

FILED  
APRIL 17, 2015  
Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32667-5-III

---

STATE OF WASHINGTON, Respondent,

v.

MICHAEL MCNEARNEY, Appellant.

---

APPELLANT'S BRIEF

---

Andrea Burkhart, WSBA #38519  
Burkhart & Burkhart, PLLC  
6 ½ N. 2<sup>nd</sup> Avenue, Suite 200  
PO Box 946  
Walla Walla, WA 99362  
Tel: (509) 529-0630  
Fax: (509) 525-0630  
Attorney for Appellant

**TABLE OF CONTENTS**

**AUTHORITIES CITED** .....ii

**I. INTRODUCTION**.....1

**II. ASSIGNMENTS OF ERROR**.....2

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** .....2

**IV. STATEMENT OF THE CASE**.....2

**V. ARGUMENT**.....7

**VI. CONCLUSION**.....14

**CERTIFICATE OF SERVICE** .....15

## **AUTHORITIES CITED**

### **State Cases**

<i>State v. Anderson</i> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	11
<i>State v. Bobenhouse</i> , 166 Wn.2d 881, 214 P.3d 907 (2009).....	8
<i>State v. Boyd</i> , 137 Wn. App. 910, 155 P.3d 188 (2007).....	7, 8
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	8
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	8
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	14
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	11
<i>State v. Johnson</i> , 158 Wn. App. 677, 243 P.3d 936 (2010).....	11
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	8
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	7, 8
<i>State v. Walker</i> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	11, 12

## **I. INTRODUCTION**

Michael McNearney was charged with one count of assaulting Brittany Mock, a cocktail waitress, at the Davenport Hotel, arising from two incidents in which McNearney allegedly touched Mock as part of a sexual advance. Although the State presented some evidence of two separate incidents of touching that could have constituted the crime charged, no *Petrich* instruction was given.

McNearney was also charged with theft for persuading Raquel Rieth to open charge accounts and loan him her debit card, which he used to purchase clothes, alcohol, and a hotel room at the Davenport. In its reply argument, without objection from the defense, the State described its burden of proof by analogy to determining who took a missing brownie and evaluating whether Bigfoot did it, utilizing the kind of “everyday decisions” argument that has been disapproved in multiple published opinions as trivializing the State’s burden of proof and the presumption of innocence.

The errors deprived McNearney of a fair trial.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR 1:** The trial court erred in failing to give a *Petrich* instruction when the State presented evidence of two separate acts to support a single charge of assault.

**ASSIGNMENT OF ERROR 2:** The State committed flagrant misconduct in its closing argument by trivializing the State's burden of proof and the jury's responsibility to assess the evidence.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** Did the instructions given fail to ensure juror unanimity as to which conduct constituted the crime of assault? YES.

**ISSUE 2:** Was the failure to give a *Petrich* instruction prejudicial? YES.

**ISSUE 3:** Was the prosecutor's use of a Bigfoot analogy to illustrate the State's burden of proof flagrantly improper and prejudicial? YES.

## **IV. STATEMENT OF THE CASE**

The State charged McNearney with second degree theft by deception and fourth degree assault with sexual motivation arising from

separate events occurring in February 2014 in Spokane. CP 18. The charges were tried together, although largely unrelated. 1 RP 5.<sup>1</sup>

To support the theft charge, the State presented the testimony of Raquel Rieth, who met McNearney and began a relationship with him in February. 2 RP 136-37. When they first met, he told her he was 27 years old and was in the Marines. 2 RP 141. Subsequently, McNearney asked her to open up credit accounts for him, because he had no money and no clothes. 2 RP 145-46. She had previously never had any credit accounts, but McNearney told her he was going to be receiving \$8,700 or \$8,500 in two weeks and would pay her back. 2 RP 143, 148.

Rieth opened credit accounts at Walmart, Buckle, and Costco and she and McNearney purchased a number of items including clothing, gift cards, cigarettes and alcohol. 2 RP 145, 148-49, 152-58. They also obtained a room at the Davenport Hotel, which Rieth secured with her debit card. 2 RP 159-60. Rieth stated she asked him to give her the card back and he refused. 2 RP 179. She did not give him permission to use the card to make charges, but reported as fraudulent a number of charges

---

<sup>1</sup> The Verbatim Reports of Proceeding herein consist of three volumes consecutively numbered and identified as volumes 1, 2 and 3. This brief will refer to the reports throughout by reference to volume and page number.

to the account during the time period that he had the card. 2 RP 164, 185-90.

When police contacted McNearney, he admitted that he owed Rieth about \$3,200 and said he was expecting to receive \$2,700 or \$2,800 the next day from a woman in California. 2 RP 238-39. He stated he was just hired at a new job, started on Monday, and would pay her back the remainder. 2 RP 241-42. He also admitted that he had Rieth's debit card and told police he had permission to use it. 2 RP 242. Later, he admitted he was not getting the money from California and that he lied to Rieth, but stated he still intended to pay her back. 3 RP 294. He also admitted lying to her about being 27 and a Marine. 3 RP 297.

The assault charge arose out of an incident that occurred on February 26 at the Davenport Hotel. Brittany Mock, a cocktail waitress, testified that while she was working that night, McNearney was at the bar saying inappropriate things in a loud voice. 2 RP 90-95. As she walked past him carrying a tray of drinks, McNearney grabbed her in the area of her vagina and said, "I want that." 2 RP 99-100. After grabbing her, McNearney walked off. 2 RP 102. Mock told the bartender not to serve him anymore. 2 RP 102-03.

Mock testified that several minutes later, McNearney came back into the lobby area and touched Mock again on her stomach. 2 RP 105. Police obtained video surveillance from inside the hotel that showed McNearney and a female companion walking past Mock toward the front doors of the hotel and McNearney reaching out and briefly touching her. 2 RP 220-21, 224.

The trial court did not give a *Petrich* instruction on the assault charge. CP 22-49. In its closing argument, the State acknowledged both of the acts supporting the single charge, stating,

Now, this is a bit of a unique situation because the defendant is charged with a single count of assault. But if you find that either of those acts is an assault, then you could find him guilty, and then you could go on to the next question of whether or not it was with sexual motivation.

3 RP 335. The State also, in its final reply remarks, told the jury the following:

Now, there's this story that prosecutors will sometimes tell to make an example of what reasonable doubt may or may not be, and sometimes it may seem like you're making light of the situation; so please forgive me. I'm not meaning to make light of the situation to make this seem any less serious than it is. But reasonable doubt, you can almost look at it -- and I'll just tell this story.

You are home. It's a rainy day. You're home, and you're there with your daughter, your granddaughter, whatever the case may be; Sally. We'll call her Sally. Sally is about 8 years old.

It's a rainy day. Sally wanted to go out and play. She can't. She can't because it's raining. So you decide, I got to do something to get Sally entertained. Let's go make some brownies.

You go in and make the brownies. You can tell Sally's so excited. She's mixing away. She's thinking about getting that hot brownie and getting to eat it. You start to put the brownies in the oven. You put them in the oven. You're telling Sally, We're going to be eating these here in a few minutes.

You pull them out of the oven. They're still piping hot. The phone rings. You've got to go into the living room to go answer that -- answer that phone; it's in the living room. And you can tell Sally's just really, again, chomping at the bit to get at those brownies. But you don't want her to get at them because she might burn herself.

You go out into the living room. You answer the call. You come back a few minutes later. What do you find? You find that there's some brownies missing from the tray. You look at Sally. Sally has a couple of crumbs on her face.

You go, Sally, I told you don't eat the brownies. You're going to get burnt. She goes, Mom, Grandma, whatever the case may be, I didn't eat them. Bigfoot ate them.

Bigfoot ate them? Well, that's ridiculous. Then you think, Well, I don't have any proof Bigfoot didn't eat them.

But is that a reasonable doubt that Sally ate those brownies? Again, you didn't actually see her eat them. Sure, you might have some tiny doubt after you kind of get past the fact that, boy, that sounds ridiculous. But is that reasonable doubt?

Consider that when considering reasonable doubt.

3 RP at 360-61.

The jury convicted McNearney of theft and assault, and found that he committed the assault with sexual motivation. CP 51-54. The trial court sentenced him to 131 days on the assault charge and 30 days on the theft charge, to run consecutively, and ordered McNearney to pay \$4,575.99 to Rieth in restitution. CP 63-82. McNearney now appeals. CP 85.

## **V. ARGUMENT**

**A. A *Petrich* instruction was required to ensure a unanimous verdict when the State presented evidence of two assaultive acts and did not elect which one comprised the basis of the charge.**

The court reviews the adequacy of jury instructions *de novo* as a question of law. *State v. Boyd*, 137 Wn. App. 910, 922, 155 P.3d 188 (2007). When the State presents evidence of multiple distinct acts to support a single charge, it must either elect which act it relies upon to support the charge, or the jury must be instructed that it must unanimously agree that the same underlying act has been proven beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Because the instruction implicates the constitutional right to a unanimous jury verdict, failure to give a *Petrich* instruction when required can be

raised for the first time on appeal. *Boyd*, 137 Wn. App. at 922-23; *see also State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991).

“Failure to give the Petrich instruction, when required, violates the defendant's constitutional right to a unanimous jury verdict and is reversible error, unless the error is harmless.” *State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009) (*citing State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990)). In evaluating whether the error is harmless, the court presumes the error was prejudicial and only affirms the conviction if no rational juror could have a reasonable doubt as to any one of the events alleged. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

A *Petrich* instruction is not required when the evidence presented shows a continuing course of conduct rather than distinct acts. *Crane*, 116 Wn.2d at 326 (*citing Petrich*, 11 Wn.2d at 571). To determine whether the conduct may be charged as a continuous offense rather than distinct acts, the court must evaluate the facts in a commonsense manner. *Petrich*, 101 Wn.2d at 571.

In the present case, the evidence presented by the State established two separate and distinct interactions between McNearney and Mock that could have formed the basis for the assault charge. As to the first incident,

Mock testified that McNearney grabbed her in the vaginal area as she was carrying a tray of drinks. 2 RP at 99-100. Mock reported this incident to her supervisor right away. 2 RP at 129. Several minutes later, Mock stated that he grabbed her stomach as he was walking out the side door. 2 RP at 105, 107. The State further introduced surveillance video showing McNearney reaching toward Mock as he walked toward the door, consistent with Mock's description of the second incident. 2 RP at 221, 224. In his statement to police, McNearney admitted touching Mock briefly to get her attention but denied grabbing her vagina. 2 RP at 237.

The State's evidence, evaluated in a commonsense fashion, establishes two distinct acts, either of which could have constituted the charged offense. There was a break in time and a change in location between the incidents, and one incident was captured on video while the other was not. The acts presented lack the continuity necessary to show an ongoing course of conduct, but rather distinct and separate events separated in time by Mock's report to her supervisor and McNearney leaving the bar area.

Moreover, in the present case, even if the acts could have been considered a continuous course of conduct for unanimity purposes, the

prosecuting attorney undermined the unanimity requirement by arguing, in closing,

Now, this is a bit of a unique situation because the defendant is charged with a single count of assault. But if you find that either of those acts is an assault, then you could find him guilty, and then you could go on to the next question of whether or not it was with sexual motivation.

3 RP at 335. Thus, the prosecuting attorney plainly directed the jury to convict McNearney if it found that either act occurred. At no point, however, was the jury instructed that it must find unanimously which of the charged acts occurred.

In the present case, a rational jury could have found that McNearney did not commit both of the acts, or that the second act happened but did not constitute an assault. The first act was not witnessed by any other person despite taking place in a crowded bar, and McNearney denied that it occurred. The second event, which was captured on video, could have been seen as non-offensive, non-assaultive contact. Accordingly, the presumption that the instructional error affected the verdict is not rebutted. Because the State did not elect which of the acts presented comprised the charged offense, and because the trial court did not give a *Petrich* instruction to ensure a unanimous verdict, McNearney should receive a new trial.

B. The prosecuting attorney committed misconduct its closing argument that was flagrant and ill-intentioned, and undermined the State's burden of proof.

The defendant bears the burden of showing that a prosecuting attorney's arguments are both improper and prejudicial. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). Failure to object to the misconduct at the time of trial waives the issue, unless the misconduct is so flagrant and ill intentioned that it could not be cured by an appropriate instruction. *State v. Walker*, 164 Wn. App. 724, 730, 265 P.3d 191 (2011) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

In *Anderson*, the court held that a prosecuting attorney's use of examples such as whether to undergo an elective dental procedure or whether to have Cheerios for breakfast were improper and "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case." 153 Wn. App. at 431. Although the majority declined to find that the comments were flagrant or ill intentioned, in *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010), the court held that such arguments were flagrant and ill intentioned because misstating the presumption of innocence reduces the State's burden and

undermines a defendant's due process rights. Similarly, in *Walker*, 164 Wn. App. 724, the court reaffirmed that the "everyday decisions" argument is improper because it trivializes the State's burden of proof.

Here, the State argued in its reply,

Now, there's this story that prosecutors will sometimes tell to make an example of what reasonable doubt may or may not be, and sometimes it may seem like you're making light of the situation; so please forgive me. I'm not meaning to make light of the situation to make this seem any less serious than it is. But reasonable doubt, you can almost look at it -- and I'll just tell this story.

You are home. It's a rainy day. You're home, and you're there with your daughter, your granddaughter, whatever the case may be; Sally. We'll call her Sally. Sally is about 8 years old.

It's a rainy day. Sally wanted to go out and play. She can't. She can't because it's raining. So you decide, I got to do something to get Sally entertained. Let's go make some brownies.

You go in and make the brownies. You can tell Sally's so excited. She's mixing away. She's thinking about getting that hot brownie and getting to eat it. You start to put the brownies in the oven. You put them in the oven. You're telling Sally, We're going to be eating these here in a few minutes.

You pull them out of the oven. They're still piping hot. The phone rings. You've got to go into the living room to go answer that -- answer that phone; it's in the living room. And you can tell Sally's just really, again, chomping at the bit to get at those brownies. But you don't want her to get at them because she might burn herself.

You go out into the living room. You answer the call. You come back a few minutes later. What do you find? You find that there's some brownies missing from the tray. You look at Sally. Sally has a couple of crumbs on her face.

You go, Sally, I told you don't eat the brownies. You're going to get burnt. She goes, Mom, Grandma, whatever the case may be, I didn't eat them. Bigfoot ate them.

Bigfoot ate them? Well, that's ridiculous. Then you think, Well, I don't have any proof Bigfoot didn't eat them.

But is that a reasonable doubt that Sally ate those brownies? Again, you didn't actually see her eat them. Sure, you might have some tiny doubt after you kind of get past the fact that, boy, that sounds ridiculous. But is that reasonable doubt?

Consider that when considering reasonable doubt.

3 RP at 360-61.

The State's argument here epitomizes the kind of "everyday decisions" argument that courts have repeatedly disapproved. The evaluation of the State's case is far weightier and more significant than the mere hunt for a missing brownie, and the State's choice of example – whether Bigfoot ate the missing brownie – makes light of its burden of proof by suggesting that the jury's deliberation need only consist of jettisoning ridiculous explanations rather than evaluating whether a crime occurred. Merely rejecting the premise that "Bigfoot did it," even had the defense presented such an argument, is not proof beyond a reasonable doubt that McNearney committed the crimes with which he was charged.

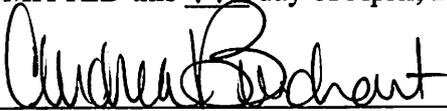
By reducing its burden to the metaphorical equivalent of refuting Bigfoot, the State's argument provides an illustrative example of trivializing the deliberative process and McNearney's presumption of innocence.

In *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), the court deemed that an improper argument was flagrant and ill intentioned because it occurred more than two years after a published opinion was issued finding the same type of argument to be improper. Here, *Anderson*, *Walker* and *Johnson* establish that the use of "everyday decisions" examples to illustrate reasonable doubt trivializes and undermines the State's burden of proof. The State had notice that such arguments are improper, but employed them anyway. Under *Fleming*, the State's disregard of prior decisions on this issue should be deemed flagrant and ill intentioned and McNearney should receive a new trial.

## VI. CONCLUSION

For the foregoing reasons, McNearney respectfully requests that the court reverse his convictions and remand his case for a new trial.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of April, 2015.

  
\_\_\_\_\_  
ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Mark Erik Lindsey  
Spokane County Prosecuting Attorney  
1100 W. Mallon Avenue  
Spokane, WA 99260

Michael J. McNearney  
c/o Kootenai Public Safety Building  
N. 5500 Government Way  
PO Box 9000  
Coeur d'Alene, ID 83816

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 17<sup>th</sup> day of April, 2015 in Walla Walla, Washington.

  
BreAnna Eng