

63946-3

63946-3

NO. 63946-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GARY KENFIELD,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

---

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS.....	2
2. SUBSTANTIVE FACTS.....	3
C. <u>ARGUMENT</u> .....	8
1. AN INSTRUCTION REQUIRING UNANIMITY AS TO THE ACT SUPPORTING A CONVICTION WAS NOT REQUIRED BECAUSE ONLY ONE CRIMINAL ACT WAS INVOLVED. ....	8
a. Relevant Facts.....	8
b. Only One Act Was Alleged In Support Of The Robbery Charged, So No Unanimity Instruction Was Required. ....	10
c. Kenfield's Claim That One Item That Belonged To Him Was In The Victim's Purse When He Took It Did Not Convert One Taking Into Multiple Distinct Crimes.....	13
2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO A GOOD FAITH CLAIM OF TITLE DEFENSE. ....	17
3. THE PROSECUTOR'S OBSERVATION THAT REDFERN DID NOT TESTIFY WAS NOT REVERSIBLE ERROR. ....	21
a. Relevant Facts.....	23
b. The Challenged Phrase, That Redfern "Did Not Testify At Trial," Was Not A Reference To The Missing Witness Doctrine.....	25

c.	If The Statement That Redfern Did Not Testify Is Considered A Reference To The Missing Witness Doctrine, The Argument Was Justified .....	27
d.	If The Statement Was Improper, It Is Not Reversible Error .....	32
D.	<u>CONCLUSION</u> .....	35

TABLE OF AUTHORITIES

Page

Table of Cases

**Federal:**

United States v. Garsson, 291 F. 646  
(D.N.Y.1923) ..... 33

**Washington State:**

Jones v. Hogan, 56 Wn.2d 23,  
351 P.2d 153 (1960)..... 33

State v. Ager, 128 Wn.2d 85,  
904 P.2d 715 (1995)..... 17, 20

State v. Blair, 117 Wn.2d 479,  
816 P.2d 718 (1991)..... 27, 28

State v. Campbell, 69 Wn. App. 302,  
848 P.2d 1292 (1993), rev'd on other  
grounds, 125 Wn.2d 797 (1995)..... 14

State v. Contreras, 57 Wn. App. 471,  
788 P.2d 1114, rev. denied,  
115 Wn.2d 1014 (1990)..... 26, 28

State v. Crane, 116 Wn.2d 315,  
804 P.2d 10, cert. denied,  
501 U.S. 1237 (1991) ..... 13

State v. Davenport, 100 Wn.2d 757,  
675 P.2d 1213 (1984)..... 29

State v. Davis, 73 Wn.2d 271,  
438 P.2d 185 (1968)..... 27, 28

State v. Dixon, 150 Wn. App. 46,  
207 P.3d 459 (2009)..... 30, 31

<u>State v. Fiallo-Lopez</u> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	14
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	22, 23, 32
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	23, 30
<u>State v. Grimes</u> , 111 Wn. App. 544, 46 P.3d 801 (2002), <u>rev. denied</u> , 148 Wn.2d 1002 (2003).....	16
<u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	10, 11, 13
<u>State v. Hanson</u> , 59 Wn. App. 651, 800 P.2d 1124 (1990).....	11
<u>State v. Hicks</u> , 102 Wn.2d 182, 683 P.2d 186 (1984).....	18
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	33
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	11
<u>State v. Komok</u> , 113 Wn.2d 810, 783 P.2d 1061 (1989).....	15, 16
<u>State v. Love</u> , 80 Wn. App. 357, 908 P.2d 395, <u>rev. denied</u> , 129 Wn.2d 1016 (1996).....	14
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	22, 32
<u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	21

<u>State v. Miller</u> , 92 Wn. App. 693, 964 P.2d 1196 (1998), <u>rev. denied</u> , 137 Wn.2d 1023 (1999).....	15
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	34
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	11
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995).....	33
<u>State v. Self</u> , 42 Wn. App. 654, 713 P.2d 142, <u>rev. denied</u> , 105 Wn.2d 1017 (1986).....	18, 20
<u>State v. Staley</u> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	20
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <u>cert. denied</u> , 498 U.S. 1046 (1991).....	32
<u>State v. Trout</u> , 125 Wn. App. 403, 105 P.3d 69, <u>rev. denied</u> , 155 Wn.2d 1005 (2005).....	18
<u>State v. Valdobinos</u> , 122 Wn.2d 270, 858 P.2d 199 (1993).....	12
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	12, 18
<u>State v. Walker</u> , 75 Wn. App. 101, 879 P.2d 957 (1994), <u>rev. denied</u> , 125 Wn.2d 1015 (1995).....	16

**Statutes**

**Washington State:**

RCW 9.94A.030(29) ..... 3  
RCW 9.94A.030(34) ..... 3  
RCW 9.94A.570 ..... 3  
RCW 9A.56.020(2) ..... 17

A. **ISSUES PRESENTED**

1. Whether the trial court abused its discretion in refusing a unanimity instruction when such an instruction was unnecessary because only one act, Kenfield's taking of a handbag and its contents, could support a robbery conviction?

2. Whether a good faith claim of title defense was not available in this case because the claim related to only one item inside the handbag that was stolen, and Kenfield concedes that he had no claim to the other items stolen.

3. Whether the prosecutor's remark in closing that a woman, Lisa Redfern, "did not testify at trial" was a comment on the evidence presented and not an invocation of the missing witness doctrine.

4. Whether Kenfield has failed to show that reliance on the missing witness doctrine with respect to Redfern would be improper, where Kenfield had a close relationship with Redfern and explicitly chose not to call her because he anticipated that Redfern would be impeached by their telephone conversations.

5. Whether Kenfield has failed to establish that the alleged prosecutorial error, to which he did not object at trial, could not have been cured by an instruction to the jury.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Gary Kenfield, was charged by amended information with attempted rape in the second degree and robbery in the second degree, both occurring on July 5, 2008, and involving the same victim, PK.<sup>1</sup> CP 3-7. Kenfield also was charged with intimidating a witness but that charge was dismissed pretrial on the State's motion. CP 6-7, 118.

Kenfield was tried in King County Superior Court, the Honorable Helen Halpert presiding. 1RP 1, 3.<sup>2</sup> A jury found Kenfield guilty of robbery in the second degree and not guilty of attempted rape. CP 177-78.

Kenfield brought a motion for new trial based on the court's "Failure To Instruct Jury On Unanimity And Animus Furandi." CP 192. Kenfield also brought a motion for new trial "On Grounds Of

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<sup>1</sup> To protect the victim's privacy, the State refers to her by her initials.

<sup>2</sup> The verbatim report of proceedings covers proceedings on 12 days, which will be referred to in this brief as follows: 1RP: May 19, 2009; 2RP: May 20, 2009; 3RP: May 21, 2009; 4RP: May 22, 2009; 5RP: May 26, 2009; 6RP: May 27, 2009; 7RP: May 28, 2009; 8RP: June 1, 2009; 9RP: June 2, 2009; 10RP: June 3, 2009; 11RP: June 4, 2009; and 12RP: July 31, 2009.

Prosecutorial Misconduct In Rebuttal." CP 203. The trial court denied both motions at the sentencing hearing. CP 214;12RP 36.

At sentencing on the robbery conviction, the State proved that Kenfield had prior convictions on separate occasions for rape in the first degree and rape in the second degree, both classified as most serious offenses under RCW 9.94A.030(29). CP 300-05; 12RP 3-27. Because the current conviction of robbery in the second degree is a most serious offense, the trial court concluded that Kenfield was a persistent offender as defined by RCW 9.94A.030(34) and sentenced him to a term of life imprisonment pursuant to RCW 9.94A.570. CP 238-47; 12RP 53.

## 2. SUBSTANTIVE FACTS

On July 5, 2008, PK was walking home at about 3 a.m. when she heard Kenfield call to her from his car. 8RP 8-9. She recognized him from an earlier casual meeting at a convenience store in her neighborhood. 8RP 9-17. The two talked in a parking lot for 45 minutes to an hour and then she agreed to drive with Kenfield to his home for drinks. 8RP 20-23. PK was carrying a small black handbag inside a large white purse with a \$50 bill among other items inside. 8RP 42-44.

Once PK got into Kenfield's car, Kenfield drove into a dark alley nearby and parked. 8RP 24-25. PK was nervous, so she got out of the car and walked back toward the lighted street. 8RP 24-27. Kenfield followed her on foot, though she told him to stop. 8RP 28. PK tried to calm Kenfield down and persuade him to leave and they talked another 30 to 45 minutes. 8RP 30-33.

Then Kenfield grabbed PK around the neck and pulled her down a slope, threatening to poke her eye out if she screamed. 8RP 33-35. Kenfield demanded that PK perform oral sex and when PK refused, Kenfield became angry and dragged PK into some bushes, causing PK to be scratched and scraped. 8RP 36-41, 47.

After Kenfield got on top of PK and began searching PK's pockets, saying "where's the money?", PK feigned an asthma attack, hoping to frighten Kenfield into leaving. 8RP 48-49. Kenfield then started to search PK's purse, which he had taken from her. 8RP 45, 49. Kenfield found PK's inhaler and unsuccessfully tried to force it into her mouth. 8RP 49. Kenfield then took PK's black handbag and ran off. 8RP 49.

PK ran to a friend's house nearby and called 911 at about 4:52 a.m. 7RP 76; 8RP 53-56. Police arrived within a minute.

8RP 56. Police observed and photographed PK's fresh cuts and scrapes. 7RP 108, 111-15; 8RP 57-58. PK described the attack, her attacker, and the man's car, saying that she knew the man as "Gary." 7RP 77-79. PK was apparently in pain and was upset when the police arrived but calmed down over time. 7RP 108, 126.

Police officers searched the area but did not immediately locate the attacker. 8RP 119-22.

At about 6 a.m., over an hour after the first police officers had arrived, a K-9 officer arrived and directed his tracking dog to the location where the attacker was last seen. 7RP 126; 9RP 8, 13. The dog found PK's large white purse in an area of bushes that PK had identified as the location where she had been dragged. 9RP 16-17. The dog then quickly tracked back to the sidewalk and around a corner, where it found Kenfield hiding in some bushes. 8RP 125-27, 149; 9RP 18-23.

PK was brought around the corner and identified Kenfield as her attacker. 7RP 142-46; 8RP 63-64.

Police following the tracking dog saw Kenfield in the dog's grip, with PK's black handbag. 8RP 128; 9RP 23. They recovered a \$50 bill from Kenfield's hand and additional property of PK's on the ground nearby. 8RP 64-65, 128, 156-57. Kenfield's bracelet

was found in the location that PK identified as the scene of the attack. 7RP 117, 122-23; 10RP 37, 46.

Kenfield testified that he was in the neighborhood that morning trying to buy drugs. 9RP 11. Immediately after testifying that he did not try to rape or rob PK, he testified that "I've never been in this situation or deal with these kind of people." 9RP 11. The State argued that this opened the door to evidence of Kenfield's two prior convictions for rape, which were factually similar to this incident. CP 281-85; 1RP 61-65; 10 RP 88-89. The trial court excluded that evidence. 10RP 92-93.

Kenfield testified that PK flagged him down and he arranged to buy \$50 worth of crack (cocaine) with her assistance. 9RP 12-16, 23-25. The two talked for an hour and smoked residue in a crack pipe while they waited, he claimed. 9RP 17-18. After the crack was delivered, he said he drove into an alley, the two got out of the car and smoked some of that cocaine, and then PK demanded to be allowed to give him oral sex. 9RP 25-28.

Kenfield claimed that after that, he gave PK another \$50 to buy more crack cocaine. 9RP 28-29. He testified that PK soon told him that she was going to keep his \$50, but then agreed to make the drug purchase that Kenfield wanted. 9RP 30-31. Kenfield said

that PK demanded more money, then apologized and collapsed into convulsions. 9RP 35-36.

Kenfield claimed that his bracelet fell off when he was opening PK's purse and that as he was searching PK's purse for an inhaler, he saw \$50 that he believed was his. 10RP 37. He decided to get that money back. 10RP 37. On direct examination, he testified that he took out that \$50 and ran with it. 10RP 44. On cross examination, he admitted that he actually took PK's black handbag out of her large white purse and ran off with PK's handbag. 10RP 69, 83.

Kenfield testified that PK then leapt to her feet, clenched her fist and said she was getting her brother, then threatened to beat him up and take all of his money. 10RP 37-38. He said that PK then ran off and he ran toward his car, but the route he chose did not give him access to the alley where he had parked his car, so he hid. 10RP 38-41.

Kenfield saw the police come but claimed he did not come out of hiding because he had drugs and a pipe. 10RP 41. He laid there for a long time, until the police dog found him. 10RP 42. Kenfield testified that he sorted through the items in PK's purse while he was hiding in the brush. 10RP 74. It was over an hour

between the arrival of the first police and the apprehension of Kenfield. 7RP 76; 9RP 8, 13, 18-23, 26.

No drugs or drug paraphernalia was found at the scene of the attack or the location where Kenfield was hiding when he was located by the tracking dog. 7RP 25, 65-68, 125. PK testified that she had not been drinking or using drugs; the officer who was with her for over an hour after the incident stated that PK did not appear to be under the influence of drugs or alcohol. 7RP 127; 8RP 22.

C. ARGUMENT

1. AN INSTRUCTION REQUIRING UNANIMITY AS TO THE ACT SUPPORTING A CONVICTION WAS NOT REQUIRED BECAUSE ONLY ONE CRIMINAL ACT WAS INVOLVED.

Kenfield claims that the trial judge erred in declining to submit a unanimity instruction to the jury relating to the robbery charge. This claim is without merit. There was only one act alleged in support of the robbery charge, so no unanimity instruction was required.

a. Relevant Facts

PK testified that Kenfield attacked her and dragged her into a secluded area, demanding oral sex. 8RP 31-35. PK refused and Kenfield became angry. 8RP 41. Kenfield got on top of PK and

searched her pockets, then, when PK feigned an asthma attack, Kenfield went into PK's purse and ran off with her small handbag. 8RP 45-49. Among other things in her purse, PK had a \$50 bill and the small handbag, which had several small items in it. 8RP 42-43.

Kenfield was tracked by the police K-9 unit and found hiding in some bushes around the corner over an hour later. 7RP 76; 9RP 8, 13, 18-23, 26. He had PK's small handbag and its contents, including her inhaler, as well as a \$50 bill. 8RP 64-65, 128, 156-57; 9RP 23.

Kenfield testified that he took PK's handbag, including the \$50 bill inside, after PK fell to the ground. 10RP 44, 69. He testified that he had given PK a \$50 bill earlier to pay for drugs that she had agreed to obtain on his behalf. 10RP 28-31. He believed the \$50 bill in her handbag was his \$50 bill. 10RP 37. He claimed that he intended to return her handbag. 10RP 47.

Kenfield requested a unanimity instruction after the trial court ruled that there was no basis for an instruction on the good faith claim of title defense because during this incident, Kenfield took from PK items to which he had no claim (her handbag and its contents other than the \$50). CP 149-50; 10RP 97; 11RP 3. Kenfield did not propose an instruction that explained how a

unanimity requirement would apply to multiple items stolen from one victim at one time. CP 149-50.

The trial court concluded that no unanimity instruction relating to multiple acts was required because the facts in this case involved one continuing offense. 11RP 3. The court ruled, "This was certainly a continuing offense, and there is no authority, nor would it make any sense in this court's view to give a good-faith claim of title defense where one of the items stolen the defense is supported by, but not the others." 11RP 3.

In denying Kenfield's motion for a new trial based on the failure to give a unanimity instruction that would permit a good faith claim of title defense, the court repeated its conclusion: "[T]he testimony was clear that there was one taking, basically." 12RP 36.

b. Only One Act Was Alleged In Support Of The Robbery Charged, So No Unanimity Instruction Was Required

When the State presents evidence of "several distinct acts," any one of which could be the basis of a conviction on one criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on "one particular incident." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). A jury must unanimously

agree on the act that supports a conviction. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). If multiple acts could support conviction, either the State must elect the particular incident it is relying on, or the trial court must give a unanimity instruction that informs the jury that it must agree on the same underlying criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

If the evidence establishes only one act that could constitute the crime charged, no unanimity instruction is required. State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990). In that case, the verdict will necessarily reflect unanimous agreement as to that one act. Id.

Even if more than one act could constitute the crime charged, no unanimity instruction is required if the acts constitute a continuing course of conduct. Petrich, 101 Wn.2d at 571. In determining whether there is a continuing course of conduct, courts evaluate the evidence in a commonsense manner. Id. For example, when the relevant acts occurred at different times and places, that tends to show that the acts were distinct and not a continuing course of conduct. Handran, 113 Wn.2d at 17.

When the trial court has refused to submit an instruction to the jury because the facts do not warrant that instruction, that decision is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Discretion is abused when it is exercised in a manifestly unreasonable manner or based on untenable reasons. State v. Valdobinos, 122 Wn.2d 270, 279, 858 P.2d 199 (1993). The trial court in this case rested its decision on its conclusion that the evidence related to only one incident, so no unanimity instruction was required.<sup>3</sup> 11RP 3; 12RP 36. The court correctly found that there was no need for a unanimity instruction based on the facts in this case.

There was only one incident alleged in this case that can be characterized as a robbery: Kenfield, by the use of force, took PK's handbag, which contained items including a \$50 bill.

The trial court concluded that the facts constituted a continuing offense, "one taking." 11RP 3; 12RP 36. One act would necessarily be a continuing course of conduct for purposes of unanimity analysis.

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<sup>3</sup> Although Kenfield recites the standard of review for trial court rulings that are based on a misunderstanding of the law, he makes no argument that the trial court in this case had any such misunderstanding of any aspect of the law relating to unanimity instructions. App. Br. at 13.

The Washington Supreme Court has held that multiple assaults over a period of two hours were a continuing course of conduct. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991). The case at bar involves one incident, not incidents at different times or places, which could indicate distinct acts. Handran, 113 Wn.2d at 17. In this case, the assault on PK followed by the taking of her purse and its contents was one act of robbery and the court did not abuse its discretion in concluding that a unanimity instruction regarding multiple was not necessary.

- c. Kenfield's Claim That One Item That Belonged To Him Was In The Victim's Purse When He Took It Did Not Convert One Taking Into Multiple Distinct Crimes.

Kenfield argues that the difference in his claim of ownership as to one item of the multiple items of property that he took warrants a finding that multiple distinct acts occurred. That argument is without support in the law. One act of taking involving multiple items of property from one victim constitutes a single criminal incident.

That a continuing course of conduct (for purposes of unanimity analysis) requires a single objective does not establish

that multiple distinct acts were at issue in this case. In each of the three cases that Kenfield cites as authority for this proposition, the issue was whether multiple criminal acts, separated by time or place, constituted a continuing course of conduct, and the courts found that the existence of a single objective established that the conduct was a continuous crime. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, rev. denied, 129 Wn.2d 1016 (1996) (cocaine in multiple locations all was part of continuing cocaine trafficking enterprise); State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (two deliveries of cocaine at different times and places were part of one continuing course of conduct); State v. Campbell, 69 Wn. App. 302, 312, 848 P.2d 1292 (1993), rev'd on other grounds, 125 Wn.2d 797 (1995) (numerous acts in furtherance of welfare fraud scheme were part of a continuing course of conduct). The rule is inapplicable to a case involving only one act that could constitute the crime, as in this case. Kenfield has cited no case in which the rule was applied to one act when the defendant claimed he had multiple motivations and such an application of the rule defies common sense.

Even if the requirement of a single objective were applied to the incident at issue here, Kenfield had only a single objective for

purposes of the robbery statute: taking property from PK by force. Kenfield testified that he intended to take the \$50 bill that was in PK's white purse. 10RP 37, 44. Kenfield testified that he saw the \$50 bill when he was searching through PK's purse, while he was at her side. 10RP 37, 44. On cross-examination he admitted that he took her handbag and its other contents, including her inhaler, as well. 10RP 69-70, 74. He agreed that he took the smaller black handbag out of PK's larger white purse. 10 RP 83.

Kenfield's claim on appeal is that, although he did take the purse "in the simplest sense," because he claimed that he intended to return the handbag, his objective with respect to that item was not to take it. App. Br. at 15. His argument that more than a "fleeting taking" is required to establish theft is contrary to our Supreme Court's definition of the term. In State v. Komok, the Court held that the "intent to deprive" component of theft is given its common meaning, which includes simply "to take." 113 Wn.2d 810, 815 & n.4, 783 P.2d 1061 (1989). Theft does not require an intent to permanently deprive another of the property. Id. at 816-17; State v. Miller, 92 Wn. App. 693, 705-06, 964 P.2d 1196 (1998), rev. denied, 137 Wn.2d 1023 (1999). The intent to return the

property taken is irrelevant. State v. Grimes, 111 Wn. App. 544, 556, 46 P.3d 801 (2002), rev. denied, 148 Wn.2d 1002 (2003).

Kenfield advocates changing the definition of "deprive" to include a durational requirement that would separate his taking of the purse from his taking of the money based on how long he intended to deprive the victim of each item. App. Br. at 15-16. The only authority cited is State v. Walker, 75 Wn. App. 101, 879 P.2d 957 (1994), rev. denied, 125 Wn.2d 1015 (1995), which distinguished "intent to deprive" from "an unauthorized taking" in the context of its decision that the crimes of theft in the first degree and the former taking a motor vehicle were not concurrent crimes. That discussion does not suggest that proof of how long the thief intends to deprive the owner of property is a required element of theft. Such a rule would be contrary to the rule established in Komok, that unauthorized taking of the property of another constitutes theft.

2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO A GOOD FAITH CLAIM OF TITLE DEFENSE.

Kenfield assigns error to the trial court's failure to instruct the jury on the good faith claim of title defense as to the \$50 bill stolen. That argument should be rejected. The evidence did not support either of the two required prongs of the good faith claim of title defense. Moreover, the instruction proposed by the defense was an inaccurate statement of the law and the court's refusal to give it also may be affirmed on that basis.

It is a defense to any charge of theft that, "[t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2). If the evidence supports that instruction, it is reversible error to refuse to give it. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). However, a defendant is not entitled to an instruction that is not an accurate statement of the law. Id. Further, it is error to give the instruction if it is not supported by the evidence. Id. When the trial court has refused to submit an instruction to the jury because the facts do not warrant that

instruction, that decision is reviewed for abuse of discretion.

Walker, 136 Wn.2d at 771-72.

The good faith claim of title defense is available even if the taking is by force. State v. Hicks, 102 Wn.2d 182, 188, 683 P.2d 186 (1984). However, under those circumstances the defense does not apply unless the property taken is specific property to which the defendant has a claim of title. Id. at 185-87. It is not a defense to a forceful taking that the victim owed money to the defendant—violent debt collection is not sanctioned. State v. Self, 42 Wn. App. 654, 657-58, 713 P.2d 142, rev. denied, 105 Wn.2d 1017 (1986).

Kenfield concedes that the good faith claim of title defense is not applicable to this robbery charge unless the taking of the black handbag is treated as a distinct act from the taking of the \$50 bill that was inside it. App. Br. at 17. Because Kenfield made no claim of title to PK's handbag or the other contents of her handbag that he took, the defense is not applicable to the theft of those items. See State v. Trout, 125 Wn. App. 403, 416-17, 105 P.3d 69, rev. denied, 155 Wn.2d 1005 (2005) (defense applies only to the claim in the specific property acquired). As argued in the previous section of this brief, there was only one taking, of multiple items of property.

Therefore, this Court should reject Kenfield's claim that the trial court erred in rejecting his instruction as to good faith claim of title.

There also is no evidentiary support for the second prong of the defense, that the property was taken "openly and avowedly." In a typical robbery case, the property is taken openly, albeit by force. In this case, however, Kenfield attacked PK and got her purse from her. Kenfield searched that large white purse while PK was on the ground, apparently having difficulty breathing. 8RP 49; 10RP 36-37. It appears that PK did not see Kenfield take her small black handbag, although she heard him flee, because PK was pretending to be unconscious. 8RP 49-52. Even if she did see him take the purse, these facts do not constitute an open taking of the \$50 bill under a claim of title.

Once Kenfield took the purse with the money, he tried to get to his car but took a route that was a dead end. 10RP 37-41. Police quickly responded to PK's 911 call and Kenfield continued to hide for more than an hour, until he was found by the police tracking dog. 7RP 76; 9RP 8, 13, 18-23, 26. This behavior after the taking also conflicts with the claim that Kenfield was openly asserting title over the property that he took from PK.

Finally, the trial court's rejection of the proposed good faith claim of title instruction was proper because the instruction proposed was an incorrect statement of the law. A defendant is not entitled to an instruction that is an inaccurate statement of the law. Ager, supra, 128 Wn.2d at 93; State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The instruction proposed by Kenfield was the following:

For the state to prove any wrongful taking, the state must prove that the defendant had the intent to steal. No wrongful taking occurs if he honestly believes the property is his own, or is nobody's, or he otherwise honestly believes he is authorized to take it, so long as the property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable. It makes no difference whether the mistake is reasonable or unreasonable so long as it is real, for in any such event the defendant lacks an intent to defraud.

CP 140-41. That instruction is inaccurate in two material respects.

The first inaccuracy is its statement that, "No wrongful taking occurs if ... he otherwise honestly believes he is authorized to take it...."

While it may be accurate in other theft cases, in a robbery case this provision would excuse forceful debt collection, which does not fall within the claim of title defense. Self, 42 Wn. App. at 657-58.

Second, the final sentence inaccurately states that if the defendant has an unreasonable mistaken belief as to his claim of title, he

lacks an intent to defraud. That sentence injects "intent to defraud," which is not an element of robbery, implying that it is part of the State's burden of proof. It also implies that a mistaken belief, if real, negates the intent element of robbery regardless of whether the defendant acted in good faith.

While the trial court did not rely on the errors in the proposed instruction in refusing to adopt it, that provides an alternative basis to affirm the trial court's decision. This Court may affirm the court's ruling on an alternative basis that appears in the record. State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587 (1997).

Because there was no evidentiary support for a good faith claim of title defense in this case, the trial court did not abuse its discretion in refusing to instruct the jury as to that defense.

3. THE PROSECUTOR'S OBSERVATION THAT REDFERN DID NOT TESTIFY WAS NOT REVERSIBLE ERROR.

Kenfield argues that he was deprived of a fair trial because the trial prosecutor improperly shifted the burden of proof in her rebuttal closing argument when she observed that Redfern "did not testify at trial." This claim should be rejected. The prosecutor's statement that Redfern did not testify did not suggest an inference

that her testimony would have been negative or that Kenfield had any burden of proof. If the reference did suggest that Redfern's testimony would have been negative, that inference was justified by the evidence in the case and proper under the missing witness doctrine. Even if the remark was improper, it was not reversible error because it was not flagrant or ill-intentioned and a curative instruction would have been sufficient to ameliorate any resulting prejudice, but there was no objection to the remark and no curative instruction was requested.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. Const. amend. V, VI; WA Const. art. I, § 3. A defendant who claims on appeal that prosecutorial misconduct deprived him of a fair trial bears the burden of establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). If misconduct is proven, it is grounds for reversal if the defendant establishes a substantial likelihood that the improper conduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

However, no objection was made to the remark now challenged. 12RP 66. A defendant who does not make a timely

objection at trial waives any claim on appeal unless the misconduct in question is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been neutralized by a curative instruction to the jury. Fisher, 165 Wn.2d at 747 (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

a. Relevant Facts

PK testified that the \$50 bill in her purse had been given to her by her mother, in payment for care provided by PK. 8RP 44.

Defense witness Peach testified that Kenfield had been working for her in the summer of 2008 and that she paid him by writing checks, usually made out to Redfern. 9RP 77. Defense witness Strohschein testified that he had at some point around July 4, 2008, seen Redfern hand \$50 bills to Kenfield. 9RP 84-86.

Kenfield testified that he lived in the same house as Redfern, who was his friend. 10RP 78. He testified that sometimes Peach paid him wages by writing a check to Redfern, and Redfern would cash the check and give him the money. 10RP 45, 77. He admitted that he had talked to Redfern about the case and that he had repeatedly told Redfern that he loved her. 10RP 75, 78.

On the first day of trial, May 19, 2009, Kenfield endorsed Redfern as a defense witness. 1RP 77-78. The State then obtained recordings of jail phone calls between Kenfield and Redfern, which included discussions of this case. 9RP 59-61; 10RP 75. Defense counsel still stated that he intended to call Redfern but was upset about the possibility that she would be impeached with the jail phone calls. 9RP 59. Redfern was not called as a witness.

In his closing argument, Kenfield's counsel argued:

Finally, Mr. Kenfield, as we have said from the very first, was found in the area with a \$50 bill and some other items. Here's the 50. How did the \$50 get there that night? We have traced a provenance for the \$50 bill, and [PK] gives no provenance for the \$50 bill. Somebody gave it to her. She doesn't work, she's unemployed, does odd jobs, doesn't know who gave it to her, doesn't know when she had that.

... .  
So let's talk about the provenance of the \$50. You saw evidence about this. Mr. Kenfield was given a check, it was written to Lisa Redfern, it was cashed, and Terry Strohschein came and said, "Yeah, I saw Gary get paid. I saw him get \$50 bills."

12RP 52-53, 55.

In her rebuttal closing argument, the prosecutor responded:

The \$50 bill, where did this \$50 bill come from? [PK] told you her mom gave it to her. The defendant told you that this woman Lisa, who did not testify at trial, gave him the \$50. And what Terry told you is that at some point in his life, he saw Terry (sic) hand the defendant a \$50 bill, but he was

candid with you, and he said, "I don't really even remember when that was."

So the suggestion that the defense somehow provided you with a better origin of the \$50 bill just doesn't hold water in this case. [PK] told you she got it from her mom. There is no reason to believe otherwise.

12RP 66. There was no objection to the prosecutor's argument on this point. 12RP 66.

In one of his motions for new trial, Kenfield's trial counsel claimed prosecutorial misconduct in the State's rebuttal argument, in the prosecutor's representation that the evidence reflected that PK had been consistent in her description of the details of the attack. CP 203-05.<sup>4</sup> He did not assert any error relating to the issue raised in this appeal. CP 203-09.

b. The Challenged Phrase, That Redfern "Did Not Testify At Trial," Was Not A Reference To The Missing Witness Doctrine.

The prosecutor did not comment, as Kenfield asserts,<sup>5</sup> that Kenfield did not call Redfern. The prosecutor simply stated that Redfern "did not testify at trial." 12RP 66. That was a fact known to the jury because Redfern had not testified. The prosecutor did

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<sup>4</sup> Kenfield agreed that the evidence reflected that PK had been consistent in her description of the attack but claimed that there actually had been an inconsistency in her statements regarding the attack, and the prosecutor's summary of the evidence at trial deprived him of a fair trial and improperly shifted the burden of proof. CP 204-09.

<sup>5</sup> App. Br. at 20.

not suggest that any negative inference should be drawn about what Redfern's testimony might have been. The prosecutor simply pointed out that, just as PK testified that she got the \$50 that was in her purse from her mother, Kenfield testified that he got it from Redfern, but Redfern had not testified to that transaction herself.

When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence.

State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990).

During both its closing argument and its rebuttal closing argument, the prosecutor clearly stated that the State had the burden of proving the crime beyond a reasonable doubt. 12RP 12, 62, 64. The single phrase that reminded the jurors that Redfern did not testify would not have suggested that the State should be relieved of its burden of proving the elements of the crime.

- c. If The Statement That Redfern Did Not Testify Is Considered A Reference To The Missing Witness Doctrine, The Argument Was Justified.

Redfern had a special relationship to Kenfield and Kenfield explicitly chose not to call her as a witness because he believed that her testimony would have an unfavorable effect on his case. It could not be clearer that the missing witness doctrine applies to Redfern. To the extent that the prosecutor's statement that she did not testify inferred that Redfern's testimony would have been negative, that was a natural inference from the evidence and there was no error in the prosecutor referring to it.

It is not error for a prosecutor to comment on the defendant's failure to call a witness under circumstances indicating that the defendant would not have failed to call the witness unless the witness's testimony would be damaging. State v. Blair, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). The inference is based on the failure to call a witness when it would be natural for the defendant to do so if the witness's testimony would be favorable. Id. (citing State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185 (1968)). This rule generally is referred to as the "missing witness" rule. Davis, 73 Wn.2d at 275-76.

While the missing witness rule does not apply if the witness is equally available to either party, a witness is not equally available simply because the witness could be subpoenaed by either party or even was present at trial. Davis, 73 Wn.2d at 276-77. A missing witness is particular available to a party if they share "a community of interest" or "ties of interest or affection" that result in a logical inference that the witness would be called by that party unless the party had reason to believe the witness's testimony would be unfavorable. Blair, 117 Wn.2d at 490 (citing Davis, 73 Wn.2d at 277).

Not every comment referring to a defendant's failure to call a witness impermissibly shifts the burden of proof. Blair, 117 Wn.2d at 491. A prosecutor is entitled to argue the reasonable inference from the defendant's testimony, when the defendant testifies at trial that a witness with a special relationship to the defendant could corroborate his story but the defendant does not call the witness. Id. at 491-92; Contreras, 57 Wn. App. at 476.

Kenfield's characterization of the relationship of Redfern to him as "his landlord"<sup>6</sup> is incomplete and misleading. Kenfield lived

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<sup>6</sup> App. Br. at 21-22.

in the same house with Redfern, called her a friend, discussed the case in multiple phone calls with her, and admitted that he regularly told Redfern that he loved her. 9RP 61-62; 10RP 75, 78. Redfern was more than a landlord – she and Kenfield had the ties of affection that would make it natural for him to call her unless he believed her testimony would be unfavorable.

Moreover, this is the unusual case where we know that Kenfield did not call Redfern because he believed that the result of her testimony would be unfavorable, as Kenfield concedes. 9RP 58-62; App. Br. at 25. That may well have been a "legitimate strategic decision," as Kenfield characterizes it on appeal. App. Br. at 25. However, that is exactly the strategic decision that would warrant the (accurate) inference that he expected that the result of calling Redfern would be negative.

Finally, the reference to Redfern not having testified was a fair reply to the defense closing argument regarding evidence connecting Kenfield to the \$50 bill. Arguments that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The

prosecutor's remarks must not be viewed in isolation, but "in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given." Gregory, 158 Wn.2d at 810.

Kenfield's defense counsel inaccurately stated in his argument that PK did not know who gave her the \$50 bill that was in her handbag. 8RP 44; 12RP 52. He later described in detail the testimony of the defendant and defense witnesses that would tie the \$50 bill to Kenfield. 12RP 55. The prosecutor responded, pointing out that PK testified that she got the \$50 bill from her mother and that Kenfield testified that he got that \$50 bill from Redfern, who did not testify herself. 12RP 66. She immediately added that although defense witness Strohschein said that he had seen someone give Kenfield a \$50 bill, he did not know when. 12RP 66. When the defense attorney actively argued Redfern's role in tying the \$50 bill to Kenfield, he invited the State's reminder that she had not testified.

State v. Dixon, 150 Wn. App. 46, 207 P.3d 459 (2009), on which Kenfield relies to establish that a response can be no more than reasonable, is an example of an excessive response. In that case, Dixon did not testify and apparently called no witnesses. Id.

at 51-52. Dixon's counsel argued that there was insufficient evidence of dominion and control of drugs in Dixon's purse because there was an unknown person in the car with Dixon. Id. at 56. The prosecutor responded with a lengthy argument to the effect that if the passenger had anything to say, Dixon would have called him. Id. at 52. Then the prosecutor argued that Dixon had not made a statement that the passenger put the drugs in her purse, and that he did not testify to that effect. Id. The court there noted that the missing witness doctrine was not applicable because: there were two good explanations for the passenger's absence (the likelihood of self-incrimination and the parties' inability to find him); there was no evidence of a relationship between Dixon and the passenger; and Dixon did not imply that the passenger would have corroborated the defense theory. Id. at 55. In that context, the response that Dixon should have called the witness was not reasonable. Id. at 56-57.

By contrast, in this case Kenfield testified and called two other witnesses to try to establish his connection to the \$50 bill. All three of those witnesses testified to Redfern's central role and Kenfield testified to his friendship and continuing contacts with Redfern. The observation that Redfern herself did not testify was

not an unreasonable response to defense counsel's challenge to the State's evidence of the source of PK's \$50 bill. Where Kenfield chose not to call Redfern in order to avoid the negative effect of her testimony, the prosecutor's simple remark that she did not testify was an appropriate response.

d. If The Statement Was Improper, It Is Not Reversible Error.

Defense trial counsel did not object to the phrase challenged on appeal. Therefore, if the remark was improper it is not reversible error unless it is misconduct so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Fisher, 165 Wn.2d at 747.

The Supreme Court recognizes the reality that the absence of an objection by defense counsel “*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial.” McKenzie, 157 Wn.2d at 53 n.2 (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991)). That court has stated, “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse,

use the misconduct as a life preserver ... on appeal.” State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995) (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

The prosecutor did not argue that Kenfield should have called Redfern or that he had any obligation to do so. The single simple statement that Redfern did not testify cannot be characterized as flagrant and ill-intentioned misconduct. Because Kenfield testified and called other witnesses on his behalf, the remark cannot be interpreted as faulting him for not testifying or not putting on a defense case.

If the phrase "who did not testify at trial" was an improper suggestion that Kenfield had a burden of proof at trial, any prejudicial effect of that single brief comment could have been cured by instructing the jury that he did not have any such burden.

Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence. As Judge Learned Hand wrote, “Juries are not leaves swayed by every breath.” United States v. Garsson, 291 F. 646, 649 (D.N.Y.1923).

State v. Kirkman, 159 Wn.2d. 918, 938, 155 P.3d 125 (2007).

During both its closing argument and its rebuttal closing argument, the prosecutor clearly stated that the State had the burden of proving the crime beyond a reasonable doubt. 12RP 12, 62, 64.

The jury was instructed that the State has the burden of proving a charge beyond a reasonable doubt, both in the general instruction as to the burden of proof and in the instruction as to the elements of robbery. CP 158, 167. The jury is presumed to follow instructions when there is no evidence that they were confused or unfairly influenced. State v. Montgomery, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008). Kenfield has cited no such evidence in this case.<sup>7</sup>

The challenged phrase in the State's rebuttal argument was proper. Even if it was improper, Kenfield has not explained why any prejudice could not have been cured and how it could have affected the verdict given that the jury had heard about Kenfield's relationship with Redfern and knew that she had not been called as

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<sup>7</sup> The jury note cited by Kenfield as proof of prejudice does not suggest any confusion on the part of the jury as to the burden of proof. CP 182; App. Br. at 26.

a witness. Any error in the challenged remark was insignificant in the context of this case.

D. CONCLUSION

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

DATED this 17<sup>th</sup> day of May, 2010.

Respectfully submitted,

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