

NO. 43981-6

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KIM BERNARD WHITE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 12-1-01377-4

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was a unanimity instruction required where defendant's actions constituted a continuing course of conduct?
2. Whether defendant invited any alleged instructional error where he proposed or approved the instructions given by the court?

B. STATEMENT OF THE CASE.

1. Procedure

On April 19, 2012, the Pierce County Prosecutor's Office (State) filed an information that charged Kim Bernard White (defendant) with one count of robbery in the first degree. CP 1–2. Defendant's jury trial began on August 7, 2012, before the Honorable Frederick W. Fleming. 2RP 42.¹ Near the close of trial, defendant requested two jury instructions for lesser included offenses for robbery in the second degree and theft in the third degree. CP 152, 154 (Defendant's proposed instructions). The court gave both instructions over the State's objection. 9/12/2012 RP 17. The jury found defendant guilty of second degree robbery. CP 80.

¹ The verbatim report of proceedings consists of six volumes and three proceedings. Each of the volumes are paginated separately. Accordingly, the State will refer to these hearing as follows:

- "7/13/2012 RP": Defendant's motion for new counsel
- "1RP," "2RP," "3RP," and "4RP": Defendant's jury trial
- "9/21/2012 RP": Sentencing

On September 21, 2012, the court sentenced defendant to 63 months in custody.² CP 116 (Judgment and sentence, paragraph 4.5). On the same day, defendant timely filed a notice of appeal. CP 127.

2. Facts

On April 18, 2012, Deanna Teague and Kersten Goeveia were working the graveyard shift at a Walgreens in Spanaway, Washington, when two men entered the store. 3RP 35–39, 82–83, 112–13. One of the men grabbed a shopping basket and approached Ms. Teague to find various items, such as soap and body lotion. 3RP 38–39. She directed the men to the proper aisle, where they went and promptly returned to ask about more items. 3RP 39, 86–87. Shortly thereafter, one of the men then left the store, leaving Ms. Teague, Ms. Goeveia, and a pharmacist alone with the man who had grabbed the hand basket. 3RP 42–43, 87. Both Ms. Teague and Ms. Goeveia identified defendant as the man who remained inside. 3RP 42, 91.

Ms. Goeveia followed the other man outside to record his vehicle information due to his suspicious behavior. 3RP 87–88. Because she suspected a potential robbery, she locked the front door per Walgreens' policy to prevent the man from reentering. 3RP 90.

² Defendant had an offender score of 12, with standard range of 63-84 months. CP 113 (Judgment and sentence, paragraph 2.3).

Meanwhile, defendant continued to browse and take items within the store. 3RP 44. When it appeared he had finished, Ms. Teague asked him if he was ready to check out. 3RP 44. Defendant responded "yes," so Ms. Teague turned to go to the register. 3RP 44. Before Ms. Teague could turn around, defendant shouted "thank you" and ran for the door. 3RP 44. Unfortunately for defendant, the door did not open because Ms. Goeveia had locked it. 3RP 44–45. Stopped at the door, Ms. Teague asked defendant if she could have her merchandise back and walked over to retrieve the property. 3RP 45. When she reached for the basket, defendant engaged her in a tug-of-war, pulling her towards the door and pushing it off of its hinges. 3RP 46.

At this point, Ms. Goeveia—who was still outside—heard the commotion at the front door and ran to aid Ms. Teague. 3RP 46, 90–95. Eventually, defendant pulled Ms. Teague outside of the store. 3RP 45–46. He dragged her across an entry display where she severely bruised her abdomen and finally let go of the basket. 3RP 46–48. Ms. Goeveia then grabbed onto the basket also in an attempt to retrieve the merchandise. 3RP 92–93. Defendant dragged Ms. Goeveia across the parking lot until she let go, only after ripping off her acrylic nails and scraping her knee in the process. 3RP 95.

Darryl Herbison, an off-duty corrections officer, was driving past Walgreens when he saw defendant struggling with the employees out front. 3RP 123–24. By the time he turned his car around, defendant had

started to leave the scene, so Herbison followed defendant to a gas station across the street. 3RP 125–26. Herbison directed responding deputies to the location, who arrested defendant. 3RP 114–16, 127–29. Defendant told the arresting deputies that he thought his friend was going to pay for the items and left Walgreens to try to catch him. 3RP 27, 118. Defendant did not testify at trial.

C. ARGUMENT.

1. A UNANIMITY INSTRUCTION WAS NOT REQUIRED BECAUSE DEFENDANT'S ACTIONS CONSTITUTED A CONTINUOUS COURSE OF CONDUCT.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Jury unanimity issues can arise when the State presents evidence of multiple acts that could form the basis of one count charged. *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984). When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations, or the court must instruct the jury to agree on a specific criminal act. *Id.* at 570-572; *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (finding that there is error only where the State fails to make a proper election and the trial court fails to instruct the jury

on unanimity). This assures that the unanimous verdict is based on the same act proved beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 511–12

In *State v. Hanson*, 59 Wn. App. 651, 800 P.2d 1124 (1990), the court held that when determining whether a unanimity instruction should be offered, the reviewing court should consider: first, what must be proven under the applicable statute; second, what the evidence disclosed; and third, whether the evidence disclosed more than one violation of the statute. 59 Wn. App. at 656–57.

However, the courts have repeatedly held that a unanimity instruction is not required where the underlying conduct supporting the charge constitutes a “continuing course of conduct.” See, e.g., *Petrich*, 101 Wn.2d at 571. The court applies a commonsense evaluation of the facts to determine whether the conduct was “continuous.” *Id.* at 571; *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

Defendant argues that a unanimity instruction was required because the prosecution did not elect which person (either Ms. Teague or Ms. Goeveia) whom defendant used force against during the course of his robbery. Brief of Appellant at 7. However, this argument fails because defendant's actions constituted a continuous course of conduct.

Under a transactional view of robbery, which this State has adopted, “a robbery can be considered *an ongoing offense* so that, regardless of whether force was used to obtain property, force used to

retain the stolen property or to effect an escape can satisfy the force element of robbery." *State v. Robinson*, 73 Wn. App. 851, 856, 872 P.2d 43 (1994) (emphasis added); *see also State v. Truong*, 168 Wn. App. 529, 277 P.3d 74, 77 (2012). "The taking is ongoing until the assailant has effected an escape." *Truong*, 277 P.3d at 77.

The force used to effect an escape, however, must relate to the taking or retention of property. In *State v. Johnson*, 155 Wn.2d 609, 121 P.3d 91 (2005), defendant walked into a Wal-Mart, loaded a television into his shopping cart, and pushed the cart out the front door. *Id.* at 609. Store security followed defendant and confronted him in the parking lot. *Id.* Defendant abandoned the shopping cart that contained the stolen merchandise and began to run away, but then turned back and punched one of the security guards in the nose. *Id.* The Supreme Court reversed defendant's first degree robbery conviction because the defendant "was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it." *Id.* at 611. The court emphasized that the force used to sustain a robbery conviction "must relate to the taking or retention of property." *Id.*

Unlike *Johnson*, defendant here used force to retain possession of the goods he stole from Walgreens while effecting an escape. Defendant's escape began when defendant ran for the exit and refused to let either Ms. Teague or Ms. Goeveia retrieve the tote. 3RP 44–48, 89–95. Defendant continuously used force to pull Ms. Teague out into the store's entry and

also to drag Ms. Goeveia across the parking lot. 3RP 44–48, 89–95. During the course of the robbery, defendant's use of force was limited to his attempt to retain the tote, which contained the stolen goods. 3RP 45–47, 93–95. Because defendant's use of force was continuous until he had effected his escape, his actions constituted an ongoing offense. *See Truong*, 277 P.3d at 77. It was thus unnecessary for the court to give a unanimity instruction.

Defendant's argument also fails because he committed only a single violation of the applicable robbery statute. In *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728 (2005), the Court determined that only a single violation of the robbery statute³ occurs where a defendant unlawfully takes business property in the presence of multiple employees. *See id.* at 710–17. The Court reviewed several appellate court decisions on the matter, including *State v. Molina*, 83 Wn. App. 144, 920 P.2d 1228 (1996), and

³ The Court's analysis includes an extensive analysis of the definition of "robbery," under RCW 9A.56.190. *See Tvedt*, 153 Wn.2d at 710–17. "Robbery" is defined as the following:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

State v. Johnson, 48 Wn. App. 531, 740 P.2d 337 (1987), and held:

In *Molina*, the court held that taking property from one cash register in the presence of two employees constituted only one robbery. In *Johnson*, the court held that only one robbery occurred where the defendant took property from the presence of two clerks in a store. . . . It should be apparent, from our analysis of the unit of prosecution for robbery, that the analysis in *Molina* and *Johnson* best carries out the legislature's intent. . . . If there is one taking of property, as the taking of the business's receipts from a single business safe or single cash register, there can be a conviction for robbery on only one count, *regardless of the number of employees present who have authority over the property, because there has been only one taking.*

153 Wn.2d at 715–16 (emphasis added). The Court recognized that multiple robberies could occur where the defendant takes personal items from each of the employees in addition to the merchandise from the store, but otherwise his actions would only constitute a single unit of prosecution. *Id.* at 716–17.

The court's decision in *Johnson* is also helpful to the issue here. In *Johnson*, the defendant tied up two employees at a video store and then stole several videocassette recorders. 48 Wn. App. at 533. The State charged the defendant with two counts of robbery because there were two employees present when he committed the crime. *Id.* at 535–36. The reviewing court disagreed that multiple robberies occurred, reasoning that "nothing was taken directly from the clerks," and "[t]he only items stolen were items for which each clerk had equal responsibility with the other."

Id. at 535. The court thus reversed one of the robbery charges as a violation of double jeopardy. *Id.* at 535–36.

Under *Tvedt* and *Johnson*, it is clear that only one robbery occurs where a defendant unlawfully removes business merchandise in the presence of multiple employees, provided he does not take any of the employees' personal items. That is the situation present here.

Defendant removed several items from Walgreens despite two employees' attempts to stop him. In doing so, he used force against both Ms. Teague and Ms. Goeveai while attempting to flee from the scene. The State proved beyond a reasonable doubt that, from the time defendant tried to stop Ms. Teague from retrieving the goods, to the time he left the parking lot, defendant committed a single robbery. Because defendant's actions were part of an ongoing course of conduct, it was not necessary for the State to elect which person defendant used force against.⁴ This Court should reject defendant's arguments in this regard.

2. IF THE INSTRUCTIONS ARE ERRONEOUS, IT WAS INVITED ERROR AS THEY WERE PROPOSED OR APPROVED BY DEFENDANT.

"The invited error doctrine 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" *State v. Ellison*, ___

⁴ Under defendant's reasoning—that the State must elect which victim defendant used force against—the State would be able to charge multiple counts of robbery depending on how many people defendant used force against during the course of his robbery. This position is directly contrary to *Tvedt* and *Johnson*.

Wn. App. ___, 291 P.3d 921, 924 (2013) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). The doctrine bars challenges to jury instructions where the court gives the instruction proposed by the defendant. *See, e.g., State v. Henderson*, 114 Wn.2d 867, 869, 792 P.2d 514 (1990); *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). This is true even where the defendant proposes an identical instruction to the instruction the trial court ultimately gives. *State v. Summers*, 107 Wn. App. 373, 381, 28 P.3d 780 (2001), *modified on other grounds*, 43 P.3d 526 (2002).

Defendant argues the to-convict instructions were erroneous because they allegedly misled the jury on its power to quit. Brief of Appellant at 9. But this argument ignores that defendant proposed the lesser-included to-convict instructions for second degree robbery and third degree theft, citing WPIC 37.04 and 70.11 respectively. CP 152 (Defendant's proposed instruction for robbery in the second degree); CP 154 (Defendant's proposed instruction for third degree theft). The court instructed the jury per defendant's request. CP 71, 73; 4RP 5, 17. Additionally, defendant proposed a nearly identical instruction for robbery in the first degree, citing WPIC 37.02, even though the court ultimately gave the State's proposed instruction. *See* CP 62 (Instruction 8); CP 148 (Defendant's proposed instruction). Each of defendant's proposed instructions include the challenged language, "it will be your duty to return a verdict of guilty." CP 148, 152, 154. Defendant invited any

alleged error, and cannot now complain that giving the instructions that he proposed was error.

Even if this Court were to consider the merits of this argument, several courts—including this Court—have repeatedly rejected defendant's argument. *See, e.g., State v. Brown*, 130 Wn. App. 767, 770–71, 124 P.3d 663 (2005); *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998); *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319 (1998). Specifically, this court in *Brown* held:

[Defendant] argues that *Bonisisio* and *Meggyesy* are distinguishable because in those cases each defendant asked the court to instruct the jury that it "may" convict. Here, [defendant] argues that the language of the "to convict" instruction [which stated the jury had a "duty" to convict] affirmatively misleads the jury about its power to acquit. . . . We find no meaningful difference between [defendant]'s argument and the issues raised in *Bonisisio* and *Meggyesy*.

Brown, 130 Wn. App. at 770–71. It is unnecessary to reexamine this issue as it has been adequately considered by the courts in *Brown*, *Bonisisio*, and *Meggyesy*.

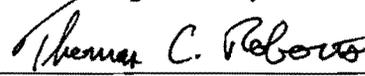
Defendant also seeks relief under the state constitution, applying the six-step analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). However, it is unnecessary for the State to repeat the *Gunwall* analysis conducted by the Court of Appeals in *Meggyesy*. *See* 90 Wn. App. at 701–04; *see also Bonisisio*, 92 Wn. App. at 794 (accepting the *Meggyesy* court's analysis). Neither the state or federal constitutions support this argument.

D. CONCLUSION.

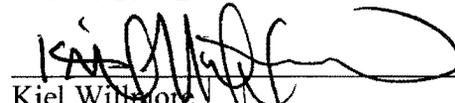
A unanimity instruction was not required in this case because defendant's actions constituted a continuous course of conduct. Moreover, this Court should deny consideration of other alleged instructional errors because the defendant—even if there was error—proposed the instructions he now challenges on appeal. For the reasons argued above, the State respectfully requests this Court to affirm defendant's conviction and deny his claims.

DATED: April 12, 2013.

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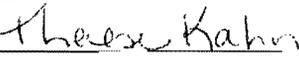
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