

NO. 63257-4-I

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

REC'D

AUG 31 2009

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

BRYAN CORBETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Deborah Fleck, Judge

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erred when it found that several of appellant's convictions did not involve the "same criminal conduct."

Issue Pertaining to Assignment of Error

Appellant was convicted of several crimes that involve the same victim, same time and place, and the same intent. Because these crimes involve the "same criminal conduct" for sentencing purposes, did the trial court miscalculate appellant's offender scores and standard ranges?

B. STATEMENT OF THE CASE

James Corbett pled guilty to an amended five count indictment charging him with: (count 1) Assault in the Third Degree, (count 2) Felony Violation of a Court Order, (count 3) Assault in the Second Degree, (count 4) Felony Violation of a Court Order, and (count 5) Felony Harassment.¹ 1RP² 2-19; CP 59-61, 62-85.

The parties acknowledged a dispute over Corbett's offender score, which the State calculated as 9. 1RP 9-10, 16; CP 65, 81-84.

¹ At the same hearing, Corbett pled guilty to misdemeanor Harassment. 1RP 19-28; CP 108-122. His sentence for that crime is not at issue in this appeal.

² This brief refers to the verbatim report of proceedings as follows: 1RP – March 5, 2009; 2RP – March 23, 2009.

Corbett contended that the assault and no contact violation in counts 1 and 2 involved the same criminal conduct and therefore should have been scored as one offense. He made the same argument concerning the assault, no contact violation, and harassment in counts 3, 4, and 5. 2RP 13-16; CP 65, 86-89.

Without articulating its analysis, the court ruled in the State's favor and imposed 63 months. 2RP 17; CP 92, 94. Corbett timely filed his Notice of Appeal. CP 102.

C. ARGUMENT

SEVERAL OF CORBETT'S CONVICTIONS INVOLVED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING PURPOSES.

"[W]henver 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" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a).

"Same criminal conduct" means crimes that involve the same intent, were committed at the same time and place, and involved the same victim. *Id.* The test is an objective one that:

takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective. Also relevant is whether one crime furthered the other.

State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). The issue is reviewed for an abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

1. Counts 1 and 2

Count 1 of the amended information charged that Corbett, “on or about August 2, 2008, with criminal negligence did cause bodily harm accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering to Zanida Green[.]” CP 59.

Count 2 charged that Corbett, “on or about August 2, 2008, did know of and willfully violate the terms of a court order . . . for the protection of Zanida Green,” having two prior convictions for violating a protection order. CP 60.

Referring to the assault in count 1, the information notes that count 2 is “a crime of the same or similar character and based on the same conduct . . . which crimes were part of a common scheme or plan and which crimes were so closely connected in

respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other[.]” CP 59.

The parties agreed the court could look to the certification for determination of probable cause to establish the facts at sentencing. CP 80. According to that document, the charges in counts 1 and 2 were based on Corbett³ punching Green with his closed fists following an accusation by Green that he had cheated on her. CP 73-74.

Based on these facts, the two crimes involved the same victim – Zanida Green.

They also involved the same time and place. Our Supreme Court has recognized that “the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct.” State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); accord State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (looking for “continuing, uninterrupted sequence of conduct” and rejecting “simultaneity” requirement); State v. Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) (“separate incidents may satisfy the same time element of the test when they occur as

³ The certification refers to Corbett as “Bryan Nichols.” CP 73-79.

part of a continuous transaction or in a single, uninterrupted episode over a short period of time.”).

The information (describing the crimes as “so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other”) confirms the two crimes involved a single, uninterrupted episode on the same day. There is no evidence of a significant intervening event. While violating the no contact order, Corbett committed assault. Therefore, the crimes involve the same time and place.

They also involve the same intent. “The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This includes whether the crimes were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996). Also relevant is whether one crime furthered the other. Burns, 114 Wn.2d at 318. Again, both crimes were part of the same episode. Moreover, violation of the no contact order most certainly furthered the assault. Corbett could not commit assault without also violating that order.

Because Corbett's convictions for the charges in counts 1 and 2 involved the same victim, the same time and place, and the same intent, they should have been scored as one offense at sentencing.

2. Counts 3, 4, and 5

Count 3 of the amended information charged that Corbett, "on or about August 3, 2008, did assault Zanida Green by strangulation[.]" CP 60.

Count 4 charged that Corbett, "on or about August 3, 2008, did know of and willfully violate the terms of a court order . . . for the protection of Zanida Green" having two prior convictions for violating protection orders. CP 60.

Count 5 charged that Corbett, "on or about August 3, 2008, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Zanida Green, by threatening to kill Zanida Green, and the words or conduct did place said person in reasonable fear that the threat would be carried out[.]" CP 61.

As with the charges in counts 1 and 2, the information indicates that all three of these charges were "of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or

plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate” their proof. CP 60-61.

The certification for determination of probable cause indicates that the three charges were based on Corbett returning to Green’s apartment the morning after the events described in counts 1 and 2. CP 74. Green awoke to Corbett drunk and yelling at her. Green indicated she was leaving with the couple’s six-month-old son and Corbett “went into a rage.” CP 75. Corbett attacked her, wrapping an alarm clock cord around her neck while simultaneously indicating he was going to kill her. CP 75. Green was able to slip her fingers between the cord and her neck and stopped struggling to conserve oxygen. Corbett eventually stopped. CP 75.

Green fell to the floor and began crying. Corbett then grabbed a pillow and pressed it against Green’s face, making it difficult for her to breathe. As before, after she stopped struggling, Corbett stopped. CP 75. Green took their son, ran into the bathroom, and locked the door. When she emerged, she found Corbett packing his belongings. Corbett lit incense, placed it in an

electrical outlet, and said he was going to burn Green and their son. Green extinguished the incense. CP 76.

When Green said she wanted to leave, Corbett again said he was going to kill her. He then began removing the bathroom door so that she could not lock herself in again. CP 76. Green was able to stick her head out the front door and scream before Corbett pulled her back inside the apartment. Officers arrived about that time in response to an anonymous 911 call reporting sounds of an assault, and Corbett slipped out a bedroom window. CP 74-76.

The charges in all three counts involve the same victim – Zanida Green. They also involve the same time and place – a relatively short period of time, on August 3, 2008, at Green’s apartment.

Finally, all three crimes involve the same intent. As with counts 1 and 2, the crimes were part of the same scheme or plan and furthered one another. Burns, 114 Wn.2d at 318; Calvert, 79 Wn. App. at 577-78. Corbett could not commit the assault or felony harassment without also violating the no contact order. Moreover, in order to commit felony harassment, Corbett had to threaten Green’s life and place her in reasonable fear the threat would be

carried out. CP 60; RCW 9A.46.020(1), (2)(a)-(b). By assaulting (strangling) Green and then threatening to kill her, the assault furthered the harassment by ensuring her reasonable fear.

In State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007), Division Two concluded that the defendant's assault and harassment did not involve the same intent, and therefore were not the same criminal conduct, where the defendant assaulted the victim, left the victim's house, reflected, and then returned and threatened to kill her (harassment). Id. at 615. Corbett's case is distinguishable. He never left the apartment and, unlike Wilson, clearly used the assault to instill fear in Green that his threat was legitimate.

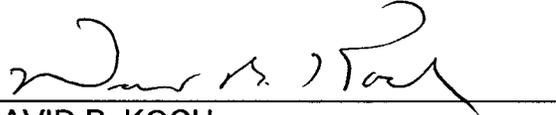
D. CONCLUSION

Corbett's offender score is 6. His case should be remanded for a new sentencing hearing.

DATED this 31st day of August, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63257-4-I
)	
BRYAN CORBETT,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRYAN CORBETT
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SHELTON, WA 98584

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STATE OF WASHINGTON
2009 AUG 31 PM 4:26

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST, 2009.

x Patrick Mayovsky