

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

STATE OF WASHINGTON,

Respondent,

v.

BEN ALAN BURKEY,

Appellant.

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

The Honorable Judge John O. Cooney

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Ben Alan Burkey accepts this opportunity to reply to the State's brief. Mr. Burkey requests that the Court refer to his opening brief for issues not addressed in this reply.

B. COUNTERSTATEMENT OF THE CASE

Mr. Burkey offers the following counterstatement of the case, in response to the State's Statement of the Case. *See* Respondent's Brief pgs. 3-8.

The State asserts "[Mr.] Burkey had Ms. Lascelles burn the clothing and wash the Thunderbird." *See* Respondent's Brief pgs. 6-7 (emphasis added) (citing RP 249; Ex. 133 at 570-571, 577). However, the record cited by the State does not contain these facts. *See* RP 249; Ex. 133 at 570-571, 577. Instead, the record states that James Tesch had Ms. Lascelles burn the clothes and wash the Thunderbird:

[The State]: Did anybody tell you what you needed to do with Rick Tiwater's chaps and leather jacket?

[Ms. Lascelles]: Yes.

[The State]: What did they tell you to do?

[Ms. Lascelles]: James Tesch told me I needed to burn them because if he got caught he was going to kill me and my kid.

...

[The State]: Did you have a conversation with Mr. Burkey regarding what happened to Rick Tiwater?

[Ms. Lascelles]: No.

(Ex. 133 at 570-571).

[The State]: What did you notice about the Thunderbird?

[Ms. Lascelles]: I didn't notice anything physically until I washed it and seen it going down the drain.

[The State]: And who told you to wash it?

[Ms. Lascelles]: Fugly did.

(Ex. 133 at 577).

“Fugly” was a nickname for James Tesch. (RP 299).

The State also asserts that Mr. Burkey told a detective “he had seen Terrance Kinard and other “black men” watching the house.” *See* Respondent’s Brief pg. 7 (citing RP 463-470). However, the record cited by the State does not state that Mr. Burkey had told a detective he saw these individuals watching the house, but rather, states that Mr. Burkey told detectives he saw Mr. Kinard drive by his house, and “some other vehicles then started showing up in the area as well as some black males on the street nearby.” (RP 463-464).

Finally, the State asserts “[d]efense counsel argued that [Mr.] Tesch committed the killing and that all [Mr.] Burkey did was help dump the body and dispose of evidence after the fact out of fear for the safety of his family.” *See* Respondent’s Brief pg. 8 (citing RP 607-633). However, defense counsel in closing argument did not argue Mr. Burkey helped dump the body or dispose of evidence. (RP 597-599, 603-634).

C. ARGUMENT IN REPLY

1. The trial court violated Mr. Burkey’s constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for first degree assault (count IV).

This argument pertains to Issue 2 raised in Mr. Burkey’s opening brief. Mr. Burkey argues the trial court violated his constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for first degree assault (count IV). *See* Appellant’s Opening Brief pgs. 21-26. Mr. Burkey argues that because the State alleged several distinct acts that could have formed the basis of this conviction, and the State did not elect one of these acts upon which to seek a conviction, the trial court had to instruct the jury to agree on a specific act. *See* Appellant’s Opening Brief pgs. 22-23.

In response, the State argues that no unanimity instruction was required, because the assaultive acts constituted a continuing course of conduct. *See* Respondent’s Brief pgs. 14, 18-19.

A unanimity instruction is required “[w]here the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge” *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (citing *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984)). However, this rule “does not apply where the evidence indicates a ‘continuing course of conduct’.” *Id.* (citing *Petrich*, 101 Wn.2d at 571). “To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner.” *Id.* (citing *Petrich*, 101 Wn.2d at 571). “[W]here the evidence involves conduct at different times and places, then the evidence tends to show ‘several distinct acts’.” *Id.*

Here, the State alleged Mr. Burkey committed first degree assault in the following ways: “taking multiple swings at someone with a ball-peen hammer to the head, to other parts of the body, when you’re taking multiple swings at someone with a golf club, when you’re running over somebody with a vehicle multiple times” (RP 595-596).

Ms. Lascelles testified Mr. Tesch showed up at Mr. Burkey’s house after 11:30 p.m., and assaulted Mr. Tiwater. (Pl.’s Ex. 133, pg. 544-551). She testified Mr. Tesch and Mr. Burkey left in the Thunderbird with Mr. Tiwater sometime between 2:30 a.m. and 4:30 a.m. (Pl.’s Ex. 133, pg. 562). Ms. Lascelles testified Mr. Tesch and Mr. Burkey returned to Mr. Burkey’s house “[e]arly, it was just daylight.” (Pl.’s Ex. 133, pg. 566).

The evidence involved assaultive conduct at both different times (11:30 p.m., and several hours later, between 2:30 a.m. and 4:30 a.m. and daylight), and different places

(Mr. Burkey's house and in the woods near Elk). (RP 595-596). Therefore, viewed in a commonsense manner, the evidence showed "several distinct acts" rather than a "continuing course of conduct." Under these facts, a unanimity instruction was required. *See Handran*, 113 Wn.2d at 17 (citing *Petrich*, 101 Wn.2d at 571).

The State also argues the invited error doctrine prohibits Mr. Burkey from challenging the trial court's failure to give a unanimity instruction for first degree assault. *See Respondent's Brief* pgs. 14, 20-22. The State argues "[Mr.] Burkey did not propose a unanimity instruction and agreed to the trial court's jury instructions that did not include a unanimity instruction." *See Respondent's Brief* pg. 22.

The doctrine of invited error prevents a defendant from proposing a jury instruction and then challenging it on appeal. *See State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). "In determining whether the invited error doctrine applies, our courts consider 'whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.'" *State v. Hood*, 196 Wn. App. 127, 135, 382 P.3d 710 (2016) (quoting *In re Personal Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014)). "The doctrine appears to require affirmative actions by the defendant." *Id.* (quoting *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000)). In *Hood*, the Court of Appeals held that the doctrine of invited error did not bar review of a reasonable doubt jury instruction that the defendant did not affirmatively request, or object to. *Hood*, 196 Wn. App. at 131-36.

Here, Mr. Burkey did not propose the to-convict instruction for first degree assault. (CP 118-119, 254; RP 531-532, 538-555, 570). He also did not object to this instruction. (RP 547). Nonetheless, he took no affirmative actions with respect to this

instruction, such as formally stipulating to the correctness of the instruction. *See Hood*, 196 Wn. App. at 134-35. In addition, by merely failing to object, Mr. Burkey did not agree to the wording of this instruction. *Cf. State v. Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998) (holding that the invited error doctrine precludes review of a jury instruction, where the defendant agreed to use the wording of the jury instruction). Therefore, the invited error doctrine does not prohibit Mr. Burkey from challenging the trial court's failure to give a unanimity instruction for first degree assault.

2. The trial court erred by denying Mr. Burkey's motion for a new trial based on the State's failure to disclose its plea agreement with Patty Lascelles to defense counsel.

This argument pertains to Issue 3 raised in Mr. Burkey's opening brief. Mr. Burkey argues the trial court erred by denying his motion for a new trial based upon the State's failure to disclose its plea agreement with Ms. Lascelles to defense counsel. *See Appellant's Opening Brief* pgs. 26-28.

In response, the State argues Mr. Burkey did not assign error to any of the factual finding made by trial court, and therefore, "these findings are verities on appeal." *See Respondent's Brief* pgs. 29-31. Specifically, the State argues Mr. Burkey did not assign error to the "factual finding" that "the defense knew or should have known about the plea agreement, and that the evidence of a plea agreement would not have changed the outcome of the trial." *See Respondent's Brief* pg. 29 (citing CP 369).

After it denied Mr. Burkey's motion for a new trial, the trial court entered a written order incorporating its oral ruling. (CP 368-376; RP 665-669). Although the written order has a section entitled "findings," the trial court did not make specific findings of fact. (CP 368-376). The language identified by the State above, that "the

defense knew or should have known about the plea agreement, and that the evidence of a plea agreement would not have changed the outcome of the trial,” was a legal conclusion made by the trial court, not a factual finding. (CP 368-376; RP 665-669). Thus, Mr. Burkey was not required to specifically assign error to this portion of the trial court’s order. *See, e.g., In re Detention of M.K.*, 168 Wn. App. 621, 623 n.3, 279 P.3d 897, 899 (2012) (incorrectly labeled findings are treated as conclusions of law, if they resolve the ultimate issue). Mr. Burkey assigned error to the trial court’s denial of his motion for a new trial. *See* Appellant’s Opening Brief pg. 2. Mr. Burkey properly challenged the trial court’s denial of his motion for a new trial.

D. CONCLUSION

Based upon the arguments set forth above and those set forth in Mr. Burkey’s opening brief, the case should be reversed and remanded for a new trial. At a minimum, the case should be remanded for resentencing, as the State concedes. *See* Respondent’s Brief pgs. 31-35. Mr. Burkey also objects to any appellate costs.

Respectfully submitted this 31st day of May, 2017.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
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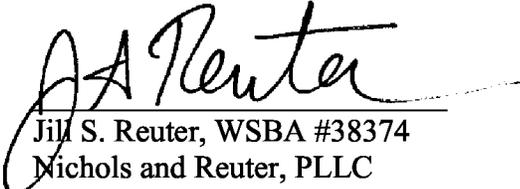
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34093-7-III
vs.)
BEN ALAN BURKEY)
Defendant/Appellant)
PROOF OF SERVICE)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 31, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

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Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 31st day of May, 2017.


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