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Court of Appeals
Division I
State of Washington

No. 74713-4-I

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

STATE OF WASHINGTON, Respondent,

v.

TERRI LYNN HUIZENGA, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defense counsel was ineffective for failing to argue that the third degree assault and felony harassment conviction were the same criminal conduct, and the matter remanded for resentencing, where a colorable argument could be made that the assault furthered the felony harassment even though the statutory intents are different.
2. Whether the sentencing judge violated defendant's Fifth Amendment right against compelled self-incrimination when he considered the defendant's failure to acknowledge any responsibility for her crimes in deciding not to impose a first time offender waiver sentence where the defendant did not remain silent but chose to speak and blamed the incident on her ex-husband and the victim.
3. Whether appellate costs should not be awarded since the State has conceded that the matter should be remanded for sentencing.

C. FACTS

1. Procedural facts

On April 28, 2015 Appellant Theresa Huizenga was charged with one count of Assault in the Second Degree, in violation of RCW 9A.36.021(1)(a), a class B felony, one count of Felony Harassment, in violation of RCW 9A.46.020(1)(a)(i) and (2)(b)(ii), a class C felony, and one count of Vehicle Prowl in the First Degree, in violation of RCW 9A.52.095(1), a class C felony, for her actions on April 19th, 2015. CP 1-2.

The vehicle prowling charge was dismissed prior to trial and the jury found Huizenga guilty of the lesser degree offense of third degree assault and the felony harassment charge. CP 51-54; RP 8. The judge declined to grant a first time offender waiver sentence and instead imposed a standard range sentence of six months on a range of three to eight months. CP 65-67.

2. Substantive Facts

While the State takes exception to the characterization of some of the testimony, it accepts the Statement of the Case as set forth in Appellant's brief for the purposes of its concession on the first issue, the ineffective assistance of counsel based on the failure to argue that the two offenses were the same criminal conduct at sentencing. The State has set forth the facts relevant to the second issue, the alleged violation of Huizenga's Fifth Amendment rights, within the context of that argument.

D. ARGUMENT

The State concedes that defense counsel was ineffective in failing to argue that offenses constituted the same criminal conduct and that the matter should be remanded for resentencing to provide defense counsel an opportunity to do so. The judge, however, did not violate Huizenga's Fifth Amendment right against compelled self-incrimination when he denied a first time offender waiver sentence in part due to her failure to acknowledge responsibility for her criminal acts because she did invoke

the right and voluntarily spoke about the incident at sentencing. Finally, given the State's concession, appellate costs should not be awarded.

1. Defense counsel was ineffective in failing to argue that the third degree assault and the felony harassment were the same criminal conduct where there is a colorable argument that the assault furthered the felony harassment.

Huizenga asserts that her convictions for third degree assault and felony harassment encompass the same criminal conduct and that she is entitled to a new sentencing hearing because her defense counsel was ineffective in not asserting that at sentencing. The State concedes the matter should be remanded for resentencing because defense counsel was ineffective in failing to argue the offenses constituted the same criminal conduct because the assault and harassment involved the same victim, occurred within a short period of time and the assault likely furthered the harassment.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev.*

den., 150 Wn.2d 1016 (2003). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. *Id.* at 15. In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). If defense counsel is ineffective for failing to argue that offenses constituted the same criminal conduct, the remedy is remand for a new sentencing hearing where defense counsel can make the argument. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

The determination as to whether offenses constitute the same course of criminal conduct involves both factual findings and court discretion, and a defendant waives the ability to challenge his offender score by failing to argue offenses constituted the same criminal conduct. State v. Beasley, 126 Wn. App. 670, 685-86, 109 P.3d 849, *rev. den.*, 155 Wn.2d 1020 (2005). If the record adequately supports either a finding of same criminal conduct or separate conduct, "the matter lies in the court's discretion." State v. Graciano, 176 Wn.2d 531, 538, 295 P.3d 219 (2013); *see also*, State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, *rev. den.*, 118 Wn.2d 1006 (1991) (if the facts support both a finding that the criminal intent was the same and that it was different, the determination regarding "same criminal conduct" is left to the trial court's discretion).

The defendant bears the burden of proving that the offenses encompassed the same criminal conduct. Graciano, 176 Wn.2d at 539-40. If the record is unclear as to whether all the factors of same criminal conduct have been met, the trial court does not abuse its discretion in concluding that the defendant failed to meet his/her burden. *Id.* at 541.

Under the Sentencing Reform Act (“SRA”), offenses are presumed to be separate unless the court makes a specific finding that they encompass the same criminal conduct. RCW 9.94A.400(1)(a) (1994); State v. Nitsch, 100 Wn. App. 512, 520-21, 997 P.2d 1000, *rev. den.*, 141 Wn.2d 1030 (2000). In determining the offender score, all other current offenses are counted as prior offenses, unless the court enters a finding that the other current offenses encompass the same criminal conduct. RCW 9.94A.589 (1)(a). “Same criminal conduct,” means “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); *see also* State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (“Same criminal conduct” is conduct that involves the same victim, the same objective intent, and occurs at the same time and place). The absence of any one of these factors precludes a finding of “same criminal conduct.” State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). In order to make this determination, courts are to consider whether one offense

furthered the other. Graciano, 176 Wn.2d at 540. The “same criminal conduct” phrase is “construed narrowly to disallow most claims that multiple offenses constitute the same criminal act...” Porter, 133 Wn.2d at 181.

While simultaneity is not required to show “same time,” incidents that occur close in time are separate and distinct if they are not part of an uninterrupted, continuous sequence of conduct. State v. Price, 103 Wn. App. 845, 856-57, 14 P.3d 841 (2000), *rev. den.* 143 Wn.2d 1014 (2001). Frequently the issue of “same time” will be intermingled with the question of “same intent” when there is a course of criminal activity over a period of time. State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990).

A defendant’s intent is to be viewed objectively, not subjectively. Rodriguez, 61 Wn. App. at 816. The court is to decide whether the intent, when viewed objectively, changed from one crime to the next. Tili, 139 Wn.2d at 123. The court first determines whether the underlying statutes involve the same intent. Rodriguez, 61 Wn. App. at 816. If the statutory intents are the same, then the court determines whether the specific defendant’s intent changed from one crime to the next under the facts of the case. *Id.*

The formation of a new, independent intent after the commission of one crime constitutes a different objective intent. The formation of a

new intent is supported if the evidence shows that the criminal acts “were sequential, and not simultaneous or continuous.” Tili, 139 Wn.2d at 124, (quoting State v. Grantham, 84 Wn. App. 854, 856-57, 932 P.2d 657 (1997)). If the evidence shows that the defendant had the “time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” then, objectively, the defendant formed a new, independent criminal intent when he committed his next criminal act. *Id.* at 123-24 (quoting Grantham, 84 Wn. App. at 859). However, if the evidence shows that the criminal acts were uninterrupted, continuous and committed within an extremely short period of time, it is unlikely that the defendant formed a new criminal intent. Tili, 139 Wn.2d at 124.

On assault in the third degree, the jury was instructed, in relevant part, that it had to find that Huizenga *caused Zima bodily harm* which was accompanied by substantial pain that lasted for a period of time, *with criminal negligence*. CP 35. Regarding felony harassment, the jury was instructed that it had to find, in relevant part, that Huizenga *knowingly threatened to kill Zima* and that the words or conduct placed Zima in reasonable fear that the threat would be carried out. CP 46.

Huizenga’s conviction for assault in the third degree was based on the dislocation to Zima’s elbow that occurred as she was drug over the

side of the boat by her hair. The felony harassment conviction was predicated upon Huizenga's threats to kill Zima after they were in the water and as Huizenga was pushing Zima's head under the water. The reasonableness of Zima's fear was arguably based on Huizenga's assaultive actions that started inside the boat and continued, within a short period of time, in the water. Although the statutory intents of the two offenses differ, a judge could certainly find that the assault furthered the commission of the felony harassment under the facts of this case. It does not appear that any such decision could have been strategic as there would have been no downside to arguing both for a lower offender score as well as the first time offender waiver. Therefore, defense counsel was ineffective in failing to argue that the two convictions were the same criminal conduct and the matter should be remanded for resentencing.

2. The judge did not violate the defendant's right against compelled self-incrimination in sentencing where she did not remain silent and blamed others for her actions.

Huizenga asserts the judge violated her Fifth Amendment right against compelled self-incrimination in denying her request for a first time offender waiver sentence. Huizenga was sentenced to a standard range sentence which can only be appealed if the judge relied upon an impermissible basis in imposing sentence. Huizenga voluntarily spoke at

sentencing and adamantly denied any responsibility for any of her actions that night at sentencing. The judge took into consideration everything that occurred at trial and Huizenga's incredible lack of *any* responsibility for what occurred that night in determining that a first time offender waiver sentence was not appropriate. Huizenga did not invoke her Fifth Amendment right and the judge did not violate it.

In general a standard range sentence cannot be appealed. RCW 9.94A.585; State v. Osman, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). A court's decision to deny a sentencing alternative and to impose a standard range sentence is likewise not subject to review. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). A court may impose any sentence within a standard range that it determines to be appropriate. RCW 9.94A.530(1). The only limitation on what a judge may consider at sentencing is information that is not admitted, acknowledged or proved at trial or sentencing. RCW 9.94A.530(2); State v. Hunley, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). A sentencing judge is not limited to the statutory factors when exercising its discretion *not* to impose a sentencing alternative. State v. Osman, 126 Wn. App. 575, 581, 108 P.3d 1287 (2005), *aff'd*, 157 Wn.2d 474 (2006); State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345, *rev. den.*, 132 Wn.2d 1007 (1997) (emphasis added).

Limited review of a standard range sentence is available, however, “if the sentencing court failed to comply with procedural requirements of the Sentencing Reform Act (“SRA”) or constitutional requirements.” Osman, 157 Wn.2d at 481-82. Limited review is also permitted where a court refused to exercise any discretion at all or relied upon an impermissible basis. Grayson, 154 Wn.2d at 342. Huizenga’s ability to appeal her standard range sentence is limited to the issue of whether the judge actually violated her Fifth Amendment right against compelled self-incrimination in sentencing her.

A defendant’s Fifth Amendment right provides that a defendant cannot be compelled to be a witness against him or herself, but it does not extend to statements made in a voluntary context. The right to remain silent extends to sentencing. In re Detention of Post, 145 Wn. App. 728, 187 P.3d 803 (2008), *aff’d*, 170 Wn.2d 302 (2010). “The “historic function” of the privilege has been to protect a “natural individual from *compulsory* incrimination through his own testimony or personal records.” Andresen v. Maryland, 427 U.S. 463, 470-71, 96 S. Ct. 2737, 2743, 49 L. Ed. 2d 627 (1976) (emphasis added). “The Constitution does not forbid all self-incrimination; it does forbid the use of *involuntary* statements made by, and used against, a defendant.” In re Teddington, 116 Wn.2d 761, 776, 808 P.2d 156 (1991). A defendant waives the Fifth

Amendment right by voluntarily testifying about a subject. Mitchell v. U.S., 526 U.S. 314, 321, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999). A court, however, may not *increase* a sentence above the standard range based on an offender's silence or denial of the current offense. State v. Strauss, 93 Wn. App. 691, 699-701, 969 P.2d 529 (1999). Just because the court did not grant Huizenga a lesser sentence, the sentencing alternative she desired, does not mean that the judge violated her Fifth Amendment rights. *See, State v. Sandefer*, 79 Wn. App. 178, 900 P.2d 1132 (1995) ("The imposition of a longer sentence after trial than originally offered in a rejected plea bargain, without more, does not establish an impermissible penalty.")

Here, Huizenga chose to speak at sentencing. She started her allocution by explaining her prior DUI, stating that there were extenuating circumstances and that she got in her truck because someone threatened to kill her dog and that she didn't make it out of the parking lot, but she had accepted responsibility for that offense. RP 481-82. She then stated that she had been stalked, burglarized, robbed, beaten multiple times and the justice system had let her down. RP 482. She continued:

I have proof. Documentation of the people that do this to me and I can't get anything accomplished. *When I went there that night, I went for peace and solitude and that's all I have done.* I have been depressed and I suffer from anxiety and I have been diagnosed with PTSD due to the abuse I have suffered.

RP 482 (emphasis added). After stating it wasn't intentional, she stated:

I had 15 of my teeth loosened and I'm looking at three surgeries from these two large people in their drunken state beating me endlessly until 911 responded to my call – my call when I called for help. I was already beaten to such a stupidity state. When I heard that 911 call I did not recognize my own voice. I was bleeding from the mouth. I had bruises all over my face. They busted my nose. It goes on and on...

I can't even proceed with my own health to get well because of what these people have done to my life and to my family's life. ... *And it will not end with these people until justice is done with them. I tried to keep peace and keep my own.* I'm appalled by the outcome.

RP 484. The 911 call belies her statements about what was occurring at, and had occurred prior to, the time of her call. RP 139-41, Ex. 12. When the judge asked her whether her opinion was that the charges were her ex-husband's fault, she responded that she had begged for a sobriety test that night because she had wanted to prove she hadn't been violating her probation, but they refused to give her a test when she was arrested and in court. RP 484. Despite Huizenga's claim she sought a sobriety test that night because she was on probation, she actually wasn't on probation that night because she didn't plead to and wasn't sentenced on the DUI until May 19, 2015. RP 471-72. Huizenga continued:

I stumbled across people that had been drinking all day, no way expecting them to be there. I made multiple calls before I went. I saw no vehicles when I got there and I went down there for peace and quite (sic) to have my life almost end. When the pictures are

shown with the bruises around my neck, the lacerations all over any (sic) body and bruises from head to toe, it will show the jury. I didn't have the opportunity in this case but I will get my day in court and you will see all I did was hang on for my dear life by hanging on to her hair with the two of them beat (sic) the living pulp out of me and I have pictures of doctor's reports from head to toe to verify that.

RP 484-85. The photos reflect that she did lose a tooth the night, but otherwise do not support her claim of being beaten until near death. Supp CP __, Sub. Nom. 43, Ex. 7, 21, 22, 23.

In declining to impose a first time offender waiver option, and in imposing a standard range sentence, the judge stated:

I do not believe this is a good case for a first time offender waiver. *Nothing I have seen thus far, and clearly nothing I have heard today*, shows in any way that Ms. Huizenga has taken any action to acknowledge any responsibility whatsoever for these crimes which she has been convicted by a jury. Clearly, in my opinion not a case for a first time offender waiver.

RP 488.

Huizenga did not invoke her right to remain silent and she was not compelled to make any statement. Far from indicating a desire to remain silent, Huizenga voluntarily made numerous statements about the incident and about her lack of culpability for anything that had occurred that night. In making the voluntary statements she did, she waived her Fifth Amendment right against self-incrimination. Huizenga was not punished for her failure to speak or denial of guilt. The judge declined to impose a

lesser sentence, a sentencing alternative, based on her actions that led to her convictions and her statements at sentencing. *See, Paluskas v. Bock*, 410 F. Supp. 2d 602, 615 (E.D. Mich. 2006) (where record demonstrates that judge did not punish defendant for failing to speak, but only declined to grant leniency at sentencing, no constitutional violation occurred).

The facts of this case are very similar to those in People v. McBride, 228 P.3d 216 (Colo. App. 2009). In that case the defendant contended on appeal that the judge had punished him for exercising his right against self-incrimination. *Id.* at 227-28. The defendant chose to speak at sentencing and claimed that the shooting had been accidental and that the gun had accidentally gone off. In imposing sentence the judge noted that the defendant had a “pattern of evading and avoiding responsibility for what he had done,” and had claimed at the time that the victim was responsible. *Id.* at 228. The court concluded that the defendant had waived his right to remain silent by speaking at sentencing and therefore the court was within its authority to consider what the defendant chose to say at sentencing. *Id.* at 228. In doing so, the appellate court assumed that the sentencing judge had considered the defendant’s statements at sentencing as an “evasion of responsibility.” Ultimately, it concluded that “[t]here is no constitutional right to be free from a court considering a dissembling sentencing allocution.” *See also, Smith v. State*,

119 P.3d 411, 422 (Wyo. 2005) (judge's considerations of defendant's statements to probation officer that he was innocent and had been set up did not violate defendant's right to remain silent); State v Muscari, 807 A.2d 407, 415 (Vermont 2002) (judge's denial of sentence reduction did not constitute a penalty against the defendant for exercising right to remain silent or failing to show remorse during the pre-sentence investigation phase).

Huizenga cites to State v. Shreves, 60 P.3d 991 (Mont. 2002) in support of her argument. Shreves is clearly distinguishable because in that case the defendant remained silent at sentencing and defense counsel indicated that he was maintaining his innocence. *Id.* at 992. The officer who compiled the presentencing investigation report had recommended a 100 year sentence in large part due to the fact that the defendant had not admitted the murder to her or expressed any remorse. *Id.* at 993. The judge then *enhanced* the defendant's sentence by imposing a parole restriction, making him ineligible for parole for 60 years, in part on defendant's failure to show remorse. *Id.* at 993-95 (emphasis added). The first issue that the court addressed in that case was whether the defendant had invoked his Fifth Amendment right because without an invocation of the right, a person may not benefit from its constitutional protection. *Id.* at 994. In that case, the court concluded the defendant had invoked his right

at sentencing, while here, Huizenga clearly did not because she voluntarily spoke about the offense and did not remain silent. In addition, in that case, the court made clear that a sentencing judge may take into consideration a defendant's lack of remorse *if* it is based on any admissible statement the defendant made pre-trial, during trial or at sentencing. *Id.* at 996. Here, to the extent that the judge based the sentence on Huizenga's lack of remorse, it was based on her statements that were made pre-trial and were testified to at trial by one of the officers, and on her statements at sentencing. Huizenga did not invoke her Fifth Amendment right and the judge had the discretion not to grant the lesser sentence requested based in part on her lack of acceptance of responsibility.

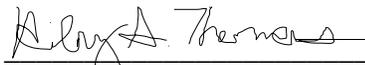
3. Appellate costs should not be awarded.

Given the State's concession regarding Huizenga's claim of ineffective assistance of counsel regarding the same criminal conduct issue, the State agrees that appellate costs should not be awarded. The State will not be seeking them as the State will not be asserting that it is the prevailing party in this case.

E. CONCLUSION

The State respectfully requests this Court to remand this matter for resentencing to permit defense counsel to argue that the assault and the harassment constitute the same course of criminal conduct, but otherwise deny Huizenga's appeal.

Respectfully submitted this 24th day of October, 2016.



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CERTIFICATE

I certify that on this date I caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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