

FILED  
MAR 14, 2016  
Court of Appeals  
Division III  
State of Washington

No. 33170-9-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

THE STATE OF WASHINGTON,

Respondent

v.

ROCKY HENSLEY,

Appellant

---

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

NO. 12-1-01270-2

---

BRIEF OF RESPONDENT

---

ANDY MILLER  
Prosecuting Attorney  
for Benton County

Megan A. Whitmire, Deputy  
Prosecuting Attorney  
BAR NO. 29933  
OFFICE ID 91004

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

    A. The evidence illustrated a continuing course of  
    conduct; hence, no unanimity instruction was  
    required. ....1

    B. Any error made in the court’s imposition of legal  
    financial obligations was invited by the defense. ....1

II. STATEMENT OF FACTS .....1

III. ARGUMENT .....1

    A. The evidence illustrates a continuing course of  
    conduct. ....1

    B. Invited error. ....2

IV. CONCLUSION.....3

TABLE OF AUTHORITIES

WASHINGTON CASES

*In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 979 P.2d 417 (1999)..2

*State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991).....2

*State v. Craven*, 69 Wn. App. 581, 849 P.2d 681 (1993) .....2

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

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

*State v. Workman*, 66 Wn. 292, 119 P. 751 (1911).....1

## I. RESPONSE TO ASSIGNMENTS OF ERROR

1. **The evidence illustrated a continuing course of conduct; hence, no unanimity instruction was required.**
2. **Any error made in the court's imposition of legal financial obligations was invited by the defense.**

## II. STATEMENT OF FACTS

The State relies upon the Statement of the Case provided in Appellant's Brief at pages 4 through 6.

## III. ARGUMENT

### A. **The evidence illustrates a continuing course of conduct.**

Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). However, this rule applies only where the State presents evidence of "several distinct acts," and does not apply where the evidence indicates a "continuing course of conduct." *Id.* at 571.

To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. *Id.* For example, where the evidence involves conduct at different times and places, then the evidence tends to show "several distinct acts." *See State v. Workman*, 66 Wn. 292, 119 P. 751 (1911); *Petrich*, 101 Wn.2d at 571. On

the other hand, where conduct occurs in one place during a short period of time between the same aggressor and victim, the actions more likely constitute a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17-18, 775 P.2d 453 (1989). Under such a circumstance, a unanimity instruction is not required. *Id.* at 17.

Where multiple acts of assault occur in a single location between two individuals, courts have determined these acts to constitute a continuous course of conduct. *See State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991) (multiple assaults over a two-hour time period). Even where a succession of assaults occurred over a three-week period, a continuous course of conduct was found. *State v. Craven*, 69 Wn. App. 581, 849 P.2d 681 (1993). Applying the same commonsense evaluation to the facts of this case in light of the cases cited above, one could only conclude that the defendant's acts constituted a single course of conduct. The assaultive conduct was directed at a single victim, at a single location, during the course of a single day. Consequently, no unanimity instruction was required.

**B. Invited error.**

The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 979 P.2d 417 (1999). Here, the court imposed

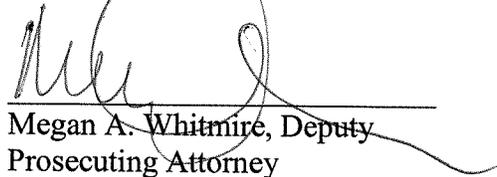
legal financial obligations precisely as requested by the defense. It is difficult to imagine a clearer cut case of invited error than that complained of in this case. The defendant's request to remand for reconsideration of his legal financial obligations should be denied.

#### **IV. CONCLUSION**

Based upon the arguments above, the defendant's conviction should be affirmed and his request for his legal financial obligations to be readdressed should be denied.

**RESPECTFULLY SUBMITTED** this 14th day of March, 2016.

**ANDY MILLER**  
Prosecutor

A handwritten signature in black ink, appearing to read 'Megan A. Whitmire', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Megan A. Whitmire, Deputy  
Prosecuting Attorney  
Bar No. 29933  
OFC ID NO. 91004

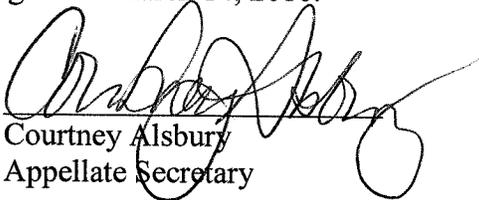
**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

David Gasch  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005

E-mail service by agreement  
was made to the following  
parties: gaschlaw@msn.com

Signed at Kennewick, Washington on March 14, 2016.

  
Courtney Alsbury  
Appellate Secretary