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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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NO. 68845-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DIMITRI EVANOFF,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

LINDSEY M. GRIEVE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. To preserve jury unanimity when the State presents evidence of multiple acts that could constitute the charged crime, the trial court must give a unanimity instruction or the State must elect which act it is relying upon. However, where the multiple acts are part of a continuous course of conduct, neither a unanimity instruction nor election is necessary. Here, Evanoff entered a bank and directed two threats to bomb at bank employees during a short time period while inside the bank. Evanoff made both threats to bomb with the same objective: to get his money quickly. Evaluating the evidence in a common sense manner, does the evidence show that the two threats were part of the same continuous course of conduct?

2. A trial court may order a mental health evaluation and treatment only when the court has considered a presentence report and has made findings that the defendant's mental illness contributed to his crime. Here, the trial court did not follow the statutorily-required procedure before ordering mental health treatment for Evanoff. Should this Court accept the State's concession of error and remand this matter for the trial court to consider whether a mental health evaluation is appropriate?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Dimitri Evanoff was charged by Information with one count of threats to bomb or injure property. CP 1. Evanoff requested that the jury be instructed on the lesser offense of misdemeanor harassment, and the jury was so instructed. CP 22-24, 39-40. A jury trial found Evanoff guilty as charged. CP 26.

The trial court granted Evanoff a First Time Offender Waiver and sentenced him to 54 days, or credit for time already served. CP 47. As a condition of community custody, the court ordered Evanoff to obtain a mental health evaluation and follow all treatment recommendations. CP 51.

2. SUBSTANTIVE FACTS.

On January 3, 2012, Evanoff entered the North Bend branch of Bank of America. 2RP¹ 22. He was upset that he had been unable to withdraw funds using an ATM. 2RP 22, 65. Evanoff cut in front of five or six customers waiting in a line and interrupted bank teller Charles Delurme while he was assisting another

¹ There are 3 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (April 17, 2012); 2RP (April 18, 2012); and 3RP (April 20, 2012).

customer. 2RP 23. While "agitated," Evanoff told the teller that the bank had messed up his account and he would not leave until the account was fixed. 2RP 23. The teller told Evanoff that he would have to wait in line or speak to other bank personnel for help because the teller was assisting a customer. 2RP 24, 36. Evanoff became more upset and began to make gestures and pace back and forth behind the customer the teller was helping. 2RP 25. Evanoff then said, "I'm going to blow you and this place up." 2RP 30.

Bank manager Jana Day recognized Evanoff from a previous visit to the bank from approximately one month before. 2RP 35. During the previous visit, Evanoff requested cash from his account, which was already overdrawn by \$500. 2RP 25. When the manager explained to him that she was unable to give him additional money because his account was overdrawn, Evanoff became "very upset" and left. 2RP 35-36.

After seeing Evanoff speaking to the teller, the manager approached Evanoff and guided him to her desk. 2RP 36. Evanoff told the bank manager, "You guys are going to give me my money." 2RP 37. Evanoff appeared upset; he was rambling and acting

aggressively. 2RP 36, 38. He then told the manager, "I'm just going to kill you guys and blow up the bank." 2RP 39.

Although it did not appear to the manager that Evanoff had a bomb with him, she was unsure what he "was capable of." 2RP 41. Wanting to "defuse the situation" and get Evanoff out of the bank, she gave Evanoff the money he was requesting and Evanoff exited the bank. 2RP 40. One to two minutes later, while the manager was talking to the assistant manager about calling corporate security to report Evanoff, he returned. 2RP 40. The manager asked the assistant manager to call the police. 2RP 40. She then assisted Evanoff with another bank request. 2RP 42. As they finished that transaction, King County Sheriff's Deputies arrived and escorted Evanoff outside. 2RP 42, 47.

Evanoff admitted to police that he had said he was going to blow up bank employees and the bank. 2RP 53. Evanoff explained that he was angry that the bank would not give him his money. 2RP 43. Evanoff was upset and talking rapidly while recounting the threats he had made inside the bank. 2RP 53. Before he was transported away from the scene, Evanoff talked to himself and ranted continuously about the bank's service. 2RP 53.

Evanoff testified at trial. 2RP 62. While admitting that he was angry, Evanoff first claimed he did not make the threats and then repeatedly claimed that he did not remember whether he had made the threats. 2RP 69-78.

C. ARGUMENT

1. EVANOFF'S RIGHT TO JURY UNANIMITY WAS PROTECTED WHERE HIS TWO THREATS TO BOMB WERE PART OF THE SAME CONTINUING COURSE OF CONDUCT.

Evanoff contends that the trial court violated his right to a unanimous jury verdict when it failed to give a unanimity instruction and the State failed to elect which threat was the basis for the charge. Evanoff's argument fails because the threats were part of a continuing course of conduct. Thus, neither a unanimity instruction nor election was necessary.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of several acts that could constitute the crime charged, the jury must unanimously agree on a specific act. State v. Kitchen, 110 Wn.2d 403, 422, 756 P.2d 105 (1988).

To ensure jury unanimity, “[t]he State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act.” Kitchen, 110 Wn.2d at 409; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

However, the State need not make an election and the court need not give a unanimity instruction if the evidence shows that the defendant was engaged in a continuous course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); State v. Craven, 69 Wn. App. 581, 587, 849 P.2d 681, review denied, 122 Wn.2d 1019 (1993). To determine whether the defendant’s conduct constitutes one continuing criminal act, “the facts must be evaluated in a commonsense manner.” Petrich, 101 Wn.2d at 571; Craven, 69 Wn. App. at 588.

Courts have considered various factors in determining whether a continuous course of conduct exists. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). Factors in this determination include whether the acts occurred in a “separate time frame” or “identifying place.” Petrich, 101 Wn.2d at 571. In general, where the evidence involves conduct at different times and places, the evidence tends to show that the acts were several

distinct acts and not a continuous course of conduct. Handran, 113 Wn.2d at 17.

In contrast, evidence that a defendant engages in more than one act intended to achieve the same objective supports the characterization of those acts as a continuous course of conduct. See Handran, 113 Wn.2d at 17 (two acts of assault, the kissing and hitting of defendant's ex-wife, did not require a unanimity instruction or election because the evidence showed a continuous course of conduct intended to secure sexual relations with the victim); Fiallo-Lopez, 78 Wn. App. at 726 (in one count of delivery of cocaine, providing a "sample" at one site followed by delivering a "larger amount" at a different location, the acts were part of a continuing course of conduct because, although they were separated in time and place, they were intended to bring about the same "ultimate purpose"); State v. Garman, 100 Wn. App. 307, 314, 984 P.2d 453 (1999) (separate criminal acts demonstrated a continuing course of conduct where the evidence supported that the acts were part of a scheme with the common objective of stealing money from the city); State v. Marko, 107 Wn. App. 215, 221, 27 P.3d 228 (2001) (threatening statements directed at different people during a ninety-minute time period formed a

continuing course of conduct that did not require a unanimity instruction or election by the State).

Here, evaluating the evidence in a common sense manner shows that Evanoff's two threats to bomb were part of a continuous course of conduct. Importantly, the two threats were intended to achieve the same common objective: to get the attention of Bank of America employees so that Evanoff could immediately get money from his bank account.

Evidence of this common objective is pervasive throughout the record. Immediately upon entering the bank and contacting a bank teller, Evanoff told him that "he wasn't going to leave until [the bank teller] fixed his account." 2RP 23. After making the first threat to blow up the teller and the Bank of America, Evanoff's first statement to the bank manager was, "You guys are going to give me my money." 2RP 37. While the bank manager attempted to figure out why Evanoff had been unable to access money using his ATM card, Evanoff made the second threat to bomb, "I'm just going to kill you guys and blow up the bank." 2RP 39. Evanoff recalled telling the bank manager, "that I was going to get my money some way or another." 2RP 74.

The bank manager withdrew cash from Evanoff's account and once Evanoff had the money, he exited the bank. 2RP 40. When talking to the police, Evanoff said he had a "problem with the bank and that they wouldn't give him his money." 2RP 51. Evanoff's acts demonstrated that the two threats were part of a continuous course of conduct directed toward the single goal of quickly obtaining money.

Notably, Evanoff directed his threats only to bank employees, even though there were five or six customers in the lobby of the bank. 2RP 23. This is further evidence that Evanoff's purpose was singular and directed toward getting his money from bank employees.

Evanoff's threats also happened in the same "time frame" and "identifying place." Both threats to bomb were made in the same place, inside the North Bend branch of Bank of America. 2RP 22. Although the exact times of Evanoff's two threats to bomb are not precisely reflected, the record shows that both were made within a short time period. Evanoff made the first threat after interrupting the bank teller. 2RP 23-24. Upon seeing Evanoff's interaction with the teller, the bank manager intervened and directed Evanoff to sit at her desk so she could assist him.

2RP 26, 36. Evanoff made his second threat to bomb while the bank manager was trying to determine why he had been unable to get money using his ATM card. 2RP 38-39.

Evanoff cites State v. Alvarez to support his claim that his threats were not part of a continuous course of conduct. 74 Wn. App. 250, 872 P.2d 1123 (1994). Evanoff's analysis is inapplicable to the present issue before this Court. While ignoring case law developed to determine whether acts are part of a continuous course of conduct for *jury unanimity* analysis, Evanoff instead cites to a case analyzing whether a single threat alone can be *sufficient evidence* for an antiharassment charge. The court's analysis in Alvarez contributes nothing to a determination of whether Evanoff's threats constitute the same course of criminal conduct.

Evanoff's threats served the same objective and occurred within the same time frame and identifying place. Evaluating the acts in a common sense manner demonstrates that the two threats to bomb were part of the same course of conduct. Thus, the trial court did not need to provide a unanimity instruction nor did the State need to elect which threat was the basis for the charge. Evanoff's right to a unanimous jury was not violated.

2. THE COURT ERRED BY ORDERING MENTAL HEALTH TREATMENT WITHOUT FOLLOWING THE STATUTORILY-REQUIRED PROCEDURE.

Evanoff argues that the trial court erred when it ordered him to obtain a mental health evaluation and follow all treatment recommendations. The State concedes that the trial court did not follow the statutorily-required procedure before ordering mental health treatment.

A trial court may order a mental health evaluation and treatment only when the court has considered a presentence report and has made findings that the defendant's mental illness contributed to his crimes. RCW 9.94B.080; State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007); State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). Failure to follow this procedure may be raised for the first time on appeal. Jones, 118 Wn. App. at 204.

The trial court certainly had cause to be concerned about Evanoff's mental health based on his behavior during the commission of the charged offense, his history of threatening behavior toward others, and his history of mental illness. 3RP 6-7,

10-11. However, there was no presentence report for the trial court to consider and the court did not make the requisite findings.

Under Jones, Lopez, and Brooks, the trial court erred when it ordered mental health treatment. This matter should be remanded for the trial court to consider whether a mental health evaluation is appropriate under RCW 9.94B.080. Jones, 118 Wn. App. at 211.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Evanoff's conviction for threats to bomb or injure property and remand for the trial court to consider whether a mental health evaluation is appropriate.

DATED this 8 day of May, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
LINDSEY M. GRIEVE, WSBA #42951
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

