

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO: 502012AP900084XXXXMB
L.T. NO: 502012MM006252XXXXMB

WAYNE DOUCET,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed: **JAN 13 2014**

Appeal from the County Court in and for Palm Beach County,
Judge Frank Castor.

For Appellant: Peggy Natale, Esq.
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For Appellee: Stephanie Dutko, Esq.
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Defendant/Appellant, Wayne Gerald Doucet ("Doucet") was charged with one count of battery causing bodily injury. The State alleged Doucet committed battery by either (1) punching/kicking the victim or (2) shooting the victim with a BB gun. Defense counsel objected to the State presenting two separate theories of battery when only one (1) count of battery was charged. The trial court found that these acts constituted one continuous criminal episode and allowed the State to present both theories of battery. On appeal, Doucet alleged that the trial court fundamentally erred by finding that these acts constituted one continuous criminal episode and allowing the State to present alternate theories of battery to the jury. Doucet contends that

since the State presented two separate acts, the verdict form should have included a special interrogatory, as Doucet requested, to determine of which act, if at all, the jury unanimously found Doucet guilty. Doucet argues that failure to include the interrogatory renders it impossible to determine if the jury rendered a unanimous verdict. We agree and reverse.

Motion for Continuance

As a preliminary matter, we address whether or not the trial court erred by denying Doucet's motion for continuance. Due to a divisional switch within the public defender's office, Doucet received a different appointed public defender less than a month before trial. On the day of trial, Doucet's counsel moved for a continuance claiming lack of time to properly prepare for trial. The trial court denied the motion, citing that Doucet previously demanded a speedy trial. While this Court is cognizant of the factors¹ it must consider to determine whether such a denial was in error, the initial inquiry lies with whether Doucet waived his right to a speedy trial. Doucet previously demanded a speedy trial and did not subsequently waive this right, even within his motion for continuance. Therefore, we find no error in the trial court's denial of Doucet's motion for continuance.

Continuous Criminal Episode

1. Factual Summary

The following is a summary of the evidence presented at trial that is relevant to the issue before this Court. The victim, Assis Tarabay ("Tarabay"), visited Doucet's sister outside of her home. Doucet's co-defendant exited the home and started a physical confrontation with

¹ The factors a reviewing court should consider to determine whether the denial of continuance is error, based on the lack of preparation time are as follows: (1) the time available for preparation, (2) the likelihood of prejudice from the denial, (3), the defendant's role in shortening preparation time, (4) the complexity of the case, (5) the availability of discovery, (6) the adequacy of counsel actually provided and (7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime. *McKay v. State*, 504 So. 2d 1280, 1282 (Fla. 1st DCA 1986).

Tarabay. Then Doucet came outside and proceeded to punch and kick Tarabay. Doucet's sister broke up the fight and Doucet and his co-defendant went back inside. After an unknown² amount of time, Doucet returned outside and then shot Tarabay with a BB gun. After deliberating, the jury returned a verdict of guilty as charged.

2. Discussion

To determine whether offenses arise from the same criminal episode requires consideration of the following factors: (1) whether separate victims are involved; (2) whether the crimes occurred in separate locations; and (3) whether there has been a temporal break between the incidents. *Russo v. State*, 804 So. 2d 419 (Fla. 4th DCA 2001). In the instant case, the parties stipulate that there are not separate victims involved, as there was only one (1) victim: Tarabay.

The Fourth District Court of Appeal found two discrete acts when a defendant threw a brick through the window of a door at the rear of a dwelling, then ran to the front of the dwelling where he threw a brick through a front window. *Nicholson v. State*, 757 So. 2d 1227 (Fla. 4th DCA 2000). The court found that the bricks were thrown at discrete times and from discrete locations. *Id.* at 1228. It found that it clearly required separate intent to throw a brick through the patio door at the rear of the house and then, after running to the front of the house, to throw a brick through a front window. *Id.* The court found that the brief period of time and short physical distance between the two nearly identical acts constituted separate acts. *Id.*

In the instant case, Doucet's actions took place at two different locations: (1) on the roadway (punching/kicking), and (2) from the side of the house (shooting). As in *Nicholson*, these constituted two discrete acts in separate locations. While the record is not clear as to

² Accounts varied as to whether Doucet immediately returned outside upon retrieving the gun or waited until after he smoked a cigarette.

exactly how much time passed between when Doucet stopped punching and/or kicking Tarabay to go inside and then go back outside, it is clear to this Court that the break in time between these acts is approximately, if not greater than, the time it took for the defendant in *Nicholson* to run from the back to the front of the house. We find that there was a significant temporal break between Doucet's actions. Therefore, Doucet's actions of punching/kicking and then shooting Tarabay are separate and distinct acts, which do not constitute a continuous criminal episode.

Verdict Form

The acts in question are distinct and separate, and the State could have brought two counts against Doucet, rather than one. However, since the State only brought one count of battery, the trial court should have included a special interrogatory on the verdict form to ensure that the jury rendered a unanimous verdict regarding which act(s) constituted battery. *See Perley v. State*, 947 So. 2d 672 (Fla. 4th DCA 2007). "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." *Id.* at 675. As a state constitutional matter, a criminal conviction requires a unanimous verdict in Florida. *Id.*

Perley is analogous to the instant case, and the parties make essentially the same arguments as those in *Perley*. The defendant in *Perley* was detained as a part of a routine traffic stop. *Id.* at 674. The defendant jumped out of the car, shoved the officer and ran away. *Id.* After being caught by the officer, the defendant broke away. *Id.* After being caught again, the defendant was transported to the hospital for medical treatment. *Id.* The defendant attempted to escape from the hospital as well. *Id.*

The State charged defendant with one count of escape, but at trial the State informed the jury that they could convict him of either instance of escape. *Id.* The appellate court found that

while the information was not fundamentally defective in and of itself, the trial court fundamentally erred in allowing the jury to deliberate on two separate instances of escape where he had only been charged with one count of escape. *Id.* The State contended that the two instances of escape merely constitute different theories of the crime and argued it was acceptable to move forward on dual theories at trial. *Id.* The Fourth District Court of Appeal disagreed, stating that presentation of dual theories of a crime is allowable only when a defendant is charged with the commission of one crime, and the State presents two scenarios or bases supporting the commissions of the crime. *Id.* It reasoned that even though the State charged the defendant with only one count of escape, it presented evidence of two entirely separate incidents, separated by both time and place, and by allowing the State to tell the jury it could convict for either instance of escape, the trial court compromised the jury's ability to render a unanimous verdict. *Id.*

The court found that the State's actions questioned the unanimity of the jury's verdict, as some members could have determined that one incident constituted escape, while others could have found the other incident constituted escape, rather than agreeing unanimously that the same incident constituted escape. *Id.* at 675; *see also Smith v. State*, 98 So. 3d 632 (Fla. 4th DCA 2012) (requiring reversal when a general verdict form was used and it was impossible to determine on which act the jury found defendant guilty).

The Second District Court of Appeal, relying on *Perley*, also found error when the trial court failed to use a special verdict form under similar circumstances. *Saldana v. State*, 980 So. 2d 1220 (Fla. 2d DCA 2008). In that case, there were three separate instances alleged of possessing several guns charged in one count. *Id.* at 1221. Upon motion, the trial court ruled that it would require a special verdict form. *Id.* The trial court reasoned that given the number

of guns, various dates and places of possession, this was necessary to ensure juror unanimity on the precise weapon possessed and the time and place of such possession. *Id.* However, a different judge presided at trial and reversed that ruling and allowed a general verdict form. *Id.* On appeal, the court found the case similar to and relied on *Perley* when ruling that allowing the jury to convict without ensuring unanimity compromised the validity of the verdict. *Id.* at 1222. The appellate court also found that the instructions given to the jury did not address this unanimity issue it faced and did not remedy the error. *Id.* at n. 2.

The acts of the instant case, as in *Perley*, are separate and distinct. In order to obtain a unanimous verdict, the trial court should have included a special interrogatory to indicate which act constituted battery.³ The record reflects that the jury was instructed that they must return a unanimous verdict, but they were not instructed that they must unanimously agree as to which act constituted battery. Therefore, any error in the verdict form was not remedied by the given instructions. Accordingly, we REVERSE and REMAND for a new trial.

ROSENBERG, KASTRENAKES, and KELLEY, JJ. concur.

³ A special interrogatory is not required in every case, and our holding is limited to the circumstances detailed here. See *Whittingham v. State*, 974, So 2d. 616 (Fla. 4th DCA, 2008) (distinguishing *Perley* by allowing a general verdict form for sexual abuse cases, reasoning that the courts consistently treat such cases differently from other types of prosecution and therefore including multiple, distinct acts within one count did not result in a non-unanimous jury verdict).