NO. 44383-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ARIEL STEVEN WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 12-1-03240-0

Brief of Respondent

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2. Whether the defendant's sentence should be affirmed where, under RCW 9.94A.525(21) and 9.94A.589(1)(a), the sentencing court properly counted defendant's two domestic violence fourth degree assault convictions as two points towards his felony harassment offender score.

B. STATEMENT OF THE CASE.

1. Procedure

On August 27, 2012, the State charged Ariel Steven Williams, hereinafter referred to as the "defendant," by information with felony harassment in counts I and II, and fourth degree assault in counts III and IV. CP 1-4. That information named Helen Tseggai, apparently also known as Asefaw, as the victim in counts I and III, and Debra Mason as the victim in counts II and IV. CP 1-4. *See* RP 101-26. It alleged a deadly weapon sentence enhancement in counts I and II, and all four counts were alleged to be domestic violence incidents "as defined in RCW 10.99.020." CP 1-3.

After several continuances, CP 5-10, RP 5[1], the case was called for trial before the Honorable Beverly G. Grant on November 27, 2012. RP 6.

The court conducted a hearing pursuant to Criminal Rule 3.5, RP 12-32, in which Tacoma Police Officer Brandon Showalter testified, RP 12-27. CP 94-96. It held that the defendant's statements to Officer Showalter were admissible at trial. RP 31-32; CP 94-96.

The State also moved to admit Debra Mason's statement to Officer Showalter as an excited utterance, but the court reserved ruling on the State's motion to admit Debra Mason's statements, RP 22-25, pending Mason's appearance to testify. RP 31-32. The court ultimately ruled that statement admissible. RP 93-95.

The court heard motions in *limine*. RP 32-35. *See* RP 95-97.

The parties conducted *voir dire* and selected a jury. RP 35.

The State gave its opening statement, RP 37-38, and called Debra Mason, RP 39-69. It then moved for a material witness warrant for Helen Tseggai, also known as Asefaw. RP 69-72, 97-98. The State then called Tacoma Police Officer Brandon Showalter, RP 73-95, and Helen Asefaw. RP 101-26.

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[1] The State adopts the system of citation to the verbatim report of proceedings used by Appellant, citing to the volume reporting pre-trial and trial proceedings as "RP" and that recording sentencing as "SRP." *See* Brief of Appellant (BOA), p. 2 n1.

The State rested. RP 129.

The defendant moved to dismiss the two felony harassment counts for insufficient evidence of a threat to kill. RP 129-31. The deputy prosecutor noted that there was evidence in the record that one of the victims described the defendant as holding a knife while telling both victims, "I am going to kill you and I don't care if I go to prison." RP 131. He argued that such evidence was sufficient. RP 131. The court agreed with the State, and denied the motion. RP 131.

The defendant then testified, RP 132-45, and rested. RP 145.

The court considered the State's proposed jury instructions, *see* CP 11-49; the State withdrew one, and the defendant took no exception to the remaining instructions. RP 145-48, 151-54. The court read the instructions to the jury. RP 148-49; CP 50-75.

On December 4, 2013, the parties gave their closing arguments. RP 154-60 (State's closing argument); RP 160-67 (Defendant's closing argument); RP 167-68 (State's rebuttal argument).

The jury returned verdicts of guilty as charged to count I, the felony harassment listing Helen Asefaw Tseggai as the victim, and counts III and IV, the fourth degree assault charges. RP 172; CP 76. 78-79. The jury found the defendant not guilty of count II, felony harassment listing Debra Mason as the victim. RP 172-73, CP 77.

With respect to counts I, III, and IV, the jury returned special verdicts indicating that the crimes were domestic violence related in that the defendant and his victims were "members of the same family or household." RP 172-74; CP 80-85. Finally, the jury returned a special verdict indicating that the defendant was "armed with a deadly weapon at the time of the commission of the crime in Count I." RP 172; CP 80-85.

On December 21, 2012, the court conducted a sentencing hearing. SRP 3-15. At that hearing, the State asserted that, for purposes of sentencing Defendant on count I, domestic violence felony harassment, the defendant's offender score was 4. SRP 6. The State arrived at this score by adding two points from Defendant's two prior first degree child molestation convictions, and one point from each of the fourth degree assault convictions because they were found to be domestic violence related. SRP 6. The State provided the court with certified copies of the judgments to prove the two prior first degree child molestation convictions. SRP 6-7; CP 97-123. The defendant did not dispute the offender score calculation, though he refused to sign a written stipulation to that score. SRP 3-15.

The State recommended and the court imposed 16 months plus 6 months for the deadly weapon sentence enhancement, for a total of 22 months in total confinement, with 12 months in community custody on

count I. SRP 8-12; CP 124-37. On counts III and IV, the court imposed 364 days in total confinement, with 119 days credit for time served, and 245 days suspended for two years on conditions including no contact with the victims and completion of a domestic violence evaluation and recommended treatment. SRP 12; CP 138-42. Finally, the court imposed legal financial obligations, including the $500 crime victim penalty assessment, $200 court costs, a $100 DNA collection fee, and $1,250 reimbursement to the Department of Assigned Counsel. SRP 11-12; CP 124-37.

On January 4, 2013, the defendant filed a timely notice of appeal. CP 143-57. *See* SRP 12-13, CP 158-61.

2. Facts

On August 24, 2012, Debra Mason was renting a townhouse located at 2119 Tacoma Court in Pierce County, Washington. RP 39-40. The defendant, who was Mason's boyfriend, lived with her at that residence. RP 40-42.

After Mason's grandmother was discharged from rehabilitation on June 9, 2012, Mason began spending the majority of her time at her grandmother's residence. RP 42-43, 66. She testified that she was

spending about one night per week at the townhouse during that time. RP 42. Nevertheless, she maintained most of her personal property at the townhouse. RP 43.

Helen Tseggai, apparently also known as Asefew, moved into a separate bedroom of that townhouse on June 22, 2012. RP 43-44, 102. Asefew testified that she was not in a dating relationship with the defendant, but that they were roommates. RP 102. She paid him $500 per month for rent. RP 102.

On August 24, Mason came to the townhouse to discuss an unpaid cell phone bill with the defendant. RP 43. The two began to argue. RP 45-46, 62, 104-05. At some point Asefaw told Mason that the defendant "had grabbed her butt," and Mason had apparently confronted the defendant with this statement. RP 46, 105-06.

The defendant said that Asefaw was lying. RP 46. The defendant went into Asefaw's room, and he and Asefaw began to argue and yell. RP 46, 107-08.

The defendant jumped on Asefaw and pushed her onto the bed. RP 46. He said, "Bitch, if I wanted to have sex with you I can do it any time." RP 47. Mason tried to stop the defendant, but the defendant began punching Asefaw. RP 47. The defendant held Asefaw down with one hand, and punched Asefaw repeatedly with the other, aiming for her head. RP 47. Asefaw testified that the defendant punched her "[e]verywhere, nonstop. Just blow after blow." RP 108.

Mason was terrified and panicked. RP 48. She ran over and tried to grab the defendant's arms to stop him, while yelling, "Please stop, Please stop." RP 48. Asefaw testified that Mason got between her and the defendant. RP 109-09.

This allowed Asefaw to stand up on the bed, RP 48-49, or on one side of it. RP 109. The defendant responded by grabbing Mason by her hair and pulling her down onto the bed. RP 48-49, 110. The defendant "squished" Mason's "cheek and face very hard" with his hand, and acted as though he was going to punch her. RP 48-49. *See* RP 109.

According to Mason, Asefaw then grabbed an empty Vodka bottle and threatened to hit the defendant with it. RP 49. The defendant released Mason, but again went after Asefaw. RP 49. He took the bottle from her, and she jumped off the bed. RP 49. The defendant then began to chase Asefaw around the room. RP 49-50. The two began arguing again, and Mason apparently left the room, hoping it would stop. RP 50.

Asefaw testified that the defendant picked up a knife she had placed on her dresser, RP 64, 111, and "started waiving it as if he was going to use it." RP 111.

When she returned to the room, Mason saw the defendant with a steak knife, jumping over the bed in pursuit of Asefaw. RP 50, 54-55.

Mason testified that, while holding that knife, the defendant "said ***something like***, 'I could kill you both right now. I could kill you right now." RP 55, 64 (emphasis added). However, Mason reported to the

officer shortly after the event that the defendant told the victims, "I'll kill you, and I don't care if I go to prison." RP 93-95.

The defendant was waving the knife around as he said this. RP 55, 64. Asefaw testified that she thought she was going to die," RP 112, and Mason believed, at least "[f]or a minute" that she was going to be stabbed by the defendant. RP 64.

The defendant then threw the knife down, and started "choking" Asefaw. RP 55. Asefaw testified that the defendant "strangled [her] so hard that [she] was lifted off the ground and [had] his fingerprints... on [her] neck for days." RP 109. Asefaw was "gagging and making noises," so Mason ran over to try to stop him. RP 55. The defendant pushed Mason onto the ground and put his foot on her, while continuing to strangle Asefaw. RP 55. Mason thought the defendant was going to kill Asefaw. She told him to "Stop it. Stop it. Please just stop it." RP 56. Asefaw "was really scared." RP 110.

Mason was able to reach the defendant's "private area" with her hand and twist it, which eventually got the defendant to stop strangling Asefaw. RP 55-56.

The defendant ran back to his room, and the women shut the door and stayed in Asefaw's room. RP 56. Unfortunately, the microphone of Asefaw's cell phone was broken and Mason's phone was in the defendant's room. RP 56-57.

When Mason went to the defendant's room to retrieve her phone, the defendant refused to give her the phone and threatened to knock her out. RP 57. So, Mason returned to Asefaw's room without her phone. RP 57.

Asefaw sent a text message to her boyfriend, asking him to come to the residence. RP 57, 123. When Mason heard the defendant walk upstairs, she ran back to his room, and got her phone. RP 57.

When Asefaw's boyfriend pulled up outside, the two women ran out of the residence and Mason called 911. RP 57. When she called 911, the defendant fled the residence. RP 57. Both Mason and Asefaw testified that the defendant "ran" from the residence, RP 57, 114, and the defendant admitted he was not at home when the police arrived. RP 140.

Tacoma Police Officers Shank and Showalter responded to that 911 call, and arrived at 2119 Tacoma Court in Tacoma, Washington to investigate a "domestic with a knife." RP 75-76. The officers found Mason alone at the residence when they arrived. RP 76-77. Showalter described Mason as upset, shaking, crying, and apparently scared. RP 77. Mason told the officer that while waving the knife the defendant said, "I'll kill you, and I don't care if I go to prison." RP 93-95.

Showalter indicated that Mason appeared to be intoxicated when he interviewed her. RP 77, 88, 92. *See* RP 137-38 (defendant described Mason as "pretty sloshed."). Mason testified that she was "shaken up," and started drinking Vodka from a bottle in Asefaw's room after the

assault. RP 60. Asefaw agreed that Mason did not drink alcohol until after the assault. RP 107.

Mason showed Showalter the knife, which he collected from the bedroom and placed into evidence. RP 79-80. That knife was admitted at trial as exhibit 1A. RP 80-81.

Officers checked the area, but were unable to locate the defendant. RP 81-82.

After the police left, the defendant returned, and started stuffing his belongings into duffle bags. RP 58. Mason called the police again. RP 58, 82. Officers returned to the scene and placed the defendant in handcuffs. RP 82.

The defendant was initially cooperative, but as Officer Showalter was walking him to the patrol car, the defendant became angry and began yelling and screaming at officers, "Fuck her and fuck you guys." RP 82-83. The defendant pulled away from the officer. RP 84. Officer Showalter told him that he needed to slow down and walk with him, but the defendant refused, saying, "fuck you" and "let's fucking go," as he started to walk faster. RP 84.

The defendant testified that he was "a little bit taken aback by being arrested." RP 142.

Officer Shank then assisted by taking the defendant by the other arm, and together, the officers escorted the defendant to their vehicle. RP 84. Officer Showalter asked the defendant to face the vehicle and spread

his feet apart so that he could search him for weapons before entering the vehicle. RP 85. The defendant made an exaggerated movement with his right foot and thrust his upper body back towards the officers, struggling with them. RP 85. Officer Showalter was afraid the defendant would hit one of them, so the officers took the defendant to the ground. RP 85-86, 90.

The defendant admitted to arguing with Mason and Asefaw, but denied touching either of them that day. RP 138, 142. He also denied picking up a knife or threatening to kill the women. RP 142.

Asefaw testified that she had injuries from the defendant's assault that extended "all over [her] body," including "handprints" on her neck, a large bruise on her right, upper arm, a smaller bruise on her left forearm, scratches on her fingers, a "bump" on the side of her head, bruises on her thighs, and a bruise on her knee. RP 116. On August 27, 2012, the police took photographs of Asefaw's injuries, which were later admitted as exhibits at trial. RP 114-22, 124. *See* RP 134.

C. ARGUMENT.

1. THE DEFENDANT'S CONVICTION FOR FELONY HARASSMENT SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THAT CRIME BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Lopez***, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (*quoting* ***State v. Myers***, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Moreover, "[i]f the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt, a conviction may be properly based on 'pyramiding inferences.'" ***State v. Bencivenga***, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (*quoting* ***State v. Weaver***, 60 Wn.2d 87, 88, 371 P.2d 1006 (1962)).

Finally, "[d]eterminations of credibility are for the fact finder and are not reviewable on appeal." ***Brockob***, 159 Wn.2d at 336; ***State v. Locke***, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013).

To prove the crime of felony harassment as charged in count I of the present case, the State was required to prove each of the following elements beyond a reasonable doubt:

(1) That on or about August 24, 2012, the defendant knowingly threatened to kill Helen Asefaw Tseggai immediately or in the future;
(2) That the words or conduct of the defendant placed Helen Asefaw Tseggai in reasonable fear that the treat to kill would be carried out;
(3) That the defendant acted without lawful authority; and
(4) That the threat was made or received in the State of Washington.

CP 50-75 (instruction no. 7). *See* RCW 9A.46.020; CP 1-3; ***State v. Hickman***, 135 Wn.2d 97, 101, 954 P.2d 900 (1997) (under the law of the

case doctrine, where no party objects to an instruction, it becomes the law of the case); RP 145-48, 151-54 (no party objected to instruction no. 7).

The defendant here argues that there was insufficient evidence of the crime of felony harassment as charged in count I because there is (1) "insufficient evidence that a threat to kill was actually made", and (2) "insufficient evidence to prove that Asefaw was actually afraid that [the defendant] would carry out any threat to kill." BOA, p. 10-11. Neither argument is supported by the record.

First, the defendant argues that the State did not present sufficient evidence that he made a "true threat" in that there was "insufficient evidence that a threat to kill was actually made." BOA, p. 9-10.

Although "[t]he First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law... abridging the freedom of speech,'" it "does not extend to unprotected speech, one category of which is 'true threats.'" ***State v. Allen***, 176 Wn.2d 611, 626, 294 P.3d 679 (2013) (*citing* ***Virginia v. Black***, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L.Ed.2d 535 (2003)). Thus, appellate courts "interpret statues criminalizing threatening language as proscribing only unprotected true threats." ***Allen***, 176 Wn.2d at 626. However, "'the constitutional concept of 'true threat' merely defines and limits the scope

of the essential threat element in the felony telephone harassment statute and is not itself an essential element of the crime.'" ***Allen***, 176 Wn.2d at 630 (*quoting* ***State v. Tellez***, 141 Wn. App. 479, 484, 170 P.3d 75 (2007)).

A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted... as a serious expression of intention to inflict bodily harm upon or to take the life' of another person.'" ***Allen***, 176 Wn.2d at 626. "[C]ommunications that 'bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole' are not true threats." ***State v. Locke***, 175 Wn. App. 779, 790, 307 P.3d 771 (2013) (*quoting* ***State v. Schaler***, 169 Wn.2d 274, 283, 236 P.3d 858 (2010)).

"The nature of a threat 'depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken," because "[s]tatements may 'connote something they do not literally say.'" ***Locke***, 175 Wn. App. at 790 (*citing* ***State v. C.G.***, 150 Wn.2d 604, 611, 80 P.3d 594 (2003) and ***Planned Parenthood of Columbia/Willamette, Inc. v. A.C.L.A.***, 290 F.3d 1058, 1085 (9th Cir. 2002)). Moreover, "'[t]he speaker of a 'true threat' need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious." *Id.* (*citing* ***Schaler***, 169 Wn.2d at 283).

In the present case, the record contains at least three accounts of what the defendant said to Mason and Asefaw while waving a knife at them.

First, Mason told the investigating officer shortly after the incident that the defendant said to Mason and herself, "I'll kill you, and I don't care if I go to prison." RP 93-95.

Second, Mason testified almost four months after the incident that the defendant "said ***something like***, 'I could kill you both right now." RP 55, 64 (emphasis added).

Third, the defendant denied making any threats to Mason and Asefaw, RP 142, and Asefaw did not remember what the defendant said while he was waving the knife at her. RP 112.

The first two accounts are obviously inconsistent with the third because the third account does not include a threat made by the defendant. However, because in a sufficiency of the evidence analysis, the evidence must be viewed "in the light most favorable to the State,'" ***Brockob***, 159 Wn.2d at 336, the third account must be disregarded.

This leaves only the first two accounts. However, these accounts may be reconciled. Mason gave the first immediately after the incident, and it was recorded as a quotation by the investigating officer. She gave the second almost four months later under the stress of trial and qualified that account by testifying only that the defendant "said something like, 'I could kill you both right now." In other words, she admitted that this

second account was a paraphrase and not a verbatim account of the words used by the defendant. Thus, the second account could reasonably be reconciled as a paraphrase of the first, more specific account.

Indeed, this would be a reasonable inference to draw from the evidence, and given that all reasonable inferences from the evidence must be drawn in favor of the State, ***Salinas***, 119 Wn.2d at 201, this inference must be drawn here. When it is, the evidence shows that the defendant, while waving a knife at Mason and Asefaw, told them, ""I'll kill you, and I don't care if I go to prison." RP 93-95.

Moreover, the record shows that this statement was made after the defendant had already assaulted the victims, RP 46-55, 108, 94-95, and while he was waving a knife around "like he was going to hurt [them]." RP 111. As a result, it was a statement that a reasonable person would foresee would be interpreted "as a serious expression of intention... to take the life' of another person,'" ***Allen***, 176 Wn.2d at 626, and hence, a "true threat" to kill Asefaw. *See Id.*

Therefore, there was sufficient evidence of the first element that "on or about August 24, 2012, the defendant knowingly threatened to kill Helen Asefaw Tseggai immediately or in the future." CP 50-75 (instruction no. 7).

The defendant also argues that there is "insufficient evidence to prove that Asefaw was actually afraid that [the defendant] would carry out any threat to kill." BOA, p. 10-11. The record shows otherwise.

Asefaw testified that the defendant "picked up the knife and started waiving [sic] it as if he was going to use it." RP 111. She testified that he was motioning with the knife "just left and right, left and right, like he was going to hurt us." RP 111. She testified that she was "[r]ight in front of [the defendant]" when he was doing this, and that she thought she "was going to die." RP 112. Thus, there was sufficient evidence in the record that "Asefaw was actually afraid that [the defendant] would carry out any threat to kill." BOA, p. 10-11.

Although the defendant argues that this fear was not reasonable because he later dropped the knife without using it to assault or kill Asefaw, BOA, p. 10-11, his other conduct undercuts this notion.

Prior to picking up the knife, the defendant had jumped on Asefaw, pushed her onto the bed, and punched her repeatedly. RP 46- 47. Asefaw testified that the defendant punched her "[e]verywhere, nonstop. Just blow after blow." RP 108. She testified that she suffered injuries from the defendant's assault that extended "all over [her] body," including a large bruise on her right, upper arm, a smaller bruise on her left forearm, scratches on her fingers, a "bump" on the side of her head, bruises on her thighs, and a bruise on her knee. RP 116.

Given that there was evidence that the defendant assaulted Asefaw shortly before he threatened to kill her and that he was waving a knife at her when he threatened to kill her, RP 111, there was sufficient evidence that the defendant's "words or conduct... placed Helen Asefaw Tseggai in

reasonable fear that the treat to kill would be carried out." CP 50-75 (instruction no. 7).

Hence, there is sufficient evidence of the second element as well, and thus, sufficient evidence from which a rational trier of fact could have found the essential elements of the crime of felony harassment beyond a reasonable doubt.

Therefore, the defendant's conviction thereof should be affirmed.

2. THE DEFENDANT'S SENTENCE SHOULD BE AFFIRMED BECAUSE, UNDER RCW 9.94A.525 AND 9.94A.589(1)(a), THE SENTENCING COURT PROPERLY TREATED DEFENDANT'S TWO DOMESTIC VIOLENCE FOURTH DEGREE ASSAULT CONVICTIONS AS TWO POINTS TOWARDS HIS FELONY HARASSMENT OFFENDER SCORE.

In sentencing the defendant on count I, felony harassment, RCW 9.94A.525(21) required the court to add one point to the defendant's offender score for each of his two domestic violence fourth degree assault convictions. *See* CP 78-79.

RCW 9.94A.525(21) provides, in relevant part, that

> If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven...
>
> (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.

See Appendix A.

RCW 9.94A.030(20) indicates that "'domestic violence' has the same meaning as defined in RCW 10.99.020 and 26.50.010."

Here, the "present conviction" was for felony harassment, which is, by definition, a class C felony. RCW 9A.46.020(2)(b)(ii). This present conviction was also a felony where domestic violence as defined in RCW 10.99.020 was plead and proven. CP 1-3. Finally, because RCW 9.94A.030(20) provides that "'domestic violence' has the same meaning as defined in RCW 10.99.020," the present conviction was for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven."

Thus, RCW 9.94A.525 applied to the sentencing of this conviction and required that the court "[c]ount 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."

Because RCW 9.94A.030 defines a "[r]epetitive domestic violence offense" as, *inter alia*, any "[d]omestic violence assault that is not a felony offense under RCW 9A.36.041," domestic violence fourth degree assault is a "[r]epetitive domestic violence offense." *See* RCW 9A.36.041.

Hence, the defendant's convictions in counts III and IV for domestic violence fourth degree assault were convictions for repetitive domestic violence offenses.

Moreover, the State alleged that each was a domestic violence offense when it filed these charges on August 27, 2012, CP 1-3, and proved that they were domestic violence offenses, as evidenced by the jury's special verdicts on December 4, 2012. CP 80-85.

Thus, the fourth degree assault convictions were convictions for repetitive domestic violence offenses "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." RCW 9.94A.525.

Because the defendant was 46 years of age at the time, CP 1-3, they were also "adult" convictions.

Finally, RCW 9.94A.589(1)(a) required that these convictions be treated as "prior" convictions for purposes of determining the defendant's offender score for the felony harassment count.

RCW 9.94A.589(1)(a) specifically provides that with the exception of serious violent offenses and certain firearms offences, "whenever a person is to be sentenced for two or more current offenses," which do not encompass the same criminal conduct,

> 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.

See Appendix B.

Here, the defendant was being sentenced for two or more current offenses. CP 1-3, 76, 78-79, 124-37.

Neither the felony harassment nor the fourth degree assault convictions were serious violent or firearm offenses, *compare* CP 1-3, *with* RCW 9.94A.030(45), RCW 9.41.040(1)-(2), RCW 9A.56.300 and RCW 9A.56.310, and they did not constitute the same criminal conduct.

RCW 9.94A.589(1)(a) provides that "[s]ame criminal conduct... means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."

Here, count IV is not the same criminal conduct as counts I or III because count IV involved Debra Mason as the victim, whereas counts I and III named Helen Asefaw Tseggai as victim. CP 1-3. Nor are counts I and III the same criminal conduct because count III required that the defendant intentionally assault Asefaw whereas count I only required that he knowingly threaten her. CP 1-3.

Therefore, the sentencing court was required by RCW 9.94A.589(1)(a) to use the fourth degree assault convictions as "prior convictions" in determining the offender score for the felony harassment count.

Hence, the fourth degree assault convictions were, under RCW 9.94A.525(21), adult prior convictions for repetitive domestic violence

offenses 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.

As a result, in sentencing the defendant on felony harassment, the court was required by RCW 9.94A.525(21) to "[c]ount one point for each" of these convictions.

The defendant, however, makes two arguments as to why this is not the case. BOA, p. 11-17. Neither is sustainable.

First, the defendant argues that the court erred in counting one point for each of the fourth degree assault convictions because the information accused him "only of committing domestic violence incidents under RCW 10.99.020, not RCW 9.94.030, as the enhancement provides," BOA, p. 14-15. He is mistaken.

While it is true that RCW 9.94A.525(21) requires that "domestic violence as defined in RCW 9.94A.030 was plead and proven," RCW 9.94A.030 provides that "'domestic violence' has the same meaning as defined in RCW 10.99.020." Because each of the fourth degree assaults in this case were alleged to be domestic violence incidents under RCW 10.99.020, CP 1-3, they were, by definition, alleged to be domestic violence incidents under RCW 9.94A.030. Moreover, because each of these incidents were proven, CP 80-85, "domestic violence as defined in RCW 9.94A.030 was plead and proven" with respect to both of the fourth degree assault counts.

Therefore, under RCW 9.94A.525(21), the court properly counted one point towards the defendant's felony harassment offender score for each of these fourth degree assault convictions.

Second, the defendant argues that RCW 9.94A.525(21) did not apply because the fourth degree assault convictions "were current –not 'prior' convictions." BOA, p. 15-17.

In support of this proposition, he cites RCW 9.94A.525(1), which defines "[a] prior conviction as "a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." BOA, p. 15. However, RCW 9.94A.525(1) goes on to provide that

> [c]onvictions 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).

Under this statute, the defendant is correct that the fourth degree assaults in this case were "other current offenses within the meaning of RCW 9.94A.589." RCW 9.94A.525(1). The problem with his argument, is that the analysis cannot end there.

Because RCW 9.94A.525(1) defines the fourth degree assault convictions in this case as "other current offenses within the meaning of RCW 9.94A.589," one must consult RCW 9.94A.589. As was discussed

above, that statute provides that "whenever a person is to be sentenced for two or more current offenses," which do not encompass the same criminal conduct,

> 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.

Because, as discussed previously, the fourth degree assaults did not encompass the same criminal conduct as the felony harassment or one another, RCW 9.94A.589 required that the sentence range for the felony harassment be determined by using the fourth degree assault convictions as if they were prior convictions for the purpose of the offender score.

Therefore, 9.94A.525(21) required the court to add one point to the defendant's offender score for each of his two domestic violence fourth degree assault convictions.

Because the court did so in this case, SRP 6-12, CP 124-37, the defendant's offender score calculation and sentence were proper and should be affirmed.

D. CONCLUSION.

Defendant's conviction for felony harassment should be affirmed because, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of that crime beyond a reasonable doubt.

Defendant's sentence should also be affirmed because, under RCW 9.94A.525, the sentencing court properly treated defendant's domestic violence fourth degree assault convictions as a "prior" offense for purposes of his felony harassment offender score calculation under RCW 9.94A.589(1)(a).

DATED: November 18, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-18-13
Date Signature

Appendix A

9.94A.525. Offender score

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) 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.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), all predicate crimes for the offense as defined by RCW 46.61.5055(14) shall be included in the offender score, and prior convictions for felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)) shall always be included in the offender score. All other convictions of the defendant shall be scored according to this section.

(f) Prior convictions for a repetitive domestic violence offense, as defined in RCW 9.94A.030, shall not be included in the offender score 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 committing any crime that subsequently results in a conviction.

(g) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under RCW 9A.44.130 or 9A.44.132, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW *9A.44.130 or 9A.44.132, which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this subsection, community custody includes community placement or postrelease supervision, as defined in chapter 9.94B RCW.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a

Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(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.

(22) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

Appendix B

9.94A.589. Consecutive or concurrent sentences

(1)(a) Except as provided in (b) or (c) of this subsection, 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 those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

PIERCE COUNTY PROSECUTOR

November 18, 2013 - 2:32 PM

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