NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

WHITNEY J. CHARLES, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D18-517
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Opinion filed November 4, 2020.

Appeal from the Circuit Court for Charlotte County; Donald H. Mason, Judge.

Howard L. Dimmig, II, Public Defender, and Julius J. Aulisio, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and C. Todd Chapman, Assistant Attorney General, Tampa, for Appellee.

ATKINSON, Judge.

Whitney J. Charles, Jr., appeals his conviction and sentence for battery with two or more prior battery convictions. See § 784.03(2), Fla. Stat. (2017). He argues that the trial court erred by denying his request to adjust the verdict form to

clarify which act constituted a battery and to ensure a unanimous jury verdict. We affirm.

The State charged Charles by an amended information with robbery by sudden snatching and battery with two or more prior battery convictions, stating the following in regard to the battery count:

> On or about May 09, 2017[,] in Charlotte County, Florida, [Charles] did unlawfully commit a battery upon [the victim], by actually and intentionally touching or striking said person against said person's will, or by intentionally causing bodily harm to said person, having been previously convicted of battery on 2003, 2015, contrary to Florida Statute 784.03(2) . . . .

At trial, the victim testified that she had been in a relationship with Charles for about a year until she ended it one or two weeks prior to the incident. On May 9, 2017, Charles showed up at her home and repeatedly knocked on her window. After about thirty minutes, the victim went outside, with her phone in her bra, to speak with Charles. While the victim was standing in the doorway about an arm's length away from Charles, Charles asked for her phone. When the victim refused, Charles quickly grabbed the phone from her bra. Charles began looking through the victim's phone while standing near her doorway. After a few minutes, Charles went down to his car in the victim's driveway and continued to look through her phone.

Eventually, the victim walked towards Charles, who was sitting on his car, in order to ask for the return of her phone. After the victim held out her arm requesting the return of her phone, Charles pushed her and said she was not getting her phone. Thereafter, while the victim was standing in front of him, Charles flicked a burning cigarette into her hair. Charles eventually went inside his car and locked the door.

Then, when the victim began walking towards her house, Charles jumped out of the car, ran towards her, grabbed her shoulder, and turned her around. The victim shrugged him off and managed to walk inside her house. Charles left with her phone. The victim got her phone back when it appeared in her mailbox some time after the incident.

During closing arguments, the State argued the following in pertinent part with respect to the battery charge:

> Let's talk about the second charge, the crime of battery. In order to prove the crime of battery the State must prove the following elements beyond a reasonable doubt: Whitney Charles intentionally touched or struck [the victim] against her will. Three times, Ladies and Gentlemen, three times he touched her against her will: One, when she attempted to put her hand out and asked for her phone back he pushed her, not pushed her hard, but as we discussed injury is not required. He put his hands on her against her will. She stated I did not tell him he could touch me. Two, once he . . . was still calling her these repulsive names he takes a cigarette he was smoking, standing, as she put it, this far away from her and flicked it into her hair. That also is a battery. She did not give him permission to flick a cigarette into her hair. It was obviously intentional. It was this close to her. Ladies and Gentlemen, this is a battery. . . . Three – and Ladies and Gentlemen, her hair was burned. Three, as she walked away deciding you know what, this is escalating, I'm nervous, it's not worth it, as she walked away he jumped back out of his car realizing oh, she's going to walk away now and he didn't want that to happen, he didn't want to lose control of the situation, Ladies and Gentlemen, so he went up, grabbed her shoulder and turned her towards him. There was no injury. She did not state there was an injury. But again, that was a third time Mr. Charles put his hands on [the victim] without her permission.

After defense counsel argued the possibility that the victim and another of Charles' ex-girlfriends had colluded against him, the State argued the following in rebuttal:

> This is not collusion. It's corroboration. These are facts that match. But nothing says that these two women worked together to come up with this story. Otherwise, if this was a plan to get him, a push to the shoulder, a flick of the cigarette and a grabbing of the shoulder, all three of those are batteries. If you're out to get him, why not say he punched me right in the mouth? Why not say he kicked me down a flight of stairs? Because that didn't happen. What did happen are the three batteries that [the victim] testified to.

After closing arguments, defense counsel objected to the verdict form because it did not distinguish between the push, the flick of the cigarette, or the grasp of the shoulder with respect to the battery count:

> If the State alleges battery and there's three theories that they've presented, i.e., a push, a cigarette or the turn by the shoulder, if the jury were to come back with [a] guilty verdict of battery it's unknown if the decision is unanimous based upon the same form of battery. In other words, two people could have found for one, two for another and two for another.

The trial court overruled defense counsel's objection because this was a "continuous and contiguous series of events in that [the victim] got close to Mr. Charles" and "there was a push, a flick of a cigarette and a grab from behind with no superseding intervening scenario between all of those actions."

A trial court's denial of a request to use a special verdict form is reviewed for an abuse of discretion. See Coday v. State, 946 So. 2d 988, 1009 (Fla. 2006) ("It was entirely within the trial court's discretion to deny the defense's requested verdict form . . . ; judges in Florida are not required to use special verdict forms."). However, a trial court's use of a general verdict form that does not ensure a unanimous verdict is reversible error. See Saldana v. State, 980 So. 2d 1220, 1222 (Fla. 2d DCA 2008) ("The trial court . . . erred in using a general verdict form that did not ensure a

unanimous verdict."); Robinson v. State, 881 So. 2d 29, 30 (Fla. 1st DCA 2004) ("[A] criminal conviction requires a unanimous verdict in Florida."). "Where a single count embraces two or more separate offenses, albeit in violation of the same statute, the jury cannot convict unless its verdict is unanimous as to at least one specific act." Perley v. State, 947 So. 2d 672, 675 (Fla. 4th DCA 2007) (quoting Robinson, 881 So. 2d at 31).

Charles argues that the trial court erred in allowing the jury to deliberate on the three separate acts of battery that the State presented when he was only charged with one count of battery. He maintains each touching was distinct and separated by both time and place. He contends that the State created the error during closing arguments by arguing that each act constituted a battery. Charles argues that the trial court's failure to adjust the verdict form compromised the jury's ability to render a unanimous verdict such that his due process rights were violated.

In support of his argument, Charles relies on Perley, 947 So. 2d 672. In Perley, the State charged the defendant with a single count of escape but presented evidence of two distinct incidents of escape that were separated by both time and place—one incident occurred at the time of his arrest and the other occurred at the hospital where he was taken after complaining of chest pains. See id. at 674. The State then made an affirmative invitation to the jury to convict the defendant of either incident of escape such that it was "difficult, if not impossible, to determine which incident the jury convicted Perley for, or if the jury reached an unanimous decision." Id. at 674–75 (reversing and remanding for a new trial).

Here, when considering the time, place, and nature of the defendant's conduct and the number of victims involved, Charles' acts could be considered part of a

single criminal episode. They occurred against the same victim in the same place (the victim's driveway) over a short period of time. There was no significant break in time or place to interrupt the continuity of the criminal episode.

On the other hand, each touching could be fairly characterized as a distinct battery, separated (albeit marginally) by time and place; arising from a different impulse; and, notably, carried out in a different manner. Cf. Cherfrere v. State, 277 So. 3d 611, 615–16 (Fla. 4th DCA 2019) (discounting the risk of a nonunanimous first-degree attempted murder conviction based on one continuous attack during which the defendant kept trying to kill the victim in various ways). It is certainly conceivable that a juror could find the flicking of a lit cigarette supportive of a battery conviction but not the grasping of a former romantic partner to turn her toward one's self.

However, the mere possibility that another juror could have come to the converse conclusion does not necessarily require special jury instructions or a special verdict form. See Perry v. State, 10 So. 3d 695, 698–99 (Fla. 1st DCA 2009) (distinguishing cases in which the prosecution gave jurors reason to believe they could reach a nonunanimous verdict, finding that "the trial court's denial of defendant's requested special jury verdict form indicating unanimity on the particular method of sexual battery on a child did not preclude unanimity of the verdict and did not constitute error" (emphasis added)). In Miller v. State, 123 So. 3d 595 (Fla. 2d DCA 2013), this court found there was an unacceptable risk of a nonunanimous jury verdict—not because the standard jury instructions or verdict form were erroneous but because the instructions did not ameliorate the confusion caused by prosecutorial remarks that suggested the jury was not required to reach a unanimous verdict:

> We are fully aware that a trial court is not required to submit a case to the jury with a verdict form that separates the elements of an offense. The verdict form is not erroneous in this case. Although we do not require the court to use forms that prove the jury reached a unanimous verdict on each element of an offense, there is no question that the law expects the jury to reach a unanimous verdict pursuant to the instructions.
>
> The precise definition of a "unanimous" verdict is probably subject to some debate. While jurors can undoubtedly have different assessments of the evidence and still reach a unanimous verdict, there can be no legitimate debate that the jurors must all agree that each essential legal element of an offense has been proven by the State.
>
> There are many valid reasons why we do not micromanage the jury's decision-making process to assure it obeys the law. The issue in this case, however, does not directly involve the jury's actual decision-making process. Instead, the issue addresses what officers of the court can properly tell the jury about its decision-making process. In this case, the assistant state attorney's argument was improper and the trial court's inaction in the face of this argument is erroneous.
>
> . . . The jury instructions were not legally incorrect, but they did not guard against the confusion created by the assistant state attorney's improper argument. The argument went to a highly disputed portion of the case and may have caused the jury to misapply the law and reach a verdict that was not actually unanimous.

Id. at 596, 598–99 (footnote omitted) (citations omitted) (finding the unpreserved error did not constitute fundamental error).

Unlike the prosecutors in Miller and Perley, the prosecutor in this case did not affirmatively tell the jury that it may convict Charles of any of three separate acts of battery. Although the State noted that each touching constituted a battery, the State explained the event as one continuous episode where three acts of touching occurred. See Cherfrere, 277 So. 3d at 615 ("Despite Appellant's assertion that the State told the

jury it could convict on either the ramming incident or the stabbing, this is not what the prosecutor said. Although the State noted either the ramming or the stabbing could satisfy the act element of the crime, the State explained the event as one continuous episode.");[1] cf. Miller, 123 So. 3d at 597 ("[T]he assistant state attorney explained to the jury that it did not need to reach a unanimous verdict on all of the elements of the charged offense.");[2] James v. State, 973 So. 2d 1194, 1195 (Fla. 2d DCA 2008) ("We agree that it would have been error had the trial court allowed evidence of two distinct incidents of penetration and told the jury it could convict James for either."); Perley, 947 So. 2d at 675.

Charles' separate acts of touching the victim could be perceived as a single criminal episode. Alternatively, the jury could have perceived them as distinct

---

[1]In Cherfrere, the State argued the following to the jury: "Well, he did do some act. He did crashing [sic] into her car, which was his first attempt to try to kill her, right into the driver's side of her car, and then getting out, chasing her down with a knife, and stabbing her multiple times." Cherfrere, 277 So. 3d at 613.

[2]In Miller, the State argued the following to the jury:

> Now, members of the jury, according to that aggravated battery charge, let's say three of you go back and say I don't think she was permanently disfigured, but I do believe that she was beaten with that stool. Even if she was hit once, well, that's aggravated battery with a deadly weapon.
>
> Well, let's say the other three of you say, you know, I don't think she was hit by a stool, but I do think that scar or that tooth—that's permanently disfigured by him, even if it was just by a fist if you believe that. Well, then your verdict still has to be guilty on aggravated battery because if it's one or the other, you could both come to the different conclusions but reach the same result and that . . . he is guilty of aggravated battery.

Miller, 123 So. 3d at 597.

batteries but unanimously determined that the defendant was guilty of one or all of them. Because neither the State nor the trial court suggested to the jury that it could convict Charles without unanimously finding that at least one of the acts constituted battery, the trial court did not err by denying Charles' request to adjust the verdict form. Accordingly, we affirm.

Affirmed.

VILLANTI and ROTHSTEIN-YOUAKIM, JJ., Concur.