts, and the court's failure to provide the jury with an appropriate directive regarding unanimity was error, as was the Court of Appeals decision affirming. Appendix at 2-3.

When a trial court abridges a right guaranteed by the Constitution, the jury's verdict will be affirmed only if the State can prove the error was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Petrich error is presumed to be prejudicial and allows for the presumption to be overcome only if no

rational juror could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411.

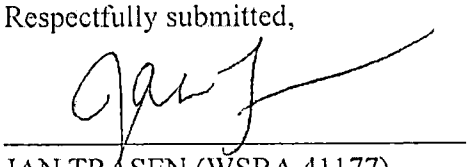
Accordingly, the Court of Appeals affirmance is in conflict with this Court's decisions, and review should be granted. RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 17th day of May, 2017.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. O'KEITH MCGILL, Appellant.	)	No. 74123-3-I DIVISION ONE UNPUBLISHED OPINION FILED: April 17, 2017

BECKER, J. — A jury unanimity instruction was not required in this burglary case because the defendant's two entries into the same apartment where he assaulted the same woman twice within two minutes amounted to a continuing course of conduct. The State was relieved of its burden to prove prior convictions at sentencing when the defendant affirmatively acknowledged his offender score and criminal history. We affirm.

Appellant O'Keith McGill was convicted of two domestic violence crimes, first degree burglary and second degree assault, for breaking into an apartment and beating up a woman who was inside.

The court refused a request by McGill to find that the two offenses were the same criminal conduct. Based on an offender score of 7, the court imposed a sentence of 67 months at the bottom of the standard range.

McGill appeals his burglary conviction and sentence.

UNANIMITY INSTRUCTION

McGill seeks reversal of the burglary conviction on the theory that the evidence showed two distinct acts of unlawful entry and the court failed to give a unanimity instruction.

In Washington, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. WASH. CONST. art. 1, § 21; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the State presents evidence of several distinct acts, any one of which could be the basis of the one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. Petrich, 101 Wn.2d at 572-73.

The State need not make an election and the trial court need not give a unanimity instruction if the evidence shows the defendant was engaged in a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Handran, 113 Wn.2d at 17. For example, where the evidence involves conduct at different times and places, then the evidence tends to show several distinct acts. Handran, 113 Wn.2d at 17. Evidence that a defendant engaged in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

At trial, the jury heard evidence that McGill pushed past the apartment's occupant to enter though the front door, assaulted the woman, and then left the apartment. McGill then walked around to the back of the apartment, broke the sliding glass door in the back with a cinder block, and entered the apartment and assaulted the woman again.

McGill argues that his two entries were not a continuing course of conduct because they were intended to secure different objectives. He testified that he first entered the apartment with the intention to store his bags there and that he made the second entry with the intention to hurt a man he believed had hit him over the head with a wine bottle.

It is undisputed that McGill assaulted the same woman in the same apartment after both entries. McGill testified that it took him only about a minute and a half to walk around the back of the apartment and gain reentry by breaking the sliding glass door. The fact that McGill broke into the same apartment almost immediately after leaving it and continued assaulting the same woman indicates a continuing course of conduct. We conclude that a unanimity instruction was not required under the facts of this case.

OFFENDER SCORE

McGill contends that the State failed to prove his criminal history for the purpose of calculating his offender score. He asks for a resentencing at which the State would be required to prove his prior convictions.

The State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. RCW 9.94A.500(1); State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012).

A criminal history summary relating to the defendant from the prosecuting authority is prima facie evidence of the existence and validity of the convictions listed therein. RCW 9.94A.500(1). Unless the defendant *affirmatively acknowledges* the alleged criminal history, the State has the burden of proving the conviction. Hunley, 174 Wn.2d at 901. A conviction can be proved with a certified copy of the judgment or comparable evidence. Hunley, 174 Wn.2d at 901. The defendant's failure to object to the prosecutor's unproved summary of prior convictions is not an acknowledgment. Hunley, 174 Wn.2d at 912, 915. Because the defendant in Hunley did not affirmatively agree with the prosecutor's summary of his criminal history, the burden to prove his prior convictions remained with the State. The prosecutor's written summary was not enough.

Here, the State submitted a presentence report which included, as appendix B, a summary of McGill's criminal history. The State also submitted an updated sentencing recommendation that indicated an offender score of 7. McGill submitted a presentence report in which he acknowledged a criminal history including three drug offense convictions in 2000, a 1994 conviction for assault three, and a 2005 misdemeanor conviction. Notably, he requested that the court exercise its discretion to find that his current offenses constituted the same criminal conduct for the purposes of calculating his offender score, which would result in an offender score of 5. McGill's presentence report

acknowledged that if the court chose not to exercise such discretion, his offender score would be 7, with a standard range of 67 to 89 months. He listed the standard sentencing range as "@ Offender Score 5: 41-54 months" and "@ Offender Score 7: 67-89 months." He argued that by finding his offenses were the same criminal conduct, the court could use its discretion to sentence him at an offender score of 5 rather than at an offender score of 7.

Unlike the defendant in Hunley, McGill affirmatively acknowledged prior convictions and agreed that they gave him an offender score of 7, unless the current offenses were counted as the same criminal conduct.

McGill contends, however, that the three class B felony drug convictions from 2000 should not count toward his offender score because they washed out. Class B prior felony convictions are not to be included in the offender score, if "since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing *any crime that subsequently results in a conviction.*" RCW 9.94A.525(2)(b) (emphasis added).

According to the State's appendix B, McGill committed a misdemeanor on June 15, 2005. His current offenses were committed on January 23, 2015, less than 10 years later. This is prima facie evidence that McGill had not spent 10 consecutive years in the community without committing any crime that subsequently results in a conviction, as would be required for his drug convictions to wash out under RCW 9.94A.525(2)(b).

McGill contends the State did not prove the misdemeanor conviction, and as a result, he is entitled to resentencing with an offender score that does not include the felony drug convictions from 2000.

McGill's presentence report acknowledged a 2005 misdemeanor conviction but did not acknowledge the exact date in 2005. Nevertheless, the report stated that "*but for* this 2005 misdemeanor all of Mr. McGill's felony history would wash." (Emphasis added.) McGill's affirmative acknowledgement that his 2005 misdemeanor conviction prevented his prior felony convictions from washing out erases his argument that the State was obligated to prove the misdemeanor conviction.

McGill asks that no costs be awarded on appeal. Appellate costs are generally awarded to the substantially prevailing party on review. But when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. McGill was found indigent by the trial court. If the State has evidence indicating that McGill's financial circumstances have significantly improved since the trial court's finding, the State may file a motion for costs with the commissioner.

No. 74123-3-I/7

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

COX, J.

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. 74123-3-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:

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Date: May 17, 2017

WASHINGTON APPELLATE PROJECT

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