

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

THE STATE OF OREGON,

No. 20CR50067

Plaintiff,

v.

RESPONSE TO DEFENDANT’S MOTION
FOR ELECTION

ALAN SWINNEY

Defendant.

Defendant has moved to require the state, in advance of trial, to elect or specify which specific assaultive conduct that defendant engaged in forms the basis of each count of the indictment. Additionally, defendant asks the court to require the state to identify the victim of defendant’s assaultive conduct in each count. Defendant cites, *State v. Payne*, 298 Or App 411 (2019) in support of his motion, but fails to engage with the actual analysis in that case. For the reasons discussed below the categorization of “motions to elect” in *Payne*, supports the State’s ability to elect (or request a concurrence instruction) upon close of evidence and not in advance of trial.

ARGUMENT

I. WHERE DEFENDANT IS CHARGED WITH A SINGLE COUNT OF AN OFFENSE, BUT THE FACTS TO BE ADUCED AT TRIAL INDICATE MORE THAN ONE OCCURRENCE OF THAT OFFENSE, THE STATE NEED NOT ELECT A FACTUAL THEORY UNTIL THE CLOSE OF ITS CASE.

In many situations, for tactical reasons, the State does, and may, elect to specify with precision to the court and jury which conduct the State believes forms the basis for each count

1 submitted to the jury. However, the state is not required to do so. Oregon law is clear that there
2 are two options available, and the State has sole discretion in choosing between them.

3 In *State v. Payne*, 298 Or App 411 (2019), Judge James provides a lengthy discussion on
4 motions to elect, timing, and the proper posture for presentation. Although this discussion is not
5 essential to the holding, it provides a good road map for analyzing these questions. The Court of
6 Appeals subsequently summarized this analysis as follows:

7 A defendant may move for a prosecutor to make a pretrial election to get more
8 information about a charge against him when the “indictment is sufficient to
9 withstand a demurrer but still may fail to give a defendant adequate notice of the
10 precise charges against him.” [*Payne*] at 417. In contrast to a pretrial election
11 motion, a defendant may move for the prosecutor to make an election after the
12 prosecutor’s case-in-chief or at the end of the trial to “ensure that the jury agrees
13 as to every necessary element or concurs on the same occurrence in reaching a
14 verdict on a single count of a charged crime.” *Id.* at 421.

15 *Antoine v. Taylor*, 303 Or App 485 (2020) (citations cleaned up).

16 That is, if the indictment does not provide defendant sufficient notice of what overarching
17 incident he is being prosecuted for, a pre-trial motion to elect would be proper. *State v. Antoine*,
18 269 Or App 66 (2015) (pre-trial motion to elect proper where defendant charged with four
19 identically worded sex abuse counts alleged to have occurred sometime within a two year
20 window); See also, *Payne* at 419 (discussing *Antoine*). On the other hand, if as here, defendant
21 engaged in multiple assaultive acts during a single criminal episode, an election at the close of
22 the State’s case (or a concurrence instruction) is proper. *Payne* at 421 (“The end-of-trial motion
23 to elect is designed to ensure that the jury agrees as to every necessary element or *concurs on the*
24 *same occurrence in reaching a verdict on a single count of a charged crime*”) (emphasis added).

25 In this case the indictment clearly specifies the date of each count, and from defendant’s
26 own motion it is clear that he understands that he is being prosecuted for assaultive behavior in
27 the course of the clashes occurring during the dueling demonstrations on that date. As in *Payne*,
28 this is a situation where defendant is entitled to notice or concurrence, as to the precise

1 occurrence in reaching a verdict on a single count of a charged crime. As such, defendant's
2 motion to elect should be denied, and the matter re-addressed upon the conclusion of the State's
3 presentation of evidence.

4 As this is properly an election of occurrence, not election of episode, the well-established
5 rule providing the state discretion to either elect or the court to give a concurrence instruction
6 holds.¹ See, *State v. Teagues*, 281 Or App 182 (2016) (“the trial court must either require the
7 state to elect the occurrence on which it will proceed or instruct the jury that the requisite number
8 of jurors must agree on one of the multiple occurrences”); *State v. Ashkins*, 357 Or 642, 659
9 (2015) (when the evidence regarding a single count permits “the jury to find any one or more
10 among multiple, separate occurrences of that offense” and the state does not elect a particular
11 occurrence, the trial court must give a concurrence instruction); *State v. Houston*, 147 Or App
12 285, 293 (1997) (where the state charged the defendant with one count of delivery of a controlled
13 substance, but presented evidence of multiple, separate deliveries, the trial court erred by failing
14 either to require the state “to elect which of the separate occasions * * * was to be the basis for
15 the jury's decision” or to instruct the jury “as to its obligation to base its decision on a single
16 criminal act”).

17 Of further note, counts 4, 8, and 9 of the indictment allege either Unlawful Use of a
18 Weapon or Menacing. These offenses allege a course of conduct “carrying with intent to use
19 unlawfully” in the case of counts 4 and 8 or “attempt[ing] to place another person in fear” as to
20 count 9. These do not have, or require, proof of any one discrete act and, as such, are completely
21 outside the framework discussed above. Indeed, *State v. Payne*, the sole authority cited by
22 defendant expressly notes that “no one act must be proven to support a conviction for menacing”
23 and found denial of a motion to elect for that crime proper. *Payne* at 429 (citing *State v. White*,

¹ Note, of course, that only some criminal offenses necessitate a concurrence instruction. See, e.g. *State v. White*, 115 Or App 104 (1992) (menacing does not require proof of any one specific act, so jury concurrence not required)

1 115 Or App 104 (1992)). Given the elements of Unlawful Use of a Weapon, there is no
2 principled basis on which to distinguish it from menacing for purpose of this analysis. Defendant
3 was committing the crime of Unlawful Use of a Weapon *the entire time* he was present at these
4 demonstrations as he possessed a weapon and all of the specific unlawful acts described in
5 discovery during that time show his mental state to use it unlawfully throughout that period. For
6 the reasons set out in *White* the jury is not required to concur as to which minute or second
7 during the hours he was present he developed or maintained the intent to use his weapon
8 unlawfully.

9 II. THE IDENTITY OF A CRIME VICTIM IS NOT A MATERIAL ELEMENT AND,
10 WHERE THAT PERSON IS NOT A WITNESS AT TRIAL, NO SOURCE OF LAW
11 REQUIRES THE STATE TO IDENTIFY THAT PERSON.

12 To the extent that defendant is arguing that he is unable to defend this action because the
13 indictment is insufficiently specific (and thus requires that the victim of each count be identified)
14 the analysis in the preceding section applies equally to this argument and his motion should be
15 denied.

16 The discovery statutes in ORS Ch. 135 do not contain any requirement that defendant be
17 provided the identity of non-witness individuals who were involved in a criminal episode.

18 The identity of the victim of a crime is not a statutory element of any offense on this
19 indictment. Each count may, and has been, properly be pled in the language of the statute as
20 defendant having victimized “another person.”² Indeed, the Court of Appeals has held that even
21 affirmatively *misidentifying* the victim in a charging document is not a problem for the State as
22 the identify of the victim is not a material element of the charge. *State v. Woodard*, 187 Or App
23 233 (2003).

² Counts 5 and 6 do identify a named victim and defendant’s motion appears only to address those counts where the victim is pled as “another person.”

1 **CONCLUSION**

2 The court should deny defendant's motion to dismiss because no source of law requires
3 the State to do as he has requested

4 Dated this 20th day of September, 2021.

5 Respectfully Submitted,

6 MIKE SCHMIDT
7 District Attorney
8 Multnomah County
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By _____
Nathan Vasquez
Senior Deputy District Attorney

Certificate of Service

I certify that on September 20th, 2021 I caused the foregoing response to Defendant's Motion to Elect to be served upon the parties hereto by the method indicated below, and addressed as follows:

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X

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ELECTRONIC SERVICE (UTCR
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/s/

Nathan Vasquez, OSB 014437
Deputy District Attorney

