

NO. 72410-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

YEMANE WELDESELAASE,

Appellant.

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

The Honorable Theresa B. Doyle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his right to effective assistance of counsel at sentencing when his attorney failed to request the court deem his three felonies to be the same criminal conduct.

2. Appellant's sentence for felony violation of a court order exceeds the statutory maximum for that offense.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of burglary, second-degree assault, and felony violation of a court order as well as two misdemeanors. The three felonies involved the same time and place, the same victim, and the same intent. Is remand for re-sentencing required because counsel was ineffective in failing to request the court exercise its discretion to treat the offenses as the same criminal conduct?

2. A standard range sentence for felony violation of a court order is a class C felony with a statutory maximum sentence of 60 months. Did the court exceed its sentencing authority when it imposed a sentence of 82 months for this offense?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Yemane Weldeselase with first-degree burglary, two counts of second-degree assault, one count of

felony violation of a court order, and one count of fourth-degree assault. CP 11-13. The State also alleged these offenses were committed against a family or household member and were aggravated domestic violence because they were committed within the sight or sound of the couple's minor child. CP 11-13.

The jury found Weldeselase guilty of the first-degree burglary, felony violation of a court order, fourth degree assault, and one count of second-degree assault. CP 86, 88-90. On count II, the jury found Weldeselase guilty of the lesser-included offense of fourth-degree assault. CP 87. The jury also answered "Yes" to the special verdict forms, finding the offenses were committed against family members and constituted aggravated domestic violence. CP 91-95.

The court accepted the State's offender score calculation of eight points, four of which were assessed for the two other current felonies, each subject to the domestic violence multiplier under RCW 9.94A.525(21). 6RP¹ 20; Supp. CP² ____ (Sub no. 66, Presentence Statement of King County Prosecuting Attorney filed June 18, 2014). The court did not consider whether the three felonies constituted the same criminal conduct

¹ There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 19, 2014; 2RP – May 20, 21, 2014; 3RP – May 22, 2014; 4RP – May 27, 2014; 5RP – May 28, 2014; 6RP – Aug. 15, 2014.

² A supplemental designation of clerk's papers was filed on February 26, 2015.

under RCW 9.94A.589. Defense counsel did not stipulate to the offender score and argued for an exceptional sentence below the standard range. 6RP 9-10.

The court imposed concurrent sentences at the top of the standard range on the three felonies: 102 months for first-degree burglary, 82 months for felony violation of a court order, and 70 months for second degree assault. CP 99. The court also imposed 364 days on each of the misdemeanors to run concurrently with the felony sentences. CP 105. Notice of appeal was timely filed. Supp. CP ____ (Sub no. 109, Notice of Appeal filed Aug. 25, 2014).

2. Substantive Facts

Weldeselase and his wife Luula Araya were both born and raised in Eritrea, where they became engaged to be married. 2RP 51-53. They married after emigrating to the United States and subsequently had three children together. 2RP 53. At the time of trial, their eldest daughter was 19 and living at college on the east coast. 2RP 53. Araya lived in the family home with their 17-year-old daughter and 15-year-old son. 2RP 53.

Normally, in their culture, the man would be head of the household and would be the primary decision-maker for the family. 2RP 82. When they married, both Weldeselase and his wife belonged to the Orthodox religion. 2RP 57-58. However, she recently converted and become a born-

again Christian without consulting him. 2RP 58, 82. In February 2012, Weldeselase moved out of the family home and, at the time of the incidents in this case, a no-contact order prohibited him from contacting Araya in person. 2RP 54. Telephone contact was permitted. Id.

During the days leading up to October 26, 2013, Weldeselase called Araya trying to persuade her to have the no-contact order lifted so he could return home. 2RP 55. The evening of October 26, he called her at work, angry about her change of religion. 2RP 57-58.

When she returned home from work about 11:30 p.m., she testified, he approached her and grabbed her by her uniform. 2RP 61-62. She claimed he said he had a gun and ordered her to open the door. 2RP 62-63. When she refused, Araya testified, he pushed her towards the door and she fell against the wall. 2RP 64-65. A niece who was staying with them opened the door, and Weldeselase and his wife walked in with him holding her wrist. 2RP 66.

Once inside, Araya testified he pushed her onto their 17-year-old daughter's bed, where the daughter had been doing homework. 2RP 67-68. Araya testified he then started hitting her (Araya's) face and nose with his fists. 2RP 69. When their daughter attempted to intervene, he began to hit her as well. 2RP 70. In his hand was a small knife, but he did not cut Araya or their daughter with the knife. 2RP 71; 3RP 31. Instead, he held it so

tightly that he cut his own hand and later threw it in the corner of the room. 3RP 33, 39.

According to Araya, Weldeselase's mood then changed suddenly. 2RP 72, 97-99. He laid his head in her lap and begged for forgiveness. 2RP 72. Still in pain, she pushed him away and said nothing. 2RP 72. Then he stood, oddly still, for several minutes until police arrived. 2RP 72-73, 100. However, she testified, he did not seem drunk, and in fact did not drink as a general rule. 2RP 75.

Meanwhile Araya and Weldeselase's 15-year-old son heard screaming and his father's voice, so he took his phone and ran to a bus stop where he called 911. 3RP 19-23. He did not see any of the events. 3RP 25.

When Officer Michael Griffin arrived, he heard women yelling and crying. 2RP34-35. When he entered the bedroom, he saw Weldeselase standing over Araya, who was lying on the bed with her hands up in front of her face. 2RP 36. He testified their daughter was crying and seemed shaken. 2RP 40. He saw blood on the women's clothing and on Araya's face. 2RP 37-40. The doctor who treated Araya testified she had facial contusions and a fractured nose. 2RP 27-28.

The defense called Dr. Ted Judd, a neuropsychologist who had examined Weldeselase. He testified it was his opinion that voluntary intoxication rendered Weldeselase incapable of extended planning or

anticipation of consequences. 4RP 39-40. He opined Weldeselase could likely form the intention to commit an action in the moment, but could not think any further than the next step. 4RP 40, 48. He opined Weldeselase did not intend to commit burglary but only acted out of a desire to be reunited with his family. 4RP 50, 54.

In closing, the prosecutor argued Weldeselase committed fourth-degree assault against his wife when he pushed her against the wall outside the home, committed second-degree assault against her when he punched her in the bedroom breaking her nose, and that any of the other times he hit her inside the bedroom could form the assault necessary to elevate the no-contact order violation to a felony. 4RP 121-23. Defense counsel argued Weldeselase drank so much he was incapable of the intent required for first-degree burglary or second-degree assault. 4RP 128-31.

C. ARGUMENT

1. WELDESELASE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO ARGUE HIS BURGLARY, ASSAULT, AND VIOLATION OF A COURT ORDER CHARGES WERE THE SAME CRIMINAL CONDUCT FOR PURPOSES OF SENTENCING.

The court accepted the State's calculation of Weldeselase's offender score for first-degree burglary as eight. 6RP 20. In that calculation, Weldeselase's other current offenses of second-degree assault and felony

violation of a court order were counted as two points each (under the multiplier for domestic violence offenses), for a total of four points. Supp. CP ____ (Sub no. 66, Presentence Statement of King County Prosecuting Attorney's Office, filed June 18, 2014). Although these offenses occurred at the same time, in the same place, against the same victim, counsel failed to request that the court exercise its discretion to find they constituted the same criminal conduct. This was deficient performance that prejudiced Weldeselase and violated his constitutional right to effective assistance of counsel at sentencing.

Every criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Id. at 226. Prejudice is demonstrated

from a reasonable probability that, but for counsel's performance, the result would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

RCW 9.94A.589 provides that, for purposes of calculating the offender score, "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." "Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). 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." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990) (discussing former

RCW 9.94A.400).³ Whether one crime furthered the other informs the objective intent analysis. Id.

The charged offenses in this case of first-degree burglary, second-degree assault, and felony violation of a court order all occurred at the same time, roughly 11:30 pm on October 26, 2013 into the early hours of October 27, 2013. 2RP 59-72. The all occurred at the same place, Araya's home. Id. And each involved the same victim, Araya. Id. The only remaining question is whether the crimes involved the same criminal 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). "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). Here, burglary and violation of the court order both furthered the assault, and there was no evidence Weldeselase's intent changed.

RCW 9A.52.050, the burglary anti-merger statute, provides "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted

³ Since the statute was amended and recodified as RCW 9.94A.589, courts have continued to apply the objective intent analysis. State v. Lessley, 118 Wn.2d 773, 777-78, 827 P.2d 996, 998 (1992).

for each crime separately.” The court has discretion to punish burglary separate from other offenses otherwise constituting the same criminal conduct. Lessley, 118 Wn.2d at 781. But the court also retains the discretion *not* to apply the anti-merger statute. State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998). Separate punishment is not mandatory under this provision. Because Weldeselase’s felony offenses involved the same time, place, intent, and victim, counsel performed deficiently in failing to request that the court consider them the same criminal conduct for purposes of calculating Weldeselase’s offender score.

“Reasonable attorney conduct includes a duty to investigate the relevant law.” State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). A cursory review of the relevant cases would have revealed the court retained discretion to treat Weldeselase’s felonies as the same criminal conduct. Defense counsel was deficient in failing to ask the trial court to exercise its discretion in Weldeselase’s favor.

Had the court exercised its discretion to count the felonies as the same criminal conduct, Weldeselase’s offender score would have been four, instead of eight. His standard range for first-degree burglary would have been 36 to 48 months, instead of 77 to 102 months. RCW 9.94A.510 (sentencing grid for felony offenses); RCW 9.94A.515 (first degree burglary has seriousness level of VII).

The presumption of competent performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). No legitimate tactical decision justified failing to request the court make a “same criminal conduct” finding when there was a possibility the court would have determined a lesser offender score if such a request had been made. Nothing prevented the court from finding the three felonies in this case constituted the same criminal conduct. Weldeselase had nothing to lose and everything to gain by making the request.

Weldeselase need not show counsel’s deficient performance more likely than not altered the outcome. Strickland, 466 U.S. at 693. He need only show lack of confidence in the outcome. Thomas, 109 Wn.2d at 226. The court here did not address the same criminal conduct issue at sentencing. Weldeselase establishes prejudice because this Court cannot be confident, based on the record, that the trial court would not have counted Weldeselase’s offender score as four instead of eight had it been asked to do so. Remand for resentencing is the appropriate remedy. Cf. State v. Williams, ___ Wn.2d ___, 336 P.3d 1152, 1153-55 (2014) (affirming Court of Appeals decision to remand for resentencing because trial court had not properly considered same criminal conduct issue).

2. WELDESELASE'S SENTENCE ON COUNT THREE EXCEEDS THE STATUTORY MAXIMUM.

Remand for resentencing is also required because Weldeselase's 82-month sentence for felony violation of a court order exceeds the court's sentencing authority under the Sentencing Reform Act.

"A trial court's sentencing authority is limited to that expressly found in the statutes. If the statutory provisions are not followed, the action of the court is *void*." State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624. (2002). The trial court generally has discretion to sentence anywhere within the standard range. State v. Mail, 65 Wn. App. 295, 297, 828 P.2d 70 (1992). The exception to this rule is when the standard range exceeds the statutory maximum term for the offense. See RCW 9.94A.505(5) ("Except as provided under RCW 9.94A.750(4) and 9.94A.753 (4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW."); RCW 9.94A.506 ("The maximum term of confinement in a range may not exceed the statutory maximum for the crime as provided in RCW 9A.20.021."). Total punishment for an offense, including imprisonment and community custody, may not exceed the statutory maximum. State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004).

An assault that violates a domestic violence court order is a class C felony. RCW 26.50.110(4). Class C felonies are punishable by a statutory maximum sentence of five years confinement. RCW 9A.20.021(1)(c). Here, the court imposed sentence of 82 months. CP 99. This sentence exceeds the statutory maximum for the offense by nearly two years.

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). The judgment and sentence must be corrected to reflect the statutory maximum term of confinement of 60 months.

D. CONCLUSION

For the foregoing reasons, Weldeselase asks this Court to vacate his sentence and remand for resentencing.

DATED this 4th day of March, 2015.

Respectfully submitted,

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

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| STATE OF WASHINGTON |) | |
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| Respondent, |) | |
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| |) | |
| YEMANE WELDESELASE, |) | |
| |) | |
| 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 4TH DAY OF MARCH 2015, 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 AND/OR EMAIL.

[X] YEMANE WELDESELASE
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STATE OF WASHINGTON
2015 MAR -4 PM 4:32

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF MARCH 2015.

X Patrick Mayovsky