

68736-1

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No. 68736-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES RICHARD ALLEN,

Appellant.

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

The Honorable Chris Washington

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Allen's right to a unanimous verdict when it failed to instruct the jury on unanimity.

2. The trial court erred in admitting the specific racist statements uttered by Mr. Allen where the content of his speech was not an element of the offense and its admission was substantially more prejudicial than probative.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a constitutionally protected right to a unanimous jury. In order to insure jury unanimity where the State alleges several acts, each of which may constitute the charged offense, the prosecutor must either elect the act or the court must instruct on jury unanimity. Here, the State proved several acts which could have constituted an assault on the police officers, but the prosecutor did not elect which act constituted the act upon which he relied, nor did the court instruct on jury unanimity. Was Mr. Allen's right to jury unanimity violated requiring reversal of his convictions for assault of a police officer?

2. Evidence that is irrelevant and/or more prejudicial than probative is not admissible. Here, the trial court allowed evidence of

the content of Mr. Allen's racist utterances and refused an offer to admit only that Mr. Allen had uttered racist statements. This evidence was not relevant to any element of the offense of assault of a police officer and its effect was far more prejudicial than its probative value. Is Mr. Allen entitled to reversal of his convictions where the trial court abused its discretion in admitting this evidence?

C. STATEMENT OF THE CASE

On October 19, 2011, officers from the Seattle Police Department were present at Westlake Park downtown overseeing an Occupy Seattle demonstration. 4/10/2011RP 31-32. At some point, the officers' attention was diverted by a man, later identified as appellant James Allen, shouting racial slurs. 4/10/2012RP 35. Mr. Allen was heard yelling, "Fuck those niggers and spics!"¹ 4/10/2012RP 36. The officers watched as Mr. Allen left the group and ran directly at the officers. 4/10/2012RP 38. Mr. Allen ran into one of the officers, allegedly spat at him and began running away towards Pine Street. *Id.* at 39.²

¹ While the content of Mr. Allen's expletives is disturbing, the actual words are critical for understanding the issues raised in this brief.

² Mr. Allen was not charged with this conduct. The spittle did not land on the officer.

Several of the police officers began chasing Mr. Allen. Seattle Police Officer Timothy Jones caught up to Mr. Allen and took him to the ground. 4/10/2012RP 184. Mr. Allen was quickly handcuffed and was escorted to a nearby police car by Officers Jones and Gabriel Shank. 4/10/2012RP 127. As he was assisted to his feet before being escorted to the car, Mr. Allen allegedly spat at Officer Jones. 4/10/2012RP 189. It did not hit Officer Jones. *Id.* The officers either pulled Mr. Allen's hood over his head to keep him from spitting, or placed a "spit sock" over his head which effectively did the same thing. 4/10/2012RP 130, 190.

According to the officers, Mr. Allen calmed himself as he was being escorted to the car. 4/10/2012RP 191. Once at the car, Mr. Allen again became combative, and again spat at Officers Jones and Shank, who in return, took Mr. Allen to the ground. 4/10/2012RP 45-46, 192-94.

The officers picked Mr. Allen up and tried to forcibly place him in the police car. 4/10/2012RP 195-96. While attempting to get his feet in the car, Mr. Allen allegedly spat directly into the face of Officer Jones.

Mr. Allen was charged with two counts of third degree assault, one count relating to Officer Jones, the other relating to Officer Shank. CP 6-7. Prior to trial, Mr. Allen moved *in limine* to bar the State from admitting his racist statements as irrelevant to the charges on which he was being tried, and the content of the statements was substantially more prejudicial than probative. 4/9/2012RP 8-10, 12-14. Mr. Allen noted he was charged with assault by spitting, not malicious harassment, thus the statements were not relevant. *Id.* Further, Mr. Allen would be substantially prejudiced because the evidence of racial epithets may have a visceral effect upon the jury. 4/9/2012RP 12-14. The State proffered that the statements were proof of motive and intent. 4/9/2011RP 11. The trial court denied Mr. Allen's motion and admitted his statements:

I am going to allow all of the statements. I think it interesting in -- it seems they may be more relevant to a lack of control, at worst an attempt to try to engage the officers, and really it seems that the prejudice is probably minimized. Since from what I am told the individuals this was directed at wouldn't be necessarily offended by the words that were said. So I think that the possible probative value does outweigh the prejudicial effects of these words being testified to by the officers.

...

In this particular case, what comes to my mind, which is it gives some reason for the police officers to decide to be focused on that particular area versus why they picked this one person out. It explains a behavior.

Again, I think really the danger of the prejudicial effect is minimized since at best I think the State could argue it was perhaps intended to just create a sense of unease or some action at the scene versus being focused on a particular individual. And if that person wasn't involved in this case, the perhaps the prejudicial effect would outweigh the probative effect. I think here, it is going to be important for the jury to get a sense of the scene there in terms of what happened. So I'm going to allow the officers to testify to what they heard and specifically the references to race in terms of the words that were used.

4/9/2012RP 11-12, 15-16. The court refused Mr. Allen's request to sanitize the statements, using the generic term "racial epithets" or similar terminology as opposed to the specific statements used:

Well, I mean if -- I just don't think it is a good idea for me to start sanitizing or modifying what was said. I don't know when I would stop then. Then I would be the architect of the facts of this case and that is not a building anyone would want to live in as far as me doing that.

4/9/2012RP 16.

At the conclusion of the trial, the jury was instructed in the "to-convict" instruction:

To convict the defendant of the crime of assault in the third degree, as charged in count [], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 19, 2011 the defendant assaulted [];

- (2) That at the time of the assault [] was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
- (3) That any of these acts occurred in the State of Washington.

CP 22 (Instruction 8 applying to Gabriel Shank); 23 (Instruction 9 applying to Timothy Jones).

In closing argument, the prosecutor told the jury that Mr. Allen's acts of spitting were the assaults that were the subject of the charges. 4/11/2012RP 104-05. The prosecutor noted there were five acts of spitting, three involving Officer Jones, two involving Officer Shank. 4/11/2012RP 105. The prosecutor did not elect which acts he was asking the jurors to find, nor did the trial court instruct on unanimity, nor was there a special verdict asking the jurors which act they relied upon.

Mr. Allen was subsequently convicted as charged. CP 8-9.

D. ARGUMENT

1. THE TRIAL COURT FAILED TO ENSURE
THE JURY VERDICT WAS UNANIMOUS
THUS REQUIRING REVERSAL OF MR.
ALLEN'S CONVICTIONS

a. A criminal defendant has a right to a unanimous verdict. A criminal conviction requires that a unanimous jury conclude that the defendant committed the criminal act charged in the information. Art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the State alleges multiple acts resulting in a single charge, either the prosecutor must elect which act she is relying on as the basis for the charge, or the trial court must instruct the jurors that they must unanimously agree that the State proved a single act beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). *See also State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) (“[w]hen the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, *either the State must elect which of such acts is relied upon for a conviction* or the court must instruct the jury to agree on a specific criminal act.”) (emphasis added). If the State fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error stemming

from the possibility that some jurors may have relied on one act or incident while other jurors may have relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).³ Whether the trial court was required to instruct the jury on unanimity is reviewed by this Court *de novo*. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

The failure to elect an act or give a unanimity instruction is presumed prejudicial and subject to harmless error analysis. *Coleman*, 159 Wn.2d at 512; *Kitchen*, 110 Wn.2d at 403. This harmless error test turns on whether a rational trier of fact could have a reasonable doubt as to whether each incident established the charged offense beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06.

b. The multiple acts proven here were multiple acts, not continuing offenses. Here the prosecutor set forth in detail the individual acts committed by Mr. Allen. The first acts by Mr. Allen occurred when the officers had Mr. Allen handcuffed and were

³ Mr. Allen did not propose a unanimity instruction at trial. But appellate courts may review for the first time on appeal a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The right to a unanimous verdict is part of the fundamental constitutional right to a jury trial which may be raised for the first time on appeal. *State v. Bobenhouse*, 166 Wn.2d 881, 912, 214 P.3d 907 (2009).

escorting him to the police car. 4/11/212RP 112. According to the officers, Mr. Allen first spat at Officer Jones, who stepped out of the way and avoided it. 4/11/2012RP 112. Once the officers got Mr. Allen to the police car, again according to the officers, Mr. Allen spat at Officer Shank and it landed on his cheek. 4/11/201RP 113. According to Jones, Mr. Allen then turned his head and spat at him. 4/11/2012RP 113. Finally, in a third incident at the police car, as the officers were getting Mr. Allen seated in the car, a “spit sock” the officers had placed on Mr. Allen’s head slipped off and he spat in Jones’s face. 4/11/2012RP 114. Mr. Allen then turned and spat directly into the face of Officer Shank. 4/11/2012 115. Thus, according to the officers’ testimony and the prosecutor’s closing argument, there were three independent episodes of Mr. Allen spitting at the officers interrupted by periods where Mr. Allen cooperated with the officers.

A unanimity instruction is required only in a multiple acts case. *State v. Furseth*, 156 Wn.App. 516, 520, 233 P.3d 902 (2010). A case is a multiple acts case when ““several acts are alleged and any one of them could constitute the crime charged.”” *Furseth*, 156 Wn.App. at 520, quoting *Kitchen*, 110 Wn.2d at 411. Each of the multiple acts alleged must be “capable of satisfying the material facts required to

prove” the charged crime. *Bobenhouse*, 166 Wn.2d at 894. Here, each act of Mr. Allen spitting arguably was sufficient to support the charged offenses. Thus, the three acts constituted multiple acts.

It may be argued that Mr. Allen’s acts were part of continuing offenses against the two officers, thus negating the requirement of a unanimity instruction. Courts distinguish between multiple acts and continuing offenses. Facts indicating “conduct at different times and places, or different victims . . . tends to show” a multiple acts case. *State v. Love*, 80 Wn.App. 357, 361, 908 P.2d 395, *review denied*, 129 Wn.2d 1016 (1996). But, facts analyzed in a common sense manner that indicate “an ongoing enterprise with a single objective” qualify as a continuing offense. *Id.* at 361.

Here, the acts were not an ongoing enterprise with a single objective, rather, there were three independent events that coincidentally involved assaults on the officers. Each of the three events was separated by periods of time when Mr. Allen cooperated with the officers. As a consequence, the three acts of spitting were at different times and different locations, thus requiring a unanimity instruction. The court erred in failing to instruct the jury on unanimity.

c. The trial court's failure to instruct on unanimity was not harmless. The error in failing to instruct on unanimity is presumed prejudicial. *Coleman*, 159 Wn.2d at 512. The error is harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06.

The only acts for which there was a quantum of evidence were the final acts of Mr. Allen's spitting at Officers Shank and Jones. Three officers, which included Shanks and Jones, testified regarding these acts. Contrast that with the testimony regarding the other acts. The officers were confused about when the "spit sock" was applied, Jones testifying it was when they were lifting Mr. Allen up from the ground, Shanks testifying the officers merely pulled Mr. Allen's hood over his head and the "spit sock" was placed on him much later. Given this disparity in testimony about minor events, it calls into question whether and how many of the other acts occurred or whether in the heat of the moment, the officers were merely confused about what had occurred. Given this discrepancy, there was not sufficient evidence to support all of the acts and the trial court erred in failing to instruct on unanimity.

2. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THE SPECIFIC RACIAL EPITHETS MR. ALLEN UTTERED, AS THEY WERE IRRELEVANT AND SUBSTANTIALLY MORE PREJUDICIAL THAN PROBATIVE

a. Only relevant evidence that is not more prejudicial than probative is admissible. Only relevant evidence is admissible. ER 401. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. ER 401; *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Evidence is unduly prejudicial where it is likely to stimulate an emotional response rather than a rational decision and is therefore not admissible. ER 403; *Powell*, 126 Wn.2d at 264. The decision to admit evidence lies within the discretion of the trial court and will be reversed when the court abuses that discretion. *State v. Hamlet*, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997).

b. The specific racial slurs uttered by Mr. Allen were irrelevant and substantially more prejudicial than probative. The State proffered this evidence as essentially *res gestate* evidence: to complete the scene. The evidence of the specific statements made by Mr. Allen should have been excluded as irrelevant and substantially more prejudicial than probative.

To be relevant, there must be a logical nexus between the evidence and the fact to be established. *State v. Burkins*, 94 Wn.App. 677, 692, 973 P.2d 15, *review denied*, 138 Wn.2d 1014, 989 P.2d 1142 (1999). Here there was no logical nexus. The State merely had to prove an assault on a police officer. Statements made by the defendant were completely irrelevant to proof of this offense, especially in this context where there was no evidence that either of the police officers was Hispanic or African-American and where Mr. Allen was not charged with malicious harassment or any other offense where the content of the speech was an element of the offense.

Assuming *arguendo* that the alleged racial slurs made by Mr. Allen were relevant, ER 403 specifically provides for the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Under ER 403, the more probative the evidence is, the less likely that a 403 factor will be of sufficient consequence to substantially outweigh the probative value. The probative value, if any, of Mr. Allen's alleged racial slurs was clearly "substantially outweighed" by the danger of unfair prejudice. The State's line of questioning appears not only to have created the danger of unfair prejudice, but to have been calculated to have exactly that

effect. While the alleged racial statements may have been relevant as *res gestae* evidence, the State's repeated reference to the alleged racist statements undoubtedly prejudiced Mr. Allen's right to a fair trial. "The requisite element of simple assault is mens rea, not men's race." *Tate v. State*, 784 So.2d 208, 214-15 (Miss., 2001).

The trial court erred when it allowed the State to admit the content of Mr. Allen's racial utterances.

c. The error in admitting the racial epithets materially affected the outcome of the trial. "Nonconstitutional error requires reversal when, within reasonable probabilities, the error materially affected the outcome of the trial." *State v. Beadle*, 173 Wn.2d 97, 120-21, 265 P.3d 863 (2011); *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

The racial epithets painted Mr. Allen as a racist where the content of his language was not necessary to prove any element of the charged offenses. Assault in the third degree merely requires proof of an assault on a police officer. Mr. Allen was not charged with malicious harassment or any other offense where the content of his speech was an element of the offense. Thus, the admission of the specific language as opposed to the generic "racial epithets" offered by

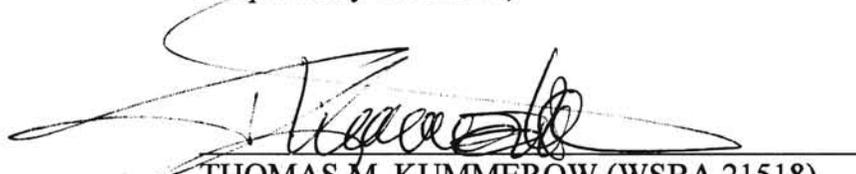
the defense allowed the jury to convict Mr. Allen based upon what he said. As a consequence, the error was not harmless. Mr. Allen is entitled to reversal of his convictions.

E. CONCLUSION

For the reasons stated, Mr. Allen requests this Court reverse his convictions and remand for a new trial.

DATED this 14th day of November 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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Respondent,)	
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JAMES ALLEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF NOVEMBER, 2012.

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