

TABLE OF CONTENTS

Page

I. ASSIGNMENTS OF ERROR..... 1

1. THE TRIAL COURT ERRED WHEN IT REFUSED TO ADMIT EVIDENCE OF MICHAEL KORNELL'S BIAS AT THE TIME OF TRIAL DEMONSTRATED BY HIS HAVING DAMAGED THE HOME OF RODI YACAPIN AND STOLEN FROM YACAPIN AFTER YACAPIN'S ARREST FOR ASSAULTING HIM. 1

2. THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY THAT THEY NEEDED TO BE UNANIMOUS AS TO WHICH ACT FORMED THE BASIS FOR THE ASSAULT IN THE FOURTH DEGREE CONVICTION. 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

1. EVIDENCE OF A WITNESS'S BIAS TOWARD THE DEFENDANT AT THE TIME OF TRIAL IS RELEVANT AND CAN BE PROVEN THROUGH EXTRINSIC ACTS. EVIDENCE OF MICHAEL KORNELL'S BIAS TOWARD RODI YACAPIN IS DEMONSTRATED BY KORNELL'S DAMAGE TO AND THEFT OF YACAPIN'S PROPERTY AFTER YACAPIN'S ARREST FOR ASSAULTING KORNELL. WAS IT ERROR FOR THE TRIAL COURT TO EXCLUDE YACAPIN'S TESTIMONY ABOUT THE DAMAGE AND THEFT TO SHOW KORNELL'S BIAS AT THE TIME OF TRIAL?..... 1

2. A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY. WHEN MULTIPLE ACTS COULD FORM THE BASIS FOR A SINGLE CRIME, THE STATE HAS TWO CHOICES; IT MUST (1) ELECT THE SPECIFIC ACT ALLEGED OR (2) INSTRUCT THE JURY THAT THEY MUST BE UNANIMOUS BEYOND A REASONABLE DOUBT AS TO THE SAME UNDERLYING CRIMINAL ACT. WAS IT ERROR FOR THE TRIAL COURT TO FAIL TO GIVE A UNANIMITY INSTRUCTION ON RODI YACAPIN'S ASSAULT IN THE

FOURTH DEGREE WHEN THE STATE NEITHER ELECTED THE SPECIFIC INCIDENT OF ASSAULT IT WAS RELYING ON OR GAVE A UNANIMITY INSTRUCTION?	1
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	7
I. THE TRIAL COURT’S REFUSAL TO ADMIT RELEVANT BIAS EVIDENCE DEPRIVED RODI YACAPIN A FAIR TRIAL. .	7
II. THE LACK OF A PETRICH UNANIMITY INSTRUCTION OR THE STATE’S ELECTION OF A SPECIFIC ACT OF ASSAULT IN THE FOURTH DEGREE DENIED RODI YACAPIN A UNANIMOUS VERDICT ON THAT CHARGE.	11
V. CONCLUSION	13

TABLE OF AUTHORITIES

Page

Cases

<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed.2d 347(1974).....	7
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990)	12
<u>State v. Dolan</u> , 118 Wn. App. 323, 73 P.3d 1011 (2003).....	9, 10
<u>State v. Gitchel</u> , 41 Wn. App. 820, 706 P.2d 1091, <u>review denied</u> , 105 Wn.2d 1003 (1985).....	12
<u>State v. Hanson</u> , 59 Wn. App. 651, 800 P.2d 1124 (1990).....	12
<u>State v. Holland</u> , 77 Wn. App. 420, 891 P.2d 49 (1995).....	13
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	12
<u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005)	7
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	12
<u>State v. Spencer</u> , 111 Wn. App. 401, 45 P.3d 209 (2002).....	8
<u>State v. Workman</u> , 66 Wn. 292, 119 P. 751 (1911).....	11
<u>United States v. Abel</u> , 469 U.S. 45, 105 S. Ct. 465, 83 L.Ed.2d 450 (1984).....	10

Statutes

RCW 9A.36.041	13
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Other Authorities

ER 401	8
ER 402	8
ER 607	8
RAP 2.5(a)(3)	12

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- 2. A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY. WHEN MULTIPLE ACTS COULD FORM THE BASIS FOR A SINGLE CRIME, THE STATE HAS TWO CHOICES; IT MUST (1) ELECT THE SPECIFIC ACT ALLEGED OR (2) INSTRUCT THE JURY THAT THEY MUST BE UNANIMOUS BEYOND A REASONABLE DOUBT AS TO THE SAME UNDERLYING CRIMINAL ACT. WAS IT ERROR FOR THE TRIAL COURT TO FAIL TO GIVE A UNANIMITY INSTRUCTION ON RODI YACAPIN'S ASSAULT IN THE FOURTH DEGREE WHEN THE STATE NEITHER ELECTED THE SPECIFIC INCIDENT OF ASSAULT IT WAS RELYING ON OR GAVE A UNANIMITY INSTRUCTION?**

III. STATEMENT OF THE CASE

On September 26, 2005, Rodi Yacapin was tried under a second amended information for assault in the second degree with a firearm enhancement (count I) and assault in the fourth degree (count II). CP 1; RP¹ 25-151. The State presented testimony from the 911 center custodian of records², two police officers, and victim Michael Kornell. RP 33-75. Yacapin testified as the sole defense witness. RP 83-111. Who was telling the truth about what happened on the evening of April 17, 2005, was the trial issue. RP 133-45.

Rodi Yacapin was building a home in Clark County. RP 40-41, 84. While the home was under construction, Yacapin had two adult male tenants, Michael Kornell and Kenneth Suture. RP 41-42, 84. Each of the men had a separate bedroom and shared the common areas of the home including the kitchen. RP 41-42, 84.

¹ "RP" as used herein refers generally to the four volumes of verbatim prepared for the case. The page numbers are sequential from volume to volume. All parts of the trial are contained in volume II-A except for a discussion about the admissibility and redaction of the 911 tape and the filing and acceptance of the second amended information before the commencement of trial. That discussion occurred on September 26, 2005, before the commencement of the trial and is contained in volume II-B.

² The witness, Debbie Butchard, was called to lay the foundation for admission of a redacted 911 tape. See Exhibit 3, Supplemental Designation of Clerk's Papers.

On the evening of April 17, Yacapin testified that he came home from a movie with his two teenage children. RP 85, 94. He wanted to put a pizza in the oven but Kornell had a pan in the oven, the oven was on, and the oven was unattended. RP 85-86. This frustrated Yacapin as he had previously had concerns about his tenants leaving the oven unattended and even leaving burners on overnight. RP 85-86. Yacapin went to Kornell's door and said that he wanted to put a pizza in the oven. RP 86. Kornell looked at Yacapin and shut his bedroom door. RP 86. Yacapin walked away. RP 86. Yacapin returned to Kornell's door a second time, knocked, and said that he was going to use the oven to cook a pizza. RP 86-87. Kornell did not respond. RP 87. Yacapin took the pan out of the oven and hollered to Kornell that he had done so and still got no response. RP 87. Yacapin was upset by Kornell's lack of response so he returned to Kornell's door, knocked, and said that he was going to use the oven. RP 87-88. Kornell pushed the door closed against Yacapin. RP 88. Angry, Yacapin pushed back. RP 88. Kornell threatened Yacapin with a hammer so Yacapin backed off. RP 89. Yacapin denied ever threatening Kornell with a gun. RP 92. The bedroom door was broken and a

phone was knocked from the wall during the pushing and shoving. RP 90-91. Yacapin denied intentionally hitting or kicking Kornell. RP 98.

Kornell testified that he was home when Yacapin returned. RP 42. Yacapin was mad because Kornell had cooked something but had not cleaned up the dishes. RP 42. Kornell told Yacapin that he would clean up the dishes when he was done eating. RP 43. Yacapin was not satisfied with this answer. RP 42-43. An argument ensued. RP 43. Yacapin pushed Kornell on the chest with both hands. RP 43. Kornell tried to call 911 using a hallway telephone but Yacapin tore the phone from the wall. RP 43. Kornell went to his room and locked the door. RP 44. Yacapin kicked in the door. RP 45. Kornell grabbed his cell phone and dialed 911. RP 45. While on the phone with 911, Yacapin attacked him by hitting and kicking him. RP 45. Kornell pushed Yacapin out of the room and shut the door as well as he could because the door had been broken during the initial kick. RP 47. Yacapin's cell phone was dislodged from his belt during the struggle and fell onto Kornell's bedroom floor. RP 48. Yacapin kicked in the door again and pointed a handgun at Kornell's face and said that he would shoot. RP 49. Kornell jumped out a bedroom window and waited

for the police to arrive. RP 50. Kornell denied having any sort of weapon during the dispute. RP 47.

Clark County Deputy Boyle arrived to find Kornell outside, shoeless, and shivering. RP 58-59. The police used a loud speaker directed at Yacapin to ask him to leave the home. RP 68. Yacapin did not respond initially but walked out on his own about 15 minutes later. RP 68. Yacapin said that he did not hear the police calling him out and just assumed that they were there to deal with his unruly tenant Kornell. RP 93-94.

Boyle located a handgun in a hall closet after Yacapin consented to the search. RP 58-62. Clark County Deputy Prather located the gun's magazine in Yacapin's left front pocket. RP 69. Prather later fired the gun and found it operational. RP 72-73. Yacapin testified that he had a concealed weapon permit for the gun and routinely carried it between his underwear and the waistband of his pants and may have had it there when arguing with Yacapin. RP 88, 93-94, 99-100.

Over a foundational objection, the State played Kornell's (redacted) 911 call to the jury. RP 38-39³. Much of the interaction between Yacapin and Kornell at and in Kornell's bedroom was recorded. (See Exhibit 3 in Supplemental Designation of Clerk's Papers.)

Immediately prior to Yacapin's testimony, the State moved in limine to exclude Yacapin from testifying that after he was arrested and while he was in custody, Kornell damaged Yacapin's home and stole items from Yacapin. RP 76-77. The State argued that this information was irrelevant. RP 76-78. Yacapin objected arguing that it was highly relevant to show the relationship between Yacapin and Kornell and that Kornell was biased and simply wanted to get Yacapin out of the house so he could take advantage of his absence. RP 78-79. The court agreed with the State and excluded the evidence on relevancy grounds. RP 79.

The jury instructions included self-defense instructions. CP 3-22. No Petrich unanimity instruction was given. CP 3-22. Yacapin took no exceptions or objections to the instructions. CP 112-17.

³ On September 23, 2006, the court heard the State's pre-trial motion to admit the 911 tape. The court ruled that the tape was admissible over Yacapin's foundational objection. RP 3-22.

Both the State and Yacapin argued during closing that the content of the 911 call supported their respective positions. RP 133-36 (State), 140-41 (Yacapin), 144 (State).

The jury found Yacapin guilty as charged to include the special verdict that he was armed with a “deadly weapon”. CP 32-34. At sentencing held on October 17, the State conceded that the “deadly weapon” language on the special verdict precluded use of a firearm enhancement at sentencing.⁴ RP 172-73. As such, the enhancement time was limited to 12 months as a deadly weapon rather than 36-months as a firearm. RP 172-73. Yacapin had no criminal history. CP 27. He was sentenced to his standard range on both counts with the enhancement time added to the second degree assault giving him a total sentence of 18 months. CP 28-30. He made a timely appeal. CP 48-70.

IV. ARGUMENT

I. THE TRIAL COURT’S REFUSAL TO ADMIT RELEVANT BIAS EVIDENCE DEPRIVED RODI YACAPIN A FAIR TRIAL.

A defendant has a constitutional right to impeach a prosecution witness with bias evidence. Davis v. Alaska, 415 U.S.

⁴ See State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005)

308, 316-18, 94 S. Ct. 1105, 39 L. Ed.2d 347(1974); State v. Spencer, 111 Wn. App. 401, 409, 45 P.3d 209 (2002). The defendant shall be afforded broad latitude in showing the bias of opposing witnesses. Spencer, 111 Wn. App. at 411. All relevant evidence is admissible unless there are specific limitations on its admissibility. ER 402. Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. ER 401. The credibility of a witness may be attacked by any party. ER 607.

Here, the trial court precluded Yacapin from testifying about bias by Michael Kornell, the State's only eye-witness. After learning that Yacapin intended to testify, the State made a motion in limine to prevent Yacapin from testifying that he had discovered that Kornell damaged his residence and stole his property while the current charges were pending and before Yacapin was able to evict Kornell. The State's argument was that the proposed evidence was a civil landlord-tenant issue that was confusing to the jury and had nothing to do with the case. RP 77. Yacapin countered that the evidence was essential to support his theory that he and Kornell had not been getting along prior to the incident, that Kornell

embellished the incident to get Yacapin out of the home, and that Kornell's damage and theft demonstrated Kornell's overall attitude and bias toward Yacapin at the time of trial. RP 78-79. In granting the State's motion, the court held that evidence of the relationship would be limited to events leading up to and at the time of the charged event. RP 79. But the trial court erred in imposing this limitation.

A case on point is State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003). In Dolan, Batts left her young son, Rollan in the care of her boyfriend, Dolan. When she returned to the home, she saw red marks on Rollan's neck. She took Rollan to the hospital. The cause of the red marks were disputed. Dolan is charged with assault of a child in the second degree. At trial, Dolan sought to admit Batts's bias toward him though evidence of the post-incident bitter custody dispute over their biological child, Raymond, and Batt's promise that she would make the whole thing go away if Dolan would relinquish custody of Raymond. Dolan, 118 Wn. App. at 328. The State challenged the admissibility as irrelevant arguing that it involved a collateral matter and had nothing to do with Batts's perception and credibility in the assault case because the entire

custody case arose after Dolan was charged with assaulting Rollan. Id. The trial court agreed and excluded the proposed bias evidence.

On review, this court disagreed with the trial court. The rules of evidence require that the accused be permitted to challenge a witness for bias. Dolan, 118 Wn. App. at 328 (citing United States v. Abel, 469 U.S. 45, 105 S. Ct. 465, 83 L.Ed.2d 450 (1984)). “Bias includes that which exists at the time of trial, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness’s accuracy while the witness was testifying.” Id. at 328-29. Bias can arise from a variety of circumstances including civil proceedings between the victim and the defendant. Id. at 328. Because the State’s case rested heavily on Batts and was entirely circumstantial, this court held that the bias evidence should have been admitted, its exclusion was not harmless and a new trial was required.

The same holds true in Yacapin’s case. The only witnesses as to what occurred between Yacapin and Kornell were Yacapin and Kornell. While 911 recorded much of the dispute, both Yacapin and Kornell argued at trial that the 911 call supported their respective position. Had the jury been made aware of the ongoing

bias of Kornell toward Yacapin as demonstrated by the post-incident damage to and theft of Yacapin's property it could have been persuaded that Yacapin's version was the correct version and acquitted him. A new trial is merited.

II. THE LACK OF A PETRICH UNANIMITY INSTRUCTION OR THE STATE'S ELECTION OF A SPECIFIC ACT OF ASSAULT IN THE FOURTH DEGREE DENIED RODI YACAPIN A UNANIMOUS VERDICT ON THAT CHARGE.

Rodi Yacapin was convicted of an assault in the fourth degree without the constitutionally-required unanimity as to the underlying act forming the basis for the assault. The State did not elect which of several acts it was relying on to support the assault. And there was no unanimity instruction telling the jurors that they must be unanimous as to which assault allegation was proven beyond a reasonable doubt. The lack of these two safeguards denied defendant the constitutional guarantee of a unanimous jury.

In State v. Petrich, the Supreme Court said:

When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected. We therefore adhere to the [State v.] Workman [66 Wn. 292, 119 P. 751 (1911)] rule, with the following modification. The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act

will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement.

State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Hanson, 59 Wn. App. 651, 656-57, 800 P.2d 1124 (1990).

Under our facts, there was no objection at the trial court to the lack of either a prosecutor-election or a unanimity instruction. However, error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 685 757 P.2d 492 (1988). The right to a unanimous verdict is a fundamental constitutional right. State v. Gitche, 41 Wn. App. 820, 821-22, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985). The failure to give a Petrich instruction can be raised for the first time on appeal as failure to give it affects the defendant's constitutional right to the unanimous verdict of a jury trial. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

To apply Petrich, three questions must be asked. First, what must be proven under the applicable statute? Second, what does the evidence disclose? Third, does the evidence disclose more than one violation of the statute? Hanson, 59 Wn. App. at 657-58.

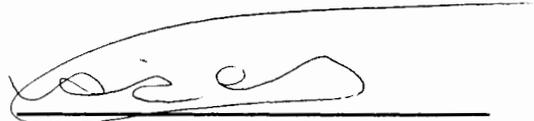
Applying this 3-part analysis, the crime of assault in the fourth degree requires an intentional assault of another. RCW 9A.36.041; CP 15 (Instruction 11). As instructed, an assault can be any of two different acts: (1) an unlawful intentional touching or striking, and (2) an unlawful act done with the intent to create imminent fear of bodily injury. CP 10 (Instruction 6). Here, the evidence was that Yacapin (1) pushed Kornell on the chest in the hallway and (2) later hit and kicked Kornell in Kornell's bedroom. These are separate acts.

The prosecutor emphasized the separateness of the acts in his closing. "Count Two is just the touching, the striking, the pushing." RP 135. Which of the separate acts of assault in the fourth degree the jury relied upon – and whether the jury was unanimous as to which act – is left to the imagination. The error was not harmless. State v. Holland, 77 Wn. App. 420, 426, 891 P.2d 49 (1995). Retrial is necessary.

V. CONCLUSION

Both the evidentiary error and the instructional error necessitate reversal and remand for retrial.

Respectfully submitted this 9th day of May, 2006.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', is written over a horizontal line.

LISA E. TABBUT/WSBA #21344
Attorney for Appellant

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2
3 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
4 DIVISION II

5 STATE OF WASHINGTON,)

6 Respondent,)

7 vs.)

8 RODI PETER YACAPIN,)

9 Appellant.)
10

) Clark County No. 05-1-00888-1

) Court of Appeals No. 34021-6-II

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13 directed to:

14 Michael C. Kinnie
15 Clark County Prosecuting Attorney
16 P.O. Box 5000
17 Vancouver, WA 98666

18 And

19 Rodi Peter Yacapin/DOC #888009
20 Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

21 And that said envelope contained the following:

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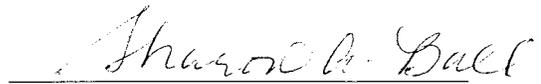
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3 Dated this 9th day of May 2006.

4 

5 LISA E. TABBUT, WSBA #21344
6 Attorney for Appellant

7
8
9 SUBSCRIBED AND SWORN to before me this 9th day of May 2006.



12 

13 Sharon A. Ball
14 Notary Public in and for the
15 State of Washington
16 Residing in Cowlitz County, WA
17 My commission expires 06/10/07

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