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Division III
State of Washington
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NO. 35481-4-III

COURT OF APPEALS

STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

MICHAEL ADRIAN HARNESS,

Defendant/Appellant.

BRIEF OF APPELLANT

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CASES

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STATUTES

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ASSIGNMENT OF ERROR

1. The trial court's determination that vehicular assault and hit and run - bodily injury do not constitute the "same criminal conduct" is error.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Do convictions under RCW 46.61.522 and RCW 46.52.020 constitute "same criminal conduct" for sentencing purposes?

2. Was it ineffective assistance of counsel not to argue a "same criminal conduct" analysis even though the trial court checked the box on the Judgment and Sentence determining that the two (2) offenses were not the "same criminal conduct"?

STATEMENT OF THE CASE

Michael Adrian Harness was driving Lyndsey Wagley's Ford Explorer on the morning of December 6, 2015. Mr. Harness failed to stop at a stop sign and T-boned a Toyota Corolla being driven by Tamara Fischer.

(RP 80, l. 25 to RP 81, l. 3; RP 85, ll. 11-14; RP 89, ll. 8-18; RP 92, ll. 6-9; RP 138, ll. 11-14; RP 139, ll. 16-23; RP 186, ll. 3-6; RP 202, l. 17 to RP 203, l. 11)

Ms. Fischer suffered substantial bodily injuries including a traumatic brain injury, collapsed lungs, broken ribs, a broken pelvis and a broken sacrum. She also had a contusion on her heart, a ruptured diaphragm and spleen, and lacerations of her stomach and intestines. (RP 82, ll. 8-10; ll. 21-23; RP 278, ll. 7-17)

An Information was filed on December 9, 2015 charging Mr. Harness with hit and run - bodily injury. (CP 4)

On January 5, 2016 an Amended Information was filed adding two (2) counts of vehicular assault charged under alternative means. (CP 6)

Multiple continuances were granted along with time-for-trial waivers. (CP 5; CP 8; CP 10; CP 13; CP 15; CP 18; CP 19; CP 20; CP 21; CP 22; CP 23; CP 26; CP 27; CP 28; CP 30; CP 31; CP 32; CP 35; CP 38)

A jury trial commenced on June 26, 2017. The jury determined that Mr. Harness was guilty of each offense. (CP 95; CP 96; CP 97)

Even though no one actually identified Mr. Harness at the accident scene, a passenger in the Ford Explorer testified that he was driving. (RP 88, ll. 24-25; RP 89, ll. 3-4; ll. 8-18; RP 110, ll. 3-4; RP 119, ll. 6-8; RP 129, l. 17 to RP 130, l. 1)

Mr. Harness claimed that Edwin Coti, who was later identified as the passenger in the Explorer, was the driver. (RP 304, ll. 1-15)

Mr. Harness only temporarily remained at the accident scene. He advised Ashley Rojas, who witnessed the accident, but who could not identify him, to call 9-1-1. (RP 111, ll. 12-22; RP 112, ll. 5-7; RP 114, l. 20 to RP 115, l. 8; RP 117, ll. 9-25; RP 305, ll. 20-24)

Ms. Wagley and her friend, Rachelle Pacsuta, were with Mr. Harness and Mr. Coti earlier that morning. They observed him leave with Mr. Coti. The next time they saw him he was sitting in the backyard at Ms. Pacsuta's house. (RP 187, ll. 11-25; RP 190, ll. 19-22; RP 190, l. 23 to RP 191, l. 12; RP 201, ll. 1-7)

Ms. Pacsuta testified that Mr. Harness stated he freaked out after the accident and left after he had someone call 9-1-1. (RP 296, ll. 3-12)

Kristen Drury, the Yakima Police Department laboratory supervisor, located a latent fingerprint belonging to Mr. Harness on the reverse side of the driver's interior door handle. (RP 252, ll. 14-16; RP 259, ll. 1-25; RP 262, l. 24 to RP 263, l. 15; RP 264, ll. 10-18)

Judgment and Sentence was entered on July 14, 2017 following the trial court's determination that Counts II and III merged. Mr. Harness had an offender score of nine (9+) plus and was sentenced to eighty-four (84)

months in prison on Count I. Eighteen (18) months community custody was imposed. (CP 103; CP 104)

Mr. Harness filed his Notice of Appeal on July 26, 2017. (CP 115)

SUMMARY OF ARGUMENT

RCW 46.61.522 and RCW 46.52.020 constitute the “same criminal conduct” under the facts and circumstances of Mr. Harness’s case.

The trial court’s determination that they did not constitute the “same criminal conduct” is error.

Defense counsel’s failure to argue that the two (2) statutes, under the facts and circumstances, would constitute “same criminal conduct” denied Mr. Harness effective assistance of counsel.

Mr. Harness is entitled to be resentenced.

ARGUMENT

I. “SAME CRIMINAL CONDUCT”

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

... [I]f 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. . . .

There can be no dispute that the two (2) offenses occurred at the same time and place.

There can be no dispute that the offenses affected the same victim.

The issue remains concerning the same intent.

RCW 46.61.522 provides, in part:

- (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
 - (a) In a reckless manner and causes substantial bodily harm to another; or
 - (b) ...; or
 - (c) With disregard for the safety of others and causes substantial bodily harm to another.

RCW 46.52.020(1) provides, in part:

A driver of any vehicle involved in an accident resulting in the injury to ... any person ... shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section

....

...

RCW 46.52.020(3) provides, in part:

(3) ... [T]he driver of any vehicle involved in an accident resulting in injury to ... any person ... shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured ... and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is required by the injured person or on his or her behalf. ...

As far as Mr. Harness has been able to determine the question of whether or not RCW 46.61.522 and RCW 46.52.020 constitute the "same criminal conduct" has not been considered in the State of Washington.

Nevertheless, without any argument by defense counsel or the prosecuting attorney, the trial court checked the box that the two (2) offenses did not constitute the "same criminal conduct."

The jury determined that Mr. Harness's actions were both reckless and in "disregard for the safety of others." The trial court merged the two (2) counts.

Mr. Harness contends that RCW 46.52.020 has knowledge as its mental state. Instruction 7, the standard WPIC instruction on knowledge, was given to the jury in connection with Count I. (CP 81; Appendix "A")

Even though the respective offenses involve differing mental states the same intent can be determined by whether or not one offense furthered the other.

... [F]or two crimes to constitute the same criminal conduct ... “both crimes must involve: (1) the same objective criminal intent, which can be measured by determining whether one crime furthered another; (2) the same time and place; and (3) the same victim.” *State v. Vike*, 66 Wn. App. 631, 633, 834 P.2d 48 (1992). Under the first prong, the focus is on the extent to which the defendant’s criminal intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

State v. Walden, 69 Wn. App. 183, 187-88, 847 P.2d 956 (1993).

QUERY: Did the one crime further the other?

Mr. Harness asserts that the vehicular assault furthered the hit and run - bodily injury. Without the vehicular assault there would have been no bodily injury and no need to remain at the scene to provide aid.

Moreover, it is apparent from the testimony at trial that Mr. Harness acted intentionally in both instances. As the jury determined, Mr. Harness was operating a motor vehicle in both a reckless manner and with disregard for the safety of others.

The jury also determined that he acted in disregard of his duties under RCW 46.52.020.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that his defense was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 20 L. Ed.2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). Defense counsel's failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel. *State v. Saunders*, 120 Wn App. 800, 824-25, 86 P.3d 232 (2004)

State v. Rattana Keo Phuong, 174 Wn. App. 494, 547, 299 P.3d 37 (2013); *see also, State v. Munoz-Rivera*, 190 Wn. App. 870, 361 P.2d 182 (2015) (holding that crimes may have the same criminal intent if they are part of a "continuing, uninterrupted sequence of conduct.", quoting *State v. Porter*, 133 Wn.2d 177, 186, 942 P.2d 974 (1997)).

It is Mr. Harness's position that the time frame involved is indicative that the vehicular assault and the hit and run - bodily injury are the "same

criminal conduct.” It was one continuous event with no intervening circumstances. In fact, the bodily injury resulting from the vehicular assault is subsumed into the hit and run - bodily injury.

The State may argue that since defense counsel did not raise a challenge to the trial court’s determination that the two (2) offenses did not constitute the “same criminal conduct” that he is precluded from raising the issue on appeal. The State would be in error.

Because Phuong’s counsel did not argue at sentencing that the offenses constituted the same criminal conduct, that argument is waived on appeal. *State v. Brown*, 159 Wn. App. 1, 16-17, 248 P.3d 518 (2010), *review denied*, 171 Wn.2d 1015 (2011). Nevertheless, because the claim of error is of constitutional magnitude, Phuong may claim ineffective assistance of counsel for the first time on appeal. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

State v. Rattana Keo Phuong, supra.

CONCLUSION

Mr. Harness respectfully requests that the Court determine that the two (2) offenses constitute the “same criminal conduct” for sentencing purposes and that his case be remanded to the trial court for resentencing.

All three (3) elements of the “same criminal conduct” analysis are present and require the relief requested.

DATED this 12th day of February, 2018.

Respectfully submitted,

s/ Dennis W. Morgan

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APPENDIX “A”

ORIGINAL

INSTRUCTION NO. 1

A person knows or acts knowingly or with knowledge with respect to a fact or circumstance or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact or circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

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NO. 35481-4-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	YAKIMA COUNTY
Plaintiff,)	NO. 15 1 01855 3
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
MICHAEL ADRIAN HARNESS,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 12th day of February, 2018, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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