

SUPREME COURT OF NEW JERSEY

Docket No. 086617

STATE OF NEW JERSEY,

Plaintiff-Petitioner,

v.

CALVIN FAIR,

Defendant-Respondent.

On Appeal From a Final Judgment of the Superior Court of New Jersey, Appellate Division, Docket No. A-0913-19

Criminal Action

Sat Below:

Hon. Clarkson S. Fisher, Jr., P.J.A.D.

Hon. Heide W. Currier, J.A.D.

Hon. Patrick DeAlmeida, J.A.D.

***AMICUS CURIAE* BRIEF ON BEHALF OF
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS - NEW JERSEY**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of Criminal Defense Lawyers of New Jersey (“ACDL-NJ”) is a non-profit corporation organized under the laws of New Jersey to, among other purposes, “protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good.” Founded in 1985, ACDL-NJ has over 500 members across New Jersey. Throughout the years, ACDL-NJ has participated as *amicus curiae* in numerous cases before this Court, as detailed in the attached Certification of Aidan P. O’Connor.

PRELIMINARY STATEMENT

The First Amendment to the United States Constitution, and Article I, paragraph 6 of the New Jersey Constitution are clear: no laws may be passed that violate a citizen’s right to free speech, unless such speech falls within one of the well-established exceptions to the First Amendment. As with many other constitutional provisions, our State Constitution provides even greater protections than the First Amendment for our citizens. United States Supreme Court and New Jersey Supreme Court precedent make clear that criminal statutes that impermissibly impinge on a citizen’s right to free speech and expression cannot stand. Thus, the

ACDL-NJ respectfully asks this Court to affirm the Appellate Division, and hold that the “reckless disregard” standard under N.J.S.A. 2C:12-3(a) is unconstitutional, because to constitute a “true threat” the State must prove that a defendant specifically intended to cause terror in making a threatening comment. Without a specific intent standard, subsection (a) crosses the line of constitutionality and must be struck down as written.

Moreover, this particular case presents serious concerns to the defense bar given the risk of a patchwork verdict and lack of unanimity underpinning the guilty verdict returned against Mr. Fair. The State’s attempt to “cast a wide net” in its indictment in this case ultimately worked against it by creating confusion, and obfuscating the jury’s deliberations. To be sure, ACDL-NJ is not arguing that the State cannot proceed on alternative theories of guilt against a defendant. When it does, however, trial courts must carefully craft jury instructions and verdict sheets to make clear that jurors must be unanimous as to the specific subsection, and the specific conduct upon which their verdict stands. Without this requisite level of specificity in the jury charge and verdict sheet, defendants, counsel, and reviewing courts will all be left to speculate as to whether the jury was truly unanimous. That is precisely what happened in this case. ACDL-NJ respectfully asks this Court to affirm the Appellate Division, and reiterate the longstanding mandate under our State Constitution and Rule 1:8-9, that jury verdicts must be unanimous.

PROCEDURAL HISTORY & STATEMENT OF FACTS

ACDL-NJ relies upon the procedural history and statement of facts as set forth in defendant's briefs.

LEGAL ARGUMENT

ACDL-NJ joins in the First Amendment arguments articulated by defendant, and respectfully asks this Court to affirm the Appellate Division's holding that N.J.S.A. 2C:33-2(a) is unconstitutionally overbroad. We add only the following point regarding jury verdict unanimity for the Court's consideration.

POINT I

JURY INSTRUCTIONS AND VERDICT SHEETS MUST MAKE CLEAR THAT THE JURY'S VERDICT MUST BE UNANIMOUS AS TO THE SPECIFIC SUBSECTION AND CONDUCT THAT SUPPORT A CONVICTION.

Juror unanimity has been a vital common law right since the Fourteenth Century, and was incorporated into the federal and New Jersey constitutions. The Sixth Amendment right to unanimous criminal jury verdicts is applicable to the states through the Fourteenth Amendment. Ramos v. Louisiana, 140 S. Ct. 1390, 1396-97 (2020). By state constitution, caselaw, and court rules, New Jersey also requires a unanimous jury verdict in criminal cases. N.J. Const. art. I, ¶ 9; State v. Parker, 124 N.J. 628, 633 (1991); R. 1:8-9. For the reasons that follow, ACDL-NJ respectfully urges this Court to affirm the Appellate Division, and remand this matter for a new trial.

A . The Juror Unanimity Requirement

The principle of juror unanimity is “deeply ingrained in our jurisprudence” and “requires jurors to be in **substantial agreement as to just what a defendant did** before determining his or her guilt or innocence.” State v. Frisby, 174 N.J. 583, 596 (2002) (internal quotations omitted) (emphasis added). In New Jersey – which unquestionably provides more constitutional protections than federal law, In re Grand Jury Proc. of Guarino, 104 N.J. 218, 22 (1986); State v. Hunt, 91 N.J. 338, 344 (1982); State v. Schmid, 84 N.J. 535, 555 (1980) (collecting cases) – juries must be unanimous as to the facts that are “material” to sustaining a conviction. Parker, 124 N.J. at 634. The right to jury unanimity means that courts must guard against the possibility of “patchwork verdicts,” where a “**conviction may occur as the result of different jurors concluding that the defendant committed different acts.**” Id. at 636-37 (emphasis added).

In this case, and as noted by the appellate panel, we do not know what subsection of N.J.S.A. 2C:12-3 the jury found that defendant violated, and we do not know which alleged statements they found constituted terroristic threats. Ensuring juror unanimity was particularly important in this case based upon the State’s poorly structured indictment – a single count alleging that defendant made terroristic threats within the meaning of N.J.S.A. 2C:12-3(a) and/or (b). While not necessarily improper on its face, the “and/or” conjunction used by the State in its indictment was

confusing in that it presented two completely separate theories of guilt within a single count indictment. Each subsection of N.J.S.A. 2C:12-3 has its own elements (as acknowledged on page 39 of the State’s brief), and require proof of different facts to sustain a conviction. Given the confusing structure of the State’s indictment in this case, it became critically important to instruct the jury with regard to reaching a unanimous verdict as to the specific subsection and conduct, and to provide a verdict sheet that would ensure a unanimous verdict on each subsection charged. Unfortunately, that was not done, and a new trial is required under these circumstances.

B. The Subsections of N.J.S.A. 2C:12-3 Require Substantially Different Proofs and Therefore Require Unanimity.

In an attempt to justify defendant’s conviction, the State now contends that unanimity was not required as to each subsection in this case, because N.J.S.A. 2C:12-3 “embodies a single offense that may be committed in a number of cognate ways.” Sb at 48.¹ In that regard, the State argues that the subsections merely provide various modes of commission of terroristic threats and, thus, a general unanimity jury instruction was appropriate. That argument is misplaced.

The terroristic threats statute states in pertinent part:

- a. A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of

¹ “Sb” refers to the State’s brief in this matter.

the risk of causing such terror or inconvenience.

b. A person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.

[N.J.S.A. 2C:12-3.]

As is plainly evident on the face of the statute itself, the two subsections of N.J.S.A. 2C:12-3 require proof of substantially different facts, and contain separate and distinct *mens rea* elements. As noted by this Court in Parker, a specific unanimity instruction should be provided when “a single crime can be proven by **different theories** based on **different acts** and at least two of these theories rely on **different evidence**, and [when] the circumstances demonstrate a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory.” 124 N.J. at 635-36.

The United States Supreme Court has recently provided additional guidance to assist courts in identifying elements of offenses, which require jury unanimity:

Elements are the constituent parts of a crime’s legal definition — the things the prosecution must prove to sustain a conviction. At a trial, they are **what the jury must find beyond a reasonable doubt to convict the defendant**. . . . Facts, by contrast, are . . . extraneous to the crime's legal requirements. . . . They are **circumstances or events having no legal effect or consequence**. In particular, they need neither be found by a jury nor admitted by a defendant.

[Mathis v. U.S., 579 U.S. 500, 504 (2016) (citations omitted) (emphasis added).]

Elements can also be distinguished from means, because the former require different proofs from one another, and are not merely alternative ways of proving a single, constituent element. United States v. McCants, 952 F.3d 416, 427 (3d Cir. 2020). In concluding that subsections (a)(1)-(3) of New Jersey’s robbery statute N.J.S.A. 2C:15-1,² are elements and not means, the United States Court of Appeals for the Third Circuit stated:

If the subsections of § 2C:15-1 were means, they would list “diverse means of satisfying a single element” of robbery. But the statute does not identify an individual element of which subsections (a)(1)-(3) are mere examples—it states no overarching genus of which they are species. Instead, it lists in the disjunctive three separately enumerated, alternative elements of robbery.

.....

Subsections (a)(1)–(3) are elements because each requires different proof beyond a reasonable doubt to sustain a second-degree robbery conviction.

[McCants, 952 F.3d at 426.]

² That section reads: “A person is guilty of robbery if, in the course of committing a theft, he:

- (1) Inflicts bodily injury or uses force upon another; or
- (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or
- (3) Commits or threatens immediately to commit any crime of the first or second degree”

Applying the same logic from McCants, the subsections under N.J.S.A. 2C:12-3 are not merely means of establishing a single element of terroristic threats, but rather separate enumerated ways in which the crime of terroristic threats may be committed.

In this matter, the State submitted evidence of several statements made by the defendant and argued that those statements constituted terroristic threats (the “head shot” comment made when the officers were at his home and several subsequent online posts). There was no limiting instruction as to the defendant’s statements in his online posts and, therefore, those statements were likely considered by the jury during its deliberations. Given the way in which the indictment, jury instructions, and verdict sheet were structured, we cannot discern which of defendant’s statements were found to constitute terroristic threats, and we do not know if the jury found that he threatened “any crime of violence” under subsection (a), or “threatened to kill” under subsection (b). Likewise, we do not know if the jury found that defendant made those statements with a “purpose to terrorize” under subsection (a), or with a “purpose to put [the officer] in imminent fear of death,” under subsection (b). These are not merely different means of committing the crime of terroristic threats, but separate theories of guilt based upon different acts and different evidence.

Based upon this Court’s holding in Parker, and the holdings of the United States Supreme Court and Third Circuit set forth above, the State’s argument that the jury was not required to reach a unanimous verdict must be rejected.

C. When the State Proceeds on Alternative Theories of Guilt, Jury Instructions and Verdict Sheets Must Make Clear that the Jury Must be Unanimous as to Each Offense Charged.

ACDL-NJ respectfully submits that when the State proceeds on alternative theories of guilt, based on separate statutory subsections, a specific unanimity charge and a clear verdict sheet are required for a constitutionally sound conviction.

Accurate and understandable jury instructions are essential to a defendant's right to a fair trial. State v. Baum, 224 N.J. 147, 158-59 (2016). Inaccurate, misleading, or confusing jury instructions which undermine confidence in the verdict constitute reversible error. State v. Olivio, 123 N.J. 550, 567-68 (1991). On appeal, the soundness of jury instructions is determined by assessing "how and in what sense, under the evidence before them, and the circumstances of the trial, would ordinary jurors understand the instructions as a whole." State v. Savage, 172 N.J. 374, 387 (2002).

The trial court has an absolute and independent duty to instruct the jury on the law governing the facts and issues of the case, regardless of the parties' requests. State v. Reddish, 181 N.J. 553, 613 (2004). In fulfilling that duty, the court must exercise its discretion to craft jury instructions that are most appropriate to the criminal matter before it, considering the facts and issues presented. State v. Funderburg, 225 N.J. 66, 80 (2016). At minimum, the jury instructions must provide a **"comprehensible explanation of the questions that the jury must determine,**

including the law of the case applicable to the facts that the jury may find.” Baum, 224 N.J. at 159 (emphasis added).

Although our Model Jury Charges provide helpful guidance to trial courts, “it is not always enough simply to read the applicable provision of the Criminal Code, define the terminology, and set forth the elements of the crime.” State v. Concepcion, 111 N.J. 373, 380 (1988). Indeed, “an instruction solely in terms of the language of the statute will not give sufficient guidance to the jury and engenders too great a risk that the jury’s ultimate determination of guilt or innocence will be based on speculation, misunderstanding, or confusion.” Olivio, 123 N.J. at 567-68. The Model charges are subject to this Court’s revision. State v. Ramirez, 246 N.J. 61, 70 (2021).

Certain kinds of jury instructions are so crucial to a jury’s deliberations on the guilt of a criminal defendant that errors in those instructions are presumed to be reversible. State v. Simon, 79 N.J. 191, 206 (1979). Certainly, errors in instructions on the essential elements of the crime and key issues in dispute are presumed reversible. State v. Vick, 117 N.J. 288, 291 (1989). For example, failing to instruct that the State must carry its burden of proof as to both the existence of a defendant’s state of mind and the core factual predicate demonstrating that state of mind is reversible error. Alleyne v. United States, 570 U.S. 99, 115-16 (2013); Apprendi v. New Jersey, 530 U.S. 466, 483 (2000).

Instructions on juror unanimity are an “indispensable element” of all criminal trials. Parker, 124 N.J. at 633. The general rule is that “in cases where there is a danger of a fragmented verdict, the trial court must upon request offer a specific unanimity instruction.” State v. Cagno, 211 N.J. 488, 517 (2012). Whether requested or not, however, courts must instruct the jury in a manner that guards against “patchwork verdicts,” where a “conviction may occur as the result of different jurors concluding that the defendant committed different acts.” Parker, 124 N.J. at 636-37.

In Parker, the Court provided examples of circumstances in which the general instruction that a verdict must be unanimous will not suffice, which included where “a single crime could be proven by **different theories** supported by **different evidence**,” and there is a reasonable likelihood that the jurors will not unanimously agree that the defendant's guilt was proven by the same theory. Ibid. (emphasis added). Parker’s language precisely describes the situation presented in this matter. Indeed, as noted by the appellate panel below:

The jury was given the option of finding a violation of either subsection (a) or subsection (b). While the judge correctly instructed the jury in response to its question that only one theory needed to be found for a guilty verdict, he did not instruct that all jurors needed to agree on which provision was violated. The jury was not entitled to render a fragmented verdict in which one group found a violation of subsection (a) and another group, or even just a single juror, found only a violation of subsection (b). Without an

instruction that would have made that clear to the jury, we can have no confidence that the jury did not produce an impermissibly fragmented verdict and we must, therefore, reverse and remand for a new trial.

[State v. Fair, 469 N.J. Super. 538, 558 (App. Div. 2022).]

The errors described above, which were compounded by the inaccurate and misleading verdict sheet, formed the basis for the Appellate Division's reversal in this matter. ACDL-NJ respectfully submits that the panel's holding perfectly identifies the unanimity requirement that should be applied in this matter, and asks this Court to affirm substantially for the reasons expressed by Judge Fisher in the panel's thoughtful and well-reasoned opinion. Additionally, ACDL-NJ submits that the Model Jury Charge for N.J.S.A. 2C:12-3, and other similar statutes, should be amended to advise trial courts that a specific unanimity charge should be provided when the State proceeds on alternative theories of guilt.

CONCLUSION

For the reasons set forth above, and based on the authorities cited, ACDL-NJ urges this court to affirm the judgment of the Appellate Division, strike N.J.S.A. 2C:12-3(a) as unconstitutionally overbroad, reiterate the longstanding requirement that jury verdicts be unanimous, and revise the Model Jury Charge for N.J.S.A. 2C:12-3 to include a requirement that specific unanimity charges be provided when the State proceeds on alternative theories of guilt.

Respectfully Submitted,

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Attorneys for *Amicus Curiae* ACDL-NJ

By: /s/ C.J. Griffin
CJ Griffin

Dated: December 22, 2022