

NO. 63257-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRYAN CORBETT,

Appellant.

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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**A. ISSUE PRESENTED**

For sentencing purposes, concurrent convictions each raise the offender's sentencing score unless they encompass the same criminal conduct. Same criminal conduct means that the convictions arise from the same criminal intent, occur at the same time and place, and are committed against the same victim. The defendant's convictions do not satisfy these conditions. Should the defendant's concurrent convictions raise his offender score?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was initially charged with six counts of Domestic Violence crimes based on incidents from August 2<sup>nd</sup> and 3<sup>rd</sup> of 2008 at the apartment of Zanida Green. CP 1-4. The prosecutor later filed a fourteen count Amended Information. CP 27-33. The additional charges included new instances of court order violations and witness tampering based on recorded phone calls and a letter. VRP<sup>1</sup> 3/3/09 p. 24-30.

On March 4, the defendant entered a plea of guilty to another Amended Information charging five counts arising from the incidents on August 2<sup>nd</sup> and 3<sup>rd</sup> of 2008. VRP 3/4/09 and CP 59-61. The court accepted the defendant's change of plea and approved

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<sup>1</sup> Verbatim Reports of Proceedings (Hereinafter "VRP") are cited by date and page number throughout this brief.

the plea agreement. This included the defendant's agreement that the sentencing court could consider the facts contained in the Certification for Determination of Probable Cause, designated as CP 4-10. VRP 3/4/09 and CP 80.

At sentencing, the prosecutor characterized the five charges as offenses that each count separately to increase the defendant's sentencing score. The defendant made a motion to have his offender score reduced to consolidate counts one and two as the same criminal conduct. He also asked that counts three through five be consolidated as the same criminal conduct. VRP 3/23/09 15-17. The court denied the motion at sentencing (VRP 3/23/09 17) and the defendant timely appealed.

## **2. SUBSTANTIVE FACTS**

The defendant was involved in a domestic relationship with Zanida Green and they have a child (Brandon, approximately 6 months old at the time of the charged crimes). In the past, the court issued at least one domestic violence related order prohibiting the defendant from any contact with Ms. Green. Before the current case, the defendant was convicted of violating such an order on at least two prior occasions. CP 4-10.

**August 3<sup>rd</sup>, 2008:**

**Count One: Assault 3<sup>o</sup> Based on  
Punching and Broken Toe;  
Count Two: Felony Court Order Violation Based on  
Prior Court Order Violation Convictions.**

At about 1:00 am on August 2, 2008, a neighbor phoned 911 to report they could hear what sounded like the defendant beating Ms. Green. When officers arrived, she had some blood on her shirt, was walking very stiffly, and insisted to the officers, "I didn't call you" and "I don't need you here." CP 4. The defendant was already gone. Ms. Green told investigating officers that the defendant "is a cheater, and I catch him at it, then he flips out and does this sort of thing." She went on to describe how he punched her, threw things around the apartment, and stomped on her foot (broken toe noted at VRP 3/4/09 24). CP 5. While the officers were still in the apartment, the defendant repeatedly phoned Ms. Green, said he knew that police were there, and questioned her about whether she had called them. CP 5.

**August 3<sup>rd</sup>, 2008:**

**Count Three: Assault 2° Based on Strangulation;  
Count Four: Felony Court Order Violation Based on  
Prior Court Order Violation Convictions.**

The following day, 911 received another call from a neighbor reporting that the defendant was back and again beating Ms. Green. She told the investigating officers that this time she awoke to the defendant drunkenly yelling at her. When Ms. Green told the defendant that she was going to leave the apartment with their son, the defendant refused to let them leave. He ripped the electrical cord from an alarm clock and wrapped it around Ms. Green's neck. She gave up struggling to conserve air and the defendant eventually tired and released her. CP 5-6.

Once released, Ms. Green regained her breathing and began crying profusely. The defendant pressed a pillow hard against her face until she again could not get enough air to continue struggling. After the defendant relented, Ms. Green locked herself in the bathroom and waited until the apartment was finally quiet. When she believed that the defendant had either left or at least settled down, Ms. Green came back out of the bathroom. CP 6-7.

### **Count Five: Felony Harassment based on Threat to Kill**

The defendant was still there and refused to allow Ms. Green to leave. He lit an incense stick, pushed it into an electrical outlet, and told her he would burn down the apartment with Ms. Green and their infant still inside. Then, like the previous day, police arrived in response to a neighbor's call to 911. The defendant ordered Ms. Green to be quiet and not let them in. By the time she eventually opened the door, the defendant had fled out a back window. Investigating officers documented the red mark around Ms. Green's neck, consistent with strangulation. CP 7-8.

### **C. ARGUMENT**

#### **1. THE SENTENCING JUDGE DID NOT ABUSE HER DISCRETION BY TREATING THE DEFENDANT'S CONVICTIONS AS SEPARATE OFFENSES THAT EACH RAISED HIS OFFENDER SCORE.**

The defendant claims that two combinations of his convictions in this case should be treated as the "same criminal conduct" for sentencing purposes. Specifically, he argues that counts one and two should constitute one instance of the same criminal conduct, and that counts three through five should constitute another. BrApp 1. This would benefit the defendant by substantially lowering his offender score resulting in a lower

standard sentencing range. Generally, current and prior convictions raise the offender score for each charge. However, our Legislature provided an exception for crimes that constitute the “same criminal conduct” as follows:

[W]henever 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.

RCW 9.94A.589(a).

Our Washington Supreme Court held that crimes only constitute the same criminal conduct when they are committed with:

(1) The same criminal intent; (2) at the same time and place; and  
(3) against the same victim. State v. Vike, 125 Wn.2d 407, 410 (1994). The Washington Practice Manual notes that all three conditions must be satisfied; explaining that the same criminal conduct rule is narrowly construed and only applies in relatively few situations. Concurrent Offenses – Same Criminal Conduct, Seth Aaron Fine, 13B WAPRAC § 3510 (citing State v. Porter, 133 Wn.2d 177, 181 (1997)). The standard of review is abuse of discretion. State v. Fisher, 139 Wn.App 578 (2007).

- a. The assault convictions are not the “same criminal conduct” as the court order violations.
  - i. The intent requirements for the defendant’s assault convictions differ from his court order violations.

The intent element for the third degree assault charged in count one specifies that the defendant “with criminal negligence did cause bodily harm ... to Zanida Green.” RCW 9A.36.021(1)(a); CP 59. Thus, the intent element was his “criminal negligence” injuring Ms. Green. Count three was an intentional assault; specifically, strangulation. RCW 9A.36.021(1)(g) and CP 60.

The defendant may claim that it was these assaults as charged in counts one and three that constituted the court order violations in counts two and four. However, he pled guilty to an amended set of charges in which counts two and four were not predicated on the assaults<sup>2</sup>. Following the plea agreement, the defendant pled guilty to court order violations predicated on his prior court order violations. RCW 26.51.110(1)(5); CP 59-61. The only criminal intent necessary for the court order violations in counts two and four was the defendant’s choice to be with Ms.

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<sup>2</sup> This is not a concession that court order violations predicated on assaults necessarily constitute the “same criminal conduct” as the underlying assaults.

Green.

For example, in State v. Chapman, a defendant was standing outside of a residence and convicted of violating the same statute as counts two and four in this case. Chapman was subject to a court order prohibiting him from being within a mile of that residence. He had two prior convictions for violating the order. On appeal, Chapman complained that this new violation should only be subject to contempt of court remedies because he had committed no other crime while standing within the area prohibited by the order. Our Washington Supreme Court held that criminal punishment “applies to a third violation without reference to whether that violation, standing alone, would subject the offender to criminal prosecution.” State v. Chapman, 140 Wn.2d 436, 449 (2000).

Thus, the only criminal intent necessary for the court order violation in Chapman and in counts two and four in this case was the defendant’s intent to be where the court order prohibited. This is a different criminal intent than the criminal negligence specified in count one or the intent necessary for the strangulation assault in count three. Therefore, the defendant’s court order violations are not the same criminal conduct as his assaults because the criminal intent differed.

- ii. Time span of the court order violations encompassed more than the times of the assaults.

Moreover, the time span of the court order violations encompassed more than the times of the assaults.

- a) Count two began before count one occurred.

In count one (assault in the third degree) and two (court order violation) on August 2<sup>nd</sup>, 2008, the defendant was already present and in violation of the court's order when Ms. Green confronted him about cheating. CP 4-10. Then he punched her and stomped on her foot, breaking her toe. VRP 3/4/09 24; CP 5. Thus, the court order violation charged in count two includes the time of the arguing before the occurrence of the assault charged in count one.

- b) Count four continued after count three occurred.

After the defendant strangled Ms. Green, providing the basis for the assault charged in count three, he remained present and in violation of the court's order until fleeing the police. CP 4-10. Hence, the court order violation in count four also included time after the assault in count three. Therefore, the defendant's court

order violations are not the same criminal conduct as his assaults because the time differed.

- iii. The “victim” of the court order violations was the public at large while the victim in the assaults was Ms. Green.

In the assaults charged in counts one and three, Ms. Green was specifically named as the crime victim. CP 4-10, 59-61. By contrast, in the court order violations charged in counts two and four, the defendant also offended against the court that issued the order and against the public at large.

Although courts may take the preferences of domestic violence victims into account when deciding about issuing orders prohibiting contact, the decision is ultimately up to the court. In fact, it is not even a defense that the person protected by the order consents to the contact. State v. Dejarlais, 136 Wn.2d 939 (1998). On this basis, the defendant does not merely offend against the person named in the order prohibiting contact. Instead, violation of such an order is an offense against the authority that issued it and the public at large which depends on compliance with court orders.

In Dejarlais, our Washington Supreme Court explained:

A domestic violence protection order issued under RCW 26.50, on the other hand, **does not protect merely the “private right”** of the person named as petitioner in the order. In fact, the court recognized, the statute reflects the Legislature's belief that **the public has an interest** in preventing domestic violence[.]

The Legislature has clearly indicated that there is a public interest in domestic violence protection orders. In its statement of intent for RCW 26.50, the Legislature stated that domestic violence, including violations of protective orders, is expressly a public, as well as private, problem, stating that:

Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more.

Dejarlais, 136 Wn.2d 939 (1998) (Emphasis added, citations omitted).

Therefore, the crimes of assault charged in counts one and three cannot constitute the same criminal conduct as the crimes of court order violations charged in counts two and four because the victims were not the same.

- b. The incineration threat charged as harassment in count five is not the “same criminal conduct” as the strangulation assault conviction in count three.

The defendant further argues that his incineration threat charged as harassment in count five should be considered the “same criminal conduct” as the strangulation assault charged in count three. He cites the court’s holding in State v. Wilson, 136 Wn.App 596 (2007). However, that case does not support the defendant’s argument at all. In Wilson, the court held that felony harassment and an assault were not the same criminal conduct when some time passed between the assault and the threat. The court explained:

The State argues, and we agree, that the record shows (1) Wilson entered the home with the intent to assault Sanders—he broke down the door, went immediately to the bedroom, pulled Sanders out of bed by her hair, and kicked her in the stomach; (2) when Sanders said that she was going to call the police, Wilson left the house to warn his friends outside; and (3) Wilson then reentered the house, this time with a newly formed and separate intent to harass Sanders verbally—he lifted a stick of wood from the broken door and threatened to kill Sanders.

Wilson, 136 Wn.App. 596, (2007).

In the defendant’s case, similar time also passed between when he strangled Ms. Green and when he threatened to burn the

apartment with Ms. Green and their six month old infant inside. During the intervening time, Ms. Green locked herself in the bathroom and did not come back out until the apartment seemed quiet enough that she hoped that the defendant had either left or settled down. CP 4-10.

Even after this passage of time, the defendant proceeded to remove the hinges from the bathroom door to prevent Ms. Green from locking herself back in there again before he made his threaten to burn the apartment with her inside. CP 4-10. Here, like in Wilson, there was a significant pause between the assault and the threat to kill in which the defendant and victim were physically separated. Under these circumstances, the defendant cannot credibly claim that strangling Ms. Green with an electrical cord was merely a prop to make his later threat to burn her alive with their infant child sound more menacing.

- c. Joinder language in the charging document does not require the sentencing judge to conclude that the separate charges are the same criminal conduct for sentencing purposes.

The defendant claims that the joinder language in the charging document is proof that some of the crimes are the same criminal conduct. BrApp 3-7. The defendant's argument ignores

the difference between joinder for trial and merger of the same criminal conduct for sentencing. The purpose of joinder for trial is to hold a single trial on related, rather than necessarily identical, charges. If mere joinder language was sufficient to merge multiple crimes into the same criminal conduct, all multiple counts joined for trial would constitute the same criminal conduct for sentencing. RCW9.94A.589(a) contains no such provision.

**D. CONCLUSION**

The sentencing judge did not abuse her discretion by denying the defendant's motion to find that counts one and two were the same criminal conduct. Nor did she abuse her discretion by denying the defendant's motion to find that counts three, four, and five were the same criminal conduct as each other. Therefore, his offender score should not be reduced to lower his standard range for sentencing.

DATED this 26<sup>th</sup> day of October, 2009.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BRYAN CORBETT, Cause No. 63257-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
\_\_\_\_\_  
Name David L. Ryan  
Done in Seattle, Washington

10/26/09  
Date October 26<sup>th</sup>, 2009