

FILED
February 6, 2017
Court of Appeals
Division III
State of Washington

337707-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

VENIAMIN GLUSHCHENKO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State's evidence was insufficient to support the conviction for first degree assault.

2. The court abused its discretion by finding the first degree burglary involving Ugur Erol was not the same criminal conduct as the first degree assault and first degree robbery.

3. The court erred by failing to adequately address the *Blazina* factors before imposing LFOs.

II. ISSUES PRESENTED

1. Admitting the truth of the State's evidence and drawing all reasonable inferences from that evidence, was there sufficient evidence presented from which a rational jury could find all of the essential elements of first degree assault beyond a reasonable doubt?

2. For purposes of the offender score calculation, did the trial court abuse its discretion when it found the first degree burglary did not constitute the same criminal conduct as the first degree assault and first degree robbery?

3. Should this court decline to accept review of the mandatory costs imposed, where no objection was raised in the trial court?

III. STATEMENT OF THE CASE

The defendant, Veniamin Glushchenko, was charged by amended information in the Spokane County Superior Court with first degree burglary with a deadly weapon enhancement (victim Ugor Erol), first degree assault with a deadly weapon enhancement (victim Ugor Erol), residential burglary (victim Brenda Eberhart), and first degree robbery with a deadly weapon enhancement (victim Ugor Erol). CP 103-04.

Facts.

On December 2, 2014, at approximately 4:00 p.m., Ugur Erol was asleep on his couch in his home at 2708 East 32nd in Spokane, when he was awakened by an unknown intruder standing approximately three to four feet from his location. RP 71-72, 74. Mr. Erol observed the defendant handling his computer, and his television was missing.¹ RP 73. The defendant told Mr. Erol to turn around. RP 74. The defendant was across the living room² at the time and armed with two knives. RP 74. Mr. Erol began pleading with the defendant to take what he wanted. RP 75. The defendant became angry

¹ Mr. Erol positively identified the defendant in court and by a photographic lineup after the incident. RP 75-76, 105-06.

² The defendant was within three to four feet of Mr. Erol during the initial confrontation. RP 74. In addition, there was only a night light and possibly another turned on at the time. RP 74-75.

and continued to demand that Mr. Erol turn around. RP 76. Mr. Erol did not comply because he was fearful of being stabbed. RP 75.

The defendant then began swinging two knives at Mr. Erol. RP 77. Mr. Erol thought the knives were kitchen knives³ with serrated blades. RP 77. Thereafter, Mr. Erol began to bleed, and further pleaded with the defendant as he thought he could die and “bleed out.” RP 77. He thought he had been stabbed at least two or more times. RP 78. Thereafter, Mr. Erol ran toward his front door to escape, as he observed the defendant exiting through the rear entrance. RP 78-79. Mr. Erol’s computer and cell phone were taken by the defendant during the incident. RP 95-96, 151, 193-94.

Mr. Erol was subsequently treated by Dr. Rana Ahmad at Sacred Heart Hospital. RP 129-39. Dr. Ahmad noted two prominent injuries, the most significant of which was a stab wound to Mr. Erol’s neck penetrating 11 centimeters.⁴ RP 131. The doctor described the wound as follows:

The neck wound went through the layer of muscle that’s called platysma. That’s the last layer of protection in the neck. Below that are very important, life-threatening structures. So that was probably the most significant injury.

...

³ Two knives recovered at the scene had blade lengths of 4½ inches and another knife had a blade length of 5 inches. RP 238.

⁴ Approximately 4.3 inches.

[Below the surface of the neck wound includes the] [c]arotid artery, subclavian vein, the trachea, the esophagus and all the veins and the arteries.

RP 131-42.

Dr. Ahmad classified this injury as life-threatening without medical intervention because Mr. Erol could have bled to death or the injury could have become infected. RP 132, 139. More importantly, if the stab wound had penetrated the carotid artery, the injury would have been life-threatening even with medical treatment. RP 132. If the stab wound had proceeded several more centimeters, it would have struck one of the “big vessels.” RP 135. Mr. Erol also had presented approximately four to five smaller stab wounds, including one to his thigh which could have been life-threatening. RP 132.

After the attack on Mr. Erol, and on December 3, 2014, Brenda Eberhart, was at her residence at 2728 East 32nd in Spokane. RP 61. In the early evening hours, she was sleeping when she heard glass break in her kitchen. RP 61. She walked to the kitchen area and observed the defendant standing outside of her residence near the shattered kitchen window.⁵ RP 61-62. The defendant reached through the broken window and

⁵ Ms. Eberhart positively identified the defendant both in court and in a previous police show up at the time of the incident. RP 61, 65, 69.

attempted to grab Ms. Eberhart, stating, "Give me your money, bitch." RP 62, 69. Ms. Eberhart told the defendant she did not have any money, and she started screaming. RP 62. The defendant subsequently fled. RP 62. After the events, Spokane police searched Mr. Erol's home and recovered the two steak knives used in the attack. RP 149-50.

Later in the evening, the defendant was apprehended at 30th and Regal in a shopping mall area near the Off Regal Lounge, hiding between several cars. RP 174-78. Officer Glenn Bartlett observed what he believed to be blood on the defendant's hands at the time of his apprehension. RP 181-83.⁶ He swabbed both hands of the defendant. RP 184.

Ultimately, a detective applied for and was granted a search warrant for a DNA buccal swab for the defendant. RP 191-92, 238-39. Mr. Erol consented to a DNA swab. RP 192. Brittany Noll, a forensic DNA scientist, conducted testing on the swabs from both knives used during the attack on Mr. Erol and swabs taken from Mr. Erol's television. RP 226-27. DNA extracted from blood on the TV matched Mr. Erol. RP 228. Blood was also detected on the knives. RP 229. The DNA extracted from the blood on the knives also matched Mr. Erol. RP 229-30. Mr. Erol and the defendant

⁶ The blood was later identified as belonging to the defendant through DNA analysis. RP 228.

were both contributors to the DNA found on the handle of the same knife.
RP 230-31.

The defendant was convicted as charged and this appeal timely followed.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S CONVICTION FOR FIRST DEGREE ASSAULT.

Standard of review.

When considering whether sufficient evidence supports a criminal conviction, this court must “view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). When the sufficiency of evidence is challenged in a criminal case, an appellate court draws all reasonable inferences from the evidence in the State’s favor and interpret them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 907, 567 P.2d 1136 (1977). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Appellate courts defer to the jury on questions of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The defendant contends under his first assignment of error that the State presented insufficient evidence to support his conviction for first degree assault with regard to Mr. Erol, as charged under count two of the amended information.

RCW 9A.36.011(1)(a)⁷ defines, in part, first degree assault as follows:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon;
...

RCW 9A.04.110(4)(c) defines great bodily harm as:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

⁷ The defendant was charged by amended information only with subsection (a) of first degree assault.

Accordingly, the trial court instructed the jury:

To convict the defendant of the crime of assault in the first degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of December, 2014, the defendant assaulted Ugor Erol;
- (2) That the defendant acted with intent to inflict great bodily harm;
- (3) That the assault was committed with a deadly weapon; and
- (4) That the acts occurred in the State of Washington.

CP 163.⁸

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

CP 164.

Deadly weapon also means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or substantial bodily harm..

CP 171.

The defendant essentially argues that the evidence failed to establish that he caused “great bodily harm.” This claim was squarely addressed and

⁸ The jury was also instructed on the lesser included offense of second degree assault. CP 173-75.

dismissed by this Court in *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 220, 340 P.3d 859 (2014). Contrary to the defendant’s argument, actual infliction of “great bodily harm” is not an element of RCW 9A.36.011(1)(a). *Id.* at 224. Rather, the State had to establish that the defendant assaulted Mr. Erol with a deadly weapon with *intent* to inflict great bodily harm under subsection (a) of the statute. *Id.* at 225.

The mens rea required to prove first degree assault is the specific intent⁹ to inflict great bodily harm.¹⁰ *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). In determining whether a defendant intended to inflict great bodily harm, the fact-finder “may consider the manner in which the defendant exerted the force and the nature of the victim’s injuries to the extent that it reflects the amount or degree of force necessary to cause the injury.” *Alcantar-Maldonado*, 184 Wn. App. at 225; *see also State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (evidence of intent may be taken from all of the circumstances of the case, including the manner and act of inflicting the wound).

⁹ A person acts with intent “when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010.

¹⁰ Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances. *Wilson*, 125 Wn.2d at 217. Likewise, even though intent is rarely demonstrated by direct evidence, it may be shown from all of the circumstances surrounding the event. *State v. Shelton*, 71 Wn.2d 838, 431 P.2d 201 (1967).

In the present case, the State's evidence at trial was sufficient for a rational jury to find that the defendant acted with intent to inflict great bodily harm. The defendant covertly entered Mr. Erol's home and began the process of stealing Mr. Erol's belongings. When confronted by Mr. Erol, the defendant was armed with two serrated knives. Without provocation, the defendant stabbed Mr. Erol, who was unarmed, multiple times.

The defendant made the decision to swing not one, but two serrated knives at Mr. Erol, causing a much greater difficulty to defend against and substantially increasing the risk of great bodily harm. The most significant blow penetrated Mr. Erol's neck approximately four inches. The doctor posited this injury as life-threatening without medical intervention. Admitting the truth of the State's evidence and all reasonable inferences from that evidence, there was sufficient evidence for a rational jury to find the defendant was acting with the intent to cause great bodily harm to Mr. Erol when he stabbed him multiple times.

Similar fact patterns have been upheld on appeal. *State v. Langford*, 67 Wn. App. 572, 587, 837 P.2d 1037 (1992), *review denied*, 121 Wn.2d 1007 (1993), *cert. denied*, 510 U.S. 838 (1993) (the court held that stabbing a person in the chest falls within the statutory standard of great bodily harm. *State v. Huddleston*, 80 Wn. App. 916, 922, 912 P.2d 1068 (1996) (a rational jury could find that the defendant acted with intent to

cause great bodily harm when he stabbed several people “in the back, chest[,] or stomach” and one person needed several surgeries to repair the damage).

The defendant’s assertion has no merit.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THE FIRST DEGREE BURGLARY WAS NOT THE SAME CRIMINAL CONDUCT AS THE FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY.

Standard of review.

An appellate court reviews a trial court’s determination of what constitutes the same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). “Under this standard, when 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. However, where the record adequately supports several conclusions, the matter lies in the trial court’s discretion. *Id.* at 538. An appellate court narrowly construes the same criminal conduct analysis to disallow most assertions of same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

A trial court abuses its discretion if it makes a manifestly unreasonable decision based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 9.94A.589(1)(a) defines “same criminal conduct” as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” See, *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). All three factors must be present. *Id.* at 22; *State v. Price*, 103 Wn. App. 845, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014, 22 P.3d 803 (2001). “If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.” *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).¹¹

Although the trial court in the present case found the first degree assault and the first degree robbery involved the same criminal conduct, it found the first degree burglary did not constitute the same criminal conduct as first degree assault and first degree robbery convictions. In doing so, the trial court remarked:

In this case, the Court heard the evidence. The evidence was very clear that the defendant went in to commit a theft. He got inside, armed himself. At that point, he’s committing the first degree burglary and the theft. Then he finds a victim

¹¹ At sentencing, sentencing courts merge crimes to avoid double jeopardy. *Chenoweth*, 185 Wn.2d at 222. “Same criminal conduct” is a principle courts use when calculating a defendant’s offender score. *Graciano*, 176 Wn.2d at 535-36. A determination that a conviction does not violate double jeopardy does not automatically mean that it is not the same criminal conduct. *Chenoweth*, 185 Wn.2d at 222.

inside. He tells the victim turn around, starts taking stuff. The victim doesn't adhere to that, then a break in time and then he stabs the victim. The victim runs out, and he takes things. I think there's specific breaks and specific changes in criminal intent throughout this case. It's a very unique case from that perspective, and, again, the reason it's a first assault right now is because of the nature of the injury, and the Court can differentiate each of those prongs of criminal intent. At a minimum, the only thing that could merge is the robbery and the assault.

RP 316.

A person is guilty of first degree burglary if he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and he or she is armed with a deadly weapon or assaults any person inside. RCW 9A.52.020. A person is guilty of first degree assault, as charged here, if he or she assaults another with a deadly weapon likely to produce great bodily harm. RCW 9A.36.011(a), (c). Furthermore, a person commits first degree robbery if, in the commission of a robbery or of immediate flight therefrom, he or she is armed with a deadly weapon. RCW 9A.56.200. Robbery is defined as:

[U]nlawfully tak[ing] personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.

RCW 9A.56.190.

Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next, such as when one crime furthers another. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this context, intent does not mean the particular mens rea required to commit the crime. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012 (2013). Rather, it means the defendant's objective criminal purpose in committing the crime. *Id.* at 642.

When a defendant has “the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” the crimes are separate and distinct from one another. *State v. Grantham*, 84 Wn. App. 854, 858-59, 932 P.2d 657 (1997).¹² The defendant bears the burden of proving same criminal conduct. *Graciano*, 176 Wn.2d at 539-40.

¹² In *Grantham*, the defendant raped the victim twice in rapid succession. 84 Wn. App. at 856. The trial court found that the two offenses did not encompass the same criminal conduct for sentencing purposes. *Id.* at 857. Division Two of this court affirmed the trial court's findings because, after completing the first rape, the defendant “had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *Id.* at 859. Because the defendant “chose the latter” option, he formed a new intent to commit a criminal act. *Id.* at 859.

In the present case, the trial court focused on the defendant's conduct and initial purpose of committing the burglary, before turning his attention to and committing the assault and robbery. Although the crimes involving Mr. Erol occurred at the same time and place, the defendant fails to prove that his objective criminal intent remained the same for the first degree burglary, as it related to the subsequent commission of the robbery and assault.

After the defendant unlawfully entered the residence, he began gathering items to steal and armed himself with two steak knives, until such time as he was abruptly and unexpectedly interrupted by the homeowner.¹³ The trial court found the defendant's initial entry into the home was to commit theft. He certainly could have paused, ceased his activity, and exited the home after the homeowner awakened. The defendant chose a different path to continue and commit further distinct and separate criminal acts involving the robbery and assault. Boiled down, his objective intent changed from committing the initial burglary into a subsequent robbery and assault. After observing the homeowner, his criminal intent changed as he certainly didn't anticipate a witness to his criminal activity. This evidence

¹³ The home was dimly lit at the time of the incident suggesting the defendant believed no one was inside the home at the time he unlawfully entered the residence.

provides tenable grounds for the trial court to reject the defendant's same criminal conduct argument.

The defendant cannot credibly argue that when he initially entered and accumulated the items in the home, that his purpose was to stab the homeowner several times to effectuate an escape and to take his property by force; his original intent could have been accomplished simply by leaving the home when he first encountered Mr. Erol. His plan and objective purpose changed and his claim, therefore, fails.

C. THIS COURT SHOULD DECLINE TO ACCEPT REVIEW OF THE MANDATORY COSTS IMPOSED, WHERE NO OBJECTION WAS RAISED IN THE TRIAL COURT AND THE TRIAL COURT LACKED DISCRETION NOT TO IMPOSE SUCH COSTS.

Although no objection was made in the trial court at the time of sentencing, the defendant asks this Court to review the imposition of legal financial obligations pursuant to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). He argues the trial court did not make an individualized inquiry into his ability to pay his legal financial obligations without first considering his current or likely future to pay. At the time of sentencing, the court ordered the defendant pay the \$500 victim penalty assessment (RCW 7.68.035), the \$200 criminal filing fee (RCW 36.18.020(2)(h)), the \$100 filing fee (RCW 36.18.020(2)(h)), and restitution (RCW 9.94A.753(4), (5)) ("Restitution *shall* be ordered

whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property” and “[t]he court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount”).

For the above costs, “the legislature has directed expressly that a defendant's ability to pay should not be taken into account.” *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).¹⁴

Because the legislature has mandated imposition of these legal financial obligations, the trial court did not need to determine the defendant’s ability to pay the costs especially in light of the defendant’s failure to object to the costs being imposed. There was no error.

V. CONCLUSION

The State requests this Court affirm the first degree assault conviction, deny the defendant’s request to be resentenced based upon his “same criminal conduct” argument, and deny the defendant’s request to

¹⁴ *Blazina* is distinguished in that it dealt with a sentencing judge considering the defendant’s individual financial circumstances before imposing *discretionary* LFOs.

remand to the trial court for consideration of his ability to pay the mandatory costs imposed by the trial court.

Respectfully submitted this 6 day of February, 2017.

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

STATE OF WASHINGTON,

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v.

VENIAMIN "BEN" GLUSHCHENKO,

Appellant,

NO. 33770-7-III

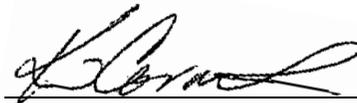
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington,
that on February 6, 2017, I e-mailed a copy of the Response Brief in this matter,
pursuant to the parties' agreement, to:

Ken Kato
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2/6/2017
(Date)

Spokane, WA
(Place)



(Signature)