

NO. 31894-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

DEXTER JOHN BUSH

Appellant.

FILED
March 04, 2014
Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 12-1-00049-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. MR. BUSH'S TWO CONVICTIONS FOR INTIMIDATING A WITNESS DO NOT VIOLATE DOUBLE JEOPARDY BECAUSE THE FACTS SUPPORT TWO UNITS OF PROSECUTION WHEN THE CRIMINAL INVESTIGATIONS SOUGHT TO BE IMPEDED ARE SEPARATE AND DISTINCT, INVOLVING CRIMINAL ACTS WITH DISPARATE ELEMENTS OCCURRING YEARS APART AND IN DIFFERENT JURISDICTIONS.
2. EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT F.R.B. WAS REASONABLY AFRAID MR. BUSH WOULD CARRY OUT HIS THREAT WHEN SHE HAD TESTIFIED SHE BELIEVED MULTIPLE SIMILAR THREATS MADE OVER AN EXTENDED PERIOD OF TIME, THAT SHE WAS TERRIFIED OF WHAT HE WOULD DO IF SHE DISCLOSED, AND WHEN, IN OVER TEN YEARS, SHE DID NOT DISCLOSE.
3. THERE WAS NO EVIDENCE THE CRIMES OF ASSAULT OR INIMIDATION WERE SEXUALLY MOTIVATED.
4. THERE IS NO LEGAL JUSTIFICATION FOR ORDERING A MENTAL HEALTH EVALUATION AS A CONDITION OF COMMUNITY CUSTODY.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State adopts the procedural facts set forth in the appellant's opening brief.

2. SUBSTANTIVE FACTS

The State adopts the substantive facts set forth in the appellant's opening brief and supplements them as follows:

At trial, the jury heard facts concerning events related to the crimes charged and also heard about the decade-plus history of violent sexual assault by Dexter John Bush (Mr. Bush) on his adopted daughter, F.R.B. The adoption took place when F.R.B. was between twelve and thirteen years old, Mr. Bush having lived with F.R.B. and her mother since F.R.B. was five. RP 85–86. At the time of the adoption, the family lived in Montana. RP 93.

F.R.B. told the jury that Mr. Bush first raped her shortly before the adoption was final, when she was twelve. RP 88. The rape was unexpected, violent and painful, with Mr. Bush holding a serrated knife to her upper lip, cutting her, and threatening to kill her if she told anyone. RP 88.

F.R.B. testified that Mr. Bush raped her almost daily thereafter, RP 90, RP 93, even after he impregnated her at age fifteen. RP 92. The rapes continued after the birth of their child, J.B. RP 93.

Mr. Bush frequently accused F.R.B. of disclosing the rapes, RP 91, threatening that if she ever told anyone he would kill her, but only after he had all her family members while making her watch. RP 89-90. F.R.B.

testified about an incident when she was thirteen, where Mr. Bush tortured her upon her return from a sleep-over, demanding that she confess to having “told”. RP 92. The jury heard that he grabbed her by the throat, tied her to a chair, and fastened an electronic stimulator to her nipples and private parts, turning up the intensity as she screamed and cried. RP 92. She told the jury that Mr. Bush walked in on her when she was fourteen, just as she was telling her mother she had been raped. RP 90. When they were next alone, Mr. Bush hit her on the arm hard enough to leave a two-week bruise, grabbed her by the throat, and told her never to try to do that again. RP 90. She told the jury that before her son was born, she tried several times to kill herself. RP 89.

F.R.B. told the jury that, following the birth of J.B., Mr. Bush modified his threats to include killing the child in her presence should she disclose. RP 93. He did this repeatedly. RP 93.

The family moved from Montana to Idaho when F.R.B. was eighteen. RP 93. A short while later, Mr. Bush divorced F.R.B.’s mother, eventually marrying a woman F.R.B.’s age with whom they later moved to Goldendale, Washington. RP 96-97. F.R.B. testified that, despite Mr. Bush’s romantic involvement with other women, his sexual assaults continued. RP 97.

The jury heard that Mr. Bush was physically violent with F.R.B., both generally and during sex. RP 93-94. During sex he threatened her and slapped her when she cried. RP 94. When drinking in the company of others, he would punch her in the arms and legs, ridiculing her if she cried and laugh it off as horseplay. RP 96. She told the jury that if she protested or fought or “did anything” when others were around, she would pay for it later when they were alone. RP 95.

The jury heard that F.R.B. did not seek medical treatment for her injuries, even after the assault charged in Count Seven, when Mr. Bush hit her so hard she believed that he had broken a bone in her eye socket. RP 123. She was too afraid of having to explain her injuries. RP 123.

F.R.B. told the jury that Mr. Bush owned a number of knives and always wore one, usually one he called his “pig sticker”. RP 95. On one occasion, in company, he scraped the knife up her leg hard enough to break the skin, claiming he was “just playing”. RP 95.

Another time, Mr. Bush pinned F.R.B. to the couch, held her eyelid open, and brought a lit cigarette to within an inch of her eyeball. RP 98. F.R.B. told the jury she was so terrified and panicked that she buried her fingernails in his arm. RP 98.

On July 4, 2010, F.R.B. started a dating relationship that lasted

through mid-October 2010. RP 114. F.R.B. testified that Mr. Bush knew about the relationship and ordered her not to have any sort of sexual relations with the young man, not even kissing. RP 114. Mr. Bush had made it clear that he was not happy that she had a boyfriend. RP 121. He interrogated F.R.B. constantly about whether she had “told”, reminding her about “the rules”, which, he told her, had not changed. RP 127. In August 2010, Mr. Bush anally raped F.R.B., charged in Count Three, explaining that she would never engage in that act with her boyfriend. RP 116. During that rape he told her she needed to keep her mouth shut and not think about leaving with the new boyfriend, who, Mr. Bush threatened, would not be able to protect her. RP 114; RP 124. F.R.B. told the jury that Mr. Bush promised he would come after her and take J.B. after having her declared an unfit mother. RP 116. She took these threats seriously. RP 124. She did not tell her boyfriend. RP 124.

It was during this summer, while she was spending a lot of time with the boyfriend, that Mr. Bush told an acquaintance, in F.R.B.’s presence, that he could kill F.R.B., her son, and his wife “without ever blinking an eye.” RP 127. F.R.B. testified that this was the first time he had said anything to anyone else about killing her, someone he supposedly loved, and she understood the statement to be a direct threat from Mr.

Bush to her. RP 128.

Sometime between September 1 and December 31, 2010, Mr. Bush learned that F.R.B. was pregnant. RP 126. F.R.B. told the jury Mr. Bush ordered her to start having sex with her boyfriend to avoid “questionable circumstances” around the child’s paternity. RP 126–27. He told her she needed to convince people that her boyfriend was the father. RP 127. He told her he would kill her and the unborn child if she was unable do so. RP 127. F.R.B. told the jury Mr. Bush was worried there would be a second child who looked like him, eventually leading to discovery of J.B.’s paternity. RP 127.

F.R.B. testified that on February 11, 2011, Mr. Bush drunkenly assaulted F.R.B. and also his young wife, slamming his wife’s head into a mirror as she held their infant son. RP 103. J.B. was almost hit by objects Mr. Bush threw around the fifteen-foot motor home. RP 103. As Mr. Bush screamed that he was going to kill everyone in the house, was going to chop them into little pieces, F.R.B. grabbed a knife and stabbed him in the neck. RP 103-04.

F.R.B. was charged with first-degree assault. RP 133. She told the jury her defense attorney told her she was facing up to thirteen years in prison. RP 104. Despite the severity of the consequences, F.R.B. did not,

while her case was pending, disclose to law enforcement, to her CPS caseworker, her defense counsel, nor to anyone else, the fact of Mr. Bush's prior sexual and physical assaults. RP 104; RP 131. F.R.B. told the jury she was more afraid of what he would do to her if she disclosed than she was of serving time. RP 104; RP 13. F.R.B. explained that when she finally did tell, it was without realizing that one of the people to whom she disclosed was a mandatory reporter. RP 106. She told the jury that when she realized that law enforcement was being notified, she was so distraught and panicked that her CPS caseworker arranged an emergency appointment with a therapist. RP 107.

During her interview with law enforcement a day or so later, F.R.B. was crying, terrified of what would happen when Mr. Bush learned that she had finally come forward. RP 42; RP 107-08. Goldendale Police Sgt. Jay Hunziker testified that after he notified F.R.B. that Mr. Bush in custody she seemed even more afraid than she had during their interview the night before. RP 42.

At trial, Mr. Bush admitted to having an ongoing sexual relationship with F.R.B. that started when she was fifteen, but asserted it was consensual. RP 186. He admitted he was J.B.'s father, telling the jury that he when he found out she was pregnant, he "freaked out" because he

was afraid of getting in trouble. RP 187. He admitted he did not want anyone to know, and that is why he did not put his name on the birth certificate and assisted F.R.B. in sham attempts to identify the father to various authorities. RP 187. Asked if he had ever raped F.R.B., Mr. Bush replied: Never. RP 196.

C ARGUMENT

1. MR. BUSH'S TWO CONVICTIONS FOR INTIMIDATING A WITNESS DO NOT VIOLATE DOUBLE JEOPARDY BECAUSE THE FACTS SUPPORT TWO UNITS OF PROSECUTION WHEN THE CRIMINAL INVESTIGATIONS SOUGHT TO BE IMPEDED ARE SEPARATE AND DISTINCT, INVOLVING CRIMINAL ACTS WITH DISPARATE ELEMENTS OCCURRING YEARS APART AND IN DIFFERENT JURISDICTIONS.

Regardless of whether the 2010 witness intimidation statute, RCW 9A.72.110(1), was ambiguous as to its unit of prosecution, the facts in this case reveal two separate and distinct units, two separate crimes. There is no double jeopardy violation.

The critical facts in this case are not the same as those in *State v. Hall*, 168 Wn.2d 726, 230 P.3d 1048 (2010), and the cases on which the Hall Court relied.

In *Hall*, the defendant was in custody on charges of first degree burglary and second degree assault stemming from a single incident

wherein he was alleged to have broken into the home of his ex-girlfriend and confronted her and her new boyfriend with a gun. *Id.* at 728-29. While in custody awaiting trial, Hall attempted to call his new girlfriend, a witness in the case, over 1,200 times, trying to persuade her not to testify or to testify falsely about those specific charges. *Id.* The Supreme Court reversed three of Mr. Hall's four witness tampering convictions, holding that the number of attempts is secondary to the statutory aim of preventing interference with a witness in any official proceeding or investigation. *Id.* at 731. " 'The obstruction of justice is the evil which the statute was designed for forestall.' " *Id.* at 735 (quoting *State v. Stroh*, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979)).

The *Hall* Court relied in part on *State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24 (2007), where the question was "whether a solicitation *in a single conversation* to murder four people constitutes a single unit of prosecution of solicitation to commit murder." *Id.* at 167 (emphasis added). The *Hall* Court focused on *Varnell's* holding that the " 'language of the solicitation statute focuses on a person's 'intent to promote or facilitate' a crime rather than the crime to be committed.' " *Hall*, 168 Wn.2d at 731 (quoting *Varnell*, 162 Wn. 2d at 169).

Once the unit of prosecution is determined, factual analysis

determines whether more than one unit of prosecution is present. *State v. Tvedt*, 153 Wn.2d 705, 717, 107 P.3d 708 (2004) (citing *State v. Bobic*, 140 Wn.2d 250, 266, 996 P.2d 610 (2000)). Multiple convictions are proper and do not violate double jeopardy if supported by the facts of the case. *Id.*

The *Hall* Court, citing examples from other cases, noted that “ ‘the facts in a particular case may reveal more than one ‘unit of prosecution’ is present’ ”. *Hall*, 168 Wn.2d at 735 (quoting *Varnell*, 162 Wn.2d at 168. *Hall* also cited *State v. Jensen*, 164 Wn.2d 943, 195 P.3d 512 (2008), which held that “a separate unit of prosecution [for solicitation to commit murder] arises when the facts support the conclusion the defendant enticed a different person, at a different time and place, to commit a distinct crime.” *Id.* (quoting *Jensen*, 164 Wn.2d at 958-59).

While the threats underlying Mr. Bush’s two intimidation convictions were, ultimately, intended to prevent F.R.B. from reporting information relevant to “a criminal investigation”, as well as to ensure her continued submission. They did not, however, concern the *same* criminal investigation, nor even the same jurisdiction. Nothing in *Hall*’s unit of prosecution analysis can logically be construed to extend to separate attempts to suppress evidence of separate crimes committed in different

jurisdictions a number of years apart.

The intimidation in Count Eight concerned a threat made during the rape for which Mr. Bush was convicted in Count Three, brought about by the fact that F.R.B. now had a boyfriend. She was specifically being warned not to confide in that young man, nor to think that she could now be protected or could flee with her son. She was told that “the rules” were still in effect and that disclosing would result in her death and the death of her son.

The threat in Count Nine, however, had nothing to do with disclosure of sexual violence, having been made in late 2010 after Mr. Bush learned he was the likely father of her unborn child. His threat, to kill her if she could not convince people that her boyfriend was the father, was motivated by his need to keep J.B.’s paternity a secret. J.B.’s paternity was evidence of statutory rape committed in Montana and Mr. Bush testified he had been afraid of getting in trouble for fathering a child during what he claimed was a consensual encounter with his fifteen-year-old adopted daughter.

Mr. Bush argues that both of these threats were merely an ongoing attempt to dissuade F.R.B. from reporting “criminal activity”, criminal activity which consisted of both violent, forcible rape in Montana, Idaho,

and Washington and statutory rape in Montana. Any ambiguity in the pre-2011 witness intimidation statute should not be extended to meld into one continuous course of conduct Mr. Bush's attempts to prevent investigation of distinct criminal acts, each with separate elements, occurring years apart in separate jurisdictions.

Although F.R.B. was the victim of both intimidation attempts, the facts here support two units of prosecution. There is no violation of double jeopardy.

2. EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT F.R.B. WAS REASONABLY AFRAID MR. BUSH WOULD CARRY OUT HIS THREAT WHEN SHE HAD TESTIFIED SHE BELIEVED MULTIPLE SIMILAR THREATS MADE OVER AN EXTENDED PERIOD OF TIME, THAT SHE WAS TERRIFIED OF WHAT HE WOULD DO IF SHE DISCLOSED, AND WHEN, IN OVER TEN YEARS, SHE DID NOT DISCLOSE.

Mr. Bush was convicted of Harassment—Threat to Kill, based on his telling an acquaintance in F.R.B.'s presence that he could kill her and her son "without ever blinking an eye". He asserts that although F.R.B. told the jury she took this as a direct threat, the State failed to prove that she reasonably believed that particular threat would be carried out.

A verdict must be affirmed when, after viewing the evidence in a light most favorable to the verdict, any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). By challenging the sufficiency of the evidence, Mr. Bush admits the truth of F.R.B.'s testimony and all reasonable inferences arising from it. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "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). Thus, it must be taken as true that F.R.B. understood Mr. Bush's statement to be a direct and chilling threat to kill her and her son. It is irrelevant that the threat was, as were all the threats preceding it, conditioned upon whether she disclosed his crimes.

F.R.B.'s circumstances are not like those of the teacher in *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003). In that case, a student was ejected from class after having become disruptive. *Id.* at 606. As she was leaving the classroom, she said to the teacher "I'll kill you, Mr. Haney, I'll kill you." *Id.* First, there is no evidence that the defendant in that case had ever before threatened the teacher or anyone else. Second, the teacher testified that he had been "concerned" by the threat because, based on what he knew of the defendant, he believed "she might try to harm him or someone else in the future." *Id.* The Supreme Court, finding the evidence

insufficient, noted “that the fear in the case of a threat to kill must be of the actual threat made—the threat to kill.” *Id.* at 609.

The question in this case is whether the jury had sufficient evidence to find beyond a reasonable doubt that F.R.B. was reasonably afraid the threat would be carried out in the event she did disclose. By the time the jury heard about this particular incident, it had already been exposed to a lengthy and horrific recitation of Mr. Bush’s prior threats, of the violence that often accompanied them, and of the terror they engendered. The jury had heard that during a decade of sexual violence, F.R.B. had made only two attempts to tell anyone else, both disclosures being within the first two years and both severely punished. She never testified that in any particular instance she thought he was only playing around, or exaggerating, or that she thought he would not actually kill her, her mother, or her son.

More than her words, F.R.B.’s acts proved how seriously afraid she was. The jury had learned that F.R.B. moved from state to state with Mr. Bush and his romantic partners, doing exactly as he ordered, holding down jobs to support him and the rest of the family while he beat her, raped her, and terrorized her. She never sought medical treatment, fearful of having to explain bruises and a broken eye socket. She would

rather have faced prison than tell the truth, truth that could have been a defense to having stabbed her stepfather in the neck.

The jury did not have to be specifically told, yet again, that F.R.B. believed Mr. Bush would kill her and her son “without even thinking about it” if she ever told the truth. It would have been unreasonable, absurd, for the jury to have concluded otherwise, to have believed that somehow, this one time, F.R.B. did not take Mr. Bush’s threat seriously. All of the elements of felony harassment were met.

3. THERE WAS NO EVIDENCE THE CRIMES OF ASSAULT OR INIMIDATION WERE SEXUALLY MOTIVATED.

The State concedes that the conduct complained of in the three counts for which “Sexual Motivation” was found does not meet the legal definition of “sexual motivation” and that the three sentencing enhancements should be reversed.

4. THERE IS NO LEGAL JUSTIFICATION FOR ORDERING A MENTAL HEALTH EVALUATION AS A CONDITION OF COMMUNITY CUSTODY.

The State concedes that there is no evidence Mr. Bush is mentally ill. The mental health treatment condition of his community supervision cannot be imposed.

D. CONCLUSION

The court should affirm both convictions for witness intimidation and the conviction for felony harassment.

The court should reverse the three sexual motivation sentencing enhancements and the mental health treatment condition and remand for resentencing.

Respectfully submitted this 4th day of March, 2014.

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COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON
Respondent,
vs.
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NO. 31894-0-III

CERTIFICATE OF MAILING

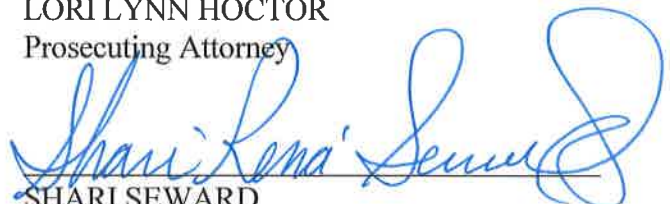
I, Shari Seward, certify that on March 4, 2014, I emailed, a copy of the Brief of Respondent to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of March, 2014.

LORI LYNN HOCTOR
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COURT OF APPEALS OF WASHINGTON
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STATE OF WASHINGTON
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CERTIFICATE OF MAILING

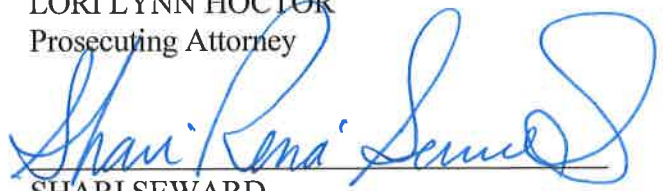
I, Shari Seward, certify that on March 4, 2014, I deposited in the United States mails by certified mail, proper postage affixed, a copy of the Brief of Respondent to:

Dexter John Bush
DOC #350418
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of March, 2014.

LORI LYNN HOCTOR
Prosecuting Attorney



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