

COURT OF APPEALS
STATE OF WASHINGTON
NOV 1 2011 4:57

No. 68114-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE TOMS, a/k/a JAMIL MU'TAZZ

Appellant.

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

APPELLANT'S REPLY BRIEF

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ARGUMENT

1. The "continuing course of conduct" exception does not apply in this case because the two alleged assaults were not "one transaction."

The State argues that a *Petrich*¹ unanimity instruction was not necessary in this case because the *Petrich* requirement "does not apply when the State presents evidence of a continuous course of conduct." Br. of Resp't at 6. The State argues that both alleged assaults were part of a continuing course of conduct because they involved the same victim, occurred a few minutes apart, and were "committed by Toms for the same purpose, namely to facilitate his evasion from capture." Br. of Resp't at 9.

The State's argument overstates the proper scope of the "continuing course of conduct" exception. The purpose of the unanimity requirement is to ensure that every member of the jury has agreed that the defendant committed a single criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 411, 756 P.2d 105 (1988). As the Supreme Court of California has recognized, the "continuous conduct exception" fits within the jury unanimity requirement because there are some cases where either "two offenses [are] . . . so closely connected in time that they form[] part of one transaction," or the "offense . . . , in itself, consists of a continuous course

¹ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

of conduct." *People v. Diedrich*, 31 Cal.3d 263, 282, 643 P.2d 971 (1982); *see also Petrich*, 101 Wn.2d at 571 (noting that the instruction is not required if the acts alleged were "one transaction"). In these types of cases, "there is no need for a unanimity instruction as to individual acts within the course of conduct, because the jury need only agree on whether the defendant committed acts the net effect of which constitutes the statutory offense." *People v. Zavala*, 130 Cal. App. 4th 758, 769, 30 Cal. Rptr. 3d 398 (2005).

A simple example of the type of case where a *Petrich* instruction would not be required would be a typical fist-fight. In the course of a fight, each person would likely deliver several blows to the other, each one of which would be sufficient to convict for assault. But because the fight is a single, ongoing "transaction," the State could properly obtain an assault conviction without basing the conviction on any one specific punch or kick.

The cases relied upon by the State are examples of this type of case. In *State v. Handran*, the Court found a continuing course of conduct for a single assault conviction where the victim "awoke to find [the defendant] leaning over her, nude and kissing her. She demanded that he leave immediately. Instead, he pinned her down, offered her money and at one point hit her in the face." 113 Wn.2d 11, 12, 775 P.2d 453 (1989). In

State v. Crane, the Court held that the exception applied when the evidence indicated that a fatal assault had occurred sometime within a two-hour window, though the evidence apparently did not identify any particular assaultive act that had occurred during that time. 116 Wn.2d 315, 329-31, 804 P.2d 10 (1991).

In this case, on the other hand, the alleged assaults cannot fairly be called a single, ongoing assault—or "one transaction"—as could a series of punches in a fist-fight or the events at issue in *Handran* and *Crane*. Indeed, the State does not even directly claim as much. Rather, it contends that the two alleged assaults were part of a continuing attempt to elude capture. Br. of Resp't at 9-10. But Mr. Mu'Tazz was not charged with attempting to elude; he was charged with assault. And the evidence indicates that there were two distinct acts—separated by Mr. Mu'Tazz's attempt to terminate the encounter and leave the scene—that could have formed the basis of that conviction. *See* App. Opening Br. at 3-4. In fact, before the second incident, Officer Ducre lost all contact with Mr. Mu'Tazz, and only re-established contact when he used his flashlight to locate Mr. Mu'Tazz, who was by then facing away from him and hiding in the bushes. *See id.* Given the significant break in continuity initiated by Mr. Mu'Tazz, the two acts cannot reasonably be called "one transaction."

The *Petrich* instruction was therefore required, and the failure to give it was reversible error as to the assault conviction.

CONCLUSION

For the foregoing reasons and those presented in the Opening Brief, Mr. Mu'Tazz asks this Court to vacate his conviction for third-degree assault.

DATED this 1st day of November, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Lahiri', written over a horizontal line.

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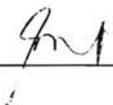
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