

NO. 73804-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD WASHINGTON,

Appellant.

FILED
Mar 21, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Gregory P. Canova, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Edward Tyrone Washington was denied his constitutional right to jury unanimity on felony telephone harassment.

Issue Pertaining to Assignment of Error

Washington was charged with one count of felony telephone harassment for threats he allegedly made during three separate calls. Jurors were not instructed that they must unanimously agree as to which call constituted felony telephone harassment and the prosecutor argued jurors could base their verdict on any of the three. Was Washington denied his constitutional right to a unanimous jury verdict?

B. STATEMENT OF THE CASE

The State charged Washington with one count of felony telephone harassment for threatening to kill Faye Givens and her two sons, Anton Givens and Jonze Peters. CP 1.

At trial, Givens described three separate telephone calls she received from Washington on March 10, 2015 at 10:20 a.m., 11:10 a.m., and 11:40 a.m. 2RP¹ 127, 134-35; 3RP 19-21. According to Givens, Washington threatened to kill her and her two sons during the calls; however, Givens's testimony regarding the nature of the threats was inconsistent with her

¹ Washington refers to the verbatim reports of proceedings as follows: 1RP—July 14, 2015; 2RP—July 15, 2015; 3RP—July 16, 2015; 4RP—July 31, 2015.

reports to police officers immediately after the alleged threats were made. 2RP 126-34; 3RP 19-20. For instance, Givens testified Washington threatened to blow up her house, but also acknowledged she never disclosed this threat to law enforcement. 2RP 128; 3RP 20. Thus, the jury was presented with convoluted evidence—it was not clear which threats, if any credible threats at all, were made during each call.

Based on Washington's discrete calls, defense counsel proposed a Petrich² unanimity instruction. 3RP 86. Despite the three calls being 50 and 30 minutes apart, respectively, the State asserted the calls constituted one continuing course of conduct. 3RP 86-87. The trial court refused to give a Petrich instruction. 3RP 87. Defense counsel excepted to the trial court's refusal. 3RP 88.

In closing, the prosecutor did not elect a single telephone call that constituted the crime of felony telephone harassment. Rather, the State argued the jury could base its verdict on any of the three calls and contended the calls were a single continuing course of conduct. 3RP 90-91.

The jury found Washington guilty of felony telephone harassment. CP 60; 3RP 124-27.

² State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

The trial court sentenced Washington to a standard range sentence of nine months. CP 112. The trial court waived all nonmandatory legal financial obligations. CP 111; 4RP 15. This timely appeal follows. CP 117-18.

C. ARGUMENT

1. WASHINGTON WAS DENIED HIS RIGHT TO A UNANIMOUS JURY

Criminal defendants have a constitutional right to a unanimous verdict by a 12-person jury. CONST. art. I, § 22; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), abrogated in part on other grounds by In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). When the State presents evidence of more than one act that could form the basis of the single charge, the State must elect which act the jury should rely on in deliberations or the trial court must instruct the jury to be unanimous on a specific act. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984), overruled in part on other grounds by Kitchen, 110 Wn.2d at 405-06 & n.1; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911); State v. Osborne, 39 Wash. 548, 552, 81 P. 1096 (1905).

The Washington Supreme Court has succinctly explained Washington law on the jury unanimity requirement:

In Washington, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in

the information has been committed. When the prosecutor presents evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. In multiple act cases, 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. Crane, 116 Wn.2d 315, 324-25, 804 P.2d 10 (1991) (citations omitted).

Here, the jury was instructed that to convict Washington of felony telephone harassment, it had to find beyond a reasonable doubt

(1) That on or about March 10, 2015, the defendant made a telephone call to another person;

(2) That at the time the defendant initiated the phone call the defendant intended to harass, intimidate, or torment that other person;

(3) That the defendant threatened to kill the person called or any member of the family or household of the person called[.]

CP 74.

The complaining witness, Faye Givens, testified Washington phoned her four times on March 10, 2015; Givens answered three of the calls. 2RP 127, 134-35; 3RP 19-21. Thus, there were three separate acts—three threatening telephone calls—per the State's evidence that potentially

constituted felony telephone harassment. See 3RP 91 (prosecutor arguing Washington was the “person who made all three calls, and the threats span those three calls”).

According to Givens, during the first call, received at 10:20 a.m., Washington stated “he was going to come to my house and shoot up my house.” 2RP 126, 134. In this initial call, Givens testified that Washington said “he had a 45, and I know that he would do it” and told Givens “to get ready, prepare for a funeral.” 2RP 126. Givens told police that during the first call, Washington said, “I’m going to smoke everybody, your son Anton, you, call the police because you know I will do it[.]” 3RP 19. Givens said she probably hung up on Washington because “he was talking like that.” 2RP 126.

During the second call, received at 11:10 a.m., Givens testified, “I think the second call was when he was going to blow up the house . . . he was glad I’m not at home because I could get blown up with the house.” 2RP 128, 134. This was inconsistent with what Givens told police, which was that in the second call Mr. Washington said, “stay where you are because I’m going to come and smoke all of you.” 3RP 20. In light of this inconsistency, Givens acknowledged that she might never have told police that Washington said he was going to bomb or blow up her house. 3RP 20-21.

With respect to the third call she answered, received at 11:40 a.m., Givens could not remember specifically what Washington said. 2RP 129. Givens also stated she could not remember the order of all the conversations. 2RP 129. However, on the day of the calls, Givens told police that in the third call Washington said, “I’m coming to your house to shoot up everybody. You can tell your son Jonze, too[.]” 3RP 20.

Given that there were three separate calls, made at 10:20, 11:10, and 11:40, and given that Givens’s testimony about the calls’ contents differed from what she told police, jurors could have entertained reasonable doubt as to which call or calls contained threats to kill. This is especially true of the second call: Givens testified that Washington threatened to blow up her house during the second call, yet the police reports showed Givens never told law enforcement about this threat. Compare 2RP 128 with 3RP 20. And her reports to police regarding the second call—that Washington said he was going to come “smoke all of you,” 3RP 20—was more consistent with what she told police and testified to with respect to the first call. Jurors could have determined Givens was simply not credible with respect to the blowing-up-the-house threat because she never told police about it, and therefore could have concluded that there were doubts whether Washington conveyed any threats to kill during the second call. Given the equivocal evidence regarding the specific threats in all of the calls, but especially the

second call, jurors certainly could have had reasonable doubt regarding which call or calls contained the threats.

Despite the three separate calls and the serious evidentiary discrepancies among them, jurors were never instructed they had to be unanimous regarding which call constituted the crime of felony telephone harassment. Because the jurors were never instructed to be unanimous, it is impossible to say that they were unanimous as to which of Washington's three acts was criminal.

Nor did the prosecutor elect a single telephone call that constituted the crime of felony telephone harassment. On the contrary, she argued that any of the three calls constituted felony telephone harassment: "His intent was the same. She's the person who received all three calls, he's the person who made all three calls, and the threats span those three calls." 3RP 91. The lack of election or a unanimity instruction violated Washington's constitutional right to a unanimous jury.

Because of the three separate telephone calls Givens testified about, defense counsel proposed a Petrich unanimity instruction. 3RP 86. The State argued that the three calls—even though they were separated by 50 minutes and 30 minutes, respectively—was one continuing course of conduct. 3RP 86-87. The trial court agreed with the State, stating it was

“satisfied that Petrich instruction is not appropriate.” 3RP 87. Defense counsel formally excepted to the denial of the Petrich instruction. 3RP 88.

The State and trial court were mistaken that three calls constituted one continuing course of conduct. “To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner.” State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). “[W]here the evidence involves conduct at different times and places, then evidence tends to show ‘several distinct acts.’” Id. (quoting Petrich, 101 Wn.2d at 571; Workman, 66 Wash. at 294-95).

Here, the first call was received at 10:20, the second call was received almost an hour later at 11:10, and the third call was received at 11:40. The temporal space between the calls alone suggests the calls were not one continuing course of conduct but three separate and distinct acts. In addition, between Washington’s calls, not only did Givens speak to several other people, she also called Washington back after both his first and second calls. 3RP 30-33. Construing the facts in a commonsense manner, Washington’s calls that were separated by 50 and 30 minutes and otherwise interrupted by other communications did not constitute a single continuing course of conduct.

Because neither the prosecutor nor a Petrich instruction informed the jury it must unanimously determine which of three separate acts constituted

felony telephone harassment, Washington's constitutional right to a unanimous verdict was violated. This court should reverse and remand for a new trial.

2. THIS COURT SHOULD DENY APPELLATE COSTS

The lack of jury unanimity at trial means that Washington should prevail on appeal, but, in the event he does not, this court should deny any request by the State for appellate costs.

This court indisputably has discretion to deny appellate costs. RCW 10.73.160(1) ("The court of appeals . . . may require an adult offender convicted of an offense to pay appellate costs." (emphasis added); State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719, at *4 (Jan. 27, 2016) (holding RCW 10.73.160 "vests the appellate court with discretion to deny or approve a request for an award of costs").

There are several reasons this court should exercise discretion to deny appellate costs. The trial court determined Washington was "unable by reason of poverty to pay for any of the expenses of appellate review." Supp. CP ___ (Sub No. 47; Order Authorizing Appeal In Forma Pauperis, Appointment of Counsel and Preparation of Record). In the declaration Washington submitted in support of indigency, Washington stated he could contribute nothing toward the expense of his appeal, noting he was unemployed before he was jailed for the current offense. Supp. CP ___ (Sub

No. 46; Motion and Declaration for Order Allowing Appeal In Forma Pauperis and Substitution of Counsel). Based on the trial court's determination of indigency, Washington is presumed indigent throughout this review. RAP 15.2(f); Sinclair, 2016 WL 393719, at *7. In addition, the trial court waived all nonmandatory legal financial obligations, including court costs and fees for court-appointed counsel. CP 111; 4RP 15.

This court has no basis in the record to determine that Washington has a present or future ability to pay. This court should accordingly decline to assess appellate costs against Washington in the event he does not substantially prevail on appeal.

D. CONCLUSION

Because Washington was denied his constitutional right to a unanimous jury, he asks that this court reverse his conviction and remand for retrial.

DATED this 21st day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73804-6-1
)	
EDWARD WASHINGTON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EDWARD WASHINGTON
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SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF MARCH 2016.

X *Patrick Mayovsky*