

No. 49683-6-II

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

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STATE OF WASHINGTON,

Respondent,

V.

ARON SHELLEY,

Appellant.

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

The Honorable Anne Hirsch

Cause No. 15-1-00582-4

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the court err when it provided a special verdict form Domestic Violence on the charge of Felony Harassment?
2. In light of the Special Verdict for Domestic Violence, did the court properly calculate the offender score at sentencing?
3. Was Shelley's mental stability properly addressed at trial did the defense have an adequate opportunity to cross exam Cheri Burgess?

B. STATEMENT OF THE CASE.

1. Substantive Facts

Aron Shelley and Cheri Burgess were raising Burgess's son, A.S. together while living with A.S.'s Aunt Cindy and Uncle Tom. RP 72. A.S. was fourteen months old on April 29, 2015 and although he was not Shelley's biological son, he had Shelley's name, and Shelley was acting as the paternal figure in the child's life. RP 71.

On April 29, 2015 Shelley got angry with Burgess. RP 74. He wanted her to leave and he yelled profanities at her, telling her "I want you to effing leave." RP 74. Burgess told him that she did not have to leave, but that made Shelley angrier and he tried to make her leave. RP 78. While they were in the living room Shelley attempted to throw her out the door, tearing her sweater and her

sports bra in the process. RP 78. Burgess fought hard because her son was still in the house. RP 78. She ended up by the door “naked from the top up.” RP 79. Burgess went into the bedroom to put on a shirt, and when she came out and entered the kitchen, Shelley followed her, telling her to leave. RP 79. Shelley grabbed a butcher knife and put it against Burgess’s throat, telling her he “was going to kill (her), effing kill (her), because (she) wasn’t leaving.” RP 79. At this moment Burgess believed that she was going to die. RP 80. Uncle Tom intervened, hitting Shelley, and Shelley relinquished the knife. RP 80. Shelley then went into the living room and Burgess followed him hoping that she could talk with him, RP 81, however she saw that Shelley was no longer in the living room and her son was not in his playpen. RP. 81.

After noticing her son was gone, Burgess ran outside to find Shelley in the driver’s seat of their car, with the baby in the front seat. RP 82. Shelley told her he was going to kill himself and the baby. RP 82. Burgess stood in front of the car to try and get her son. RP 82. Shelley then revved the engine lunging forward, striking Burgess with the vehicle. RP 83. When she would not move, he did it again, hitting her in the knee. RP 83. Shelley then got out of the car, and when he did Burgess got in the driver’s seat

and attempted to drive off, however the gate was closed. RP 84. When she got out to unlock the gate Shelley was chasing her. RP 85. Burgess told Shelley that he could do what he wanted to himself but that he could not take the baby. RP 85. Shelley then grabbed the baby by his throat squeezing him, telling Burgess that if she did not leave he would continue to squeeze the baby's neck. RP 85-87. Burgess then went into the house where she called the police. RP 87.

While Burgess was calling the police, Uncle Tom got in the car with Shelley and tried to talk to him. RP 143. Shelley told Uncle Tom that "he was gonna take the car, ram it through the fence, into a tree, kill himself, kill the boy." RP 143.

When Deputy Hamilton arrived he saw Shelley in the driver's seat, holding the baby in a choke hold. RP 163. Deputy Hamilton attempted to talk to Shelley, and eventually he got Shelley to get out of the car. RP 165. Deputy Hamilton then grabbed the baby and gave him to Uncle Tom before placing Shelley in custody. RP 166.

## 2. Procedural Facts

Shelley was charged with second degree assault, intentional assault with a deadly weapon, a knife, during the commission of a crime (Count 1) and second degree assault based on intentional

assault with a deadly weapon, a car (Count 2). Burgess was the complainant in counts 1 and 2. Shelley was also charged with second degree assault of a child, based on strangulation or suffocation (Count 3) and felony harassment based on a threat to kill A.S. (Count 4). The State also charged Shelley with 4 counts of violating a no-contact order (Counts 5-8). CP 8-9.

On July 29, 2015, defense counsel filed a Motion and Declaration for Competency Determination and an Order for Pretrial Mental Health Evaluation by Western State Hospital was entered. CP 10-17. Shelley was evaluated at Western State Hospital and Licensed Psychologist Melissa Dannelet opined that "Shelley has the capacity to understand the nature of the proceedings against him and to assist in his defense." CP 28. Based on that report, the parties entered an Agreed Order on Competency on August 31, 2015. CP 29. On June 22, 2016, a subsequent Order for Pretrial Mental Health Evaluation by Western State Hospital was entered with the request for an evaluation on diminished capacity. CP 30-32. On August 23, 2016, Western State Hospital Licensed Psychologist, Melissa Dannelet completed a report which concluded that "Shelley had the capacity to for the requisite mental stated to commit the alleged offense. Whether Mr. Shelley indeed

formed the requisite mental state to commit the alleged offenses is the province of the trier of fact.” CP 33-44. At trial, the defense called Dr. David Dixon to testify regarding Shelley’s mental state. RP 221-254. Dr. Dixon testified that Shelley was suffering from a mental defect and was “not able to form the intent to commit the crimes he’s charged with.” RP 253-254. In rebuttal, the State called Dr. Dannelet to testify regarding her evaluation of Shelley. RP 309-333. Dr. Dannelet testified, “It’s my opinion that [Shelley] did have the capacity to form intent of the time of his actions.” RP 328.

At trial Shelley was convicted of counts 1,3,4,5, and 6. CP 48, 53, 55, 57. For the charge in count 1, the jury answered yes to each of the special verdict forms for domestic violence and a deadly weapon. CP 49-50. Special verdict forms alleging domestic violence were also answered yes on counts 3, 4, 5, and 6. CP 54, 56, 58, 60. The jury returned not guilty verdicts on counts 2, 7, and 8. CP 51, 61, 63. Shelly’s offender score was calculated at 9 on each felony count and he was sentenced to a term of total confinement of 132 months. CP 124-125.

### C. ARGUMENT.

1. The trial court did not err in applying the domestic violence special verdict to the felony harassment conviction.

The trial court correctly applied the domestic violence special verdict to Shelley's felony harassment conviction. The appellate court should affirm the trial court's decision that the domestic violence special verdict was accurate. RCW 9.94A.525(21) states that "if the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven..." RCW 9.94A.525(21). RCW 9.94A.030 states that domestic violence has the meanings given to it from RCW 10.99.020 and RCW 26.50.010. RCW 10.99.020(5) lists but does not limit the crimes that fall under domestic violence. RCW 26.050.010 defines domestic violence as "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members..." RCW 26.050.010(3).

Shelley was convicted of felony harassment based on a threat to kill a third party, A.S., on or about April 30, 2015. Shelley was holding A.S. by his neck and squeezing, telling Burgess that he would continue to squeeze until she left. RP 85-87. Under jury

instruction 26 the elements of felony harassment were established as (1) the defendant knowingly threatened to kill A.S. immediately or in the future, (2) the defendant's words or conduct placed Burgess in reasonable fear that the threat would be carried out, (3) the defendant acted without lawful authority, and (4) the threat was made in the state of Washington. RP 374, CP. Additionally the jury answered the special verdict affirmatively, that Shelley and A.S. were household or family members. RP (10/28/16) 4. Because the special verdict was correctly applied, Shelley's offender score is accurate. "Jury instructions are reviewed under a de novo standard "within the context of the jury instructions as a whole." State v. Olsen, 175 Wn. App. 269, 283, 309 P.3d 518 (2013) (quoting State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006)).

In State v. G.S., G.S. told his school bus driver that he was upset about others picking on him in school, and that he was going to "shoot the place up." State v. G.S., 104 Wn. App. 643, 646, 17 P.3d 1221 (2001). G.S. was found guilty of felony harassment in the trial court, and the conviction was reversed on appeal. In analyzing the harassment statute, RCW 9A.46.020, the appellate court stated "an element of felony harassment includes threatening bodily injury either to the person with whom the accused is

communicating or to *any other person*.” Id. at 652. Also, “there is no requirement that the “person threatened” also be a person to whom the accused intends to cause bodily injury.” Id. at 653.

In State v. J.M., the defendant threatened to shoot the school’s principal and several other teachers. State v. J.M., 144 Wn.2d 472, 475, 28 P.3d 720 (2001). The defendant communicated this threat to two other boys as they were walking home from school. Id. One of the boys told a counselor about the threats who then relayed the information to the principal. Id. The defendant was convicted of felony harassment. Id. at 476. The appellate court held “the felony harassment statute does not require that the defendant know or should know his or her threat will be communicated to the threatened person.” Id.

In analyzing RCW 9A.46.020 the Supreme Court states the “statute also contemplates that a person may be threatened by harm to another. An example that comes readily to mind is a communication of intent to harm the child of the person threatened.” Id. at 488. The court goes on to say “the person to whom the perpetrator communicates the threat may be someone other than the person threatened.” Id.

The Washington State Supreme Court held that felony harassment under statute RCW 9A.46.020 “does not require that the person making a threat to cause bodily injury know or should know that the threat will be communicated to the victim of the threat.” Id.

Here Shelley threatened to kill, or cause bodily injury to A.S., RP 85-87, and he communicated that threat to Burgess placing her in reasonable fear that Shelley would carry out his threat towards A.S. Both Burgess and A.S. were victims of the threat. Under G.S., the person to whom the threat is communicated and the person threatened do not need to be the same person. Shelley threatened to kill A.S. by continuing to squeeze his neck. RP 85-87. This threat was communicated to Burgess. The relationship between A.S. and Shelley is relevant because Shelley’s threats were to kill A.S. by continuing to squeeze his neck. Therefore the special verdict of domestic violence, finding that Shelley and A.S. were family or household members is legally relevant and valid.

The situation here is exactly what the Supreme Court had in mind in J.M., when they provided the example of a threat to harm someone’s child. Also, under the holding provided by the Supreme Court in J.M. the felony harassment statute does not require the

defendant, Shelley, to know that his threat will be communicated to the victim, A.S. As a result, by communicating the threat to Burgess it does not displace A.S. from being the victim.

The special verdict that the crime of felony harassment was a crime of domestic violence was accurate because the Appellant was threatening to kill A.S. and the jury answered affirmatively when posed with the question of whether A.S. and the Appellant were family or household members. Although the Appellant was directing his harassment towards Burgess, the threats pertained to A.S., and his well-being. It was accurate for the special verdict to question the relationship between A.S. and the Appellant, because the Appellant's threats were to kill A.S. The State alleged and the jury found that the state proved that the crime charged in count 4 was a crime of domestic violence. CP 8, CP 56.

RCW 9.94A.525(21) does not specify who the victim must be for domestic violence. The statute simply says "where domestic violence as defined in RCW 9.94A.030 was plead and proven." RCW 9.94A.525(21). In the trial court domestic violence for Count 4, felony harassment was plead and proven. The domestic violence special verdict was accurate regardless of who the threat was communicated to because the statute only states where plead and

proven. The trial court accurately applied the domestic violence special verdict.

2. The trial court did not err in the charges and the offender score, therefore the case does not need to be remanded for resentencing.

The trial court accurately assessed Shelley's offender score. The court of appeals should affirm the decision of the trial courts charges and offender score. The special verdict of domestic violence for the felony harassment charge in Count 4 did not err in asking whether Shelley and A.S. were family or household members. At sentencing the court established Shelley's offender score as nine. RP (11/17/16) 33. Shelley's score was calculated by counting one point for his three non-violent prior offenses, one point each for Counts 5 and 6, violating the no contact order, and two points each for Counts 1, 3, and 4, all three of which were doubled as a result of being either violent offenses or domestic violence. After calculating his offender score to be nine, Shelley was given a 120 month sentence with a 12 month enhancement because of the deadly weapon, equaling 132 months total.

The offender score is measured through RCW 9.94A.525. RCW 9.94A.525(21) governs the offender score for domestic violence.

"If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven... 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 and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense... a felony domestic violence harassment offense..."

RCW 9.94A.525(21)(a).

Under RCW 10.99.020 domestic violence includes crimes "committed by one family or household member against another."

RCW 10.99.020(5).

In this case the domestic violence special verdict for felony harassment was accurate. The court did not err in asking whether Shelley and A.S. were household or family members because the threats made by Shelley were to kill A.S. The domestic violence special verdict was accurately applied because Shelley was threatening A.S. The threats being communicated to Burgess does not remove A.S. from being the victim, and shift that label to Burgess, Burgess was the person to whom the threat was communicated.

Based on the foregoing analysis, the felony harassment was against A.S., and the trial court accurately applied the domestic

violence special verdict. Therefore there is no need for resentencing.

3. Shelley's mental stability was adequately litigated at trial and the defense had an adequate opportunity to cross examine Cheri Burgess.

In his Statement of Additional Grounds, Shelley first alleges that his mental stability was not properly addressed. Prior to trial both his competency and capacity were evaluated by Western State Hospital. Further, the defense put forward testimony from Dr. David Dixon regarding Shelley's mental capacity which the State countered with testimony from Western State Hospital Dr. Melissa Dannelet. While Shelley does not specify how his mental stability was not properly addressed, it is clear from the record that his mental stability was a key component of the defense case at trial and was fully litigated.

In his second additional ground, Shelley alleges that the victim's testimony at trial differed from her statement on the night of the incident. At trial, defense counsel had the opportunity to cross examine Cheri Burgess regarding her statement to law enforcement on the night of the incident and in fact did question Ms. Burgess regarding those statements. RP 114-123. There was

no error at trial. Defense counsel adequately cross examined Ms. Burgess.

D. CONCLUSION.

The trial court did not err in applying the domestic violence special verdict to Count 4, and the Appellant's offender score of nine is accurate, leaving no need for resentencing. The State respectfully requests this court to affirm the Appellant's conviction.

Respectfully submitted this 27 day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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

Dated this \_\_\_\_\_ day of July, 2017, at Olympia, Washington.

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**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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