

NO. 72048-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

SEAN G. PATAYSINGH,

Appellant.

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

MARA J. ROZZANO  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

MAILED 25 MAR 10 50

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I  
MARK K. ROE

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## **I. ISSUES**

1. Was a unanimity instruction necessary where the State elected which acts constituted each count of the charged offenses?

2. Should the court have given the jury a unanimity instruction even though the acts were a continuing course of conduct?

## **II. STATEMENT OF THE CASE**

The defendant was charged by amended information with one count of first degree assault with a deadly weapon enhancement (knife) for an incident that took place on December 29, 2013. CP 68. On May 13, 2014, a jury found the defendant guilty as charged, including the deadly weapon enhancement. CP 33, 34.

At trial the jury heard testimony indicating that on December 29, 2013, Luke Oakland, a 43 years old landscaper, went to the Taster's Wok restaurant and bar in Lynnwood to watch a football game in the lounge. Mr. Oakland testified that he regularly frequented the Taster's Wok and that when he entered the bar that day he saw three people he knew from there, witnesses Craig Leake, Robert Lloyd and Chad Tilley. Mr. Leake was seated at a table with a group of his friends. Mr. Oakland was seated at the bar

with Mr. Lloyd and Mr. Tilley. At some point during the game, the defendant entered the bar. The defendant was wearing a suit and a white scarf and carrying a cane. The defendant greeted Mr. Oakland as he walked past him. Mr. Oakland responded even though he had never met the defendant before. 1 RP 53-55, 69-73.

In his statement to the police, the defendant said he recognized Mr. Oakland as a person to whom he had sold marijuana 4 or 5 years earlier. The defendant could not remember the name of the man he had done business with, explaining that he had not seen him for 2 or 3 years. When asked to describe Mr. Oakland that evening, the defendant explained that "I have no contacts in my eyes so I really can't see." The defendant explained the man he had done business with owed him about \$4,500. (exhibit 12 pg 4, 9).

Mr. Oakland watched the rest of the game seated at the bar. At the end of the game, Mr. Oakland saw Mr. Leake step outside to smoke and since he had not seen him for a while, Mr. Oakland took this opportunity to step outside to talk to him.<sup>1</sup> Mr. Leake is a crab

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<sup>1</sup> Mr. Leake testified the defendant and Mr. Oakland were already outside when he stepped out. 1 RP 56.

fisherman in Alaska and had just returned to the area for a brief Christmas break. 1 RP 55, 74.

When he got outside, Mr. Leake was on his cell phone. The defendant was coming towards Mr. Oakland and asked him if he had any change. When Mr. Oakland responded that he did not, the defendant continued advancing and asked him if he had any money. Again Mr. Oakland responded that he did not. The defendant then asked Mr. Oakland, "Where's my fucking money?" and as Mr. Oakland was moving backwards, stabbed him with a knife to the chest. The defendant left the knife in Mr. Oakland's chest and immediately started hitting him with a cane. The defendant hit Mr. Oakland in the arm and shoulder with the cane about four times. Although Mr. Leake was on the phone, he was facing the defendant and Mr. Oakland. Mr. Leake confirmed Mr. Oakland made no threatening gestures, movements or comments towards the defendant. Mr. Leake stated he could hear the two men were talking about money, then he saw the defendant hit Mr. Oakland once in the chest without provocation, Mr. Leake said the defendant then immediately started hitting Mr. Oakland on his shoulder and upper arm with his cane. Mr. Leake stepped in to stop the defendant from hitting Mr. Oakland anymore. The

defendant then fled on foot. It was at this point that Mr. Leake saw the knife in Mr. Oakland's chest, right by his heart. 1 RP 57-59, 62, 76-79.

Mr. Oakland pulled the knife out of his chest. The knife was recovered by police and measured. It had an approximately 5 inch blade. Mr. Oakland was bleeding a lot from the stab wound. His friends had him lay down on the floor of the bar and applied pressure to the wound until aid arrived. Mr. Oakland was taken to Harborview Medical Center where he was in surgery for three hours. The doctors had to cut his sternum completely open. It took 34 stiches to mend the wound. Mr. Oakland described this for the jury, calling it open heart surgery. 1 RP 60-61, 78-80, 95, 105-107; 2 RP 128-131; 2 RP 140.

The defendant was identified by Mr. Oakland, Mr. Leake, Mr. Lloyd as the person who stabbed Mr. Oakland then hit him repeatedly with a cane. 1 RP 56, 73, 93; 2 RP 134. .

A redacted copy of the defendant's statement to the police was played for the jury. Exhibit 12, a transcript of the redacted statement, was admitted for illustrative purposes and the jury was provided copies so they could better understand the recording. In his statement to the police, the defendant had a number of

explanations for what had taken place that night. The defendant initially claimed that he and the victim stepped outside to talk. They began arguing and the victim pulled a knife on him and tried to stab him. The defendant claimed he took the knife away and stabbed the victim in self-defense. The detectives pointed out that it was hard to believe that he was able to do that without receiving some injury. The defendant then admitted he had the knife but denied pulling the knife until the victim lunged at him. The defendant admitted the victim was unarmed. Again, the detectives questioned the possibility of this version. The defendant then admitted he pulled the knife before the victim lunged at him and again claimed he stabbed him in self-defense. When the detectives questioned why a person would lunge at someone with a knife, the defendant again changed his story to say the victim did not lunge at him, but was just moving towards him and ran into the knife, essentially impaling himself on the knife. The detectives pointed out that this didn't make much sense either. The detectives pointed out that the defendant appeared to be trying to think on his feet and was just making it worse. They encouraged him to come clean about what had happened. The defendant eventually admitted that he stabbed the victim out of frustration and anger and that the victim had not

made any threatening move toward him. The defendant specifically said he was not afraid of the defendant or concerned for his safety. He was angry and frustrated at trying to collect the drug debt. The defendant said he didn't intend to kill the victim, just to let him know he was serious about collecting the debt. 2 RP 143-144; Exhibit 12 at 4-28.

In closing argument, the prosecutor carefully argued each element he had to prove beyond a reasonable doubt for the jury. In reference to the "to convict" instruction, the prosecutor argued, that the defendant had stabbed Luke Oakland with the knife that had been admitted into evidence and had beaten him with the cane that had been admitted into evidence. He argued that that met the definition of assault. The prosecutor continued his argument by moving to the second element that he needed to prove; that the assault was committed with a deadly weapon. The prosecutor then argued the knife, with just under a five inch blade, was a deadly weapon, especially in the manner it had been used by the defendant. The prosecutor never argued the cane satisfied this element. 2 RP 200, 203.

When the prosecutor addressed the third element; that the defendant acted with intent to inflict great bodily harm, he argued

that the placement of the knife when he stabbed the knife into Mr. Oakland's chest all the way to the hilt proved that element. The prosecutor added that the jury could deduce the defendant's intent to inflict as much damage as possible from the fact that after he got the knife stuck in Mr. Oakland, he began beating him with the cane, in an attempt to inflict more injury on him. There were the only two references to the cane in the prosecutor's closing arguments. The prosecutor focused the remainder of his argument and his rebuttal on the assault with the knife. 2 RP 203-210; 223-226.

### **III. ARGUMENT**

#### **A. THE PROSECUTOR ELECTED THE ACTS WHICH CONSTITUTED EACH CHARGED OFFENSE.**

Where evidence is presented of several distinct acts constituting a crime occurred the Court has required the State to elect which act is relied upon for a conviction in order to ensure juror unanimity. State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911). The Court announced a modified Workman rule in State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). "The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal

act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement." Id. at 572. Where several acts are alleged, and any one of them could constitute the crime charged the jury must be unanimous in regard to which act constituted the charged crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). In order to ensure juror unanimity the prosecution must either elect which act it relies upon to support the charge or the court must instruct the jury that all 12 must agree that the same underlying act was proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. The Court did not explain how a prosecutor would make an election sufficient to satisfy the unanimity requirement.

One case has held an election was adequately made when considering the manner in which the case was charged, the instructions as a whole, and the prosecutor's closing arguments. State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), disapproved on other grounds, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). There the defendant assaulted victim Jefferson by punching him in the face. He then assaulted victim Jefferson by pointing a gun at Jefferson. As Jefferson fled the defendant fired a

shot. The shot went through victim Carrington's front room window, narrowly missing Mr. Carrington. The defendant was charged with two counts of second degree assault with a deadly weapon. The defendant argued that either assault could have been based on one of the three acts of assault so that the court should have given a unanimity instruction. Id. at 350. This Court disagreed and found the State had made a proper election. This Court looked to the Information and jury instructions which made it clear that the State's case was based on the two assaults involving a deadly weapon. In addition the prosecutor's closing argument made it clear that the threat to Jefferson constituted count I and the near shooting of Carrington constituted count II. Id. at 351-52.

Here the State made an election which was sufficient to ensure juror unanimity. The jurors were given the following instructions at the close of evidence

You have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict."

CP 35.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision

CP 52.

Jury instructions are considered as a whole and viewed in the manner in which an ordinary juror would interpret them. Bland, 71 Wn. App. at 351, State v. Noel, 51 Wn. App. 436, 440, 753 P.2d 1017, review denied, 111 Wn.2d 1003 (1988). An ordinary reading of these instructions informed the jury that they must unanimously agree to return a guilty verdict.

In addition the prosecutor's argument made it clear that the State elected certain acts as each charged count. The prosecutor made it clear in closing argument that the knife, with its almost 5 inch blade was the deadly weapon that proved the second element of first degree assault; that the assault was committed with a deadly weapon.

The prosecutor adhered to Petrich rule by making an election regarding which specific acts constituted the charge. The prosecutor charged one count of first degree assault with a deadly weapon. In closing argument he assigned the assault with a deadly weapon as the assault with the knife. There is no evidence in the record that the jury did not adhere to the acts assigned to charged offense when rendering their verdicts.

**B. THE DEFENDANT'S RIGHT TO A UNANIMOUS VERDICT WAS NOT VIOLATED AS THE TWO ACTS WERE A CONTINUING COURSE OF CONDUCT.**

Even if the prosecutor's argument did not amount to an election, the absence of a unanimity instruction did not deny the defendant a unanimous verdict because the two acts were a continuing course of conduct. The defendant argues that assaulting Luke Oakland with a knife and a cane were two separate acts.

Where several distinct acts are alleged, and any one of them could constitute the crime charged the jury must be unanimous in regard to which act constituted the charged crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), abrogation on other grounds recognized, In re Stockwell, 179 Wn.2d 588, 316 P.3d 107 (2014). In that case in order to ensure juror unanimity the prosecution must either elect which act it relies upon to support the charge or the court must instruct the jury that all 12 must agree that the same underlying act was proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds, Kitchen, 110 Wn.2d at 107.

However, neither a unanimity instruction nor an election is necessary when the acts testified to constitute a continuing course

of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Whether the defendant's acts constitute a continuing course of conduct is evaluated in a commonsense manner. Id. Where the alleged conduct occurs in one place during a short period of time between the same aggressor and victim, the assault constitutes a continuing course of conduct. Id.

Here the evidence shows that the defendant stabbed Luke Oakland, then immediately began striking him on the shoulder and arm with his cane. This all took place in one place during a short period of time between the same aggressor and victim. The defendant's conduct was a continuing course of conduct that supported his conviction for one count of first degree assault.

Even if the defendant's acts could be characterized as distinct, the prosecutor elected any error in failure to instruct on unanimity or to elect which act constituted the crime is harmless if a rational trier of fact could have found each incident prove beyond a reasonable doubt. Handran, 113 Wn.2d at 17-18.

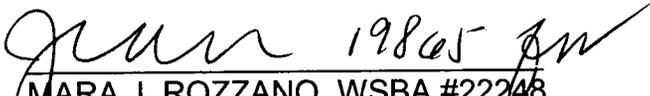
#### **IV. CONCLUSION**

For the forgoing reasons the State asks the Court to decline to review the issue because it is not a manifest constitutional error.

If the Court does review the issue the State asks the Court to affirm the defendant's conviction for first degree assault.

Respectfully submitted on February 24, 2015.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:  19865 JW  
MARA J. ROZZANO, WSBA #22248  
Deputy Prosecuting Attorney  
Attorney for Respondent