Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-287

APRIL TERM, 2002

State of Vermont v. Steven D. Ekberg	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Chittenden Circuit DOCKET NO. 4619-8-00 Cncr Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction for disorderly conduct, see 13 V.S.A. 1026, claiming he was denied his right to a unanimous jury verdict. We affirm.

The incident giving rise to defendant's conviction occurred in South Burlington on May 26, 2000. The victim, Andrea Sisino, testified that on that Friday, she was present at the Sheraton conference center in connection with her responsibilities as executive director of the annual Vermont City Marathon. The Marathon held an exposition at the conference center over the weekend with display booths and educational lectures. The exposition also served as the place race participants picked up their race packets. May 26 was the first day of the expo, and runners began picking up their race packets that afternoon.

In the late afternoon of May 26, Ms. Sisino heard defendant's loud and boisterous voice while she was working in the Marathon office just off the Sheraton's lobby. She left the office and saw defendant talking to, and interfering with, runners who were attempting to pick up their race packets. While defendant was engaged with the runners he was looking at Ms. Sisino. Ms. Sisino testified that defendant said in a very loud voice, "There's the fucking kangaroo. Head kangaroo, fucking race director right there. Do you know her? She's the fucking kangaroo." Defendant then began walking towards her. She asked defendant to leave, and said she would call the police if he did not do so. Defendant responded with vulgarities again and urged her to call the police. Ms. Sisino testified that defendant was aggressive and that people began to avoid him. She went back to her office and called the South Burlington police. She testified that she was in her office for "[m]aybe just a couple of minutes."

After calling the police, Ms. Sisino left her office and saw defendant walking towards her in a deliberate and stern manner into the hotel lobby. She informed defendant that she had called the police, and he began calling the police "pussies" and "kitty cats." He approached Ms. Sisino closely, getting within one to two feet of her face and told her she was "such a cunt." Ms. Sisino testified that defendant's behavior frightened her, and that his aggression was escalating. She decided to call the police a second time, this time using her cell phone to call the Marathon's police liaison. Defendant then ran out some glass doors. Ms. Sisino left the building through the front door and observed defendant immediately to her left. Defendant continued to yell vulgarities at Ms. Sisino until the police arrived a few minutes later. The responding officer testified that Ms. Sisino looked very upset and scared when he arrived at the scene.

The State thereafter charged defendant with disorderly conduct. The information alleged that defendant "recklessly

created a risk of causing a public inconvenience by engaging in tumultuous behavior, to wit: by approaching Andrea Sisino in a threatening manner and calling her names, in violation of 13 V.S.A. 1026." Defendant pled not guilty, and the court convened a jury trial. At trial, defendant's strategy was twofold. First, he argued to the jury that his behavior was nothing more than an exercise of his rights under the First Amendment to the United States Constitution. Second, he sought to impeach the victim's testimony by demonstrating that her behavior during the incident was inconsistent with her allegation that his conduct caused her fear. The jury convicted defendant, and he was sentenced to pay a fine and to serve thirty to sixty days, with all but ten days suspended. Defendant timely appealed.

Defendant raises one issue on appeal: the evidence presented at trial showed three separate incidents of disorderly conduct, and the court committed plain error by failing to instruct the jury that it had to be unanimous as to which of the three incidents constituted the crime charged. Without the proper instruction, some jurors might agree that one encounter between the victim and defendant was a criminal violation while other jurors might determine that the State proved a different encounter was criminal; thus, defendant's right to a unanimous jury was impinged without the proper instruction. The encounters defendant alleges were separate and distinct consisted of the first encounter after Ms. Sisino left her office to ask defendant to stop causing a disturbance, the second encounter after she called the police from her office, and the third encounter after she called the Marathon's police liaison. He claims the evidence raised a jury question as to whether his conduct in each case was "threatening" as the information alleged.

When the State's information alleges a single unlawful act and the evidence reflects more than one such act, the State must elect which act it will rely upon for conviction. State v. Gilman, 158 Vt. 210, 215 (1992); State v. Bailey, 144 Vt. 86, 98 (1984). If the acts are "so closely related in time and circumstances as to constitute one continuous offense or transaction," however, no election is required. State v. Holcomb, 156 Vt. 251, 255 (1991). In cases where the defendant failed to preserve the election issue for appellate review, we examine the claim for plain error only. Id. Reversal is warranted "only in rare and extraordinary cases where we find that the omission in the charge and in the State's actions so affects the substantial rights of the defendant that we will notice the error despite the lack of proper objection." Id. Defendant did not ask for the omitted instruction, and his claim here does not meet the plain error standard.

The acts defendant contends were separate and distinct were so closely related in time and circumstances that they were a single continuous offense. The record shows that the victim's encounters with defendant occurred in the same general area over a relatively brief period of time, and involved the same type of conduct, namely spewing vulgarities and acting boisterously in a public place. The victim testified that she had to call the police two times in her effort to get defendant to cease his disruptive behavior. Although the victim was not in defendant's presence during the entire incident, there was no reason for the jury to distinguish between defendant's encounters with her because the evidence suggested defendant was engaging in a continuing course of disorderly conduct, which did not stop until the police arrived.

In addition, the victim's testimony described her fear of defendant throughout the entire incident, suggesting that defendant's conduct at all times was threatening. Moreover, defendant's trial strategy, which focused primarily on his right to free speech, did not distinguish between the acts defendant alleges on appeal were separate and distinct, and he does not allege that his defense was impaired in any way by the claimed error. See Holcomb, 156 Vt. at 255 (no plain error appeared where defense did not distinguish between two acts at trial and where defendant was not hampered in preparing his defense). Finally, even if one considers the entire incident to be three separate events, it is illogical for the jury to believe that one of the events occurred or put the victim in fear and the others did not because defendant's conduct in all cases was substantially similar. Under all these circumstances, we cannot conclude that the alleged error, if any, was so grave as to be plain error requiring reversal.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice