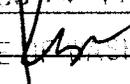


NO. 36720-3

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GREGORY BONDS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 06-1-04441-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit evidence of defendant's prior convictions for crimes of dishonesty which were more than ten years old where the convictions were substantially more probative than prejudicial? Alternatively, was the error, if any, harmless?

2. Did court properly count second degree assault and felony harassment as separate offenses for purposes of defendant's offender score when the two crimes did not have the same intent and defendant had completed his assault of his wife before he threatened to kill her?

B. STATEMENT OF THE CASE.

1. Procedure

On September 20, 2006, the State charged Gregory L. Bonds, hereinafter "defendant," with second degree assault and felony harassment, both counts were firearm enhanced. CP 1-2. On November 13, 2006, the State filed an amended information adding one count of first degree unlawful possession of a firearm. CP 4-6.

The parties appeared for trial before the Honorable Bryan Chushcoff on June 11, 2007. RP 4¹. On June 13, 2007, the defendant stipulated he had previously been convicted and/or adjudicated of a serious offense for purposes of count III, first degree unlawful possession of a firearm. CP 44. This stipulation was read to the jury. RP 472. On June 25, 2007, the jury convicted defendant of second degree assault and felony harassment, but were unable to reach a verdict on first degree unlawful possession of a firearm and left the special verdict forms blank. RP 911-12; CP 81, 82.

On August 24, 2007, the Court sentenced defendant to an exceptional sentence of 96 months on his second degree assault conviction, concurrent with a standard range sentence of 60 months on his felony harassment conviction. RP 941-42; CP 86-97. The court imposed 18 to 36 months of community custody. RP 942; CP 86-97. Findings of fact and conclusions of law for the exceptional sentence were filed on August 28, 2007. CP 116-18. A motion and order correcting judgment and sentence was filed on September 28, 2007, correcting a scrivener's error in the August 24th judgment and sentence that listed defendant's felony harassment sentence as 80 months instead of 60 months, as was ordered by the court. CP 119-120; RP 941-42.

¹ The verbatim transcript of proceedings consists of twelve sequentially paginated volumes that shall be referred to as RP; all other transcripts are referred to as DATE RP (6/13/07 RP).

Defendant filed a timely notice of appeal on August 29, 2007. CP 101-15.

2. Facts

Ms. Weekly-Bonds testified that she, her daughter, Veatrice Jordan, and her grandchildren reside at 2353 South Ash in Tacoma. RP 196, 197. On September 19, 2006, Ms. Weekly-Bonds came home from work at approximately 12:30 am and saw her daughter and three people Ms. Weekly-Bonds did not know sitting at her kitchen table. RP 200. Ms. Jordan told Ms. Weekly-Bonds that the three people were waiting for defendant. RP 200. Ms. Weekly-Bonds went upstairs, watched television and drank two beers. RP 200, 201, 202. A couple of hours later, defendant calls and Ms. Weekly-Bonds tells him that there were three people waiting for him at the house. RP 202. Defendant, who sounded tired and high, said "I'll be there in a few minutes, bitch." RP 202, 203. Ms. Weekly-Bonds testified that defendant had been high for four to five days preceding this incident. RP 203-04.

Ten minutes after he called, defendant knocked on Ms. Weekly-Bonds' front door. RP 205. Ms. Weekly-Bonds opened the door and defendant yelled at her for having people waiting for him for hours and called her a "bitch." RP 205-06. As defendant entered the house, he struck her in her face. RP 206. Ms. Weekly-Bonds fell back onto a chair with

her head on one armrest and her legs over the other. RP 244. Defendant punched Ms. Weekly-Bonds in the face and, when she fell to the ground, he choked her. RP 206-07, 245. Ms. Weekly-Bonds could not breathe when defendant was choking her and she thought she would die. RP 207. Ms. Weekly-Bonds testified that defendant then put a gun in her mouth and said "Bitch, I will kill you, and I'll burn down this mother fucking house with you and your kids in it." RP 207, 208. Ms. Weekly-Bonds said she was able to push defendant off and called 911 from laundry room. RP 208-09. Ms. Weekly-Bonds told the 911 operator that this man (meaning defendant) was going to kill her. RP 259. While she was talking to the 911 operator, defendant pulled the telephone cord out of the wall. RP 213-14, 260. Defendant took the phone from the laundry room; the other two house phones were later found hidden in a cabinet in the living room. RP 214-15. Defendant then fled in Ms. Weekly-Bonds' SUV. RP 212.

As a result of defendant's assault, Ms. Weekly-Bonds testified that her mouth was bleeding and her throat was sore. RP 211. She testified that defendant was high when he assaulted her and that he had been high for four to five days before this incident. RP 203. When defendant gets high he becomes agitated quickly and easily. RP 203. In the four to five days leading up to this incident, Ms. Weekly-Bonds also saw defendant with a handgun. RP 224-25. The gun was a revolver with a longer barrel,

which was similar to the gun he used during this assault. RP 226. Ms. Weekly-Bonds testified that she was afraid for her life as well as for her kids and grandkids. RP 211.

Ms. Jordan testified that she lived with her mother in September 2006, when this incident took place. RP 557. On September 18th, while her mother worked, several people came by the house for defendant, but defendant was not there. RP 558. The three people, two men and a woman, sat and drank at the kitchen table while they waited for defendant to arrive. RP 558. When Ms. Weekly-Bonds came home between 11:45 pm and 12:30 am, everyone was still drinking around the kitchen table waiting for defendant. RP 560-61. Ms. Weekly-Bonds was upset that there were strangers drinking in her house and being loud. RP 562.

Ms. Jordan testified that when her mother went upstairs, Ms. Jordan stayed downstairs with the three people waiting for defendant. RP 563. When defendant came home, he and Ms. Weekly-Bonds argued for a few seconds at the front door about the three people waiting for defendant. RP 567, 568, 575, 576, 577. Ms. Jordan testified that when defendant closed the door, he struck Ms. Weekly-Bonds in the face. RP 567, 576, 577, 578, 579, 598. Ms. Jordan saw her mother fall backward into a chair as a result of the blow. RP 568, 570, 578, 599. When she saw defendant punch her mother in the face, Ms. Jordan ran out the back door along with the other

three people who had been waiting for defendant. RP 567, 569, 570, 580, 592.

Ms. Jordan testified that she was afraid of defendant. RP 569. When she saw him strike her mother, Ms. Jordan ran from the house without trying to help her mother or calling 911. RP 569. Ms. Jordan testified that she didn't call 911 because of "the way we were brought up, we don't see anything. What goes on in the house stays in the house, period." RP 581.

A few hours later, Ms. Jordan returned to her mother's house. RP 571. By that time, the patrol officers had come and gone. RP 571, 572. Ms. Jordan spoke with her mother, who was crying, and noted her mother had a fat lip and a black eye. RP 603, 607. Defendant called to find out if the officers were still at the house. RP 571. After Ms. Jordan told defendant that the police had left, defendant returned to the house. RP 220. Ms. Weekly-Bonds testified that when defendant returned he attempted to apologize by saying that he hadn't meant to hit her so hard in her mouth. RP 217, 218, 219. When Ms. Jordan left the house around 7:00 or 8:00 am, she saw defendant several houses down from Ms. Weekly-Bonds' house. RP 573.

Detective Muse received this case for follow-up on the morning of September 19th. RP 416, 417. He and Detective Carol Krancich went to Ms. Weekly-Bonds residence to contact her. RP 417. They arrived at

approximately 9:45 am and a person, later identified as defendant, was standing next to a vehicle in front of the victim's residence. RP 418, 421, 422. Defendant looked back at Detective Muse's vehicle several times before driving away. RP 420. Detective Muse called for a patrol vehicle to contact defendant, and then followed defendant until the patrol officers initiated a traffic stop. RP 421.

Once defendant was taken into custody, Detectives Muse and Krancich returned to Ms. Weekly-Bonds' residence to contact her. RP 218, 422. Detective Muse testified that Ms. Weekly-Bonds appeared to be upset during the interview. RP 422-23. Her emotions varied from being calm to crying, physically shaking, and upset. RP 423, 424. Detective Muse contacted forensics to photograph Ms. Weekly-Bonds' injuries. RP 221-22, 428. These injuries included swelling around her neck, a split lip, and bruising around her eye and neck. RP 255; CP (Plaintiff's exhibit Nos. 6, 7, 8, 12)

In contrast, defendant testified that there was no one other than Ms. Weekly-Bonds in the house when he returned home on September 19, 2006. RP 614. Defendant testified that Ms. Weekly-Bonds was intoxicated and confronted him about ending their relationship as he goes upstairs to their bedroom. RP 614, 615, 616. Defendant testified that he decided to leave and Ms. Weekly-Bonds pushed him. RP 617. When he

went down the stairs, he testified that Ms. Weekly-Bonds began hitting and kicking him in the back of his head. RP 617. When he turned to face her, he testified that she struck him in the nose causing his nose to bleed. RP 617. Defendant testified that he reacted “like that. When I did like that, it hit her face.” RP 617. Defendant said Ms. Weekly-Bonds then went to the phone and called 911. RP 618, 619. Defendant testified he left the house because the police had been called and would be coming. RP 620-21. Defendant testified that the blood found on the floor of Ms. Weekly-Bonds’ house was his and not hers. RP 620, 621. Defendant testified that the photos of Ms. Weekly-Bonds did not depict injuries, but were a reflection of what she always looked like. He testified that Ms. Weekly-Bonds normally has dark rings around her eyes, her lips and neck are normally puffy, and the marks on her neck are the result of rashes, not bruising. RP 626-29.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO IMPEACH DEFENDANT WITH HIS PRIOR CONVICTIONS PURSUANT TO ER 609(b).

A trial court’s decision to admit impeachment evidence under ER 609 is reviewed for abuse of discretion. *State v. King*, 75 Wn. App. 899, 910 n.5, 878 P.2d 466 (1994), *review denied*, 125 Wn.2d 1021 (1995). A

conviction for a crime of dishonesty that is less than ten years old is per se admissible pursuant to ER 609(a)(2). However, a conviction that is more than ten years old is not admissible for impeachment under 609(b) unless “the probative value of the conviction supported by specific facts and circumstances substantially outweighed its prejudicial effect.”

To admit impeachment evidence under 609(b), a trial court must balance, on the record, the prejudicial impact of the conviction against its probative value using several admissibility factors, including: 1) the length of the defendant’s criminal record; 2) remoteness of the prior conviction; 3) nature of the prior crime; 4) the age and circumstances of the defendant; 5) centrality of the credibility issue; and impeachment value of the prior crime. *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980).

In the present case, the court properly determined the probative value of defendant’s three crimes of dishonesty outweighed the prejudicial effect and allowed the State to use these convictions at trial for impeachment purposes. RP 653-55. Prior to making its decision, the Court was advised that defendant had an extensive criminal history “...that stretches from the early ‘80s clear up until the present time with a total of 44 times that Mr. Bonds has been booked into the Pierce County Jail and, basically, in and out of prison for numerous offenses ever since then.” RP 647-48. As a result of these multiple intervening convictions, defendant had been sentenced, collectively, to more than 18 years in either

jail or prison.² The court was aware of the offense dates for the prior convictions and the nature of those crimes. RP 646-55. The court specifically noted that credibility was particularly important in this case. RP 654.

In ruling defendant's crimes of dishonesty from the 1980s were admissible, the trial court acknowledged the strong presumption against admitting crimes of dishonesty that were more than ten years. RP 653-54. The court noted that a crime of dishonesty that is more than ten years old may not truly indicate something about that person's ability for truthfulness or honesty. RP 654. However, in this case, defendant's extensive criminal history "would suggest his ability not to conform with

² The prosecutor advised the court as follows:

Mr. Bonds went on after that 1987 Robbery 2nd conviction to another conviction in 1987 for Unlawful Possession of a Controlled Substance, which is a Class C felony, to another felony conviction in November of 1988 for Bail Jumping, to another conviction in September of 1999 for Felony Possession of a Firearm, to two more convictions in May of 1991, Unlawful Possession of a Controlled Substance with Intent, Unlawful Possession of a Firearm. Moving on from that, he had an eight-year, one month prison sentence on that, so he was on ice for a while. When he got back out, he got a conviction in 1998 for Unlawful Possession of a Controlled Substance, another Class C felony, three years seven months. In November of '01, Attempted Unlawful Delivery of Cocaine, another Class C felony, 12 and a day. Finally, in 2002, a sentencing in 2004, Unlawful Possession of a Controlled Substance, cocaine, for which he was sentenced in March of 2004 to a total of 50 months with nine to twelve months in community custody. It looks like upon his release, according to the records that I have from the Department of Corrections, he was in prison from March 23 of '04 – he was in jail from February 6th of '04 to March 23rd of '04. On March 23rd, he was transferred to prison. He served in prison until January 18, 2006. He was on work release from January 18 of '06 until February 19 of '06. he then returned for a parole violation on February 19th of '06 until June 19th, '06. He was then on supervision for barely over six weeks before going back to prison again, on August 2 of '06 until August 23 of '06. RP 649-50.

the law to some extent.” RP 654. Additionally, the court noted that the credibility of defendant and Mrs. Weekly-Bonds was particularly critical because the jury had to choose between two different versions of events. RP 654. Because defendant’s criminal history continued unabated from the 1980s to the present and, as a result, defendant’s crimes of dishonesty were not attenuated by time and because credibility was particularly important in the present case, the trial court determined that the probative value of defendant’s 1982 first degree theft, 1985 attempted second degree burglary, and 1986 second degree robbery outweighed the prejudicial effect. Specifically, the trial court stated:

... While I have some sympathy for the idea that, at some point, [a crime of dishonesty] no longer represents the character of someone, with all of the other convictions that have occurred here and the problems with the law that Mr. Bonds has had and given a closeness of the matter, it seems to me that it is important to credibility, and that a jury can weigh its age in the context of all of this themselves.

I will permit all of those convictions.

RP 654-55.

To ensure the jury would only use evidence of defendant’s prior crimes of dishonesty in evaluating defendant’s credibility, the court included a limiting instruction in the court’s instructions to the jury. CP 52 (Jury Ins. No. 5).

The defendant relies on *State v. Hardy*, 133 Wn.2d 701, 946 P.2d 1175 (1997) to support his argument that the court erred in admitting defendant’s crimes of dishonesty. However, *Hardy* is distinguishable

because the crime with which the State sought to impeach Hardy was not a crime of dishonesty.

In *Hardy* the Supreme Court reversed Hardy's conviction for robbery because the trial court allowed the State to impeach Hardy with a prior drug conviction pursuant to ER 609(a)(1). Noting that the trial court stated "the impeachment value of the prior crime is almost nil" the Supreme Court found that it was error to admit the conviction without the State or the Court articulating how it was probative of Hardy's veracity. Because the evidence against Hardy was not overwhelming and the victim was the only other eyewitness to testify, the court found that there was a reasonable probability that the improper impeachment evidence affected the jury's determination. *Id.* at 713.

Unlike *Hardy*, here the State had a strong case against the defendant and the crimes used to impeach defendant were crimes of dishonesty. Ms. Weekly-Bonds testified that the defendant had strangled, struck, and threatened to kill her. RP 206,207, 208. Her injuries were consistent with having been strangled and struck. RP 211, 255, 257, 288, 289, 292, 334, 336, 337, 338, 341, 396, 429. Ms. Weekly-Bonds called 911 to report the incident and defendant disconnected the phone, abruptly ending the call. RP 208-215. The 911 tape was played for the jury. RP 258; Plaintiff's Exhibit No. 1 (911 tape). Additionally, Ms. Bond's daughter testified she was home when defendant entered the house and immediately struck Ms. Weekly-Bonds in the face and knocked her back

over a chair. RP 567, 569, 570, 580, 592. Ms. Jordan's testimony corroborated her mother's version that defendant assaulted her immediately upon entering the residence. Because the State presented overwhelming evidence that defendant assaulted and threatened to kill Ms. Bonds, and the crimes used to impeach defendant were crimes of dishonesty (burglary; theft, and robbery), the trial court properly allowed to State to use those crimes for impeachment under ER 609(b).

Assuming, *arguendo*, the trial court erred in allowing the State to impeach defendant with his three crimes of dishonesty, this court will only reverse if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Calegar*, 133 Wn.2d 718 at 727, 947 P.2d 235 (1997). To determine if there is a reasonable probability that the error materially affected the outcome of the trial, the court looks to the following factors: 1) the evidence at trial; 3) the importance of the defendant's credibility; and 3) the effect the prior convictions may have had on the jury. *Hardy*, 133 Wn.2d at 712.

In the present case there is no reasonable probability the error materially affected the outcome of the trial. First, as argued above, the evidence against defendant was strong. Second, as noted by the court, both the defendant's and the victim's credibility were important to the case. Third, it is clear from the verdicts that the jury was not improperly

influenced by defendant's crimes of dishonesty. CP 81, 82, 133-35; RP 911-12.

Here, the jury convicted defendant of second degree assault and felony harassment, but did not convict defendant of unlawful possession of a firearm or find firearm enhancements for either of the two counts on which they did convict. CP 81, 82, 133-35; RP 911-12. The fact that the jury convicted defendant of some, but not all, of the crimes with which he was charged and did not find he was armed with a firearm on the two counts on which they did convict, shows that defendant's crimes of dishonesty did not improperly influence the jury. The jury believed defendant when he testified that he was not armed with a firearm, but disbelieved his version of the assault and threat. Had the jury been improperly influenced by defendant's criminal history, they would have convicted him as charged rather than only convicting him of two of the three counts.

Additionally, the defendant was on trial for assault, felony harassment, and unlawful possession of a firearm. These crimes are very different than defendant's convictions for robbery, theft, and attempted burglary. Because the crimes are dissimilar, the potential prejudice to defendant is much less than it otherwise would be. *State v. Pam*, 98 Wn.2d 748, 760, 659 P.2d 454 (1983)(Utter, J., concurring).

Finally, the jury was specifically instructed to use defendant's prior convictions for crimes of dishonesty only for purposes of determining defendant's credibility. CP 52. Jurors are presumed to have followed the court's instructions. *State v. Swan*, 114 Wn.2d 613, 709 P.2d 610 (1990).

Thus, if the court erred in allowing the State to impeach defendant with his crimes of dishonesty, the error was harmless because there is no reasonable probability that the jury verdict would have been materially impacted had the evidence been excluded.

Defendant's claim is without merit and must fail.

2. THE COURT PROPERLY COUNTED DEFENDANT'S CONVICTIONS FOR FELONY HARASSMENT AND SECOND DEGREE ASSAULT AS SEPARATE OFFENSES WHEN CALCULATING DEFENDANT'S OFFENDER SCORE BECAUSE THE TWO CRIMES DID NOT HAVE THE SAME INTENT AND DEFENDANT HAD COMPLETED HIS ASSAULT OF HIS WIFE BEFORE HE THREATENED TO KILL HER.

Multiple crimes committed against a single victim are the same criminal conduct for purposes of sentencing if they (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a); *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The absence of any one of these criteria prevents a finding of same criminal conduct. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The Legislature intended the phrase "same

criminal conduct” to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). A trial court's determination as to whether separate acts constitute the same criminal conduct will be reversed only for clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). Abuse of discretion is possible if the trial court arbitrarily counted the convictions separately. *State v. Haddock*, 141 Wn.2d 103, 110.

In the present case, there is no doubt that the crimes were committed against the same victim and at the same place. However, second degree assault and felony harassment each have a different intent. Second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 711, 887 P.2d 396 (1995). Felony harassment requires a person to knowingly threaten to kill the person threatened or any other person and places the person threatened in reasonable fear the threats will be carried out. RCW 9A.46.020(2)(b)(ii). Because the intents for the two crimes are not the same, the trial court properly counted them as separate offenses when calculating defendant's offender score.

Here defendant was charged with two alternative means of committing second degree assault. CP 7-9. The first means was an assault with a deadly weapon and the second means was an assault in which defendant recklessly inflicts substantial bodily harm. The jury was

unable to reach a verdict as to whether defendant was armed with a firearm at the time he assaulted Ms. Weekly-Bonds. CP 81, 82, 133-35; RP 911-12. Because the jury was unable to agree that defendant was armed with a firearm, his conviction for second degree assault was based upon his strangulation of Ms. Weekly-Bonds. CP 81, 82, 133-35; RP 911-912.

Ms. Weekly-Bonds testified that when defendant returned home, he immediately called her a “bitch” and struck her in the face. RP 205-06. The force of this blow caused her to fall back into a chair. RP 206, 244. Defendant repeatedly punched Ms. Weekly-Bonds in the face and then strangled her. RP 206, 207, 208. Ms. Weekly-Bonds testified she could not breathe, but did not lose consciousness. RP 207. Defendant then pulled a gun from his waistband and put it into Ms. Weekly-Bond’s mouth saying “Bitch, I will kill you, and I’ll burn down this mother fucking house with you and your kids in it.” RP 207, 208. Ms. Weekly-Bonds managed to get away from defendant and ran to the laundry room where she called 911. RP 208-09, 210.

Defendant’s objective intent changed from the assault to the felony harassment. Defendant’s objective intent when he assaulted Ms. Weekly-Bonds was to physically harm her. Defendant repeatedly punched Ms. Weekly-Bonds in the face and then strangled her, cutting off her air supply. This intent changed when he threatened to kill her and her children by burning down the house. RP 207-08. When defendant

threatened to kill Ms. Weekly-Bonds and her children, defendant pulled a gun from his pants and put the barrel in her mouth before he threatened her. RP 207. Defendant's intent when he threatened to kill her and her children was to place her in fear of an event that would occur in the future. Because defendant's objective intents were different, the court properly counted them as separate offenses when defendant's offender score was calculated.

Additionally, as noted above, the two crimes did not occur at the same time. Defendant had completed the second degree assault when his hands were removed from her neck. After the assault, defendant threatened to kill Ms. Weekly-Bonds and burn down her house with her and her children in it. Because one crime was completed before the second crime began, the two crimes did not occur at the same time. Again, the court properly counted the two offenses separately when calculating defendant's offender score.

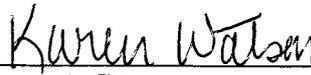
Because defendant's objective intent changed from one crime to the next, and because they did not occur at the same time, defendant's claim that his two convictions constituted same criminal conduct pursuant to RCW 9.94A.589(1)(a) is without merit.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions.

DATED: August 14, 2008.

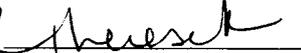
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/14/08 
Date Signature