

NO. 66315-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TODD A. SMITH,

Appellant,

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER, JUDGE

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
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A. ISSUES PRESENTED

When the State presents evidence of multiple acts indicating a continuous course of conduct, a unanimity instruction is not required. A continuing course of conduct occurs when the facts support a finding that the conduct in each instance was for the furtherance of the same purpose. Here the evidence showed the threats made by the defendant were committed within a relatively short period of time, were directed towards the same victim, and the ultimate purpose of both acts by the defendant were to place the named victim, Officer Sullivan, in reasonable fear that the threats would be carried out. If a unanimity instruction is not given, that error is harmless if a reasonable jury could find that the facts support a finding of guilty beyond a reasonable doubt in each incident. Does the defendant fail to show that a unanimity instruction was required and that lack of that instruction was not harmless error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Todd A. Smith was charged in Count I with Felony Harassment and in Count II with Malicious Mischief in the Third Degree. CP 1-2. Smith was

tried by jury before King County Superior Court Judge Ronald Kessler. At trial Smith did not testify or present evidence. The jury found Smith guilty as to Count I and as to Count II. CP 36-37¹. Smith has been convicted of a level 3 offense and received an offender score of 3. The trial court imposed a standard range 10 month sentence for the Felony Harassment conviction and a consecutive, suspended 12 month sentence for the Malicious Mischief conviction and 24 months probation. Smith timely appealed. CP 39-49.

2. SUBSTANTIVE FACTS

On the evening of July 9, 2010, Rebecca Bolte was at the Wayward Vegan Café, located in the city of Seattle, attending a fundraising event being hosted by the cafe. 2RP 41-42. At about 8:30 pm Ms. Bolte observed Todd A. Smith come from out of the café, wrap his hand in some clothing and then punch the 5'x 5' plate glass window in the front of the café. 2RP 43-45. The window shattered covering the inside of the café with broken glass. 2RP 43, 55. After breaking the window, Smith charged away but a group of patrons, about 20 to 30, surrounded him and tried to talk with him and keep him there until the police arrived. 2RP 45-46.

¹ The State Adopts Smith's citation to the record: 1RP – 10/11/10; 2RP – 10/12/10; 3RP – 10/13/10; 4RP – 10/14/10; 5RP – 10/29/10

Officer David Sullivan responded to a call indicating some type of disturbance at the Wayward Café. 2RP 66-67. When Officer Sullivan arrived he was the first officer on scene and observed a crowd of about 20 people surrounding Smith. 2RP 67-69. Officer Sullivan observed Smith to be upset; he was bleeding and wasn't making a whole lot of sense when responding to questions. 2RP 68. Officer Sullivan also noticed that Smith smelled and appeared to be intoxicated. 2RP 69. Officer Sullivan patted Smith down to check for weapons, of which none were found. 2RP 69. Shortly thereafter numerous other officers responded and Seattle Fire Department was also dispatched to the café to treat cuts on Smith's left hand. 2RP 70. An American Medical Response (AMR) ambulance was also called to transport Smith to UW medical center² for additional treatment. Officer Sullivan observed Smith at the back of the ambulance and confirmed where they were taking him. 2RP 71-72.

AMR employees, Michael Anderson, along with his partner were dispatched to the Wayward café to transport Smith to the University of Washington for medical treatment. 3RP 8. Once they arrived, Anderson and his partner proceeded to assist Smith to the stretcher. 3RP 9. Anderson observed that Smith was uncooperative and appeared agitated in nature. 3RP 9. With the assistance of the fire department Smith was

² From here after the UW medical center is the "hospital" referred to throughout the

finally secured on the stretcher in three seatbelts, shoulder harness and soft restraints and placed him in the back of the ambulance. 3RP 10-11.

Anderson rode alone with Smith in the back of the ambulance while his partner drove to the hospital. 3RP 11-12. Anderson observed Smith going on “verbal rampages,” and making nonsensical statements. 3Rp 12-13. However, a few moments after hearing the nonsensical talking Smith became “very, very quiet” and in a “very, very clear voice he stated “that after he got out of jail he was going to go back to the café and start killing people.” 3RP13. Anderson informed Smith that he was required by law to report any threats he heard and Smith proceeded by saying “that he would kill any cops that try to stop him.” 3RP 13.

Anderson informed Smith that he was required by law to report any threats he heard. 3RP 13. Once Anderson arrived at the emergency department he meet up with police about 20-30mins after the ambulance had arrived and provided a statement regarding the threats he heard Smith make. 3RP 14-15.

Officer Sullivan arrived at the hospital where he initially took a statement from one of the ambulance crew. 2RP 72-73. Officer Sullivan, being the primary officer on the case had the role of supervising Smith while he received treatment and then to ultimately reassume custody of

remainder of the brief.

him and take him back to the station to be processed. 2RP 73-74. When Officer Sullivan entered the area where Smith was being treated he chose to sit outside the room but with a view toward him because Smith was agitated by his presence. 2RP 74-75. Smith began yelling at Officer Sullivan and “lurching” toward him on his gurney. 2RP 75. Officer Sullivan observed that when the medical staff attended to Smith he became quiet but would become agitated again once they left and Officer Sullivan was left watching him. 2RP 75. Smith told Officer Sullivan that “I’m going to kill you” “I’m going to kill you and your family.” 2RP 77-78. Smith also looked carefully at Officer Sullivan’s name tag and repeated his name, D.Sullivan, several times in a manner suggesting he was attempting to memorize it. 2RP 78.

As a police officer, Officer Sullivan is, with some regularity, the target of nondescript threats such as “Wait until I get out” or “Boy, if I see you on the street.” 2RP 65. However, Officer Sullivan believed Smith’s threats were different in nature because he not only believed Smith but also because Smith was “very specific about his intent to harm me, to kill me.” 2RP 86, 95. Officer Sullivan approximated that he was with Smith at the hospital for about an hour, until Smith was done receiving treatment. 2RP 80. During the time Officer Sullivan was with Smith at the hospital

he did not hear Smith make any threats towards anyone other than himself.
2RP 80.

After Smith was done receiving treatment, Officer Sullivan called several other officers to the ER in order to escort and transport Smith to the police station. 2RP 80.

C. ARGUMENT

1. A UNANIMITY JURY INSTRUCTION WAS NOT REQUIRED BECAUSE THERE WAS A CONTINUING COURSE OF CONDUCT

The defendant contends that the State presented evidence of two distinct acts but only charged the defendant with one count of felony harassment; thus, creating a requirement for a unanimity instruction. The right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury and thus may be raised for the first time on appeal. State v. Gooden, 51 Wn. App. 615, 617, 754 P.2d 1000 (1988) citing to State v. Handyside, 42 Wn. App. 412, 415, 711 P.2d 379 (1985); State v. Girchel, 41 Wn. App. 820, 706 P.2d 1091 (1985).

A unanimous verdict is assured if either: (1) the State elects the act upon which it relies for the conviction, or (2) the jury is instructed that all twelve jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572,

683 P.2d 173 (1984)³; see also State v. Stark, 48 Wn. App. 245, 738 P.2d 684 (1987). However, in Petrich the Washington State Supreme Court carves out an exception to the unanimous verdict requirement for a continuing course of conduct. The Court states:

Under appropriate facts, a continuing course of conduct may form the basis of one charge in an information. But “one continuing offense” must be distinguished from several distinct acts,” each of which could be the basis for a criminal charge. To determine whether one continuing offense may be charged, the facts must be evaluated in a commonsense manner.

Petrich, 101 Wn.2d at 571, 683 P.2d 173.

- a. **No unanimity instruction was required because the defendant’s threat to kill the named victim made in the ambulance and then again at the hospital were part of a continuing course of conduct**

In determining whether there is a continuing course of conduct, this court evaluates the facts in a commonsense manner considering, (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose. State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010); see also, State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). In distinguishing between distinct criminal acts and a continuous course of conduct, this court has held

³ Apart from its enunciation of the harmless error test, Petrich remains good law.

“that ‘evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred ...,’ while ‘evidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct....’”

Brown, 159 Wash.App. at 14, citing, State v. Fiallo-Lopez, 78 Wash.App. 717, 724, 899 P.2d 1294 (1995).

The court in Petrich cites a factually relevant case that supports the continuing offense theory. The case, United States v. Berardi, 675 F.2d 894 (7th Cir. 1982), involved a defendant who committed three acts designed to intimidate a witness at trial but was charged with only one count of obstruction of justice. The court found the defendant’s single objective was to influence the witness; therefore, his acts constituted a continuing course of conduct. Id. at 898.

In Berardi, the alleged acts of obstruction occurred within a relatively short period of time, were committed by one defendant, involved a single witness, and were in furtherance of the defendant’s solitary goal of influencing the witness to prevent them from revealing to the grand jury the circumstances of the property assessment. Id.

The defendant’s course of conduct in Berardi is similar to Smith’s course of conduct. The ambulance threat and the threat at the hospital

State v. Kitchen, 110 Wn.2d 403, 406, 756 P.2d 105 (1988).

occurred within a relatively short period of time, were both committed by one defendant and were in furtherance of Smith's solitary goal of placing Officer Sullivan in reasonable fear that the Smith would carry out his threat to kill him.

To be convicted of felony harassment, the State must prove beyond a reasonable doubt that the defendant knowingly threatened to cause immediate or future bodily injury and used words or conduct that places the person in reasonable fear that the threat would be carried out. RCW 9A.46.020⁴. Furthermore, if a person harasses another person by threatening to kill the person threatened or any other person, the harassment constitutes a class C felony. Id.

The State concedes that in closing the prosecutor mentioned two specific instances where the defendant made threats to kill another person or persons. The first threat occurring in the ambulance when Smith after being advised by Anderson that he is legally obligated to report any threats

⁴ The relevant portion of RCW 9A.46.020 provides:

- (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
 - ...
 - (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.

to police, that he would “kill any cops that try to stop him” from going back and killing people at the café. 3RP13. The second threat occurring at the hospital when Smith said to Officer Sullivan, “I’m going to kill you” I’m going to kill you and your family.” 2RP 78.

Both threats could have constituted independent violations of RCW 9A.46.020 and could have been charged in separate counts. However, it is a well established rule that the decision as to “[w]hether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion. Petrich, 101 Wn.2d at 572. While the State could have brought two separate counts of felony harassment, the State fairly interpreted Smith’s threats as a continuous course of conduct.

In support of the State’s theory of the case, which the jury accepted, the Prosecutor in closing argued that “[t]he idea, the thought starts forming in the ambulance. Sure he doesn’t name Officer Sullivan, but then we can see where it goes from there. His anger at maybe being arrested, maybe being in restraints, then escalates to Officer Sullivan who comes to guard him.” 3RP 47. The ambulance threat is mentioned because it provides important context and gives weight to the hospital threat.

Furthermore, the threats were sequential in time, occurring within a couple hours of each other, were both committed by Smith, and were in furtherance of the defendant's objective of placing Officer Sullivan in reasonable fear that the threats to his life would be carried out by Smith. The defendant's behavior in the ambulance and then towards Officer Sullivan at the hospital were part of his continuing course of conduct. Therefore, no unanimity instruction was required.

b. Even if a unanimity instruction was required in this case, that error was harmless because a reasonable jury could still have found the defendant guilty beyond a reasonable doubt

When the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. State v. Loehner, 42 Wn. App. 408, 411-412, 711 P.2d 377 (1985) (Scholfield, J., concurring), review denied, 105 Wn. 2d 1011 (1986); see also State v. Gitchel, 41 Wn. App. 820, 823, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985).

Although Smith made threats at two separate locations the threats were made as part of a continuous course of conduct intended to place Officer Sullivan in reasonable fear that the threats would be carried out. However, even if this court finds that a unanimity instruction was necessary, the lack of such instruction was, nevertheless, harmless error.

The error was harmless because a reasonable jury could find the defendant guilty beyond a reasonable doubt for the threat made in the ambulance or the threat made at the hospital. The threat made in the ambulance was brought to the attention of Officer Sullivan via the statement he took from Anderson once he arrived at the hospital. Officer Sullivan at this time became aware of the threat and it would be reasonable for a jury to believe that Officer Sullivan believed the threat was directed towards him and that it placed him in reasonable fear that the treat would be carried out. The court should reject the defendant's argument and affirm his conviction.

D. CONCLUSION

Based on the foregoing reasons, this court should affirm the Appellant's conviction.

DATED this 1 day of August, 2011.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

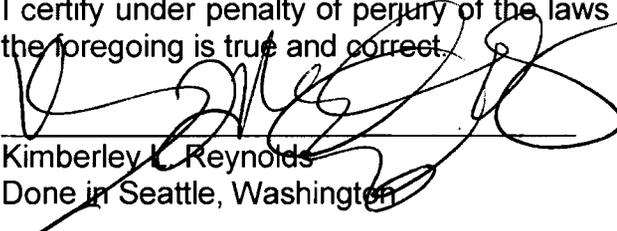
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. TODD A. SMITH, Cause No. 66315-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Kimberley L. Reynolds
Done in Seattle, Washington

8/2/11

Date

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