

FILED
NOV 04 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 29128-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

RICKY DESHAWN THOMAS
Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. The trial court failed to recognize that continuing assaultive behavior resulting in first degree burglary and felony violation of a no contact order amounts to “same criminal conduct” for sentencing purposes.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does a “same criminal conduct” analysis apply when continuing assaultive behavior constitutes the underlying basis for convictions of first degree burglary and felony violation of a no contact order?

STATEMENT OF CASE

Ricky Deshawn Thomas was charged with first degree burglary/domestic violence (DV) by an Information filed on December 9, 2009. (CP 1)

An Amended Information was filed on March 4, 2010. It contains seven (7) counts. Count I retains the first degree burglary-DV offense (an alleged push). Count II is the felony no contact order violation based upon assault (grabbing another person’s face). Count III alleges second degree assault (bruising another person’s arm). It also contains a DV tag.

Count IV is witness tampering.

Counts V, VI and VII are no contact order violations based upon telephone calls. (CP 11)

Prior to trial a Second Amended Information was filed. The only changes in this Information were the addition of an aggravating factor to Count I (pregnancy) and a reduction of Count III to third degree assault (by a door). (CP 63).

Mr. Thomas pled guilty to Counts II, IV, V, VI and VII on May 17, 2010. It was an Alford plea. (CP 67)

A jury found Mr. Thomas guilty of first degree burglary-DV and third degree assault-DV. It returned a special verdict finding that the victim was pregnant. (CP 197; CP 198; CP 199).

Judgment and Sentence was entered on June 4, 2010. The standard range sentence on first degree burglary with an offender score of 4 is 36 to 48 months. The trial court imposed an exceptional sentence of 60 months based upon the jury's special verdict. All other counts were sentenced within the standard range and assigned the correct community custody. (CP 253).

Mr. Thomas filed his Notice of Appeal as to Counts I and III on June 4, 2010. (CP 265).

SUMMARY OF ARGUMENT

A continuing course of assaultive conduct, underlying charges of first degree burglary and felony violation of a no contact order, requires a “same criminal conduct” analysis for purposes of sentencing.

Mr. Thomas’s convictions constitute the “same criminal conduct” under RCW 9.94A.589(1).

Mr. Thomas needs to be resentenced based upon an offender score of 2 as opposed to an offender score of 4.

ARGUMENT

Mr. Thomas maintains that he was improperly sentenced. It is his position that Counts I, II and III of the Second Amended Information constitute the “same criminal conduct” based upon underlying continuous assaultive behavior.

RCW 9.94A.525(1)(a) provides:

A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.

RCW 9.94A.589(1)(a) states, in part:

... [W]henver a person is to be 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: **PROVIDED**, 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... . “Same criminal conduct,” as used in this subsection, means two or more crimes **that require the same criminal intent, are committed at the same time and place, and involve the same victim. ...**

(Emphasis supplied.)

Mr. Thomas went to Shanda Howard’s apartment on December 4, 2008. He wanted to pick up his clothes. When Ms. Howard opened the door he rushed in, grabbed her face, pushed her against a wall and began choking her. A no contact order was in place. (RP 13, ll. 16-18; RP 21, ll. 16-25; RP 24, ll. 2-18; ll. 21-23).

As the struggle continued Ms. Howard and Mr. Thomas ended up on a couch. She began pounding her foot on the floor to alert her downstairs neighbor, Ladene Holloway. (RP25, ll. 8-14; RP 41, l. 23 to RP 42, l. 4; RP 42, ll. 19-22).

Ms. Holloway ran upstairs. Ms. Howard was screaming. She saw that Ms. Howard’s arm was caught in the door. Someone was trying to pull her back inside the apartment. (RP 25, ll. 17-29; RP 43, ll. 1-10).

Ms. Holloway put her foot in between the door jam and the door to relieve the pressure on Ms. Howard’s arm. Mr. Thomas was the person inside the apartment. He kept trying to pull Ms. Howard back into the

apartment even though her arm was stuck in the door. Mr. Thomas claimed that he did not know Ms. Howard's arm was caught in the door. (RP 43, ll. 1-3; ll. 14-20; ll. 24-25; RP 44, ll. 13-16; RP 77, ll. 15-18).

Officer Hull of the Richland Police Department responded to a 911 call. He contacted Ms. Howard who was crying and upset. He saw red marks on her neck and bruising on her arm. (RP 53, ll. 16-17; RP 54, l. 15 to RP 55, l. 4).

Ms. Howard became pregnant by Mr. Thomas in August 2009. She was still pregnant in December. She later lost the child. (RP 22, ll. 4-12; RP 78, l. 22 to RP 79, l. 8).

The foregoing events occurred in a limited period of time. It is these events that underlie Counts I, II and III:

COUNT I

That the said **RICKY DESHAWN THOMAS** in the County of Benton, State of Washington, on or about the 4th day of December, 2009, in violation of RCW 9A.52.020(1)b), with intent to commit a crime against a person or property therein, did enter or remain unlawfully in the building of Shanda Howard, located at 1845 Leslie Road, #D110, Richland, Washington and while in such building the accused did intentionally assault Shanda Howard, by pushing her,

COUNT II

That the said **RICKY DESHAWN THOMAS**, in the County of Benton, State of Washington, **on or about the 4th day of**

December, 2009, in violation of RCW 10.99.050(2) and RCW 26.50.110(4), having been found guilty of a crime with a condition of the sentence restricting the defendant's ability to have contact with **SHANDA MARIE HOWARD** in **BENTON COUNTY SUPERIOR COURT 08-1-00302-1**, and with such order containing a provision that specifically indicates that violation of said order is a crime, did, with knowledge of the Court's order, willfully violate that order and did intentionally assault another in a manner that does not amount to assault in the first or second degree... **GRABBED HER BY THE FACE... .**

COUNT III

That the said **RICKY DESHAWN THOMAS** in the County of Benton, State of Washington, on or about the 4th day of December, 2009, in violation of RCW 9A.36.031(1)(d), with criminal negligence did cause bodily harm to **SHANDA MAIRE HOWARD**, ...by means of a thing likely to cause bodily harm, to wit, a door....

The State's Seconded Amended Information attempts to break down a single, continuing assaultive offense into separate crimes based upon a push, grabbing a face, and a door closing on an arm. Counts I, II and III all require proof that an assault occurred. The question is whether or not there were separate assaults or a single continuous assaultive event.

The State, in closing argument, told the jury:

"He slammed her up against the wall and started choking her and hitting her... ."

(RP 107, ll. 17-19)

“...[H]e assaulted a person. He admitted that when he
plead guilty to violation of a no contact order ...

He said I pushed her.”

(RP 108, ll. 11-14).

“We have a red neck. ... We have bruising on the arm... .

We have scraping on her arm. She was assaulted.”

(RP108, ll. 19-22).

“You heard the testimony of Shanda Howard. She said,
yeah, not only did he slam me against the wall and
choke me, punch me, and hit me but he jammed
the door multiple times into her arm.”

(RP 109, ll. 3-6).

Mr. Thomas maintains that the State, by breaking a continuous
chain of events into segments, so as to charge multiple counts (thereby
increasing his offender score), violated RCW 9A.94.589(1).

Mr. Thomas is not alleging a double jeopardy violation. However,
double jeopardy analysis supports his argument.

The United States Supreme Court, in *Brown*
v. Ohio, 432 U.S. 161, 169, 53 L. Ed. 2d
187, 97 S.Ct. 2221 (1977),... stat[ed]:

The Double Jeopardy Clause is not
such a fragile guarantee that pro-
secutors can avoid its limitations
by the simple expedient of div-
iding a single crime into a series

of temporal or spatial units.

The double jeopardy clause of the Fifth Amendment serves three primary purposes. First, it protects against the subsequent prosecution for the same offense after an acquittal. Second, it protects against a subsequent prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense, imposed at a single proceeding... .

State v. Potter, 31 Wn. App. 883, 886, 645 P. 2d 60 (1982).

Mr. Thomas is not arguing merger. He concedes that the burglary anti-merger statute applies. *See*: RCW 9A.52.050.

Mr. Thomas recognizes that Counts I, II and III are not one offense. However, they do constitute the “same criminal conduct.”

Mr. Thomas’s actions were continuing in nature. There was no significant time lapse. In fact, the State’s argument required a finding of contemporaneous assaults predicated upon the push, the face grab and the arm caught in the door.

There can be little doubt that the offenses involved the same victim - Shanda Howard.

All of the incidents occurred at Ms. Howard’s apartment within a limited time period.

The only aspect of the “same criminal conduct” analysis that may be in question is the existence of “same criminal intent”.

Violation of the no contact order occurred when Mr. Thomas entered the apartment. The entry into the apartment was elevated to first de-

gree burglary by the assaultive conduct. The no contact order violation was elevated to felony status by his assaultive behavior. It appears that Mr. Thomas's jealousy underlies all of his assaultive behavior. (RP 25, ll. 2-14).

Mr. Thomas asserts that the State recognized it had a problem with regard to Counts II and III. In the Amended Information Mr. Thomas was charged with second degree assault. However, second degree assault cannot be the predicate offense for a felony no contact order violation. Thus, the State reduced the charge to third degree assault.

In *State v. Davis*, 90 Wn. App. 776, 781-82, 954 P. 2d 325 (1998), the State argued that first degree burglary and assault under the burglary anti-merger statute did not constitute the "same criminal conduct."

The *Davis* court ruled at 782:

Davis pointed the gun at Anthony when she threatened to call the police to stop the burglary and assault on Milton. On these facts, the trial court could reasonably conclude that the assault furthered the burglary and, therefore, Davis had the same criminal intent in each.

See also: State v. Lessley, 118 Wn. 2d 773, 777, 827 P. 2d 996 (1992).

When Mr. Thomas went to Ms. Howard's apartment he intended to violate the no contact order. Once he was inside the apartment his assaultive behavior elevated both the no contact violation and the burglary to a higher status. The assault was continuous and encompassed each of the means designated by the State in Counts I, II and III.

Mr. Thomas compares his case to *State v. Spencer*, 128 Wn. App. 132, 137, 114 P. 3d 1222 (2005). The *Spencer* Court ruled that violation of a no contact order is a continuing offense as long as the person remains within the prohibited zone.

As long as Mr. Thomas remained in Ms. Howard's apartment he was violating the no contact order.

As long as Mr. Thomas was assaulting Ms. Howard he was violating the no contact order.

As long as Mr. Thomas assaulted Ms. Howard he was committing the crime of first degree burglary.

As long as Mr. Thomas assaulted Ms. Howard he was committing either third or fourth degree assault.

To determine whether a defendant's acts are a continuing course of criminal conduct, "the facts must be evaluated in a common-sense manner." ... "[T]he doctrine of continuing offenses should be employed sparingly and only when the Legislature expressly states the offense as a continuing offense, or **when the nature of the offense leads to a reasonable conclusion that the Legislature so intended.**"

State v. Spencer, supra, quoting State v. Petrich, 101 Wn. 2d 566, 571, 683 P. 2d 173 (1984) and *State v. Green*, 150 Wn. 2d 740, 742-43, 82 P. 3d 239 (2004) (emphasis supplied.)

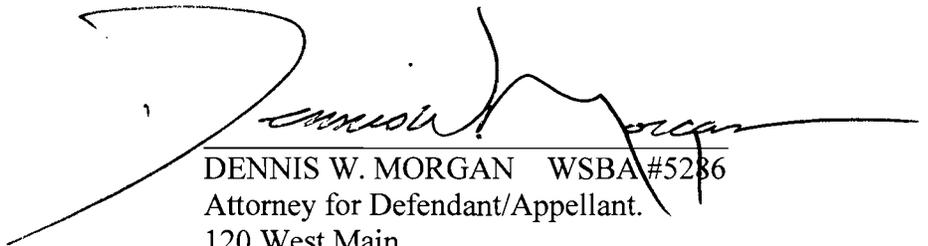
Mr. Thomas actions constitute the "same criminal conduct" for sentencing purposes.

CONCLUSION

Why people do the things they do is beyond the ken of me and you. Nevertheless, Mr. Thomas is entitled to be resentenced based upon the foregoing "same criminal conduct"/continuing crime analysis.

DATED this 2^d day of November, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis W. Morgan", is written over a horizontal line. The signature is fluid and cursive.

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STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	BENTON COUNTY
Plaintiff,)	NO. 09 1 01147 1
Respondent,)	
)	AFFIDAVIT OF MAILING
RICKY DESHAWN THOMAS,)	
)	
Defendant,)	
Appellant.)	
_____)	

STATE OF WASHINGTON)
: ss.
County of Adams)

CONNIE HILLE, being first duly sworn upon oath, deposes and says:

That on this date I mailed in the mails of the United States of America a properly stamped and addressed envelope directed to:

RENEE S. TOWNSLEY, CLERK
Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

AFFIDAVIT OF MAILING

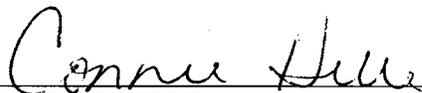
BENTON COUNTY PROSECUTOR'S OFFICE

Attention: Andrew Miller
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Kennewick, Washington 99336

RICKY DESHAWN THOMAS #341080

Washington State Penitentiary
1313 N. 13th Ave, Unit Echo, E-121
Walla Walla, Washington 99362

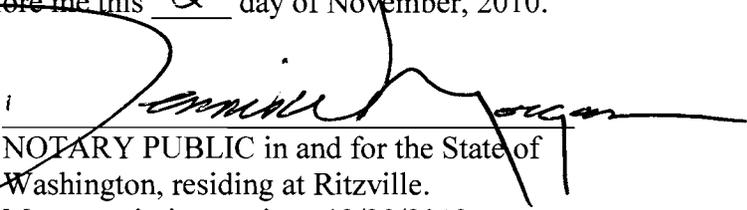
Containing a copy of the *APPELLANT'S BRIEF*.



CONNIE HILLE

SUBSCRIBED AND SWORN to before me this 2nd day of November, 2010.

DENNIS W. MORGAN
Notary Public
State of Washington
My Commission Expires
December 28, 2013



NOTARY PUBLIC in and for the State of
Washington, residing at Ritzville.
My commission expires: 12/28/2013.