

68114-1

68114-1

NO. 68114-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE TOMS aka JAMIL MU-TAZZ,

Appellant.

RECEIVED
SUPERIOR COURT
KING COUNTY
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KW

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Verdicts in criminal trials require juror unanimity. Toms struck Officer Ducre twice during a two to three minute period as he, Toms, attempted to escape being apprehended. Was a unanimity instruction required?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Robert Lee Toms with vehicle prowl in the second degree, assault in the third degree, and a violation of the uniform controlled substances act for possession of cocaine. CP 9. On October 10, 2011, Toms' trial commenced before the Honorable Richard Eadie. 1 RP 3.¹ On October 18, 2011, the jury found Toms guilty as charged on all counts. CP 26, 27 and 28.

¹ Reports of Verbatim Report of Proceedings consist of five volumes from five separate dates not inclusive of the sentencing hearing. The volumes are not consecutively paginated. In this brief, the 10/10/11 report of proceeding before the Honorable Richard Eadie is cited as 1 RP; the 10/11/11 report of proceeding is cited as 2 RP; and each subsequent date's report of proceeding is sequentially numbered accordingly.

2. SUBSTANTIVE FACTS

On May 14, 2011, Jared Hooper and Khalil Safarian-Tousi attended the Seattle Sounders soccer game in Seattle. 3 RP 120-21, 136-37. Hooper drove his car to the game. 3 RP 136. Instead of parking at the stadium, Hooper parked his car on the street in the International District of Seattle near Jackson Street and 10th Avenue. 3 RP 137.

Around 10:30 p.m., after the game ended, Hooper and Safarian-Tousi walked from the stadium back to Hooper's car. 3 RP 122-23, 138. Upon arriving at the location where Hooper parked his car, both Hooper and Safarian-Tousi saw someone inside Hooper's car. 3 RP 123, 138. The person in Hooper's car, later identified as Toms, was leaning into the passenger compartment through a window with his legs hanging out of the car. 3 RP 122, 125, 141. Upon seeing Toms inside the car, Hooper immediately ran towards the car. 3 RP 139. As Hooper approached Toms, Toms removed himself from the car. 3 RP 139. Toms ducked as Hooper attempted to grab him, causing Hooper to miss and fall to the ground. 3 RP 124, 132, 141. Toms ran into the wooded area parallel to the street. 3 RP 141. Hooper chased after Toms, following him into the wooded area. 3 RP 141. As Hooper

followed Toms, Toms said to him, "I have company." 3 RP 142.

Eventually, Toms reached a ledge adjacent to the wooded area and jumped down some 10 to 20 feet, evading Hooper. 3 RP 144.

Hooper returned to his car where he and Safarian-Tousi contacted a police officer. 3 RP 144-45. Hooper provided a description of Toms to the police officer. 3 RP 145.

Seattle Police Department Officer Paul Ducre was on routine patrol when he heard a radio broadcast about a car prowl in the area of 10th Avenue and South King Street. 2 RP 30. Officer Ducre responded to the area where the suspect was seen running.

2 RP 31. Officer Ducre responded to an area called the "jungle."

2 RP 32. He parked his marked patrol car and saw an individual, later identified as Toms, standing about 30 yards away.

2 RP 34-36; 3 RP 59-60.

Officer Ducre approached Toms. 2 RP 40. As he approached, Toms turned towards Officer Ducre and immediately started running away from Officer Ducre. 2 RP 40. Officer Ducre identified himself as a police officer and commanded Toms to stop. 2 RP 40-1. Toms did not stop. Id. Officer Ducre chased after him. 2 RP 41.

Officer Ducre caught up to Toms as he reached a concrete barrier on the outskirts of the jungle. 2 RP 46. Officer Ducre shoved Toms in the back, causing the two to fall to the ground. 2 RP 46. As Officer Ducre was disentangling himself from the shrubbery, he felt Toms kick him in the left side of his lower back. 2 RP 48. Toms stood up and started running away again. 2 RP 50. Officer Ducre stood up and gave chase. 2 RP 51.

Officer Ducre followed Toms, but eventually lost sight of him for about two or three minutes. 2 RP 51. Officer Ducre pulled out his flashlight and shined it in a sweeping motion looking for evidence. 2 RP 53. As Officer Ducre scanned the area with his flashlight he walked toward a pillar where he saw Toms' leg sticking out in his path. 2 RP 53. Officer Ducre tripped over Toms' leg and fell to the ground. 2 RP 53. Officer Ducre rolled awkwardly onto his neck and strained a muscle during the fall. 2 RP 54.

Officer Ducre ordered Toms to show his hands. 2 RP 54. Toms did not follow his commands. 2 RP 54. Toms tried to stand up, contrary to the officer's directions, so Officer Ducre holstered his handgun and physically took Toms to the ground. 2 RP 55. While on the ground, Toms tried to escape Officer Ducre's hold. 2 RP 55. Officer Ducre believed Toms was either trying to escape

or wanted to continue to fight. 2 RP 55. Officer Ducre had to punch Toms in the face to get him to stop turning his body away from Officer Ducre. 2 RP 55.

Officer Trinh responded to Officer Ducre's location and took Toms into custody. 3 RP 59-60.

C. ARGUMENT

A PETRICH INSTRUCTION WAS NOT REQUIRED BECAUSE THE ASSAULT WAS A CONTINUING COURSE OF CONDUCT.

In Washington, a conviction may stand only when a unanimous jury concludes that the defendant committed the criminal act charged in the information. State v. Crane, 116 Wn.2d 315, 324-25, 804 P.2d 10 (1991); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). To ensure jury unanimity when there is evidence of multiple acts, the State must elect a single act upon which it will rely for a conviction, or the court must instruct the jury that all must agree on a specific criminal act. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

However, the rule articulated in Petrich applies only when the State presents evidence of "several distinct acts." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 253 (1989) (quoting Petrich,

101 Wn.2d at 571). It does not apply when the State presents evidence of a continuous course of conduct. Handran, 113 Wn.2d at 17 (quoting Petrich, 101 Wn.2d at 571). See State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) (continuing course of conduct applied to multiple acts of assault over a two-hour time period, resulting in a fatal injury); Handran, 113 Wn.2d at 17 (continuing course of conduct exception applied to acts of assault occurring in one place, during a short period of time, by the same aggressor upon a single victim, in an attempt to secure sexual relations).

To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Handran, 113 Wn.2d at 17. When the evidence involves conduct at different times and places, it tends to show several distinct acts. Handran, 113 Wn.2d at 17 (citing Petrich, 101 Wn.2d at 571); State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911). In contrast, when the evidence shows that a defendant engaged in a series of actions intended to achieve the same objective, it supports the characterization of those actions as a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). A continuing course of conduct requires an ongoing enterprise with

a single objective. State v. Gooden, 51 Wn. App. 615, 619-20, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988).

In Handran, the defendant climbed through a window into his ex-wife's apartment. 113 Wn.2d at 12. Handran's ex-wife awoke to Handran kissing her. Id. She demanded he leave the apartment, but instead of doing so, he pinned her down and at one point struck her in the face. Id. The defendant offered no jury unanimity instruction and no instruction was given. Id. at 13. The jury found the defendant guilty of burglary in the first degree. Id. The Court held that the facts, when viewed in a commonsense manner, evidenced a continuing course of conduct as to the assault underlying burglary in the first degree. Id. at 17. In doing so, the Court noted that the criminal conduct occurred in one place during a short period of time between the same aggressor and victim. Id.

In Crane, the defendant ostensibly provided periodic child care for a three year-old boy over a several week period. 116 Wn.2d at 317-21. During this period of time, the boy displayed indicia of being physically abused on multiple occasions. Id. Eventually, a neighbor of Crane called 911 after she observed the boy's face red, swollen, and beginning to blister, consistent with him being burned. Id. at 321. The boy died two days after

paramedics rushed him from the defendant's home. Id. at 321. At trial, multiple physicians who examined the victim before and after his death testified. Id. at 322-23. Each medical expert agreed the fatal injuries would have rendered the boy unconscious within minutes to hours after being hit, and that it was highly unlikely he would have regained consciousness at any time thereafter. Id. at 329. After considering the testimony of the physicians, the court concluded that a two hour window, two days before the boy's death was the most logical time when the fatal injuries were inflicted by Crane. Id. at 330. In its analysis applying the "continuous conduct" exception, the court noted, "a unanimous jury verdict would not be required as to each incident of assault during this short period of time; instead, the jury would only need to be unanimous in its determination that the conduct occurred." Id. at 330.

Like in Handran and Crane, the assaultive conduct committed by Toms occurred over a short period of time, involved the same parties and was conducted for the same purpose: to evade capture. This was a continuing course of conduct and no unanimity instruction was required.

First, Toms' conduct involved the same victim, Officer Ducre. Toms first kicked Officer Ducre near the concrete barrier then he tripped him near a concrete pillar.

Second, Toms' conduct against Officer Ducre occurred over a very short period of time. In Crane, where a continuous course of conduct was found, the conduct in question occurred over a period of some two hours. In this case, the incident took place over as little as two minutes or as long as three minutes; a period that is substantially shorter than the period in Crane.

Third, the conduct was committed by Toms for the same purpose, namely to facilitate his evasion from capture. Toms' acts in furtherance of his evasion from capture started when he avoided the pursuit of Hooper at the scene of the vehicle prowl, continued with his threat to Hooper that he had friends with him, and continued further as he fled from Officer Ducre, even after the officer identified himself as a police officer. After Officer Ducre initially pushed Toms to the ground, Toms kicked him in the lower back and immediately continued on his path of escape. Officer Ducre gave chase, and as Officer Ducre approached his hiding place, Toms tripped Officer Ducre. Toms' trip was another step in furtherance of his evasion from capture. Toms did not stop

attempting to evade capture even after that. After tripping Officer Ducre, Toms fought with Officer Ducre. Only after Officer Ducre struck Toms with his fist did Toms finally submit. In sum, the assaults by Toms involved the same victim, occurred over a very short period of time, and facilitated the same objective of evading capture, thus they were a continuing course of conduct and no unanimity instruction was required.

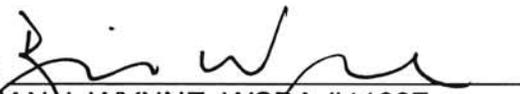
D. CONCLUSION

The assaultive conduct committed by Toms occurred over a short period of time, involved the same parties and was conducted for the same purpose: to evade capture. Therefore, the assaultive conduct was a continuing course of conduct and no unanimity instruction was required.

DATED this 25TH day of September, 2012.

Respectfully submitted,

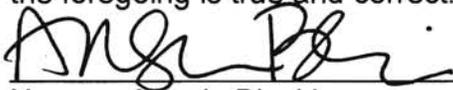
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Rabi Lahiri, 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. ROBERT LEE TOMS AKA JAMIL MU-TAZZ, Cause No. 68114-1-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.



Name Angela Blocki
Done in Seattle, Washington

9/25/12

Date 9/25/12

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