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No. 51961-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD PINKNEY, JR.

Appellant.

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

The Honorable John C. Skinder, Judge
Cause No. 17-1-01268-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Pinkney's convictions for two counts of assault in the second degree by strangulation constitutes double jeopardy where the testimony at trial shows that Pinkney stopped the first assault and left the room prior to returning to commit the second.

2. Whether the two counts of assault in the second degree constitute the same criminal conduct where the two offenses were interrupted by Pinkney leaving the room, which gave him the opportunity to rethink his criminal purpose.

3. Whether the trial court abused its discretion in determining that the crimes of assault in the second degree by strangulation and felony harassment were not the same criminal conduct given that the statutory intent required for each offense is different.

4. Whether any error in not treating offenses as same criminal conduct was harmless given that Pinkney's offender far exceeds 9 and the imposition of an exceptional sentence was not based on the calculation of his offender score.

5. Whether State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714, (2018), requires an order striking the \$200 filing fee and the \$100 DNA fee.

6. Whether this Court should remand the matter for the sole purpose of correcting clerical errors in the judgment and sentence.

7. Whether sufficient evidence supported Pinkney's convictions for assault in the second degree when the evidence is viewed in a light most favorable to the State.

B. STATEMENT OF THE CASE.

1. Procedural history

The State charged the Appellant, Edward Junior Pinkney, III, with multiple domestic violence charges based on incidents that

occurred on July 16, 2017. CP 3-4. On October 9, 2017, an evidentiary hearing was held at which the trial court found that several prior acts of domestic violence were admissible pursuant to ER 404(b). CP 15-16. The State filed a third amended information alleging two counts of assault in the second degree by strangulation, one count of felony harassment-threat to kill, one count of theft in the third degree, one count of third degree malicious mischief, and one count of interfering with reporting domestic violence. CP 17-18. The State alleged that all of the crimes involved domestic violence, and further alleged that counts one, two and three were part of an ongoing pattern of abuse and occurred shortly after Pinkney had been released from incarceration. CP 17-18.

Trial proceeded on the charges listed in the third amended information on November 27, 2017. RP 2.¹ At the start of trial, the defense moved to bifurcate the proceedings and requested that the trial court sever the harassment charge from the assault charges. CP 19-23; RP 21, 35. The trial court denied the motion to sever and granted the motion to bifurcate the proceedings. RP 74, 76.

¹ The Verbatim Report of Proceedings from the trial is reported in three volumes, which are sequentially numbered. For purposes of this brief, the citations to those volumes will be cited as RP.

Following trial, the jury convicted Pinkney of all counts and found that counts one through five involved family or household members. RP 426-428; CP 71-81. The jury then considered the aggravating factors in the bifurcated proceeding, ultimately concluding that counts one, two and three were aggravated domestic violence offenses and occurred shortly after Pinkney had been released from incarceration. RP 490-491; CP 99-104.

Prior to sentencing, the defense filed a memorandum arguing that the two assaults in the second degree charges were the same offense and thereby double jeopardy prohibited conviction on both counts and that all three felony counts constituted the same criminal conduct. CP 110. The State argued that double jeopardy did not apply and that the offenses did not constitute the same criminal conduct. RP 510-513. The trial court found, "that counts one, two and three are not same course of criminal conduct, and under the case law the court is also finding that double jeopardy does not apply to counts, one two and three." RP 528. The court ultimately sentenced to Pinkney to 96 months on counts one and two, exceeding the standard range by 12 months based solely on the aggravating factor that the offenses

had occurred shortly after release from incarceration. RP 529-530; CP 124-125. This appeal follows.

2. Substantive history

Sharon Smith had been in a dating relationship with Pinkney. RP 119-120. Smith described the relationship as “rough” and “controlling,” with disrespect and name-calling. RP 120. Prior to the charged incident on July 16, 2017, Smith indicated that Pinkney would threaten to hit her “basically once a week” and that she would cower away from him. RP 121-122.

On July 15, Smith indicated that she and Pinkney went into town and Pinkney was calling her names on the bus and pushed her in the back as she got off the bus. RP 122-124. Pinkney purchased a fifth of vodka and proceeded to drink it when they arrived back at Smith’s apartment. RP 124-125. Smith testified that Pinkney became aggressive and “got demonic” and started threatening her when she asked him to leave. RP 126. Smith said that Pinkney aggressively asked her if she was going to call the police about him. RP 128.

Before 5 A.M. on July 16, Smith and Pinkney went outside and spoke with police officers who were at the apartment complex. RP 214. Smith indicated that she told one of the officers “he’s

torturing me” while the officers were encountering a different person. RP 132. Smith then stated, “Watch this. When we go back over there, watch,” and asked Pinkney for a cigarette, following which, Smith indicated that Pinkney started cussing her out. RP 133.

Pinkney and Smith returned to the apartment. RP 134. Smith said she went back inside because of a threat that was made and indicated that she was afraid of what would happen if she didn't. RP 134. Officer Jordan Reisher, of the Olympia Police Department, testified regarding the interaction. RP 227, 229. Officer Reisher indicated that he was at the apartment with his partner for an unrelated call and Smith and Pinkney started talking with them. RP 229. Officer Reisher said that Smith told him that Pinkney had been yelling at her and that he was under the influence. RP 231. When Officer Reisher asked Smith if she wanted him to do something about it, she told him, “Just play it off like I didn't tell you anything.” RP 231. Officer Reisher recalled Smith asking for a cigarette and said that Pinkney and Smith went back inside. RP 232.

After going back into the residence, Smith called 911 but hung up because she “was scared he was going to come into the

room and catch” her. RP 135. 911 called back and Smith stated, “Don’t call back.” RP 135. Smith stated that Pinkney was in the hallway and after they called back he came into the room and said “Bitch, you calling the police on me?” RP 136.

Smith indicated that the events became physical, testifying, that Pinkney ran into the room, stated “Bitch, I am going to give you something to cry for,” and as she jumped up he grabbed her around the neck and pushed her into the closet. RP 136. During the incident, Pinkney used both hands. RP 137. Smith testified that while he had his hands around her neck, Pinkney was pushing forward and squeezing “with all his hands and his palms too”. RP 138-139. Smith indicated that she was unable to breath while this was happening. RP 140.

When Pinkney pushed Smith into the closet she hit the doors, damaging them. RP 140, 147, 149. A trash can was also broken during the incident. RP 143, 147. Smith testified that while Pinkney was squeezing her neck and pushing her, he said, “Bitch, I’ll kill you and your mom and spend the rest of my life in prison.” RP 149-150. Smith indicated that she believed him because of his violent behavior stating, “I lived with this man. And yeah. I believed him.” RP 150. Smith said that the squeezing of her neck

lasted long enough for her to gasp when he let her catch her breath. RP 151.

After Pinkney stopped squeezing Smith's neck, he left the room. RP 151. Smith indicated that he went to the living room of the apartment during which time she got in a fetal position on the bed crying. RP 151. Smith testified that she next had contact with Pinkney when he "ran back in the room and choked [her] for the second time." RP 151. Smith indicated that she was crying and begging for god and asking him to leave when he came back in and said, "You going to need god." RP 151.

At that point, Smith jumped up again and Pinkney put her in the same position as before. RP 151. Smith said that the second incident was worse than the first because he was squeezing tighter causing even more difficulty breathing than the first incident. RP 152. Smith stated, "when I could hardly breathe I was begging him to let me go, and eventually after a couple of seconds he did the push back and he let me go." RP 153. During the incident, he told her, "I told you bitch I will kill you." RP 153.

Smith testified that Pinkney's demeanor was "totally different" during the second incident, "like he would do it you know." RP 154. She said that the second incident was longer than the first

and lasted "10 or 15 seconds." RP 154. When Pinkney returned to the living room, and then came back into the bedroom, Smith said that she made a run for it, grabbed a bat by the door and ran across the street. RP 155.

When Pinkney came outside, Smith stated that he had her cellphone, and stated, "yeah, bitch. I got your phone," following which she ran back into the apartment and found the adaptor for her home phone. RP 156. She indicated that he had taken the adaptor earlier when he was accusing her of calling the police. RP 157-158. Smith locked the door and used the house phone to call 911. RP 171. The 911 call was admitted at trial as Exhibit 11 and played for the jury. RP 173. During the call, Smith stated, "he choked me out twice in my closet," and "he threatened to kill my whole family." RP 176, 178.

Officer Brenda Anderson of the Olympia Police Department responded to the 911 call. RP 245. Officer Anderson made contact with Smith and noted "she was very disheveled," and that "she was crying" and "was flustered." RP 247. Officer Anderson testified that "there was some redness around the neck area and [Smith's] chest," but she did not see a lot. RP 274. Officer

Anderson stated, that she really couldn't see bruises, but the lighting in the apartment and Smith's skin is darker. RP 274-275.

C. ARGUMENT.

1. The two counts of Assault in the Second Degree were not the same offense, therefore the convictions for both are not prohibited by double jeopardy.

Double jeopardy claims are reviewed de novo. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). The Fifth Amendment to the United States Constitution and Washington Constitution art. I, § 9, provide coextensive protection against being twice prosecuted for the same offense. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). That protection precludes more than one punishment for the same offense. Villanueva-Gonzalez, 180 Wn.2d at 980.

Whether a defendant has been punished more than once for the same crime depends on what the legislature intended as the punishable act. State v. Leyda, 157 Wn.2d 335, 343, 138 P.3d 610 (2006). When a defendant has been convicted of multiple counts of the same statute, the question is what the legislature intended to be the unit of prosecution. Villanueva-Gonzalez, 180 Wn.2d at 980. If only one unit of prosecution of the crime has been committed, there can be only one punishment. State v. Adel, 136 Wn.2d 629, 634,

965 P.2d 1072 (1998). If the statute does not define the unit of prosecution, or if the intent of the legislature is not clear, the ambiguity must be resolved in favor of the defendant. Lyeda, 157 Wn.2d at 343.

The Washington Supreme Court has addressed the unit of prosecution of assault, and concluded that it is a course of conduct crime. Villanueva-Gonzalez, 180 Wn.2d at 983. It reached this result after determining that the legislature did not specify a unit of prosecution and then examining the common law. Id. at 986. Based upon the ambiguity of the common law definition of assault and after considering authority from other jurisdictions, the court applied the rule of lenity and adopted the interpretation most favorable to the defendant. Id. The court said that this interpretation avoids “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).

Once the court determines the unit of prosecution, it must then conduct a factual analysis to determine if the facts show one or more than one unit of prosecution. State v. Bobic, 140 Wn.2d 250, 266, 996 P.2d 610 (2000). The court in Villanueva-Gonzalez, having determined that assault is a course of conduct crime, said:

There is no bright-line rule for when multiple assaultive acts constitute one course of conduct. While any analysis of this issue is highly dependent on the facts, courts in other jurisdictions generally take the following factors into account:

- 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.

We find these factors useful for determining whether multiple assaultive acts constitute one course of conduct. 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.

Villanueva-Gonzalez, 180 Wn.2d at 985.

Viewing the totality of the circumstances in this case, the two incidences of assault in the second degree were not the same course of conduct because they were separated by Pinkney leaving the room to go to the living room. RP 151. Whether the initial course of conduct was interrupted, failed, or abandoned is a factor in determining whether each course of conduct is separate and distinct. State v. Boswell, 185 Wn.App. 321, 331, 340 P.3d 971 (2014).

In Boswell, the defendant was convicted of two counts of Attempted First Degree Murder and lost his challenge for double jeopardy. 185 Wn.App. at 337. Boswell first gave his girlfriend poisoned tea, but when that failed by only causing her to vomit and fall asleep on the couch, he then shot her in the head. Id. at 325-26. Like assault, the court held that attempted murder was a “course of conduct” crime, and that while all of the defendant’s actions were done with the one purpose of killing the victim, they were separate “courses of conduct.” Id. at 332. In coming to this conclusion, the court cited the fact that different methods were used, that the attempts were separated by “a period of time,” that the second came only after the first had failed, and that the defendant had a period of time “to consider his actions.” Id.

The break in time and the opportunity for Pinkney to form his intent to assault Ms. Smith anew lead to the conclusion that the two assaults were not the same course of conduct. Between the first and the second strangulation, Smith testified that Pinkney left the room and went back to the living room. She then curled up on the bed and cried at which point he came rushing back in, the apparent motivation being that he was upset by her crying. RP 151. While the specific amount of time that elapsed does not appear in the

record, Smith's testimony that Pinkney's demeanor "was totally different" during the second assault demonstrates that Pinkney's actions were interrupted by his exit from the room and he had the opportunity to rethink his criminal intention. RP 154.

The break in the assault where Pinkney left the room distinguishes the facts of this case from cases where a double jeopardy violation has been found. In Villanueva-Gonzalez, the defendant pulled his girlfriend out of a room, hit her head with his forehead, breaking her nose, and then grabbed her by the neck and held her against some furniture. 180 Wn.2d at 978. In In re Pers. Restraint of White, the defendant struck the victim in the back of the head while telling her she was going to die, strangled her and then pointed a gun at her. 1 Wn.App.2d 788, 790, 407 P.3d 1173 (2017). Unlike those cases, the two assaults here were interrupted by Pinkney going to the living room.

Pinkney relies on the unpublished opinion in State v. Carpenter, No. 43878-0-II, 2015 LEXIS 1966, where this Court found trial testimony that Carpenter briefly relented the choking of the victim when witnesses intervened unpersuasive.² The facts of

² Under GR 14.1, unpublished opinions have no precedential value, are not binding on any court, and may be cited only for such persuasive value as the Court deems appropriate.

that case were set forth in a prior unpublished decision, State v. Carpenter, No. 43878-0-II, 2014 Wash.App. LEXIS 353 (2014). There, two incidents of assault by strangulation were interrupted when a relative pulled the defendant away from the victim. The relative then left the room, and returned to find the defendant continuing to strangle the victim. Id. at 5. Those facts are quite different from this case in that it was the relative, not the defendant who left the room.

Pinkney committed two separate assaults, separated by his leaving the room and Smith curling up on the bed and crying. While the exact time between the two assaults is not evident from the record, the totality of the circumstances support the conclusion that the offenses were not the same course of conduct for the purpose of double jeopardy.

2. Counts one and two were not the same criminal conduct because Pinkney left the room and had an opportunity to rethink his criminal intent.

When calculating an offender score, RCW 9.94A.589(1)(a) provides that all “current and prior convictions [should be treated] as if they were prior convictions for the purpose of the offender score,” but recognizes the exception that “if the court enters a finding that some or all of the current offenses encompass the

same criminal conduct then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a) (emphasis added).

The “same criminal conduct” “means two or more crimes that require the same criminal intent, involve the same victim, and are committed at the same time and place.” All of these elements must exist in order for a court to make a finding of same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Courts narrowly construe this analysis to disallow most assertions and a trial court’s finding on the issue is reviewed under an abuse of discretion standard. Porter, 133 Wn.2d at 181 (1997); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999). Abuse occurs if the trial court “arbitrarily counted the convictions separately.” Haddock, 141 Wn.2d at 110.

To determine if two crimes share a criminal intent, the Court must focus on whether the defendant's intent, viewed objectively, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). The Court must also consider whether one crime furthered the other. State v. Lessley, 118 Wn.2d

773, 778, 827 P.2d 996 (1992). Thus, it 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).

In this case, the Defendant committed one strangulation before stopping, leaving the room, hearing Ms. Smith cry, and forming the objective intent to come back and commit a second strangulation. The case is not dissimilar from State v. Grantham, where the defendant raped the victim once before pausing, having a brief verbal and physical interaction with her, and then raping her a second time. 84 Wn. App. 854, 856, 932 P.2d 657 (1997). In finding that the brief lapse in time was critical to the determination of same criminal conduct, the court stated that,

“Grantham[...]had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. The evidence also supports the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other.”

Id. at 859. Here, as was the case in Grantham, because the Defendant chose to commit the second act after leaving the room, the two counts of assault in the second degree are not the same

criminal conduct. The trial court did not abuse its discretion when it determined that the two offenses were not the same criminal conduct.

3. Though committed at the same time and place, against the same victim, the crime of harassment was not the same criminal conduct as the crimes of assault in the second degree.

The crime of assault in the second degree by strangulation requires that the defendant assaults another by strangulation or suffocation. RCW 9A.36.021(1)(g). The crime of felony harassment-threat to kill, requires, in this context, that without lawful authority, the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened or any other person and by words or conduct places the person threatened in a reasonable fear that the threat will be carried out, and that the threat is a threat to kill the person threatened or any other person. RCW 9A.46.020(1)(a)(1), (1)(b), and (2)(b)(ii). The assault requires that the perpetrator have the intent to physically harm the victim, while the harassment only requires the intent to threaten the victim.

In State v. White, 136 Wn.App. 596, 615, 150 P.3d 144 (2007), this Court considered whether the crimes of assault and

harassment involved the same criminal intent and noted, “these two crimes’ respective statutes define different criminal intents.” While the State acknowledges, as noted above, that the mens rea for the respective offenses is not dispositive, State v. Phuong, 174Wn.App. at 546, the fact that the two crimes involved different statutory intents is informative when deciding whether the trial court abused its discretion in finding that the offenses were not the same criminal conduct. The trial court’s conclusion that the offenses did not involve the same criminal intent was not an abuse of discretion because one act was intended to physically harm the victim while the other act was intended to verbally harass her.

4. If this Court determines that any of the offenses constitute the same criminal conduct, remand for resentencing is unnecessary because the offender score for each offense far exceeds 9.

As noted in the Brief of Appellant, scoring the assaults and the harassment as a single offense would only lower his offender score on the assault to 14 and to 13 on the harassment. With an offender score of “9 or more,” Pinkney’s standard range sentence does not change even if this Court determines that the offenses constitute the same criminal conduct. RCW 9.94A.510.

The Sentencing Reform Act (SRA) does not require the trial

court to specifically calculate an offender score that far exceeds nine, “so long as the court is not considering the imposition of an exceptional sentence based on reasons related to the offender score.” State v. Lilliard, 122 Wn.App. 422, 433, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005); *Overruled in part (on other grounds)*, State v. Tyler, 191 Wn.2d 205, 215, 422 P.3d 436 (2018). An exceptional sentence may be upheld even if the trial court should have considered some of the offenses as same criminal conduct if the offender score exceeds nine. State v. Bobenhouse, 166 Wn.2d 881, 896-897, 214 P.3d 907 (2009)(any error in not treating Bobenhouse’s crimes as the “same criminal conduct” was harmless).

Here, the trial court imposed an exceptional sentence based only on the jury’s finding that the offenses occurred shortly after release from incarceration. RP 529-530. As in Bobenhouse, error, if any occurred, in not treating the offenses as same criminal conduct was clearly harmless and would not require that this Court remand this matter for resentencing.

5. The State does not oppose an order striking the \$200 filing fee and the \$100 DNA fee pursuant to the holding in *State v. Ramirez*.

Legislative amendments to RCW 43.43.7541 and RCW 36.18.020(2)(h), which took effect on June 7, 2018, require that costs as described in RCW 10.01.160, which include the \$200 filing fee, “shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c), and that the \$100 DNA fee not be collected if the State has previously collected the offender’s DNA as a result of a prior conviction. Laws of 2018, ch. 269, § 17.

The amendments apply prospectively to defendants whose appeals were pending when the amendment was enacted. State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714, (2018). However, the “crime victim penalty assessment under RCW 7.68.035 may not be reduced, revoked, or converted to community restitution hours.” RCW 10.01.180(5). RCW 26.50.110(1)(b)(ii) states that the trial court “shall impose a fine of fifteen dollars, in addition to the any penalty or fine imposed, for a violation of a domestic violence protection order issued under this chapter.”

The record is silent in regard to whether or not Pinkney has previously submitted a sample of his DNA to the State crime lab. Pinkney argues that because he has prior felony convictions, the State clearly must have previously collected his DNA, however,

defendants do not always submit to DNA collection despite being ordered to do so. Brief of Appellant, at 38; State v. Thornton, 188 Wn.App. 317, 372, 353 P.3d 642 (2015). In State v. Thibodeaux, no. 76818-2-1, (Slip. Op.)(November 26, 2018), Division I of this Court rejected a similar argument as that made by Pinkney regarding the DNA fee, stating, “the existing record does not establish that the State has already collected Thibodeaux’s DNA.” Id. at 7. The fact of a prior conviction alone is not enough to show actual submission of a DNA sample. State v. Lewis, 194 Wn.App. 709, 379 P.3d 129, *review denied*, 186 Wn.2d 1025, 385 P.3d 118 (2016).

Claims of error on direct appeal must be supported by the existing record on review. RAP 9.1. However, the State has checked its records and noticed that there is an indication that Pinkney has previously provided a DNA sample. While the State does not concede error based on the record, in the interest of expedient justice, the State does not oppose a remand for a ministerial order striking the \$100 DNA-collection fee.

In future cases, where the State’s records show the appellant had not previously submitted a sample, the State

reserves the ability to object pursuant to Thibodeaux, Thornton and Lewis.

It is clear that the trial court properly ordered the \$200 filing fee and the \$100 DNA fee prior to the legislative amendments which took effect in June of last year. Based on the holding in Ramirez that those amendments apply prospectively to cases which were on appeal at the time the amendments took effect, the State does not oppose an order striking the \$200 filing fee and \$100 DNA fee.

6. The State does not oppose an order remanding for the sole purpose of correcting the clerical error in the Judgment and Sentence.

The State concedes that Pinkney was convicted of only one count of felony harassment. CP 18, 75. The judgment and sentence entered does contain two significant clerical errors in that it includes two convictions for felony harassment and does not include the gross misdemeanor offense of interfering with reporting of domestic violence that Pinkney was convicted of at trial. CP 121-122; 74; 81. As Pinkney correctly notes, the proper remedy for clerical errors in the judgment and sentence is to remand for the sole purpose of correcting them. In re Pers. Restraint of Mayer, 128 Wn.App. 694, 708, 117 P.3d 353 (2005).

7. Sufficient evidence was presented to support the convictions of assault in the second degree.

In his Statement of Additional Grounds, Pinkney alleges that the State fail to present sufficient evidence to support his convictions for assault in the second degree by strangulation. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d. at 201. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

When viewed in a light most favorable to the State, sufficient evidence was presented to support the convictions for assault in the second degree. Smith testified that Pinkney ran into the room,

stated "Bitch, I am going to give you something to cry for," and as she jumped up he grabbed her around the neck and pushed her into the closet. RP 136. During the incident, Pinkney used both hands. RP 137. Smith testified that while he had his hands around her neck, Pinkney was pushing forward and squeezing "with all his hands and his palms too". RP 138-139. Smith indicated that she was unable to breathe while this was happening. RP 140.

After Pinkney stopped squeezing Smith's neck, he left the room. RP 151. Smith indicated that he went to the living room of the apartment during which time she got in a fetal position on the bed crying. RP 151. Smith testified that she next had contact with Pinkney when he "ran back in the room and choked [her] for the second time." RP 151. Smith indicated that she was crying and begging for god and asking him to leave when he came back in and said, "You going to need god." RP 151.

At that point, Smith jumped up again and Pinkney put her in the same position as before. RP 151. Smith said that the second incident was worse than the first because he was squeezing tighter causing even more difficulty breathing than the first incident. RP 152. Smith stated, "when I could hardly breathe I was begging him to let me go, and eventually after a couple of seconds he did the

push back and he let me go.” RP 153. During the incident, he told her, “I told you bitch I will kill you.” RP 153. Clearly the jury found Smith more credible than Pinkney. The evidence presented was sufficient to support the convictions.

D. CONCLUSION.

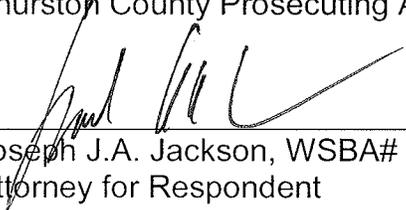
Pinkney’s two convictions for assault in the second degree do not violate the prohibition against double jeopardy because Pinkney completed the first act of assault in the second degree, left the room, and then later returned to commit the second offense. Similarly, the trial court did not abuse its discretion in finding that the break in time between the offenses was sufficient for a determination that the two offenses were not the same criminal conduct. The trial court did not abuse its discretion in determining that the crime of harassment was not the same criminal conduct as the two assaults because the crimes have different statutory intents.

If the trial court erred in any way by finding that the offenses were not “same criminal conduct” any error was harmless because Pinkney’s offender score far exceeded nine and the exceptional sentence was not based on his offender score. The State does not

oppose an order remanding the matter for entry of an order striking the \$200 filing fee and the \$100 DNA fee and an order correcting the clerical errors in the judgment and sentence. Sufficient evidence supported Pinkney's convictions for assault in the second degree, therefore, his SAG claim is without merit. The State requests that this Court affirm all other aspects of Pinkney's sentence.

Respectfully submitted this 24th day of January, 2019.

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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 24TH day of January, 2019, at Olympia, Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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