

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 39327-1-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

RICHARD L. SALLEE,

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
MASON COUNTY

The Honorable Amber L. Finlay, Judge  
Cause No. 08-1-00482-1

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PATRICIA A. PETHICK, WSBA NO. 21324  
Attorney for Appellant

P.O. Box 7269  
Tacoma, WA 98417  
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking Counts II and IV (malicious harassment) and Count III (assault in the second degree) from the jury for lack of sufficient evidence.
2. The trial court erred in calculating Sallee's offender where Counts I and II involving the same victim (Rivas) and Counts III and IV involving the same victim (Naranjo) constituted the same or similar criminal conduct.
3. The trial court erred in allowing Sallee to be represented by counsel who provided ineffective assistance in failing to argue at sentencing that his offender score was miscalculated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Sallee was guilty in Counts II and IV (malicious harassment) and Count III (assault in the second degree)? [Assignment of Error No. 1].
2. Whether the trial court erred in calculating Sallee's offender where Counts I and II involving the same victim (Rivas) and Counts III and IV involving the same victim (Naranjo) constituted the same or similar criminal conduct? [Assignment of Error No. 2].
3. Whether the trial court erred in allowing Sallee to be represented by counsel who provided ineffective assistance in failing to argue at sentencing that his offender score was miscalculated? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Richard L. Sallee (Sallee) was charged by first amended information filed in Mason County Superior Court with two counts of

assault in the second degree (Counts I and III), and two counts of malicious harassment (Counts II and IV). [CP 82-84].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Sallee was tried by a jury, the Honorable Amber L. Finlay presiding. The court declared a mistrial after a juror admitted to not believing the interpreter's translation of testimony. [CP 81; Vol. I RP 40-42]. The matter was then reset for trial. [Vol. I RP 43].

Sallee had no objections and took no exceptions to the court's instructions. [Vol. II RP 197]. The jury found Sallee guilty as charged on all four counts. [CP 20, 21, 23, 25; Vol. II RP 232-233].

The court sentenced Sallee to standard range sentences of 15-months on all four counts based on an offender score of 3 calculated using the current offenses as Sallee had no prior convictions with the sentences running concurrently for a total sentence of 15-months. [CP 6-19; Vol. II RP 242].

A timely notice of appeal was filed on May 19, 2008. [CP 5]. This appeal follows.

## 2. Facts

On October 18, 2008, between 10:30 and 11 PM, Edgar Rivas (Rivas) and his wife Maria Naranjo (Naranjo) were returning to their apartment after attending a party. [Vol. I RP 78-79, 87-88]. As they were

entering the foyer heading towards the stairs leading to their apartment, they encountered their neighbor, Sallee. [Vol. I RP 79, 88]. Sallee began insulting them saying that Mexicans should go back to Mexico. [Vol. I RP 79-80, 88]. While neither Rivas nor Naranjo spoke English, Rivas became concerned and hurried Naranjo up the stairs towards their apartment. [Vol. I RP 80, 88]. Rivas testified that while he was hurrying his wife into their apartment, Sallee went into his apartment, returned with a gun, and pointed the gun at him and his wife. [Vol. I RP 88-90]. Naranjo testified that she never saw Sallee point a gun at her only learning of this fact from her husband after she was inside the apartment. [Vol. I RP 80, 85]. Both Rivas and Naranjo testified to feeling scared, but neither testified nor told the police that Sallee made any specific threats to them. [Vol. I RP 80-82, 86, 90-92; Vol. II RP 123, 165, 167-168, 171].

As they were entering their apartment, Rivas called a friend, Gloria Krise (Krise), who spoke Spanish, telling her what had occurred with Krise calling 911 to report the incident. [Vol. I RP 68-71, 81, 91]. Krise called 911 and then went to Rivas and Naranjo's apartment to translate for them when the police arrived. [Vol. I RP 71-74; Vol. II RP 113-114, 150-152]. Krise testified that while she was on the phone with Rivas she heard Sallee, whom she knew, saying, "I'm gonna kill you fucking Mexicans." [Vol. I RP 72].

The police also spoke with Sallee, who gave a different version of the events, and who consented to the search of his apartment where two guns were found. [Vol. II RP 112, 114-115, 119-122, 141-145, 153-158, 160-161].

Larry Mitcheli (Mitchell), the apartment manager where Rivas and Naranjo, and Sallee lived, testified that Sallee had made several complaints about “Mexicans” in the apartment building and suggested that Mitchell find a way to have them move out. [Vol. II RP 135-137]. Mitchell admitted that Sallee never made any threats regarding “Mexicans.” [Vol. II RP 138].

Sallee testified in his defense.

He testified that he was sitting on the stoop having a cigarette when Rivas and Naranjo came home. [Vol. II RP 176]. It appeared to him that Naranjo was drunk and that Rivas was holding her up. [Vol. II RP 176-177]. When he entered the foyer after Rivas and Naranjo had started up the stairs to their apartment, Sallee testified that Rivas spit on him. [Vol. II RP 178]. Sallee entered his apartment leaving the door open and saw Rivas pacing in front of his and his wife’s apartment while talking on his cell phone eventually entering the apartment. [Vol. II RP 179-180]. Sallee then went out to his car upon returning Rivas reappeared and called him a “f-ing Americano.” [Vol. II RP 180]. Sallee entering his

apartment told Rivas to sleep it off thinking Rivas was intoxicated. [Vol. II RP 181]. At this point another neighbor, Diaz, walked up to Sallee's apartment door, looked inside the apartment, and taunted Sallee. [Vol. II RP 181-182]. Sallee, who was cleaning his hunting gun, shut the door feeling "assaulted" (by both Rivas and Diaz), and decided to contact the police. [Vol. II RP 183, 189]. As he was leaving to phone the police (Sallee did not have a phone), Sallee was contacted by arriving officers. [Vol. II RP 183-184]. Sallee denied making any threats to Rivas and Naranjo, and denied pointing a gun at either of them. [Vol. II RP 186, 189].

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT SALLEE WAS GUILTY OF TWO COUNTS OF MALICIOUS HARASSMENT (COUNTS II AND IV) AND ONE COUNT OF ASSAULT IN THE SECOND DEGREE (COUNT III).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.

Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

a. Count III—Assault In The Second Degree Against Naranjo.

Here, Sallee was charged and convicted in Count III of assault in the second degree. [CP 23, 82-84]. As instructed by the court in Instruction No. 11, [CP 39], the essential elements of this crime are as follows:

- 1) That on or about the 18<sup>th</sup> day of October, 2008, the defendant intentionally assaulted Maria Naranjo with a deadly weapon; and
- 2) That the acts occurred in the State of Washington.

In addition, the court instructed the jury as to the meaning of “assault” in Instruction No. 6, [CP 34], as follows:

An assault is an intentional touching or striking of another that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict bodily injury if not prevented. It is not necessarily that bodily injury be inflicted.

An assault is also an act, with unlawful force, one with intent to created in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

[Emphasis added]. Simply stated under this definition an assault involves either an actual touching (shooting a person), an attempt to cause injury (shooting at a person but missing), or scaring someone into believing they will be injured (pointing a gun at a person).

In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Sallee actually assaulted Naranjo. Since there is no evidence that Naranjo was shot and there is no evidence that Sallee fired the gun at Naranjo and missed, the burden rested upon the State to establish proof beyond a reasonable doubt that Naranjo saw Sallee point the gun at her and believed she was about to be injured. This is a burden the State cannot sustain even without considering the fact that Sallee testified in his defense and denied even having a gun when he encountered Naranjo and her husband.

Naranjo specifically testified at trial that she did not see Sallee point the gun at her. [Vol. I RP 80, 85]. In fact, Naranjo testified that she

was not even aware that Sallee had a gun until her husband, Rivas, told her this fact once safely inside their apartment. [Vol. I RP 80, 85]. Given these facts it cannot be said that Sallee committed the crime of assault in the second degree against Naranjo.<sup>1</sup>

This court should reverse and dismiss Sallee's conviction on Count III.

b. Counts II and IV—Malicious Harassment.

Here, Sallee was charged and convicted in Counts II and IV of malicious harassment—one count being against Rivas and the other being against Naranjo. [CP 20, 21, 82-84]. As instructed by the court in Instructions Nos. 19 and 20, [CP 47, 48], per the language of RCW 9A.36.080(1)(c), the essential elements of these crimes are as follows:

- 1) That on or about the 18<sup>th</sup> day of October, 2008, the defendant threatened a specific person;
- 2) That the defendant placed that person in reasonable fear of harm to persons or property;
- 3) That the defendant acted because of the defendant's perception of the person's race, color, or national origin;
- 4) That the defendant acted maliciously and intentionally; and
- 5) That the acts occurred in the State of Washington.

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<sup>1</sup> In contrast, there is evidence in the record supporting Sallee's assault in the second degree conviction against Rivas (Count I) based on Rivas's testimony that he actually saw Sallee point the gun at him and was scared. [Vol. I RP 88-90].

Under RCW 9A.36.080(1)(c), words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. A “threat” is defined in RCW 9A.04.110(27) in pertinent part as follows:

“Threat” means to communicate, directly or indirectly the intent:

- (a) To cause bodily injury in the future to the person threatened or to any other person....

[Emphasis added].

In order to sustain these charges and convictions, the State bore the burden of proving beyond a reasonable doubt the essential elements that Sallee threatened Rivas and Naranjo, and that Naranjo was reasonably in fear of harm. This is a burden the State cannot sustain.

With regard to Naranjo, the State has failed to establish either of these essential elements. Naranjo testified that Sallee made insulting remarks that Mexicans should go back to Mexico—there was no “threat” of bodily injury in the present let alone in the future as required by statutory definition. [Vol. I RP 79-80]. Nor could it be said that Naranjo was reasonably placed in fear of harm when she specifically testified at trial that she was not even aware that Sallee had a gun until her husband, Rivas, told her this fact once safely inside their apartment. [Vol. I RP 80, 85]. While it is true that Naranjo testified that she was upset and scared by

Sallee's remarks because she dislikes discrimination, the evidence presented at trial regarding the malicious harassment charge pertaining to Naranjo consists of nothing more than menacing statements that per statute prohibit a conviction for malicious harassment.

This court should reverse and dismiss Sallee's conviction for malicious harassment against Naranjo.

With regard to Rivas, the State has failed to establish that Sallee threatened Rivas. Rivas testified that Sallee made insulting remarks that Mexicans should go back to Mexico—there was no “threat” of bodily injury in the present let alone in the future as required by statutory definition. [Vol. I RP 88]. While it is true that Rivas testified that he saw Sallee point a gun at him, this circumstance does not constitute a “threat” because it communicated an intent to cause bodily injury in the present not at a different time or place (the future). *See Seattle v. Allen*, 80 Wn. App. 824, 832, 911 P.2d 1354 (1996).

This court should reverse and dismiss Sallee's conviction for malicious harassment against Rivas.

(2) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE SALLEE'S OFFENDER SCORE WAS MISCALCULATED.

A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. *State v. McCraw*, 127 Wn. 2d

281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score may be raised for the first time on appeal. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, “that a defendant cannot agree to punishment in excess of that which the Legislature has established,” and that “in general a defendant cannot waive a challenge to a miscalculated offender score.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, *citing* State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Here, Salle was convicted in Count I of assault in the second degree and in Count II of malicious harassment with the victim in both counts being Rivas. [CP 21, 25]. Similarly, Sallee was convicted in Count II of assault in the second degree and in Count IV with malicious harassment with the victim in both counts being Naranjo. [CP 20, 23]. In addition, all four of these crimes occurred at the same time, and same place. The record does not reveal why Sallee's current convictions in Counts I and II and Counts III and IV were not considered to be the same or similar criminal conduct for purposes of calculating his offender score.

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant's offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), *reviewed denied*, 143 Wn.2d 1010 (2001) (*quoting State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “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).

For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged. Rather, the inquiry focuses on the extent to which criminal intent, as objectively viewed, changed from one crime to the next. Whether one crime furthered the other may be relevant but generally does not apply when the crimes occurred simultaneously. State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Moreover, our courts have held that separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *See e.g.*, State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Here, it cannot be disputed that Counts I and II involved the same victim—Rivas, and that Counts III and IV involved the same victim—Naranjo. Nor can it be disputed that all four counts occurred at the same time and place—late evening on October 18, 2008, at the apartment building where Rivas, Naranjo, and Sallee all lived; and that Sallee’s “intent” remained the same, i.e. his intention to create an apprehension of injury/threaten Rivas and Naranjo. Thus, the trial court should have

determined that Sallee's convictions in Counts I and II constituted same or similar conduct and Counts III and IV constituted same or similar criminal conduct for purposes of calculating his offender score. Such a finding would reduce Sallee's offender score from three to one. This court should remand for resentencing.

- (3) SALLEE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THAT HIS OFFENDER SCORE WAS MISCALCULATED.

Should this court find that trial counsel waived or invited the errors claimed and argued in the preceding section of this brief (sections 2) by agreeing to the miscalculation of his offender score [Vol. II RP 241], then both elements of ineffective assistance of counsel have been established.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is

determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, *See* State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (*citing* State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Here, both prongs of ineffective assistance are met. First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object to the calculation of Sallee's offender score for the reasons set forth in the preceding section of this brief particularly where counsel acknowledged at sentencing that there are two victims but failed to recognize that the counts pertaining to each victim are subject to a same or similar criminal conduct analysis, and had counsel done so, the trial court would not have miscalculated Sallee's offender score.

Second, the prejudice is self evident. Again, for the reasons set forth in the preceding section, had counsel properly objected to the calculation of Sallee's offender score, the trial court would not have found an improper offender score of three and would have sentenced Sallee with an offender score of one.

E. CONCLUSION

Based on the above, Sallee respectfully requests this court to reverse and dismiss his convictions.

DATED this 22<sup>nd</sup> day of December 2009.

*Patricia A. Pethick*  
PATRICIA A. PETHICK  
Attorney for Appellant  
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 22<sup>nd</sup> day of December 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Richard L. Sallee  
DOC# 330970  
c/o Mason County Probation and Parole  
P.O. Box 368  
Shelton, WA 98584-0638

Monty Cobb  
Mason County Dep. Pros. Atty.  
P.O. Box 639  
Shelton, WA 98584-0639

Signed at Tacoma, Washington this 22<sup>nd</sup> day of December 2009.

Patricia A. Pethick  
Patricia A. Pethick

09 DEC 23 AM 11:55  
STATE OF WASHINGTON  
BY W DEPUTY  
COURT OF APPEALS  
DIVISION II