

NO. 66056-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TAVORRIS POWELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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STATE OF WASHINGTON  
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**A. ISSUE**

1. The State charged Powell with first-degree unlawful possession of a firearm. Although the evidence showed that Powell had actual and constructive possession of four firearms during one incident, and the statute permits the filing of a separate count for each firearm possessed, the State exercised its discretion to file a single count encompassing all four firearms. Based on the evidence of multiple firearms and the single count charged, the court instructed the jury that it had to be unanimous as to which act the State had proven beyond a reasonable doubt. On appeal, Powell asserts for the first time that due to a single comment by the prosecutor in closing argument, that the jury might have convicted him of an "uncharged" act. Should this Court reject Powell's claim that despite the charging document, the evidence, and the trial court's instructions, the prosecutor's isolated comment created a binding, "clear election" that the charge was based on possession of a specific firearm.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Tavorris Powell with two counts of Robbery in the First Degree, Attempting to Elude a Pursuing Police Vehicle, and Unlawful Possession of a Firearm in the First Degree. CP 13-15. The State alleged a firearm enhancement on the first robbery count. CP 13. The jury convicted Powell on all of the crimes charged, except for the first robbery count. CP 71-75. The trial court imposed a standard range sentence: 150 months for the robbery, 12 months for attempting to elude, and 67 months for unlawfully possessing a firearm. CP 83-92; 7RP 11-13.<sup>1</sup>

**2. SUBSTANTIVE FACTS**

On January 8, 2010, Powell called Bao Do allegedly seeking to buy marijuana. 4RP 350-51. Do agreed to meet Powell, having previously sold him marijuana without any problems. 4RP 348-49. When they met this night, however, Powell pulled out a handgun, cocked it, and demanded to drive Do's car, a 2002 silver Mercedes. 4RP 352, 356, 361. As they drove around, Powell stopped to pick

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<sup>1</sup> The Verbatim Report of Proceedings consists of seven volumes, designated as follows: 1RP (8/16/10), 2RP (8/17/10, 8/18/10, and 8/19/10), 3RP (8/24/10), 4RP (8/25/10), 5RP (8/26/10), 6RP (8/30/10, 8/31/10, and 9/1/10), and 7RP (9/24/10).

up two friends, one of them being the co-defendant, Joshua Dawson,<sup>2</sup> and three guns kept in a red bag. 4RP 364-65, 370-71; 5RP 477-82, 526. At various points, Do was forced to ride in the trunk of his car. 4RP 368-69, 385-88; 5RP 483-85.

As the night went on, Powell told Do that he wanted Do to "set up" one of his friends, Thuong Nguyen. 4RP 374-75. Fearing for his life, Do called Nguyen and arranged to meet him under the guise of selling him marijuana. 4RP 269, 374-77, 396. Upon arrival, Powell turned to Dawson and told him to rob Nguyen. 5RP 491-92, 525-26. Powell's friend handed Dawson a gun from the red bag and together they got out of the car and hid until Nguyen arrived. 4RP 381; 5RP 489-92, 526.

Nguyen drove his white Mustang to the meeting place and immediately noticed a handgun pointed at him when he opened his car door. 4RP 246-48. Dawson and the other man each stood on one side of Nguyen's car, displaying their guns and demanding that Nguyen leave his keys in the car. 4RP 250-52. Dawson rifled through Nguyen's pockets, taking Nguyen's personal items. 4RP 256; 5RP 490, 522. Told to leave, Nguyen walked away and

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<sup>2</sup> Dawson pled guilty prior to trial. 2RP 25. Powell's second friend was never identified. 5RP 478-81, 525-26.

saw Do sitting in the passenger seat of his car looking scared and nervous, with Powell sitting in the driver's seat holding a gun. 4RP 264-66, 286-87.

As Nguyen passed by, Powell ordered him to empty his pockets into the Mercedes. 4RP 267-68. Nguyen complied, giving Powell his license and \$20. 4RP 268, 294. After Powell and his friends drove off in the Mercedes and Mustang, Nguyen ran to the nearest pay phone and called the police. 4RP 268, 294. Do later called the police after escaping out of the trunk of his car. 4RP 385-88.

Police responded quickly to the calls and saw a silver Mercedes in the area, matching Bao's description and being driven by an African-American male. 2RP 52-53; 3RP 184. As soon as police turned around to follow the car, another African-American male jumped out of the passenger seat carrying a red bag. 2RP 52-53. Police chased the Mercedes as it sped through city streets at 70-100 mph, running red lights and weaving in and out of traffic. 2RP 55-57.

Although police failed to apprehend either the driver or the passenger, they found a red bag half-a-block away from the original location with three handguns inside, and the Mercedes abandoned

nearby with a handgun under the steering wheel. 2RP 60-61, 92-93, 112-13; 3RP 186-87; 4RP 452-54. At trial, Do and Nguyen identified the gun under the steering wheel as the gun Powell used to rob them (Exhibit 17). 4RP 283-84, 395.

During closing argument, the prosecutor told the jury that Powell "technically" had actual and constructive possession of four firearms during the incident, but the jury could "make it easy" on themselves and "pick the one he had in his lap," referring to Exhibit 17. 4RP 399; 6RP 571. Elaborating further, the prosecutor stated, "the State has charged one charge of unlawful possession of firearm, and that is for the firearm that the defendant had in his lap." 6RP 571.

Shortly after closing argument, the parties agreed that the jury should receive the following Petrich instruction:

The State alleges that the defendant committed an act of violence under the Uniform Firearms Act First Degree *on multiple occasions*. To convict the defendant of Violation of the Uniform Firearms Act First Degree, *one particular act* of violation of the Uniform Firearms Act First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Violation of the Uniform Firearms Act First Degree.

CP 64 (emphasis added); 6RP 604-05. An hour-and-a-half later, the jury inquired, "For the weapons charge, is it sufficient that the defendant had any firearm, or must we agree on a specific weapon?" CP 29. After conferring with counsel, the court answered, "*You must agree that the defendant possessed a firearm at a specific point in time.*" CP 30 (emphasis added); 6RP 604-05.

The next morning, the court empanelled an alternate juror and reread the Petrich instruction and summarized the previous day's question, stating:

During the course of deliberations, the jury sent out a question regarding that Instruction. And the question in essence asked if the jury had to agree as to which of the four firearms were involved in that act. After conferring with counsel, the answer given to the jury was that they need not agree as to which of the firearms was involved, but they needed to agree that there was at least one particular act where the defendant was in possession of a firearm.

6RP 604-05. The jury reached a verdict the next morning, convicting Powell of robbing Nguyen of his Mustang, attempting to elude police, and unlawfully possessing a firearm, while acquitting him of having robbed Do of his Mercedes. 6RP 609-10.

**C. ARGUMENT**

**1. THE JURY REACHED A UNANIMOUS VERDICT ON THE CRIME CHARGED.**

Powell argues that the jury might have convicted him of an uncharged crime based on the prosecutor's comment in closing argument that he possessed a specific gun, and the trial court's failure to clarify the State's election. Powell's argument fails. The information, evidence, and jury instructions all reflect that Powell committed multiple acts that could have constituted unlawful possession of a firearm. The trial court properly instructed the jury that they had to unanimously agree on the underlying act that constituted the crime charged.

A criminal defendant has a constitutional right to a unanimous verdict on the crime charged. See State v. Furseth, 156 Wn. App. 516, 519, 233 P.3d 902, review denied, 170 Wn.2d 1007 (2010) (recognizing the defendant's right is rooted in the Sixth Amendment to United States Constitution and Article I, section 22 of the Washington Constitution). To ensure jury unanimity on a case where multiple acts could form the basis of one count, either the State must elect a specific act that forms the basis of the crime, or the trial court must instruct the jury that it must unanimously

agree that the State proved a specific criminal act beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

Courts consider multiple factors when determining whether the State properly elected a specific act, including the charging document, evidence, instructions, and closing argument. State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008). A prosecutor's statement in closing argument is insufficient alone to create a "clear election" when the evidence and jury instructions suggest that multiple acts constituted the crime charged. See id. (holding that the prosecutor's election in closing argument was insufficient because there was evidence of multiple acts that could have formed the basis of the crime charged and the jury instructions did not specify an underlying criminal act).

Constitutional error results when the State fails to make a proper election and the trial court fails to instruct the jury on unanimity. Kitchen, 110 Wn.2d at 411. The error is harmless only if no rational juror could have a reasonable doubt that each incident alleged could have established the crime beyond a reasonable doubt. Id.

Here, the State charged Powell with one count of unlawful possession of "a firearm." CP 14-15. The evidence showed that Powell actually possessed four firearms. 3RP 221-24; 4RP 356, 370-71; 5RP 485-86. Although the statute allows the State to charge one count for each firearm, the State exercised its discretion to file a single count. RCW 9.41.040(7) ("Each firearm unlawfully possessed under this section shall be a separate offense."). The information did not specify a particular firearm that Powell unlawfully possessed, rather it alleged generally that he possessed "a pistol."<sup>3</sup> CP 15. Although the prosecutor claimed in closing argument that Powell was charged for unlawfully possessing the firearm "in his lap," the charging document and evidence reflect that Powell possessed multiple firearms at the time of the incident.

The court's instructions confirm that multiple acts formed the basis of the one count charged. To convict Powell, the jury had to find beyond a reasonable doubt that he possessed "a firearm." CP 60. The court defined first-degree unlawful possession of a firearm as knowingly possessing "any firearm" after having been

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<sup>3</sup> The firearms introduced at trial satisfied the legal definition of a "pistol" given that they were all handguns "designed to be held and fired by the use of a single hand." See RCW 9.41.010(13) (defining "pistol"); WPIC 133.50 (same); 3RP 226-27; 5RP 454.

previously convicted of a serious offense. CP 58. Having been instructed on actual and constructive possession, the jury could have convicted Powell based on his actual possession of the firearm "in his lap," or his constructive possession of the firearms in the red bag. CP 59. None of the court's instructions identified a specific firearm that Powell unlawfully possessed.

Following closing argument, the court's Petrich instruction clarified that the State had alleged that Powell had committed "acts of Violation Uniform Firearms Act First Degree on *multiple occasions*," and that to convict him, the jurors must "*unanimously agree as to which act has been proved*." CP 64 (emphasis added); 6RP 604-05.

The court reread and summarized this instruction three more times when it responded to the jury's inquiry, empanelled the alternate juror, and advised the juror of the jury's question and its answer. CP 30; 6RP 604-05. The fact that the parties agreed to the Petrich instruction, and the court's answer to the jury's inquiry, shows that neither party, nor the court, believed that the prosecutor's isolated statement constituted an election that the firearm in Powell's lap was the sole basis for the charge.

Moreover, the court instructed the jury that "lawyers' statements are not evidence," and that they "must disregard" any "remark, statement, or argument that is not supported by the evidence or the law" contained in the instructions. CP 36. Jurors are presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Any misconception the jurors might have had about the impact of the prosecutor's statement in closing argument would have been remedied by this instruction, and the court's repeated instruction that the jury must unanimously agree on a specific underlying act.

Given the charging document, evidence, and jury instructions, Powell cannot show that the prosecutor "clearly elected" the gun in his lap. Powell provides no authority for the position that a prosecutor's statement in closing argument is sufficient alone to elect a specific criminal act in a multiple acts case. Indeed, the case law is to the contrary. Kier, 164 Wn.2d at 813-14; see also State v. Bland, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993), overruled on other grounds by, State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007) (holding that the prosecutor "clearly elected" based on the charging document, special verdict forms, evidence, jury instructions, and closing argument).

The jury reached a unanimous verdict on the crime charged. Powell's attempts to characterize this as an "uncharged crime" case should be rejected in light of the multiple acts committed by Powell and the court's Petrich instruction. The facts of this case bear no resemblance to the "uncharged crime" cases on which Powell relies. See Cole v. Arkansas, 333 U.S. 196, 202, 68 S. Ct. 514, 92 L. Ed. 644 (1948) (remanding case where the defendants' convictions were affirmed under a different criminal statute than that with which they were charged, tried, and convicted); State v. Pelkey, 109 Wn.2d 484, 490-91, 745 P.2d 854 (1988) (reversing conviction where the court allowed the State to amend the information to allege a new crime after the State rested its case-in-chief); State v. Doogan, 82 Wn. App. 185, 187-90, 917 P.2d 155 (1996) (reversing conviction where the court instructed the jury on an uncharged alternative means).

The jury convicted Powell of unlawfully possessing a firearm after having been properly instructed that they must unanimously agree on the specific underlying criminal act that formed the basis of the crime charged. The information, evidence, and instructions all reflected that Powell committed multiple acts constituting the crime charged. Given this record, the prosecutor's statement in

closing argument was not an election that created the possibility that the jury convicted Powell of an uncharged act.

**D. CONCLUSION**

For the reasons stated above, the Court should affirm Powell's conviction for first-degree unlawful possession of a firearm.

DATED this 14<sup>th</sup> day of July, 2011.

Respectfully submitted,

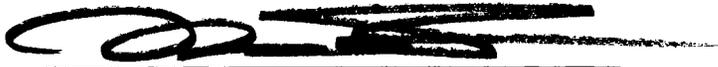
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer L. Dobson and Dana M. Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. TAVORRIS POWELL, Cause No. 66056-0-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington

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Date

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