

66867-6

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NO. 66867-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JERRY PERKINS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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DIVISION ONE
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A. ARGUMENT

1. WHERE THERE WAS INSUFFICIENT EVIDENCE OF ASSAULT IN THE SECOND DEGREE, REVERSAL IS REQUIRED.

- a. There was a lack of proof that Mr. Perkins inflicted substantial bodily harm. The State initially relied on evidence related to an alleged stab wound inflicted during the altercation on the night of the incident; however, the State's eventual withdrawal of all "deadly weapon" language from jury instructions indicated its reliance on the injury to Mr. Hedgcoth's nose, instead. 2/23/11 RP 75-77.

Even in the light most favorable to the State, the evidence adduced at trial failed to establish that Mr. Hedgcoth suffered substantial bodily harm caused by this incident – or more specifically – caused by Mr. Perkins. "'Substantial' as used in RCW 9A.36.021(1)(a), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

Although Mr. Hedgcoth testified that he momentarily lost consciousness, he suffered no substantial pain or lasting impact from this event. 2/23/11 RP at 60. Mr. Hedgcoth testified that he

had been a boxer for many years, and he told police detectives the same. 2/22/11 RP 63-65; 2/23/11 RP 60.

The State asserts that the incident on November 6th resulted in a broken nose, and that Mr. Perkins's actions caused the fracture. Resp. Brief at 6. However, the testimony of Dr. Susan Bigelow failed to establish the cause of the fracture. While the State is correct that this Court may not review the credibility determinations made by the trier of fact, Mr. Perkins does not ask this Court to assess Dr. Bigelow's credibility. This medical witness simply was not asked at trial to give her opinion as to the cause of the fracture. 2/23/11 RP 5-6. At trial, Dr. Bigelow merely repeated what her patient told her about the incident, testifying that Mr. Hedgcoth appeared with a "nasal bone fracture that was lined up, not displaced." Id. at 5. The doctor never stated what her medical opinion was as to the cause of the injury, and whether she believed the injury to be caused by the instant altercation, or whether a non-displaced fracture was consistent with Mr. Hedgcoth's prior boxing injuries and facial surgeries.

It was therefore impossible to determine whether the cause of the fracture on the CAT scan was the incident on November 6th or the complainant's prior years as an amateur boxer.

Even in its best light, the State's evidence proved only that Mr. Perkins participated in an assault on Mr. Hedgcoth. However, since the State failed to establish that Mr. Hedgcoth suffered substantial bodily harm, this conviction was entered in the absence of proof beyond a reasonable doubt of each element.

b. The prosecution's failure to prove all essential elements requires reversal. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case such as this, where the State fails to prove an essential element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Because the State failed to prove the element that Mr. Perkins inflicted substantial bodily harm, the Court must reverse the conviction. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. THE JURY WAS NOT INSTRUCTED ON UNANIMITY, DENYING MR. PERKINS HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

a. The State neither elected the act upon which it relied, nor did the trial court instruct the jury on unanimity. The failure to either elect, nor to instruct on unanimity, results in a Petrich violation which is not harmless, which requires reversal. State v. Petrich, 101 Wn.2d 566, 569, 683 P.3d 173 (1984); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); Const. art. I, § 22.

Here, the State changed its prosecution theory throughout the trial, since it apparently could not rely on the testimony of complaining witness Mr. Hedgcoth.¹ The prosecution seemed to argue that Mr. Perkins was either the principal or an accomplice in both the taking of Mr. Hedgcoth's money and in the assault.

The State produced evidence of two specific and separate assaultive acts allegedly constituting assault in the second degree: the conduct resulting in a fractured nose and the conduct resulting in a puncture wound to the arm. Indeed, the State initially presented its case as a stabbing – the amended information informed the jury that, as to both counts, Mr. Perkins had been

¹ The deputy prosecutor stated, "Clearly I was not expecting that testimony," following Mr. Hedgcoth's appearance at trial. 2/23/11 RP 75.

armed with a deadly weapon, specifically, a knife. CP 34-35.

Photographs of two knives seized from the location of the incident were introduced as exhibits during the trial, without objection.

2/23/11 RP 17-19. At trial, however, Mr. Hedgcoth seemed unable to clearly recall whether Mr. Perkins had a knife, recanting this part of the accusation. Id. at 51-52, 58-59.

Given the evidence adduced at trial and the State's closing argument which failed to elect the act constituting the assault, a Petrich instruction requiring jury unanimity was required.

b. The two acts of assault presented by the State were not a continuous course of conduct. The State argues in its Response Brief, "viewed in a common sense manner, this [incident] represents a single course of conduct intended to secure a single objective – collecting a debt. The jury is not required to agree unanimously on which blow constituted the charged assault." Resp. Brief at 8-9.

However, since the jury acquitted Mr. Perkins of the robbery, it seems that the focus here must remain on the assault.

Here there were allegedly two distinct acts, separate from one another. The first was an assault resulting in Mr. Perkins allegedly punching Mr. Hedgcoth in the nose. 2/23/11 RP 51-54.

The second assault, initially alleged by Mr. Hedgcoth and then partially recanted, involved a puncture wound to his right arm. Id. at 5. This was a separate attack, and it was unclear who wielded the weapon. Id. at 51, 58-59.

This was not a continuous course of conduct but two distinct acts, and simply eliminating the “deadly weapon” language of the instruction, without providing the jury with additional directive, was inadequate.

c. The error in failing to instruct the jury on unanimity was not harmless. When a trial court abridges a right guaranteed by the United States Constitution, the jury's verdict will be affirmed only if 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).

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 assault, particularly given the posture of the case following the reading of the amended information and opening statements. CP 34-35; 2/22/11 RP 17. 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. Perkins constituted the assault in the second degree.

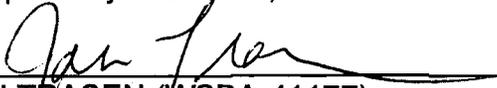
Accordingly, this Court must reverse Mr. Perkins's conviction and remand for a new trial.

B. CONCLUSION

For the foregoing reasons, as well as upon the grounds stated in the Opening Brief of Appellant, Jerry Perkins respectfully requests this Court reverse his conviction and remand the case for further proceedings. In the alternative, Mr. Perkins requests this Court reverse his sentence and remand for imposition of a standard range sentence.

DATED this 16th day of February, 2012.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
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Attorney for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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JERRY PERKINS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **REPLY 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:

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X _____ 