

63946-3

63946-3

NO. 63946-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

GARY KENFIELD,

Appellant.

REC'D
FEB 22 2010
King County Prosecutor
Appellate Unit

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

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <i>The altercation according to the state</i>	2
2. <i>The altercation according to Kenfield</i>	4
3. <i>The arrest</i>	7
4. <i>"Good faith claim of title" and right to jury unanimity</i>	8
5. <i>Improper rebuttal closing argument</i>	9
6. <i>Procedure</i>	10
C. <u>ARGUMENT</u>	11
1. THE TRIAL COURT ERRED BY REFUSING TO GIVE A JURY UNANIMITY INSTRUCTION, THE RATIONALE FOR WHICH ALSO CAUSED THE COURT TO WRONGLY REFUSE TO GIVE A "GOOD FAITH CLAIM OF TITLE" DEFENSE INSTRUCTION	11
a. <i>The trial court should have given a unanimity instruction</i>	11
b. <i>Because the taking of the money was a distinct act, the trial court should have given a "good faith claim of title" defense instruction</i>	16
2. THE PROSECUTOR'S BURDEN SHIFTING DURING REBUTTAL CLOSING ARGUMENT MANDATES REVERSAL	20

TABLE OF CONTENTS (CONT'D)

	Page
a. <i>The prosecutor's comment about Redfern's absence was a misuse of the missing witness doctrine.</i>	20
b. <i>The argument was not a reasonable response to Kenfield's closing argument.</i>	23
c. <i>The prosecutor's argument was flagrant, ill-intentioned, and unfairly prejudicial.</i>	24
D. <u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Ager</u> 128 Wn.2d 85, 904 P.2d 715 (1995).....	18, 19
<u>State v. Austin</u> 59 Wn. App. 186, 796 P.2d 746 (1990).....	17
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	20, 24
<u>State v. Blair</u> 117 Wn.2d 479, 816 P.2d 718 (1991).....	22
<u>State v. Bobenhouse</u> 166 Wn.2d 881, 214 P.3d 907 (2009).....	12
<u>State v. Boyd</u> 137 Wn. App. 910, 155 P.3d 188 (2007).....	13
<u>State v. Brightman</u> 155 Wn.2d 506, 122 P.3d 150 (2005).....	13
<u>State v. Burri</u> 87 Wn.2d 175, 550 P.2d 507 (1976).....	17
<u>State v. Campbell</u> 69 Wn. App. 302, 848 P.2d 1292 (1993) <u>reversed on other grounds</u> , 125 Wn.2d 797 (1995).....	13
<u>State v. Charlton</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	20
<u>State v. Cheatam</u> 150 Wn.2d 626, 81 P.3d 830 (2003).....	20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Contreras</u> 57 Wn. App. 471, 788 P.2d 1114 <u>review denied</u> , 115 Wn.2d 1014 (1990).....	21
<u>State v. Corwin</u> 32 Wn. App. 493, 649 P.2d 119 <u>review denied</u> , 98 Wn.2d 1004 (1982).....	11
<u>State v. Crane</u> 116 Wn.2d 315, 804 P.2d 10 <u>cert. denied</u> , 501 U.S. 1237 (1991).....	12
<u>State v. Cuthbert</u> __ Wn.2d __, __ P.2d __, 2010 WL 354390 (2010).....	19
<u>State v. Davis</u> 73 Wn.2d 271, 438 P.2d 185 (1968).....	22
<u>State v. Dixon</u> 150 Wn. App. 46, 207 P.3d 459 (2009).....	21, 24
<u>State v. Dykstra</u> 127 Wn. App. 1, 110 P.3d 758 (2005) <u>review denied</u> , 156 Wn.2d 1004 (2006).....	23
<u>State v. Fernandez-Medina</u> 141 Wn.2d 448, 6 P.3d 1150 (2000).....	13
<u>State v. Fiallo-Lopez</u> 78 Wn. App. 717, 899 P.2d 1294 (1995).....	13
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	24
<u>State v. Handran</u> 113 Wn.2d 11, 775 P.2d 453 (1989).....	13

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hanson</u> 59 Wn. App. 651, 800 P.2d 1124 (1990).....	13
<u>State v. Hicks</u> 102 Wn.2d 182, 683 P.2d 186 (1984).....	18
<u>State v. Hudlow</u> 99 Wn.2d 1, 659 P.2d 514 (1983).....	18
<u>State v. Jerrels</u> 83 Wn. App. 503, 925 P.2d 209 (1996).....	26
<u>State v. Jones</u> 34 Wn. App. 848, 664 P.2d 12 (1983).....	11
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	11, 12
<u>State v. Kjorsvik</u> 117 Wn.2d 93, 812 P.2d 86 (1991).....	11
<u>State v. La Porte</u> 58 Wn.2d 816, 365 P.2d 24 (1961).....	23
<u>State v. Love</u> 80 Wn. App. 357, 908 P.2d 395 <u>review denied</u> , 129 Wn.2d 1016 (1996).....	13
<u>State v. Marko</u> 107 Wn. App. 215, 27 P.3d 228 (2001).....	12
<u>State v. May</u> 100 Wn. App. 478, 997 P.2d 956 <u>review denied</u> , 142 Wn.2d 1004 (2000).....	19

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Miles</u> 139 Wn. App. 879, 162 P.3d 1169 (2007).....	24
<u>State v. Miller</u> 92 Wn. App. 693, 964 P.2d 1196 (1998) <u>review denied</u> , 137 Wn.2d 1023 (1999).....	15
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	21, 22
<u>State v. Mora</u> 110 Wn. App. 850, 43 P.3d 38 <u>review denied</u> , 147 Wn.2d 1021 (2002).....	18
<u>State v. Petrich</u> 101 Wn.2d 566, 683 P.2d 173 (1984).....	12, 13
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	25
<u>State v. Suarez-Bravo</u> 72 Wn. App. 359, 864 P.2d 426 (1994).....	26
<u>State v. Toth</u> 152 Wn. App. 610, 217 P.3d 377 (2009).....	26
<u>State v. Walker</u> 75 Wn. App. 101, 879 P.2d 957 (1994) <u>review denied</u> , 125 Wn.2d 1015 (1995).....	15, 16
<u>State v. Wright</u> 152 Wn. App. 64, 214 P.3d 968 (2009).....	13

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Chambers v. Mississippi
410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)..... 17

United States v. Severson
3 F.3d 1005 (7th Cir. 1993) 24

Washington v. Texas
388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d. 1019 (1967)..... 17

OTHER JURISDICTIONS

People v. Doll
371 Ill.App.3d 1131, 864 N.E.2d 916, 309 Ill.Dec. 675 (Ill. App. 2007) 22

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.56.010 15

RCW 9A.56.020 15, 18

RCW 9A.56.190 11

U.S. Const. amend. VI 11, 20

Wash. Const. art. I, § 22..... 11, 20

Webster's Third New International Dictionary 606 (1993)..... 15

A. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to give a jury unanimity instruction.

2. Because it erroneously refused to provide a unanimity instruction, the trial court also wrongly refused to give a "good faith claim of title" defense instruction.

3. The prosecutor committed flagrant misconduct by improperly shifting the burden of proof through misuse of the missing witness doctrine.

Issues Pertaining to Assignments of Error

1. The trial court refused to give jurors a unanimity instruction in this prosecution for second degree robbery because it concluded the appellant's taking of a \$50 bill and taking of a purse were part of a continuing course of conduct. Was the court's refusal erroneous where the appellant had different objectives for taking the money and taking the purse?

2. The trial court refused to instruct jurors it was a defense to robbery if the appellant took the \$50 bill believing in good faith he was retaking his own bill because the defense did not apply to the purse he also took. This conclusion was based on the court's finding the taking of both

the money and purse were part of a continuous course of conduct. But because the takings were instead distinct acts, did the court err by refusing to give the claim of title instruction with respect to the \$50 bill?

3. Did the prosecutor commit flagrant and ill-intentioned misconduct by remarking during rebuttal closing argument that the defendant's landlord, who played a role in the defendant's defense theory, did not testify, when the landlord was not particularly available to the defendant?

B. STATEMENT OF THE CASE

1. *The altercation according to the state*

Paige Knight testified that she was walking home at about 3 a.m. on July 5, 2008, when she heard Gary Kenfield call her name. 6RP¹ 8-10. She recognized Kenfield, who was driving on an adjacent road, from having briefly met him two weeks earlier at a neighborhood convenience store. 6RP 10-16. Kenfield parked next to where Knight was standing and got out of his car. 6RP 16-18.

¹ The verbatim report of proceedings is cited to as follows: 1aRP (5/19/2009); 1bRP (5/21/2009); 1cRP (5/26/2009); 1dRP (5/27/2009); 2RP (5/20/2009); 3RP (5/22/2009); 5RP (5/28/2009); 6RP (6/1/2009); 7aRP (6/2/2009); 7bRP (6/3/2009); 8RP (6/4/2009); 9RP (7/31/2009).

The two talked and smoked cigarettes for about an hour. 6RP 20-22, 95-96. Knight had not drank alcohol or used drugs, but it appeared to her Kenfield had been using drugs. 6RP 22-23. The conversation ended with Knight agreeing to accompany Kenfield to his apartment for drinks. 6RP 23-24. Knight thought nothing of the hour; the 29-year-old mother of four sometimes met with friends at late hours and slept all day. 6RP 4, 24.

Kenfield began to drive in the correct direction, but instead of turning around, he turned down the alley toward Knight's apartment complex and parked near an abandoned home. 6RP 24-26. Disconcerted, Knight asked Kenfield why he parked there. She got out of the car and began to walk away. 6RP 26-28, 96-97. Kenfield mood changed to one of aggression. He followed Knight and was undeterred when she said she would call the police if he continued. 6RP 28-29.

Knight stopped after a short distance, near her friend Joe's residence, and asked Kenfield what he wanted. 6RP 30-33. The two then talked and smoked cigarettes for about 45 minutes. 6RP 33, 98-99. All of a sudden Kenfield put one arm around Knight's neck and told her he would poke her eye out if she screamed. He dragged her down a nearby hill, stopped, and demanded oral sex. 6RP 34-37. Knight refused to comply. 6RP 39-41.

Kenfield got angry and dragged Knight into the bushes. 6RP 46-49. Knight, who had asthma, began to feign an asthma attack in hopes Kenfield would panic and run away. 6RP 48-49. Knight told Kenfield she could not breathe, at which point "he started going in my purse looking for money, anything he could find, and my inhaler." 6RP 48-49. Knight did not see how Kenfield got her purse because she was pretending she had passed out. Kenfield also went through her pockets, asking her, "Where's the money, where's everything at." 6RP 48-50. He found her inhaler, crudely tried to administer aid, grabbed the purse, and ran off. 6RP 49-52. Knight waited a few minutes, ran to Joe's home, and called 911. 6RP 52-56.

When police came, Knight still had \$2 and change in her pocket. 6RP 50. Knight's keys, which had also been in a pocket, were found in the bushes. Knight surmised Kenfield either took and quickly discarded the keys, or they slipped out of her pockets. 6RP 51, 157-58. Knight lost her purse, which contained her inhaler and other items, and a \$50 bill her mother had given her for household expenses. 6RP 41-48.

2. *The altercation according to Kenfield*

Kenfield testified he was driving down a road in search of crack cocaine when Knight caught his attention. When Knight said she could

get drugs for him, he followed her directions and parked his car. 7bRP 11-13. Kenfield had never before met Knight. 7bRP 13. Knight got into the car and asked how much crack Kenfield wanted and if he wanted a date. He declined her offer for sex and said he wanted \$50 worth of crack. Knight demanded the cash and Kenfield gave her a \$50 bill. 7bRP 14. He had earned the money by doing odd jobs around a friend's house for \$25 per hour. 7aRP 76-86, 7bRP 48-49, 65.

Kenfield accompanied Knight to Joe's house, where Knight went inside to call her drug dealer. Knight referred to Joe as her "brother." While waiting for the dealer to arrive, Kenfield and Knight talked and smoked cigarettes. 7bRP 14-17. The dealer eventually drove up and Knight exchanged Kenfield's money for drugs. 7bRP 22-23. Back at Kenfield's car, Knight handed him the crack and they got in. 7bRP 23. Knight retrieved her pipe and demanded her portion of cocaine for facilitating the transaction. When Kenfield refused to smoke in the car, Knight directed him to drive down the alley and park near an abandoned building with an open garage. 7bRP 25, 56-57.

They went inside the garage and each smoked a "hit" of crack. 7bRP 25, 28, 59, 84. Knight then unexpectedly pulled Kenfield's shorts down and told him she was going to give him oral sex. 7bRP 25, 28, 69,

79-81. Kenfield rebuffed the offer and instead gave Knight another \$50 bill to buy a second batch of crack. 7b 28-29, 69, 81-82.

Knight quickly began walking back toward Joe's house. 7bRP 29-30, 81-82. When Kenfield followed, Knight turned and told him to stop following or she would call police. She also said she was keeping his \$50, which she had put inside her purse. 7b29-30, 81-82. A brief dispute followed, culminating in Knight's agreement to obtain more crack with the \$50. 7bRP 30-31.

Knight again began walking toward Joe's when she abruptly sat down and demanded another hit of crack. 7bRP 31-33. After she took her hit, Knight angrily told Kenfield to give her the rest of his money. When she made a quick move as if to go for a weapon, Kenfield grabbed her arm and shoulder, which went kind of limp." Knight momentarily began to act strangely, as if she were "tripping." 7bRP 33-36. Knight quickly snapped out of it, apologized, took Kenfield's arm, and told him to sit down and "take a hit." 7bRP 36. Kenfield pulled his arm free, at which point Knight passed out and began convulsing.

Thinking she had overdosed and was about to die, Kenfield comforted Knight. He asked what he could do to help and Knight told her to get her inhaler, which he found inside her purse. While doing that, he

also found his \$50, which he took out of the purse. 7bRP 36-37. He gave Knight two squirts of the inhaler, which caused her to spring up, turn around, and clench her fists. Knight announced she was getting her brother so she could come back, assault him, and take his money. Knight ran back toward Joe's house. 7bRP 37-38.

Kenfield fled in fear, consciously in possession of the \$50 because it belonged to him. 7bRP 38-40, 44-46. He also ended up with the purse, which contained Knight's inhaler and other items. He intended to return the purse and items by dropping them at Joe's door as soon as it was safe to get back to his car. 7bRP 46-47. He heard voices, then footsteps, in hot pursuit. He found an area with high grass and lay down to hide until his pursuers left. 7bRP 40-41.

3. *The arrest*

Seattle police began to arrive within minutes of Knight's 911 call. 5RP 107-08, 6RP 55-56. Knight met a detective outside, told the officer what happened, and provided a description of Kenfield. 5RP 108-11. The detective broadcast the information to her colleagues and summoned the assistance of a police tracking dog and its handler. 5RP 111, 7bRP 8-9. Within seven minutes of arrival, the dog found Kenfield hiding in the grass. 7bRP 22-27. An arresting officer testified Kenfield clutched the

\$50 bill in his left hand and a women's purse was either in his right hand or under his prone body. 6RP 127-129.

4. *"Good faith claim of title" and right to jury unanimity*

Kenfield filed motions requesting a "good faith claim of title instruction" to support his defense theory that the \$50 bill he retrieved from Knight belonged to him. CP 138-41, 145-48. During the instructions conference held after all evidence was in, the trial court denied Kenfield's motions because he had no good faith claim to the purse, which he took along with the \$50 bill. 7bRP 97.

The following day, Kenfield renewed his motion for the good faith claim instruction. He also argued that because the defense applied to the \$50 bill but not the purse, jury unanimity would be assured only if a unanimity instruction was given. CP 149-51. The trial court denied the motion, finding a unanimity instruction was not warranted because the taking of the money and the purse was a continuing offense and Kenfield had no claim of title to the purse. 8RP 3.

Kenfield later filed a motion for arrest of judgment and new trial based on the trial court's failure to provide claim of title and unanimity instructions. CP 192-202. He argued that without the unanimity instruction, it was possible jurors may have found him guilty of second

degree robbery for taking the \$50, which would have been wrong given the court's refusal to give the claim of right defense instruction. 9RP 29-30, 35. The trial court denied the motion, finding there was one continuous taking and the claim of title did not apply to the purse. 9RP 36.

5. *Improper rebuttal closing argument*

Kenfield testified the \$50 bill was part of the payment he received for doing handiwork around the home of a friend named Ann Peach. 7bRP 45. Peach wrote checks to Kenfield's landlord, Lisa Redfern, on June 23, June 28, and July 3 in an amount totaling \$1,085. 7aRP 77-82. Redfern cashed the checks and gave him the money in \$50 bills. 7aRP 83-86, 7bRP 45-46. Redfern's friend Terry Strohschein initially testified he saw the transaction between Redfern and Kenfield on July 3 or July 4. 7aRP 83-84. On cross examination, however, Strohschein admitted he could not remember on which day the transaction occurred. 7aRP 84-86.

During closing argument, defense counsel sought to persuade jurors the \$50 bill belonged to Kenfield. Counsel argued:

How did the \$50 get there that night? We have traced a provenance for the \$50 bill, and Ms. Knight gives no provenance for the \$50 bill. Somebody gave it to her. She doesn't work, she's unemployed, does odd jobs, doesn't know who gave it to her, doesn't know when she had that.

8RP 52.

On rebuttal, the prosecutor sought to show the \$50 bill was Knight's. The prosecutor said:

The \$50 bill, where did this \$50 bill come from? Paige [Knight] told you her mom gave it to her. The defendant told you *that this woman Lisa, who did not testify at trial*, gave him the \$50. And what Terry told you is that at some point in his life, he saw Terry (sic) hand the defendant a \$50 bill, but he was candid with you, and he said, "I don't really even remember when that was."

So the suggestion that the defense somehow provided you with a better origin of the \$50 bill just doesn't hold water in this case. Paige told you she got it from her mom. There is no reason to believe otherwise.

8RP 66 (emphasis added).

Defense counsel did not object to this argument.

6. *Procedure*

The state charged Kenfield with attempted second degree rape and second degree robbery. CP 6-7. The jury found him not guilty of attempted rape and guilty of second degree robbery. CP 177-78. Because the robbery conviction was Kenfield's third strike, the trial court imposed a sentence of life in prison without parole. CP 238-47.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY REFUSING TO GIVE A JURY UNANIMITY INSTRUCTION, THE RATIONALE FOR WHICH ALSO CAUSED THE COURT TO WRONGLY REFUSE TO GIVE A "GOOD FAITH CLAIM OF TITLE" DEFENSE INSTRUCTION.

To convict Kenfield of second degree robbery, the jury had to find, beyond a reasonable doubt, that he unlawfully took personal property from Knight against her will by the use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.190. Robbery also requires an intent to deprive the victim of property. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); State v. Corwin, 32 Wn. App. 493, 497, 649 P.2d 119, review denied, 98 Wn.2d 1004 (1982). Although the statutory definition of robbery does not include a mens rea element, intent is nonetheless a necessary element of the crime. State v. Jones, 34 Wn. App. 848, 850, 664 P.2d 12 (1983); Corwin, 32 Wn. App. at 497.

- a. The trial court should have given a unanimity instruction.*

As with all elements of a crime, the intent to steal must be found by a unanimous jury beyond a reasonable doubt. This is because an accused in Washington has the constitutional right to a unanimous jury verdict. U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the prosecutor

presents evidence of several acts that could form the basis of a charge, either the state must elect the act upon which it will rely for conviction or the court must instruct the jury to agree on a specified criminal act. State v. Crane, 116 Wn.2d 315, 324-25, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001).

Absent election, the failure to give such an instruction is constitutional error. The failure to so instruct in a multiple acts case is constitutional error. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). The error derives from the possibility some jurors may have relied on one act and others a different act, which causes a lack of unanimity on all of the elements required for a conviction. Kitchen, 110 Wn.2d at 411.

In Kenfield's case, jurors heard evidence that Kenfield took a \$50 bill and a purse from Knight's presence. The taking of either item under the circumstances described could constitute robbery. Therefore, if the taking of the money was a distinct act from the taking of the purse, a unanimity instruction should have been given.

But a unanimity instruction need not be given when the evidence shows a continuing course of conduct rather than several distinct acts.

Petrich, 101 Wn.2d at 571; State v. Boyd, 137 Wn. App. 910, 923, 155 P.3d 188 (2007). To determine whether the acts were distinct or part of the same incident, the facts must be evaluated in a commonsense manner. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

If the trial court's refusal to give an instruction is based on a factual dispute, it is reviewed for an abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). In so doing, courts look at the evidence in the light most favorable to the proponent of a unanimity instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000); State v. Hanson, 59 Wn. App. 651, 656-657, 800 P.2d 1124 (1990). But a trial court's decision to give an instruction based on a legal ruling mandates de novo review. State v. Wright, 152 Wn. App. 64, 70, 214 P.3d 968 (2009).

Regardless the standard, a continuing course of conduct requires an ongoing venture with a single objective. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, review denied, 129 Wn.2d 1016 (1996); State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995); State v. Campbell, 69 Wn. App. 302, 312, 848 P.2d 1292 (1993), reversed on other grounds, 125 Wn.2d 797 (1995).

Kenfield testified the \$50 bill was his, earned by laboring for Peach, and given to Knight only to buy a second batch of crack after the first test smoke met with his approval. His intent in taking the money, therefore, was to reclaim his own property. He ended up with Knight's purse, in contrast, in the heat of the moment. And he retained possession of the purse because he intended to drop it and the items inside it at Joe's door as soon as the coast was clear.

When considering the evidence in the light most favorable to Kenfield, it is evident a reasonable juror could have found different objectives for taking the money and taking the purse. Even Knight's testimony supports this conclusion. For example, it is undisputed Knight feigned an asthma attack. Both Knight and Kenfield testified Kenfield quickly went through the purse, found the inhaler, and administered aid after seeing Knight's convincing act. Indeed, Knight testified she really did suffer from asthma and, while pulling the stunt, told Kenfield she could not breathe. Aside from the \$50 bill, the purse contained only a lighter, perfume, inhaler and other items for which Kenfield had no use. 6RP 42-44. Finally, upon arrest, Kenfield had separated the \$50 from the purse and other items, making it easier for him to return the purse.

In the words of the theft statute, Kenfield's objective in taking the purse was not to "deprive" Knight of the item. RCW 9A.56.020(1)(a) (Theft means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another ... with intent to deprive him or her of such property"). Courts give the word "deprive" its common meaning. RCW 9A.56.010(6); State v. Miller, 92 Wn. App. 693, 705-06, 964 P.2d 1196 (1998), review denied, 137 Wn.2d 1023 (1999). "Deprive" means "to take away," "to take something away from," or "to keep from the possession, enjoyment, or use of something." Webster's Third New International Dictionary 606 (1993).

While Kenfield did "take" the purse in the simplest sense, he did not act with the objective of keeping it from Knight's possession or use. In a related context, this Court held "intent to deprive" element requires more than a mere fleeting taking. Distinguishing between "joyriding" and theft, this Court held the "intent to deprive" element under the theft statute, "implies that the deprivation be of a greater duration than that required for taking a motor vehicle without permission." State v. Walker, 75 Wn. App. 101, 107-08, 879 P.2d 957 (1994), review denied, 125 Wn.2d 1015 (1995). The two crimes were thus not concurrent and the trial court did

not err by granting the state's motion to amend the information from taking a motor vehicle to theft. Walker, 75 Wn. App. at 108.

In order to meaningfully distinguish situations like Kenfield's, where the evidence supports an inference of incidental and momentary taking from the run of the mill "take to keep" robbery, the Walker Court's rationale should apply here. Just as a joy rider's objective in taking a car is to briefly use it,² Kenfield's goal was to quickly return the purse before he left the scene. The purse taking was therefore not part of a single continuous taking that included the taking of money. The trial court's contrary conclusion, which deprived Kenfield of a unanimity instruction, was erroneous. This Court should reverse.

b. Because the taking of the money was a distinct act, the trial court should have given a "good faith claim of title" defense instruction.

From the start, Kenfield's primary defense theory was that he rightly reclaimed his own \$50 and therefore did not intend to deprive Knight of the property of another. CP 108-11 (motion for preliminary "good faith claim of title" instruction); 8RP 48, 52-56 (closing argument).

² See Walker, 75 Wn. App. at 106 (joyriding statute would be violated by taking car without permission "for a spin around the block[,] while theft statute would be offended only if accused "intended to deprive the owner of its use, as is the case when the motor vehicle is taken for a substantial period of time.").

The trial court consistently refused to instruct the jury with regard to the theory, finding Kenfield had no good faith claim to the purse and its contents and took the purse along with the \$50 in one continuous act. 7bRP 97, 8RP 3.

But as shown above, the trial court erred by finding the two distinct takings were a continuing course of conduct. Because the taking of the \$50 bill was separate from that of the purse, the good faith claim of title defense is animated. The trial court's improper finding of a continuing course of conduct resulted in a deprivation of Kenfield's right to present a valid defense.

The federal and state constitutional right to due process guarantees a defendant the right to defend against the state's allegations and present a defense. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d. 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (trial court erred in ruling Austin's subjective state of mind was irrelevant; because "evidence was material to Austin's defense, it was a denial of due process to exclude it."). As well, the Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the right to

present a defense. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

Washington's "good faith claim of title" defense is codified in RCW 9A.56.020(2)(a): "In any prosecution for theft, it shall be a sufficient defense that . . . The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." An accused who relies on this defense must present evidence (1) that the property was taken openly and avowedly and (2) that there was some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property taken. State v. Ager, 128 Wn.2d 85, 95, 904 P.2d 715 (1995). The defense, which also applies to robbery, negates the essential element of intent to steal. State v. Hicks 102 Wn.2d 182, 186, 683 P.2d 186 (1984); State v. Mora, 110 Wn. App. 850, 855, 43 P.3d 38, review denied, 147 Wn.2d 1021 (2002). The rationale is that a defendant cannot be guilty of theft if he takes property under a good faith subjective belief that he owns or is entitled to possession of the property. Ager, 128 Wn.2d at 92.

In determining whether there is sufficient evidence to support a good faith claim of title defense, the court must interpret the evidence most strongly in favor of the accused. State v. Cuthbert, ___ Wn.2d ___, ___

P.2d __, 2010 WL 354390, at *12 (2010). In so doing, the judge must not weigh the proof or assess witness credibility, for those tasks are the jury's. State v. May, 100 Wn. App. 478, 482, 997 P.2d 956, review denied, 142 Wn.2d 1004 (2000). If the evidence supports an instruction on the defense, it is reversible error to refuse to give the instruction. Ager, 128 Wn.2d at 93.

In Kenfield's case, there was ample evidence to support the good faith claim of title instruction. Kenfield testified he earned the \$50 from working at Peach's house and received the bill from Redfern after she cashed one of Peach's checks written for Kenfield. Peach confirmed she had written three checks for Kenfield in the days before his meeting with Knight. Peach and Strohschein explained Redfern cashed checks for Kenfield using \$50 bills. Kenfield gave a \$50 bill to Knight for more cocaine. Knight chose to convert the money to her own use rather than to buy more drugs. Kenfield reclaimed the same \$50 bill, which was rightfully his. The good faith claim of title defense clearly applies under these facts and the trial court erred by not giving the instruction. This error requires reversal of Kenfield's conviction.

2. THE PROSECUTOR'S BURDEN SHIFTING DURING REBUTTAL CLOSING ARGUMENT MANDATES REVERSAL.

Because the accused has no burden to present evidence, a prosecutor may not comment on the accused's failure to call a witness unless the witness is particularly available to the defense. The prosecutor violated this rule by commenting during rebuttal argument that Kenfield did not call a witness who was equally available to both parties. Kenfield suffered prejudice because the prosecutor's misconduct went to an important part of the defense. Reversal is warranted.

a. The prosecutor's comment about Redfern's absence was a misuse of the missing witness doctrine.

A prosecuting attorney's misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22 (amend. 10). State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

A prosecutor may generally not comment on the lack of defense evidence because the defense has no duty to present evidence. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). But if the missing witness doctrine applies, the prosecutor may comment on the defense's

failure to call a witness. State v. Montgomery, 163 Wn.2d 577, 597-98, 183 P.3d 267 (2008). Under the doctrine, a prosecutor may point out an accused failed to call a witness when it would have been natural to do so and when the witness was peculiarly available to the defense. State v. Dixon, 150 Wn. App. 46, 55, 207 P.3d 459 (2009); State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114, review denied, 115 Wn.2d 1014 (1990).

The doctrine applies only if (1) the potential testimony is material and not cumulative; (2) the absent witness is "particularly under the control of the defendant rather than being equally available to both parties;" and (3) the witness's absence is not sufficiently explained. Montgomery, 163 Wn.2d at 598-599. Finally, the doctrine may not be applied if it would contravene a criminal defendant's right to silence or shift the burden of proof. Montgomery, 163 Wn.2d at 599.

In Kenfield's case, the missing witness was his landlord, Lisa Redfern, who Kenfield said was the source of the \$50 bill found in his possession when he was arrested. Kenfield did not have particular control over Redfern; as the Supreme Court recently said in finding a defendant's landlord not specifically under his control: "few tenants believe they

control their landlords." Montgomery, 163 Wn.2d at 599. There is no reason to believe Kenfield controlled his landlord, either.

Moreover, a witness is particularly available to one party only where the party has "so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging." State v. Blair, 117 Wn.2d 479, 490, 816 P.2d 718 (1991) (quoting State v. Davis, 73 Wn.2d 271, 277, 438 P.2d 185 (1968)). Kenfield enjoyed no such "superior opportunity" to know about Redfern. Indeed, the prosecutor informed the court Kenfield gave notice of Redfern's contact information, which enabled the state to obtain recordings of jail telephone conversations between Kenfield and Redfern for possible use as impeachment evidence. 7aRP 61. See People v. Doll, 371 Ill.App.3d 1131, 1137, 864 N.E.2d 916, 922, 309 Ill.Dec. 675, 681 (Ill. App. 2007) (missing witness inference may not be drawn when witness is also known and available to the other party yet is not called by it.).

Because Redfern was not particularly available to Kenfield, the missing witness doctrine does not excuse the prosecutor's improper rebuttal argument. In addition, the prosecutor's comment shifted the

burden of proof onto Kenfield. For these reasons, the remark constituted misconduct.

b. The argument was not a reasonable response to Kenfield's closing argument.

The state may assert the argument was not error because it was a reasonable response to Kenfield's closing argument. Argument is not improper if it does not go beyond what is necessary to respond to the defense argument. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005), review denied, 156 Wn.2d 1004 (2006); State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

Kenfield's counsel legitimately and zealously argued the state failed to trace the origin of the \$50 bill because Knight did not specify in her testimony where and when she obtained the bill. On rebuttal, the prosecutor argued Knight testified her mother gave her the money and Kenfield's witness Strohschein admitted he could not remember on what date he saw Redfern give Kenfield the money. This was arguably a fair response.

But then the prosecutor went beyond what was necessary to respond to Kenfield's argument by stating, "The defendant told you that this woman Lisa, who did not testify at trial, gave him the \$50." 8RP 66. The obvious implication from this comment was that Kenfield did not call

a witness who may have been able to help him because he did not want the jury to hear what she might say. This was misuse of the missing witness doctrine and improper burden shifting; it was not a reasonable response to defense counsel's argument. See State v. Dixon, 150 Wn. App. 46, 57, 207 P.3d 459 (2009) (prosecutor adequately rebutted Dixon's reasonable doubt argument, but went beyond what was necessary to rebut defense argument by stating Dixon should have produced a witness for live testimony); United States v. Severson, 3 F.3d 1005, 1014-15 (7th Cir. 1993) (although defense counsel's remarks came "very close" to inviting prosecutor's retorts, "because the lawyer was tossing neither horseshoes nor hand grenades, very close does not count.").

c. The prosecutor's argument was flagrant, ill-intentioned, and unfairly prejudicial.

Kenfield did not object to the prosecutor's improper remark. Reversal is nevertheless required if the prosecutor's remarks were so flagrant and ill-intentioned they could not have been cured by a jury instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Belgarde, 110 Wn.2d at 508.

It is flagrant misconduct to shift the burden of proof to the defendant. State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007)

In addition, the prosecutor was well aware of the missing witness rule, having moved in limine to prevent the defendant from using the rule because Knight's friend "Joe" was not being called as a witness by the state. 1RP 87. The prosecutor's knowing misuse of the doctrine during rebuttal suggests ill intent. See State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984) (statements made during closing argument are presumably intended to influence the jury).

Finally, the prosecutor knew exactly why Kenfield did not call Redfern as a defense witness. Just before calling the defense investigator as a witness, Kenfield, both on his own and through counsel, explained that at one time, there was a discussion between the parties about the possibility of presenting by stipulation evidence Redfern cashed a check that was the source of the disputed \$50 bill. Kenfield explained he did not want to call Redfern for fear she would be impeached by conversations she had with Kenfield that were recorded by the jail. 7aRP 58-64.

Not calling Redfern was therefore a legitimate strategic decision by the defense. The prosecutor unfairly punished Kenfield for the decision by implying the defense had a duty to present evidence by stating that he did not produce corroborating evidence by calling specific witnesses to testify.

This was misconduct resulting in prejudice beyond a reasonable doubt. State v. Toth, 152 Wn. App. 610, 615, 217 P.3d 377 (2009).

To determine whether there is a substantial likelihood that misconduct affected the verdict, the court considers its prejudicial nature and its cumulative effect on the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Aside from the prejudicial nature of the burden shifting, here there was tangible proof the jury wrestled with the \$50 bill issue. During deliberations, the jury submitted the following question:

In an incomplete transaction, in which the first party gives money to the second party, but the purchased item or service is not given to the first party, at what point does ownership of the money transfer away from the first party? Does it transfer at all?

CP 182. The trial judge gave the stock answer to the question: "You must decide the case based on the evidence received during the trial and the instructions previously provided." CP 183.

Regardless of whether the court's answer was sufficient, the jury's question plainly indicates it considered the ownership of the \$50 bill important to the analysis of the robbery count.

The prosecutor's misapplication of the missing witness doctrine therefore had a demonstrable effect on the jury's verdict because the

implication was that Redfern would have given unfavorable testimony on the point had Kenfield called her to the stand. Kenfield thus establishes flagrant and ill-intentioned misconduct that resulted in a substantial likelihood of prejudice. In this situation, reversal is warranted.

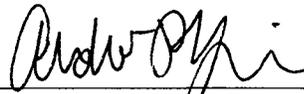
D. CONCLUSION

The trial court violated Kenfield's right to present a defense by refusing to give jurors a unanimity instruction and a "good faith claim of title" defense instruction. Flagrant prosecutorial misconduct also deprived Kenfield of his right to a presumption of innocence and a fair trial. For these reasons, Kenfield's conviction should be reversed.

DATED this 22 day of February, 2010.

Respectfully submitted,

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