

NO. 66315-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TODD A. SMITH,

Appellant.

REC'D  
MAY 17 2011  
King County Prosecutor  
Appellate Unit

2011 MAY 17 10:14:03

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The jury instructions did not require the jury to unanimously agree on the acts underlying felony harassment as required by the Sixth and Fourteenth Amendments and article I, sections 3, 21, and 22 of the Washington Constitution.

Issue Pertaining to Assignment of Error

The jury trial provisions of the Sixth Amendment and article I, section 21 require jury unanimity beyond a reasonable doubt of every essential element of the crime charged. When evidence indicates two distinct acts, either one of which could form the basis of a crime, either the prosecutor must elect the specific act upon which it relies for conviction, or the jurors must be instructed they all must agree beyond a reasonable doubt on the same act. Did the trial court err by failing to give a unanimity instruction when the prosecutor presented evidence of two distinct acts that could be construed as threatening to kill the named victim but did not elect a specific act upon which it was relying for the conviction?

B. STATEMENT OF THE CASE

Rebecca Bolte was at a fundraiser at a Seattle café, standing outside talking with some friends, when she observed Todd A. Smith come out from inside and put his fist through a large glass window. 2RP

41-45.<sup>1</sup> The window shattered, littering the inside of the café with glass. 2RP 45, 55. Smith charged off, but a group of 20 to 30 café patrons surrounded him and kept him there until police arrived. 2RP 45-47. Smith was grunting and seemed to be drunk. 2RP 46.

Officer David Sullivan arrived to see a large crowd surrounding Smith. 2RP 66-68. Smith was upset, bleeding from a cut on his hand, and mumbling nonsensically. He appeared to be and smelled intoxicated. Sullivan patted Smith down for weapons and recalled finding none. 2RP 68-70, 83-84, 86, 89, 97. Smith made no coherent statements during this time. 2RP 70. He followed Sullivan's commands and did not resist. 2RP 71.

Michael Anderson, an emergency medical technician, and a partner were dispatched in their ambulance and responded to the café. 3RP 5-8. Anderson described Smith as agitated, anxious, not wanting to go to a hospital, and loudly making nonsensical statements. Despite Smith's resistance, Anderson and others secured him to a stretcher using four-point restraints and other harnesses. 3RP 9-11, 23.

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<sup>1</sup> The five-volume verbatim report of proceedings is cited to as follows: 1RP – 10/11/10; 2RP – 10/12/10; 3RP – 10/13/10; 4RP – 10/14/10; 5RP – 10/29/10.

Once Smith was inside the ambulance and on his way to the hospital, Anderson asked a series of standard medical questions. Instead of answering the questions, Smith went on a "verbal rampage" for about five minutes that sounded like a "foreign language." 3RP 11-12. Smith said he had been drinking throughout the day. Anderson smelled the distinct, obvious odor of an alcohol-type substance coming from Smith. 3RP 15-17. Some of Smith's actions were consistent with those displayed by other intoxicated people Anderson had seen. 3RP 17-18, 20.

Smith then became very quiet and Anderson asked if he was okay. In a slurred, agitated tone, Smith said that after he got out of jail, he was going to return to the café and start killing people. Anderson advised Smith he was required to report any threats he made to police. 3RP 13. Smith proceeded to say he would kill any police officers who tried to stop him. 3RP 13, 21.

Anderson delivered Smith to the emergency room at the hospital and gave a statement to police about what Smith had told him. 2RP 73, 3RP 14-15.

Sullivan was assigned to watch Smith as he was being treated at the hospital, then to reassume custody of him and transport him to the police station. 2RP 73-75. Smith was agitated, yelling, and according to

Sullivan, "certainly didn't like the sight of me, and he in no uncertain terms let me know that." 2RP 74. Sullivan sat outside the room so as not to exacerbate Smith's agitation. 2RP 75.

After being assessed and bandaged, Smith was restrained on a large gurney. He continued screaming and yelling and managed to lurch toward Sullivan on the gurney. 2RP 75-76. Smith told Sullivan he was going to kill him and his family. He looked at the officer's name tag and repeated to himself, "D. Sullivan," as if trying to memorize the name. 2RP 78.

Sullivan had been threatened before "with some regularity" while working as a police officer, but rarely took the threats seriously. 2RP 64-65, 83. Smith's threat was different, Sullivan explained, because "I guess I believed him." 2RP 95. It was also different because "he was so very specific about his intent to harm me, to kill me." 2RP 86.

Smith and Sullivan remained at the hospital for about an hour. When they were finished there, Sullivan transported Smith to the police station without further incident. 2RP 80-81.

The State charged Smith with felony harassment for the threat against Sullivan and third degree malicious mischief for the broken window. CP 1-2. The information charged felony harassment in pertinent part as follows:

That the defendant TODD ALAN SMITH . . . on or about July 9, 2010, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to David Sullivan, by threatening to kill David Sullivan, and the words or conduct did place said person in reasonable fear that the threat would be carried out . . . .

Smith did not testify or present evidence. Defense counsel made four key points during closing argument: (1) Smith did not utter a "true threat" because his intoxication prevented him from being able to foresee Sullivan would take the threat seriously. 3RP 52; (2) Sullivan's fear was not reasonable. 3RP 53-56; (3) alcohol prevented Smith from forming the requisite knowledge. 3RP 57; and (4) with respect to malicious mischief, counsel the State failed to prove Smith acted maliciously. 3RP 57-58.

The jury apparently had a different view. They found Smith guilty as charged. CP 36-37. The trial court imposed a standard range 10-month sentence for harassment and a consecutive, suspended 12-month sentence for malicious mischief and 24 months probation. CP 39-49.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON UNANIMITY AFTER THE STATE FAILED TO ELECT ONLY ONE OF THE TWO DISTINCT ACTS AS THE BASIS FOR THE CHARGE OF HARASSMENT.

Smith committed two acts that may have formed the basis of the jury's guilty verdict. The first occurred in the ambulance when, after

Anderson told him he must report any threat to police, Smith said he would "kill any cops that try to stop him" from killing people at the café. 3RP 13. The second was at the hospital, when he said to Smith, "I'm going to kill you and your family." 2RP 78. In such circumstances, a jury unanimity instruction is required, unless the State clearly elects one act as the basis for the charge. Because neither happened here, the trial court Smith's conviction must be reversed.

- a. Because two threats could have formed the basis of the jury's verdict, the prosecutor did not elect, and the court gave no unanimity instruction, there was constitutional error.

The State constitutional right to a unanimous jury verdict and the federal constitutional right to trial by jury require jury unanimity on all essential elements of the crime charged. State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); State v. Badda, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); Const. art. 1, § 22; U.S. Const. amend. 6.

When the evidence presents multiple distinct acts, any one of which could form the basis for conviction, either the court must instruct the jury it must unanimously agree that the same act has been proven beyond a reasonable doubt, or the State must elect which act it is relying on as the basis for the charge. Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn. 2d 566, 572, 683 P.2d 173 (1984). Where neither option

is taken, there is constitutional error stemming from the possibility some jurors relied on one act or incident and some another. State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008); Kitchen, 110 Wn.2d at 409, 411.

Since the error is manifest and of constitutional magnitude, it may be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991); State v. Furseth, 156 Wn. App. 516, 519 n.3, 233 P.3d 902, review denied, 170 Wn.2d 1007 (2010). Smith may therefore raise the issue even though he did not request election or propose a unanimity instruction.

The elements of felony harassment are that the defendant knowingly made a threat to kill immediately or in the future, and that the victim reasonably feared that the threat would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b).<sup>2</sup> The trial court's "to-convict" instruction

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<sup>2</sup> RCW 9A.46.020 provides in pertinent part as follows:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

....

mirrored these elements at Smith's trial. CP 25 (instruction 7, attached as Appendix A). In other words, "the person threatened must find out about the threat . . .; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out." State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001)."

As applied here, the two acts were the ambulance threat to "kill any cops," which Anderson conveyed to Sullivan, 2RP 73, 3RP 14-15, and the hospital threat in which Smith told Sullivan directly that he was going to kill him and his family. 2RP 78.

Each of these acts could have formed the basis of the single count of felony harassment charged. Sullivan did not focus on one or the other threat during his testimony. He testified he "took a statement from one of the ambulance crew," then went into the hospital where Smith was "directing his anger toward, you know, me being the cops." 2RP 75. Sullivan's reference to "the cops" referred back to Smith's ambulance

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(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .

....

[2](b) A person who harasses another is guilty of a class C felony if . . . (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

threat he would "kill any cops." 3RP 14-15. Sullivan was in full uniform at the hospital. 2RP 80, 81.

With respect to the hospital statement, Sullivan said Smith presented an immediate risk and a future risk. 2RP 78-79. Sullivan explained the hospital threat was much different than the other threats he had received over the years because Smith "was very specific about his intent to harm me – to kill me." 2RP 86. Sullivan's explanation could have applied to both threats, of course, because Smith threatened to kill cops in the first and Sullivan, a police officer, in the second.

The prosecutor was only slightly more specific in closing argument. She said the threat was different because Sullivan testified he believed it, it was a specific threat to kill him at a time when Smith was lurching his gurney at him, and he repeated Sullivan's name as if to memorize it. 3RP 36, 42-45, 62-63. These comments focus on the hospital threat.

But the prosecutor also said, when discussing the elements, that Sullivan received the threats at the "UW medical center." 3RP 49.<sup>3</sup> This statement includes the ambulance threat, which Anderson conveyed at the

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<sup>3</sup> The UW medical center is the "hospital" referred to elsewhere in the brief.

"emergency department" of the "hospital facility." 2RP 72-73, 3RP 14-15. The prosecutor also argued that "even in the ambulance ride when he spoke about killing someone, killing a cop, he was pretty clear." 3RP 47. According to the prosecutor, "The idea, the thought starts forming in the ambulance." 3RP 47. Finally, the prosecutor, in reading from the instruction defining "threat," said, "A threat means to communicate directly *or indirectly* the intent to cause bodily injury in the future to a person threatened or to any other person." 3RP 41 (emphasis added).<sup>4</sup> These statements apply to the ambulance threat as well.

Under these circumstances, some jurors could have relied on the ambulance threat and others on the hospital threat. Because the prosecutor did not elect which threat she relied on and because the trial court gave no unanimity instruction, Smith's right to a unanimous jury verdict, as well his right to trial by jury, were violated.

- b. The prosecutor did not elect either of the two threats as the one serving as the basis of the charge.

In Smith's case, the State did not sufficiently elect which threat it was relying on for proof of guilt. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007), is instructive on this point.

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<sup>4</sup> This is from instruction 6, which is attached as Appendix B.

To prove Williams guilty of first degree burglary, the State had to prove he assaulted any person. 136 Wn. App. at 496. However, two distinct assaults were alleged and proved, one against Johnson and the second against Otis. The court gave no unanimity instruction on this point. 136 Wn. App. at 496-97.

The State maintained it elected to rely on the assault against Johnson rather than the one against Otis and no unanimity instruction was therefore required. 136 Wn. App. at 497. This Court rejected the State's assertion:

While the record indicates that the State emphasized the assault against Johnson to a greater extent than the assault against Otis, the State did not expressly elect to rely only on the assault against Johnson in seeking the conviction. The State proffered evidence, including the 911 call herein discussed, and testimony by Johnson, indicating that an assault against Otis occurred. The State also referred to the assault against Otis in its closing argument. The State did not specifically elect to rely on the assault against Johnson.

Williams, 136 Wn. App. at 497.

The facts in Smith's case are similar. As set forth, the State referred to both the ambulance threat and the hospital threat in closing argument. While the prosecutor may have placed greater emphasis on the hospital assault, she nevertheless did not clearly elect to rely on that threat to the exclusion of the ambulance threat. Moreover, Anderson testified to

the ambulance threat, and both Anderson and Sullivan testified that Anderson gave a statement after transporting Smith to the hospital. As in Williams, this Court should find the State did not "specifically elect to rely" on the hospital threat.

Furthermore, in other contexts courts have held prosecutors' arguments cannot cure instructional deficiencies. See State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (rejecting State's argument that it elected which victim it relied on to prove robbery during closing argument; held it could not "consider the closing statement in isolation[.]" noted evidence identified two different victims of the robbery, jury instructions did not specify particular victim alone was to be considered a victim of the robbery, and "jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel."); State v. Berg, 147 Wn. App. 923, 935-36, 198 P.3d 529 (2008) ("double jeopardy violation at issue here results from omitted language in the instructions, not the State's proof or the prosecutor's arguments[.]" evidence of separate acts to support each conviction and an explanation in closing argument that the jury had to agree that two particular acts occurred did not cure omission); State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) (trial court, not expert witness or jury, must declare

law; court does this by deciding whether particular legal proposition is correct and then crafting appropriate instruction); State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995) (court's failure to instruct jury that intent was element of attempt was not cured by defense counsel's argument to jury because "a jury should not have to obtain its instruction on the law from arguments of counsel.").

These cases also support Smith's contention that the State did not clearly elect here. Importantly, the jury here was also instructed "the lawyers' statements are not evidence" and that "[t]he law is contained in my instructions to you." CP 18 (instruction 1).

Smith thus urges this Court to conclude the prosecutor failed to properly make an election.

c. Smith's acts were distinct.

The rule set forth above applies only where the State presents evidence of separate and distinct acts, rather than a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). The State may argue Smith's ambulance threat and his threat inside the hospital were a continuing course of conduct. Smith urges this Court to reject such a possible contention.

“A continuing course of conduct requires an ongoing enterprise with a single objective.” State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, review denied, 129 Wn.2d 1016 (1996). In contrast, where evidence shows conduct at different times and places, or different victims, the evidence tends to show several distinct acts. State v. Garman, 100 Wn. App. 307, 313, 984 P.2d 453 (1999), review denied, 141 Wn.2d 1030 (2000). To determine whether criminal conduct constitutes one continuing act, courts review the facts in a commonsense manner. Handran, 113 Wn.2d at 17.

Applied to the facts in Smith's case, the two threats were not a continuing course of conduct. The first occurred in the ambulance and the hearer was Anderson. The second occurred inside the hospital and Sullivan heard the threat. Anderson testified it took officers 20 to 30 minutes to arrive at the hospital after he was there with Smith. 3RP 14. He then gave his statement to Sullivan. 2RP 73, 3RP 15.

Sullivan was less specific, saying "some period of time elapsed" between when he took the statement and when he saw Smith being treated inside. 2RP 73-74. When Sullivan arrived, Smith was agitated and directed his anger at "me being the cops." 2RP 75. At some point thereafter, Smith uttered his threat. 2RP 75-77.

This evidence shows the threats occurred at different times and places. They were not part of an ongoing enterprise. Instead, the threats were random outbursts by an agitated Smith. This Court should find the threats distinct acts.

d. The error was not harmless.

Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to be prejudicial. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). The State can overcome this presumption "only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." Kitchen, 110 Wn.2d at 405-06.

The State cannot make that showing here because the "reasonable fear" element was not proven with respect to the ambulance threat. Jurors were instructed that to convict Smith as charged, it had to find "the words or conduct of the defendant placed David Sullivan in reasonable fear that the threat to kill would be carried out[.]" CP 25 (Appendix A). Neither Anderson nor Sullivan testified the ambulance threat to "kill any cops" placed Sullivan in such reasonable fear. Nevertheless, because of

Sullivan's testimony and the prosecutor's argument, some jurors may have relied on the ambulance threat.

For these reasons, the error was not harmless beyond a reasonable doubt and the felony harassment conviction must be reversed.

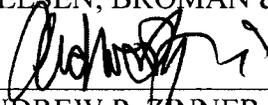
D. CONCLUSION

For the foregoing reasons, Todd Smith respectfully requests this Court to reverse his conviction and remand for a new trial.

DATED this 17 day of May, 2011.

Respectfully submitted,

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## APPENDIX A

No. 7

To convict the defendant of the crime of harassment as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 9, 2010, the defendant knowingly threatened to kill David Sullivan immediately or in the future;

(2) That the words or conduct of the defendant placed David Sullivan in reasonable fear that the threat to kill would be carried out;

(3) That the defendant acted without lawful authority; and

(4) That the threat was made or received in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count I.

APPENDIX B

No. 6

A person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out and the threat to cause bodily harm consists of a threat to kill the threatened person or another person.