

COURT OF APPEALS NO. 49259-8-II

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

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STATE OF WASHINGTON,

Respondent,

V.

ROBERT VESTRE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Mark McCauley, Judge

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

VESTRE WAS DENIED HIS RIGHT TO A UNANIMOUS JURY VERDICT.

In his supplemental brief, Vestre argued his right to a unanimous jury verdict was violated because the state presented evidence of two separate break-ins the jury could have relied on to convict Vestre of burglary and there was no election by the prosecutor or instruction to the jury it must be unanimous as to the act relied upon. Supplemental Brief of Appellant (SBOA) at 5-9. In response, the state claims there was no error because the two burglaries were a continuing course of conduct. The state also argues any error was not manifest. For the reasons discussed below, the state's arguments should be rejected.

At the outset, it should be noted the defense had no obligation to request a Petrich<sup>1</sup> instruction, contrary to the state's suggestion. See State's Response to Supplemental Brief of Appellant (RSBA) at 2. State v. Hood, 196 Wash. App. 127, 134, 382 P.3d 710, 713 (2016), review denied, 187 Wash. 2d 1023, 390 P.3d 331 (2017). As noted in that case:

CrR 6.15(a) does not impose an obligation to propose jury instructions. If a party wishes to propose instructions, CrR 6.15(a) sets forth the timing and procedure to be followed. See State v. Sublett, 176 Wash.2d 58, 75-76, 292 P.3d 715 (2012). Since it is the

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<sup>1</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

State that wishes to secure the conviction, the State ordinarily assumes the burden of proposing an appropriate and comprehensive set of instructions. Just as a defendant has no duty to bring himself to trial, Barker v. Wingo, 407 U.S. 514, 527, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), a defendant has no duty to propose the instructions that will enable the State to convict him.

Hood, 196 Wash. App. at 134. The state's attempt at blame-shifting should be rejected.

The state claims that “because both burglaries were at the same building, occurred within the same time frame, and for the same purpose, the constitute a continuous course of conduct[.]” State's RSBOA at 3 (citing State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (no election or unanimity required when multiple acts constitute a continuing course of conduct). The state's argument is disingenuous considering it's the exact opposite of what it argued in its initial response brief. Specifically, the state argued the proposed testimony of Samantha Phelps (for which the defense sought a continuance to obtain)<sup>2</sup> “would have only cast doubt on one of the burglaries the evidence showed the Defendant committed.” State's Response Brief (RB) at 8-9. Similarly, the state argued there was no error in the denial of the continuance because: “Even if the witness ‘Samantha Phelps’ could testify that Sarah Arends planted

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<sup>2</sup> In his opening brief, Vestre argued the court's denial of his motion for a continuance deprived him of his right to present a defense. Brief of Appellant (BOA) at 13-18.

stolen property, that would only cast doubt on the first break-in.” RB at 9.

For the state to argue continuing course of conduct now is an about-face.

The two break-ins were not a continuing course of conduct. To determine whether conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner, considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). For instance, where the evidence involves conduct at different times and places, then the evidence tends to show several criminal acts. Handran, 113 Wn.2d at 17.

Division One’s decision in State v. McGill – although unpublished – is instructive on the question before this Court. State v. McGill, 198 Wn. App. 1040 (2017); GR 14.1.<sup>3</sup> In that case, the jury heard evidence that McGill pushed past the apartment’s occupant to enter through the front door, assaulted the woman, and then left the apartment. McGill then walked around the back of the apartment, broke the sliding glass door in the back with a cinder block, and entered the apartment and assaulted the woman again. McGill, 198 Wn. App. 1040, \*1.

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<sup>3</sup> Appellant cites McGill as nonbinding authority as it is the only case undersigned counsel found addressing whether two burglaries constituted a continuing course of conduct.

On appeal, McGill argued his right to jury unanimity was violated because the evidence showed two distinct acts of unlawful entry and there was no election or unanimity instruction. Division One disagreed:

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

McGill, 198 Wn. App. 1040, \*1.

Whereas no unanimity instruction was required in McGill, a unanimity instruction was required here. The unlawful entries here were made a day apart, not a minute and a half. The parties completely left the Seaport Authority, drove all the way back to Maple Valley and spent the night. The next day, it was not the same people who went back to the Seaport. Sarah Arends stayed home. While the unlawful entries may have had the same purpose, they were separated in time and participants. The acts therefore were not part of a continuing course of conduct.

The error in not giving a unanimity instruction was manifest constitutional error. RAP 2.5(a)(3). What the state may or may not have done, had counsel objected is not the test. See State's RSBOA at 6

(arguing that if defense counsel requested a unanimity instruction, the state “could have amended the Information and alleged a second count for Burglary in the Second Degree instead.”)<sup>4</sup>

For a claim of error to qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. The defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial. State v. Davis, 175 Wash.2d 287, 344, 290 P.3d 43 (2012); State v. O’Hara, 167 Wash.2d 91, 99, 217 P.3d 756 (2009). “[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” O’Hara, 167 Wash.2d at 100, 217 P.3d 756. “If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.” Davis, 175 Wash.2d at 344, 290 P.3d 43.

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<sup>4</sup> Again, the state is basically conceding that these were separate acts, not a continuing course of conduct.

The right to a unanimous jury verdict is constitutional. State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) CONST. art. I, §§ 21, 22. And the court heard the evidence, which consisted of multiple unlawful entries, and could have instructed the jury it must be unanimous as to the unlawful entry relied upon. Accordingly, the error asserted here is manifest and should be reviewed by this Court.

C. CONCLUSION

For the reasons stated in this reply and in the supplemental brief of appellant, this Court should reverse Vestre's conviction.

Dated this 13<sup>th</sup> day of September, 2017.

Respectfully submitted,

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