

FILED
Court of Appeals
Division II
State of Washington
11/29/2018 10:32 AM

NO. 51961-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD PINKNEY, III,

Appellant.

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

The Honorable Erik Price, Judge
The Honorable John Skinder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Edward Pinkney's two convictions for second degree assault violate the state and federal prohibitions on double jeopardy.

2. The trial court erred in refusing to find Pinkney's assault and harassment convictions constituted the same criminal conduct.

3. The \$200 criminal filing fee and \$100 DNA fee should be stricken from the judgment and sentence.

4. A clerical error in the judgment and sentence should be corrected.

Issues Pertaining to Assignments of Error

1. Do Pinkney's two convictions for second degree assault violate double jeopardy, where they constitute a single course of conduct, necessitating dismissal of one of the counts?

2. Did the trial court err in refusing to find Pinkney's assault and harassment convictions encompassed the same criminal conduct, where they involved the same time, place, victim, and criminal intent?

3. Under the Washington Supreme Court's recent decision in State v. Ramirez, __ Wn.2d __, 426 P.3d 714 (2018), must the \$200 criminal filing fee and \$100 DNA fee be stricken from the judgment and sentence?

4. Is remand appropriate for the trial court to correct a clerical error in the judgment and sentence?

B. STATEMENT OF THE CASE

The State charged Edward Pinkney, III, with three felonies: two counts of second degree assault by strangulation and one count of felony harassment based on a threat to kill,¹ and three gross misdemeanors: one count of third degree theft, one count of third degree malicious mischief, and one count of interfering with domestic violence reporting. CP 3-4 (information), 17-18 (third amended information). The State alleged all were crimes of domestic violence, and further alleged the aggravating circumstances of an ongoing pattern of abuse and recent release from incarceration. CP 17-18.

1. State's Evidence

All the charged offenses arose from a single evening Pinkney spent with his romantic partner, Sharon Smith, at Smith's apartment. 2RP 125.² Smith testified at trial that she and Pinkney dated from January to July of 2017. 2RP 120.

On the evening of July 15 and into the early morning hours of July 16, 2017, Smith testified Pinkney was drinking heavily. 2RP 122-26. When

¹ The State also alleged the alternative means of felony harassment that Pinkney had a prior harassment conviction, but could not proceed on that basis after the trial court excluded evidence of the conviction. 2RP 108-09; 3RP 263-64.

² This brief refers to the verbatim reports of proceedings as follows: 1RP – October 9, 2017; 2RP – November 7, 27-29, 2017; 3RP – November 29-30, 2017; 4RP – November 30, December 1, 4, 2017, January 1, February 20, 2018; 5RP – January 30, 2018.

Pinkney starting getting aggressive—calling Smith names and threatening her—Smith asked Pinkney to leave, but he refused. 2RP 126-28, 131. Smith admitted on cross-examination that she also asked Pinkney to leave because he was not helping her pay her bills. 2RP 194-95; 3RP 204. Smith testified Pinkney keep looking out the windows and accusing her of calling the police on him. 2RP 127-28.

Sometime around 5:00 a.m., two police officers responded to another call at Smith’s apartment complex. 2RP 131-32; 3RP 229. Smith and Pinkney went outside to talk to the police. 2RP 131-32. Smith claimed she told one of the officers that Pinkney was “torturing” her and asked the officer to observe how abusive Pinkney was when she asked for a cigarette. 2RP 132-34. The officer did nothing, however, and Smith went back inside her apartment with Pinkney after he supposedly threatened her. 2RP 133-34.

Jordan Reisher was the police officer who interacted with Smith. 3RP 227-30. He recalled Smith “seemed kind of concerned,” and whispered something about Pinkney yelling at her and being under the influence. 3RP 230. Officer Reisher asked if Smith wanted him to do anything, but she declined. 3RP 231. Reisher did not see Pinkney act in any abusive manner towards Smith. 3RP 233. Smith eventually told Pinkney to come back inside her apartment and did not seem afraid when she did so. 3RP 232-34.

After this interaction, Smith called 911 but immediately hung up because, she claimed, she was scared Pinkney would catch her. 2RP 135. When the 911 dispatcher called back, Smith told the dispatcher, “Don’t call back.” 2RP 135. At this point, around 6:00 or 7:00 a.m., Smith testified her interactions with Pinkney became physical. 2RP 130, 136.

Smith said she was in her bedroom, crying for Jesus to help her, when Pinkney ran in and said something like, “Bitch, I’m going to give you something to cry for,” and “You’re going to need Jesus.” 2RP 130, 136. Smith claimed that, when she jumped up from her bed, Pinkney grabbed her around the neck with both hands and pushed her into the closet doors. 2RP 136-37, 140. The push into the closet knocked the doors off their tracks and broke a small plastic piece, which Smith’s landlord charged her money to fix. 2RP 142-43, 146-47. The damage to the closet doors was the basis for the malicious mischief charge. 3RP 374-75.

Smith testified Pinkney squeezed her neck, causing her to lose her breath. 2RP 139-40. This was the basis for the first assault charge. 3RP 370. With his hands around her neck, Pinkney allegedly told Smith, “Bitch, I’ll kill you and your mom and spend the rest of my life in prison.” 3RP 150. Smith explained she felt scared Pinkney was serious. 3RP 150. Smith testified Pinkney squeezed her neck “[l]ong enough me to gasp when he let me go to catch my breath.” 2RP 151.

When Pinkney let go, Smith explained, he pushed her, left the room, and went to the living room. 2RP 151. Smith testified she was on the bed crying when Pinkney “ran back in the room and choked [her] for the second time,” telling her, “You going to need god.” 2RP 151. She said he did so because she was “crying and begging for god and asking him to leave.” 2RP 151. Smith did not say exactly how much time passed before Pinkney ran back into her bedroom.

Smith testified the second choking was worse because Pinkney squeezed her neck tighter than before, making her unable to breathe. 2RP 151-52. Smith said Pinkney pushed her more forcefully into the closet and said, “I told you bitch I will kill you,” again making her fearful. 2RP 153. Smith explained Pinkney squeezed her throat for approximately 10 to 15 seconds, longer than the first time. 2RP 154. This was the basis for the second assault charge. 3RP 370. The two threats to kill during the first and second choking incidents were the basis for the harassment charge. 3RP 368-69; CP 68.

When Pinkney let go of Smith the second time, Smith testified she grabbed a bat and ran out of her apartment. 2RP 155-56. She knocked on neighbors’ doors, but no one answered because it was early in the morning. 2RP 156. Smith said Pinkney came outside with her cellphone in his hand, taunting her with it. 2RP 156. This was the basis for the third degree theft

charge. 3RP 373-74. With Pinkney outside, Smith ran back inside her apartment and locked the door. 2RP 156.

Once inside, Smith found the adaptor for her home phone under her dresser, wrapped in a t-shirt. 2RP 156-57. Smith explained Pinkney accused her of calling the police “all night,” so he took the adaptor, though she did not see what he did with it. 2RP 157-58. This was the basis for the interfering with domestic violence reporting charge. 3RP 375.

Smith’s subsequent 911 call was played for the jury. 2RP 159, 173. Smith identified Pinkney and told the dispatcher that Pinkney “just choked [her] out” and “threatened to kill [her] whole family.” 2RP 173, 178. Smith claimed she had bruises on her neck. 2RP 174. Smith told the dispatcher, however, “I got a bat. I’m not worried about him.” 2RP 177.

Officer Brenda Anderson responded to the 911 call shortly before 7:00 a.m. 2RP 180; 3RP 244-45. Anderson contacted Smith, who was disheveled and described two incidents of strangulation, as well as threats to kill. 3RP 247, 268. Anderson did not see any bruises on Smith’s neck, as Smith claimed. 3RP 274-75, 285. Nor did Anderson observe any other signs of strangulation, such as redness, petechial hemorrhaging, or a raspy voice. 3RP 285-87. Anderson subsequently arrested Pinkney, but could not find Smith’s cellphone. 3RP 221, 270-71. Anderson did not note any signs of intoxication or smell of alcohol on Pinkney. 3RP 283-84.

The trial court admitted ER 404(b) evidence on the harassment charge. 1RP 60-64; CP 15-16. Smith testified her relationship with Pinkney involved disrespect, threats, and name-calling. 2RP 120. She testified to one incident a couple months prior where he pushed her onto a bed. 2RP 121. The day before the charged events, Smith claimed Pinkney pushed her off a bus, causing her to stumble but not fall. 2RP 123-24. When Anderson contacted her, Smith had bruises from, she claimed, prior incidents with Pinkney. 2RP 185-89; 3RP 276-79. The jury was instructed it could consider this evidence only for the purpose of Smith's reasonable fear the alleged threats would be carried out, and for no other purpose. CP 44, 56.

2. Pinkney's Testimony and Defense

Pinkney testified at trial that no physical altercation or threats occurred. 3RP 327-33. Pinkney explained he and Smith went to the grocery store on July 15, then returned to Smith's apartment, where they watched television, ate, and slept. 3RP 320-21, 325, 340. Pinkney testified he previously helped Smith pay her rent, but refused to do so that month. 3RP 319. He explained Smith had a "slight attitude" about this, but otherwise they got along fine that evening. 3RP 319, 322-23. Pinkney did not call Smith names, did not threaten to kill her or her family, did not push her into the closet or hide her phones, and never choked her. 3RP 323-33. In short,

Pinkney never laid a hand on Smith. 3RP 333. He could not say why Smith called the police on him. 3RP 340-41.

In closing, both parties acknowledged the case boiled down to Smith's credibility versus Pinkney's. 3RP 376 (State agreeing "[t]his is he said/she said in many ways so credibility plays a huge part"), 383 (defense emphasizing the case was "[b]asically her word against his"). Defense counsel emphasized Officer Reisher did not see anything amiss when he observed Smith and Pinkney around 5:00 a.m. 3RP 385-87. Smith voluntarily went back inside her apartment with Pinkney, even though police were present. 3RP 385-87. Pinkney did not appear intoxicated to Officer Anderson when she interacted with him around 7:00 a.m. 3RP 385. Anderson also did not observe any physical signs of strangulation, inconsistent with Smith's claim on the 911 call that her neck was bruised. 3RP 390. Finally, counsel emphasized, Smith told the 911 dispatcher that she had a bat was not afraid of Pinkney. 3RP 391.

3. Verdict, Bifurcated Trial, and Sentencing

The jury found Pinkney guilty as charged on all counts. CP 71-81. The jury further found Pinkney and Smith were family or household members for all the offenses. CP 71-81. After a bifurcated trial, at which the jury was allowed to consider the ER 404(b) evidence, the jury found (1) Pinkney committed the felonies shortly after being released from

incarceration and (2) the felonies were aggravated domestic violence offenses, manifested by an ongoing pattern of abuse over a prolonged period of time. CP 90-92, 99-104.

At sentencing, defense counsel contended the two assault convictions violated double jeopardy because they arose from a single course of conduct. CP 109-10; 4RP 518. Counsel further argued all three felonies constituted the same criminal conduct because they involved the same time, same place, same victim, and same criminal intent, i.e., Pinkney's intent did not change from one crime to the next. CP 110-11; 4RP 518.

The State opposed both arguments. As to the two assaults, the State argued there was a break in time between them and an opportunity for Pinkney to form different intent. 4RP 510-12; Supp. CP__ (Sub. No. 100, State's Supp'l Sentencing Memorandum, 6). As to the assault and harassment, the State acknowledged "they occurred at the same time," and "certainly the strangulation contributed to her fear of his threats being carried out." 4RP 511. However, the State asserted, the crimes were not the same criminal conduct because the prior abusive history also contributed to Smith's fear. 4RP 511-12.

The trial court rejected both arguments, finding no double jeopardy and no same criminal conduct:

The court reviewed its extensive notes at trial of the testimony of Ms. Smith and the other testimony in the trial, and under the case law which is cited by the state and the defense, the court does not find that double jeopardy applies nor does the same criminal conduct analysis apply.

4RP 528. The court did not engage in any other analysis. 4RP 528.

With the three current felony domestic violence offenses and Pinkney's prior criminal history, the trial court calculated Pinkney's offender score to be 18 on the assault convictions and 17 on the harassment conviction. CP 123-24; 4RP 524-25. The gross misdemeanor convictions were not included in Pinkney's offender score. CP 123-24; Supp. CP__ (Sub. No. 99, Statement of Prosecuting Attorney). The court imposed an exceptional sentence of 96 months on the assault convictions—12 months above the standard range—based on the rapid recidivism aggravator. CP 112, 124-25; 4RP 529-30. Pinkney timely appealed. CP 113-14.

C. ARGUMENT

1. PINKNEY'S TWO SECOND DEGREE ASSAULT CONVICTIONS BASED ON A SINGLE COURSE OF CONDUCT VIOLATE DOUBLE JEOPARDY.

Double jeopardy prohibits a person from being "twice put in jeopardy for the same offense." CONST. art. I, § 9; see also U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."). While a defendant may face multiple charges arising from the same conduct, the double jeopardy prohibition

forbids a trial court from entering multiple convictions for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Double jeopardy claims are reviewed de novo. Id.

In State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014), the Washington Supreme Court articulated the test for determining whether multiple assault convictions violate double jeopardy. The court held assault “should be treated as a course of conduct crime until and unless the legislature indicates otherwise.” Id. at 984. This means assault applies to a course of conduct rather than individual actions. Id. Interpreting assault as a course of conduct crime “helps to avoid the risk of a defendant being ‘convicted for every punch thrown in a fistfight.’” Id. at 985 (quoting State v. Tili, 139 Wn.2d 107, 116, 985 P.2d 365 (1999)).

The Villanueva-Gonzalez court emphasized “[t]here is no bright-line rule for when multiple assaultive acts constitute one course of conduct.” Id. Review in each case will be “highly dependent on the facts.” Id. The court explained the following factors are useful in determining whether multiple assaultive acts constitute one course of conduct:

- The length of time over which the assaultive acts took place,
- Whether the assaultive acts took place in the same location,

— The defendant’s intent or motivation for the different assaultive acts,

— Whether the acts were uninterrupted or whether there were any intervening acts or events, and

— Whether there was an opportunity for the defendant to reconsider his or her actions.

Id. “However, no one factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors.” Id.

For example, Villanueva-Gonzalez’s girlfriend returned from a night out and went into their children’s bedroom. Id. at 978. Villanueva-Gonzalez told her to get out of the room. Id. When she did not comply, Villanueva-Gonzalez pulled her out of the room. Id. He head butted her, breaking her nose and causing blood to run down her face. Id. Villanueva-Gonzalez then grabbed his girlfriend by the neck and held her against a piece of furniture so that it was difficult for her to breathe. Id. He was ultimately convicted of second degree assault based on the head butt and fourth degree assault based on the strangulation. Id. at 978-79.

The court held Villanueva-Gonzalez’s actions took place during a single course of conduct. Id. at 985-86. The assaults occurred in the same location. Id. The record implied, though did not clearly state, the acts took place over a short period of time. Id. at 986. There was nothing in the

record indicating any interruptions or intervening events, and nothing to suggest Villanueva-Gonzalez “had a different intention or motivation for these actions or that he had an opportunity to reconsider his actions. Id. The two assault convictions therefore violated double jeopardy. Id.

The court of appeals reached the same conclusion in In re Pers. Restraint of White, 1 Wn. App. 2d 788, 407 P.3d 1173 (2017). There, White and his girlfriend had a dispute about the custody of their child. Id. at 790. When White’s girlfriend stated the child should live with her, White pointed a gun at her and threatened to kill her. Id. White then threw his girlfriend to the floor and repeatedly struck her, telling her she was going to die. Id. When she tried to get up, White put his hands around her neck so she could not breathe. Id. White was convicted of second degree assault with a deadly weapon for pointing the gun and second degree assault by strangulation. Id. at 791.

Considering the factors articulated in Villanueva-Gonzalez, the court emphasized White’s intent did not change between the gun pointing and the strangulation. Id. at 795. Rather, “the episode as a whole was motivated by the disagreement over where [their child] would live.” Id. Nor did their child’s screaming at White to stop create an interruption or moment of calm during the ongoing assault. Id. at 796. The assaultive acts “occurred in the same location within a short period of time,” during which White repeatedly

expressed the intent to kill his girlfriend. Id. at 796. White's assaultive acts therefore constituted a single course of conduct and the two convictions violated double jeopardy. Id. at 798.

Aside from White, there have been few other published decisions addressing multiple assault convictions since Villanueva-Gonzalez. Unpublished opinions therefore provide some additional guidance.³ Of course, no single factor is dispositive, as the Villanueva-Gonzalez court emphasized, but courts generally appear to reject double jeopardy claims when the assaults are punctuated by a significant gap in time.

In State v. Mackey, No. 49198-2-II, 2018 WL 333142, at *5 (Jan. 9, 2018), for instance, two assaults did not violate double jeopardy where they occurred in different locations over the course of two days. See also State v. Tricomo, No. 47238-4-II, 2016 WL 2347041, at *3 (Apr. 26, 2016) (no double jeopardy where assaultive acts occurred over several hours, in different places in the victim's home); State v. Killian, Nos. 44926-9-II, 45958-2-II, 2014 WL 6790373, at *4 (Dec. 2, 2014) (no double jeopardy where assaultive acts occurred on separate days and were interrupted by routine daily events).

³ Under GR 14.1, unpublished decisions have no precedential value, are not binding on any court, and are cited here only for such persuasive value as this Court deems appropriate.

Similarly, in State v. Martin, No. 44891-2-II, 2014 WL 7462511, at *4 (Dec. 30, 2014), there was no double jeopardy where Martin strangled his ex-girlfriend in the bathroom (first assault), then threatened her, stopped her from using the phone, hid some of her belongings, left the house, and finally forced his way back into the house and threw her down in a different location, the kitchen (second assault). See also State v. Aquiningoc, No. 71539-9-I, 2015 WL 4090100, at *4 (July 6, 2015) (no double jeopardy where assaults occurred over a relatively long period of time, Aquiningoc and the victim moved to different locations in the apartment, and the attacks were punctuated by several instances of relative calm, like Aquiningoc packing clothing, trashing the victim's apartment, and arguing).

By contrast, in State v. Carpenter, No. 43878-0-II, 2015 WL 4921150, at *2 (Aug. 18, 2015), two assaults violated double jeopardy where they occurred against the same victim, at the same location, and within a short period of time. The record suggested the assaults were interrupted and Carpenter had an opportunity to reconsider his actions when witnesses intervened, causing Carpenter to briefly relent choking the victim. Id. The court emphasized, however, “this is only one relevant factor in determining whether his assaultive acts constituted one course of conduct.” Id.

Pinkney's two second degree assault convictions were based on the two acts of strangulation that occurred in Smith's bedroom. 3RP 368-70; CP

50-51. Under RCW 9A.36.021(1)(g), a person is guilty of second degree assault if he “[a]ssaults another by strangulation or suffocation.” “Strangulation” means “to compress a person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with the intent to obstruct the person’s blood flow or ability to breathe.” RCW 9A.04.110(26).

Applying the Villanueva-Gonzalez factors and consider the case law discussed above, it is clear that Pinkney’s two assaultive acts of strangulation constituted a single course of conduct, therefore violating double jeopardy. For the purposes of argument, this brief assumes, though does not concede, the truth of the State’s evidence.

First, the two assaultive acts happened in quick succession. Smith did not say how much time passed between the two choking incidents. However, similar to Villanueva-Gonzalez, the record implies they took place over a very short period of time.

Smith said the first choking incident lasted only long enough to make her gasp when Pinkney let go. 2RP 151. Pinkney then pushed Smith and went to the living room. 2RP 151. Smith did not say how long Pinkney was in the living room, but nor did she describe him doing anything of note in there. 2RP 151. Rather, Smith was on the bed crying when Pinkney “ran back in the room and choked [her] for the second time.” 2RP 151. Smith said this second choking incident lasted only 10 to 15 seconds, which was

longer than the first incident. 2RP 154. The clear import of Smith's testimony was the second choking incident occurred almost immediately after the first, with time only for Pinkney to go to the living room.

The State essentially conceded as much in opposing Pinkney's pretrial motion to sever the assault and harassment charges. The State characterized the assaults and harassment as "an ongoing incident," explaining "the assaults and the harassment really occurred simultaneously, the strangulations one after the other, the harassment during that second strangulation." 2RP 27 (emphasis added). The State admitted "[t]he incidents occurred on the same date and same time." 2RP 27. The first factor therefore weighs in favor of a single course of conduct. See White, 1 Wn. App. 2d at 794-95 (considering the State's concession below regarding same criminal intent to be highly probative in its double jeopardy analysis).

Second, there can be no real dispute the two assaultive actions happened in the same location. The first choking incident occurred in Smith's bedroom, when Pinkney pushed her into the closet doors, put his hands around her neck, and threatened to kill her. 2RP 136-37, 140. The second choking incident likewise occurred in Smith's bedroom, when Pinkney again pushed her into the now-askew closet doors, put his hands around her neck, and threatened to kill her. 2RP 151-53. This second factor

also weighs in favor of the two assaultive acts being part of one course of conduct.

Third, Pinkney's intent or motivation did not change from one strangulation to the next. In its briefing below, the State contended Pinkney's "apparent motivation" for the second choking was being upset by Smith's crying. Supp. CP__ (Sub. No. 100, State's Supp'l Sentencing Memorandum, 6). The State did not explain how this motivation was any different than the first choking. The record shows it was not.

Smith testified she was in her bedroom, "crying praying to Jesus to help [her]," when Pinkney came in her room and choked her for the first time. 2RP 130, 136. Pinkney told Smith, "You're going to need Jesus," and threatened to kill her and her mother. 3RP 130, 150. When Pinkney left the room, Smith resumed "crying and begging for god and asking him to leave." 2RP 151. Pinkney then ran back in the room and choked Smith for a second time, again telling her "You going to need god" and threatening to kill her. 2RP 151, 153.

Thus, the apparent motivation for both the strangulations was Smith crying and praying. Both times, Pinkney choked Smith, threatened to kill her, and told her that she was going to need god. The assaults were basically identical in terms of intent and motivation. The overarching theme of the evening appeared to be Pinkney's intoxication and paranoia that Smith was

going to call the police on him. 2RP 127-28, 135-36. That motivation likewise did not change during the ongoing assaultive acts. The third factor therefore also weighs in favor of a single course of conduct.

Fourth, the two choking incidents were separated by a short gap in time, but there were no intervening events. Again, the record does not establish how much time passed between the choking incidents, but suggests it was not long. Regardless, nothing occurred in that brief span of time that constituted an intervening event.

The unpublished cases discussed above provide some examples of intervening events, like routine daily events in Killian, forcing back in the house in Martin, or several instances of communication and relative calm in Aquiningoc. Killian, 2014 WL 6790373, at *4; Martin, 2014 WL 7462511, at *4; Aquiningoc, 2015 WL 4090100, at *4. In Carpenter, the choking incidents were briefly interrupted when witnesses intervened. 2015 WL 4921150, at *2. The court emphasized, however, this was “only one relevant factor in determining whether his assaultive acts constituted one course of conduct,” and concluded the two assaults violated double jeopardy. Id.

Pinkney’s case is most analogous to Carpenter. There was only a brief interruption in Pinkney’s ongoing assaultive conduct. No routine daily events occurred in between the two choking incidents. Pinkney did not leave the apartment, instead going only to the living room. There was no moment

of relative calm—Smith cried and begged for god throughout the encounter. Nothing in the record suggests either party calmed down during the momentary break in assaultive acts. And, as emphasized in Villanueva-Gonzalez and Carpenter, “no one factor is dispositive, and the ultimate determination should depend on the totality of the circumstances.” Villanueva-Gonzalez, 180 Wn.2d at 985. The fourth factor therefore also weighs in Pinkney’s favor or, at least, does not weigh against him.

Fifth, and similarly, there is no evidence in the record that Pinkney had an opportunity to reconsider his actions. As discussed, there was only a brief gap in time when Pinkney ceased choking Smith and went to the living room. Notably, however, a gap in time and opportunity to reconsider are not one and the same, as the Villanueva-Gonzalez court expressly denoted them to be distinct factors for consideration. 180 Wn.2d at 985. Pinkney never left the apartment and there is no evidence he did anything in the living room that would have allowed him to reconsider his actions. The two choking incidents were part of one ongoing, heated dispute in which Pinkney was intoxicated, paranoid Smith was calling the police, and frustrated with her for crying and asking him to leave. Both Pinkney and Smith were still in the heat of the moment during the ongoing assault. This final factor weighs in favor of a single course of conduct.

Below, the State relied heavily on State v. Boswell, 185 Wn. App. 321, 340 P.3d 971 (2014), to argue against double jeopardy. 4RP 512; Supp. CP__ (Sub. No. 100, State's Supp'l Sentencing Memorandum, 4-6). Boswell was convicted of two counts of attempted first degree murder for twice trying to kill his girlfriend. 185 Wn. App. at 326. Boswell first attempted to poison his girlfriend by crushing pills and mixing them in her tea. Id. at 332. This attempt failed, after which a period of time passed before Boswell formulated a new plan and again attempted to kill his girlfriend. Id. While his girlfriend was sleeping, Boswell acquired a gun and shot her in the head. Id. Thus, Boswell employed different methods of attempting to kill his girlfriend; the attempts were punctuated by a significant gap in time; and the second attempt began after only after the first attempt failed. Id. The two attempts were therefore separate, distinct courses of conduct and properly represented two units of prosecution. Id.

Pinkney's case is readily distinguishable from Boswell. Pinkney did not use different methods to assault Smith. Rather, he choked her twice, while threatening to kill her, in response to her crying and begging for god. There is no evidence Pinkney formulated a new plan after the first assaultive act. Nor is there any suggestion Pinkney choked Smith the second time only because the first time failed. Rather, both choking incidents were very short, lasting less than 10 to 15 seconds each. 2RP 154. Only a brief period of

time interrupting the conduct. Boswell is inapposite and does not control the outcome here.

In sum, the acts underlying Pinkney's convictions occurred in the same place, within a short period of time, interrupted only by a brief gap in time, with no intervening circumstances, no opportunity for Pinkney to reconsider his actions, and no change in motivation. The two choking incidents were nearly identical, with Pinkney putting his hands around Smith's throat, pushing her into the closet doors, and threatening to kill her. The Villanueva-Gonzalez factors and the totality of the circumstances demonstrate the acts were part of a single course of conduct. Pinkney's two assault convictions therefore violate double jeopardy. This Court should remand for the trial court to vacate one of the second degree assault convictions. White, 1 Wn. App. 2d at 798.

2. PINKNEY'S ASSAULT AND HARASSMENT
CONVICTIONS CONSTITUTE THE SAME CRIMINAL
CONDUCT FOR SENTENCING PURPOSES.

When a person is sentenced for two or more current offenses, "the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" means two or

more crimes that involve “the same criminal intent, are committed at the same time and place, and involve the same victim.” Id.

A trial court’s determination of whether multiple crimes constitute the same criminal conduct is reviewed for abuse of discretion or misapplication of the law. State v. Graciano, 176 Wn.2d 531, 536-37, 295 P.3d 219 (2013). “[W]hen the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” Id. at 537-38. The defendant bears the burden of showing multiple crimes involve the same criminal conduct. Id. at 539.

Here, defense counsel argued the two assault convictions and the harassment conviction all encompassed the same criminal conduct. CP 109-11; 4RP 518. The trial court rejected the argument based on “its extensive notes at trial of the testimony of Ms. Smith and the other testimony in the trial, and under the case law which is cited by the state and the defense.” 4RP 528. The three current felony convictions counted as four points total in Pinkney’s assault and harassment offender scores. RCW 9.94A.525(1), .525(21)(a)-(b), .589(1)(a); Supp. CP__ (Sub. No. 99, Statement of Prosecuting Attorney). However, examination of the record and the law demonstrate the assaults and harassment constituted the same criminal conduct and the trial court abused its discretion in ruling otherwise.

- a. The two assaults encompass the same criminal conduct.

“Even though they may be separate, albeit similar, analyses, a determination that a conviction does not violate double jeopardy does not automatically mean that it is not the same criminal conduct.” State v. Chenoweth, 185 Wn.2d 218, 222, 370 P.3d 6 (2016). Thus, even if this Court determines the two assaults do not violate double jeopardy, it must still consider whether they encompass the same criminal conduct.

The two incidents of strangulation that resulted in the two second degree assault convictions indisputably involved the same place and the same victim. Pinkney choked Smith twice in her bedroom, up against the closet doors. 2RP 136-37, 151-53.

Though the more difficult question, the two assaults also involved the same time and same criminal intent. With regard to same time, “[t]he Supreme Court has specifically rejected a requirement that the offenses occur simultaneously in order to be the same criminal conduct.” State v. Price, 103 Wn. App. 845, 856, 14 P.3d 841 (2000). Specifically:

Although the statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act, there is one clear category of cases where two crimes will encompass the same criminal conduct—the repeated commission of the same crime against the same victim over a short period of time.

State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (internal quotation marks omitted). A few minutes between offenses is “sufficiently close” to be deemed same criminal conduct. State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999).

As discussed above, the record is not clear exactly how much time elapsed between the first and second choking incidents. But the record suggests it was not long—only enough time for Pinkney to release his hold on Smith’s throat, go to the living room, and then come running back into Smith’s bedroom to resume choking her. 2RP 151. The State even conceded the assaults and harassment were an “ongoing incident,” occurring “simultaneously,” with “the strangulations one after the other.” 2RP 27. They were part of an ongoing, continuous assaultive event. The immediately sequential choking incidents therefore occurred at the same time, for purposes of the same criminal conduct analysis.

The final question is, then, whether Pinkney’s intent remained the same from one incident to the next. In Chenoweth, the supreme court considered the “statutory criminal intent” for child rape and incest, and concluded the two crimes involved separate intent. 185 Wn.2d at 223-24. Applying Chenoweth to Pinkney’s case, it is clear the two assaults involved the same statutory criminal intent because they were charged and prosecuted under the same assault provision—assault by strangulation. CP 17, 50-51;

RCW 9A.36.021(1)(g). Both crimes therefore encompassed the same statutory intent to strangle.

However, case law is clear that statutory intent is not dispositive. State v. Haddock, 141 Wn.2d 103, 113, 3 P.3d 733 (2000) (“[C]ounts with identical mental elements, if committed for different purposes, would not be considered the ‘same criminal conduct.’”). Rather, in determining whether two offenses involve the same criminal intent, “trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.” State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This analysis includes whether the crimes were “intimately related or connected to another criminal event,” whether the objective substantially changed between the crimes, whether one crime furthered the other, and whether both crimes were part of the same scheme or plan. Id. at 214-15 (quoting State v. Adcock, 36 Wn. App. 699, 706, 676 P.2d 1040 (1984)); State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Thus, intent in this context is not the mens rea element of the particular crime, but rather the individual’s objective criminal purpose. State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013); State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088 (2014).

The holding of Chenoweth does not change the objective criminal purposes standard articulated in Dunaway. While incest requires knowledge

of the family relationship, child rape is a strict liability offense with no mens rea element. RCW 9A.64.020(1)(a); RCW 9A.44.079(1). This indicates the “same criminal intent” required for same criminal conduct under RCW 9.94A.589(1)(a) must mean the defendant’s criminal purpose rather than the statutory intent, because many crimes do not have statutory intents, like the child rape at issue in Chenoweth. The Chenoweth court also emphasized clear legislative intent to punish rape and incest as separate offenses. 185 Wn.2d at 224. Not so with assault, which is a course of conduct crime. Villanueva-Gonzalez, 180 Wn.2d at 984-85.

In Tili, for instance, Tili was convicted of three counts of first degree rape for three penetrative acts that occurred in quick succession. 139 Wn.2d at 112. First, Tili penetrated the victim L.M.’s anus with his finger. Id. He then used to finger to penetrate her vagina, “separately, and not at the same time.” Id. After forcing L.M. to say she liked the violations, Tili then inserted his penis into her vagina. Id. at 117.

Though the court held these “three independent acts of rape” did not violate double jeopardy, they did constitute same criminal conduct. Id. The court explained the three penetrations were continuous, uninterrupted, and took place over approximately two minutes. Id. at 124. “This extremely short time frame, coupled with Tili’s unchanging pattern of conduct, objectively viewed,” the court held, “render[ed] it unlikely that Tili formed

an independent criminal intent between each separate penetration.” Id. The trial court therefore abused its discretion in failing to treat Tili’s three first degree rape convictions as one crime for offender score purposes. Id.

The Tili court contrasted the facts at issue there with State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997). Grantham raped L.S. Id. at 856. When L.S. did not move afterward, Grantham began kicking her. Id. He then stood over her and threatened her not to tell, while L.S. begged for him to stop and take her home. Id. After this, Grantham proceeded to force L.S. to perform oral sex on him. Id.

The Grantham court held there was evidence of new objective intent between the two rapes. Id. at 859. The court reasoned Grantham had time to pause and reflect on what he did, threaten L.S., and then use new force to commit the second rape. Id. Thus, “the combined evidence of a gap in time between the two rapes and the activities and communications that took place during that gap in time,” as well as “the different methods of committing the two rapes,” led to the conclusion that the two rapes were not the same criminal conduct. Id. at 858.

Pinkney’s case is akin to Tili rather than Grantham. As discussed, Pinkney’s aggressive behavior towards Smith on July 16 appeared to originate from his intoxication and paranoia that Smith was going to call the police on him. 2RP 127-28, 135-36. The specific animus for both choking

incidents, was Smith crying and begging for god. Smith was in her bedroom crying for Jesus to help her, when Pinkney ran in, told her, “You’re going to need Jesus,” pushed her into the closet doors, choked her, and then threatened to kill her. 2RP 130, 136-40, 150. Pinkney then briefly relented and went to the living room. 2RP 151. When Smith resumed crying and begging for god, Pinkney ran back in her bedroom, told her “You going to need god,” pushed her into the closet doors, choked her, and threatened to kill her again. 2RP 151-53.

Unlike Grantham, Pinkney used the same method for committing the assaults: strangulation. No activities or communications occurred during the brief gap in time between the two assaults—Pinkney stopped choking Smith, went to the living room, and then immediately resumed choking Smith in the same manner and location. His objective criminal purpose in both assaults was to retaliate against Smith for crying and to make her fearful he would kill her. There is no evidence Pinkney’s intent changed from one nearly identical strangulation to the next.

The record makes clear the two assaults involved the same time, same place, same victim, and same criminal intent. The trial court therefore abused its discretion in refusing to find the two convictions encompassed the same criminal conduct.

- b. The assaults and harassment encompass the same criminal conduct.

The record likewise demonstrates Pinkney's assault and harassment convictions encompassed the same criminal conduct. The assaults and harassment clearly involved the same victim and same place: Smith, in the bedroom of her apartment. They also involved the same time. With his hands around her neck the first time, Smith testified Pinkney told her, "Bitch, I'll kill you and your mom and spend the rest of my life in prison." 3RP 150. With his hands around her neck the second time, Smith testified Pinkney again told her, "I told you bitch I will kill you." 2RP 153. The assaults and harassment therefore occurred simultaneously.

Below, the State conceded the assaults and harassment involved the same time, place, and victim. In opposing Pinkney's pretrial motion to sever, the State emphasized the offenses occurred simultaneously, "on the same date and the same time." 2RP 27; see also (State conceding at sentencing that the offenses "occurred at the same time"). The State pointed out Pinkney "harassed Ms. Smith while he strangled her." Supp. CP__ (Sub. No. 54, State's Response to Defense Motion to Sever, 5). The State argued the offenses "occurred so close in time it would be impossible for the State to try them separately. Supp. CP__ (Sub. No. 54, State's Response to Defense Motion to Sever, 5); accord 2RP 27.

The State also essentially conceded the assaults and harassment involved the same criminal purpose by furthering one another. For instance, the State argued in closing Pinkney's threats to kill "tell you what his intent was. His intent was to strangle her." 3RP 369. The State further emphasized the threats to kill were "made both times during both occasions where he was strangling her, where he had his hand around her throat." 3RP 370. The State likewise agreed at sentencing "certainly the strangulation contributed to her fear of his threats being carried out." 3RP 511.

The only distinction the State made between the assaults and harassment was other evidence contributing to Smith's reasonable fear the threats would be carried out. 3RP 511. Specifically, the State emphasized, "her fear also had to do with all of the prior history." 3RP 511. But it is not at all clear how the prior abusive history changed Pinkney's criminal purpose of threatening to kill Smith while choking her.

To prove second degree assault, the State had to prove Pinkney intentionally assaulted Smith by strangulation. CP 50-51. The intent required for assault can be proved in three ways: (1) an intentional touching or striking of another person that is harmful or offensive, (2) an act done with intent to inflict bodily injury upon another, or (3) an act done with

intent to create apprehension and fear of bodily injury.⁴ CP 46. “Strangulation” includes compressing a person’s neck with the intent to obstruct that person’s blood flow or ability to breathe. CP 49.

To prove felony harassment, the State had to prove (1) Pinkney knowingly threatened to kill Smith or another person, and (2) Pinkney’s words or conduct placed Smith in reasonable fear the threat would be carried out. CP 56; RCW 9A.46.020. A “threat” means “to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.” CP 54.

These definitions demonstrate the intent in committing assault is not necessarily different than the intent in committing harassment. Here, the record establishes the intents were one and the same. Pinkney compressed Smith’s neck, making her unable to breathe, while he also threatened to kill her and her mother. 2RP 150, 153. The assault and harassment furthered one another by putting Smith in fear Pinkney was going to kill her. The threat to kill helped establish Pinkney’s intent to strangle, while the strangulation made Pinkney’s threat to kill credible.

Pinkney’s case is distinguishable from, for instance, State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007). There, Wilson broke down the

⁴ Notably, these three intents are defined in the common law, not by statute. State v. Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994).

door to Saunders's home, pulled her out of bed by her hair, and kicked her in the stomach. Id. at 614. When Saunders said she was going to call the police, Wilson left the house to warn his friends outside. Id. at 614-15. He then reentered the house, picked up a stick of wood from the broken door, and threatened to kill Saunders. Id. at 615.

The court of appeals held Wilson's resulting assault and felony harassment convictions did not amount to same criminal conduct. Id. at 603. Wilson reentered Saunders's home "with a newly formed and separate intent to harass Saunders verbally." Id. at 615. The two crimes "were separated in time, providing opportunity for completion of the assault and ending Wilson's assaultive intent, followed by a period of reflection and formation of a new, objective intent upon reentering the house to threaten Sanders and to harass her." Id.

By contrast, the evidence demonstrated Pinkney assaulted and threatened Smith simultaneously. Unlike Wilson, the offenses encompassed a "continuing, uninterrupted sequence of conduct." Porter, 133 Wn.2d at 186; see also State v. Miller, 92 Wn. App. 693, 707-08, 964 P.2d 1196 (1998) (attempted theft and assault convictions same criminal conduct where defendant assaulted police officer in order to deprive the officer of his weapon); State v. Anderson, 2 Wn. App. 453, 464, 864 P.2d 1001 (1994) (escape and assault convictions same criminal conduct where defendant

assaulted the corrections officer to further his escape from custody). That Smith was also fearful of Pinkney because of their prior history does not change the fact that the assaults and harassment occurred at the same time and indisputably furthered one another.

The trial court erred in finding the assaults and harassment did not encompass the same criminal conduct, where they involved the same place, time, victim, and criminal intent.

c. Remand for resentencing is the appropriate remedy.

Scoring the assault and harassment convictions as a single offense would lower Pinkney's offender score to 14 on the assault and to 13 on the harassment. Supp. CP__ (Sub. No. 99, Statement of Prosecuting Attorney). With an offender score still above "9 or more," Pinkney's standard range sentence does not change even with the same criminal conduct determination. RCW 9.94A.510.

"A correct offender score must be calculated before a presumptive or exceptional sentence is imposed." State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) [hereinafter Tili II]. However, the sentencing court need not calculate a precise offender score that exceeds nine points unless "considering the imposition of an exceptional sentence based on reasons related to the offender score." State v. Lillard, 122 Wn. App. 422, 433, 93 P.3d 969 (2004). Typically, remand for resentencing is unnecessary where it

is apparent the sentencing court would simply impose the same sentence again. Tili II, 148 Wn.2d at 358.

Despite these rather forgiving standards, remand is necessary. Although not required to do so, the trial court determined a precise score above nine. CP 124. That score is wrong, and it is inscribed on Pinkney's judgment and sentence for consideration in any future cases. Thus, minimally, Pinkney's offender score should be corrected.

Moreover, a future sentencing court would be bound by the current sentencing court's same criminal conduct determination. RCW 9.94A.525(5)(a)(i) ("Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score."). A current finding of same criminal conduct could therefore impact Pinkney's offender score in the future.

Finally, it is impossible to conclude the trial court would have imposed the same sentence with a reduced offender score. The trial court imposed an exceptional sentence of 96 months, 12 months above the standard range on the two assault convictions. CP 124-25; 4RP 529-30. The exceptional sentence was based solely on the rapid recidivism aggravating factors. 4RP 529-30; CP 112. The court nowhere stated it would impose the

same exceptional sentence even with a finding that the current felonies encompassed the same criminal conduct. See 4RP 528-30; CP 112.

The trial court should be given the opportunity to reconsider the exceptional sentence following a finding of same criminal conduct. This Court should therefore reverse Pinkney's sentence and remand for resentencing. Tili, 139 Wn.2d at 128.

3. THE \$200 CRIMINAL FILING FEE AND \$100 DNA FEE MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE BASED ON PINKNEY'S INDIGENCY.

In Ramirez, 426 P.3d at 717, 722, the Washington Supreme Court discussed and applied House Bill (HB) 1783, which took effect on June 7, 2018 and applies prospectively to cases on direct appeal. HB 1783 amended RCW 10.01.160(3) to mandate: "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 6. The bill also amended RCW 36.18.020(2)(h) to prohibit imposing the \$200 criminal filing fee on indigent defendants. Laws of 2018, ch. 269, § 17.

Under RCW 10.101.010(3)(a), a person is indigent if he or she receives certain types of public assistance, including supplemental security income (SSI). A person is also indigent under RCW 10.101.010(3)(c) if he or she receives an annual income after taxes of 125 percent or less of the current federal poverty level.

This amendment “conclusively establishes that courts do not have discretion to impose such LFOs” on individuals “who are indigent at the time of sentencing.” Ramirez, 426 P.3d at 723. In Ramirez, the court struck discretionary LFOs and the \$200 criminal filing fee because Ramirez was indigent at the time of sentencing, i.e., his income fell below 125 percent of the federal poverty guideline. Id.

At sentencing, Pinkney was ordered to pay the previously mandatory \$200 criminal filing fee and \$100 DNA fee. CP 127; 4RP 531. However, Pinkney testified at trial that he is unemployed and receives SSI. 4RP 336. Pinkney’s motion for indigency likewise stated he receives SSI and has no other income or assets. CP 116-18. The trial court accordingly found Pinkney to be indigent and allowed him to seek appellate review at public expense. CP 119-20. HB 1783 applies prospectively to Pinkney because his direct appeal is still pending. Because Pinkney was indigent at the time of sentencing, the sentencing court improperly imposed the \$200 criminal filing fee. Ramirez, 426 P.3d at 723.

HB 1783 also amended RCW 43.43.7541 to read, “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction.” Laws of 2018, ch. 269, § 18 (emphasis added). This amendment “establishes that the DNA database fee is no

longer mandatory if the offender's DNA has been collected because of a prior conviction." Ramirez, 426 P.3d at 721.

Prior to amendment, RCW 43.43.7541 required collection of a biological sample for purposes of DNA identification analysis from every adult convicted of a felony. See Laws of 2002, ch. 289, §§ 2, 4 (mandatory biological sampling took effect on July 1, 2002). Pinkney has multiple prior felony convictions. CP 123. He therefore would necessarily have had his DNA sample collected pursuant to former RCW 43.43.7541.

Because Pinkney's DNA sample was previously collected, the DNA fee in the present case is no longer mandatory under RCW 43.43.7541. The fee is discretionary. Under the current version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants. The sentencing court therefore improperly imposed the \$100 DNA fee.

This Court should remand for the \$200 criminal filing fee and \$100 DNA fee to be stricken from the judgment and sentence because Pinkney was indigent at the time of sentencing. Ramirez, 426 P.3d at 723.

4. A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Pinkney was convicted of only one count of felony harassment. CP 18 (third amended information), 75 (verdict form). However, the judgment and sentence shows two convictions for felony harassment, while failing to

show the misdemeanor conviction for interfering with domestic violence reporting. CP 121-22. This is clearly a clerical error. The proper remedy is to remand for correction of this clerical error. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

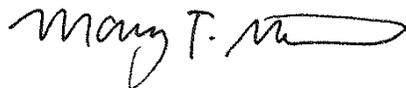
D. CONCLUSION

For the reasons discussed above, this Court vacate one of the assault convictions because it violates double jeopardy. This Court should also remand for a finding that the harassment and remaining assault convictions constitute the same criminal conduct. Finally, this Court should remand for the trial court to strike the \$200 criminal filing fee and \$100 DNA fee, as well as correct a clerical error in the judgment and sentence.

DATED this 29th day of November, 2018.

Respectfully submitted,

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November 29, 2018 - 10:32 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51961-5
Appellate Court Case Title: State of Washington, Respondent v. Edward Junior Pinkney, III, Appellant
Superior Court Case Number: 17-1-01268-1

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