IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66867-6-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
JERRY ARTHUR PERKINS,	)	
	)	
Appellant.	)	FILED: July 30, 2012
	)	
	)	
	)	

Appelwick, J. — Perkins appeals his conviction for second degree assault. He contends the evidence was insufficient to support his conviction and he was denied his right to a unanimous verdict. He also claims that the jury instruction defining recklessness relieved the State of its burden of proof, challenges the constitutionality of the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981, ch. 9.94A RCW, and raises additional arguments in a pro se statement of additional grounds. Finding no error, we affirm.

FACTS

In 2010, John Hedgcoth had no regular employment, but supported himself through social security payments and occasional odd jobs. Sometime that year, he borrowed approximately $100 from Jerry Perkins. Hedgcoth and Perkins had known each other for many years and were "related street family."

One day in November, Hedgcoth performed some plumbing repairs and was paid approximately $380 in cash. That evening, on his way to buy dinner, he saw Alexander Hinojosa, an acquaintance he also knew as "Primo." Hedgcoth and Primo

used to live at the same motel and Hedgcoth had purchased cocaine from Primo on one occasion. Hedgcoth stopped to talk to Primo, and told him he made "some good money" that day. Primo said he needed to talk to Hedgcoth and asked him to stop by his house after he was finished.

Hedgcoth arrived at Primo's house a short time later. When Primo let him inside, another longtime acquaintance, Shawn Godwin, hit Hedgcoth on the head from behind. Primo was also behind Hedgcoth, hitting him and pushing him toward the couch. Hedgcoth fell head-first into the couch and lost consciousness. When he came to, Perkins was there and demanded the money Hedgcoth owed him. Hedgcoth handed Perkins about $60. Perkins then punched Hedgcoth in the nose. He began bleeding profusely. Hedgcoth also sustained a stab wound during the attack. He thought it was Perkins who stabbed him with a knife, but said he could not be 100 percent sure, because it was hard to see clearly while all three men were attacking him. When they stopped hitting him, Perkins found his wallet on the floor. It was open and all the cash was gone.

Primo told a girl to "haul" Hedgcoth out of the house. She drove his van to the first stop sign and got out. Hedgcoth felt he was losing a lot of blood, but continued driving ten blocks further to a hospital. At the hospital, a CAT (computerized axial tomography) scan confirmed that Hedgcoth's nose was broken. The bones were not displaced, so there was no recommended treatment other than medication for the pain and ice. Hedgcoth also had a closed head injury, bruising, and a laceration. Hedgcoth did not want to be admitted to the hospital and thought his grandchildren were waiting for him, so he left the hospital against medical advice.

Perkins was charged with first degree robbery and second degree assault.[1] The jury found Perkins guilty of assault, but acquitted him of robbery. Based on Perkins' two prior convictions for second degree assault, the court sentenced him to life imprisonment as a persistent offender.

DISCUSSION

I. Sufficiency of the Evidence

Perkins argues that his conviction is not supported by sufficient evidence. While Perkins concedes that the evidence was sufficient for the jury to conclude that he participated in the assault, he claims it failed to establish he inflicted substantial bodily harm. Perkins claims that Hedgcoth's injuries had no lasting impact and it was "impossible to determine" whether Hedgcoth's nose was broken when Perkins punched him in the face, or whether it was preexisting injury from when Hedgcoth was an amateur boxer.

In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State, deciding whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). The reviewing court "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

[1] The assault charge was originally based on both assault with a deadly weapon and infliction of substantial bodily harm. RCW 9A.36.021(1)(a),(c). After Hedgcoth expressed some uncertainty at trial as to whether Perkins was the person who stabbed him, the State agreed to withdraw the deadly weapon allegation and the jury was instructed solely on the theory that Perkins assaulted Hedgcoth and inflicted substantial bodily harm.

To prove second degree assault, the State had to prove that Perkins intentionally assaulted Hedgcoth and thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a). "'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

Sufficient evidence supports the conclusion that Perkins inflicted substantial bodily harm when he hit Hedgcoth in the face and broke his nose. Hedgcoth testified that upon impact, blood began "[s]hooting across the floor." His nose continued to bleed enroute to the hospital and upon arrival, was swollen and inflamed. Testing confirmed that the bone was fractured.

There was evidence in the record that Hedgcoth was an amateur boxer at some unknown point in the past and underwent plastic surgery after he stopped boxing. But, no evidence suggested that the fracture diagnosed at the time of the assault was the result of a prior injury. Hedgcoth did not say he had a broken nose before. And, according to the testimony of the emergency room treating physician, bones fractured in the past would fuse back together.

In addition to a bone fracture, Hedgcoth also sustained bruising, swelling, significant bleeding, and black eyes. These visible injuries by themselves rise to the level of temporary substantial disfigurement. See State v. Hovig, 149 Wn. App. 1, 5, 13, 202 P.3d 318 (2009) (red teeth-marks lasting for one to two weeks constituted substantial bodily injury); see also State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (bruises from being hit by a shoe resulted in temporary but substantial

disfigurement). There was ample evidence from which a rational trier of fact could conclude that Perkins inflicted a bone fracture and other injuries that involved temporary but substantial disfigurement.

II. Unanimity

Perkins argues that he was denied the right to a unanimous verdict, because the State presented evidence of two separate acts of assault—punching and stabbing—but did not elect the act upon which it relied, and the trial court did not instruct the jury on unanimity.[2]

Conviction requires that a unanimous jury conclude that the defendant committed the criminal act charged in the information. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). 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); Petrich, 101 Wn.2d at 572.

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). Here, even assuming the evidence established multiple acts of second degree assault, no election or instruction was required, because Perkins' acts formed a continuing course of conduct. To determine whether multiple acts form one continuing offense, we view the facts in a common sense manner. Petrich, 101 Wn.2d at 571.

[2] Although Perkins did not raise this issue below, the failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error that may be raised for the first time on appeal. See Rap 2.5; State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995).

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.

Our courts have found a continuing course of conduct in cases involving multiple acts of assault committed with a single purpose against one victim within a short period of time. For example, in Crane, multiple acts of assault against a child victim over a two hour time period, ending in the death of the child, were a continuing course of conduct. 116 Wn.2d at 330. Similarly, in Handran, no unanimity instruction was required where the defendant, charged with burglary, broke into his former spouse's residence and repeatedly assaulted her during a short period for the purpose of securing sexual relations. 113 Wn.2d at 17-18.

The evidence here also demonstrates a continuing course of conduct. The multiple acts of assault, whether by Perkins or an accomplice, all occurred at the same place, against the same victim, and within a short time span. A rational trier of fact could conclude that the acts shared a common objective: to collect the debt owed by Hedgcoth and punish him for his delinquency. No unanimity instruction or election was required.

III. Jury Instructions Defining Recklessness

Perkins asserts that the trial court's instructions relieved the State of its burden of proving the essential elements of assault in the second degree. Specifically, he claims that the jury instruction defining recklessness created an unlawful mandatory

presumption.[3]

A mandatory presumption is one that requires a jury "to find a presumed fact from a proven fact." State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Mandatory presumptions violate a defendant's due process right if they relieve the State of its obligation to prove all elements of the charged crime. Id. In deciding whether a jury instruction creates a mandatory presumption, we ask whether a reasonable juror would interpret the presumption as mandatory. Id. at 701.

Second degree assault, as charged here, requires two distinct acts with two corresponding mental states: the defendant must intentionally assault and recklessly inflict substantial bodily harm on another. RCW 9A.36.021 (1)(a); State v. McKague, 159 Wn. App. 489, 509, 246 P.3d 558, aff'd, 172 Wn.2d 802, 262 P.3d 1225 (2011). The "to convict" instruction set forth these elements and required the jury to find:

> (1) That on or about the 7th day of November, 2010, the defendant, or an accomplice intentionally assaulted John Hedgecoth [sic];
>
> (2) That the defendant, or an accomplice, thereby recklessly inflicted substantial bodily harm on John Hedgecoth [sic]; and
>
> (3) That this act occurred in the State of Washington.

The instructions also defined "recklessly" as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that an assault will result in substantial bodily harm and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular result is required to establish an element of a crime, *the element is also established if a person acts*

[3] Again, although Perkins did not object below, if he is correct, the claimed error is of constitutional magnitude that may be raised for the first time on appeal. RAP 2.5; State v. Holznecht, 157 Wn. App. 754, 760-62, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011).

intentionally or knowingly as to that result.

(Emphasis added.)

Perkins argues that the instruction defining "recklessness" created a mandatory presumption that if the jury found Perkins knowingly or intentionally assaulted Hedgcoth, he also necessarily recklessly inflicted substantial bodily harm. Perkins relies on State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009), and claims the recklessness instruction given by the court is "similar" to the one provided in that case. He is mistaken. In Hayward, the recklessness instruction stated, "'Recklessness also is established if a person acts intentionally.'" Id. at 643. The Hayward instruction mirrored former 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, at 153 (2d ed. 1994), while the instruction in this case follows the language of the current version of the pattern instruction, revised in 2008.[4] Hayward, 152 Wn. App. at 644; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, at 209 (3d ed. 2008) (WPIC). The court in Hayward expressly addressed the revised pattern instruction and observed that unlike the former version, the revised instruction creates no mandatory presumption. 152 Wn. App. at 646. This is because the instruction correctly specifies that the jury may find recklessness only if it determines that Perkins acted intentionally or knowingly with respect to the infliction of substantial bodily harm.[5]

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[4] The pattern instruction provides:

> [When recklessness [as to a particular [result] [fact]] is required to establish an element of the crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].]

11 WPIC 10.03, at 209 (alterations in original).

[5] Also since Hayward, both this court and Division Two of the Court of Appeals

The jury instructions in this case set forth the elements of second degree assault and informed the jury that it must find separate mental states for the assault and the injury. The recklessness instruction correctly states that proof of an intentional or knowing mental state as to the infliction of substantial bodily harm establishes a reckless mental state as to that element. Nothing in the instructions improperly conflated the intent the jury had to find regarding the assault with the separate intent the jury had to find with respect to causing substantial bodily harm. The instructions did not create a mandatory presumption or relieve the State of its burden of proof.

IV. Persistent Offender Sentence

Finally, Perkins argues that his constitutional rights were violated when the trial court, not the jury, found the existence of his prior two strikes for sentencing purposes under the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981, chapter 9.94A RCW. Our Supreme Court has "repeatedly rejected" the argument that a jury must determine the existence of prior convictions. State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007). Perkins also contends the legislature's failure to classify the persistent offender finding as an element, which would allow for a jury determination and require proof beyond a reasonable doubt, violates equal protection guarantees. We rejected this argument in State v. Langstead, 155 Wn. App. 448, 228

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have considered instructions similar to the one given in Hayward and reached a different result. In McKague, the court approved of an instruction that provided, "'When recklessness as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.'" McKague, 159 Wn. App. at 509 (emphasis omitted). In Holzknecht this court considered an instruction closer to that in Hayward, stating, "'Recklessness is also established if a person acts intentionally or knowingly.'" Holzknecht, 157 Wn. App. at 762. We concluded that this instruction was sufficient to inform the jury of the two separate mental states required. Id. at 766.

P.3d 799, review denied, 170 Wn.2d 1009, 249 P.3d 624 (2010). Applying rational basis review, we held "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense." Langstead, 155 Wn. App. at 456-57. Both Division Two and Division Three of the Court of Appeals have likewise rejected this argument. State v. Williams, 156 Wn. App. 482, 496-98, 234 P.3d 1174, review denied, 170 Wn.2d 1011, 254 P.3d 773 (2010); McKague, 159 Wn. App. at 517-19. Following Thiefault and Langstead, we reject Perkins' constitutional challenges to the persistent offender statute.

V. Statement of Additional Grounds

A. Denial of Sixth Amendment Right to Choice of Counsel

In his statement of additional grounds, Perkins claims the trial court denied his right to retain counsel of his choice by denying his request to fire his attorney or grant a continuance.

Defendants have the right to retain counsel of choice and the denial of a motion for continuance in order to retain new counsel may unlawfully deprive the defendant of that right. State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990). But, the right to retain counsel of one's choice is not unlimited—the assertion of the right must be made within a reasonable time before trial. Id. Absent substantial reasons for delay, a late request will generally be denied, especially if a continuance may delay trial. Id.

Here, Perkins asked to fire his attorney or for a continuance on the first day of trial, after the jury selection was complete. He said, "I would like someone competent enough to try my case, if it has to come out of my pocket to pay somebody for it or

whatever." Perkins told the court that counsel had advised him to plead guilty and, since conviction would amount to a third strike, that was "proof enough" of incompetence. Counsel responded that he had met with Perkins several times, provided all discovery to him, and was ready to proceed to trial. Counsel also confirmed that he had contacted the only witness suggested by Perkins, but decided against calling that witness. With respect to a plea bargain, counsel denied encouraging Perkins to plead guilty, but said he merely discussed the pros and cons of doing so. The court denied the motion as untimely:

> Well, given the fact that the trial call was actually on a Friday, here we are on Monday morning with jurors downstairs ready to be present, I would just find it's too late -- one, I'll find that Mr. Lee has obviously prepared for trial. He's brought Motions in Limine, he's briefed the case, he's gone over instructions, so it appears as though he's prepared it. Apparently he's talked to his client and gone over things with him at least on three separate occasions. While the stakes are high, the factual matter isn't particularly complex that's being presented by the State, so I don't know what more time would do.

A criminal defendant is not entitled to a continuance as a matter of right. State v. Early, 70 Wn. App. 452, 457-58, 853 P.2d 964 (1993). Such a motion is within the trial court's discretion. Id. at 458. Denial of a motion to continue will not be disturbed absent a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted. Id.

Nothing in the record demonstrates that the trial court abused its discretion in denying Perkins' untimely motion. Perkins provided no explanation as to why he took no steps to replace counsel before trial started. He merely claims that the outcome of trial would have been different if he had been able to retain new counsel who would have prepared an adequate investigation and presented witnesses on his behalf. But,

these conclusory allegations fail to establish prejudice. And, to the extent that Perkins' argument relies on matters outside the trial court record, it cannot be raised on direct appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

B. Lesser Included Instruction

Perkins argues that the trial court erred in refusing to give his proposed lesser included instruction on fourth degree assault.

A party is entitled to a lesser included offense instruction where "(1) each element of the lesser offense is a necessary element of the greater offense charged (the legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (the factual prong)." State v. Meneses, 169 Wn.2d 586, 595, 238 P.3d 495 (2010). When determining whether the evidence was sufficient to support an instruction, we view the evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The factual prong is satisfied if the evidence would permit a jury to rationally find the defendant guilty of the lesser offense but acquit the defendant of the greater offense. Id. at 456. To satisfy the factual prong, some evidence must be presented that affirmatively establishes the defendant's theory on the lesser included offense. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990).

The court declined to give the lesser included instruction, because it concluded the evidence did not support it as a factual matter:

> The legal prong is certainly present. It is legally a lesser included crime. However, the evidence was that the defendant struck Mr. Hedgcoth in the nose and that Mr. Hedgcoth's nose was broken. There's no affirmative evidence that it wasn't broken. So the jury can either believe it was an assault or not an assault. But if there was an assault, it led to a broken

bone.

Where, as here, the court refuses to give an instruction based on a factual determination, we review the denial for abuse of discretion. State v. Hunter, 152 Wn. App. 30, 43, 216 P.3d 421 (2009), review denied, 168 Wn.2d 1008, 226 P.3d 781 (2010).

This argument rests on Perkins' contention that the evidence did not establish his assault caused the broken bone. Perkins points out that when asked specifically if his nose broke when Perkins punched him, Hedgcoth said, "I believe it was the punch to the nose," but it was "hard to tell" since "everything was happening so fast." This testimony does not amount to affirmative evidence that Perkins did not inflict substantial bodily harm. And, as the trial court observed, it is not enough that the jury might disbelieve the evidence of guilt. See Fernandez–Medina, 141 Wn.2d at 456.

There was no affirmative evidence that would have permitted the jury to conclude that Perkins assaulted Hedgcoth but did not break his nose. Hedgcoth testified about only one blow to the face—the one inflicted by Perkins.[6] There was no evidence of a cause for Hedgcoth's broken nose, apart from the assault that immediately preceded his arrival at the hospital. To give a lesser included instruction in these circumstances absent affirmative evidence would encourage "jury speculation that the factual prong is intended to prevent." State v. Rodriguez, 48 Wn. App. 815, 820, 740 P.2d 904 (1987). The trial court did not abuse its discretion.

C. Jury Instruction Requiring Unanimity

[6] Even if there was evidence to suggest that either Godwin or Primo hit Hedgcoth in the face, the jury was instructed that Perkins was liable as a principal or an accomplice.

Perkins argues the court erred by instructing the jury it must be unanimous and therefore infringed on the jury's right to disagree. The instruction on the jury's use of the general verdict form followed the basic concluding pattern instruction and stated, "Because this is a criminal case, each of you must agree for you to return a verdict." 11A WPIC 151.00, at 622-23. Citing State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Perkins argues that the instruction improperly suggested that unanimity was required for acquittal. But, Bashaw involved unanimity with respect to special verdict forms and its nonunanimity rule was, in any event, overruled by State v. Nuñez, No. 85789-0, 85947-7, 2012 WL 2044377 (Wash. June 7, 2012). Jury unanimity is a goal strived for in criminal verdicts and the very object of the system is to secure unanimity by a comparison and discussion of views among the jurors. Nuñez, 2012 WL 2044377 at 6; Jones v. United States, 527 U.S. 373, 382, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1990). There was no error.

D. Reasonable Doubt Instruction

Perkins challenges the jury instruction defining reasonable doubt, because it included the following language taken from the pattern instruction: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." 11 WPIC 4.01, at 85. Although Perkins claims this language "confuses jury after jury," it has been expressly approved by our courts. State v. Pirtle, 127 Wn.2d 628, 656-58, 904 P.2d 245 (1995); State v. Lane, 56 Wn. App. 286, 299-301, 786 P.2d 277 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); State v. Price, 33 Wn. App. 472, 475-76, 655 P.2d 1191 (1982). The instruction correctly stated the burden of proof.

E. Prosecutorial Misconduct

Finally, Perkins claims it was misconduct for the prosecutor to state in closing argument that "[d]rug debts are enforced with violence." He argues this statement was not supported by the evidence, was prejudicial, and amounted to improper vouching. But, the remark was a fair inference drawn from the evidence, despite Hedgcoth's denial that he used the money he borrowed from Perkins to buy drugs. And, the prosecutor's suggestion that Hedgcoth incurred the debt for drugs was not especially prejudicial to Perkins, as the prosecutor did not suggest that Perkins supplied drugs to Hedgcoth or to anyone else. Perkins fails to establish that the argument was improper or prejudicial.

We affirm.

WE CONCUR: