

NO. 49683-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ARON SHELLEY,

Appellant.

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

The Honorable Anne Hirsch, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The jury's special verdict finding that the appellant's felony harassment conviction was a crime of domestic violence is invalid as a matter of law.

2. As to the harassment charge, the domestic violence designation was neither pleaded nor proven.

3. The trial court erred in sentencing the appellant based on an offender score that reflected the invalid domestic violence verdict.

Issue Pertaining to Assignments of Error

The State charged the appellant with felony harassment based on a threat to kill a third party, a 14-month-old child, which was directed, not at the child, but at the child's mother.

The information alleged crime was one of domestic violence because the appellant and the child were family or household members. For purposes of a domestic violence special verdict, the jury was asked whether the appellant and the child were family or household members. The child, however, was not the target of the harassment. The jury's domestic violence special verdict as to that conviction was, therefore, invalid as a matter of law.

Where the invalid domestic violence finding as to the harassment charge affected the appellant's offender score on three separate counts—

including the charge with the longest sentence—should this Court remanded for resentencing on all counts?

B. STATEMENT OF THE CASE¹

1. Charges, diminished capacity defense, and verdicts

For events occurring April 29 through April 30, 2015, the State charged Aron Shelley with second degree assault, charged as intentional assault with deadly weapon (Count 1). The State alleged Shelley was armed with a deadly weapon, a knife, during commission of the crime. CP 8; RCW 9A.36.021(1)(c); see also RCW 9.94A.533(4)(b) RCW 9.94A.825 (both addressing deadly weapon sentence enhancement). The State also charged Shelley with another count of second degree assault based on intentional assault with deadly weapon, a car (Count 2). Cheri Burgess, Shelley's cohabitating girlfriend, was the named complainant as to Counts 1 and 2. CP 8.

The State also charged Shelley with second degree assault of a child, 14-month-old A.S., Burgess's son, based on strangulation or suffocation (Count 3). CP 8; RCW 9A.36.021(1)(g) (general assault statute); RCW

¹ The first four volumes of the verbatim reports, reflecting court dates of October 24 through 27, 2016, are consecutively paginated. This brief refers to those volumes collectively as "RP." This brief refers to the verbatim report of the verdict as RP (10/28/16) and to the sentencing hearing as RP (11/17/16).

9A.36.130(1)(a) (assault of a child). Shelley was also charged with felony harassment based on a threat to kill A.S. (Count 4). The information alleged that Shelley's "words or conduct placed another person in reasonable fear that the threat would be carried out." CP 8; RCW 9A.46.020.

The State also charged Shelley with four counts of misdemeanor violation of a no-contact order (VNCO), alleged to have occurred on May 4, 11, 13, and 19, 2015 (Counts 5-8). The State alleged Shelley sent letters intended for Burgess on those dates. CP 9; RCW 26.50.110(1).

The State alleged that each crime was one of "domestic violence," that is, that crime was committed against a family or household member. CP 8-9. As to Counts 3 and 4, assault of a child and felony harassment, the information alleged that Shelley and A.S. were family or household members. CP 3-5, 83. As for each of the remaining counts, the charging document alleged Shelley and Burgess were family or household members. CP 8-9.

At his jury trial, Shelley asserted a defense of diminished capacity as to each charge. See CP 12 (diminished capacity jury instruction, applicable to all counts). Accordingly, he presented the testimony of an expert psychologist. The testimony revealed Shelley had a long history of psychiatric treatment. RP 220-305 (testimony of defense expert, Dr.

Dixon). The State presented a competing psychological expert from Western State Hospital. RP 309-49.

A jury acquitted Shelley of Counts 2, 7, and 8, but it convicted him of the remaining counts. CP 48-64.

As to Count 1, the jury answered “yes” to a special verdict form asking if Shelley was armed with a deadly weapon at the time of commission of the crime. CP 50, 82.

As for the domestic violence allegations corresponding to each charge, the jury was asked to determine if Shelley was a family or household member of either Burgess or A.S. The jury answered “yes” as to each charge for which it returned a guilty verdict. CP 49 (Count 1, Burgess); CP 54 (Count 3, A.S.); CP 56 (Count 4, A.S.); CP 58 (Count 5, Burgess); CP 60 (Count 6, Burgess).

2. Trial testimony as to underlying incident

Cheri Burgess is the mother of A.S. RP 70. A.S. was born in mid-February of 2014, making him 14 months old during the events in question. RP 72-73. Shelley is not A.S.’s biological father, although Burgess and Shelley lived together and were raising the child together. RP 71, 105. Burgess, Shelley, and A.S. lived a home owned by Shelley’s aunt and uncle, who also resided in the home. RP 72-73.

Late the evening of April 29, Burgess and Shelley were at home with A.S. and the uncle, Tom Sovey. The aunt was out of town, and Burgess's older daughter was staying with a relative. RP 73-74.

At some point, Shelley became angry and ordered Burgess to leave the house. RP 74. Shelley was also muttering to himself, saying things such as "this is not right." RP 75-76.

Burgess was not certain what, precisely, had provoked Shelley's anger. RP 119. She surmised he may have been frustrated he could not leave the house² or in severe pain from a back injury. RP 124. Although Burgess was not certain, she thought Shelley may have been drinking or using drugs. RP 76-77.

Shelley had, in the past, been prescribed anti-psychotic medication. RP 76. The evening of the incident, Burgess told police she believed Shelley had run out because his doctor had failed to prescribe the appropriate medication. RP 115-18, 121-23. Sovey also believed lack of appropriate medication was a factor in the incident. RP 150-51, 153-55.

Burgess refused to leave and informed Shelley that Sovey had said she could stay. RP 74. Shelley reiterated that he wanted Burgess out of the house, but he told her to "leave the baby." RP 74.

² Sovey testified he thought Shelley was under "house arrest," but he did not elaborate further. RP 142.

Burgess attempted to reason with Shelley. She told him she would try to contact his doctor on his behalf. But Shelley only got angrier. RP 76, 78. Shelley attempted to force Burgess out of the house. In the process, Shelley yanked off Burgess's sweater and damaged her sports bra. RP 78.

Burgess went to the bedroom to change her shirt. Upon leaving the bedroom, Burgess was confronted again by Shelley in the kitchen. RP 79, 102. He placed a large kitchen knife to Burgess's throat and said he was going to kill her because she was not leaving. RP 79-80. Shelley relented, however, once Sovey intervened. RP 80; see also RP 140 (Sovey's testimony). Shelley appeared to come to his senses for a moment,³ and he handed the knife to Sovey. RP 80.

Shelley walked away while Burgess and Sovey discussed what had happened. RP 80-81. When Burgess entered the living room, A.S., who had been in his playpen, was gone. The door leading outside was open. RP 80-81.

Burgess followed Shelley outside. Shelley, who looked "dazed," had placed A.S. in the family's Dodge Durango. RP 81. Shelley was in the

³ Burgess testified she thought she saw Shelley return to himself for a moment, but then he was "gone again." RP 120-21, 124.

driver's seat, while A.S. was standing unrestrained in the passenger seat. RP 82.

Burgess stood in front of vehicle to prevent Shelley from driving away. RP 83-84. But Shelley revved the engine, pulled forward, and struck Burgess in the knees. Nonetheless, Burgess remained standing. RP 83-84.

Shelley left the Durango, leaving A.S. alone. Burgess got into the driver's seat and drove to the gate separating the driveway from the road. The gate, however, was locked. RP 84-85.

As Burgess got out to unlock the gate, Shelley ran toward the car. RP 85. He grabbed A.S. by the throat and upper chest. RP 85-86. A.S. made a sound as if he was having trouble breathing. RP 86. Burgess tried to grab A.S., but Shelley kept his hand on A.S.'s neck. RP 86. Shelley said, "If you don't leave . . . I'm just gonna squeeze him, keep squeezing him. Get away from me. Leave, leave. Just effing leave. Leave my boy." RP 87. Burgess believed Shelley would kill A.S. RP 87.

Burgess went inside and called the police. RP 89. Meanwhile, Sovey, now outside, urged Shelley to calm down. RP 143, 150-51.

Police arrived shortly thereafter. One of the officers saw Shelley, still in the car, holding A.S. with his elbow under the child's neck. But A.S. did not appear to be in distress. RP 163, 174. Although Shelley was staring

straight ahead and largely non-responsive, he eventually handed A.S. to one of the officers when asked to do so. RP 164-66.

A.S. was returned to Burgess. RP 88, 166. Burgess noted that, at that point, A.S. had red marks on his chest and neck. RP 88; see also RP 198 (police officer's similar testimony). A.S. was fussy but calmed down quickly. RP 88-89.

Burgess continued to live with Sovey and his wife for a few months after the incident. RP 138-39. Shelley sent several letters to the residence. RP 89. Not all were addressed to Burgess. But Burgess believed the letters were intended for her, based on their content. RP 89-90, 109-12. A May 1, 2015 pre-trial no-contact order prohibited Shelley from contacting Burgess. RP 90; Ex. 35.

3. Sentencing

The sentencing court determined that Shelley's offender score was nine for each of the felony charges, Counts 1, 3, and 4. RP (11/17/16) at 33.

This score was calculated by counting Shelley's three non-violent prior offenses as a single point each. CP 153. The current misdemeanor VNCOs counted as a single point each based on their status as "repetitive domestic violence offenses." See RCW 9.94A.525(21)(c) ("Count one point for each adult prior conviction for a repetitive domestic violence

offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was . . . [pleaded] and proven.”).⁴

However, the court doubled each of Shelley’s current felony offenses based on their status as either violent offenses or domestic violence offenses. See RCW 9.94A.525(8) (for violent offenses, doubling score for other violent offenses); RCW 9.94A.525(21)(a) (for felonies “where domestic violence as defined in RCW 9.94A.030 was . . . [pleaded] and proven,” doubling score for certain felony domestic violence offenses, including harassment, “where domestic violence as defined in RCW 9.94A.030 was . . . [pleaded] and proven” as to that charge as well).

Based on the resulting offender score, the court sentenced Shelley to 84 months of incarceration, plus a 12-month deadly weapon enhancement, on Count 1; 120 months, the statutory maximum, on Count 3; 54 months on Count 4; and 364 days for each count of misdemeanor VNCO. CP 154; see RCW 9.94A.510 (offense seriousness level); RCW 9.94A.515 (sentencing grid, listing sentencing ranges based on offense seriousness level and offender score). The court ran each term concurrently, except for the sentence enhancement, which it ran consecutively to the

⁴ This brief cites to the current version of the Sentencing Reform Act because no substantive changes have been made to the relevant provisions since April and May of 2015.

longest sentence. This resulted in a total sentence of 132 months of confinement. CP 154.

The court also found Shelley indigent and waived all non-mandatory financial obligations. RP (11/17/16) at 37-40; CP 137-38

Shelley timely appeals. CP 121.

C. ARGUMENT

THE DOMESTIC VIOLENCE SPECIAL VERDICT THAT APPLIES TO THE FELONY HARASSMENT CONVICTION IS INVALID AS A MATTER OF LAW. BECAUSE THE INVALID VERDICT AFFECTED THE OFFENDER SCORE, RESENTENCING IS REQUIRED.

The State charged Shelley with felony harassment charged based on a threat to kill a third party, a 14-month-old child, which was directed, not at the child, but at the child's mother. For purposes of a domestic violence special verdict for that charge, the jury was asked whether Shelley and *the child* were family or household members. Moreover, as to that charge, the charging document alleged only that Shelley and the child, A.S., were family or household members.

But the harassment was not directed at A.S. Rather, it was directed at Burgess. The jury's domestic violence special verdict as to that conviction, finding that Shelley and A.S. were family or household members, was legally irrelevant. The special verdict was, therefore, invalid as a matter of law.

The invalid domestic violence finding as to the harassment charge affected Shelley's offender score on all three felony convictions, including the charge with the longest sentence. This Court should remand for resentencing on all counts,

1. A court may only impose a sentence authorized by the charging document and jury's verdict.

Under the state and federal constitutions, a court may only impose the sentence authorized by the charging document and the jury's verdict. The information and the jury's special verdict did not authorize the increased sentence in this case.

"The right of trial by jury shall remain inviolate[.]" CONST. art. I, sec. 21. Under both the Sixth Amendment and article I, sections 21 and 22⁵ of the state Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).

⁵ Article I, section 22 provides that:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

In Blakely v. Washington, the Court clarified this rule, holding “that the ‘statutory maximum’ [in this context] is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.” 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis in original).

Even before the Supreme Court decided Apprendi, Washington provided similar protections. In State v. Frazier, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972), the state Supreme Court held that

[w]here a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

The failure to submit a sentencing factor to a jury violates the right of an accused to a jury trial under both the federal and state constitutions. Williams-Walker, 167 Wn.2d at 899. Moreover, for purposes of sentence enhancement, the sentencing court is bound by the jury’s special verdict findings. A court’s disregard of the sentence enhancement authorized by a

special verdict violates the right of the accused to a jury trial. Id. at 897; cf. State v. Recuenco, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008) (finding imposition of firearm sentence enhancement invalid, and that error could never be harmless, where charging document did not allege firearm enhancement) (“Recuenco III”).

Based on the foregoing principles, the sentencing court was not permitted to treat the harassment conviction as a domestic violence offense, and thereby increase Shelley’s sentence, unless the State properly alleged, and the jury’s verdict established, that the crime met the definition of domestic violence. As Shelley will demonstrate, neither the charging document nor the jury’s verdict support the sentence.

2. The special verdict as to harassment is invalid as a matter of law and does not support the increase in Shelley’s offender score and resulting sentence.

As to Count 4, felony harassment, the jury’s domestic violence special verdict is invalid as a matter of law. It does not, therefore, support the resulting increase in Shelley’s offender score and sentence.

- a. *Harassment was committed against Burgess, not A.S.*

As charged and proven in this case, Burgess, not A.S., was the target of harassment.

Felony harassment requires a threat by an accused to kill the “person threatened,” or a third party, and that the “person threatened” be placed in

reasonable fear. RCW 9A.46.020.⁶ Under that statute, the “person threatened” may be the person *against* whom the threat to inflict bodily injury is made, or, as in the situation where a person’s child is threatened, the “person threatened” may be the person *to whom* the threat is communicated. See State v. J.M., 144 Wn.2d 472, 485, 488, 28 P.3d 720 (2001) (depending on the circumstances, person to whom the threat is communicated may be the victim of the threat, even if there is no threat to harm that person); see also State v. Morales, 174 Wn. App. 370, 380, 298 P.3d 791 (2013) (analyzing J.M. and noting that for purposes of the statute, the “person threatened” is the target of the coercion or intimidation that

⁶ Under RCW 9A.46.020 a person is guilty of harassment if:

[(1)](a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person . . . and

(b) *The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .*

. . . .

[(2)](b)[(ii)] A person who harasses another is guilty of a class C felony if . . . the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened *or any other person*[.]

(Emphasis added.)

forms the act of harassment; in the case where a threat to harm a child is directed at a parent, the parent is the person threatened).

As the crime was charged, Burgess was clearly the “person threatened.” See CP 8 (charging document). Moreover, under the State’s theory of the case as developed at trial, Burgess was the “person threatened,” and therefore the target of harassment. See CP 93 (to-convict instruction, requiring State to prove Burgess was placed in reasonable fear); RP 395-96 (State’s closing argument that threat to A.S. was terrifying for, and an attempt to manipulate, Burgess); see also RCW 9.94A.030(54) (defining “victim,” for purposes of Sentencing Reform Act (SRA), as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.”).

Shelley was not charged with harassing A.S. It is doubtful he could have been so charged. There was no evidence that A.S., a 14-month-old preverbal child, was placed in reasonable fear. See State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d 673 (2002) (the “person threatened” must subjectively feel fear and that fear must be objectively reasonable). Proving such a charge would likely require expert witnesses on child development. But this Court need not answer the intriguing questions that such a case

might present.⁷ As charged and as proven, any act of harassment was committed against Burgess, not A.S. Thus, the jury's verdict indicating that A.S. and Shelley were family or household members, while not in dispute, was not legally relevant for purposes of sentencing. Williams-Walker, 167 Wn.2d at 899; Recuenco III, 163 Wn.2d at 442.

- b. *Because the harassment conviction in this case cannot be considered a crime of domestic violence, the offender score is incorrect as to all felony convictions.*

Harassment cannot be considered a crime of domestic violence in this case because the charging document and the jury's verdict do not support it. The offender score is incorrect as to all felony charges. Remand for resentencing is, therefore, required.

RCW 9.94A.525 controls offender score calculation under the SRA.

Under the pertinent provision,

[i]f the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was . . . [pleaded] and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

- (a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead

⁷ For example, could one make a "true threat" to such a young child, given that, to qualify as a "true threat," the person must foresee that the child would interpret the statement as a serious expression of intent to inflict harm? See State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (discussing "true threats").

[pleaded] and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a *felony domestic violence harassment offense*, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was . . . [pleaded] and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was . . . [pleaded] and proven after August 1, 2011.

RCW 9.94A.525(21) (emphasis added).

“‘Domestic violence’ has the same meaning as defined in RCW 10.99.020 and 26.50.010.” RCW 9.94A.030(20). Under RCW 10.99.020(5), domestic violence “includes but is not limited to” several enumerated crimes “*when committed by one family or household member against another.*” (Emphasis added.) Under RCW 26.50.010, “domestic violence” means, in relevant part, “the infliction of fear of imminent

physical harm, bodily injury or assault, *between family or household members.*” (Emphasis added.)

The Count 4 special verdict form asked whether Shelley and A.S. were family or household members, that is, whether the harassment charge could be considered a crime of domestic violence for purposes of the relevant statutes. However, for the reasons stated above, the crime was committed against Burgess, not A.S. For purposes of increasing the sentence on Count 4, the State never alleged, and the jury never found, Shelley and Burgess, the target of the harassment, were family or household members. CP 56.

A valid domestic violence special verdict enables a sentencing court to increase an offender score for that crime, and to use that offense differently in calculating the offender score for other crimes. Where there is no such charge or verdict, the court may not treat the crime as one of domestic violence. Williams-Walker, 167 Wn.2d at 896-97; Recuenco III, 163 Wn.2d at 442; RCW 9.94A.525(21) (requiring that domestic violence allegation be pleaded and proven for special sentencing provision to apply).

In this case, the necessary domestic violence-related allegation was neither pleaded nor proven as to the harassment charge. Yet the erroneous categorization enabled the sentencing court to reach an offender score of nine rather than eight on second degree assault of a child—the charge with

the longest sentence⁸—as well as second degree assault. See RCW 9.94A.525(21) (for felonies “where domestic violence as defined in RCW 9.94A.030 was . . . [pleaded] and proven,” doubling score for certain felony domestic violence offenses, including harassment, “where domestic violence as defined in RCW 9.94A.030 was . . . [pleaded] and proven” as to that charge as well).

The improper designation also affected the scoring for felony harassment itself, because it caused each assault conviction to double. Compare RCW 9.94A.525(21) with RCW 9.94A.525(7) (general “nonviolent” offense scoring).

Domestic violence was neither pleaded nor proven as to the harassment conviction. Because the sentences for each felony are invalid under both the constitution and the SRA, resentencing is required.

⁸ RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (listing seriousness level for crime as “IX”).

D. CONCLUSION

Neither the charging document nor the jury's verdict supported the increased sentence in this case. This Court should remand for resentencing on all felony counts based on a corrected offender score.

DATED this 30TH day of May, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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