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6-29-16

Court of Appeals
Division I
State of Washington

No. 74123-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

O'KEITH McGILL,

Appellant.

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

OPENING BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. McGill's right to a unanimous jury under Article I, Section 21.

2. Mr. McGill's right to a unanimous jury was violated when the State failed to elect a single act as the basis for the burglary, and the trial court failed to give the required unanimity instruction.

3. The State did not prove Mr. McGill's criminal history for purposes of calculating his offender score.

4. The trial court erred in calculating Mr. McGill's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When evidence of multiple criminal acts is introduced to support a single conviction, either the State must elect one act, or the court must instruct the jury on unanimity. Here, the State introduced evidence of two separate burglaries, but the court failed to give a unanimity instruction, to ensure jury unanimity in the conviction. Did the court's failure to instruct the jury on unanimity violate Mr. McGill's constitutional right to a unanimous verdict?

2. The State bears the burden to prove an offender's criminal history for purposes of calculating the offender score. The State may

not rely on bare allegations unsupported by evidence. Did the State fail to prove Mr. McGill's criminal history where it merely listed his alleged prior convictions on an unsworn and uncertified "Prosecutor's Understanding of Defendant's Criminal History" and presented no evidence to prove the allegations, or to disprove wash-out?

C. STATEMENT OF THE CASE

For the past year, O'Keith McGill was a regular overnight guest at the Tyee Apartments on Aurora Avenue in Shoreline. RP 153, 255-56. An older veteran named Jim Kershaw lived in Apartment 6, and he permitted Mr. McGill and other homeless individuals to stay at his apartment for periods of time, during which Mr. Kershaw fed them and allowed them to store their bags. RP 151-52, 270-71.¹

On January 23, 2015, Mr. McGill arrived at Mr. Kershaw's front door, during a period when he was no longer a welcome guest at the apartment. RP 160. A few days earlier, Mr. Kershaw had asked Mr. McGill to leave, due to a change in Mr. McGill's "attitude and character." RP 158. On January 23rd, Mr. McGill came to the apartment window, and then to the front door. RP 160, 196, 272. Mr.

¹ Mr. McGill described Mr. Kershaw as "a kindhearted man. RP 270. Mr. Kershaw said that Mr. McGill had been "like a brother" to him, and that they had a "fantastic relationship." RP 153.

McGill had several bags with him, and asked Mr. Kershaw if he could store his bags in the apartment, as usual. Id.

When Mr. Kershaw said he was no longer welcome, Mr. McGill pushed past Mr. Kershaw, through the front door of the apartment. RP 162, 199. Once inside, Mr. McGill saw there were others sitting in the apartment eating dinner with Mr. Kershaw, including Ted Bishop,² Gilles Martineau, and Emilee Piirainen. Ms. Piirainen, also a member of the homeless community in the area, describes herself as a heroin user. RP 196. She and Mr. McGill were briefly involved. RP 192-93.

Once Mr. McGill was inside the apartment, he heard Ms. Piirainen telling Mr. Kershaw not to let him in, and he became angry. RP 196-99. Mr. McGill and Mr. Bishop engaged in a physical struggle, both falling into the coffee table. RP 162. When Mr. McGill stood up to gather his bags, he was suddenly hit over the head with a wine bottle. RP 274-76. Mr. McGill was disoriented and bleeding from a serious head-wound, uncertain who had hit him with the bottle, but suspecting it was Mr. Bishop. RP 275 (“I saw stars. I was pissed off”).

Mr. McGill assaulted Ms. Piirainen, in his enraged state, before running out the front door to look for Mr. Bishop. RP 276. Mr. McGill

then ran around the back of the apartment building. RP 279-80. He located the back porch of Mr. Kershaw's apartment and threw a cinder block through the sliding glass door. RP 280. When Mr. McGill entered the apartment again through the broken door, he was unable to find Mr. Bishop, who had already fled the area. RP 90-91. Instead, Mr. McGill located Ms. Piirainen, who was still in the bedroom. RP 202. Mr. McGill, in his anger, and still suffering from a serious head wound, assaulted Ms. Piirainen again, resulting in substantial bodily harm. RP 201-03, 256, 281-82, 287.

Mr. McGill was charged with one count of burglary in the first degree and one count of assault in the second degree, as domestic violence offenses. RCW 9A.52.020; RCW 9A.36.021(1)(a); RCW 10.99.020. The jury found Mr. McGill guilty as charged.

² Mr. Bishop was later identified as Shaun Tebege, a relative of Mr. McGill by marriage. RP 113. He is referred to in the record, as here, by his moniker, Mr. Bishop.

D. ARGUMENT

1. Mr. McGill was denied his right to a unanimous verdict when the court failed to instruct the jury it had to be unanimous as to the act constituting the burglary.

a. A defendant may only be convicted by a unanimous jury.

A criminal defendant has a constitutional right to a jury trial and a corresponding constitutional right that the jury be unanimous as to its verdict. Const. art. I, § 22; U.S. Const. Am. V, XIV; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Thus, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

To ensure jury unanimity where the State charges one count of criminal conduct and presents evidence of more than one criminal act, the State must either elect a single act upon which it will rely for conviction, or the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 569, 683 P.3d 173 (1984).

Lack of assurance that a verdict was unanimous is a manifest constitutional error that can be raised for the first time on appeal. State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993); RAP 2.5(a). Thus, the fact there was no objection or challenge by Mr. McGill at trial does not preclude this Court's review on appeal.

- b. The State never elected the act upon which it relied for the burglary, nor did the trial court instruct the jury on unanimity, as is required.

The State introduced evidence of two separate alleged burglaries, without electing which one the jury should rely upon.

The State produced evidence of two specific and distinct unlawful entries into the apartment: First, Mr. McGill appeared at the front window and asked Mr. Kershaw if he could store his luggage at the apartment. RP 160-62, 272-76. After being denied entry, Mr. McGill allegedly pushed past Mr. Kershaw and entered through the front door, later engaging in an argument with Ms. Piirainen, which soon became assaultive. RP 162-65, 182, 201-03.

The second entry into the residence was distinct from the first in time, manner, and intent. After Mr. Bishop hit Mr. McGill over the head with a wine bottle, Mr. McGill began to bleed profusely. RP 83-84, 90-91, 104-05, 165, 185, 203, 274-76. Angry and disoriented from

his head-wound, Mr. McGill walked around to the rear of the apartment building and located the back patio of the unit. RP 178-80

McGill estimates it took approximately a minute and a half to walk around the building to the back. Mr. McGill lifted a cinder block from the patio and hurled it through the unit's sliding glass door. RP 166, 182, 202. Once inside the apartment this second time, he looked for Bishop in order to avenge his head-wound, but located only Ms. Piirainen. RP 90-91 (Officers testified that Bishop had left the scene, and they found Mr. McGill dazed and bleeding from the head.). Not finding his intended target, Mr. McGill took out his anger on the complaining witness, assaulting her again. RP 178-80, 202.

This second entry into the apartment was separate and distinct from the first. Indeed, both the State and the complaining witness described the acts as separate. RP 202 (“And he was coming in the back door this time, only he had broken through it ... [a]nd this time he was telling me that I owed him money suddenly.”) (emphasis provided). In testifying about the events following the glass door shattering, Ms. Piirainen stated, “He was just beating me up again.” Importantly, she did not describe this as a continuation of the first entry into the residence, or even a continuation of the first assault. Likewise, in closing argument,

the prosecutor argued that Mr. McGill returned to the residence and entered it “again,” or “re-entered” it. RP 303, 309-11.

Given the State’s proof and the closing argument by the prosecutor which failed to elect the act which constituted the burglary, a Petrich instruction requiring jury unanimity was required. The court did not provide such an instruction. CP 24-47.³ The failure to so instruct was error.

c. The two acts of burglary presented by the State were not a continuous course of conduct.

The Petrich rule applies only when the State presents evidence of “several distinct acts.” State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989), quoting Petrich, 101 Wn.2d at 571. It does not apply when the evidence indicates a “continuous course of conduct.” Id. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Handran, 113 Wn.2d at 17; State v. Doogan, 82 Wn. App. 185, 191, 917 P.2d 155 (1996). When the evidence involves conduct at different times and places, it tends to show several distinct acts. Handran, 113 Wn.2d at 17, citing Petrich, 101 Wn.2d at 571; State v. Workman, 66 Wash. 292,

³ A so-called Petrich instruction informs the jury that multiple acts have been alleged against a defendant. To convict, one or more particular charged acts

294-95, 119 P. 751 (1911). However, when the evidence shows that a defendant engaged in a series of actions intended to achieve the same objective, the inference is those actions constituted a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

As discussed above, here the State alleged two distinct unlawful entries, separate from one another. The first was the entry during which Mr. McGill allegedly pushed past Mr. Kershaw in the front doorway, with the intent to store his luggage. RP 160-62, 272-76. The second was the entry through the sliding glass door in the back, while attempting to find and assault Mr. Bishop. RP 166, 182, 202. This was a separate alleged entry, with a different method and a different motivation. Whereas in the first brush past Mr. Kershaw, the State alleged Mr. McGill intended to assault Ms. Piirainen, when he walked around back and entered through the patio, Mr. McGill sought retribution for the assault Mr. Bishop had just perpetrated.

In addition to the intent being independent, the timing of each incident was distinct. Finally, the place of each incident further shows the lack of continuing course of conduct. This was not a continuous

must be proved beyond a reasonable doubt, and the jury must unanimously agree as to which act has been proved. See, e.g., Kitchen, 110 Wn.2d at 410-11.

course of conduct, but two distinct acts, and the court's failure to provide the jury with an appropriate directive regarding unanimity was error.

d. The error in failing to instruct the jury on unanimity was not harmless.

When a trial court abridges a right guaranteed by the Constitution, the jury's verdict will be affirmed only if the State can prove the error was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

When the State fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error. 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, 110 Wn.2d at 411.

Petrich error is presumed to be prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411, quoting State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985), review denied, 105 Wn.2d 1011 (1986).

Here, the jury had no guidance as to which act constituted the burglary. Given this, the error in failing to give a Petrich instruction was not harmless, as the verdict failed to guarantee that all of the jurors were unanimous on which act by Mr. McGill constituted the burglary in the first degree. There was wide variability in the credibility of the State's witnesses, including admissions by Ms. Piirainen that she was using heroin at the time of the incident; testimony from eyewitness Gilles Martineau that he suffers from amnesia and has memory issues following a six-month coma; and the failure of the police to speak with the apartment manager. RP 140-41, 171, 188, 196.

Due to the lack of unanimity, this Court must reverse Mr. McGill's conviction.

2. The State did not prove Mr. McGill's criminal history for the purpose of calculating the offender score

In Washington, a sentencing court's calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which is a list of prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525.

a. State's burden to prove criminal history.

Constitutional due process⁴ requires the State to prove the existence of prior convictions by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); RCW 9.94A.530(2). The State bears the burden of proving not only the existence of prior convictions, but also any facts necessary to determine whether the prior convictions should be included in the offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 480.

Despite its general reluctance to address issues not preserved in the trial court, the Washington Supreme Court “allow[s] belated challenges to criminal history relied upon by a sentencing court.” State v. Mendoza, 165 Wn.2d 913, 919-20, 920, 205 P.3d 113 (2009) (citing Ford, 137 Wn.2d at 477-78). The purpose is to preserve the sentencing laws and to bring sentences in conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Mendoza, 165 Wn.2d at 920; State v. Jones, 182 Wn. 2d 1, 10, 338 P.3d 278, 282 (2014).

⁴ The Fourteenth Amendment provides: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law.”

The Supreme Court has consistently held the Sentencing Reform Act (SRA) must be interpreted in accordance with principles of due process. State v. Hunley, 175 Wn.2d 901, 913-15, 287 P.3d 584 (2012); Jones, 182 Wn. 2d at 10; Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 482. For a sentence to comport with due process, the facts relied upon by the trial court must have some evidentiary basis in the record. Mendoza, 165 Wn.2d at 926; Ford, 137 Wn.2d at 481-82. “It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.” Mendoza, 165 Wn.2d at 926 (citing Ford, 137 Wn.2d at 480); Jones, 182 Wn. 2d at 10.

The SRA expressly places this burden on the State because it is “inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.” Ford, 137 Wn.2d at 480 (citation omitted). Where the State fails to meet its burden of proof, the defendant may challenge the offender score for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85.

In Hunley, at sentencing, the State presented a written statement of the prosecuting attorney, summarizing its understanding of Mr.

Hunley's criminal history. 175 Wn.2d at 905. This was an unsworn document listing Mr. Hunley's alleged prior convictions but was not accompanied by any documentation or certified copies related to the alleged offenses. Id. Mr. Hunley neither disputed nor affirmatively agreed with the prosecutor's summary. Id. The trial court calculated the offender score based on the prosecutor's summary, and Mr. Hunley did not challenge the offender score or the sentence in the trial court. Id.

The Supreme Court reversed the sentence. Id. at 915-16. Hunley's alleged prior convictions were established solely on the prosecutor's summary assertion of the offenses. Id. Because the prosecutor did not present any evidence documenting the alleged convictions, and Mr. Hunley never affirmatively acknowledged the prosecutor's assertions regarding his criminal history, the resulting sentence violated constitutional due process. Id. at 913-15. Mr. Hunley was entitled to be resentenced following a hearing at which the State was required to prove the prior convictions unless affirmatively acknowledged by Mr. Hunley. Id. at 915-16.

This case is indistinguishable from Hunley. As in Hunley, to satisfy its burden to prove Mr. McGill's criminal history, the State

presented only a summary list of his alleged prior convictions. CP ___, sub. no. 73 (Presentence Statement -- Prosecutor's Understanding of Defendant's Criminal History). The State presented no evidence documenting the alleged convictions. Nor did the prosecutor provide evidence to support length of incarceration, if any, which would be highly relevant, considering the remoteness of Mr. McGill's criminal record. RCW 9.94A.525(2). Mr. McGill did not affirmatively acknowledge the prosecutor's summary; yet, the sentencing court relied upon it in determining Mr. McGill's offender score. RP 347; CP 65.

b. The State failed to show Mr. McGill's prior convictions did not wash out.

Here, according to the State's allegations, Mr. McGill had no felony convictions since the year 2000. CP ___, sub. no. 73. Although the State alleged a misdemeanor conviction from conduct occurring in 2005, there was no evidence presented, other than the "Prosecutor's Understanding" worksheet. Id.

Under Washington law, prior Class B felony convictions shall not be included in the offender score unless the court finds the person has not spent ten years in the community from the date of release from confinement to the commission of another offense. RCW 9.94A.525(2).

This “wash out” provision requires that the State prove that a defendant’s prior convictions have not washed out. Id.

Here, the trial court’s only findings regarding Mr. McGill’s criminal history included that his most recent felony conviction was the 2000 controlled substance case, for which Mr. McGill’s sentence was reversed on appeal as excessive. CP ____, sub. no. 73; RP 347 (court acknowledging Mr. McGill’s previous reversal). Thus, to include these 2000 felonies, or any of the other priors in the offender score calculation, the trial court was required to conclude there was no ten-year period in which Mr. McGill was crime-free.

The court’s findings do not support such a conclusion. The current offense was committed on January 23, 2015. CP 1-2. The last alleged felony was re-sentenced on January 3, 2003. CP ____, sub. no. 73; CP 50 (stating Mr. McGill’s sentence was reduced to 46 from 87 months after winning his appeal, “which was essentially time-served”). As with each of the other offenses, the court did not make any findings as to Mr. McGill’s date of release from confinement related to the 2000 felony controlled substance conviction. Thus, the only available date for purposes of determining whether to include this prior offense is the date of sentence (or alternatively, the date of re-sentencing). The present

offense was committed more than ten years after either date. Thus, because the court's findings are not supported by sufficient evidence, Mr. McGill's offender score should be, at most, a "4," as the 2000 controlled substance convictions have washed, and the State has not shown otherwise. RCW 9.94A.525(2).

Accordingly, even if this Court could accept the prosecutor's summary as sufficient, Mr. McGill's offender score was improperly calculated. For both of these reasons, Mr. McGill is entitled to resentencing. Hunley, 175 Wn.2d at 913-16.

3. The Court should not impose appellate costs against Mr. McGill.

In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs, as Mr. McGill has already been found indigent and had all discretionary trial LFO's waived. CP 61; RP 348; see RAP 14; see also RAP 1.2(a), (c); RAP 2.5.⁵ The imposition of costs on an indigent defendant is contrary to the Rules of Appellate Procedure, the statutes, and the Constitution. Even if this Court disagrees with Mr. McGill's position on appeal, the Court should exercise its discretion not to impose appellate costs against him. RAP

⁵ Mr. McGill does not concede the State will substantial prevail on appeal, but includes this argument to preserve his rights pursuant to this Court's decision in State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016).

1.2(a), (c); State v. Blazina, 182 Wn.2d 827, 835, 841, 344 P.3d 680
(2015) (Fairhurst, J., concurring).

E. CONCLUSION

Mr. McGill was denied his constitutional right to a unanimous jury verdict; therefore, his conviction for burglary in the first degree must be reversed. In the alternative, Mr. McGill is entitled to be resentenced with the proper offender score, and the State held to its burden to prove his prior convictions. This Court should also exercise its discretion to deny costs on appeal to Mr. McGill, who is indigent.

Respectfully submitted this 29th day of June, 2016.

s/ Jan Trasen

JAN TRASEN (WSBA 41177)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74123-3-I
v.)	
)	
O'KEITH MCGILL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] O'KEITH MCGILL	(X)	U.S. MAIL
718298	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
1313 N 13TH AVE		
WALLA WALLA, WA 99362-1065		

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JUNE, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710