

NO. 47212-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL MCBEE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 13-1-01267-9

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

1. Where defendant affirmatively denied the need for a *Petrich* instruction below, does the invited error doctrine preclude review of defendant’s challenge to the absence of such an instruction on appeal? Further, where the prosecutor elected the assaultive act relied on and the acts were a continuing course of conduct, was a *Petrich* instruction on jury unanimity required?1

2. Where the court omitted a dismissed count on the judgment and sentence, should this Court issue an order amending the judgment?1

B. STATEMENT OF THE CASE.....1

1. Procedure1

2. Facts.....3

C. ARGUMENT.....6

1. REVIEW OF THE ALLEGED *PETRICH* ERROR IS PRECLUDED BY THE DOCTRINE OF INVITED ERROR. FURTHER, NO *PETRICH* INSTRUCTION WAS REQUIRED BECAUSE THE PROSECUTOR MADE AN ELECTION IN CLOSING AND THE EVIDENCE SHOWED A CONTINUING COURSE OF CONDUCT; THEREFORE, THERE WAS NO ERROR IN THE COURT NOT GIVING A *PETRICH* INSTRUCTION.....6

2. ANY ERROR IN FAILING TO DOCUMENT THE DISMISSAL OF COUNT VI ON THE JUDGMENT CAN BE RECTIFIED BY ENTRY OF AN ORDER IN THE TRIAL COURT12

D. CONCLUSION..... 13-14

Table of Authorities

State Cases

State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121 (2011) 13

State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) 10, 11

State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990)..... 8

State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) 6, 7

State v. Petrich, 101 Wn.2d 566, 569,
683 P.2d 173 (1984) 1, 6, 7, 8, 9, 12, 13

State v. Rodriguez, 187 Wn. App. 922, 937, 352 P.3d 200 (2015)..... 10

State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)..... 7

State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014) 10

State v. Wilson, 125 Wn.2d 212, 219, 883 P.2d 320 (1994)..... 11

Statutes

RCW 9A.36.011 11

Rules and Regulations

CrR 7.8(a) 12, 13

Other Authorities

WPIC 4.25 7

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where defendant affirmatively denied the need for a *Petrich* instruction below, does the invited error doctrine preclude review of defendant's challenge to the absence of such an instruction on appeal? Further, where the prosecutor elected the assaultive act relied on and the acts were a continuing course of conduct, was a *Petrich* instruction on jury unanimity required?
2. Where the court omitted a dismissed count on the judgment and sentence, should this Court issue an order amending the judgment?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Michael McBee (hereinafter "defendant") with one count of attempted first degree murder (Count I), two counts of first degree assault (Counts II and III),¹ one count of first degree burglary (Count IV), one count of second degree malicious mischief (Count V), and one count of second degree unlawful possession of a firearm (Count VI). CP 1-4.

¹ Count I was against Kevin Headland. Count II was against Deborah Headland. Count III was against Stephen Norman. CP 1-4.

After a CrR 3.5 hearing, the court found statements made by defendant to arresting officers were admissible. 1RP 40.² The parties stipulated to the relevance and admissibility of two *res gestae* events related to the crime. *See* 1RP 43–47.

Before the prosecution rested its case-in-chief, it made a record of its intent to dismiss the unlawful possession of a firearm charge (Count VI). *See* 6RP 557. Count VI was later dismissed in front of the jury. 8RP 721.

On Count I, the jury was unable to reach a unanimous verdict and a mistrial was declared as to that count. 8RP 796, 808. Defendant later pleaded guilty to second degree assault against Kevin Headland. *See* CP 233–242; 9RP 821. On Counts II and III, the jury found defendant guilty of the lesser-included second degree assaults. 8RP 802. The jury found defendant guilty as charged on Counts IV and V. 8RP 803. The jury further found by special verdict form that defendant was armed with a firearm during the commission of Counts II, III, IV, and V. 8RP 802–03.

The court sentenced defendant to standard range sentences totaling 217 months—of which 150 months was for mandatory firearm enhancements. CP 327. Defendant filed timely notice of appeal. CP 274.

² The consecutively paginated verbatim report of proceedings will be referred to by the volume number, RP, and the page number. (#RP #).

2. Facts

On March 26, 2013, Stephen Norman was at his daughter's house helping her remodel her kitchen. 3RP 110. While he was there, Kevin Headland—an old friend Norman knew from their work at Boeing who lived nearby—stopped by and invited Norman over to see Kevin Headland's new boat. 3RP 110.

After looking at the new boat, the two men shared a beer in Kevin Headland's garage. 3RP 116. Shortly thereafter, Kevin Headland's wife, Deborah Headland came home. 3RP 116. Deborah Headland went inside the house to do some dishes while the men visited in the garage. 3RP 178.³

As Norman and Kevin Headland opened a second beer, chaos erupted. 3RP 116. Defendant came around the corner and began firing a gun a few inches from Norman's head. 3RP 117. Defendant looked at Norman and said, "You are a dead mother fucker." 3RP 118. Kevin Headland ducked behind a car, then he ran out the side door to the garage. 3RP 119. Norman tried to go into the house, but the door was locked. 3RP 119. Norman turned around, and found defendant standing six feet away holding his gun straight at Norman's face. 3RP 119. Norman began pleading for his life. 3RP 119. Defendant told Norman to "Get the fuck out of [t]here." 3RP 120. Norman ran out the garage door toward a

³ Stephen Norman recalled Deborah Headland remaining in the garage, 3RP 116, but Deborah Headland recalled being inside doing dishes. 3RP 178. Kevin Headland recalled that Deborah Headland was just going inside the house at the time. 4RP 306. Deborah was "99.9 percent" sure she was not in the garage when shots were fired. 3RP 181.

neighbor's house where he called police. 3RP 120. He then heard multiple more gunshots. 3RP 120.

When Kevin Headland saw defendant charge into the garage with a gun, he dropped to the ground and attempted to shield himself with his car. 4RP 306. As defendant began shooting, Kevin Headland rolled to the side-door of the garage, opened it, and ran out. 4RP 306. As he ran, Kevin Headland heard more gunshots. 4RP 306. He saw a bullet tear up the grass at his feet. 4RP 306. Kevin Headland was able to continue running and escape into his neighbor's yard. 4RP 307. As he called 911 from the neighbor's phone, Kevin Headland heard more gunshots coming from the direction of his house. 4RP 308.

Deborah Headland was doing the dishes when she heard gunshots. 3RP 178. As soon as she heard the gunshots, she went to the living room and called the police. 3RP 182. Deborah Headland soon saw defendant come around the back of the house, separated from her by only a glass sliding door. 3RP 183. Defendant fired one shot into living room through the slider; Deborah felt like the gun was aimed right at her. 3RP 184; 189. Deborah Headland ducked as the bullet ricocheted around the room. 3RP 185.

Defendant walked into the house through the broken slider and tried to open the bedroom doors, angrily yelling that he was "going to kill the son of a bitch." 3RP 185. Not successfully finding Kevin Headland in the house, defendant walked back out the shattered slider door and up the

street to defendant's house. 3RP 188. Defendant lived less than one-quarter mile from the Headlands; defendant's house was visible from the Headland property. 3RP 227.

Tyler Cardin and Don Finlayson lived next door to the Headlands. 4RP 338; 5RP 378. They both were standing near the back sliding glass door—which overlooks the backyard adjacent to the Headland's backyard—when they saw Kevin Headland running for his life and defendant chasing him with a gun. 4RP 339, 342; 5RP 381, 387. Charles Barger also lives adjacent to the Headlands. 4RP 397. Barger saw defendant go into the Headland's garage, heard the gunshots, and then heard subsequent gunshots in the back of the Headland home. 5RP 410.

When officers responded to the scene, defendant was inside his house. 3RP 159. Pierce County Sheriff deputies secured the perimeter before the SWAT team arrived and took over. 5RP 428. Defendant remained barricaded in his home for several hours. 3RP 99. Defendant had been hanging up on the SWAT negotiators, but one was finally able to maintain contact with defendant. 5RP 457. Defendant ultimately agreed to surrender on the condition that he could talk to his friend "Bob" first. 5RP 459. SWAT agreed, accompanied Bob, and heard defendant tell Bob, "My only mistake was I missed." 5RP 460.

The defense mental health expert, Joseph Nevotti, testified that due to the defendant's prior brain injury, his alcoholism, and his self-reported post traumatic stress disorder (PTSD), it was "entirely possible that

[defendant's] ability to think logically and rationally was impaired" at the time of the shootings. 7RP 616. The State's mental health expert, Les Hutchins, reported that defendant denied ever having been diagnosed with a mental health condition, including PTSD. 8RP 641. Further, "[b]ased on [defendant's] engaging in goal-directed and purposeful behavior . . . he was not sufficient impaired by alcohol" for his capacity to be considered diminished. 8RP 689. Defendant did not testify. 7RP 697.

C. ARGUMENT.

1. REVIEW OF THE ALLEGED **PETRICH** ERROR IS PRECLUDED BY THE DOCTRINE OF INVITED ERROR. FURTHER, NO **PETRICH** INSTRUCTION WAS REQUIRED BECAUSE THE PROSECUTOR MADE AN ELECTION IN CLOSING AND THE EVIDENCE SHOWED A CONTINUING COURSE OF CONDUCT; THEREFORE, THERE WAS NO ERROR IN THE COURT NOT GIVING A **PETRICH** INSTRUCTION.
 - a. The invited error doctrine precludes review of any **Petrich** instruction issue because defendant explicitly rejected the court's offer to give such an instruction.

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). For example, the doctrine prevents a party from requesting an instruction, then later complaining on appeal that the requested instruction was given. *State v. Studd*, 137 Wn.2d 533,

546, 973 P.2d 1049 (1999) (citing *Henderson*, 114 Wn.2d at 870). In the present case, defendant affirmatively stated a *Petrich* instruction was unnecessary when the court inquired about giving one. Therefore, the challenge to the absence of a *Petrich* instruction on appeal is precluded by the invited error doctrine.

The court in the present case asked defense counsel directly whether a *Petrich* instruction was required as to the assault against Deborah Headland. 6RP 518. Defense counsel responded, “I wouldn’t think so.” 6RP 519. Thus, defendant rejected a *Petrich* instruction. Under the invited error doctrine, defendant is precluded from challenging on appeal that the instruction he explicitly rejected below was not given by the court. Defendant invited any potential error, therefore review is precluded.

- b. No *Petrich* instruction was required because the State elected the assaultive act against Deborah Headland it relied upon.

A defendant may only be convicted when a unanimous jury concludes the criminal act charged has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When a defendant commits several criminal acts but is charged with only one count, the State may either elect the act it will rely on or the judge must instruct the jury as to the unanimity requirement. *Id.* at 572; *see* WPIC 4.25. If the evidence

proves only one violation, however, no *Petrich* instruction is required. *State v. Hanson*, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990). In the present case, the prosecutor elected the assaultive act it was relying on for the assault against Deborah Headland.

Deborah Headland testified that she was standing in her house, on the phone with 911 when defendant aimed right at her and shot, shattering the sliding glass door. 3RP 189. The bullet ricocheted around the room as Deborah ducked. 3RP 184–85. Under her testimony, only one assaultive act occurred. Stephen Norman, on the other hand, testified that Deborah Headland was in the garage with him and Kevin Headland when defendant first began shooting. 3RP 119. Therefore, arguably, Norman’s testimony provides a basis for finding Deborah Headland was assaulted in the garage.

During the State’s closing argument, although the prosecutor acknowledged the inconsistency between Norman’s testimony and Deborah Headland’s, the argument focused the jury on the assault inside the house. *See* 8RP 726 (“[T]here is a discrepancy as to whether she was in the garage or not. She testified she had gone inside the house. She testified that she had done that before any shooting had happened whatsoever.”); 8RP 731 (“[Defendant] went around to the back of the house and bl[ew] out the back door of the house with Deborah Headland on the other side of the glass door.”). The prosecutor’s argument focused the jury on the assault of Deborah Headland inside the house when

defendant shot out the glass door between him and Deborah Headland. Therefore, the State elected the act it relied upon and no *Petrich* instruction was required.

That the State elected this act of assault is further shown by defense counsel's closing argument which focused on the election made by the State. Defendant's closing argument did not address any assault on Deborah Headland in the garage, but focused only on the assault of Deborah Headland inside the house. See 8RP 763 ("He comes up to a garage, [defendant] does, *two people in there*"); 8RP 764 ("[Defendant] shoots out the window, the sliding glass door, walks into the house, does not in any way attempt to hurt Deborah Headland."). The closing arguments show the prosecutor elected the act relied upon—the shooting toward Deborah Headland inside the house—and, therefore, no *Petrich* instruction was required.

- c. Even if the State had not elected in closing, the assaults would be a continuing course of conduct and no *Petrich* instruction would be required.

Even if the prosecutor had not elected which act was relied upon in closing argument, no *Petrich* instruction would be required because the assaults would fall under the continuing course of conduct exception. A unanimity instruction tells the jury that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 572. There are, however, exceptions to the rule of

jury unanimity. One exception is that, under certain facts, a continuing course of conduct may for the basis of one charge, as distinguished from several distinct acts, each of which would be the basis. *Id.* at 571. Facts must be evaluated in a common sense manner to determine if one continuing offense may be charged. *Id.* If the evidence shows conduct at different times and places, it tends to show several distinct acts; whereas, conduct occurring in one place during a short period of time between the same victim and aggressor tends to show one continuing act. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Assault can be a continuing course of conduct crime. *State v. Rodriguez*, 187 Wn. App. 922, 937, 352 P.3d 200 (2015) (citing *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 985, 329 P.3d 78 (2014)).

In the present case, the two possible assaultive acts against Deborah Headland comprised a continuing course of conduct. Looking at the evidence in a common sense manner, defendant came to the Headland home and began indiscriminately shooting in the garage. 3RP 117. Defendant continued shooting in the yard. 3RP 306. Then, defendant shot through the sliding glass door into the house. 3RP 184. These acts all occurred in one place—the Headland home—and within a short period of time. The acts were also done to achieve the same common objective—to scare and harm the Headlands and Stephen Norman. *See* 3RP 118, 185.

Defendant asserts that the transferred intent instruction given below prevents this court from finding the assaultive acts were done to

achieve the same common objective. *See* Br. of App. p. 18–22; CP 198. Whether the *specific intent* could have transferred, however, is not the relevant question when conducting a continuing course of conduct analysis.⁴ In determining if the evidence supports a continuing course of conduct, a court considers whether the multiple acts were intended to secure the *same objective*. **Handran**, 113 Wn.2d at 17. Although multiple acts having the same specific intent may be sufficient for the same objective standard, it is not necessary.

For example, in **Handran**, the Court found a continuing course of conduct for two assaultive acts—a kiss and a hit—of the defendant against his ex-wife. *Id.* Rather than questioning whether the *specific intent* of the two acts were the same, the Court stated, “the actions evidence a continuing course of conduct to secure sexual relations with his ex-wife.” *Id.* The focus of the Court was that the *objective* was to secure sexual relations, rather than if the kiss and hit were done with the same specific intent required for the assault. In the present case, defendant acted with the stated objective to harm Kevin Headland. *See* 3RP 118, 185. He voiced this objective multiple times as he moved from one area of the home to

⁴ Although beyond the scope of the issue presented, it should be noted that the issue of transferred intent raised by defendant, Br. of App. p. 19–20, is arguably not relevant to the assault of Deborah Headland at all. Even if Deborah Headland was an “unintended victim”—despite defendant seeing her through a glass door and firing a gun at her—the Court has said that once the mens rea of assault is established, RCW 9A.36.011, *not the doctrine of transferred intent*, provides that any unintended victim is assaulted if they fall within the statutory terms. **State v. Wilson**, 125 Wn.2d 212, 219, 883 P.2d 320 (1994).

another shooting his gun. 3RP 118, 185. This common objective—coupled with the fact that the shootings all occurred in one location and within a brief period of time—supports finding a continuing course of conduct.

Therefore, no *Petrich* instruction was required because the two assaultive acts against Deborah Headland constituted one continuing course of conduct.

2. ANY ERROR IN FAILING TO DOCUMENT THE DISMISSAL OF COUNT VI ON THE JUDGMENT CAN BE RECTIFIED BY ENTRY OF AN ORDER IN THE TRIAL COURT.

Prior to the close of evidence, the parties agreed to dismiss Count VI, a charge for unlawful possession of a firearm. 6RP 530–31. The court informed the jury at the close of the case that they were no longer to consider Count VI. 8RP 721. While there is a place on the judgment and sentence (paragraph 3.1) to indicate dismissed counts, no such notation was made on defendant’s judgment. CP 324.

Although the omission in this case is not readily classified as an “error,” the most analogous rule is Court Rule 7.8(a), which states in relevant part:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

CrR 7.8(a). A clerical mistake for the purpose of the court rule are those that, when amended, would correctly convey the intention of the court based on other evidence. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). Ordering the correction of the identified omission in this case would accurately convey the court's intention to dismiss the count, as discussed above.

The State agrees that defendant may be entitled to the notation of the dismissed count on the judgment and sentence. This omission may be rectified by an order amending the judgment to reflect the dismissed count or an independent order doing the same.

D. CONCLUSION.

Review of defendant's *Petrich* instruction challenge on appeal is precluded under the doctrine of invited error because he affirmatively denied the need for such an instruction. Further, no *Petrich* instruction was required in this case because the prosecutor elected which assaultive act it relied upon and the two potential assaults were part of a continuing course of conduct. Therefore, the State respectfully requests this court affirm defendant's convictions.

The State further requests that this court direct entry of an order amending the judgment or an independent order to reflect that the court below dismissed Count VI.

DATED: October 19, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811


Jordan McCrite
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.19.15 Megan Kar
Date Signature

PIERCE COUNTY PROSECUTOR

October 19, 2015 - 11:54 AM

Transmittal Letter

Document Uploaded: 5-472121-Respondent's Brief.pdf

Case Name: St. v. McBee

Court of Appeals Case Number: 47212-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

Sloanej@nwattorney.net

nielsene@nwattorney.net