

No. 45393-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

CODY JOHNSON,

Appellant.

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

The Honorable Gary r. Tabor, Judge
Cause No. 13-1-00225-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether four convictions for harassment, under the facts of this case, violate the prohibition against double jeopardy.

2. Whether Johnson was denied his right to a unanimous verdict because multiple acts were proven and the court did not give a unanimity instruction.

3. Whether the court erred by failing to instruct the jury that it must be unanimous as to which alternative means supported the convictions.

4. Whether some of Johnson's prior Oregon convictions were for crimes not comparable to Washington crimes and thus improperly included in his offender score.

5. Whether any of Johnson's prior convictions washed out and should not be counted in his offender score.

6. Whether Johnson's trial counsel was ineffective for failing to object to the inclusion of his out-of-state convictions in his offender score.

B. STATEMENT OF THE CASE.

The State will accept the appellant's statement of the substantive and procedural facts, with the addition of the following.

At sentencing, when the State presented Johnson's criminal history, defense counsel said:

I have received the prosecutor's statement of criminal history. Mr. Johnson does object to one of the convictions that's listed, the malicious mischief in the first degree, but I will note that even if the Court does not include that conviction, his point range would go from 11 to 10, but it does not change the potential

range, but other than that, we're in agreement that what the state has listed is correct.

RP 279-80.¹

C. ARGUMENT.

1. The State concedes that under the facts of this case there was only one unit of prosecution for harassment and three of the convictions must be vacated.

Johnson argues that multiple convictions for an offense where the facts support only one unit of prosecution violates the prohibition against double jeopardy under both Amendments Five and Fourteen of the United States Constitution and the Washington Constitution art. I, § 9. The State does not dispute his statement of the law.

As charged in the second amended information, the State was required to prove that without lawful authority, Johnson threatened to kill (Counts I and II) or cause bodily injury to or damage the property of (Counts III and IV) Justin Bingley or any other person, and Johnson's words placed Justin Bingley in reasonable fear that the threat would be carried out. CP 7-8. The evidence was that Johnson spent an estimated 30 to 45 minutes yelling and screaming at Justin Bingley, threatening to beat him, kill

¹ All references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated July 29 and 30, 2013, and August 22, 2013.

him and his family, and insinuating that he might have a vehicle accident. RP 67-69, 73-76, 80. Bingley was frightened. RP 79.

When a defendant is convicted of multiple violations of the same statute, the double jeopardy question focuses on what "unit of prosecution" the legislature intends as the punishable act under the statute. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). "The unit of prosecution for a crime may be an act or a course of conduct." State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). Only one Washington case has addressed the unit of prosecution for harassment. In that case, the Court of Appeals held that where there is a threat to one identified person and a single person has been placed in fear by the threat, the conduct constitutes one offense, even if the conduct occurred on different days. State v. Morales, 174 Wn. App. 370, 387, 298 P.3d 791 (2013). Given that authority, the State concedes that the conduct in this case supports only one count of harassment. Johnson concedes that there is sufficient evidence to support one count. Appellant's Opening Brief at 8.

Where two or more convictions constitute double jeopardy, judgment is entered on the greater offense and the equal or lesser counts are vacated. See State v. Turner, 169 Wn.2d 448, 459, 238

P.3d 461 (2010). Therefore, one count of felony harassment and both gross misdemeanor counts should be vacated.

2. Because Johnson can be convicted of only one count of harassment, this court need not address the claim that the trial court erred by failing to give a unanimity instruction as to the separate acts alleged.

Johnson argues that because the State did not elect specific acts to support each count, the court was required to give a unanimity instruction, instructing the jury that it must be unanimous as to which act on which it based a conviction. Appellant's Opening Brief at 10. Because the State concedes that this was in fact one course of conduct, this court need not address that question.

The evidence presented at trial indicated a continuing course of conduct. Where several acts form a continuing course of conduct, a unanimity instruction is not necessary. State v. Crane, 116 Wn.2d 315, 326, 804 P.2d 10 (1991). Such an instruction would be required when several individual acts are offered to support a single charge and there is conflicting testimony that would cast reasonable doubt that one or more of the acts occurred. State v. Coleman, 159 Wn.2d 509, 513, 150 P.3d 1126 (2007). In Johnson's case, there was no conflicting evidence, and the jury

could find that each and every individual threat was proved beyond a reasonable doubt.

The failure to give a unanimity instruction to the jury was not error.

3. Because the State concedes that only one felony count of harassment should stand, Johnson's argument that the court must instruct the jury that it must be unanimous as to the alternative means charged in the gross misdemeanor counts is moot. It is also incorrect.

The jury in Johnson's trial was instructed that to convict him of the two gross misdemeanor counts of harassment it could find that either of two alternatives was proven—that he threatened to cause bodily injury or physical damage to property. Instructions 15 and 17, CP 19-21. Because the State concedes that these two convictions must be vacated, the State will respond to this argument only to note that a unanimity instruction is not required if substantial evidence supports each alternative means. State v. Lobe, 140 Wn. App. 897, 905, 167 P.3d 627 (2007); State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

Johnson argues that there was insufficient evidence offered to support the alternative of threats to damage property. He maintains that no rational jury could find the veiled threat of a car

accident to be a threat to property. His argument implies that suggesting an “accident” could happen was a threat to cause bodily injury. Appellant’s Opening Brief at 16. It is hard to imagine an “accident” that would cause bodily injury that would not also damage the vehicle.

4. Johnson waived a challenge to the comparability of his Oregon convictions because he agreed that those convictions were properly included in his offender score. Even if he did not waive, the record is insufficient for this court to find that the Oregon crimes are not comparable to Washington offenses.

The State does not dispute that Johnson may challenge his offender score for the first time on appeal. State v. Mendoza, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009) He argues that five of his Oregon convictions were improperly included in his offender score because they are not comparable to Washington crimes. Appellant’s Opening Brief at 17-24; CP 25, 41. However, at sentencing, defense counsel said:

I have received the prosecutor’s statement of criminal history. Mr. Johnson does object to one of the convictions that’s listed, the malicious mischief in the first degree, but I will note that even if the Court does not include that conviction, his point range would go from 11 to 10, but it does not change the potential range, but other than that, *we’re in agreement that what the state has listed is correct.*

RP 279-80, emphasis added.

The court, with no objection from the State, declined to include the contested conviction in Johnson's offender score. RP 281.

A defendant does not waive a challenge to his offender score merely by failing to object to the inclusion of out-of-state convictions. Mendoza, 165 Wn.2d at 928-29. Here, however, defense counsel affirmatively agreed to the State's list of prior convictions. Johnson himself did not address his criminal history at all. The State did not provide the court with documentation of the now-challenged offenses and the court did not conduct a comparability analysis.

If defense counsel "affirmatively acknowledged" that the State's calculation of the offender score was correct, a sentencing court may consider out-of-state convictions even where the defendant disputes the score. State v. James, 138 Wn. App. 628, 643, 158 P.3d 102 (2007); State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) ("[A] defendant's *affirmative acknowledgment* that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements." (emphasis in original)). If the defendant disputes material facts, the court must either hold an evidentiary hearing or not consider those

facts. James, 138 Wn. App. at 643, citing to In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). The court here chose to disregard the disputed conviction. Johnson waived his challenge to the remaining convictions.

While the State maintains that defense counsel's statement constitutes a waiver, it recognizes that counsel did not specifically acknowledge comparability, although that is certainly implied because of the number of out-of-state convictions in Johnson's prior record. In Mendoza, the court discussed the State's burden to prove prior convictions by a preponderance of the evidence, but "[t]his is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence." Mendoza, 165 Wn.2d at 920. It found that the defendants in that consolidated case neither objected to nor affirmatively agreed to the criminal history relied upon by the sentencing courts. Id. at 918-19. It further concluded that the cases must be remanded for resentencing, and set forth the following remedies:

When a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the defendant's prior convictions, then the State is held to the record as it existed at the sentencing hearing. . . . But where, as here, there is no

objection at sentencing and the State consequently has not had an opportunity to put on its evidence, it is appropriate to allow additional evidence at sentencing.

Id. at 930, internal cite omitted.

In State v. Lucerno, 168 Wn.2d 785, 230 P.3d 165 (2010), the defendant agreed to the offender score, which could only have been reached by including a California burglary conviction. No comparability analysis was conducted and the conviction was included in reaching his standard range sentence. The Supreme Court found that Lucerno did not “affirmatively acknowledge” that the California conviction was comparable to a Washington crime. Id. at 789.

The State maintains that Johnson did more than agree to his offender score, but if this court determines that defense counsel's agreement was insufficient to acknowledge comparability, then it must be remanded for resentencing, but the State must be allowed to produce the evidence of the prior convictions. It is apparent from the record of the sentencing hearing that the State possessed documentation for the convictions other than the disputed malicious mischief that the court declined to consider. RP 280. Because of defense counsel's acknowledgement, the State was not required to

produce that documentation. The court may then do a comparability analysis if, on remand, Johnson does not affirmatively acknowledge comparability.

Johnson urges this court to conduct its own comparability analysis and find that five of the Oregon convictions are not comparable. However, he only discusses half of the analysis, comparing the elements of the Oregon statutes to Washington statutes.

The SRA requires “substantial similarity” between the elements of the foreign and the Washington offenses. State v. Jordan, ___ Wn.2d ___, ___ P.3d ___ (2014) (No. 85410-6, May 15, 2014), slip op. at 4. The Washington Supreme Court treats the Washington Constitution, art. I, § 3 coextensively with the Fourteenth Amendment to the United States Constitution, and citing to Nichols v. United States, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), “recognizes that the sentencing process is ‘less exacting than the process of establishing guilt.’” Jordan, slip op. at 5. “[W]e have interpreted the SRA as requiring rough comparability—not precision—among offenses.” Id., slip op. at 9.

RCW 9.94A.525(3) provides for including foreign convictions in the offender score.

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

In State v. Olsen, ___ Wn.2d ___, ___ P.3d ___ (2014) (No. 89134-6, May 15, 2014), the Supreme Court endorsed the comparability analysis it articulated in In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005). That two-part test looks first to the legal prong. If the out-of-state conviction is identical to, or narrower than, the Washington statute, the conviction counts in the offender score. Olsen, slip op. at 12. Johnson stops his analysis here. However, if the foreign and the Washington statutes are not legally comparable, the next step is to consider the factual prong. There the court looks to the defendant's actual conduct in the foreign jurisdiction, and if that conduct would have violated a comparable Washington statute, the conviction counts toward the offender score. The sentencing court "may consider only facts that were admitted, stipulated to, or proved beyond a reasonable doubt." Olsen, slip op. at 12-13.

If this court determines that Johnson did not waive a comparability analysis, on remand the sentencing court should conduct such an analysis, considering, if necessary, the facts of the foreign crimes, and in light of the guidance set forth in Jordan and Olsen.

5. The record in this case is inadequate for this court to determine whether any of Johnson's prior convictions washed out and should not be counted in his offender score. On remand, the sentencing court should make that determination.

Johnson argues that because there is a gap of seventeen years between some of the convictions they should not be counted in his offender score because they have washed out. Appellant's Opening Brief at 25-27. He concludes that if the Oregon convictions are comparable, they are class B and C felonies and would have washed out in the seventeen-year interim between convictions.

Class B felonies are not counted in an offender score if, "since the last date of confinement" pursuant to that conviction, the offender has spent at least ten years in the community without acquiring another criminal conviction. RCW 9.94A.525(2)(b). The wash out time for C felonies is five consecutive crime-free years in the community. RCW 9.94A.525(2)(c). Johnson acknowledges

that no information was presented to the sentencing court regarding how long Johnson was actually in the community following the challenged 1990 convictions before he acquired the next convictions in 2007. CP 25, 41.

Because Johnson's counsel agreed to the list of prior convictions, the State was not required to present evidence of the time Johnson spent in custody pursuant to any of the 1990 convictions. One would expect that the sentence for first degree attempted murder, one of the 1990 Oregon convictions, carried a hefty amount of prison time. Johnson asks this court to simply count from date of conviction to date of conviction, but that is not the standard set forth in the statutes cited above.

In addition, RCW 9.94A.525(b) and (c) provide that "any crime" resulting in a conviction within the statutory time prevents prior convictions from washing out. "Any crime" includes misdemeanors and gross misdemeanors. Non-felony offenses would not necessarily be brought to the sentencing court's attention because they do not count toward the offender score.² RCW 9.94A.525.

² The exception is when the current offense is a felony DUI or physical control, serious traffic offenses, which are not felonies, will count toward the offender score. RCW 9.94A.525(2)(e) and RCW 9.94A.030(43).

Because this matter must be remanded for resentencing, the State should, under the authorities cited in the preceding section, be permitted to introduce evidence of not only the time Johnson actually spent in the community between 1990 and 2007, but also any misdemeanor and gross misdemeanor convictions, or their foreign equivalents, that would have prevented the 1990 convictions from washing out.

6. Johnson has failed to demonstrate that his trial counsel was ineffective for failing to object to the inclusion of his Oregon convictions in his offender score.

Johnson maintains that his trial counsel provided ineffective assistance because he failed to object to the Oregon convictions that were included in his offender score. Appellant's Opening Brief at 27-29. He fails to carry his burden of showing ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient

performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

The record in this case does not indicate how much defense counsel knew about Johnson's criminal history. If, for example, he had knowledge to show that the challenged convictions are comparable to Washington crimes and that there were non-felony convictions preventing the 1990 Oregon convictions from washing out, it was perfectly proper for him to agree to the criminal history presented by the State. To find ineffective assistance of counsel, this court would have to not only hold that the Oregon convictions were improperly counted but that trial counsel had no reason to

believe otherwise. That cannot be done on the record before this court.

D. CONCLUSION.

The State concedes that the four convictions for harassment constitute double jeopardy and only one felony harassment conviction should stand. Because of that, this court need not reach Johnson's claims regarding unanimity instructions for either specific acts or alternative means. Finally, he fails to show on this record that his offender score was improperly calculated. On remand, the State should be allowed to present evidence of the comparability of the foreign convictions and any factors that prevent the 1990 convictions from washing out.

Respectfully submitted this 28th day of May, 2014.



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May 28, 2014 - 2:55 PM

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