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A. STATEMENT OF THE ISSUES

1. Whether the defendant's multiple attempts to forcefully enter the residence constituted a continuing course of conduct.

2. Whether the wording of Jury Instruction No. 6 constituted manifest error.

3. Whether the lack of a request for a lesser-included instruction on attempted first-degree criminal trespass constituted ineffective assistance by the defendant's trial counsel.

B. STATEMENT OF THE CASE

On December 8, 2005, Randle Kuhn acted as an undercover informant for law enforcement. In this capacity, he engaged in a transaction as a buyer which was monitored by police. As a result of that transaction, defendant Wesley Phipps was arrested. Trial RP 7-8.

During the early morning of December 13, 2005, Kuhn was staying at the apartment of a woman named Kim. Kim was present as were three other persons who were staying there that night. Trial RP 14, 21-22. The apartment was on the second floor. Trial RP 17. Kim was sleeping in the bedroom that night, while Kuhn slept on the couch

in the living room and the three other persons slept on the floor in that room. Trial RP 22.

At approximately 3 o'clock that morning, there was knocking on the front door which woke Kim and Kuhn. Trial RP 23. Kim told Kuhn that she did not want anyone else coming into the apartment at that time. Kuhn unlocked the bolt, left the chain on, and opened the front door. He observed one person, a male individual he knew as "Galaxy", who had been at the apartment earlier that evening. At about 1 o'clock that morning, Kuhn had demanded that Galaxy leave because Galaxy was making too much noise. As a result, Galaxy had become angry with Kuhn. Trial RP 14-15, 26.

When Kuhn observed Galaxy outside the front door at approximately 3 a.m., Galaxy asked to come inside. Kuhn denied this request and told Galaxy to come back later. Galaxy repeated his request, and Kuhn repeated his refusal, and told Galaxy he was going to shut the door. At that point, Phipps appeared at the doorway and attempted to force open the front door, but was prevented from doing

so by the chain lock. Trial RP 15.

Phipps then stated he wanted to come in and wanted to talk "right now", that he had just gotten "out" and that he was very upset. As he said these things, Phipps had his hands clenched as fists and appeared to want to fight with Kuhn. Phipps told Kuhn that he was going to "handle" him. Kuhn felt that he was being threatened. Trial RP 18.

Kuhn persuaded Phipps to let him shut the door, supposedly in order to undo the chain lock. However, when Kuhn got the door shut, he bolted it, and told Phipps to leave or he would call the police. Trial RP 18.

Kuhn then heard footsteps going down the stairs. Less than a minute later, Kuhn heard someone coming up the back stairs to the back door. The blinds on the sliding glass door in the back were partially open, and Kuhn could see two figures but could not see their faces. The back door then began to shake violently, as if someone was trying to force his way in. However, the door

held firm and the two figures went down the stairs. A few minutes later, Kuhn heard a car start outside. Trial RP 20.

Later that same day, Lacey Police Detective Dave Miller contacted Phipps in order to question him concerning the events of that early morning. Lacey Police Community Service Officer Carrie Nastansky accompanied Miller. Trial RP 30 and 41. Miller asked Phipps if he had gone to an apartment in Lacey during the prior night and if he had contacted Kuhn. Phipps denied this, stating that he had never been in Lacey that night. Phipps adamantly claimed he had remained at home the entire night, and that he had five witnesses who all would corroborate this. Trial RP 30, 43.

Phipps was then transported to the Thurston County Jail. On the way to the jail, Phipps began to cry, worrying that he would not see his children that weekend. Miller responded that Phipps was being deceitful regarding his activities the prior night, and that there were two witnesses who would confirm that Phipps had

been at the apartment where Kuhn was staying.
Trial RP 43.

At this point, Phipps changed his story. He stated that someone named "Mike" had picked him up to take him to an apartment in Lacey. Phipps stated this happened around 3 in the morning, and that their purpose in going to this apartment was so that he could purchase a vehicle. Phipps claimed he was surprised to see Kuhn at this apartment, and that he never threatened Kuhn, but rather just asked to speak to him. Trial RP 31, 43-44.

On December 16, 2005, an Information was filed in Thurston County Superior Court charging Phipps with one count of attempted residential burglary. CP 5. On February 14, 2006, a First Amended Information was filed which retained the original charge, but slightly amended the charging language. The charge at that point was phrased as follows:

In that the defendant, WESLEY SHANE PHIPPS, in the State of Washington, on or about the 13th day of December, 2005, with intent to commit a crime against a person or

property therein, did take a substantial step towards entering or remaining unlawfully in a dwelling other than a vehicle.

CP 10.

A jury trial of this cause took place on February 27, 2006. Michael Robinson, a friend of the defendant's, was the only defense witness. Curiously, Robinson testified he had been with Phipps during the evening of December 13th, from around 10 p.m. to 11:30 p.m. Trial RP 46. Yet, the allegations pertained to the early morning of December 13th, and the testimony of Detective Miller was that Phipps was arrested on December 13th. Trial RP 30-31. This anomaly was never clarified.

Robinson testified he had driven Phipps over to an apartment in Lacey that night because Phipps was going to buy a car from him, and Robinson was looking for his mother in order to get the vehicle title from her. Robinson claimed he went up to the apartment by himself, and that Kim answered the door and told him his mother was not there. Robinson testified that he then left and drove

Phipps back over to the west side. Trial RP 47-48.

The State argued that the defendant had intended to intimidate Kuhn, who was a potential witness against him, even to the point of using force against Kuhn, and had sought to enter the evidence without permission in order to accomplish this intimidation. Trial RP 68-72. The defense responded that the State had failed to prove these allegations because of Kuhn's lack of credibility and because of a poor investigation by law enforcement. Trial RP 80-81. The jury returned a verdict of guilty as to the charge of attempted residential burglary.

A sentencing hearing was held on February 28, 2006. The defendant's standard sentence range was determined to be 24.75 to 32.25 months. A sentence of 32.25 months in prison was imposed, but to run concurrently with the defendant's 64-month sentence for delivery of a controlled substance in Thurston County Superior Court Cause No. 05-1-2364-7. 2-28-06 Hearing RP 5-6, 9; CP

23-31.

C. ARGUMENT

1. Because the defendant's acts in attempting to forcefully enter the residence were part of a continuing course of conduct, it was not required that the State elect one of these acts as the basis of the charge or, in the alternative, that a unanimity instruction be given to the jury.

When the facts show two or more criminal acts which could constitute the crime alleged, the jury must unanimously agree on the same act to convict the defendant. Stae v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *modified by* State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Therefore, the State must elect the specific criminal act on which it is relying for conviction, or the trial court must instruct the jury that all the jurors must agree that the same underlying criminal act was proven beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411.

But the State need not make an election and the trial court need not give a unanimity instruction if the evidence shows the defendant was engaged in a continuing course of conduct.

State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Handran, 113 Wn.2d at 17.

In the present case, the defendant contends that his attempted forced entry at the front door was a separate act from his attempted entry at the back door. He then argues that since the State did not elect which act it was relying on to prove the charge, the lack of a unanimity instruction to the jury was prejudicial error requiring a reversal of his conviction. The defendant also contends that the error requires dismissal of the charge, but provides no rationale for that remedy.

Generally, evidence that several distinct acts took place at different times and places tends to show that these acts did not constitute a continuing course of conduct. Handran, 113 Wn.2d at 17. However, where several acts of criminal conduct occurred in one place during a short period of time, involved the same victim or

victims, and were intended to secure the same objective, those acts will generally be found to have been a continuing course of conduct. Handran, 113 Wn.2d at 17.

Thus, multiple assaults upon the same victim over a two-hour period, resulting in a fatal injury, were held to be a continuing course of conduct. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991). The same conclusion was reached with regard to several assaults by the same aggressor upon a single victim in one place, over a short period of time, in an attempt to secure sexual relations. Handran, 113 Wn.2d at 17. In State v. Marko, 107 Wn. App. 215, 221, 27 P.3d 228 (2001), multiple threats over a 90-minute period directed at the same two victims were held to constitute one continuing act of intimidating a witness.

In the present case, the two attempts at forced entry occurred within a few minutes of each other, were in the same place, against the same victims, and were both intended to serve the goal

of intimidating Kuhn. As a result, these two acts constituted a single course of conduct constituting attempted residential burglary. Therefore, no unanimity instruction was required, and so the absence of such an instruction was not error.

Even if the absence of a unanimity instruction had been error, it would have been harmless error. In a multiple acts case where there is no election by the State or unanimity instruction, the error is of constitutional proportions. Therefore, the error will not be held harmless unless the appellate court can determine that the error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990). The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt as to any of the acts alleged. Camarillo, 115 Wn.2d at 65.

In Camarillo, supra, the single charge of indecent liberties was based upon three separate acts alleged against the defendant by a single

victim. The defendant simply denied that the events occurred. There was no evidence upon which a rational juror could discriminate between the incidents. To have rendered the verdict it did, the jury obviously chose to believe the victim. Any rational juror, having determined that one of the incidents occurred, would necessarily have believed that the others occurred as well. Therefore, the lack of election by the State or a unanimity instruction was held to be harmless error beyond a reasonable doubt. Camarillo, 115 Wn.2d at 70-72.

The same is true in the present case. The issue of Kuhn's credibility as to one attempted entry was no different from that issue as to the other entry. The defendant simply denied being there at all. Then he simply denied that anything happened even close to what was alleged by Kuhn. Robinson contradicted both Kuhn and the defendant, and there remained a question whether he was even testifying about the same night. There was no evidence upon which a rational juror could

discriminate between the alleged acts.

The jury clearly chose to believe Kuhn. On this basis, having determined that one of the attempted entries occurred, the jury would necessarily have determined the other occurred as well. Thus, even if the two attempted entries had not constituted a continuing course of conduct, any resulting error would have been harmless beyond a reasonable doubt.

The defendant has also claimed defendant's counsel rendered ineffective assistance of counsel because he failed to propose a unanimity instruction. However, as argued above, the two incidents were a single continuing course of conduct and so a unanimity instruction was not appropriate. Therefore, defendant's counsel did not render ineffective assistance by not proposing such an instruction.

2. Jury Instruction No. 6 was not misleading, particularly when considered together with Jury Instruction No. 7, and so there is no showing of manifest error to justify a claim made for the first time on appeal that the giving of Instruction No. 6 constituted prejudicial error.

In Jury Instruction No. 6, the trial court

defined the crime of attempted residential burglary.

A person commits the crime of attempted residential burglary, when, with intent to commit that crime, he or she does an act which is a substantial step towards the commission of that crime.

CP 18. In Jury Instruction No. 7, the court set forth the elements of that offense.

To convict the defendant of the crime of attempted residential burglary, as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of December, 2005, the defendant did an act which was a substantial step toward the commission of residential burglary;

(2) That the act was done with the intent to commit residential burglary; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 18. Both of these jury instructions followed the format and language recommended for a crime of attempt by Washington Pattern Jury Instructions

100.01 and 100.02. At trial, the defendant did not take exception to the giving of either one of those instructions. Trial RP 51-52.

Nevertheless, the defendant contends on appeal that Jury Instruction No. 6 was misleading and improper because it used the phrase "that crime" rather than specifying "residential burglary". He argues the instruction encouraged jurors to assume that the phrase "that crime" referred to "attempted residential burglary" rather than "residential burglary, and so the jurors would have concluded that the crime of attempted residential burglary was committed when a person with the intent to commit attempted residential burglary took a substantial step towards the commission of attempted residential burglary.

The defendant contends that he is permitted to make this claim of error for the first time on appeal because it is of constitutional significance. Under RAP 2.5(a)(3), a defendant may assert an error affecting a constitutional

right provided he can show that the error was manifest, meaning that it had practical and identifiable consequences at trial. State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). However, in this case there is no showing of manifest error.

Jury Instruction No. 6 was not misleading or improper. It is presumed that jurors use their common sense and reasoning powers. State v. Brown, 139 Wn.2d 20, 24, 983 P.2d 608 (1999). By the very word "attempt", any juror would have understood that a crime of attempt involved some effort to commit a crime without actually succeeding in accomplishing it. Therefore, common sense would have dictated to any juror that the phrase "intent to commit that crime" would refer to an intent to commit the crime attempted, and therefore residential burglary. Likewise, the only common sense interpretation of the phrase "substantial step toward the commission of that crime" would have been a substantial step toward the commission of the crime attempted, which was

residential burglary.

Furthermore, jury instructions should be read as a whole to determine whether they properly inform the jury of the applicable law as opposed to misleading the jury. Jury Instruction No. 7, the "to convict" instruction, specifically stated that the State must prove the defendant took a substantial step toward the commission of "residential burglary". Furthermore, that instruction specified that the State must prove that the act was done with the intent to commit "residential burglary". Particularly in the light of this instruction, there is no conceivable way a juror could have been confused as to what the phrase "that crime" referred to in Instruction No. 6.

Despite this being the case, the defendant argues the State is precluded from arguing that Jury Instruction No. 7 clarified Instruction No. 6. He essentially argues that the adequacy of Jury Instruction No. 6 can only be considered in a vacuum. For this argument, he relies upon State

v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997).

However, the appellate court in State v. Smith was concerned with error in the "to convict" instruction, whereas here the concern raised refers to the definition of the crime. The "to convict" instruction carries with it a special weight because the jury will generally treat that instruction as the yardstick to measure a defendant's guilt or innocence. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). In addition, the concern in Smith was not that imprecise language might mislead a juror, which is the argument here, but rather that the "to convict" instruction in Smith stated something that was unambiguously wrong, and so a correct statement of the element which must be proved was missing from the instruction. Smith, 131 Wn.2d at 260-262.

The general rule is that instructions are sufficient if, when read as a whole, they properly inform the jury of the applicable law. Mills, 154 Wn.2d at 7. While the holding in State v. Smith, supra, may constitute an exception to that general

rule, it is not an exception that would apply here. Thus, it is appropriate in this case to evaluate Jury Instruction No. 6 in conjunction with Instruction No. 7.

In State v. Pittman, 134 Wn. App. 376, ____ P.2d ____ (2006), Division One of the Court of Appeals considered this same issue concerning the adequacy of a definitional instruction for attempted residential burglary modeled on WPIC 100.01. In that case also, the "to convict" instruction helped clarify what crime a defendant must have intended to commit and toward which he must have taken a substantial step in order to be convicted. The court rejected the claim that WPIC 100.01 is misleading, and particularly when joined with a proper "to convict" instruction, there was no showing of practical and identifiable consequences at trial showing manifest error. Therefore, the court refused to allow the defendant to raise the issue for the first time on appeal. Pittman, 134 Wn. App. at 382-383.

The same conclusion should be reached in this

case. There has been no showing of manifest error. Taken as a whole, the instructions in this case properly informed the jury of the applicable law.

The defendant also argues that his trial counsel rendered ineffective assistance because he did not take exception to Jury Instruction No. 6. However, as argued above, that instruction was not misleading. Therefore, there is no reasonable probability that such a failure to object affected the outcome of this trial.

3. The lack of a request for a lesser-included offense instruction for attempted first-degree criminal trespass did not constitute ineffective assistance by defendant's trial counsel.

The defendant argues on appeal that his attorney rendered ineffective assistance of counsel by failing to propose a lesser included offense instruction for attempted criminal trespass in the first degree. When a convicted defendant claims that his trial counsel's assistance was ineffective, he has the burden to show that counsel's performance fell below an

objective standard of reasonableness. The appellate court must apply a strong presumption that the defendant was properly represented. Deficient performance is not shown by matters that go to trial strategy and tactics. The defendant must also show prejudice by establishing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Garrett, 124 Wn.2d 504, 517-519, 881 P.2d 185 (1994); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

The first question here is whether the defendant would have been entitled to an instruction for attempted first-degree criminal trespass as a lesser included offense. A defendant is entitled to a lesser included offense instruction if each of the elements of the lesser offense is a necessary element of the charged offense and if the evidence supports an inference that only the lesser offense was committed. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The State concurs that each of the

elements of attempted first-degree criminal trespass is a necessary element of attempted residential burglary. Pittman, 134 Wn. App. at 384-385. However, the State disputes that in this case the evidence supported giving a lesser included offense instruction for attempted criminal trespass.

When reviewing whether there was a factual basis in the evidence for a lesser-included instruction in this case, the court must examine the evidence in the light most favorable to the defendant. However, the evidence must affirmatively establish the theory of the case put forward by the defendant in support of the instruction. It is not enough that the jury might disbelieve the evidence pointing to guilt. Fernandez-Medina, 141 Wn.2d at 455-456.

In the present case, both versions of events told by the defendant to Detective Miller denied any wrongdoing. The same was true for Robinson's testimony, as he denied that Phipps even went up to the apartment. Therefore, only Kuhn's version

of events could be relied on to claim that there was a basis for a lesser-included instruction.

The evidence was that five days before, the defendant had been placed in jail because of Kuhn functioning as a police informant. The defendant had just gotten out of custody when he went to see Kuhn. The defendant hid at first, with the apparent intent to surprise Kuhn and enter without permission if Kuhn chose to allow "Galaxy" to enter. When that did not work, Phipps sprang at the door and tried to force his way in. Trial RP 15.

Only when that failed did Phipps demand to be allowed in so he could talk to Kuhn. At the same time, Phipps acknowledged he had just gotten out and was very upset with Kuhn. Phipps had his hands in the form of fists. Phipps told Kuhn that he was going to "handle" Kuhn. Kuhn felt threatened at this point. Trial RP 18-19.

When Kuhn got the front door shut, Phipps and his friend went over to the back door. They then tried to force their way into the apartment

through the back door. They only left when that attempt failed. Trial RP 20.

There is no way a reasonable juror could infer from these facts that Phipps only wanted to talk in a non-threatening manner to Kuhn. The defendant can only point to his self-serving claim to that effect when he stood outside the door and was trying to persuade Kuhn to let him in. However, all of Phipps actions and demeanor before and after that statement contradicted it, and indicated that Phipps was intent on either using force against Kuhn or threatening Kuhn. Thus, there was no factual basis for a lesser-included offense jury instruction for first-degree criminal trespass, and defendant's attorney did not render ineffective assistance by failing to request such an instruction.

Even if a factual basis had existed for the giving of a lesser-included offense instruction, it would normally be a matter of trial strategy whether to offer one or not. By not offering such an instruction, a defendant could choose an "all

or nothing" strategy, which would result in acquittal if the jury found insufficient evidence for the charged offense. However, in some instances the appellate court has found that the choice not to offer the lesser-included instruction, and to adopt this "all or nothing" strategy, constituted ineffective assistance. State v. Ward, 125 Wn. App. 243, 249-251, 104 P.3d 670 (2004); State v. Pittman, 134 Wn. App. 376, 387-390, ____ P.2d ____ (2006).

The analysis of whether there was ineffective assistance with regard to an "all or nothing" strategy is inevitably heavily fact-based. In Pittman, the defendant was charged with attempted residential burglary and the court found ineffective assistance for not seeking an instruction for attempted first-degree criminal trespass. However, the evidence that the defendant had an intent to commit a crime in the residence was quite weak. Pittman appeared affected by something other than alcohol at the time, and said he was just coming off a

methamphetamine blackout. He had not taken anything from the victims' property even though he had the opportunity to do so, and his behavior seemed somewhat confused. Pittman, 134 Wn. App. at 386. In the present case, by contrast, the defendant's actions were consistently purposeful and indicated a desire for aggression and an intent to be either forceful or threatening towards Kuhn.

As noted above, to prove ineffective assistance of counsel, the defendant must show a reasonable probability that the outcome of the case would have been different but for counsel's error. Here, given the evidence, the defendant cannot reasonably show a reasonable probability the jury would have found that the defendant wished to forcefully enter the residence just to talk in a non-threatening manner to Kuhn, and therefore there is no reasonable probability the jury would have found the defendant guilty, but only of the lesser offense.

D. CONCLUSION

Based on the above, the State respectfully requests that this court affirm the defendant's conviction for attempted residential burglary.

DATED this 23rd day of October, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

FILED
COURT OF APPEALS

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NO. 34495-5-II

STATE OF WASHINGTON

BY CMM IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
WAYNE S. PHIPPS,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

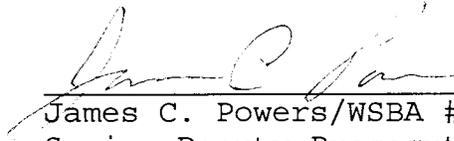
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 23rd day of October, 2006, I caused to be mailed to appellant's attorney, PETER B. TILLER, a copy of the Respondent's Brief, addressing said envelope as follows:

Peter B. Tiller,
Attorney at Law
P.O. Box 58
Centralia, WA 98531-0058

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 23rd day of October, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney