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NO. 68736-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES ALLEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly refused to instruct the jury to reach a unanimous verdict as to which act constituted the assault element of the offense where two acts were a continuing course of conduct?

2. Did the trial court properly exercise its discretion in ruling that defendant's statements were not substantially more prejudicial than probative?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Seattle Police Officer Matthew Pasquan was on duty October 19, 2011, in full official uniform overseeing the Occupy Seattle Protest at Westlake Park in downtown Seattle, Washington. He was located on the west side of the park. 4/10/2012 RP 29-35. While on shift that evening, Officer Pasquan heard yelling coming from a group of people approximately 50-60 feet away. When he looked at the group, he saw the defendant in a shoving match with another white male. He saw Allen was observed swinging his arms toward the crowd. 4/10/2012 RP 36-37, 149. Allen was yelling "Fuck all those niggers and spics." None of the officers were of

African-American ethnicity. 4/9/2012 RP 10. Suddenly, Allen began running toward Officer Pasquan who was accompanied by Officer Diamond and Officer Bailey nearby. 4/10/2012 RP 36-37.

Allen ultimately ran toward Officer Diamond and attempted to spit at him, but did not hit him. Allen continued running and turned around to yell "Fuck all those niggers". 4/10/2012 RP 38-39. Allen also yelled "Fuck the cops", as he ran away from the crowd. 4/10/2012 RP 180. Officers Shank and Jones, who were also on duty, gave chase after Allen and tackled him a short distance away. Allen wrestled with the officers but was ultimately placed in handcuffs. 4/10/2012 RP 124-25.

While walking Allen to the patrol car, the defendant turned to Officer Jones and spat at him. However, Officer Jones was able to avoid the spit. 4/10/2012 RP 129, 189-90. Allen yelled "Fuck the Niggers. Fuck the clowns. Fuck the cops." 4/10/2012 RP 188. Officer Shank then pulled Allen's hood over his face, while they continued escorting him to a patrol car. Once at the patrol car, Officer Shank began to pat down Allen for weapons. Allen turned around and spat on Officer Shank's face striking his left cheek. 4/10/2012 RP 131-32. Allen was taken to the ground by officers and a spit sock was placed over his head. R4/10/12 RP 134.

Once they gained control over Allen officers again immediately attempted to place the defendant in the patrol car. While trying to physically force Allen into the backseat, the spit sock slipped off and Allen spat in Officer Shank's face again, striking him in his eyes and face. 4/10/2012 RP 136-38. At that time, Officer Jones heard someone say the spit sock came off. When Officer Jones looked up to see where the spit sock was, he found himself 5 inches from Allen's face. Allen then spat in Officer Jones's eye and mouth. 4/10/2012 RP 197.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR TO INSTRUCT THE JURY ON UNANIMITY BECAUSE THE DEFENDANT'S ACTS OF ASSAULT WERE PART OF A CONTINUING COURSE OF CONDUCT.

The trial court's failure to provide a unanimity instruction is presumed prejudicial and subject to harmless error analysis. State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980). Such error is harmless only when a trier of fact could have found each incident proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 573, 683 P.2d 173 (1984).

When there is evidence of several distinct acts, any of which support the basis of a criminal charge, the trial court must ensure the jury reaches a unanimous verdict on one particular incident. State v. Petrich, 101 Wn. 2d at 572. Only where there are “several distinct” acts does Petrich apply, and in determining whether one continuing offense may be charged, the facts must be evaluated in a common sense manner. Petrich, 101 Wn. 2d at 571. When there is more than one act of assault, as part of a continuing course of conduct, the trial court is not required to instruct the jury to return a unanimous verdict as to which act constituted the underlying assault. State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989).

In contrast, Petrich, the defendant had been charged with indecent liberties and second degree statutory rape. In that case, the victim testified to multiple incidents of sexual contact beginning March 1, 1979, with the last episode occurring in December of 1980. Petrich, 101 Wn.2d at 568. Where evidence involves conduct at different times and places, the evidence tends to show “several distinct” acts. Petrich, 101 Wn.2d at 571.

Here, Allen had been charged with two counts of assault in the third degree, one for Officer Jones and one for Officer Shank. The evidence supported more than one act of assault committed by

Allen on both officers during a short period of time with the same victims. Unlike in Petrich, both victim officers testified that Allen had spat on them while escorting him to the patrol car, patting him down for weapons and placing him in the rear of the vehicle. It was not alleged that the defendant assaulted the officers by different means such as physical touching or use of an object.

It was also not alleged that Allen spat at the victims on separate dates, times or places. Using a common sense approach as described in Petrich, the evidence in this case supported a continuing course of conduct of assault against the officers given the small window of time and brevity of their interaction. This is clearly distinguishable from the facts in Petrich.

Because Allen's actions were a continuing course of conduct, the State was not required to elect a particular act, nor was the jury required to return a unanimous verdict as to which act supported their decision. No Petrich instruction was required.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT THE PROBATIVE VALUE OF ALLEN'S STATEMENTS WAS NOT OUTWEIGHED BY ANY SUBSTANTIAL PREJUDICE.

A trial court's decision on the admissibility of evidence will not be reversed absent an abuse of discretion. State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992). Under Washington Rules of Evidence 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The trial court did not abuse its discretion in admitting Allen's statements although they contained racial epithets. The were admissible because they were relevant for showing Allen's intent. 4/9/2012 RP 12. Allen's angry outbursts showed his intent to further offend the officers with his conduct. Particularly when Allen admitted spitting at the officers but claimed it was unintentional. 4/11/12 RP 65. Furthermore, the Court held that such evidence was necessary to provide the jury a full sense of the scene and circumstances. 4/9/2012 RP 15.

Given the claim of accident and the overwhelming evidence from several witnesses, admitting Allen's statements was harmless error and relevant for purposes of showing intent. Statements admitted were not an abuse of discretion and any prejudice was outweighed by its probative value.

D. CONCLUSION

The trial court did err in failing to require the jury to return a unanimous verdict as to a particular act because the acts committed by Allen were part of an ongoing course of conduct. The probative value of the defendant's statements outweighed any prejudice to the defendant.

DATED this 4 day of February, 2013.

Respectfully submitted,

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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 Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JAMES ALLEN, Cause No. 68736-1-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.

Betty A. Huddleston
Name

Done in Seattle, Washington

2/4/13
Date