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Division III
State of Washington
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NO. 36294-9-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CHARLES BAKER,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. Under the facts and circumstances, the burglary inference instruction - No. 11 (CP 126; Appendix "A") was improper.
2. The lack of a unanimity instruction deprived Charles Baker of the constitutionally required unanimous verdict when the prosecuting attorney argued multiple acts as the basis for the burglary without selecting a single act.
3. The prosecuting attorney committed misconduct by misstating the law on at least two (2) occasions during closing argument.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by giving the burglary inference instruction?
2. Did the lack of a unanimity instruction deprive Mr. Baker of a unanimous jury verdict when the prosecuting attorney, during closing argument, relied upon multiple acts as the basis for the residential burglary?
3. Did the prosecuting attorney commit misconduct in closing argument by misstating the law?

STATEMENT OF THE CASE

Amirah Dour was renting a residence at 1814 East 4th in Spokane, Washington from Melissa Dailey. The lease was set to expire on November 30, 2017. Ms. Dour was moving out of the rental since she had purchased her own home. (Kerbs RP 111, ll. 2-15; RP 132, ll. 19-23; RP 135, ll. 13-18; RP 158, ll. 23-25)

Ms. Dour began moving to her new home on October 22, 2017. She continued to pay the utilities at 1814 East 4th through the end of her lease. (Kerbs RP 161, ll. 1-2; RP 166, ll. 18-23; RP 167, ll. 2-3)

Ms. Dailey and Ms. Dour were both acquainted with Mr. Baker. Mr. Baker had been living in the neighborhood for a number of years. (Kerbs RP 134, ll. 1-6; RP 164, ll. 1-8)

On an unknown date Mr. Baker moved some of his belongings into the residence at 1814 East 4th. Another neighbor, George Hettinger, was aware that Mr. Baker was living there. Mr. Hettinger had formerly allowed Mr. Baker to live in a truck and a motorhome. (Kerbs RP 188, ll. 3-13; RP 197, ll. 9-10; RP 199, ll. 16-18; RP 200, ll. 16-24; RP 202, ll. 8-21)

Mr. Hettinger observed Mr. Baker decorate the residence for Halloween. He also saw him taking out garbage and cleaning up around the yard. The arresting officers and Ms. Dour also observed that the house had been decorated for Halloween. (Kerbs RP 129, ll. 13-22; RP 159, ll. 15-17; RP 205, ll. 9-14; RP 206, ll. 16-17)

On November 7, 2017 James Blaine, a contractor working for Ms. Dailey, observed two (2) people on the porch at 1814 East 4th with mountain bikes. They were smoking. He pulled around into the alley and made contact. He went inside the house to check on its

condition. (Kerbs RP 110, ll. 5-11; RP 111, ll. 2-15; ll. 18-20; RP 112, l. 16 to RP 113, l. 5)

Mr. Blaine contacted Ms. Dailey. A call was also made to law enforcement. Officers Berrow, Willard and Howe responded to a burglary in progress. (Kerbs RP 208, ll. 1-2; RP 220, ll. 17-18; RP 222, l. 22 to RP 223, l. 1; RP 252, l. 1)

The officers made contact with Mr. Baker. They went through the house and noted damage to a bedroom door and the back door; some broken blinds; and graffiti on cabinets in the laundry room. A knife, which had been placed above a doorway by Mr. Baker, fell in front of Mr. Blaine when he opened the door. (Kerbs RP 142, ll. 14-18; RP 153, ll. 14-15; RP 170, l. 20 to RP 171, l. 8; RP 213, ll. 16-19; RP 215, ll. 1-4; RP 226, l. 12 to RP 227, l. 8; RP 244, ll. 7-9)

The officers noted that Mr. Baker's car was parked in front of the house. His bicycle was in the living room. There were also items in one (1) of the bedrooms confirming that it was occupied. These included a cellphone, a charger and men's clothes. (Kerbs RP 246, ll. 13-20; RP 258, ll. 15-16; RP 259, ll. 17-23)

An Information was filed on November 9, 2017 charging Mr. Baker with residential burglary and unlawful possession of a controlled substance. Mr. Baker pled guilty to the controlled substance violation prior to trial. (CP 6; CP 62)

Multiple continuances were granted until commencement of trial on July 23, 2018. (CP 13; CP 14; CP 15; CP 16; CP 17; CP 18; CP 22; CP 26; CP 29)

Testimony was introduced at trial concerning a broken window. However, the body cams worn by the officers did not show a broken window. (Kerbs RP 117, ll. 6-10; RP 141, ll. 16-19; RP 249, l. 14 to RP 250, l. 1)

Ms. Dailey and Ms. Dour confirmed that Mr. Baker did not have permission to be living in the house. He was not on the lease. He had not been one of Ms. Dour's former roommates. (Kerbs RP 137, ll. 23-24; RP 139, ll. 10-12; RP 161, ll. 12-16; RP 163, ll. 15-20; RP 169, ll. 6-12)

Ms. Dour had made duplicate keys for her various roommates. There were six (6) known keys. (Kerbs RP 146, ll. 10-17; RP 178, l. 5 to RP 180, l. 4)

Mr. Baker had a key to the house. He apologized for living there. (Kerbs RP 119, ll. 10-18; RP 122, ll. 1-9)

Ms. Dour's two (2) air conditioning units and some wall hangings were missing, along with a table and chairs. (Kerbs RP 169, l. 19 to RP 170, l. 1)

The trial court provided the jury with Instruction No. 11 - the burglary inference instruction. Defense counsel did not object.

During closing argument the prosecuting attorney argued that the knife which had fallen from above the door constituted a booby trap amounting to an attempted assault. Furthermore, argument was presented that Mr. Baker's use of the utilities, along with the missing air conditioners and table and chairs amounted to theft. The prosecutor also argued that the graffiti, damages to the front door and Ms. Dour's mattress were malicious mischief. (Kerbs RP 297, l. 16 to RP 299, l. 2; RP 299, ll. 5-14)

No unanimity instruction was provided to the jury.

The prosecuting attorney, during closing argument, stated:

“Your common sense can tell you that conduct creating a risk of an actual harm to person or property within a building is a crime.”

Defense counsel's objection was overruled. (Kerbs RP 297, ll. 11-15)

Then, during the prosecutor's rebuttal argument the follow argument was made:

“So just being there unlawful is enough, under the law, to show intent.”

(Kerbs RP 321, ll. 2-3)

Defense counsel argued against each of the individual bases for the alleged acts committed by Mr. Baker within the house. There was no argument concerning the need for a unanimous verdict. (Kerbs RP 303, ll. 3-9; RP 303, l. 18 to RP 305, l. 8; RP 305, l. 19 to RP 306, l. 17; RP 309, l. 1 to RP 314, l. 9)

The jury determined that Mr. Baker was guilty of residential burglary. (CP 134)

Judgment and Sentence was entered on August 23, 2018. Mr. Baker received a prison based DOSA. (CP 316)

A Notice of Appeal was filed on August 29, 2018. An Order of Indigency was entered the same date. (CP 331; CP 333)

SUMMARY OF ARGUMENT

Mr. Baker was denied his constitutional right to a unanimous jury verdict. No unanimity instruction was given to the jury. The prosecuting attorney did not elect a single act to support the underlying crime for residential burglary. There was insufficient evidence to support each of the claimed offenses allegedly supporting the burglary.

The giving of the inference instruction compounded the error by allowing the jury to speculate on Mr. Baker's intent.

The prosecuting attorney's closing argument further exacerbated the error by misstating the law.

ARGUMENT

I. INFERENCE

Mr. Baker contends that the trial court's instructing the jury on the burglary inference was error under the facts and circumstances of his case. Instruction No. 11 states:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

There is no dispute that Mr. Baker unlawfully entered the residence at 1814 East 4th.

What is in dispute is whether or not he committed a crime against a person or property while he was inside the residence.

The State's argument concerning attempted assault is specious. There was no intent to assault anyone.

Ms. Dour had a lease through November 30, 2017. Under the terms of the lease she was required to pay the utilities. Thus, whether or not Mr. Baker was residing there, he had no obligation to pay the utilities or repay Ms. Dour.

Mr. Baker was actually living in the residence. He was treating it as his own. Even though he was a mere squatter he was not mistreating the property.

It was not determined when any damages to the property occurred. It was not determined if Mr. Baker caused the damages.

The State never established that Mr. Baker disposed of any of Ms. Dour's property. It may have been missing; but it would be speculation at best that Mr. Baker disposed of it.

There is no indication who placed the graffiti on the laundry room cabinets.

There was no proof as to who may have left blood on Ms. Dour's mattress.

Mr. Baker had a key to the front door. There is no evidence as to how the trim at the top of that door became broken.

The use of the inference instruction under the facts and circumstances was prejudicial to Mr. Baker.

Basic principles of due process require the State to prove every essential element of a crime beyond a reasonable doubt. *Deal* [*State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996)] at 698 (quoting *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994)). Thus, the State bears the burden of proving every element of burglary, including criminal intent.

State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

The State attempted to establish Mr. Baker's criminal intent through the inference instruction.

The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof, where they are not favored in criminal law. *Hanna*, 123 Wn.2d at 710

...

... Again, "when permissive inferences are only part of the State's proof supporting an element and not the 'sole and sufficient' proof of such element, due process is not offended if the prosecution shows that the inference more likely than not flows from the proven fact." *Deal*, 128 Wn.2d at 700 (citing *Brunson*, 128 Wn.2d at 107).

State v. Cantu, *supra*, 826.

The State had no independent “sole and sufficient” proof concerning any alleged intent to commit a crime inside the residence. The closest the State comes is with regard to Ms. Dour’s missing property.

Nevertheless, due to the fact that the State argued multiple bases for criminal intent, in the absence of a unanimity instruction, there is no way to determine which act the jury relied upon.

To determine if sufficient evidence supports a conviction, we consider “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime *beyond* a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion) (cited emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979)). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A “**modicum**” of evidence does not meet this standard. *Jackson*, 443 U.S. at 320.

State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). (Emphasis supplied.)

When Instruction No. 11 is considered in light of the paucity of evidence of criminal intent, it becomes apparent that it should not have been given by the trial court. It allowed the jury to speculate.

II. UNANIMITY

A defendant’s right to a unanimous jury verdict is the guaranty that a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Pursuant to this right, a jury must be unanimous as to *which* act or incident constitutes a particular charged count of criminal conduct. *State v. Noltie*, 116 Wn2d 831, 842-43, 809 P.2d 190 (1991); *Petrich*, 101 Wn.2d at 572. Thus, in cases where several acts could form the basis of one charged count, in order to convict the defendant on that count, **either the State must elect the**

specific act on which it relies for conviction **or the court must instruct the jury that it must unanimously agree that a specific criminal act** has been proved beyond a reasonable doubt. *Noltie*, 116 Wn.2d at 843; *Petric*, 101 Wn.2d at 572.

State v. Borsheim, 140 Wn. App. 357, 365, 165 P.3d 417 (2007). (Emphasis supplied.)

The prosecuting attorney did not select a specific act. Multiple acts were argued as the basis for establishing criminal intent. In the absence of an election of a specific act a unanimity instruction was required. No unanimity instruction was requested. No unanimity instruction was given.

In the absence of a unanimity instruction there is no way to determine which, if any act, or all acts, the jury relied upon to support the conviction. As argued in the preceding portion of this brief, not all of the alleged acts were established beyond a reasonable doubt.

In the multiple acts case, the State alleges more than one act, each of which constitutes the crime charged. *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). The State must either elect at trial which of the acts it chooses to proceed upon, or the court must instruct the jury they must unanimously agree which act constituted the crime. *Kitchen*. Neither occurred here. **This failure amounts to constitutional error.** *Kitchen*. “The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Kitchen*, at 411. “[T]he error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.” *Kitchen*, at 411 (quoting *State v. Loehner*, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) ... *review denied*, 105 Wn.2d 1011 (1986)).

State v. Brooks, 77 Wn. App. 516, 521, 892 P.2d 1099 (1995). (Emphasis supplied.)

Mr. Baker asserts that the error was not harmless in his case.

There was no proof he caused any damage inside the house.

There was no proof that he removed Ms. Dour’s air conditioners and wall hangings.

There was no proof that he deprived Ms. Dour of the value of the utilities which she was obligated to pay.

There was no proof that he attempted to assault anyone inside the residence.

In “multiple acts” cases, the jury must unanimously agree as to which incident constituted the crime charged. Where multiple acts relate to one charge, the State must elect the act on which it relies to convict the defendant, or the trial court must provide a unanimity instruction - a *Petrich* instruction. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). **The failure to do so in multiple acts cases is constitutional error.** “The error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act] resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Under *Petrich*, where this error occurs we’ll apply constitutional harmless error analysis.

State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009).

The State asserted attempted assault, malicious mischief, theft of utilities, and theft of property as the multiple bases upon which to establish criminal intent.

The prosecuting attorney’s closing argument began:

Good morning. On November 7th of 2017, Mr. Charles Baker was living at 1814 East 4th Avenue. He did not have permission to live in that home. He had not paid rent to the home owner, Melissa Dailey. He had not paid rent to the renter, Amirah Dour. While he was staying there, Mr. Baker used the electricity, he used the water, he used the renter’s own mattress, he never paid for the utilities he used, he never paid for the bed that he used, and he -- while living

there, he also booby trapped the house to prevent his possessions or the possessions of others from being taken.

While he was living there, he barricaded the back door with a chair under the handle so that it would not be opened from the outside. While Mr. Baker was living in that home, the home was damaged. The cabinets were graffitied, the front door had damage to it, the windows were covered with cardboard.

(Kerbs RP 292, ll. 1-17)

Defense counsel countered as follows:

The State's attempted to argue multiple different crimes that Mr. Baker might have had the intent to commit in this house. They're giving you multiple options because they don't have enough evidence, really, to support any of those options. The State had to prove beyond a reasonable doubt that Mr. Baker had the intent to commit a crime in this house.

(Kerbs RP 303, ll. 3-9)

Mr. Baker contends that there was insufficient proof to establish that each and every one of those alleged acts were committed by him. In the absence of the State's election the jury verdict could not be considered unanimous.

In the absence of a unanimity instruction Mr. Baker was deprived of his constitutional right to a unanimous verdict.

III. PROSECUTORIAL MISCONDUCT

“A prosecuting attorney commits misconduct by misstating the law.” *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

As pointed out in the Statement of the Case Mr. Baker submits that the prosecuting attorney misstated the law on at least two (2) occasions. Both occasions involved the use of the inference instruction.

Instruction 11 adds to this a little bit and says “a person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding on you and it is for you to determine what weight, if any, such inference is given.”

So this instruction basically tells you that the fact that someone is -- is coming into someone else's house without permission, you can infer they are there to commit a crime; you don't have to, but you can.

So when we look about -- look at the facts of our case when discussing whether or not a crime was committed in the home, I want to look at the entirety of the testimony you heard. But, first, I want to remind you again it's important to use our common sense. Your common sense can tell you that conduct creating a risk of or actual harm to person or property within a building is a crime.

MS. HARARA: Objection, Your Honor.

THE COURT: Overruled.

(Kerbs RP 296, l. 22 to RP 297, l. 15)

 Additionally, you have the additional instruction that says you can infer from his presence in the home that he intended to commit the crimes therein. So just being there unlawful is enough, under the law, to show intent.

(Kerbs RP 320, l. 25 to RP 321, l. 3)

 Even though the trial court overruled defense counsel’s objection Mr. Baker claims that misstating the law was so prejudicial to him that his conviction must be reversed. It was prejudicial to him because of the insufficiency of the evidence as to each of the allegations of what crime was committed and the lack of a unanimity instruction.

 Finally, misconduct by the State is particularly egregious. “The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” [Citation omitted.] This is because “[t]he jury knows that the prosecutor is an officer of the State.” [Citation omitted.] “It is therefore, particularly grievous that this officer would so mislead the jury” regarding the critical issue in this case.

State v. Allen, supra, 380.

CONCLUSION

Charles Baker is entitled to have his residential burglary conviction reversed and dismissed due to the lack of a unanimity instruction; instructional error by including the burglary inference instruction; and the prosecuting attorney's misstatement of the law.

DATED this 19th day of January, 2019.

Respectfully submitted,

s/ Dennis W. Morgan

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APPENDIX "A"

INSTRUCTION NO. 11

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

NO. 36294-9-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 17 1 04504 8
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
CHARLES BAKER,)	
)	
Defendant,)	
Appellant.)	
_____)	

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