No. 44383-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ARIEL WILLIAMS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Beverly G. Grant, Judge

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Plm 7/15/13

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1. The state and federal due process rights of appellant Ariel Williams were violated when he was convicted for felony harassment in the absent of sufficient evidence to prove all the essential elements of that crime.

2. The trial court erred in increasing the offender score with a current conviction even though the statute providing for the increase specifically applies only to "prior" convictions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove felony harassment, the prosecution was required to present evidence sufficient to show, beyond a reasonable doubt, that Mr. Williams made a knowing threat to kill the victim, that the victim believed that he would make good on that threat, and that the belief was reasonable. Is reversal required for failing to prove every element of felony harassment where the prosecution failed to prove that Williams made a true threat to kill and the circumstances were such that any fear that he would kill was not reasonable?

2. The Legislature specifically defined a "prior conviction" as one which existed before the current conviction or convictions were gained. Did the sentencing court err and is reversal and remand for resentencing required where the court increased the offender score by counting two current convictions as "prior" convictions for the purposes of an enhancement statute and further was Williams sentenced improperly because he was not charged as required for the enhancements to apply?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Ariel Williams was charged by information with two counts of domestic violence felony harassment with deadly weapon enhancements and two counts of domestic violence fourth-degree assault.

CP 1-3; RCW 9A.36.041(1); RCW 9A.46.020; RCW 9.94A.530; RCW 9.94A.533; RCW 9.94A.825; RCW 10.99.020. After a continuance on October 23, 2012, jury trial was held on November 27-29, and December 3-4, 2012, before the Honorable Judge Beverly Grant. RP 1, 5, 9, 38, 100, 151.[1] Williams was acquitted of one count of felony harassment but convicted of all other offenses and special verdicts as charged. CP 76-85.

On December 21, 2012, Williams was order to serve a standard range sentence of 22 months in custody, with 6 months of that "flat time" for the sentencing enhancement. CP 124-37; 2RP 1-9. For the two fourth-degree assaults, he received 364 days suspended. CP 138-42; 2RP 12.

Williams appealed and this pleading follows. CP 143-5.

2. Testimony at trial

On August 24, 2012, Debra Mason still had most of her things at the townhouse condominium she was renting with her boyfriend, Ariel Williams, and another woman, Helen Asefaw. RP 40-43, 63. Mason was not living there at the time and had been "actually" living with her grandmother since the beginning of June. RP 42. Mason would go over to the condominium "maybe once a week" and would usually end up spending the night when she came by. RP 40-43.

That day, Mason went to the home to confront Williams about her cell phone being turned off. RP 40-42. According to Mason, she had "just" given Williams money to pay that bill. RP 40-42.

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[1]The verbatim report of proceedings consists of two volumes in this case. The volume containing the pretrial and trial proceedings of October 23, November 27-29, and December 3-4, 2012, will be referred to as "RP." The volume containing the sentencing on December 21, 2012, will be referred to as "SRP."

Mason was at the home with Williams, with whom she had previously had a relationship, for a few hours. RP 62. Mason admitted that she had allowed illegal behavior to occur in her home and that police had found black tar heroin in Asefaw's room. RP 63, 67. It was something Williams pointed out to Mason during their arguments that day. RP 67-68.

When Asefaw came into the room, Mason and Williams were sitting at the chairs next to the desk in Williams' bedroom. RP 45. At some point, Asefaw had accused Williams of having grabbed Asefaw's "butt." RP 43. Williams got upset, saying Asefaw was lying, and they ended up in an argument which progressed into yelling and bickering as the two went into Asefaw's room. RP 46.

While this arguing was going on between Asefaw and Williams, Mason said, she went into Asefaw's room and tried to stop it. RP 46. According to Mason, at some point, Williams "jumped on" Asefaw on the bed or pushed her onto the bed. RP 46. Mason claimed that Williams said "[b]itch, if I wanted to have sex with you I can do it any time" as he pushed Asefaw down. RP 47. Mason went over to try to stop what was going on and, Mason said, that was when Williams started "punching" Asefaw. RP 47.

Asefaw testified that she had started living with Williams on a platonic basis in June of that year, and that she had woken up to hear Williams and Mason arguing about Asefaw's claim that Williams had grabbed her butt. RP 102-105. Asefaw listened to the fight as it went on, with the two at it the "whole morning." RP 105-106. Asefaw said the

fight began after Mason came into Asefaw's roon to talk about the fight and was followed by Williams, who confronted Asefaw about her claim that he had grabbed, which he said was a lie. RP 107-108. Asefaw started yelling that Williams was a liar and lying about "everything" and he responded that he could have had sex with her any time he wanted. RP 108. According to Asefaw, when she scoffed at his claim, Williams then walked over and started hitting her. RP 108.

Mason was panicking, trying to grab Williams' arm, and she yelled "[p]lease stop," which distracted Williams. RP 43-49. Asefaw then got up and stood on the bed. RP 43. Mason claimed that Williams next grabbed Mason by the hair, pulled her down and "squished" her face, then seemed like he was going to punch her. RP 48. According to Mason, Asefaw had gotten an empty bottle of vodka from her dresser and was threatening to hit Williams, who then went towards Asefaw to try to stop her from hitting him. RP 49. Williams took the bottle from Asefaw and Asefaw jumped off the bed. RP 49.

Williams and Asefaw were arguing again and Asefaw seemed to be trying to stay away from Williams. RP 50. Asefaw got up and was jumping on the bed again, as was Williams. RP 50. At that point, Mason claimed, Williams "had a knife." RP 50-51.

Asefaw admitted that she had a knife in her room, in her dresser, which she had there "just for safety." RP 108. She had gotten it out during the fight and set it on her dresser, "just in case." RP 124. Mason identified a steak knife she was shown as "the same steak knife" that she saw Williams with that night. RP 54. On cross-examination, Mason

conceded that Asefaw had the knife in her room already. RP 62-63.

Mason testified that Williams then said "something like, 'I could kill you both right now,'" while waving the knife around. RP 54, 64. Asefaw said she did not recall what he was saying but he was "motioning" like "he was going to hurt us" and she thought she was going to die. RP 112.

Williams, however, made no effort to stab either Mason or Asefaw, instead just waving the knife around for a moment and then throwing it down. RP 64. Mason was "not concerned about it" at that point. RP 65.

Both Asefaw and Mason testified that Williams had already, at some point, choked and went "after" Asefaw. RP 55. Mason thought he was choking Asefaw and she was gagging and making noises. RP 55. When Mason ran over to try to stop the altercation, Williams pushed her down and put his foot on her. RP 55. Mason said she was "able to reach to his private area and got to it and twisted it," which ultimately got him to stop. RP 55-56.

Mason was very clear that she did not remember Williams saying anything when he had his hands on her neck. RP 56. Mason herself was saying, "[s]top it" and "[p]lease just stop it." RP 57. Mason then said she was thinking Williams was going to kill Asefaw. RP 57.

After Williams stopped, he ran back to his bedroom and Asfaw said they should call the police. RP 56. Neither had a working cell phone in the room, however, and Mason said that when she went to get her cell phone from Williams' room, Williams threatened to "knock . . .out"

Mason and would not give her the phone. RP 57. A little later, she heard Williams go upstairs so Mason ran to grab her cell phone. RP 57. In the meantime, Asefaw had been texting her boyfriend, asking him to "please get there." RP 57. Mason said that, when Asefaw's boyfriend drove up, Asefaw ran out and Williams heard the noise so he came downstairs. RP 57. "Everybody" ended up outside and Mason called police. RP 57. Mason said Williams "ran" and was gone when police arrived. RP 57-58.

According to Mason, Williams returned about an hour after police left and started to grab stuff and put it into some "duffle bags." RP 58. When he returned, she said, she called the police. RP 58. Williams left and went to the neighbor's but was ultimately arrested. RP 58.

Williams testified that Mason showed up in the morning complaining about her phone being off. RP 136. He told her he was sleeping, her phone was back on and she needed to come back because he had to work that night. RP 136-37. He was talking when he heard Asefaw laughing and Mason went to open the door and talk to Asefaw. RP 136-38. Williams said he had to be at work by 6 that night. RP 137.

About a half hour after Mason arrived, Asefaw came to Williams' room and asked Mason to go to the store to get Asefaw alcohol, because Asefaw was only 19 years old. RP 137-38. Mason and Asefaw left and did not return for about 45 minutes, until it was about 10:30.

Williams said that, while the argument was loud and there was some yelling and screaming, he did not physically touch either woman that day. RP 138. Williams had planned to move out and move into another place with another girl, which was part of the reason for the

argument. RP 139-40. Williams left about 1:45 or 2 p.m. and came back around 6 in the evening, at which point he was arrested. RP 140. When he arrived back home he noticed a card on the counter and went to talk to Mason, who was in "the fetal position" downstairs. RP 140. He shook her to try to wake her up, saying, "Debra, what the heck is this," and she woke up, saying, "[y]ou're in trouble." RP 140-41. When he asked, "[t]rouble for what," she responded "[y]ou better run." RP 141. He said he was not running and she got on the phone to call police. RP 141. He said, "whatever," went to the bathroom, heard the doorbell ringing, answered the door and found several police officers there. RP 141. Williams was handcuffed and said he did not try to assault the officers although he did say at one point, "[f]uck her and fuck you guys." RP 142-43. He also said, "[f]uck you guys. She's drunk. I didn't do anything." RP 143-44.

Williams was clear that Mason was "pretty sloshed" and had been drinking vodka and Asefaw had a cup which Williams did not see her pour into but which smelled like alcohol. RP 137. An officer who arrived after that second call described Mason as "emotionally upset" and said she "appeared to possibly be intoxicated," having speech which was "a bit slurred" and had a vague odor of "intoxicants." RP 77.

On cross-examination, the officer admitted he did not write "possibly under the influence" in his report but actually wrote that Mason was "under the influence of alcohol to such a degree it was difficult to interview her." RP 88. The officer also said that he was told by Mason that Williams had said, "I'll kill you, and I don't care if I go to prison" to

both Mason and Asefaw. RP 94-95.

Mason admitted she was drinking that day but said it was "[a]fter the beating had occurred," when she was in the room for "that 15 minutes." RP 59. There was some vodka in the room and she was shaken up. RP 59. She also discussed being, apparently, a prostitute or "escort" for Williams at some point and threatening to get her "smeared" at her "actual work," which was a loan officer. RP 61-62.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE FELONY HARASSMENT

Mr. Williams was charged with felony harassment for both Asefaw (also known as Tseggai) (count I) and Mason (count II). CP 1-3. The jury acquitted him of the charge involving Mason, convicting only of guilt for the alleged harassment of Tseggai. CP 76-85. The conviction for felony harassment must be reversed, because there was insufficient evidence to prove an essential element of the crime.

Both the state and federal constitutions provide for due process, which requires the prosecution to prove every element of a crime, beyond a reasonable doubt. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Article 1, § 22; Sixth Amend., 14th Amend. Evidence does not meet that standard unless it is sufficient, taken in the light most favorable to the state, to convince a rational, fair-minded trier of fact of the truth of the declared premise. See Salinas, 119 Wn.2d at 201.

Here, there was not such evidence to support the conviction for felony harassment. Under RCW 9A.46.020,

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
>
> (ii) To cause physical damage to the property of a person other than the actor; or
>
> (iii) To subject the person threatened or any other person to physical confinement or restraint; or
>
> (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

Under subsection (2)(a), harassment is a gross misdemeanor unless certain conditions, set forth in subsection (b) of the statute, are met, in relevant part:

> (b) A person who harasses another is guilty of a class C felony if any of the following apply:
>
> . . .
>
> (ii) The person harasses another person under subsection (1)(a)(i) of of the section by threatening to kill the person threatened or any other person[.]

It is under this subsection that Williams was charged. See CP 1-3.

The prosecution failed to meet its burden of proving all the essential elements of the crime in this case. Because the First Amendment protects speech, our courts have limited the scope of the harassment

statute to only those comments which amount to "true threats." See State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Thus, to prove a crime involving a threat to kill, the prosecution must show the elements that 1) without lawful authority, 2) the defendant knowingly threatened to kill another immediately or in the future, 3) the defendant's words and conduct placed the other in reasonable fear that the threat to kill would be carried out, 4) that it was a "true threat" and 5) that it occurred in our state. See RCW 9A.46.020(1); State v. C.G., 150 Wn.2d 604, 609, 80 P.3d 594 (2003).

Here, the prosecution failed to present sufficient evidence to prove all of the essential elements of the felony crime. First, there was insufficient evidence of a true threat. Because of the First Amendment implications of criminalizing speech, "[a]n appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat." State v. Kilburn, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). Here, there is insufficient evidence that a threat to kill was actually made. "I could kill you" is a statement of anger, potentially, or of possibility, but not intent, because the declarant "could" but also might not, as opposed to "I will kill you" or "I'm going to kill you."

Further, there was insufficient evidence to prove that Asefaw was actually afraid that Williams would carry out any threat to kill. Asefaw did not recall what Williams had said when he had the knife. And it was *Mason*, not Afesaw, that the officer said had told police Williams had threatened, "I'll kill you, and I don't care if I go to prison." RP 94-95. Afesaw herself did not mention any such comment and instead said he had

just been saying "rude things" and "insults." RP 111-12. She also and described the motions he was making as "just left and right, left and right, like he was going to hurt us" - not as grabbing or stabbing at them, trying to kill. RP 111. Although Asefaw said at that point she thought she was going to die, that fear has to be *reasonable* based upon the conduct and actions of the defendant, who only held the knife for a very short period of time before simply dropping it and whose actions belied any likely threat that "I could kill you" might contain.

Because there was insufficient evidence to prove all the essential elements of felony harassment, this Court should reverse and dismiss that conviction.

2. THE TRIAL COURT ERRED IN INCREASING THE SENTENCE BASED ON ANOTHER CURRENT OFFENSE WHEN THE RELEVANT STATUTE PROVIDED FOR SUCH AN INCREASE FOR PRIOR CONVICTIONS

Even if reversal and dismissal were not required based upon the insufficiency of the evidence, reversal and remand for resentencing would be required, because the sentencing court erred in increasing the offender score based upon a calculation which counted one of the other current convictions as a "prior" conviction.

a. Relevant facts

At sentencing, the prosecutor explained the calculation of the offender score the prosecutor had reached. SRP 6. Williams had only been found of two prior felony charges in the past but the prosecutor had counted two of the current misdemeanor convictions as one point each, for a total offender score of "4." SRP 6. The prosecutor said the "two

other concurrent[]" convictions which were "Assault 4's" counted as one point because the jury "came back with a DV verdict." SRP 6. He went on:

> While they're not felonies there is a statute that went into effect, I believe a year ago, that found when there is a felony DV either being pled to or found guilty of, and then they're found guilty of the Assault 4 DV, those would count as felony points.

RP 6.

The court found the offender score was "correct as calculated by the State." RP 7-8. The court then imposed a sentence based upon the range as calculated by the prosecution, which was "18 plus to 22 months," adopting the high-end sentencing recommendation of the prosecution for 22 months total. RP 8, 11. Stand-by counsel and Mr. Williams, who represented himself at the sentencing, declined to sign a "stipulation to offender score" that was proffered, instead wanting to "keep all options open" about whether the standard range was properly calculated. RP 14.

b. The court erred in counting the current misdemeanor assaults as "prior" offenses when they did not meet that definition

The sentencing court erred in imposing the sentence based on the offender score as calculated by the prosecutor, because the prosecutor improperly increased that score by two points based on counting two current misdemeanors as one point each under a statute which did not, in fact, apply.

As a threshold matter, the issue is properly before this Court. A defendant may raise an unlawful, illegal or erroneous sentence for the first time on appeal. State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (2009),

review denied, 170 Wn.2d 1014 (2010); see State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Further, a defendant generally "cannot waive a challenge to a miscalculated offender score," except to the extent that he makes an agreement to facts which ultimately result in the sentence he challenges. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004), quoting, In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).

On review, this Court applies the de novo standard to the sentencing court's calculation of the offender score, rather than any of the deferential standards. See, e.g., Ford, 137 Wn.2d at 479-80.

Applying such review, this Court should reverse. RCW 9.94A.525(21) provides the rules for calculating the offender score in this case. All of the charges were alleged to be "domestic violence" incidents. See CP 1-3. Under the relevant version of RCW 9.94A.030(20), "domestic violence" is defined by reference to two other statutes and "has the same meaning" as the definitions of the same term in those statutes, which are RCW 10.99.020 and RCW 26.50.010. RCW 10.99.020(5) defines "domestic violence" as including but not being limited to certain crimes committed by one family or household member against another, such as fourth-degree assault. RCW 10.99.050(d). RCW 26.50.010 further defines "domestic violence" to include such things as physical harm or bodily injury between family or household members and "the infliction of fear of imminent physical harm" between such persons. RCW 26.50.010.

Thus, the rules for a "domestic violence" offense will apply to

sentencing for the felony harassment in this case. Under RCW 9.94A.525, where the "present conviction" is for a felony "domestic violence offense," there are certain changes to the way the offender score is calculated. First, where the present conviction is for a "domestic violence offense" *and* "domestic violence as defined in RCW 9.94A.030 was plead and proven," prior convictions are counted differently, in relevant part:

> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

"Repetitive domestic violence" offense is defined in RCW 9.94A.030(41) to include a "[d]omestic violence assault that is not a felony offense under RCW 9A.36.041," as well as other offenses which have a "[d]omestic violence" finding, such as "[d]omestic violence stalking offense" and any federal or other court conviction that would be classified as a "repetitive domestic violence offense" under the statute. RCW 9.94A.030(41). There is no definition of frequency required for a domestic violence offense to be "[r]epetitive."

In this case, the prosecutor used the "repetitive domestic violence" enhancement to increase Williams' offender score at trial based upon the fourth-degree assault convictions charged in the current information - counts III and IV. Those counts were charged as involving "a domestic violence incident **as defined in RCW 10.99.020.**" CP 1-3 (emphasis added). The enhancement, however, specifically requires that a prior conviction only qualifies "where domestic violence **as defined in RCW 9.94A.030,** was plead and proven after August 1, 2011." RCW 9.94A.525

(emphasis added). The information here accused Williams only of committing domestic violence incidents under RCW 10.99.020, not RCW 9.94A.030 as the enhancement statute provides.

More important, the enhancement could not here apply because the misdemeanor convictions the prosecution relied on were current - not "prior" - convictions. It is not necessary for this Court to engage in difficult analysis to determine what amounts to a prior conviction for the purposes of determining the offender score, because the Legislature has specifically defined it:

> **A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed**. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

RCW 9.94A.525(1) (emphasis added). Further, the statute excludes from the offender score "prior convictions for a repetitive domestic violence offense" if "since the last date of release," the defendant has spent a certain number of years in the community with no convictions. RCW 9.94A.525(2)(f).

Thus, for the purposes of the offender score rules, a conviction is only a "prior" conviction if it exists before the date of sentencing for the offense for which the offender score is being determined. RCW 9.94A.525(1). By definition, here, the two convictions for the misdemeanor assaults were not "prior," as they were for conduct which occurred the same time as the offense for which the offender score was being calculated - the harassment.

There is some confusing language in RCW 9.94A.589, the statute dealing with whether sentences are to run consecutive or concurrent, which provides:

> whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. PROVIDED, that if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then the current offenses shall be counted as one crime.

This general statutory language, however, does not control. It is a maxim of statutory construction that a specific statute will control over a general statute. See Kingston Lumber Supply Co. v. High Tech Development Inc., 52 Wn. App. 864, 765 P.2d 27 (1988), review denied, 112 Wn.2d 1010 (1989). Here, the specific definition of a "prior" conviction for the purposes of determining the offender score is contained in RCW 9.94A.525, which is specifically addressed to determining the offender score and defining the "offender score rules." RCW 9.94A.525. In contrast, RCW 9.94A.589 is specifically addressed to the issue of "[c]onsecutive or concurrent sentences" and which discusses calculating the offender score in light of when sentences should run concurrent because the current offenses all encompass "same criminal conduct."

Notably, the idea that a prior conviction for a repetitive domestic violence offense must be defines as a conviction which is actually *prior*, not current, is supported by the Legislative exception contained in RCW 9.94A.525(2)(f), allowing a "wash" of such offenses "if, since the last date of release from confinement or entry of judgment and sentence, the offender had spent ten consecutive years in the community" without a

conviction. It would be nonsensical to refer to a "[p]rior conviction" as having been ten consecutive crime-free years before the current conviction as would be required if the Legislature actually intended a "prior conviction" to be defined as including all current convictions, too.

The sentencing court erred in counting Williams' two misdemeanor assault convictions as one point each in Williams' offender score for felony harassment. Even if the insufficiency of the evidence to prove felony harassment did not compel reversal, this Court should reverse and remand for resentencing.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the conviction for felony harassment or, in the alternative, remand for resentencing.

DATED this 15th day of July, 2013.

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Wa. 98402, and to Mr. Ariel Williams, DOC 733510, Airway Heights CC, P.O. Box 1899, Airway Heights, WA. 99001-1899.

DATED this 15th day of July, 2013.

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