

FILED  
Court of Appeals  
Division III  
State of Washington  
4/23/2019 12:22 PM

NO. 36294-9-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

---

**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**CHARLES BAKER A.K.A. DANIEL WILSON,**

Defendant/Appellant.

---

**REPLY BRIEF**

---

Dennis W. Morgan    WSBA #5286  
Attorney for Appellant  
P.O. Box 1019  
Republic, Washington 99166  
(509) 775-0777

## TABLE OF CONTENTS

### TABLE OF CONTENTS

#### TABLE OF AUTHORITIES

TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS	ii
STATUTES	ii
RULES AND REGULATIONS	ii
ARGUMENT	1

**TABLE OF AUTHORITIES**

**CASES**

*Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005).....1  
*State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983)..... 1  
*State v. Bergeron*, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985).....4  
*State v. Handran*, 113 Wn.2d 11, 775 P.2d 453 (1989)..... 3, 4  
*State v. Irby*, 187 Wn. App. 183, 347 P.3d 1103 (2015).....2, 4  
*State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).....5, 6  
*State v. Schaler*, 169 Wn.2d 274, 291-92, 236 P.3d 858 (2010).....5

**CONSTITUTIONAL PROVISIONS**

Const. art. I, § 3 ..... 1  
United States Constitution, Fourteenth Amendment..... 1

**STATUTES**

RCW 9A.04.100 ..... 1

**RULES AND REGULATION**

CrR 6.15 (c)..... 4, 5  
RAP 2.5 .....1

## ARGUMENT

The State challenges the Assignments of Error and Issues raised by Mr. Baker pursuant to RAP 2.5. The State's brief essentially claims that Mr. Baker has provided insufficient authority and argument to support the assignments and issues.

In general, issues not raised in the trial court may not be raised on appeal. *See*: RAP 2.5 (a) (an "appellate court may refuse to review any claim or error which is not raised in the trial court"). However, by using the term "may" RAP 2.5 (a) is written in discretionary, rather than mandatory terms. *See*: *State v. Ford*, 137 Wn.2d 472, 477, 484-85, 973 P.2d 452 (1999).

*Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

The issues raised by Mr. Baker are constitutional issues. They involve the right to due process under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3. They also involve the constitutional mandate that the State must prove each and every element of an offense beyond a reasonable doubt. *See*: RCW 9A.04.100.

... [D]ue process requires the State to prove its case beyond a reasonable doubt, thus, sufficiency of the evidence is a question of constitutional magnitude. [Citations omitted.] A constitutional claim may be raised initially on appeal. RAP 2.5 (a)(3); *State v. Regan*, 97 Wn.2d 47, 50, 640 P.2d 725 (1982); *State v. Theroff*, 95 Wn.2d 385, 391, 622 P.2d 1240 (1980). ...

*State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

Mr. Baker's challenge is to the lack of a unanimity instruction. The lack of a unanimity instruction prejudicially impacted the jury's ability to determine whether or not the State had proved that Mr. Baker had committed any crime inside the residence. The State argued multiple acts.

Query: Was there sufficient proof of each and every act?

Under Washington's constitution, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. Wash. Const. art. I, § 21; *State v. Petrich*, 101 Wash.2d 566, 569, 683 P.2d 173 (1984); *State v. Ortega-Martinez*, 124 Wash.2d 702, 707, 881 P.2d 231 (1994). When the prosecutor presents evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must give what is known as a *Petrich* instruction requiring all jurors to agree that the same underlying criminal act has been proved beyond a reasonable doubt. *State v. Kitchen*, 110 Wash.2d 403, 409, 756 P.2d 105 (1988), citing *Petrich*, 101 Wash.2d at 570, 683 P.2d 173; *State v. Workman*, 66 Wash. 292, 294-95, 119 P. 751 (1911).

*State v. Irby*, 187 Wn. App. 183, 197, 347 P.3d 1103 (2015).

The multiple acts argued by the State included malicious mischief, theft, and attempted assault.

As argued in his original brief, Mr. Baker asserts that the State failed to present sufficient evidence of each of the alleged offenses underlying the burglary charge. Moreover, the State did not elect a specific act or acts upon which it was relying.

The State references *State v. Handran*, 113 Wn.2d 11, 775 P.2d 453 (1989) in connection with its assertion that no unanimity instruction was required.

The State claims that the *Handran* case supports its argument that a continuing course of conduct was involved in connection with the alleged burglary.

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. [Citation omitted.] However, this rule applies only where the State presents evidence of “several distinct acts”. It does not apply where the evidence indicates a “continuing course of conduct”. *Petrich*, at 571. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. *Petrich*, at 571. 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 Wash. 292, 294-95, 119 P.751 (1911); *Petrich*, at 571.

*State v. Handran*, *supra* 17.

The facts in *Handran* differ significantly from the facts in Mr. Baker’s case. The defendant entered his ex-wife’s bedroom after breaking into the home. He kissed her. He was nude. He attempted to have sexual intercourse with her. There was a short interval between the kiss and the attempted sexual intercourse.

The *Handran* Court determined that the short interval between the kiss and attempted sexual intercourse did not constitute separate distinct acts.

In Mr. Baker's case a period of at least two weeks occurred between the initial entry into the residence and this arrest on November 7, 2017. This is where the inference instruction compounds the error in Mr. Baker's case.

In *State v. Bergeron*, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985) the Court stated:

... [W]e now hold that the specific crime or crimes intended to be committed inside burglarized premises is *not* an element of burglary that must be included in the information, jury instructions or trial court's findings and conclusions. It is sufficient if the jury is instructed ... in the language of the burglary statute.

It should be noted that the *Bergeron* Court did not discuss the need for a unanimity instruction. When there are multiple acts forming the basis of the alleged burglary charge unanimity becomes critical.

The *Irby* Court noted at 199: "Such an error is harmless only if no rational trier of fact could have entertained a reasonable doubt that *each* incident established the crime."

The State further contends that the invited error doctrine applies and references CrR 6.15 (c). The State misreads the rule.

CrR 6.15 (c) states:

Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special

finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

CrR 6.15 (c) does not address the failure to request an instruction.

Defense counsel did submit proposed instructions. They related to the fact that Mr. Baker was not going to testify and requested a lesser included offense with the necessary definitions.

The invited error doctrine does not apply where an attorney has not proposed an instruction. *See: State v. Schaler*, 169 Wn.2d 274, 291-92, 236 P.3d 858 (2010).

The State further contends that no manifest error occurred, and even if it did, it was not prejudicial to Mr. Baker's case.

*State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) appears to be the seminal case in relation to the manifest error issue.

Mr. Baker contends constitutional error occurred and that he has sufficiently identified that error. As to whether or not the error is manifest the *O'Hara* court notes at 99:

After determining the error is of constitutional magnitude, the appellate court must determine whether the error was manifest. " 'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *Kirkman*, 159 Wn.2d

at 935 (citing *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *McFarland* [*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)] at 333-34). To demonstrate actual prejudice, there must be a " 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.' " *Kirkman*, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting *WWJ Corp.*, [*State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999)] at 603). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. [Citations omitted.] ...

There is no way to determine if the jury relied upon all of the alleged acts which the State claims occurred in the residence, one act, or more than one act.

What the State did establish is that Mr. Baker was occupying the residence as a squatter. He was not lawfully in the residence. He had decorated the residence for Halloween. He had taken out garbage and cleaned up the yard. The record also reflects that Mr. Baker had a key to the residence. It does not reflect how he acquired possession of that key.

If effect, the State piled inference upon inference in order to try and establish that Mr. Baker committed some offense inside the residence after having entered it.

As the *O'Hara* Court stated at 99-100:

The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the

focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. [Citations omitted.] It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to 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.

Under the facts and circumstances of Mr. Baker's case the trial court had heard all of the evidence. It was aware that the State was basing the charge upon multiple acts.

Even if neither the prosecution nor the defense proposed a unanimity instruction, the trial court should have recognized the need for one.

Mr. Baker otherwise relies upon the argument contained in his original brief.

DATED this 23rd day of April, 2019.

Respectfully submitted,

s/Dennis W. Morgan  
DENNIS W. MORGAN WSBA #5286  
Attorney for Defendant/Appellant.  
P.O. Box 1019  
Republic, WA 99166  
(509) 775-0777  
[nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com)

**NO. 36294-9-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 ) SPOKANE COUNTY  
 Plaintiff, ) NOS. 17 1 04504 8  
 Respondent, )  
 )  
 v. ) **CERTIFICATE OF SERVICE**  
 )  
 CHARLES BAKER A.K.A. )  
 DANIEL WILSON, )  
 )  
 Defendant, )  
 Appellant. )  
 \_\_\_\_\_ )

I certify under penalty of perjury under the laws of the State of Washington that on this 23rd day of April, 2019, I caused a true and correct copy of the *REPLY BRIEF* and to be served on:

COURT OF APPEALS, DIVISION III  
Attn: Renee Townsley, Clerk  
500 N Cedar St  
Spokane, WA 99201

E-FILE

Spokane County Prosecutor's Office  
Attn: Brian O'Brian  
[SCPAAppeals@spokanecounty.org](mailto:SCPAAppeals@spokanecounty.org)

E-FILE

Charles Baker A.K.A Daniel Wilson #955852  
Coyote Ridge Correction Center  
PO Box 769, CELL E-B-11  
Connell, Washington 99326

U.S. MAIL

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99169

Phone: (509) 775-0777

Fax: (509) 775-0776

[nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com)

**April 23, 2019 - 12:22 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36294-9  
**Appellate Court Case Title:** State of Washington v. Charles Baker, aka Daniel Wilson  
**Superior Court Case Number:** 17-1-04504-8

**The following documents have been uploaded:**

- 362949\_Briefs\_20190423122209D3191279\_8128.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Baker reply brief.pdf*

**A copy of the uploaded files will be sent to:**

- bobrien@spokanecounty.org
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

**Comments:**

---

Sender Name: Dennis Morgan - Email: nodblspk@rcabletv.com

Address:  
PO BOX 1019  
REPUBLIC, WA, 99166-1019  
Phone: 509-775-0777

**Note: The Filing Id is 20190423122209D3191279**