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

NO. 44119-5-II

FROM CLALLAM COUNTY SUPERIOR COURT

NO. 11-1-00336-1

STATE OF WASHINGTON,

Respondent /Cross Appellant

vs.

DALE PURSER,

Appellant.

AMENDED BRIEF OF RESPONDENT CROSS APPELLANT

Lewis M. Schrawyer, WSBA # 12202
Deputy Prosecuting Attorney
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296
lschrawyer@co.clallam.wa.us
Attorney for Respondent

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ISSUE TWO

When a defendant commits reprehensible crimes against his wife, assaulting her on a continuous basis in front of a child of the couple and threatening to kill the child along with the mother and the child's extended family, and when the trial court advises the defendant that the trial court will review a no contact order on proof the defendant is no longer a threat to the child, can it be said that the record clearly supports the court's entry of a lifetime no contact order without a basis, and without permitting the defendant the opportunity to have the order modified?

ISSUE THREE

When the jury hears of two threats to kill, one to J.P. and one later to her son, and is instructed that it must find evidence beyond a reasonable doubt that J.P. was threatened, is the jury properly instructed so that the defendant is not being punished for an act he was not charged with?

ISSUE FOUR

When the jury hears two threats made on the same day, where

J.P. is threatened in the defendant's presence and the second threat is to kill her son B.C. if she calls the police, is there sufficient difference in law and fact such that the crimes do not either merge or create double jeopardy?

CROSS APPEAL

When a trial court finds that crimes were the same criminal conduct for sentencing purposes, has the court committed reversible error when it found each assault had the same purpose, scheme or plan as the harassment or intimidation convictions?

STATEMENT OF THE CASE

J.P. married Mr. Purser on February 20, 2009 (8/29/2012 RP 31). She had a son named B.C. when they married; a son she called D.P.Jr. was born on January 15, 2010 (8/29/2012 RP 31). At first, Mr. Purser was a calm, shy person, but he began experiencing mood swings like a rollercoaster; one minute calm, one minute crying, one minute screaming and then back to calm (8/29/2012 RP 31). He would have bursts of rage and became very controlling and violent (8/29/2012 RP 31).

The first time he became physically violent toward J.P. was before D.P.Jr. was born (8/29/2012 RP 32). He had been out all night drinking and came home very upset and angry (8/29/2012 RP 32). He accused her of having someone in the house (8/29/2012 RP 33). She was lying in bed and tried to get up; he pushed her down each time she tried to rise (8/29/2012 RP 33). He let her up, shoved her back on the bed, and then began kneeing her in the face and the side of her body (8/29/2012 RP 33). He was arrested and pleaded guilty to

assaulting her (8/29/2012 RP 33).

When he returned home, he grabbed her by the throat and told her that she had better not call the police or he would take D.P.Jr. away from her (8/29/2012 RP 34). He also threatened to kill her and her family (8/29/2012 RP 34). She believed he would carry out his threat (8/29/2012 RP 34). Even though his behavior did not improve, she was afraid to leave him because he always would threaten her, her children and her family (8/29/2012 RP 35). She believed he would carry out his threat (8/29/2012 RP 35).

Towards the end of their relationship, the physical violence escalated. He would strangle her, slap and hit her, threaten her, punch her and drag her by her hair on almost a daily basis (8/29/2012 RP 36). She could not leave him because he would separate the two boys, keeping one with him when she left the residence (8/29/2012 RP 37). By August of 2011, the fighting was continuous; the issues included "money or his daughter or the kids or B.C.'s father" (8/29/2012 RP 37).

On August 31, 2011, she took D.P.Jr. to a medical appointment (8/29/2012 RP 38). Before the appointment could begin, she was taken aside to question her about her black eye (8/29/2012 RP 38). She made up a story but her eye was black because Mr. Purser had punched her in the eye (8/29/2012 RP 38).

On September 1, 2011, she decided she had enough of the abuse because her children had seen way too much violence and she and they were living in fear of Mr. Purser (8/29/2012 RP 38-9). She began to fill out paperwork but he struck her (8/29/2012 RP 39). He then took the notebook away and hit her in the face with it (8/29/2012 RP 38). She told the boys to run from the house, but he would not let them leave (8/29/2012 RP 39). He began punching her in her face, in both her eyes and her nose (8/29/2012 RP 39). He punched her in the mouth so hard it busted her mouth open while choking her; she could not breathe because the blood was running down her throat (8/29/2012 RP 39). The children watched this entire episode

and were scared and crying (8/29/2012 RP 40). She finally convinced Mr. Purser to stop hitting and choking her so she could get her mouth fixed. He told her that there was a police officer standing outside; she was to take both children and go into the bathroom (8/29/2012 RP 40). Mr. Purser was angry because the police showed up and told her that, had the police come in or if they didn't leave, he was going to kill her and the children (8/29/2012 RP 40).

Mr. Purser then took J.P. to the dentist to get her tooth fixed (8/29/2012 RP 41). He told her to lie about how her mouth was hurt; she did because he threatened to kill the children if she called the police (8/29/2012 RP 41). He pulled a knife and showed it to her (8/29/2012 RP 41). The dentist set her tooth in a brace (8/29/2012 RP 102).

The brace lasted about two weeks (8/29/2012 RP 102) but was knocked out of place when Mr. Purser hit her in the mouth again (8/29/2012 RP 44). His reason this time was because D.P.Jr. was fussy after having had surgery (8/29/2012

RP 45).

Shortly after that incident, she took the two children and left the residence (8/29/2012 RP 45). She and her father asked Mr. Purser to leave the house so she and the children could return; he refused (8/29/2012 RP 46). He took the two boys into the home without her and stated that he wanted one night with them and then would leave in the morning (8/29/2012 RP 46-7). J.P. parked her vehicle in a manner that allowed her to see in the house and stayed awake in it all night (8/29/2012 RP 47).

The following morning, September 23, 2011, she went into the house to grab B.C. to get him ready for school (8/29/2012 RP 47). B.C. came out of his room and jumped on Mr. Purser; Mr. Purser responded by throwing him on the "ground" and punching him in the side (8/29/2012 RP 48). B.C. began crying; J.P. tried to hold him while she was feeding D.P.Jr. when Mr. Purser attacked her from behind (8/29/2012 RP 48-9). He was hitting her and trying to grab her throat; she

responded by trying to put the children under her so Mr. Purser could not hit them (8/29/2012 RP 49). He climbed on top of her and was choking her and screaming at her about how all this was her fault and that he was not going to leave but, instead, kill her (8/29/2012 RP 49). She believed that he would kill her (8/29/2012 RP 49). As he continued to beat her and choke her he kept telling her that he was going to kill her and told the children to say good-bye to her because he was going to kill her (8/29/2012 RP 50).

By this time, the children had moved to the front of the love seat (8/29/2012 RP 50). When it appeared to J.P. that he was going to attack B.C. who was crying, she pulled the children underneath her and covered them, holding onto them (8/29/2012 RP 50). Mr. Purser pulled her off of the children and began punching her in her side as hard as he could; she had never been hit that hard before in her life (8/29/2012 RP 51). When Mr. Purser saw that the punch really hurt her, he mocked her and began striking her repeatedly in the same spot

(8/29/2012 RP 51). He struck her at least twenty times (8/29/2012 RP 51).

At some point, she realized she was very injured; she was seeing black and was gasping for air. She knew that something serious had happened to her (8/29/2012 RP 51). Mr. Purser grabbed her, pulled her away from the children and began strangling her and punching her while on top of her (8/29/2012 RP 52). He finally stopped beating and choking her when she begged him to stop so she could take D.P.Jr. to his doctor's appointment (8/29/2012 RP 52). She was not allowed to take B.C. with her (8/29/2012 RP 52).

While at the doctor's office, she was again asked about an injury, this time to her ear (8/29/2012 RP 52). She knew the nurse practitioner knew she was lying when she said that D.P.Jr. had scratched her but she was scared that Mr. Purser would kill B.C. while she was gone (8/29/2012 RP 53). She was in terrible pain, feeling as if she was going to pass out, holding onto things for balance, seeing all black and her body

hurt when she tried to breathe or talk or to do anything (8/29/2012 RP 53). When she returned home, she backed her car into the ground and went inside (8/29/2012 RP 54). She told B.C. to run for the car but Mr. Purser caught him (8/29/2012 RP 54). He began choking her, holding her against the wall to the point she could not breathe (8/29/2012 RP 54). She knew then that, if she did not get herself and the children out of his presence, he was going to kill her or them, or both (8/29/2012 RP 54).

He finally agreed to let her leave after she promised she would not call the police; if she did, he would kill them and kill her family (8/29/2012 RP 54, 59). After she left to go to her friend's work place, he called her before she could call 911 and told her that she had better not call the police or tell anyone what happened or tell her father or he would kill B.C. (8/29/2012 RP 60). She immediately called 911 because this is the first time he had actually threatened to kill one child and the one child he threatened to kill was not his child (8/29/2012 RP

60).

The police arrested Mr. Purser and removed the children from the house while J.P. went to the hospital (8/29/2012 RP 61). She refused to stay at the hospital because she did not know that the children were safe, but the pain was so great she returned to the hospital the next day (8/29/2012 RP 61). She had emergency surgery and her spleen was removed (8/29/2012 RP 8). She had significant inner abdomen bleeding; about 20 percent of her blood was in her abdomen, which is life threatening (8/29/2012 RP 9). The kind of damage the doctor observed to J.P.'s inner abdomen was consistent with blunt force trauma (8/29/2012 RP 10).

At sentencing, the State conceded that the harassment conviction, count II, was the same course of conduct as the attempted intimidation charge for sentencing purposes (10/23/2012 RP 5). However, the State argued that the two intimidation counts (one before going to the dentist on September 1, 2011, one over the telephone on September 23,

2011) were a separate course of conduct because both acts were committed after each assault was complete; both occurred at a separate place and time from the assaults (10/23/2012 RP 6). Mr. Purser responded that the intimidation convictions were part of the same course of conduct as the two assault convictions because "they were not separated by significant amounts of time" (10/23/2012 RP 7-8).

The Court, without any explanation, found the crimes all constituted the same criminal conduct (10/23/2012 RP 34). The judgment and sentence reflects that counts I through III (Assault 1, Harassment, Intimidation of a Witness) are the same criminal conduct and counts IV and V (Assault 2, Intimidation of a Witness) are also the same criminal conduct (CP 108).

ARGUMENT

ISSUE ONE

When a jury is instructed that it must first find that the defendant committed a crime, and then find whether the crime occurred in a domestic situation, and then find one of three plain language aggravators that are further defined with common language definitions, is a challenge to the aggravators

as "void for vagueness" viable?

RESPONSE

I. Standard of Review: Issues of statutory construction and constitutionality are questions of law subject to *de novo* review. *State v. Bradshaw,* 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

II. Analysis: A statute is void for vagueness if it "fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Eckblad,* 152 Wn.2d 515, 518, 98 P.3d 1184 (2004), citing to *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *State v. Branch,* 129 Wn.2d 635, 648, 919 P.2d 1228 (1996). "We consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as

applied to the conduct of others.' " *Holder v. Humanitarian Law Project,* ___ U.S.___, 130 S.Ct. 2705, 2719, 177 L.Ed.2d 355 (2010) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

State v. Duncan, ___ Wn.2d ___, 300 P.3d 352 (2013), addressed this same vagueness analysis. The Court first analyzed whether the jury was instructed that "substantial bodily injury" was sufficiently different from proof that the "victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." *Duncan, id.* at 354. Citing to *State v. Pappas,* 176 Wn.2d 188, 193, 289 P.3d 634 (2012), the Court held that the jury was properly instructed that it must find the victim's injuries substantially exceeded the level of bodily harm necessary to meet the elements of the crime. In other words, the level of injury substantially exceeded the assault charge's element of substantial bodily

injury. Thus, *Blakely*[1] was satisfied.

The jury in this case was instructed that the victim and Mr. Purser were household members and therefore domestic violence may have occurred (Inst. 33, CP 132). If the jury found Mr. Purser guilty of any of the charges or the lesser included charge, it must determine "[w]hether the crime is an aggravated domestic violence offense." (Inst. 32, CP 122). The jury was then instructed that "aggravated domestic violence offense" could be found if "the offense was part of an ongoing pattern of psychological, physical, or sexual incidents of abuse over a prolonged period of time." The instruction further defined "ongoing pattern of abuse" to mean "multiple incidents of abuse." The term "prolonged period of time" was defined for the jury as "more than a few weeks." (Inst. 33, CP 123).

Or, the jury could find aggravated domestic violence occurred because "the offense was committed within the sight

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[1] *Blakely v. Washington,* 542, U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 403 (2004), citing to *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed. 435 (2000)).

or sound of the victim's and/or Defendant's children who were under the age of 18 years." (Inst. 33, CP 123).

Or, the jury could find aggravated domestic violence occurred because "the Defendant's conduct during the commission of the offense manifested deliberate cruelty or intimidation of the victim." (Inst. 33, CP 123). "Deliberate cruelty" was defined in Instruction 35, CP 125.

Mr. Purser argues these terms are vague because "there is no assurance that a subsequent jury would even apply the same standard regarding what inheres in or is normally associated with the crime." Appellant's brief, page 16. *Holder v. Humanitarian Law Project, supra,* makes it clear the test for vagueness is not whether the terms are sufficiently clear to apply in subsequent cases, but whether the aggravators are sufficiently clear in the present case.

If Mr. Purser is still arguing the aggravators are vague as applied here, he is not correct. First, unlike *Duncan* and *Pappas,* these aggravators are not an extension of the

underlying offense. Because they are not an extension of the underlying crimes, there is no chance the jury can confuse the the crime's elements and the aggravators' elements. Second, there is nothing vague about these terms. The first aggravator states clearly that the jury must find multiple incidents of abuse over a prolonged period of time. It does not become more clear than that; "multiple incidents" and "prolonged period of time" are common terms and "assault" is defined in jury instruction number 13 (CP 103). The second aggravator required the jury to find Mr. Purser beat on his wife and threatened her while his or her minor children could hear or see what was happening. Again, the language is clear; any rational person could easily determine from the evidence that both children were present during each assault. The third aggravator required the jury to find Mr. Purser either manifested deliberate cruelty or intimidated his wife. Although "manifested" is clearly a lawyer's word for "showed," it is still pretty clear. Even if it is not as clear, the term "intimidate" is.

The terms are not vague, at all, and "offers a sufficiently objective definition for jurors" to determine whether each aggravator applies. *Duncan, id,* at 356. It is simply impossible to believe that jurors would be unable to rationally apply what are essentially common terms to the charges before them. The void for vagueness challenge fails.

ISSUE TWO

When a defendant commits reprehensible crimes against his wife, assaulting her on a continuous basis in front of a child of the couple and threatening to kill the child along with the mother and the child's extended family, and when the trial court advises the defendant that the trial court will review a no contact order on proof the defendant is no longer a threat to the child, can it be said that the record clearly supports the court's entry of a lifetime no contact order without a basis, and without permitting the defendant the opportunity to have the order modified?

RESPONSE

I. Standard of Review: The imposition of crime-related prohibitions is reviewed for an abuse of discretion. *State v. Riley,* 121 Wn.2d 22, 36, 846 P.2d 1365 (1993). An abuse of discretion occurs when the decision is manifestly unreasonable

or exercised on untenable grounds or for untenable reasons. *State v. Hays,* 55 Wn.App. 13, 16, 776 P.2d 718 (1989).

II. Analysis: The Trial Court did not abuse its discretion. The so-called "life" ban on contact with D.P.Jr. is reasonable under the circumstances reviewed the by trial court.

Mr. Purser was sentenced on October 23, 2012 (10/23/2012 RP 1). On page 33, the Trial Court expressed his reason for the sentence it imposed:

> In twenty years on the bench the court has not seen a more sever [sic] act of domestic violence, short of a killing that [could have] occurred in this case. So, when the court looks at the guidelines, the court has a range that the Legislature has given the court. In this case the range is 162 to 216 months and when deciding what part of the range the court's going to impose, the court looks at the circumstances behind the case to determine whether or not this is kind of a minor violation or major violation. As far as the court's concerned this was a major violation of the assault one because of the harm that was done and the way it was inflicted.

(10/23/2012 RP 33). The trial court imposed the top of the range for assault in the first degree (10/23/2012 RP 34).

When the State asked for a lifetime no contact order, the

Trial Court agreed:

> Yeah, I'm going to impose that. You know, I want to make it clear though, that will be in effect unless it's otherwise changed by the court. So, Mr. Purser, even though you're done with your time, you've completed [all the programs you stated you would complete in prison], the no contact orders [sic] in effect.
>
> So, it's a lifetime no contact order unless it's changed by the court. So, unless the court makes that change in it, it's gonna be lifetime, so in order for the court to change it, there would have to be [sic] you come into court, Ms. Purser getting notice of that, the court having to deal with whatever the court's gonna do at that point to determine whether or not that's gonna be done or not, okay?

(10/23/2012 RP 34).

A review of the testimony from Ms. Purser shows the trial court was clearly justified in imposing what was termed "a lifetime" no contact order. Mr. Purser's behavior with his family is appalling. He severely injured his wife in front of his children, made all manner of threat to intimidate her, including threats to kill the children. He assaulted her continually, including holding her down on the bed when she was pregnant with D.P.Jr. (8/29/2012 RP 33, 39), threatening to take D.P.Jr.

from her if she called the police on him (8/29/2012 RP 34, 35), threatening to kill Ms. Purser and her entire family (8/29/2012 RP 35), strangling or hitting or threatening or punching her on an almost daily basis in his anger—unable to see that she was not at fault and blaming her for every problem (8/29/2012 RP 36), keeping one child with him to ensure she would not leave or contact the police (8/29/2012 RP 37), beating her up in front of the children when she attempted to leave him, and choking her and busting her tooth (8/29/2012 RP 39). In this particular event, D.P.Jr. was crying and Mr. Purser's response was to blame her and tell her to make the child stop crying (8/29/2012 RP 39). On that occasion, Mr. Purser told her to go to the dentist to get her tooth fixed, then pulled a knife out and said he would kill the kids if she called the police (8/29/2012 RP 41). After the dentist put a brace on her tooth, Mr. Purser knocked it loose less than two weeks later (8/29/2012 RP 44). When she tried to leave him for the second time, he held the children as hostages (8/29/2012 RP 46). When she tried to remove the

older child from the house for school, Mr. Purser attacked the child (8/29/2012 RP 48). He then attacked her, threatening, "I'm going to kill you" (8/29/2012 RP 49). When the older child started crying, it infuriated Mr. Purser; J.P. had to grab the children and place them under her body to stop his attack on them (8/29/2012 RP 50). That is when he beat her so bad he destroyed her spleen (8/29/2012 RP 10, 51). When Mr. Purser saw how badly he was hurting J.P. by blows to the abdomen, he laughed and struck her again and again. D.P.Jr. was so mortified by this behavior his development was slowed to the point Ms. Purser became concerned he was autistic (8/28/2012 RP 111).

If ever a so-called father should be separated from his child, this is it. Mr. Purser's behavior showed a complete lack of empathy for his wife and children. Under the facts of this case, it would not be an abuse of discretion to eliminate all future contact between Mr. Purser and D.P.Jr., because eliminating contact based on this record is the most reasonable

condition to protect D.P.Jr. from danger and from witnessing further violence. One of the saddest aspects of a very sad situation is that both D.P.Jr. and his brother are going to be scarred for life, and the record reflects that D.P.Jr. is going to encounter serious developmental delays. Threatening to kill children as a means to control a spouse is reprehensible. Between his complete lack of empathy and his misguided threats, Mr. Purser presents an extreme danger to all three people listed on the domestic violence no contact order.

The record does not reflect, however, that the no contact order would exist for life, if Mr. Purser actually changed his behavior. To the extent that his contact with Mr. Purser is delayed as long as possible, D.P.Jr. may have some chance to develop into a normal child. But, the Trial Court did not enter an order keeping them apart for life with no possibility that Mr. Purser could convince the Court to modify the no contact order. The order may be modified if Mr. Purser can show in the future he has learned whatever is necessary so that D.P.Jr. is not in

danger. On this record, however, modification of the order at present would endanger D.P.Jr. The very experienced trial court Judge correctly determined that, at this point in time, an order keeping Mr. Purser away from all three victims for life was appropriate, but left the window open for a modification in the future. The Trial Court was well within its authority to enter a modifiable lifetime no contact order.

ISSUE THREE

When the jury hears of two threats to kill, one to J.P. and one later to her son, and is instructed that it must find evidence beyond a reasonable doubt that J.P. was threatened, is the jury properly instructed so that the defendant is not being punished for an act he was not charged with?

RESPONSE

I. Standard of Review: In Washington, a criminal defendant may be convicted by a jury only if the members of the jury unanimously conclude that the defendant committed the criminal act with which he or she was charged. *State v. Petrich,* 101 Wn.2d 566, 569, 683 P.2d 173 (1984). A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the

United States Constitution and in article I, section 22 of the Washington Constitution. *State v. Kitchen,* 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the evidence indicates that more than one distinct criminal act has been committed, the "jury must be unanimous as to *which* act or incident constitutes a particular charged count of criminal conduct." *State v. Borsheim,* 140 Wn.App. 357, 365, 165 P.3d 417 (2007).

II. Analysis: Mr. Purser made two threats on September 23, 2011. The first threat was to kill J.P. and he "would kill the kids and he would kill my mom and my dad or my sister" (8/29/2012 RP 54, 59). The threat to kill J.P. was made while she was in Mr. Purser's presence. The second threat was to kill B.C. (8/29/2012 RP 60). The second threat was made over the telephone when J.P. was attempting to report Mr. Purser (8/29/2012 RP 60). The jury was instructed that it could find Mr. Purser guilty of harassment if it found that on or about September 23, 2011, Mr. Purser threatened to kill J.P. immediately or in the future (Instr. 23, CP 113). The State's

instruction properly elected between the two threats. An election was made; the jury was properly instructed; there is no error. Unlike *State v. Morales,* ___ Wn.App. ___, 298 P.3d 791 (2013), where the State erred when it argued to the jury it could find the defendant guilty under an uncharged theory, the State in this case properly identified a single person as the victim of harassment.

Morales is also important because it defines multiple threats in a harassment scenario as one unit of prosecution. On September 23, 2011, Mr. Purser threatened J.P. on more than one occasion but the State correctly charged him with one count of harassment. It would have disproportionate to charge Mr. Purser with multiple counts of harassment because his behavior over the course of the day never changed.

The same analysis applies to the attempted intimidation. Because it was one victim and the different threats were made close in time, it would be disproportionate to charge multiple counts of attempted intimidation.

At the same time, the harassment charge and the attempted intimidation charge are different because each had a different victim. Each charge was a separate unit of prosecution because each charge was supported by different evidence.

ISSUE FOUR

When the jury hears two threats made on the same day, where J.P. is threatened in the defendant's presence and the second threat is to kill her son B.C. if she calls the police, is there sufficient difference in law and fact such that the crimes do not either merge or create double jeopardy?

RESPONSE

I. Standard of Review: Claims of double jeopardy are reviewed *de novo*. *State v. Freeman,* 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

II. Analysis: Mr. Purser argued that the harassment and the attempted intimidation are the same act for purposes of double jeopardy. They are not. Each threat occurred at a different time with a different victim for a different purpose.

State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753

(2005) quoted *Blockburger*[2] as saying "we presume that the legislature did not intend to punish criminal conduct twice when the evidence required to support a conviction would have been sufficient to warrant a conviction for another charge." In this case, the evidence and the elements are not the same. As the State explained earlier, one threat was to kill J.P. and he "would kill the kids and he would kill my mom and my dad or my sister" (8/29/2012 RP 59). That threat fills the elements of the harassment charge (Instr. 23, CP 113) ("knowingly threatened to kill J.P. immediately or in the future"). The second threat came in a later telephone call threatening to kill B.C. if Ms. Purser called the police (8/29/2012 RP 60): "He called me and he told me I better not call the police or tell anyone what happened or tell my dad and if I did that he would kill B.C. and said you better remember one of these children isn't mine." That threat is covered in Instruction 27, CP 117

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[2] *Blockburger v. United States,* 284 U.S, 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

("threat against a current or prospective witness attempt[ing] to induce that person not to report the information relevant to a criminal investigation..."). The simple fact is the two threats did not occur at the same time or for the same purpose.

According to *State v. Freeman,* 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005), The analysis may follow four steps: First, did the legislature intend the two crimes to be punished separately? Second, if the legislative intent is not clear, the *Blockburger* test may be applied:

> [W]e must apply the "same evidence" rule of statutory construction to determine whether the statutes really proscribe the same offense. *Blockburger v. United States,* 284 U.S, 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).
>
> The same evidence rule considers "whether each provision requires proof of a fact which the other does not." *Id.* Offenses are the same if they are "identical both in fact and in law." *State v. Reiff,* 14 Wn. 664, 667, 45 P. 318 (1896); *see State v. Roybal,* 82 Wn.2d 577, 581, 512 P.2d 718 (1973). But they are different "[i]f there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other." *State v. Vladovic,* 99 Wn.2d 413, 423, 662 P.2d 853 (1983)(citing *Roybal,* 82 Wn.2d at 581, 512 P.2d 718). This requires viewing the elements "as charged and proved," not abstractly. *State v. Freeman,* 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

Employing the *Blockburger* decision, "the test to be applied to determine whether there are two offenses or only one, is

whether each provision requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. at 304, 52 S.Ct. 180, "'If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.' "*State v. Calle,* 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (quoting *State v. Vladovic,* page 423, 662 P.2d 853.

The third analysis is whether the lesser crime completes an element necessary to prove the greater crime. *State v. Francis,* 170 Wn.2d 517, 524-525, 242 P.3d 866 (2010)524-25.[3] *State v. Freeman, supra,* pp. 777-78, cited to *State v. Vladovic,* 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983) to state that the merger doctrine applies where the legislature has

[3]*State v. Francis,* 170 Wn.2d 517, 524, 242 P.3d 866 (2010), modified the *Freeman* test, however, to read "[w]e view the offenses *as they are charged* (emphasis in original). The State Supreme Court has now determined that whether two crimes merge for double jeopardy purposes is determined by looking at the charging language.

clearly indicated that in order to prove a particular degree of crime (*e.g.,* first degree rape) the State must prove not only that the defendant committed the crime (*e.g.,* rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.,* assault or kidnapping).

The merger doctrine then leads into the exception to the merger test, whether there is an injury to the person or property which is separate and distinct from and not merely incidental to the crime of which it forms an element. *State v. Freeman,* p. 760, 108 P.3d 753.

Neither the merger doctrine nor its exception applies here. First, the Legislature has said nothing about whether either conviction should be punished separately. There is therefore no evidence of legislative intent. Second, the *Blockburger* test does not favor merger because neither crime is the same in law and fact. *In re Fletcher,* 113 Wn.2d 42, 47, 776 P.2d 114 (1989). The "same evidence" test does not apply because neither the law or the facts are necessary to sustain a

conviction on the other charge. *State v. Calle,* at 777, 888 P.2d 155; *State v. Roybal, at* 577, 512 P.2d 718. Each crime has an independent purpose and effect in law and fact; there is no double jeopardy.

Count II charged Mr. Purser with harassment, threats to kill: "did threaten to kill another immediately or in the future..." Count III charged Mr. Purser with intimidating a witness: "did attempt to induce that person not to report information relevant to a criminal prosecution, and/or induce that person not to have a crime prosecuted; and/or induce that person not to give truthful and complete information relevant to a criminal investigation."

The two crimes occurred at different times of the same day under different circumstances. The threat to kill J.P. occurred at the family home. The attempt to intimidate her occurred during a later telephone call. Even though they occurred on the same day, proof of one threat is unnecessary to

prove the second threat.[4]

"Threats to kill" is a subset of RCW 9A.46.020 (1)(a)(i)[5], which is an element of the Harassment statutes. A threat under RCW 9A.46.020 only requires proof that a person knowingly and without lawful authority threatens to cause bodily injury to another, now or in the future. The statute makes the threat a crime, by itself.

To violate RCW 9A.72.110(1)[6], a person must attempt to

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[4] Had Mr. Purser not made two separate threats, there would be double jeopardy because proof of a threat to intimidate a witness would prove harassment. The definition of a "threat" in the intimidation statute is the same as the definition of a "threat" in the harassment statute.

[5] (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. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

[6] (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

(a) Influence the testimony of that person;

intimidate a person from acting within the legal system. Mr. Purser was convicted of two counts of attempting to intimidate a witness. The first attempted intimidation occurred on September 1, 2011. It does not merge in any manner with any other charge. The second attempted intimidation occurred on September 23, 2011, in a telephone call to J.P. Unlike the

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(b) Induce that person to elude legal process summoning him or her to testify;

(c) Induce that person to absent himself or herself from such proceedings; or

(d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in *RCW 9A.04.110(27).

(b) "Current or prospective witness" means:

(i) A person endorsed as a witness in an official proceeding;

(ii) A person whom the actor believes may be called as a witness in any official proceeding; or

(iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child.

(4) Intimidating a witness is a class B felony.

(5) For purposes of this section, each instance of an attempt to intimidate a witness constitutes a separate offense.

harassment charge, a threat to kill J.P., the attempted intimidation in the telephone call was a threat to kill B.P..

Clearly, the harassment conviction and the second attempted intimidation are legally and factually different. *In re Fletcher,* 113 Wn.2d at 47, 776 P.2d 114. Even if there is some similarity, however, they do not merge because they are not identical in law. *State v. Calle,* 125 Wn.2d at 778, 888 P.2d 155. Moreover, *Calle* stresses that different locations in the criminal code are evidence of the Legislature's intent to punish two crimes separately because the two statutes serve different purposes. From the language of the harassment statute, it is clear the Legislature intended that a person who threatens another person may be punished for the threat alone. From the language of the intimidation statute, it is clear the Legislature intended to punish a person who interfered with the legal system. Two separate purposes exist for the two statutes, even if there were no factual difference.

CROSS APPEAL

ISSUE

When a trial court finds that crimes were the same criminal conduct for sentencing purposes, has the court committed reversible error when it found each assault had the same purpose, scheme or plan as the harassment or intimidation convictions?

RESPONSE

1. Standard of Review: The trial court's determination of what constitutes the same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. *State v. Graciano,* 176 Wn.2d 531, 537, 295 P.3d 219 (2103). "Under this standard, when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result." *Granciano,* 176 Wn.2d at 537-38, 295 P.3d 219. "But where the record adequately supports either conclusion, the matter lies in the court's discretion." *Granciano,* 176 Wn.2d at 538, 295 P.3d 219. The defendant bears the burden of proving same criminal conduct. *Granciano,* 176 Wn.2d at 539-540, 295 P.3d 219

Because the Trial Court did not provide any explanation about why it found convictions I-III were the same criminal conduct, and convictions IV and V were the same criminal conduct, there is no discretion to consider. The Trial Court listened to the State's request that the crimes be separately addressed, but the Trial Court did not explain why the State was incorrect. In any event, the Court's determination is incorrect.

To constitute the "same criminal conduct" for offender score purposes, crimes must require the same criminal intent, be committed at the same time and place, and involve the same victim. RCW 9.94A.589 (1)(a). Unless all three of these elements are present, the offenses do not constitute the same criminal conduct and must be counted separately in calculating the offender score. *State v. Porter,* 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The critical question is whether the crimes were sequential, or part of a continuous, uninterrupted course of conduct. *State v. Price,* 103 Wn.App. 845, 857-59, 14 P.3d 841 (2000), *review denied,* 143 Wn.2d 1014 (2001).

The controlling decision in this area is *State v. Wilson,* 136 Wn.App. 596, 612-616, 150 P.3d 144 (2007). In that case, the State correctly argued that assault does not have the same criminal intent as harassment. The defendant assaulted the victim, left the residence to warn his friends outside, reentered the residence and threatened to kill the victim. Assault has a different criminal intent than harassment. In addition, the Court ruled that the two criminal acts were "separated in time, providing the opportunity for completion of the assault and ending [the defendant's] assaultive intent, followed by a period of reflection and formation of a new, objective intent...to threaten the victim and to harass her." *Wilson,* 136 WnApp. page 615, 150 P.3d 144.

On September 1, 2011, Mr. Purser beat his wife in the face so hard he broke a tooth from its socket (8/29/2012 RP 39). He then stopped beating her and ordered her to quiet the crying children. (8/29/2012 RP 40). Police apparently had arrived at the apartment so Mr. Purser told J.P. to hide with the children in

the bathroom (8/29/2012 RP 40). When he finally agreed to let her go to the dentist to fix her tooth, he threatened to kill her if she called the police or her family (8/29/2012 RP 41).

On September 1, 2011, Mr. Purser had plenty of time to reflect between the extensive beating he inflicted on his wife and the threat he made to kill her and the children. At the very least, two events intervened: The time she spent breast feeding D.P.Jr. and the time she spent in the bathroom. The two acts did not occur at the same time nor did they involve the same criminal intent. The beating was to punish J.P. for trying to escape the marriage. The attempted intimidation was to keep her from contacting the police or family while at the dentist.

On September 23, 2011, Mr. Purser beat J.P so seriously he almost killed her. She begged him go let her take D.P.Jr. to the doctor. She left and came back. Upon her return, she attempted to get the children out of the house; he then threatened to kill her and her children. She begged him to let her leave and went to her friend's work place. He called her

and threatened to kill B.C. if she called the police.

The beating was separated from the first threat by her intervening trip to D.P.Jr.'s doctor. The threat to kill at the home and the attempted intimidation on the telephone were separated in time, long enough for Mr. Purser to reflect and then call J.P. to threaten to kill B.C. if she contacted the police. Although the State conceded at sentencing the harassment count was "same criminal conduct," the concession is not correct. The Court is not bound by an incorrect concession. *State v. Knighten,* 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). All of the separate convictions were related only in the sense that Mr. Purser was out of control and, as J.P. finally realized, he was going to kill her and the children if she did not leave (8/29/2012 RP 54: "I knew if I stayed in that house he was going to kill me or kill the children and he always said that he would kill them and make me watch as he killed them and he would kill me."). Otherwise, each separate incident had a different intent and was sufficiently separated in time to permit

Mr. Purser to reflect on his next step. None of the charges are the same criminal conduct for sentencing purposes.

CONCLUSION

Mr. Purser received a fair trial. He was formerly charged with each count, giving him fair notice of the accusations against him. The jury was given very clear instructions, in common sense language, that any rational juror could understand. The jury was charged specifically that to convict him of harassment, the jury had to find beyond a reasonable doubt that on September 23, 2011, he harassed J.P. There is no error there. Each charge stands independently from the next charge for purposes of double jeopardy and for sentencing. The Trial Court should have found each charge had an independent intent and followed a period of reflection. This matter should be returned to the Superior Court for an exceptional sentence for five separate convictions.

Respectfully submitted this March 28, 2014

WILLIAM B. PAYNE, Prosecutor

Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney
Clallam County

CERTIFICATE OF DELIVERY

Lewis M. Schrawyer, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Thomas M. Kummerow on March 28, 2014.

WILLIAM B. PAYNE, Prosecutor

Lewis M. Schrawyer

CLALLAM COUNTY PROSECUTOR

March 28, 2014 - 10:33 AM

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