

NO. 73804-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD WASHINGTON,

Appellant.

FILED  
Jul 19, 2016  
Court of Appeals  
Division I  
State of Washington

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN D. GAIN

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

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 acts are part of a continuous course of conduct, neither a unanimity instruction nor election is necessary. Here, Washington made four telephone calls to the victim on one day during a period of time that spanned an hour and twenty minutes. In these calls, he made threats to kill her and her two sons, and the threats were of the same character and made with the same objective: to frighten her. Evaluating the evidence in a common sense manner, does the evidence show that the threats were part of the same continuous course of conduct?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Edward Washington was charged by amended information with felony telephone harassment. CP 59. When Washington requested that the jury be given a Petrich instruction, the State responded that the calls were a continuing course of conduct, and the trial court concluded that a Petrich instruction was

not appropriate. 3RP 86-87<sup>1</sup>. A jury found Washington guilty as charged. CP 60.

Washington was sentenced to nine months in jail. CP 112; 4RP 14.

## 2. SUBSTANTIVE FACTS.

The Honorable Judge Brian Gain presided over the trial court. 1RP 1. Faye Givens testified at trial that she received four telephone calls from Washington on March 10, 2015; the first call at 10:20 a.m., the second at 11:10 a.m., the third at 11:40 a.m., and the fourth at 11:41 a.m. 2RP 122, 134; 3RP 31-33. She did not answer the call received at 11:40 a.m. 3RP 33. She called 911 at 11:43 a.m. 3RP 33.

Givens testified on direct examination that in the first call, Washington said he was going to come shoot Givens's son, smoke them, and blow up her house and shoot her in the process. 2RP 123. Givens testified that she had heard the phrase "smoke someone" before, and it was in the context that the speaker was going to shoot someone. 2RP 124-25. Givens said that

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<sup>1</sup> The Verbatim Report of Proceedings consists of four volumes. The State has adopted the following reference system: 1RP (7/14/15), 2RP (7/15/15), 3RP (7/16/15), and 4RP (7/31/15).

Washington also told her that he was going to come to her house, shoot up her house, he had a .45, and [she] knew that he would do it, he told her she could call the police, and to get ready, prepare for a funeral. 2RP 126. She thought that in the second call

Washington was talking about blowing up the house. 2RP 128.

On cross-examination, Givens was unsure whether Washington's threats to smoke everybody, her son Anton, her, and [that] "she should call the police because [she] knew he would do it" were in the first call or second call. 3RP 19. She testified that she had told police that in the second call, Washington said "stay where you are because I'm going to come and smoke all of you." 3RP 20. She testified that she had told police that in the third call, Washington told her "I'm coming to your house to shoot up everybody. You can tell your son Jonze too." 3RP 20.

Givens testified that she told police that Washington had told her he was going to bomb her house. 3RP 20-21. She agreed that it was not in her initial statement to police, but stated she had told police that Washington was going to shoot up her house. 3RP 21.

Givens did not remember specifically what Washington said in the third call, nor did she remember the order of all of the conversations. 2RP 129. All of the threats made by Washington

came during the three phone calls she answered from him on March 10, 2015. 2RP 129, 134.

Givens called Washington back at 10:29 a.m. on March 10, 2015, after receiving the first call from him. 3RP 31. Between receiving the first and second calls from Washington, Givens received a call from her parents and from her son. 3RP 32. Washington then called her again at 11:10 a.m., she called her son at 11:13 a.m., and she called Washington back at 11:15 a.m. 2RP 134; 3RP 32. Givens testified that she called her son to find out if Washington had called him and made the threats to him. 2RP 136. She called an unknown person at 11:38 a.m. and then her son again at 11:40 a.m. 3RP 33. At 11:40 a.m., Washington called her again, but she did not answer. 3RP 33. After speaking with her son, Givens made the decision to call 911. 2RP 136.

In closing, the State did not argue in that the jury “could base its verdict on any of the three calls.” App. Br. 2, 14-16. The State argued that though there were three calls, only one call was listed in the jury instruction, because Washington engaged in a continuing course of conduct, that he intended to harass and intimidate Faye Givens when he made the threats against her and her two sons in those three calls, that his intent was the same, she was the

recipient of all three calls, he is the person who made all three calls, and the threats spanned all three calls. 3RP 89-91.

C. ARGUMENT

1. WASHINGTON'S RIGHT TO JURY UNANIMITY WAS PROTECTED WHERE THE THREATS TO HARM THE VICTIM WERE PART OF THE SAME CONTINUING COURSE OF CONDUCT.

Washington 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. Washington'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); State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991), overruled on

other grounds, In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) (applying the continuing course of conduct exception to multiple acts of assault against a victim over a two-hour period); State v. Locke, 175 Wn. App. 779, 803, 307 P.3d 771 (2013) (series of email threats to governor formed a continuing course of conduct).

Here, evaluating the evidence in a common sense manner shows that Washington's threats were part of a continuous course of conduct. Importantly, the threats were intended to achieve the same common objective: to harass, intimidate, and torment Faye Givens.

Evidence of this common objective is pervasive throughout the record. From the time of the first call, with the exception of 10-20 seconds, Washington was angry and was ranting. 2RP 124; 3RP 35-36. When asked what Washington had said to her, she said "Mr. Washington was a little bit irate. He was telling me that my son had said something to this lady friend of his, and he was going to come shoot him, smoke us, and blow up my house and all this kind of stuff, and shoot me in the process." 2RP 123.

Givens testified that Washington told her he was going to come to her house and shoot up her house, he said he had a .45,

[she] knew that he would do it, she could call the police, and told her to get ready, prepare for a funeral. 2RP 126.

Givens thought that Washington threatened to blow up the house in the second call. 2RP 127-28. Washington told her "you better be glad you're not going to be home, you better not go home," and she assumed that he was going to be [carrying out his threats] within a small period of time. 2RP 130. Washington knew she was not at home because she had told him she was at work; she thought she had maybe told him this in the first phone call. 2RP 130.

Givens did not remember specifically what Washington said in the third call, nor did she remember the order of all the conversations. 2RP 129. The threats made by Washington on the day in question were made in those three phone calls. 2RP 129. She was in the same place when she received all of the threats from Washington. 2RP 129.

Washington's repeated phone calls to Givens demonstrated that the multiple threats were part of a continuous course of conduct directed toward the single goal of frightening and harassing her.

Notably, Washington directed his threats only to Givens, though he was good friends with and had known her sons for years. 2RP 121; 3RP 10-11. This is further evidence that Washington's purpose was singular and directed toward frightening and harassing Givens.

Washington's threats occurred in the same "time frame" and "identifying place." The threats were all made via telephone to Givens on March 10, 2015. 2RP 122, 129. They were made between the times of 10:20 a.m. (the time of the first call) and 11:40 a.m. (the time of the third call). 2RP 134.

Washington'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 threats made to Faye Givens 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. Washington's right to a unanimous jury was not violated.

In reviewing a multiple acts case in which there has been no election by the State or unanimity instruction by the trial court, the proper standard for determining whether the error is harmless is if a

rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, J., concurring), review denied, 105 Wn.2d 1011 (1986). Based on the evidence, there was no reason for the jury to have a reasonable doubt that any of the calls were made or received, nor for them to doubt the threatening nature of the calls. The defense essentially presented no evidence.

2. THE RECORD IS NOT SUFFICIENTLY DEVELOPED AS TO WHETHER THE APPELLANT HAS THE FUTURE ABILITY TO PAY COSTS; APPELLANT'S MOTION TO PRECLUDE A FUTURE REQUEST IS NOT RIPE.

This Court should not foreclose the State's option to seek appellate costs in this case, should it prevail, because the record is too limited to make such a determination at this stage. As in most cases, the appellant's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record does not contain information about the appellant's financial status — except for the simple declaration from the appellant that he was unemployed before he was in jail, found in his motion and declaration for order allowing appeal in forma pauperis — and the

State did not have the right to obtain information about the appellant's financial situation. CP 47.

An order authorizing appointment of appellate counsel addresses only an appellant's present financial circumstances and ability to pay appellate costs up front. It does not address future ability to pay or ability to pay over time. It is the future ability to pay, instead of simply the current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments). See also State v. Shelton, 72848-2-I, 2016 WL 3461164, at \*7 (Wash. Ct. App. June 20, 2016) (challenge to DNA fee not ripe until State seeks to collect, and appellant has not shown future inability to pay); State v. Stoddard, 192 Wn. App. 222, 228-29, 366 P.3d 474 (2016) (constitutional challenges to DNA fee fail because they "assume his poverty" while "the record contains no information, other than Stoddard's statutory indigence for purposes of hiring an attorney," that he will not be able to pay the fee).

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Washington's conviction for felony telephone harassment and to deny his request to preclude the State from seeking appellate costs.

DATED this 19<sup>th</sup> day of July, 2016.

Respectfully submitted,

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