

FILED
July 9, 2014
Court of Appeals
Division III
State of Washington

No. 32054-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

STEVEN FLOYD OLSEN, Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Olsen was found guilty at trial of Assault in the Second Degree and felony Violation of Court Order. The text of RCW 26.50.110(4) states the elements for a felony level no-contact order violation, including two ways in which it may be committed: “an assault ...that does not amount to assault in the first or second degree” or “any conduct that is reckless and creates a substantial risk of death or serious physical injury to another person.” The plain text of the statute provides that the conviction may rest upon either prong. As the jury found Olsen guilty of Assault in the Second Degree, the jury only considered the second prong and found beyond a reasonable doubt that Olsen’s conduct was reckless and created a substantial risk of death or serious physical injury to the victim.

The case law that Olsen cites for his position does not support the holding he wishes this Court to make. Rather, the case law indicates that a person may be guilty of both Assault in the Second Degree and felony Violation of Court Order, that the legislature intended to punish both separately, and that there is only a restriction if the State is relying upon the first prong of RCW 26.50.110(4).

As to the additional assignment of error, the defense opened the door to additional questions about the nature of Olsen’s relationship with the victim because they questioned the victim at length about the on-

again-off-again nature of that relationship, dates of break-ups, the living situations during each event, and the state of the relationship at the time of incident on August 11, 2013. The State on re-direct was properly allowed to ask the victim to explain these events and put them in proper context.

Even if the trial court should not have allowed the victim to testify on these subjects and that decision was an abuse of discretion, the case should still not be overturned as this error did not have a material effect on the outcome: there was a great deal of evidence that Olsen created a substantial risk of death or serious physical injury to the victim on August 11, 2013.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Does either the text of RCW 26.50.110(4) or the case law preclude conviction for both second degree assault and felony violation of a no-contact order?

2. Did the trial court err in allowing the victim to testify about the nature her relationship with Olsen in more specificity after the defense had discussed that relationship at length?

III. STATEMENT OF THE CASE

Olsen and the victim, Terri Wortham, had been dating for about three years, and were living together, as of August 11, 2013. RP1 96. On that date, there was a no-contact order between the two, but the victim had

been allowing Olsen to live with her, while repeatedly asking him to leave. RP1 97.

On August 11, 2013 around four in the morning, Olsen “jumped” on the victim, pinning her down on the bed with a long hunting knife to her throat, taking two “swipes.” RP1 101, 103-104. The knife caused scratches, but not more serious injury. RP1 104. The victim believed she was going to die. RP1 104. The victim then grabbed an aluminum baseball bat that had been sitting next to her bed and hit Olsen in the face once. RP1 105. Olsen took the bat out of her hands and hit the victim with the bat at least three times, on the head, side, and back. RP1 105-106. Olsen next hit the top of the victim’s head with the bat as if he was “chopping a piece of wood.” RP1 106. The victim fell unconscious and woke up with a “busted” lip uncertain of how that injury had happened. RP1 106.

Next, Olsen dragged the victim down the hallway by her hair or arm. RP1 107-108. The victim eventually convinced Olsen that they both needed to go to the hospital for their injuries. RP1 108-109. The plan was to tell the doctor that they “got jumped.” RP 109.

When the two got out to the car, the victim got in the driver’s seat and drove away, Olsen shattering the driver-side window with the bat as she was pulling away. RP1 110.

The victim found help and was eventually taken to the hospital. RP1 112-113. The victim was treated with, *inter alia*, three staples in the back of her head, two staples on the top of her head, and twelve stitches in her lip. RP1 113.

Before the trial began, the trial court held a preliminary hearing outside the presence of the jury on whether evidence of prior bad acts of abuse in the relationship between Olsen and the victim should be either excluded or bifurcated from the rest of the trial, as the evidence was relevant to the aggravator the State had charged which was later dismissed. RP1 38-50; RP3 73-74.

After taking the testimony of the victim, along with cross-examination by defense, the trial court ruled that the evidence was relevant to the aggravator, but bifurcated that question from the rest of the trial citing concern that, while the evidence of prior conduct was relevant to aggravator, that the incidents and the way the victim related them would compromise a fair trial. RP1 49.

In that hearing, the trial judge specifically asked the victim whether abusive incidents were low points in the relationship or characterized it, to which the victim responded that they characterized the relationship. RP1 46.

In her direct testimony, the victim testified that a no-contact order was in place because of an “incident” that had happened, but the two were “trying to work it out.” RP1 97-98.

During cross-examination, the defense delved into the “on-again” “off-again” nature of the relationship between the victim and Olsen, including the number of times the two had broken up, and where Olsen was living each time. RP2 17-213

In response to a defense question about what had happened on Olsen’s birthday in 2012 regarding the change of their relationship status and where Olsen was living, the victim answered, “I had him – I kicked him out of the house, out of where I was living at. And he came back, and there was a fight there in the front yard. He kicked me in the stomach that time.” RP2 19. The defense did not object to that response or move to strike. RP2 19-20. The defense continued to ask questions surrounding the parties’ attempts to “work out” the relationship. RP2 21.

On re-direct, the State, after confirming that the victim had stated that she and Olsen had broken up “a few times” asked the victim to explain the reasons. RP2 54. During this line of questioning the defense objected, citing the motion in limine. RP2 54. The trial court overruled the objection. RP2 54. The State also asked the victim what had happened

during the incident that she had mentioned during her cross-examination that led to a break-up. RP2 55.

The jury convicted Olsen of Assault in the Second Degree and Felony Violation of a Court Order. RP3 69.

IV. ARGUMENT

1. Olsen may be convicted of both Assault in the Second Degree and Felony Violation of a No-Contact Order.

A. The Court should affirm the jury's verdict because the text of the statute does not support Olsen's position.

RCW 26.50.110(4) states:

Any assault that is a violation of an order issued under this chapter... and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

While subsection RCW 26.50.110(1) provides that contact in violation of a valid no-contact order is a gross misdemeanor, it is subsection (4) (and (5)) that defines which actions elevate a violation of a no-contact order to a felony. *State v. Bunker*, 169 Wn.2d 571, 577, 238 P.3d 487 (2010). In defining the acts that raise the seriousness of this crime, the legislature provided two options, made clear by the disjunctive use of “and.”

Not only are the “not amount” and “substantial risk” prongs separated by a comma and “and,” the language defines each prong separately as a class C felony, clearly marking the two as separate ways to fulfill the element that that raises such behavior to a felony.

The fact that the language found in the “substantial risk” prong is similar to that found in reckless endangerment does not make this a crime of reckless endangerment. It simply puts before the jury another requirement that must be met before the violation can be raised to the level of felony.

This separation is supported by *State v. Spencer*, 128 Wn. App. 132, 138-139, 114 P.3d 1222 (2005), which discusses the legislature’s intent when passing RCW 26.50.110, pointing out that “The purpose of that statute is to assure victims of domestic violence maximum protection from abuse. To accomplish the goal of maximum protection, the legislature implemented a scheme whereby ‘assaultive violations of no-contact orders [are punished] more severely than nonassaultive violations.’” The court went on to reiterate the rule that we “must interpret and construe statutes so that all the language used is given effect, with no portion rendered meaningless or superfluous.” (*Id.* at 139 (*internal citations omitted*)).

While the “not amount” prong is at odds with a concurrent conviction of first or second degree assault, there is no basis, within in the text of the statute, to believe that the second prong is similarly restricted. There are many ways to assault a person in the first or second degree that is not “reckless and creates a substantial risk of death or serious physical injury to another person” such as assaulting with a firearm or deadly weapon by intending “to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” RCW 9A.36.011(1)(a); RCW 9A.36.021(c); WPIC 35.50. This reality is especially important here because it was under RCW 9A.36.021(c) that the defendant was convicted of Assault in the Second Degree, thus not necessarily fulfilling the “substantial risk” element of the no-contact order violation. In order to return the verdict it did, the jury necessarily had to make two separate findings beyond a reasonable doubt: “deadly weapon” and “reckless and creates a substantial risk of death or serious physical injury” which were not inextricably connected.

The trial court recognized this and clearly instructed the jury on this distinction. Instruction 11 was given to the jury as follows:

Felony violation of a court order. The elements which must be proved in order to convict the Defendant of count two differ depending on the verdict you returned, if any, on count one and the lesser degree of crimes of assault. Therefore, two sets of elements appear below labeled one and two. Only one of the two sets of elements will apply. One, if you found the Defendant guilty of either assault in the third degree or assault in the fourth degree, the following applies...Two, if you found the Defendant not guilty of both assault in the third degree and assault in the fourth degree, or if you did not consider those lesser degree crimes because you found the Defendant guilty of assault in the second degree as charged in count one, the following applies: to convict the Defendant of felony violation of a court order as charged in count two, the State must prove, beyond a reasonable doubt: One, that on or about August 11, 2013, there existed a no-contact order applicable to the Defendant. Two, that the Defendant knew of the existence of this order. Three, that on or about said date the Defendant knowingly violated a provision of this order. Four, that the violation consisted of conduct which was reckless and which created a substantial risk of death or serious physical injury to another person, and five, that the Defendant's act occurred in the State of Washington.

RP3 14-16.

Because the jury found Olsen guilty of Assault in the Second Degree, they did not consider the "not amount" prong that Olsen seeks to put at issue in this appeal. They found that Olsen's conduct while in violation of a no-contact order created a substantial risk of death or serious physical injury to the victim. Therefore the Court should affirm the jury's verdict.

B. The Court should affirm the jury's verdict because the case law does not support Olsen's position.

The case law cited by Olsen does not stand for the rules which he asks this Court to apply. *State v. Leming*, 133 Wn. App. 875, 138 P.3d 1095 (2006). *Review denied by: State v. Leming*, 160 Wn.2d 1006, 158 P.3d 615 (2007), is a case involving double jeopardy and explicitly holds, “the Legislature intended to punish separately both assault in violation of a no-contact order and second degree assault...” *Id.* at 887. The court leaves open the possibility that the two crimes may encompass the same criminal conduct for sentencing purposes, which the sentencing court did, under RCW 9.94A.589(1); RP October 22, 2013 16. However, the assertion that under this case a defendant cannot be convicted of both no-contact order violation and second degree assault is simply false, as it was this set of convictions that the court affirmed. *Leming*, 133 Wn. App. At 887.

The other case Olsen cites for his position is *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003). Again Olsen seems to overlook the case’s holding in favor of quoting the case out of context. The Court in *Ward* held that the whether assault in violation of a no-contact order rose to the level of first or second degree is not an “essential element” of felony no-contact order violation. *Id.* at 806. That case dealt *only* with the “not amount” prong and the jury was never provided with the “substantial risk” prong. Instead, the State relied on a special verdict form asking the jury whether “the conduct that constituted a violation of the no-contact order

[was] an assault,” thus only submitting to the jury the first method of committing felony no contact order violation. *Id.* at 807. In that situation, unlike here, the State need not prove that the assault did not rise to first or second degree assault as long as they did not charge those degrees of assault. *Id.* at 814. The State did not end up relying on that prong at all as the jury found the defendant guilty of second degree assault.

2. Olsen’s conviction should not be overturned for improper evidence at trial.

A. The trial court did not abuse its discretion in admitting the victim’s testimony about the history of the relationship during re-direct examination.

The trial court’s rulings on evidentiary issues and motions in limine are reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court has abused its discretion when its decision is “manifestly unreasonable or based upon untenable grounds or reasons.” *Id.*

“Opening the door” is a doctrine which applies to whether otherwise inadmissible evidence may become admissible due to the other party’s questioning. *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). *Jones* points out that this effect may be triggered in two ways, “(1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at

trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence. *Id.* (citing 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007)).

While this doctrine may be overruled by constitutional concerns, it is not overruled by other rules of evidence. *Id.* Thus, while Olsen's discussion of the general requirements for admitting evidence under ER 404(b) is generally correct, evidence admitted because the door was opened does not necessarily need to go through the same process.

Both "triggers" of opening the door occurred in this case. The defense raised the nature of the relationship and the break-ups, presumably to cast doubt on the victim's veracity. Therefore the State asked the victim to explain the volatility in the relationship to put the history of the relationship in proper context and to explain and clarify it. Despite Olsen's characterization, the defense's question on this subject was not a "passing reference," but a prolonged discussion of the times when the relationship was "on," "off," where the parties lived, and how they got back together.

The trial judge heard the defense's objection as to the question touching on a motion in limine but overruled it after having heard a full evidentiary hearing on the subject before the trial began and listening to the testimony thus far. Not only was the trial judge's decision to overrule the objection not manifestly unreasonable, it was correct.

B. The victim's discussion of prior bad acts of the defendant was not an error which had a reasonable probability of affecting the outcome of the trial.

“An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome.” *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997) (citing *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993)).

Olsen claims that the discussion of previous physical fights between him and the victim materially affected the outcome of his trial on the subject of whether he created a “substantial risk of death or serious physical injury” to the victim under the no-contact order violation elements. In a case where testimony and pictures showed great injury to the victim and where several staples were needed to close the injury done to the victim’s head with an aluminum baseball bat, it seems odd that Olsen believes that the victim saying that the two had previously gotten into physical fights has *any* bearing on the element, let alone a material effect on the outcome. The evidence that the victim suffered a substantial risk of death or serious physical injury on August 11, 2013 was overwhelming and unaffected by the discussion of previous incidents: the victim stated she believed she was going to die, there were many injuries

to her head, and she was losing a lot of blood before she received stiches and staples.

V. CONCLUSION

The Court should affirm Olsen's convictions because a defendant may be convicted of both Assault in Second Degree and felony Violation of a Court Order under the text of RCW 26.50.110(4) and case law.

The Court should affirm Olsen's conviction on felony Violation of a Court Order as the defense opened the door to the victim's testimony about prior physical fighting in their relationship and this evidence did not have a reasonable probability of materially affecting the outcome

DATED: July 9, 2014

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