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NO. 68845-6-I

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

REC'D
FEB 25 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DIMITRI EVANOFF,

Appellant.

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

The Honorable Sharon Armstrong, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his right to a unanimous jury verdict.

2. The trial court erred when it ordered appellant, as a condition of community custody, to obtain a mental health evaluation and follow all recommended treatment.

Issues Pertaining to Assignments of Error

1. Where the state charged appellant with one count of threatening to bomb or injure property, but the state offered evidence of threats appellant made to two different people during separate encounters, and failed to make an election in closing argument, and where the court failed to instruct jurors they must be unanimous as to which act formed the basis for the charge, was appellant deprived of his right to a unanimous verdict?

2. The trial court is authorized to order a mental health evaluation and treatment only where certain statutory prerequisites are satisfied. These prerequisites were not met in appellant's case. Should this community custody condition be stricken?

B. STATEMENT OF THE CASE¹

1. Trial

Following a jury trial in King County Superior Court, appellant Dimitri Evanoff was convicted of threatening to bomb or injure property. CP 44-51. The state's prosecution centered on a dispute occurring at the North Bend branch of Bank of America, where Evanoff was a customer. CP 1-6; 2RP 63.

Evanoff is retired and receives social security. 2RP 64, 76. At midnight on the third of every month, his social security check is directly deposited into his Bank of America account. 2RP 64, 76. On the date of the dispute – January 3, 2012 – however, Evanoff was unable to access his funds at the usual time. 2RP 65.

Evanoff experienced the same problem the preceding month, as well, and felt he had been treated poorly by bank employees when he sought assistance to remedy the problem. 2RP 65. Accordingly, on the morning of January 3, Evanoff first went to the Snoqualmie police department to request a police escort to the bank, to ensure a respectful resolution. Unfortunately,

¹ This brief refers to the transcripts as follows: 1RP – 4/17/12; 2RP – 4/18/12; and 3RP – 4/20/12.

the police were unable to accommodate Evanoff's request, so he went to the bank unaccompanied. 2RP 67.

Charles Delurme is a merchant teller at the North Bend Bank of America branch. 2RP 21-22. He testified he was helping another customer that morning when Evanoff interrupted and said there was a problem with his account. 2RP 23, 28. Evanoff insisted he wasn't leaving until it was fixed. 2RP 23. Delurme told Evanoff he would have to get in line or have a seat in the lobby and wait for one of the personal bankers to assist him. 2RP 24. According to Delurme, Evanoff reiterated he wasn't leaving until his account was fixed and said he was going to kill Delurme and blow up the building. 2RP 24. Delurme was shocked but not afraid. 2RP 26, 32.

Bank manager Jana Day overheard that Evanoff needed assistance² and brought Evanoff to her desk to address his complaint. 2RP 36. Day remembered Evanoff from an earlier occasion, possibly one week to one month before, during which Evanoff was reportedly angry the bank would not allow him to withdraw money. 2RP 35, 44. According to Day, Evanoff's account

² Day did not hear Evanoff make any threats to Delurme. 2RP 36, 45.

was overdrawn at the time. 2RP 35. Although Evanoff was angry, he left peaceably after Day explained the bank would not give him any money. 2RP 35-36.

On this occasion, Evanoff was upset he was unable to access the funds from his social security check. According to Day, Evanoff was speaking rapidly and said that if the bank did not give him his money, he would blow it up. 2RP 36-38. He did not understand why his debit card wasn't working. 2RP 37. Day testified that in the interest of expediting Evanoff's departure, she assisted in withdrawing the desired amount from Evanoff's account and he left. 2RP 40.

Day was in the process of contacting the bank's security office to inform them of what happened, when Evanoff re-entered the bank. 2RP 40. Evanoff testified he returned because he still needed a replacement for his temporary, non-functioning debit card. 2RP 65, 67. Day assisted Evanoff again, but in the meantime, had directed another employee to contact the police. 2RP 40-42, 47.

Evanoff was just leaving the bank with his new debit card when he was contacted by police. He believed everything had been straightened out at that point. 2RP 67. Evanoff denied

stating to Delurme that he would blow up the bank. 2RP 69. Evanoff did not think he said anything about blowing up the bank to Day. 2RP 69. Evanoff admitted he raised his voice, but only after Day did so first. 2RP 69.

2. Sentencing

The state requested the court sentence Evanoff under the first time offender sentencing alternative so that it could also impose 12 months of community custody. 3RP 3-4, 7; RCW 9.94A.650.³ As a condition, the state wanted the court to require

³ RCW 9.94A.650 provides, in relevant part:

(2) In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

(3) The court may impose up to six months of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year.

(4) As a condition of community custody, in addition to any conditions authorized in RCW 9.94A.703, the court may order the offender to pay all court-ordered legal financial obligations and/or perform community restitution work.

Evanoff to undergo a mental health evaluation and follow any recommended treatment. 3RP 4, 7.

Evanoff objected to community custody, as well as the mental health condition. 3RP 5-6, 9-10. Evanoff explained he is a well adjusted and happy person. 3RP 9-10. Although he had some issues with depression in the past, he sought professional help at that time and successfully addressed the issues. 3RP 10.

Nonetheless, the court indicated it saw a pattern of overreaction on Evanoff's part and therefore would follow the state's recommendation "so that you [Evanoff] can at least have an up-do-date mental health evaluation to see if there is anything that is causing your overreaction." 3RP 11. Accordingly, the court imposed 12 months of community custody and the condition that Evanoff undergo a mental health evaluation and follow any recommended treatment. CP 47, 51. This appeal timely follows. CP 53.

C. ARGUMENT

1. EVANOFF'S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED.

In criminal prosecutions, the accused has a constitutional right to a unanimous jury verdict. U.S. Const. amend. VI; Wash.

Const., art. 1, § 22. To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the act. State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990).

In Washington, a defendant can only be convicted when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). In multiple acts cases where several acts are alleged, any one of which could constitute the crime charged, the jury must be unanimous as to which act constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001). To ensure jury unanimity, either the State must elect the act upon which it will rely for conviction or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1990), cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572.

When the trial court fails to give a proper unanimity instruction, the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established

the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411 (citing State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985) (Scholfield, J., concurring), rev. denied, 105 Wn.2d 1011 (1986)). This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational jury could have a reasonable doubt as to any one of the incidents alleged. Id. (citing State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)).

Here, the state presented evidence of two acts, either of which could have formed the basis for the charge. First, Delurme testified Evanoff approached him, complained there was something wrong with his account, declared he was not leaving until it was fixed and said he was going to kill Delurme and blow up the bank. 2RP 24.

Second, Day – who did not overhear the threat Evanoff reportedly made to Delurme – testified that when subsequently assisting Evanoff at her desk, he said that if the bank did not give him his money, he would blow it up. 2RP 36-38.

Accordingly, the state presented evidence of two separate threats to bomb or injure property made to two different people.

The state did not elect which act it was relying on and the court did not instruct the jury it must be unanimous. This was error.

In response, the state may argue no unanimity instruction was required, on grounds the state's allegations comprised a continuing course of conduct. The Petrich rule applies only where the state presents evidence of several distinct acts, not where the evidence indicates a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). This argument should be rejected, however.

In the double jeopardy context, the harassment statute – RCW 9A.46.020⁴ – has been interpreted as criminalizing a single

⁴ Under RCW 9A.46.020:

- (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
 - (ii) To cause physical damage to the property of a person other than the actor; or
 - (iii) To subject the person threatened or any other person to physical confinement or restraint; or
 - (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or

threat. In State v. Alvarez, 74 Wash.App. 250, 872 P.2d 1123 (1994),⁵ the Court of Appeals found that a harassment charge could be based on one threat. Id. at 260, 872 P.2d 1123. Under the harassment statute, a person was guilty if, among other things, he or she “knowingly threatens” another. Id. at 255, 872 P.2d 1123 (quoting RCW 9A.46.020). The defendant argued that there has to be more than one threat, noting that the legislative statement of intent targeted “repeated invasions of a person's privacy by acts and threats which show a pattern of harassment.” Id. at 256, 872 P.2d 1123 (quoting RCW 9A.46.010). The court noted that the legislature could have said “course of conduct” in the statute, but did not, and declined to import the language of the statement of intent into the elements of the statute. Alvarez, 74 Wn. App. at 260.

another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. “Words or conduct” includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

Emphasis added.

⁵ This holding was affirmed in State v. Alvarez, 128 Wn.2d 1, 12, 904 P.2d 754 (1995).

The threatening to bomb or injure property is worded similarly to the harassment statute. Under it, “[I]t shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, ... or any other building[.]” RCW 9A.02.020 (emphasis added).⁶ Nor is there any “course of conduct” language used in the statute. Like the harassment statute, the plain language indicates the threatening to bomb statute is aimed at criminalizing a single act, rather than a course of conduct. Because two such acts were alleged here, and the jury was not instructed it

⁶ The full text of the statute provides:

(1) It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

(2) It shall not be a defense to any prosecution under this section that the threatened bombing or injury was a hoax.

(3) A violation of this section is a class B felony punishable according to chapter 9A.20 RCW.

must be unanimous, Evanoff's right to a unanimous jury verdict was violated.

The error was not harmless. Significantly, Evanoff denied threatening Delurme but stated merely that he did not think he threatened Day. Accordingly, it is possible some jurors entertained a reasonable doubt as to the reported threat to Delurme. Because Evanoff was denied his right to a unanimous jury verdict, this Court should reverse his conviction.

2. THE TRIAL COURT ACTED OUTSIDE ITS STATUTORY AUTHORITY BY ORDERING A MENTAL HEALTH EVALUATION AND TREATMENT AS A COMMUNITY CUSTODY CONDITION.

The court erred in imposing a mental health evaluation and treatment as conditions of community custody. A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). While Evanoff did in fact object to the mental health evaluation, a defendant may challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001). Moreover, an offender has standing to challenge conditions even though he has

not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd., 135 Wn.2d 326, 957 P.2d 655 (1988); see also Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague sentencing condition). The legality of Evanoff's community custody condition therefore is properly before this Court.

RCW 9.94B.080⁷ provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94B.080 authorizes a trial court to order mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v.

⁷ Although the heading to RCW 9.94B.080 indicates that it applies to crimes committed prior to July 1, 2000, the statute is applicable to crimes committed after that date. See Laws of 2008, ch. 231, § 55.

Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). A court may not order an offender to participate in mental health treatment as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." Jones, 118 Wn. App. at 202; accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 ; Brooks, 142 Wn. App. at 850-52.

Although RCW 9.94A.500(1)⁸ authorizes trial courts to order a presentence report where the defendant may be a mentally ill person under RCW 71.24.025, there is no indication such a report was ordered in Evanoff's case. Nor does the record contain any applicable mental status evaluations. And nowhere did the court make the statutorily mandated finding that Evanoff is a mentally ill person as defined by RCW 71.24.025 and that a qualifying mental

⁸ RCW 9.94A.500(1) provides, in pertinent part:

If the court determines that the defendant may be a mentally ill person as defined in RCW 71.24.025, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.

illness influenced his crime.⁹ The trial court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

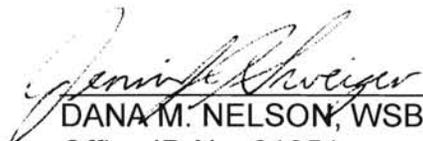
D. CONCLUSION

Because Evanoff was deprived of his right to a unanimous jury verdict, this Court should reverse his conviction. Alternatively, this Court should order the trial court to strike the mental health community custody condition from the judgment and sentence.

Dated this 25th day of February, 2013

Respectfully submitted

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⁹ In fact, in the context of the CrR 3.5 hearing, the court found no evidence Evanoff did not understand what was occurring or that his actions were somehow influenced by mental illness. 1RP 64.