IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	DIVISION ONE
Respondent,	)	
	)	No. 66772-6-I
v.	)	
	)	
JEROMY KEITH LADWIG,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 16, 2012
_____	)	

Dwyer, J.—To ensure jury unanimity in a case where multiple acts could constitute a charged crime, the State must tell the jury which act it has elected to rely on for conviction or the court must instruct the jury to unanimously agree on a specific act. No election or instruction is required, however, if multiple acts form a continuing course of criminal conduct. In this appeal from convictions for possession of methamphetamine and use of drug paraphernalia,[1] Jeromy Ladwig contends his paraphernalia conviction must be reversed because there was no jury instruction or election by the prosecutor ensuring jury unanimity, and the court failed to properly respond to a jury inquiry during deliberations. Because no instruction or election was required in this case, and because the prosecutor made a clear election in any event and Ladwig's challenges to that

[1] Ladwig does not challenge his conviction for possession of methamphetamine.

election and the handling of the jury inquiry are fatally flawed, we affirm.

I

On July 12, 2010, Oak Harbor Police executed a search warrant at a residence leased by Ladwig's father. The warrant authorized a search of the residence and the person of Jeromy Ladwig. While on the property, officers noticed movement inside a small travel trailer behind the residence. They knocked on the trailer door but received no response. Officers then phoned Ladwig's father, who arrived at the property and opened the trailer.

The police found Ladwig in bed, apparently sleeping. After reading him Miranda[2] warnings, police asked if there was any methamphetamine in the trailer. Ladwig said he had used some the night before and whatever was left "would be in a baggie in the ashtray by the T.V." Report of Proceedings (RP) at 146. He also said "that he snorts it" and still had "the drip in the back of his throat." RP at 146-147.

Ladwig and his father subsequently consented to a search of the trailer. Police found two small plastic baggies containing a white substance in an ashtray next to the bed. They also found two glass smoking pipes and a blue tube or straw near the bed. A detective testified that, based on his experience, the pipes "appeared to be connected with methamphetamine." RP at 89. The substance in one of the baggies later tested positive for methamphetamine. The other baggie, the pipes, and the blue tube were not tested.

[2] Miranda v Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The State charged Ladwig with possession of methamphetamine and use of drug paraphernalia. At trial, the prosecutor told the jury in his opening statement that Ladwig was charged with "use of drug paraphernalia for the pipes" found in the trailer. RP at 41.

At the close of the State's case, the defense moved to dismiss the use of drug paraphernalia charge. Defense counsel noted that the pipes had not been tested and that there was no evidence they contained any residue or controlled substance. The court denied the motion and the defense rested its case.

The court instructed the jury that to convict Ladwig of using drug paraphernalia, they had to find, among other things

> [t]hat on or about the 12th day of July, 2010, the defendant used drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, *store, contain, . . . ingest, inhale, or otherwise introduce into the human body* a controlled substance.

Clerk's Papers (CP) at 29 (emphasis added). The instructions also defined "drug paraphernalia" in part as "all equipment, products, and materials of any kind that are used, intended for use, or designed for use in . . . *storing*, *containing, . . . ingesting*, *inhaling*, or *otherwise introducing into the human body* a controlled substance." CP at 30. Paraphernalia includes "glass, stone, plastic, or ceramic pipes." CP at 30. The instructions did not require the jury to agree on a particular use of paraphernalia.

During closing argument, the prosecutor repeatedly told the jury that the

paraphernalia charge was based on Ladwig's use of the pipes. He told them that "the second [charge] is Use of Drug Paraphernalia for the pipes." RP at 186. Later, when referring to the pipes, he said, "That's the paraphernalia that we're talking about." RP at 189. In summarizing the evidence on the paraphernalia charge, he said, "We have pipes plus admitted use plus methamphetamine." RP at 190. He concluded both portions of his argument by stating that Ladwig's use of the pipes made him guilty on the paraphernalia count. Defense counsel argued that the pipes were never tested and that there was no testimony explaining what the pipes were or how they were typically used.

During deliberations, the jury sent out the following question: "Does the definition of drug paraphernalia include the small baggies which contained the white substance?" CP at 34. After consulting counsel, the court responded: "The law is contained in my instructions to you. You must consider the instructions as a whole." CP at 34.

The jury convicted Ladwig as charged. He appeals.

II

Criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). If the State presents evidence of multiple acts that could constitute the crime charged, it "must tell the jury which act to rely on in its deliberations or the

court must instruct the jury to agree on a specific criminal act." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to do so is constitutional error because of "the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411. A unanimity instruction is not required, however, if multiple acts form a continuing course of criminal conduct. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991).

Ladwig contends an instruction or election was required in this case because several uses of paraphernalia could have supported his conviction. Unanimity was not ensured, he argues, because the court did not give a multiple acts, or "Petrich" instruction and the State did not make a proper election. The State contends no instruction or election was required because the evidence did not show multiple acts supporting conviction, and, in any event, the prosecutor made an election during opening and closing arguments.

We need not decide whether the evidence established multiple uses of paraphernalia because even assuming it did, no instruction or election was required because the uses were part of a continuing course of conduct. To determine whether multiple acts form one continuing offense, courts must view the facts in a common sense manner. Petrich, 101 Wn.2d at 571. Evidence that multiple acts were intended to secure the same objective supports a finding that

the defendant's conduct was a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Courts also consider whether the conduct occurred at different times and places or against different victims. Petrich, 101 Wn.2d at 571.

Viewed in a common sense manner, the facts here demonstrate a continuing course of conduct. All of the items of paraphernalia—the pipes, the straw, and the baggie—were found in the same place. The State relied on Ladwig's use of paraphernalia during a single time period, i.e., the evening before his arrest. To the extent the pipes, straw, and baggie involved separate uses of paraphernalia, they shared a single ultimate objective: Ladwig's use of methamphetamine. The acts thus constituted a continuing course of conduct and no election or instruction was required.

Even were we to conclude that the uses of paraphernalia were not a continuing course of conduct, we would reach the same result. As the State correctly points out, the prosecutor clearly and repeatedly elected one specific use—i.e., use of the pipes—for the paraphernalia charge. See State v. Bland, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (closing argument identifying a particular act for each count supported conclusion that the State made an election). At no point did he argue that the jury could base its verdict on any other paraphernalia.

Ladwig argues in passing and without supporting authority that the

prosecutor's election was insufficient because he "never told jurors they could not base their verdict on other items found in the trailer." Appellant's Br. at 8. We need not consider conclusory and unsupported claims. State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (appellate courts do not review "issues for which inadequate argument has been briefed or only passing treatment has been made"); State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (appellate court will not review issue unsupported by relevant authority or persuasive argument).

Similarly, we need not consider Ladwig's suggestion in a footnote that the election is undermined by State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), and the trial court's jury instructions. State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) (arguments raised in footnotes need not be considered). Furthermore, Ladwig's attempt to inject Kier's double jeopardy analysis into the unanimity issue in this case would conflict with the State Supreme Court's prior holdings in Petrich and Kitchen. Nothing in Kier purports to overrule those cases, and we presume the Supreme Court does not overrule binding precedent subsilentio. State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999).

Ladwig also argues that even if the prosecutor made a valid election, unanimity was not ensured given the jury's inquiry and the court's response to the inquiry. He contends the inquiry indicated that the prosecutor's election had

been ineffective, and it was incumbent on the court to either remind the jury of the prosecutor's election or give them a Petrich instruction. We reject this contention for several reasons.

First, Ladwig nowhere explains why this claim can be raised for the first time on appeal. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) (defendant has burden of demonstrating why argument can be raised for the first time on appeal). Second, he fails to discuss well established law governing judicial responses to jury inquiries. Finally, his contention lacks merit.

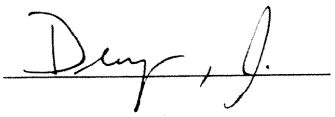
Trial courts have no obligation to answer a deliberating jury's inquiry and the content of a response is a matter within the court's discretion. State v. Langdon, 42 Wn. App. 715, 718, 713 P.2d 120 (1986). Our courts have repeatedly emphasized that jury inquiries are not final determinations, and that confusion at the time of an inquiry may clear up without assistance from the court. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (citing State v. Miller, 40 Wn. App. 483, 698 P.2d 1123 (1985)). In this case, the jury commenced deliberations with proper instructions and, consistent with Petrich and Kitchen, a clear election by the prosecutor. When the court received the jury inquiry at issue, it immediately and appropriately asked counsel for their suggestions. CrR 6.15(f). The prosecutor preferred a response, which the court eventually gave, informing the jury that the law is contained in their instructions and that they must consider the instructions as a whole. Defense counsel

expressly acquiesced in this response and expressed no concerns about jury unanimity.

Ladwig cites no authority requiring a court to sua sponte instruct a jury in response to an inquiry when the issue has not been raised by counsel, counsel have agreed to a different response, and counsel would not be afforded an

opportunity to address the already deliberating jury concerning the new instruction's impact, if any, on the case. Accordingly, his contention fails.

Affirmed.



We concur: