Supreme Court No. 1036981
COA No. 86856-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ZAQUAI MCCRAY,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

ANSWER TO STATE'S PETITION FOR REVIEW

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CONSTITUTIONAL PROVISIONS

A. ARGUMENT IN ANSWER TO PETITION

1. Review is not warranted under RAP 13.4(b)(1).

The Court of Appeals decision was properly reasoned and is simply an instance of the Court reversing without prejudice where the State's manner of charging, presentation of the case, jury instructions, and argument show that the verdict carries no assurances of unanimity. See, e.g., State v. Coleman, 159 Wn.2d 509, 513, 150 P.3d 1126 (2007) (where the evidence showed multiple instances of an act that each "could form the basis" of a guilty verdict, but the prosecutor failed to elect which instance the jury should rest its verdict on, unanimity was violated) (Emphasis added.).

Per longstanding law, this constitutional error is harmless "only if no rational juror could have a reasonable doubt as to any of the incidents alleged." Coleman, at 512 (citing State v. Kitchen, 110 Wn.2d 403, 411-12, 756 P.2d 105 (1988)). This high burden on the State of showing harmlessness exists "because of the possibility that some

jurors relied on one act or incident and some relied on another, resulting in a lack of unanimity[.]" Coleman, at 512; CONST. art I, § 21.

In the Court of Appeals below, the Respondent's central contention was that State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) did not apply because the defendant's conduct was a "continuing course," as contrasted with a "multiple acts" case - the doctrine applying only to the latter. BOR, at pp. 12-19. The Court of Appeals correctly ruled that this was not a continuing course case, distinguishing the State's citation to cases including the published decision in State v. Thompson, 169 Wn. App. 436, 446, 290 P.3d 996 (2012).

Now, the Petitioner, seeking review, does not place substantial reliance on the unsupportable notion of a "continuing course," but instead asserts that the case was proffered to the factfinder as one where the accused committed one robbery, which had multiple victims. PFR, at

21, 22. The State contends that because the crime of robbery can be committed when a person's property is taken in their presence or that of others, the verdict below must have been premised on a conclusion that the defendant committed a single robbery of one or more "victim(s)" [singular, or plural, apparently] who were present in the home. BOR, at pp. 15-17.

Certainly a given robbery case could be presented to a jury in such a manner. For example, multiple convictions for robbery may be secured and do not violate double jeopardy where each count was supported by evidence of a forcible taking of property from a person. State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728, 732 (2005) ("By describing the crime of robbery as it did, the legislature established an offense which is dual in nature - robbery is a property crime and a crime against the person."). The robbery statute allows this. Tvedt, at 713 ("one can be convicted of robbery for each forcible taking from a separate person.").

Ultimately, as the Court of Appeals rightly emphasized, where is a Petrich contention, the question of error comes down to how the prosecution charged and endeavoured to prove the case *at bar*. See State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993) (in determining whether a case involved multiple acts and thus required a Petrich instruction or an election, the reviewing court considers the whole record of trial, including the evidence, information, argument and instructions); State v. Corbett, 158 Wn. App. 576, 593, 242 P.3d 52 (2010) (courts consider the instructions, evidence and closing arguments, to determine if the jury understood it was required to find each element proved as to each count). Here, the Court of Appeals correctly recognized that this was a multiple acts case, governed by Petrich. Decision, at p. 6 (The State must "elect the act on which it will rely for conviction.") (citing Petrich, 101 Wn.2d at 572.).

The very matters that the Petitioner relies upon to claim that the Court of Appeals decision was incorrect - the absence

of a named victim in the charging document, or in the instructions of law (see State's PFR, at pp. 1, 7-8), are the circumstances that created the Petrich error in the first place, all of which were of the State's own making. As the Court of Appeals stated:

> Again, although four individuals beyond [defendants] McCray and Javonne were present during the incident, only a single count of robbery was charged and neither the information nor the jury instructions identified a specific person as the victim. It is the manner by which the State charged and argued this case that created alternative crimes for the jury to consider. This assignment of error is not simply based on the absence of an instruction on unanimity, but rather on how that omission interacts with the State's failure to properly elect the specific act on which it intended to rely to secure a guilty verdict on this count.

Decision, at p. 11. As the Court of Appeals also correctly stated, the trial prosecutor told the jury that both co-defendants, at some point during the incident, possessed the gun and pointed it at complainants Desire'e Lair, Harold

Walker, Brandon Floyd and "Ace" Jones and "demanded their stuff." Decision, at pp. 11-12 (Emphasis in COA decision).

Petitioner argues that this was not how the trial prosecutor argued the case to the jury. PFR, at p. 17 and n. 6. First, this is incorrect. See, e.g., 9/26/22RP at 546 (prosecutor arguing to the jury that the defendants "searched Harold and Desire'e's room for [the] valuables" while wielding the shotgun); 9/26/22RP at 546-47 (arguing that proof of robbery was shown by evidence that "items were taken" from Brandon Floyd and were taken "against Brandon [Floyd]'s will" by the use of force where defendants "assaulted Brandon, or Old School, with that firearm;" 9/26/22RP at 547 (arguing that "items were taken against the will of Brandon, Harold and Desire'e;" 9/26/22RP at 548 (arguing that Brandon and Ace Jones were "trying to stop the defendants" and tussled with them; 9/26/22RP at 554 (arguing that the defendants "used that shotgun to put fear inside of

Desire'e and Harold and Brandon and Ace. And they did so with the intent to commit Theft, to take property.").

Second, even if a jumble of statements made in closing argument included one which might support the Petitioner's characterization of its case (the matter posed here solely for purposes of argument), and others that do not, this appeal is operating in the Petrich realm where express clarity, not a jumble, is required. State v. Carson, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015) (an adequate election is made only where the prosecutor "clearly identifies" the particular acts on which charge is based). Pointing to a sentence in closing argument that might support the State's claim on petition for review is inadequate to show that the lay jury was clearly informed by the prosecutor as to the set of facts constituting the crime under the State's theory.

The State cites to State v. Kier, 164 Wn.2d 798, 812, 194 P.3d 212 (2008) and State v. Nelson, 191 Wn.2d 61, 419 P.3d 410 (2018) (the case of State v. Tvedt, 153 Wn.2d 705,

107 P.3d 728 (2005), is discussed supra). The State argues that the Court of Appeals could only reverse by holding, contrary to Nelson, that the victim must have an ownership interest in the stolen property. PFR, at p. 3. The State also argues that proof of robbery "does not require the specific identity of the victim or victims." PFR, at p. 22.

But the Court of Appeals discussion of certain possible aspects of robbery are not pronouncements of law, rather, they are part of the discussion of the robbery trial in this case which serve to illustrate the fractured manner in which the State charged, presented, and argued its case to the jury, and the prosecutor's shifting characterizations of the case, including by arguing lack of a possessory interest in order to secure the highest possible offender score. Decision, at p. 12 (stating, "Even after the conclusion of a trial that resulted in guilty verdicts, the State itself could not describe with confidence what facts it had proved with regard to the robbery."

2. Review should be denied.

The gravamen of Petrich error is exemplified by this trial case which was argued to the jury sans election and thus resulted in a verdict obtained entirely in disregard of the unanimity guarantee. By failing to clearly identify the acts that the State believed made out the robbery count charged, it allowed some jurors to rest their determination on one hypothetical instance of robbery against a person, and other jurors to rely on another involving a different person, while still other jurors may have rested their decision on yet another possible instance. There were no assurances of unanimity in this case.

The error, which is constitutional, can be deemed harmless not by the presence of sufficient evidence, but rather, only if the evidence as to each of the multiple acts was so strong and consistent that a Court can say that no juror could have done anything other than decree the defendant guilty as to each and every instance. State v. Kitchen, 110

Wn.2d at 409; State v. Coleman, 159 Wn.2d at 513. The Court of Appeals properly reversed.

B. CONCLUSION

This Court should deny the Petition for Review. This brief contains 1,590 words and complies with RAP 18.17.

DATED this 23rd day of January, 2024.

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January 23, 2025 - 4:16 PM

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