

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	No. 66315-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
TODD ALAN SMITH,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: <u>April 16, 2012</u>
	)	
	)	

Cox, J. — When the evidence at trial establishes multiple criminal acts that could each constitute the charged crime, the defendant is entitled to a unanimity instruction or an election by the State of the act relied on for conviction. Here, the State neither alleged multiple acts nor was there evidence of more than one threat to kill a specific police officer that could have supported the charged crime of felony harassment. Neither a unanimity instruction nor an election was required. We affirm.

On the evening of July 9, 2010, the Wayward Vegan Café in the University District of Seattle was crowded with patrons attending a fundraiser event. Without warning, Todd Smith punched his fist through the café’s front glass window and shattered the window. Smith tried to flee, but a group of 20 to 30 patrons followed and surrounded him. Someone called 911. Some of the patrons tried to talk to Smith and calm him down while they waited for the police to arrive.

Police Officer David Sullivan responded to the report of the disturbance. When he arrived at the café, Officer Sullivan found Smith surrounded by patrons with a bleeding hand. Smith appeared to be upset. He also smelled of alcohol, appeared to be intoxicated, and muttered unintelligibly in response to the officer's questions. The officer determined that Smith was unarmed, and that his injuries required medical treatment. Smith complied with the officer's verbal commands and responded to him in a neutral manner. The paramedics arrived and transported Smith to the University of Washington Medical Center.

Emergency Medical Technician, Michael Anderson, rode in the back of the ambulance with Smith. Initially, Smith appeared very agitated and anxious. He made rambling statements that Anderson was unable to understand. Then, Smith became very quiet and in a "very clear voice" said that "after he got out of jail he [would] go back to the café and start killing people."<sup>1</sup> Anderson told Smith that he was required by law to report that type of statement to law enforcement. Smith continued, and said that he would "kill any cops that try to stop him."<sup>2</sup>

Officer Sullivan arrived at the hospital after the ambulance. After taking a statement from the ambulance crew, the officer proceeded to the triage unit where Smith was receiving medical treatment. Officer Sullivan observed that Smith's agitation had greatly escalated since he last saw Smith at the café.

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<sup>1</sup> Report of Proceedings (October 13, 2010) at 13.

<sup>2</sup> Id.

Smith's anger was now specifically directed toward the officer. Officer Sullivan was responsible for supervising Smith, so he could take custody of him after his injuries were addressed. The officer tried to remain out of Smith's line of sight so as not to provoke him.

At one point, Smith was yelling and lurching toward Officer Sullivan. Although he was in four-point restraints, Smith succeeded in inching the gurney toward the officer. Smith told Officer Sullivan "'I'm going to kill you and your family.'"<sup>3</sup> He squinted and craned his neck so he could read Officer Sullivan's badge and repeated his name over and over "like he was trying to memorize [the] name for future reference."<sup>4</sup> Officer Sullivan explained that although he is subject with some regularity to vague threats that he does not consider to be serious, he believed Smith's threat was credible because he was "so very specific and so seemingly intent on remembering" his face and name.<sup>5</sup>

The State charged Smith with felony harassment, for threatening to kill Officer Sullivan, and third degree malicious mischief, for damaging property of the cafe. Following a jury trial, Smith was convicted as charged.

#### UNANIMITY

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<sup>3</sup> Report of Proceedings (October 12, 2010) at 78.

<sup>4</sup> Id.

<sup>5</sup> Id. at 79.

Smith challenges his felony harassment conviction. He contends that the State presented evidence of two distinct threats to kill Officer Sullivan: the threat to kill “any cops” who tried to stop him from returning to the café and killing people, and the threat made directly to Officer Sullivan at the hospital to kill him and his family. Smith argues that because there was evidence of two threats, but only one count of felony harassment, either a unanimity instruction was required or the State was required to elect one of the two threats as the basis for the charge. Because there was no unanimity instruction and the State made no election, Smith claims that constitutional error occurred and his conviction should be reversed.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed.<sup>6</sup> If the State presents evidence of multiple distinct acts that could form the basis of one charge, the State must tell the jury which act to rely on or the court must instruct the jury to agree on a specific act.<sup>7</sup> Although Smith did not raise the issue of a unanimity instruction at trial, he may raise it for the first time on appeal, as it concerns an alleged manifest constitutional error.<sup>8</sup>

The threshold question in determining whether a unanimity instruction

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<sup>6</sup> State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

<sup>7</sup> Petrich, 101 Wn.2d at 572; State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

<sup>8</sup> State v. Bobenhouse, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009).

was required is whether the prosecution was a “multiple acts case.”<sup>9</sup> A multiple acts prosecution occurs when “several acts are alleged and any one of them could constitute the crime charged.”<sup>10</sup> Each of the multiple acts alleged must be “capable of satisfying the material facts required to prove” the charged crime.<sup>11</sup>

The premise of Smith’s argument is that this was a multiple acts prosecution. We reject this premise.

The felony harassment charge was based on a threat to kill Officer Sullivan alone. Specifically, the information stated that Smith committed the crime of felony harassment as follows:

That the defendant TODD ALAN SMITH in King County, Washington, on or about July 9, 1010, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to David Sullivan, by threatening to kill David Sullivan, and the words or conduct did place said person in reasonable fear that the threat would be carried out.<sup>[12]</sup>

Furthermore, the court instructed the jury in the to convict instruction that it had to find that Smith “knowingly threatened to kill David Sullivan immediately or in the future” and that the threat “placed David Sullivan in reasonable fear that

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<sup>9</sup> See id.

<sup>10</sup> State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

<sup>11</sup> Bobenhouse, 166 Wn.2d at 894.

<sup>12</sup> Clerk’s Papers at 1.

the threat to kill would be carried out.”<sup>13</sup> Juries are presumed to follow the court’s instructions.<sup>14</sup>

For these reasons, this was simply not a multiple acts case. There was no chance that the jury was less than unanimous in its verdict on the charge of felony harassment based on a threat to kill Officer Sullivan.

Smith’s threat to kill any police officers who might try to prevent him from committing a future crime at the Wayward Vegan Café when he got out of jail was not specifically addressed to Officer Sullivan. And there was no evidence that the threat expressed to Anderson placed Officer Sullivan in reasonable fear. The threat referencing law enforcement officers was not capable of satisfying the material elements required to prove felony harassment as charged.

Because this was not a multiple acts prosecution, no unanimity instruction was required.

We affirm the judgment and sentence.

Cox, J.

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<sup>13</sup> Clerk’s Papers at 25; see RCW 9A.46.020(1); (2)(b).

<sup>14</sup> State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

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WE CONCUR:

Schiveller, J.

Demp, J.