

FILED  
Court of Appeals  
Division II  
State of Washington  
1/31/2018 9:47 AM  
NO. 49654-2

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

STATE OF WASHINGTON, RESPONDENT

v.

DEMETRIUS D. WARLICK, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 16-1-01808-6

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**Brief of Respondent**

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

1. Should this Court affirm the defendant's convictions where they do not violate double jeopardy as each one was based on separate and distinct incidents?
2. Should this Court remand the defendant's case for resentencing where his term of confinement plus his term of community custody exceeds the statutory maximum sentence for his conviction?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On May 6, 2016, the State charged Demetrius Warlick, hereinafter referred to as the "defendant," with three counts of felony domestic violence court order violation (Counts I, II and IV) and two counts of domestic violence malicious mischief in the third degree (Counts III and V). CP 3-6. On August 10, 2016, the State amended charges to add one count of felony domestic violence stalking (Count VI).<sup>1</sup> CP 7-10.

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<sup>1</sup> On October 6, 2016, the State filed a Corrected Amended Information reflecting a correction on Count IV for the year listed at the end of the date range and spelling of the victim's last name. CP 12-15.

On October 18, 2016, a jury trial was held before the Honorable Katherine M. Stolz. RP 199. Prior to trial, the defendant stipulated to the following:

That the defendant, Demetrius Darnell Warlick, has been previously convicted of the crime of Harassment against Sherry Marie Rilea.

That the defendant, Demetrius Darnell Warlick, has twice been previously convicted for violating the provisions of a court order.

That on or about the 23<sup>rd</sup> of February, 2016, the 22<sup>nd</sup> day of April, 2016, and the 25<sup>th</sup> day of April, 2016, there existed a no contact order applicable to the Defendant. The Defendant knew of the existence of this order. The order contains the provision that the Defendant shall have no contact, directly or indirectly, in person, in writing, by telephone, or electronically, either personally or through any person, with Sherry Marie Rilea (date of birth 11/30/1971) and that the Defendant is prohibited from entering or knowingly coming within 1,000 feet of Sherry Marie Rilea's home, school, or place of employment.

CP 44-46.

On October 27, 2016, the jury found defendant guilty beyond a reasonable doubt of two counts of felony domestic violence court order violation (Counts II and IV), one count of malicious mischief in the third degree (Count V), and one count of felony domestic violence stalking (Count VI). CP 53-63, RP 718-720. With respect to each of those counts, jury also found that the defendant and the victim, Sherry Marie Rilea, were members of the same family or household for the purposes of the

domestic violence special verdict. CP 54-64, RP 718-720. The jury was unable to reach a verdict on one count of malicious mischief in the third degree (Count III) and found the defendant not guilty of one count of felony domestic violence court order violation (Count I).<sup>2</sup> CP 53, 57.

Sentencing was held on November 10<sup>th</sup> 2016. RP 728. On Count VI, stalking, the Court sentenced the defendant to the high end of the sentencing range, 96 months in custody with credit for time served and the mandatory legal financial obligations: \$200 court costs, \$500 crime victim penalty assessment and \$100 DNA lab fee. RP 740-741. On Counts II and IV, felony domestic violence protection order violation, the Court sentenced the defendant to the high end of the sentencing range, 60 months in custody with 12 months of community custody, law abiding behavior, no contact with the victim for 10 years and evaluations to be completed at his community custody officer's recommendation. RP 740-741. On Count V, malicious mischief in the third degree, the Court sentenced the defendant to 314 days in custody with no time suspended. RP 740-741. The Court ordered that all time be served concurrently. RP 740-741.

Defendant timely filed a Notice of Appeal. CP 122.

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<sup>2</sup> On March 9, 2017, the Court granted the State's motion to dismiss Count III, malicious mischief in the third degree. CP 132-135.

## 2. FACTS

The defendant and Sherry Rilea were married on March 6, 2010, but separated four years later in 2014. RP 313. The defendant did not take the separation or divorce well. 314. Due to the contentious nature of the divorce, Ms. Rilea moved in with her friend April Calvert in September of 2014. RP 310-311.

In 2010, the defendant was convicted of two counts of felony domestic violence court order violation. CP 45. In 2014, the defendant was convicted of the crime of felony domestic violence harassment against Ms. Rilea. CP 46. As a result of these convictions, the defendant was prohibited from contacting Ms. Rilea. CP 41-44.

On February 22, 2016, Ms. Rilea was at home with April Calvert and her son, Joseph Dominquez, when she heard a loud knock at the door. RP 316-317. Dominquez saw through the upstairs window that the defendant's father, Clay, was knocking on the door. RP 221-222, 321. Clay told the defendant, who was hiding in the bushes, "there's no one there." RP 221-222, 321. Dominquez saw the defendant's white Cadillac outside. RP 215. After Clay left, the defendant came out of the bushes, went to his vehicle and left. RP 222-225. Sherry contacted law enforcement and provided a handwritten statement of what occurred. RP 314-318.

The defendant returned to Ms. Rilea's house on April 22, 2016. RP 323-324. Ms. Rilea watched helplessly as the defendant drove into her driveway, smashed out her car windows with a crowbar, and drove away. RP 323-324. Prior to smashing out Ms. Rilea's windows, the defendant called and texted Ms. Rilea several times earlier that day in spite of the court order. RP 323-324. Pierce County Sheriff's Deputy Cannon responded to Ms. Rilea's 911 call. RP 353-536. As Deputy Cannon contacted Ms. Rilea, the defendant called Ms. Rilea again. RP 541. Deputy Cannon answered Ms. Rilea's phone, but the defendant didn't speak. RP 541. Ms. Rilea was fearful of the defendant. RP 544.

On April 25, 2016, the defendant came back to Ms. Rilea's residence and broke out the remaining windows on her car with a rock. RP 340-342; 327. The defendant also text messaged Ms. Rilea earlier that day. RP 335. Ms. Rilea again contacted law enforcement and provided them with photos of the text messages from the defendant. RP 335.

Even after the defendant was arrested, he continued to contact Ms. Rilea by calling her repeatedly from the Pierce County Jail. RP 362. Ms. Rilea never answered his calls because she feared for her safety. RP 362.

C. ARGUMENT.

1. THE DEFENDANT'S MULTIPLE  
CONVICTIONS DO NOT VIOLATE DOUBLE  
JEOPARDY AS EACH CONVICTION WAS  
BASED ON SEPARATE AND DISTINCT  
INCIDENTS.

The double jeopardy clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. The double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *Gocken*, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime. *Gocken*, 127 Wn.2d at 100.

Appellate courts “review questions of law such as merger and double jeopardy de novo.” *State v. Zumwalt*, 119 Wn. App. 126, 129, 82

P.3d 672 (2003), *aff'd sub nom.*, ***State v. Freeman***, 153 Wn.2d 765, 108 P.3d 753 (2005). When addressing a double jeopardy challenge, the court first considers whether the legislature intended cumulative punishments for the challenged crimes. ***State v. Freeman***, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Legislative intent can be explicit as in the antimerger statute where it provides that burglary may be punished separately from any related crime. ***Freeman***, 153 Wn.2d at 772-73; RCW 9A.52.050. However, there can also be sufficient evidence of legislative intent that the court is confident that the legislature intended to separately punish two offenses arising out of the same bad act. ***Freeman***, 153 Wn.2d at 772 (citing ***State v. Calle***, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate offenses)).

If the legislative intent is not clear, then the court will turn to the test from ***Blockburger v. United States***, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to determine if double jeopardy has been offended by defendant's multiple convictions. ***Freeman***, 153 Wn.2d at 772. Under the ***Blockburger*** test the court examines each crime to determine if one crime contains an element that the other does not. *Id.* This analysis is not done on an abstract level, but "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is

whether each provision requires proof of a fact which the other does not.”

*Freeman*, 153 Wn.2d at 772 (quoting *Blockburger*, 284 U.S. at 304).

However, the *Blockburger* presumption may be rebutted by other evidence of legislative intent.

Finally, merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. *State v. Vladovic*, 99 Wn.2d 413, 419 n2, 662 P.2d 853 (1983). “The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions.” *State v. Michielli*, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997). With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *Missouri v. Hunter*, 459 U. S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1982).

The merger doctrine can be used to determine legislative intent even when two crimes have different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, the court will presume the legislature intended to punish both offenses through a greater sentence for the greater

crime. *Freeman*, 153 Wn.2d at 772-73 (citing *Vladovic*, 99 Wn.2d at 419).

A person commits the crime of felony stalking when, without lawful authority, he or she intentionally and repeatedly harasses or repeatedly follows a second person, placing that person in reasonable fear that the first person intends to injure her or the second person's property, either with the intent to frighten, intimidate, or harass, or under circumstances where the first person knows or reasonably should know that the second person is afraid, intimidated, or harassed; And the first person had previously been convicted of any crime of harassment against the second person. RCW 9A.46.110(5)(b).

Here, the jury found the defendant guilty beyond a reasonable doubt of the crime of felony domestic violence stalking (Count VI). RP 718-720. To prove this charge at trial, the State presented evidence of the defendant repeatedly calling Ms. Rilea from the Pierce County Jail after he was arrested for twice smashing out her car windows and showing up at her house. RP 362, 666. Ms. Rilea testified that she didn't answer the phone calls because she feared for her safety. RP 363. The State also used the defendant's stipulation to his prior domestic violence harassment conviction to support the element of a prior conviction for the purposes of elevating the stalking charge to a felony. CP 46, RP 669.

Here, the defendant claims that his convictions for domestic violence court order violation and felony stalking should merge because the State used “the same evidence to convict the defendant of violating the protection orders and of felony stalking.” Brief of Appellant at 8. This claim fails because the evidence to support each conviction arose from separate and distinct incidents.

The defendant analogizes this case to *Parmelee* in which he relies on solely in support of his argument. Brief of Appellant at 7-8. *State v. Parmelee*, 175 Wn. App. 702, 32 P.3d 1029 (2011). In *Parmelee*, this court held that two of Parmelee’s three convictions for violation of a court order merged into his felony stalking conviction. *Id.* at 711. In that case, the victim obtained a permanent protection order and two no-contact orders against her ex-husband, Parmelee. *Id.* at 704-705. Parmelee, who was incarcerated, encouraged other inmates to write the victim letters. *Id.* at 705-707. The State charged Parmelee with one count of felony stalking and three counts of violating a court order based on three letters the victim received. *Id.* at 705-708. This Court stated that each letter to the victim violated a court order and that the stalking charge was based on repeated harassment by the letters. *Id.* On appeal, Parmelee argued that the merger doctrine prohibited multiple convictions because violating a protection order was “an essential element of stalking.” *Id.* at 710. This Court

determined that the stalking statute required “more than one underlying act –repetitive behavior- to constitute stalking. *Id.* Accordingly, the State had to prove that at least two of the three protection order violations occurred to “secure convictions for both felony stalking and the protection order violations.” *Id.* at 711. Thus, this Court concluded that two of Parmelee’s protection order violations were essential elements of the crime of felony stalking and merged into the stalking conviction. *Id.* The Court also held that Parmelee’s third protection order violation conviction was not an essential element of felony stalking and thus stood as an independent conviction. *Id.* Accordingly, only two of the convictions for violation of a protection order merged into the stalking conviction. *Id.* The third conviction did not merge. *Id.*

This case is clearly distinguishable from *Parmelee*. Here, unlike in *Parmelee*, the State did not rely solely on evidence of the defendant violating the protection orders to support the stalking conviction. *Id.* at 705-708. The defendant’s two convictions for violation of a court order were based on the evidence that he came to Ms. Rilea’s home on April 22, 2016 and April 25, 2016 to smash out her car windows. CP 12-15; RP 322, 340-342. However, the felony stalking conviction was based on evidence that the defendant repeatedly called Ms. Rilea from the Pierce County Jail after being arrested. RP 362, 666-669. During closing

arguments, the State argued that the defendant's jail calls supported the repeated harassment element of felony stalking stating the following:

You're going to have Exhibit 54, the call logs that Deputy Moss pulled; and you're going to see – on this three-page piece of paper, I counted 28 attempts to call that same phone number over and over again, and that's – you know, these are between May 5<sup>th</sup> and May 10<sup>th</sup>; so in five days, I've counted 28 – and what I say isn't evidence. You'll have this exhibit, so please count it yourself. But within five days, 28 attempts to call is, certainly, "repeated harassment" or "repeatedly followed."

RP 666.

Moreover, the defendant's stipulation to his prior harassment conviction served as the prior conviction necessary to elevate the stalking conviction to a felony. RP 669. Evidence of the defendant's violations of the no contact orders on April 22<sup>nd</sup> or 25<sup>th</sup> were not necessary to support the felony stalking conviction. Thus, where the acts relied upon to support each conviction are completely separate, merger does not apply. As such, this Court should dismiss the defendant's claims and affirm his convictions.

2. THIS COURT SHOULD REMAND FOR RESENTENCING SO THAT THE TRIAL COURT CAN REDUCE DEFENDANT'S COMMUNITY CUSTODY TIME IN ACCORANCE WITH THE STATUTE AND CASE LAW.

Defendant asserts that his sentence is in error as he was sentenced to 60 months confinement and 12 months community custody when the statutory maximum for his crimes is 60 months. It appears that defendant is correct. The total term of incarceration, plus community custody, may not exceed the statutory maximum for the crime charged. *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012). RCW 9.94A.701(9) states, "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." The statute was effective as of July 26, 2009. *State v. Land*, 172 Wn. App. 593, 603, 295 P.3d 782 (2013). "The trial court, not the Department of Corrections, is required to reduce an offender's term of community custody to ensure that the total sentence is within the statutory maximum." *Land*, 172 Wn. App. at 603; *Boyd*, 174 Wn.2d at 473.

In the instant case, defendant was sentenced on November 10, 2016. CP 97-114; RP 728. This is clearly after the statute was in effect. As such, the trial court was required to reduce the community custody

time so that the combined confinement time and community custody time did not exceed the statutory maximum. The trial court did not do so. As defendant was sentenced to the high end of the standard range, which is also the full statutory maximum, the 12 months community custody is in error. This Court should remand back for resentencing with the instructions that the community custody time be removed as any community custody time in this case would exceed the statutory maximum.

D. CONCLUSION.

This Court should dismiss the defendant's double jeopardy violation claims and affirm his convictions where the evidence that supported each conviction was based on separate and distinct acts. This Court should also remand back for resentencing with the instructions that

the community custody time be removed as any community custody time  
in this case would exceed the statutory maximum.

DATED: January 31, 2018.

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**PIERCE COUNTY PROSECUTING ATTORNEY**

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**Appellate Court Case Title:** State of Washington, Respondent v. Demetrius D. Warlick, Appellant  
**Superior Court Case Number:** 16-1-01808-6

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