

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 65358-0-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAMES STEVEN PAULEY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: December 24, 2012
	)	

Lau, J. — A jury convicted James Pauley of first degree robbery, second degree assault, attempting to elude a pursuing police vehicle, and vehicular assault. The jury also found that Pauley was armed with a deadly weapon when he committed the robbery and assault charges. The trial court imposed a standard range sentence. Pauley appeals, arguing the instructions misinformed the jury regarding whether unanimity is required to answer “no” on the special verdict form. He also argues the trial court erred in denying his motion to suppress the knife and his motion to sever. Finding no error, we affirm his judgment and sentence.

**FACTS**

On February 13, 2009, a stranger confronted and swung a knife at John

Donahue as he started getting into his car in a QFC grocery store parking lot.

Donahue swore, yelled, and ran away when he saw the man flinch. The man with the knife first started chasing after Donahue, then ran the other way. Donahue and eyewitness Brian Olmstead described the assailant as a white male, 5 feet 10 inches tall, with brown hair, a slender build, and wearing a blue, hooded sweatshirt. Although police officers failed to locate a suspect that night, Donahue identified Pauley as his attacker a few days later in a photomontage and also at trial.

The day after the Donahue incident, William Stollar pulled his Jaguar into a park and ride lot a quarter mile away from the QFC where Donahue was assaulted. As he sat in his car with his door open, a man pointed a knife at him and ordered him out of the car. Stollar complied, and the man drove away with his car. Stollar called 911 and responding officers broadcast a description of the car and suspect within minutes. Stollar described his attacker as a white male, 5 feet 10 inches tall, with light-colored hair, a small build, and wearing a blue sweatshirt.

Officer Mike Girias heard the broadcast of the call and located the Jaguar within 10 minutes on State Route 520. Girias confirmed that the Jaguar matched the description of the car reported stolen and that the driver matched the suspect's description. Girias pulled in behind the Jaguar and followed it while he waited for other backup units to arrive. Once they arrived, Girias activated the lights and sirens on his marked patrol car, attempting to stop the Jaguar.

The driver failed to stop and drove off at speeds estimated at 80 mph. Although multiple police cars pursued, the driver stopped only when he drove over "stop sticks"

with spikes inside that deflated his tires. Officers handcuffed Pauley and then pulled him out of the car. They searched Pauley and the car, looking for the knife described by Stollar. Officers recovered the knife from the front passenger side floor board.

Stollar identified the knife as the one Pauley used to rob him of the Jaguar. Donahue said that he thought it looked like the knife Pauley used to assault him the night before. Stollar picked Pauley out of a photomontage a few days after the incident and identified him in court as the person who robbed him at knife point.

The State charged Pauley with first degree robbery while armed with a deadly weapon against Stollar, attempting to elude a pursuing police vehicle, and vehicular assault. It also charged Pauley with second degree assault with a deadly weapon against Donahue. The charges from the two incidents were joined for trial over Pauley's objection. Prior to trial, Pauley moved to suppress the knife evidence. The court denied the motion because Pauley lacked standing to challenge the search of Stollar's car. The court also denied Pauley's two pretrial motions to sever the charges against him.

The trial court instructed the jury on the deadly weapon enhancements: "Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision." The jury convicted Pauley on all counts charged and found he was armed with a deadly weapon at the time of the robbery and assault. Pauley appeals.

## ANALYSIS

### Standing

Pauley argues that the trial court erred in denying his motion to suppress the knife found during the search of Stollar's car. He argues that automatic standing entitles him to challenge the search under the Fourth Amendment and article I, section 7.

"To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure." State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The elements of robbery are (1) unlawfully taking (2) personal property (3) from the person or presence of another (4) against the person's will (5) by use or threatened use of immediate force. RCW 9A.56.190.

We recently addressed Pauley's standing claim in State v. Truong, 168 Wn. App. 529, 277 P.3d 74 (2012), review denied, No. 87621-5 (Wash. Sup. Ct. Oct. 30, 2012). There, we reaffirmed our holding in State v. Hayden, 28 Wn. App. 935, 939, 627 P.2d 973 (1981), that possession is not an element of robbery. We find no reasoned basis to depart from this rule and therefore conclude that Pauley's standing claim fails.

#### Unanimity Instruction

For the first time on appeal, Pauley argues the court erred in instructing the jury that in order to answer the special verdict form, "each of you must agree." We review this claimed error of law de novo. State v. Sublett, 156 Wn. App. 160, 183, 231 P.3d 231 (2010). Instruction 26 stated in relevant part:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the

time of the commission of the crimes in Counts one (I) and three (III).

.....  
Because this is a criminal case, each of you must agree for you to return a verdict.

Pauley relies on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). There, the Supreme Court held that for purposes of a special verdict, “a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum available sentence.” Bashaw, 169 Wn.2d at 146. In State v. Guzman Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012), the Supreme Court overruled Bashaw and approved the instruction given by the trial court. Guzman Nuñez controls. The trial court here gave a similar unanimity instruction approved in Guzman Nuñez. Pauley’s jury instruction challenge fails.

#### Motion to Sever

Pauley next contends that the trial court's failure to grant his motion to sever the charges violated his right to a fair trial. The State counters that Pauley waived his right to challenge this issue on appeal by failing to renew his motion to sever at trial. Pauley does not respond to this argument.

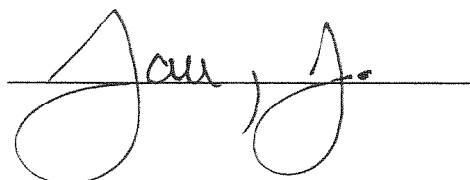
CrR 4.3(a) permits joining two or more offenses of the same or similar character, even if the offenses are not part of a single scheme or plan. Properly joined offenses may be severed if the defendant is prejudiced in presenting separate defenses or if a single trial would encourage the jury to cumulate evidence or infer a criminal disposition. State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). CrR 4.4(a) requires a defendant to make a pretrial motion to sever and, if overruled, to renew the

motion “before or at the close of all the evidence.” If the defendant fails to do either, severance is waived and cannot be raised on appeal. State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987 (“Henderson moved to sever the bail jumping count before trial, but failed to renew his motion at or before the close of trial. He therefore waived the issue.”); State v. Ben-Neth, 34 Wn. App. 600, 606, 663 P.2d 156 (1983).

Pauley initially moved to sever the offenses against him prior to trial. The trial court denied his motion based on the cross-admissibility of the evidence and Pauley's “pattern of behavior.” RP (Nov. 20, 2009) at 30. Following the denial, Pauley successfully moved to continue the trial date.

On the third day of pretrial motions, Pauley renewed his motion to sever and the trial court denied the motion, finding “no new evidence” and “no new reason” to revisit the earlier ruling. RP (Mar. 3, 2010) at 86, 88. The trial court noted that Pauley claimed general denial on all counts and that his argument rested on his concern that the jury would convict him of assault based on the strength of the State's evidence on the other charges. While acknowledging this concern, the trial court indicated it would instruct the jury to consider the charges separately and juries follow the court's instructions. The parties immediately proceeded to pick a jury. Pauley never moved to sever again or reraise the issue of severance with the trial court. We conclude Pauley waived his right to challenge the denials of his motion to sever by failing to renew the motion at trial. CrR 4.4(a); Henderson, 48 Wn. App. at 551; Ben-Neth, 34 Wn. App. at 606.

Finding no error, we affirm Pauley's

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judgment and sentence.

WE CONCUR:

Leach, C. J.

Dwyer, J.