

COURT OF APPEALS
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STATE OF WASHINGTON
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09 JUN 2007

NO. 38344-6-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RANDY WILLIAM GOLDSBERRY,

Appellant.

BRIEF OF RESPONDENT

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I. ANSWERS TO ASSIGNMENTS OF ERROR

1. While the special verdict jury instruction did not ask the jury to find whether the victim of harassment reasonably believed the defendant's threat to kill, this was harmless error as applied to count four since there was uncontroverted evidence Philomena Thomas¹ reasonably believed the defendant would kill her.
2. The State must concede error as to the jury instruction on felony harassment as to count two pertaining to Noreen Williams as there was conflicting evidence of belief and the error cannot be deemed harmless.²
3. There was sufficient evidence on count two to prove Goldsberry committed felony harassment, however given the State's concession, they court need not consider this argument.
4. There was sufficient evidence that the crime of Assault in the second degree and felony harassment against Philomena Thomas was not same criminal conduct. However, Defense counsel's failure to argue same criminal conduct for the crimes of Assault in the second degree and felony harassment did potentially rise to ineffective assistance of counsel and the State has no objection to allowing the defendant to argue same criminal conduct upon re-sentencing.
5. The trial court exceeded its authority by imposing a ten-year no contact order for Noreen Williams as the defendant was convicted of a Class C felony against Ms. Williams. Given the State's concession of error as to the jury instruction, the conviction and hence the no-contact order will be vacated.

¹ "Philomena" is the spelling of Ms. Thomas' first name in the Information. CP 1-4. It is spelled incorrectly in the verbatim report of proceedings as "Filamena." For the sake of accuracy, "Philomena" will be used in the State's Response.

² Noreen Williams and Noreen Goldsberry are the same person. At the time of the incident Noreen Goldsberry was married to the defendant. At the time of trial the couple was divorced and Ms. Williams had changed her last name. RP 99-101.

6. The court did not exceed its authority by issuing a ten-year no contact order protecting Philomena Thomas as the defendant was convicted of a Class B felony against Ms. Thomas.

II. ISSUES PERTAINING TO ANSWERS TO THE ASSIGNMENTS OF ERROR

1. Was there uncontraverted evidence that Philomena Thomas reasonably believed the defendant would kill her such that any error in instruction was harmless?
2. Whether defense counsel was ineffective when he failed to argue same criminal conduct concerning the Assault and Harassment of Philomena Thomas?
3. When a court convicts a defendant for multiple offenses against the same victim, is a court required to state the crime of conviction for which a no-contact order issues or can it merely enter an order for the length of the greatest statutory maximum crime?

III. STATEMENT OF THE CASE

Procedural History

The State concurs with the Defendant's recitation of procedural history with the following exceptions and additions:

The trial court gave the jury the instruction that a separate crime is charged in each count and they must decide each count separately and

their verdict on one count should not control their verdict on another count. CP 18.

The court inquired of the State as to the sentencing range. 3 RP 334.³ The State replied 51-56 months as to the Assault in the second degree, but later amended that to 39-44 months, as there was a miscalculation as to the number of months for the deadly weapon enhancement. 3 RP 334, 344. The court inquired from defense counsel if this was agreed. 3 RP 334. Defense counsel said, “that’s my understanding.” 3 RP 334.

Statement of Facts

On January 22, 2007, the defendant, Randy Goldsberry, arrived extremely intoxicated at the Shell station where his wife worked. 1 RP 51-52. His wife, Noreen Williams, was not at work, but home sick. 1 RP 51-52. Philamena Thomas was working at the Shell Station. 1 RP 51. Concerned about Goldsberry driving himself home, Thomas called Noreen and arranged to drive Goldsberry home in his truck. 1 RP 53-54. During the 10 to 15 minute ride home, Goldsberry made some suggestive

³ “1 RP” is the Report of Proceedings for the pre-trial hearings and the first day of trial, September 15, 2008. “2 RP” is the Report of Proceedings for the second day of trial, September 16, 2008. “3 RP” is the Report of Proceedings for sentencing on September 17 and 18, 2008.

comments that made Thomas uncomfortable. 1 RP 54, 55. When Thomas changed the subject to his wife, Goldsberry became agitated and expressed anger with Noreen. 1 RP 54.

When they arrived at the defendant's home, Noreen asked to use the phone to call her sister to pick her up. 1 RP 56. Goldsberry went to the back room where Noreen was in bed sick. 1 RP 103. He asked Noreen why Thomas drove him home. 1 RP 103. When Noreen told him she didn't know, Goldsberry started screaming at her that he wanted his keys and if he didn't get his keys someone was going to get hurt. 1 RP 103-04. Noreen described Goldsberry as very mad. 1 RP 104.

Goldsberry left the house for a few minutes and when he returned he went immediately to the bedroom. 1 RP 105. He didn't say much, but grabbed his bow case and started to unzip it. 1 RP 105. Noreen described him as pissed and tried to wrestle the bow from him. 1 RP 105-106. Thomas described she could hear yelling from the back bedroom and noises like something was being thrown or dropped. 1 RP 57. Thomas was scared and called 911. 1 RP 57. Noreen was unable to get the bow away from Goldsberry, and followed him into the living room. 1 RP 58-61, 111, 2 RP 154.

Goldsberry had an arrow notched in the bow, pulled the bow string back three-quarters of the way, pointed it at Thomas and said “are you ready to die?” 1 RP 59-61, 111, 2 RP 154. Both Noreen and Thomas described Goldsberry as very angry and serious in his threat. 1 RP 61, 111. Thomas said she believed Goldsberry would kill her. 1 RP 62. His voice was direct and clear and he was “ready to do it.” 1 RP 61. Noreen yelled at Goldsberry “no, Randy no.” 1 RP 59, 2 RP 156.

Goldsberry then told both women to go outside. 1 RP 63, 113. According to Thomas, Goldsberry put his foot in her back and shoved, causing her to hit the doorframe. 1 RP 64. Goldsberry said “get moving, bitch.” 1 RP 64. Thomas walked into the yard while Noreen stayed on the porch. 1 RP 64. Thomas explained she was trying to put some space between she and Noreen so there would be two separate targets. 1 RP 64. Holding the bow at his side, Goldsberry told Thomas to stop moving, saying “You take one more move, you’re dead.” For about five minutes Goldsberry yelled and screamed degrading and humiliating things at Noreen while Thomas waited in the yard. 1 RP 65. Thomas also testified that during this time, Goldsberry told both Noreen and Thomas to start running because he was going to kill both of them. 1 RP 91-92.

Noreen testified that he told her to run across the street so he could shoot her. 1 RP 115. She told him no. 1 RP 115. When asked if she thought he was serious in his threat, Noreen said she didn't think so. 1 RP 115. When she told him no, Goldsberry responded, "What? You don't think I'll do it?" 1 RP 115. This time Noreen told him "No. I know you will." 1 RP 115. She explained that she was trying to calm him down by agreeing with him. 1 RP 115-16. However, Goldsberry wasn't calming down; rather he continued to tell her to run across the street so he could shoot her. 1 RP 116. Noreen then sat on the porch. 1 RP 117.

Goldsberry then turned to Thomas saying something like "this is all your fault." 1 RP 68. He pulled the bow string back and pointed the bow and arrow at her. 1 RP 68-69, 91. He said, "You're going to die right now." 1 RP 69. Just then Goldsberry's grandson Jacob started crying inside the house. 1 RP 69, 117. Goldsberry dropped the bow and arrow into the back of his truck and went inside. 1 RP 70. Noreen followed him inside and told her adult daughter Kathleen to call her grandmother to pick up Kathleen and Jacob. 1 RP 71, 118. Noreen explained she had never seen Goldsberry this angry and wanted them to be safe. 1 RP 118.

Kathleen was packing when Goldsberry came in and wanted to hold Jacob. 1 RP 118. Neither Noreen or Kathleen were willing to let Goldsberry take the child. 1 RP 118-19. Noreen took Jacob and Kathleen got within inches of Goldsberry's face telling him he was not getting her son and needed to leave. 1 RP 119. Goldsberry then grabbed Kathleen by the throat and shoved her onto the bed. 1 RP 120, 2 RP 160. He was on top of Kathleen squeezing her throat. 1 RP 120. Kathleen had difficulty breathing and felt dizzy. 2 RP 162. Noreen pulled Goldsberry's hair and slapped him in the face trying to get him to let go. 1 RP 120, 2 RP 161. Kathleen struggled against Goldsberry and after about two minutes was able to get enough room to dial 911 on the cell phone in her pocket. 1 RP 120, 2 RP 160-162. Kathleen gave one last shove with her legs and was able to get Goldsberry off her. 2 RP 163. She held the cell phone up so Goldsberry could see. 2 RP 163. Goldsberry said "If that's 911 that will be the last thing you ever do," and he disappeared out the door. 1 RP 121, 2 RP 163.

Thomas stayed outside after Noreen and Goldsberry went in. 1 RP 71. She peered into the home windows, seeing some of the interaction between Noreen, Kathleen, and Goldsberry. 1 RP 71. She dialed 911

several times telling them if they did not hurry the defendant would kill them all. 1 RP 72. Again, Ms. Thomas said she really thought Goldsberry was going to kill her. 1 RP 72.

After Goldsberry left the home, the Cowlitz County Sherriffs arrived. 1 RP 121. Deputy Plank spoke with the women at the house and wrote a statement for Noreen because she was crying, distraught, and didn't feel like writing a statement. 2 RP 202. Deputy Plank wrote Noreen's statement sentence by sentence as she was telling him what happened. 2 RP 202. After she finished, Deputy Plank read the statement back to Noreen. 2 RP 202. Noreen made some minor changes to the statement, and signed the statement under the penalty of perjury. 1 RP 133, 2 RP 203.

At trial, Noreen reviewed the statement she gave to Deputy Plank. 1 RP 131. While she couldn't remember at trial if Goldsberry pointed the bow and arrow at her that night, she admitted that she put in her written statement that he pointed the arrow at her outside when he told her to run. 1 RP 133. When the State asked her if her written statement was accurate as to the events, Noreen said it was, but that she didn't remember. 1 RP 134. The State asked Noreen Williams if she was scared when Goldsberry

pointed the bow and arrow at her. 1 RP 135. Noreen responded, “At that point, I don’t think I was. Because he had never hurt me. He had never hurt me before. This was a total change. This was totally unexpected. I just wanted him to go away. And maybe I was scared. All I remember is I was sick and this was ridiculously happening. And there was no reason for it. None whatsoever.” 1 RP 135.

Deputy Sid Ackler also responded to the 911 calls. 2 RP 183-84. He contacted Goldsberry a few blocks from the home. 2 RP 184-85. During the contact Goldsberry was yelling “I want that – I want my wife, that whore, out of the house. I’m going to kill them all.” 2 RP 186. After he was placed in Deputy Ackler’s patrol car, Goldsberry continued to demand the police force his wife out of the house. 2 RP 187. He said he paid the rent and bills and the house was his. 2 RP 187. He continued to make threats to kill her and anybody that was in the house. 2 RP 187.

During the drive to the jail, Deputy Ackler discovered Goldsberry using his cell phone even though his hands were cuffed behind him. 2 RP 188. Goldsberry yelled into the phone, “I’m going to kill you. I want you out of that house.” At the same time of the phone call, Philomena Thomas observed Noreen Goldsberry receive a phone call and recognized the

caller as Goldsberry. 1 RP 75. After the call, Goldsberry continued to make threats towards his wife. 2 RP 190.

After Goldsberry was charged, he twice met with Dr. Melissa Dannelet, a psychologist at Western State Hospital. 2 RP 231, 233. During those interviews he told her that he had been drinking, Ms. Thomas drove him home, and he was angry. 2 RP 235-238. He said had words with his wife and Ms. Thomas. 2 RP 235. He said he took out a compound bow and placed an arrow on it. 2 RP 235, 238. He said he didn't feel they would have any need to feel afraid or scared, and if he really wanted to hurt them he would have used his bear tip arrows. 2 RP 236. He later elaborated that he and Noreen were arguing about Ms. Thomas' presence and Goldsberry wanted her to leave. 2 RP 239. He said after he took the bow from the wall, Noreen attempted to wrestle it away from him. 2 RP 239. Mr. Goldsberry said he used the bow for intimidation and to get the women to listen to him. 2 RP 240, 242. He also admitted he choked Kathleen, but said she could breathe the entire time. 2 RP 231-244.

IV. ARGUMENT

A. OMISSION OF AN ELEMENT AS TO COUNT FOUR OF FELONY HARASSMENT WAS HARMLESS.

Appellant correctly cites State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005), requiring a court to instruct the jury they must find the victim in a felony harassment case reasonably believed the defendant threatened to kill them. Under State v. Mills, the failure to include in either the to convict or special verdict instruction the required language constitutes the omission of an essential element of felony harassment. See id. The State must concede the omission in both counts two and four.

However, an omission of an essential element does not require reversal if the State can show the error is harmless. See State v. Brown, 147 Wa.2d 330, 340, 58 P.3d 889 (2002), State v. Shouse, 119 Wa.App. 793, 797, 83 P.3d 453 (2004). An error is harmless if “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Brown, at 341, *quoting* Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827 (1999). When applied to an omitted element in a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. Id.

In regards to count two, while the State believes there was sufficient evidence to prove Noreen Williams reasonably believed the defendant's threat to kill her, the State cannot argue this evidence was uncontroverted. Noreen Williams' own testimony was contradictory about whether she believed the threat he would shoot her and Williams' and Thomas' testimony differed about whether the threat was a threat to kill or a threat to shoot. 1 RP 91-92, 115. Thus, the State concedes the conviction for count two must be vacated and the matter remanded for re-trial as to this count.

In regards to count four, the jury instruction did leave out the reasonable belief finding as to the threat to kill, however there was uncontroverted evidence Philomena Thomas reasonably believed Goldsberry would kill her.

In a footnote in State v. Mills, the Washington Supreme Court found it could not say beyond a reasonable doubt the jury would find the victim was placed in reasonable fear of being killed, even though it was clear from the record a threat to kill was made. See Mills, 154, Wa.2d at 422, fnt 7. In the case, Mills called the victim on June 3, 2000, leaving her a message they needed to discuss their friend. See Id., 154 Wa.2d at 5.

Four days later Mills spoke to the victim saying, “I told you about messing with him” and to look at her Altima. Id. Substantial damage was later found to the victim’s car. Id. Two hours after the first call, while the victim was speaking with the police, Mills left her the following message:

Bitch, you fuckin’ bitch. I’m tired of playin’ around with you. Watch, I’m going to get a year tops when I murder your ass. I stabbed someone for messing with Bill, I got 33 days. Now watch what I’m going to get for murder...I’m a kill you suicide, you need to know who the fuck I am. I’m gonna kill you in the back of your head, I’m going to walk up behind you, slit your fuckin’ neck, you dumb ass bitch. That’s why I just found out what apartment you live in. Now I’m coming over now.

Id. The victim testified “she became very scared after the call and subsequently learning of Mills’ criminal history “thought all the more [Mills] would carry out what she said she would do.”” Id.

Mills is distinguishable from the present case, specifically count four. In Mills, the defendant made multiple threats that she would kill the victim and slit her neck. See Mills, 154, Wa.2d at 5. However, the victim never actually said she thought the defendant would kill her. Rather, she said she believed she would carry out the threat. See id. Additionally, the threats were made over the phone and the only follow through on the previous threat was damage to a car. See id.

In this matter there is uncontroverted evidence Goldsberry threatened to kill Philomena Thomas. All three women testified that while still in the house Goldsberry asked Philomena Thomas if she was ready to die. 1 RP 59-61, 111, 2 RP 154. Additionally, there is ample evidence that a reasonable person in Thomas' position would believe he meant to kill her, because at the time of the threat Goldsberry held a bow and notched arrow and pointed it at Thomas. 1 RP 59-61, 111, 2 RP 154. Moreover, Goldsberry was very angry and serious in his threat, had been in an argument with Noreen earlier, and by his own words wanted Thomas to leave. 1 RP 57, 103-104, 2 RP 235-39. Lastly, unlike Mills, Thomas testified she believed Goldsberry would kill her and he was ready to do it. 1 RP 61-62, 111. Arguably even Noreen was convinced because she responded "no, Randy no" and earlier attempted to wrestle the bow from him. 1 RP 58-61, 2 RP 156. Lastly, even though as Appellant cites, Thomas never had any prior problem with Goldsberry, she was so frightened that she called 911 several times and told them if they didn't hurry there would be four dead people in the home. 1 RP 62, 72.

Appellant argues it is reasonably likely that the jury convicted Goldsberry of harassment because it found he would cause bodily injury to Thomas. Lastly, even though as Appellant cites, Thomas never had any prior problem with Goldsberry, she was so frightened that she called 911 several times and told them if they didn't hurry there would be four dead people in the home. 1 RP 62, 72.

Appellant argues it is reasonably likely that the jury convicted Goldsberry of harassment because it found he would cause bodily injury to Thomas. See App Brf at 15. However, the jury is instructed that a separate crime is charged in each count and they must decide each count separately and their verdict on one count should not control their verdict on another count. CP 18. Juries are presumed to follow the instructions given and this particular jury demonstrated they were able to follow this instruction when it declined to reach a verdict as to count one – Assault in the second degree against Noreen Williams, but find the defendant guilty as to count two – Felony Harassment against Noreen Williams. CP 50, 51, See State v. Willis, 67 Wa.2d 681, 686, 409 P.2d 669 (1966). The jury in

the present case were clearly able to distinguish between a threat of bodily harm and assault under the facts.

Under the facts presented to the jury, a reviewing court can find uncontroverted evidence beyond a reasonable doubt that Philomena Thomas reasonably believed Goldsberry would kill her and any error did not contribute to the verdict.

B. THE STATE DOES NOT OBJECT TO GOLDSBERRY ARGUING SAME CRIMINAL CONDUCT UPON RESENTENCING AS DEFENSE COUNSEL WAS POTENTIALLY INEFFECTIVE WHEN HE FAILED TO ARGUE SAME CRIMINAL CONDUCT CONCERNING THE ASSAULT AND HARASSMENT OF PHILOMENA THOMAS.

Goldsberry argues his counsel was ineffective when he failed to argue the assault in the second degree and felony harassment convictions against Philomena Thomas were same criminal conduct.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wa.App. 256, 262, 576 P.2d 1302, 1306 (1978); *see also* U.S. CONST. AMEND. VI, WASH. CONST. ART. 1, § 22. “[T]he substance of this guarantee is that courts must make ‘effective’ appointments of counsel.” *Jury*, 19 Wa.App. at 262, 576 P.2d at 1306 quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct.

55, 77 L.Ed. 158 (1932). The test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* citing State v. Myers, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263, 576 P.2d at 1307. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” State v. Visitacion, 55 Wa.App. 166, 173, 776 P.2d 986, 990 (1989) citing State v. Sardinia, 42 Wa.App. 533, 539, 713 P.2d 122 (1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* citing State v. Sardinia, 42 Wa.App. 533, 539, 713 P.2d 122 (1986).

Given the State’s earlier concession concerning count two - the felony harassment conviction against Noreen Williams, the jury’s finding of guilt will be vacated and the matter remanded to the trial court for a

new trial on that count. This means that whatever the outcome, the Defendant will have to be re-sentenced. While the State feels the convictions for Assault and Felony Harassment against Thomas were not same criminal conduct given the multiple incidents of assault and harassment and the separation of time and intent, the State concedes that given the case law concerning ineffective assistance, the State cannot find a valid reason why defense counsel did not make the argument and were the trial court to find same criminal conduct, the defendant would be prejudiced in his offender score. The State does not object to allowing the defendant to argue same criminal conduct upon re-sentencing.

C. A COURT IS NOT REQUIRED TO STATE THE CRIME OF CONVICTION FOR WHICH A NO-CONTACT ORDER ISSUES, BUT MAY ENTER AN ORDER FOR THE LENGTH OF THE GREATEST STATUTORY MAXIMUM CRIME?

Goldsberry argues the trial court's entry of a 10-year no contact order protecting Noreen Williams was entered in error. The State concedes this error as the Defendant's conviction was for a class C felony with a statutory maximum sentence of five years. Additionally, given the State's concession concerning the conviction for the Felony Harassment, the order will be vacated due to the vacation of the conviction and remand.

Goldsberry also argues the 10-year anti-harassment order protecting Philomena Thomas is unclear because the defendant was convicted of both a class B and class C felony. The Appellant cites no authority that a trial court must specify the crime for which a protection order is entered. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007), holds a court may enter an order effective for the statutory maximum allowed by the crime. It does not state a court must elect or clarify the crime for which the court enters the order.

The jury convicted Goldsberry of Assault in the second degree against Philomena Thomas. CP 51. Goldsberry has not appealed the jury's finding concerning this count. Thus, the entry of an anti-harassment order effective for 10 years is well within the court's authority under State v. Armendariz. See id. Clarification is unnecessary, superfluous and places form above substance.

V. CONCLUSION

The State concedes the court should vacate the jury's conviction as to count one and remand for a new trial. The State urges the court to deny Goldsberry's appeal as to count four, finding any error harmless. The State concedes defense counsel was potentially ineffective by failing to

argue same criminal conduct and given the trial court must re-sentence the defendant, does not object to allowing the trial court to consider the same criminal conduct argument. Lastly, the State concedes the no-contact order issued protecting Noreen Williams must be vacated as part of Goldsberry's sentence as to count two. However, the State urges the court to deny the appeal as to the anti-harassment order protecting Philomena Thomas as there was no error.

Respectfully submitted this 1st day of July, 2009.

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

2009 JUL 13 11:13 AM
STACIA
BY [Signature]

STATE OF WASHINGTON,)	NO. 38344-6-H
)	Cowlitz County No.
Respondent,)	07-1-00113-9
)	
vs.)	CERTIFICATE OF
)	MAILING
RANDY WILLIAM)	
GOLDSBERRY,)	
)	
Appellant.)	
_____)	

I, Michelle Sasser, certify and declare:

That on the 2nd day of July, 2009, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief addressed to the following parties:

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

Dated this 2nd day of July 2009.

[Signature]
Michelle Sasser