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Division III
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No. 35807-I-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

TALON N. CUTLER-FLINN, Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

For the most part, the Appellant's statement of the case and "Facts" are accurate with only a couple notable omissions. First it must be noted that from the very outset the State maintained that the various assaults charged in this matter were separate and distinct. The original Information (Clerks Papers, pages 1 - 8, *hereinafter* CP, 1 - 8) specified that the Assault in the Fourth Degree charged in Count 1 was committed when "the Defendant knowingly assaulted Stacey J. McKay by intentionally striking her." CP 1. The Assault in the Second Degree charged in Count 2 was specifically described occurring when "the Defendant knowingly assaulted Stacey J. McKay by strangulation or suffocation." CP 2. This same distinctive designation was used to describe Counts 3 and 4 (CP 3 - 4), and Counts 5 and 6 (CP 5 - 6).

When the State moved to include additional charges of Violation of a Protective Order, the language specifying the distinctive nature of the allegations of assault was repeated in the Amended Information. (CP 48 - 57). And, when yet another time the Defendant violated the Court's order protecting the victim, the State amended the Information to add another count of Violation of a Protective Order. Second Amended Information. CP 92 - 102. Again, the State specifically spelled out in the charging document that the Fourth Degree Assaults were based on "striking" the victim,

and the Second Degree Assaults were based upon a distinct act of “strangulation or suffocation.” *Id.*

The State maintained the position that the assaults were each separate acts through the trial. Based upon the evidence presented at trial the Trial Court, in regards to the Assault in the Fourth Degree charge set forth in Count 1, provided the following definitive statement :

Specifically, the Court finds that this assault is separate and distinct from the assault by strangulation or suffocation on this same date.

Finding of Fact and Conclusions of Law after Bench Trial, Specific Finding #1, CP 157. Similarly, the Trial Court entered a finding as to the Assault in the Second Degree charge set forth in Count 2:

Specifically, the Court finds that this assault is separate and distinct from the assault by striking on this same date.

Id. Specific Finding #2. The Court made the same findings of “separate and distinct” assaults as to the Fourth Degree Assaults and Second Degree Assaults in Counts 3, 4, 5, and 6.

The Appellant’s recitation of the “Facts” also omits the Appellant’s own recognition of the separate and distinct nature of the Fourth Degree Assaults and the Second Degree Assaults charged in this matter. Early on in this case the Appellant asserted an “Insanity” defense. Notice of Intent to Rely Upon the Insanity Defense, CP 11. He was sent to Eastern State Hospital where,

among other things, he was evaluated to determine his “capacity to understand the proceedings against him and to assist in his own defense.” Report From Eastern State Hospital, dated February 3, 2017, page 8, CP 40. When Dr. R. Cory Fanto, Ph.D. discussed the pending charges with the Appellant, the Appellant himself defined the Assault in the Fourth Degree charges as separate and distinct from the Assault Second Degree charges:

He defined Assault as “to hit someone.” In differentiating between the second degree and the fourth degree Assault charges, he identified that the second degree Assault charge involves strangulation and the other was related to hitting.

Id. Based upon the result of this examination the Trial Court found the Appellant competent to stand trial. Findings of Fact and Order on Competency Motion, CP 47.

Following a bench trial in which the Appellants was found guilty on all counts, the Court held a sentencing hearing. RP 293 - 337. As a preliminary matter the Prosecutor pointed out that the Court had made findings regarding the issue here on appeal:

However, I believe that the Court's findings, as to the individual crimes being separate and distinct is accurate and should be included in the findings.

RP 292. And later continued:

But, I do believe that the findings, specifically, the Court finds this is all separate and distinct from the assault by strangulation or suffocation on the same date and that type of language that runs through each of the first six specific findings of fact is accurate. I

believe that the evidence was that the assault in the fourth degree consisted of beating, punching, striking especially in the ribs and abdomen area and that the strangulation was separate and distinct from it. It wasn't several blows or strangling blows, strangling and so forth. The strangulation was a separate and distinct act and designed not to hurt Ms. McKay, but to strangle her.

I --- I would stand by my findings, including the language about separate and distinct nature of each and every one of the assaults.

RP 293. When the Defense questioned the finding that the assaults were each separate and distinct the Prosecutor responded:

I think the Court talked about an **escalating series of act [sic]** and I believe that although they may have happened at the same place and involved the same victim, they are [inaudible] separate in that they didn't occur in one flurry but rather over a period of time. And, clearly, the intent of punching was to hurt --- to hurt the victim and to hurt the unborn child. The strangulation was a separate and distinct intent.

RP 294. The Trial Court Judge agreed that the assaults were each a separate and distinct act and that they did not share the same intent:

Which is what I found. When I found Mr. Cutler-Flinn guilty on all of the assault counts, whether fourth or second degree, each encompassing a different act, each encompassing a separate intent.

Id. The Trial Court then, having found that the crimes did not merge or constitute the same criminal conduct, sentenced the Appellant accordingly. RP 334 - 337.

Also significantly missing from the Appellant's version of the "facts" of this case is the trial testimony regarding his statements to the victim concerning his premeditated intent to kill her. Although the Appellant makes passing reference to some of these statements while discussing the Trial Court's findings (See: Appellant's Brief, page 10, *hereinafter* Brief) the record is far more compelling on this aspect of the case.

The victim testified that after being physically assaulted and strangled during the incidents on January 15, 2017 the Appellant made a number of statements evincing his intent to kill her, "... I could hear him talking to himself. He was trying to find a shovel that we didn't have anymore." RP page 61. The victim went on to explain the Appellant's statements:

Victim: He said where is the shovel, I can't find the shovel, oh well, I don't need it anyway.

Prosecutor: In your mind, in your own mind, what did that mean?

Victim: That was about as real as it got. I thought it meant I was gonna --- I was really gonna die and that he was --- he was gonna bury me somewhere alive or not, either way, that I was not gonna come back from that. There was like no going back. So, that's what I thought.

Id. Considering the events of the day this does not appear to be an unreasonable interpretation. The victim also testified about the Appellant's stated intent to kill her:

Victim: I would get my gag out and start telling him to stop or turn around and then he would um --- he would put it back in my mouth and just tell me to shut up. He said that a lot and just said you're not changing my mind. Like I'm doing this, you're not changing my mind. Like, you know, you might as well not even try.

Prosecutor: What were you trying to change his mind about?

Victim: Well, I thought --- I thought he was taking me somewhere to kill me. I mean you're tied up in a car, you know, at that point, getting beaten for quite awhile like you pretty much don't think you're going anywhere good. You know.

RP 62 - 63. When the victim was asked, point-blank, about the Appellant's stated intent to kill her, she was resolute:

Prosecutor: Ms. McKay, is there any doubt in, your mind that but for your pleadings, Mr. Cutler-Flinn would have killed you and left you in the field?

Victim: I think he certainly would have and I think that's what he intended to do to begin with.

RP 94. The victim testified that the Appellant expressed to her that he intended to kill her by making reference to her daughter:

Prosecutor: After Mr. Cutler-Flinn put you back in the car and headed back from that spot near the shed, do you remember him saying something about whether or not you would ever see your daughter again?

Victim: Yes.

Prosecutor: What did he say?

Victim: He just said I was never gonna see her again. That she would be fine because she has her dad and she has my mom and that women are useless anyways, so it doesn't --- you know, she'll be fine and

just I remember he said I was gonna --- like sometime in the car he had said I was gonna meet God soon.

Prosecutor: Was going to ---

Victim: On the way there.

Prosecutor: That you were going to what?

Victim: Meet God soon.

Prosecutor: What did you take that to mean?

Victim: I was gonna die.

Prosecutor: What do you believe stopped Mr. Cutler-Flinn from killing you on January 1st?

Victim: I honestly don't know what stopped it. I just know at the end I was saying everything that I could say and I had said that I hadn't ever called the cops before, why would I call them now.

RP 137. When the Prosecutor asked, the victim testified that Appellant informed her, in no uncertain terms, that his statements regarding his intent to kill her were genuine:

Prosecutor: And tell you that this time it was for real?

Victim: Yeah, this time was for real, this time I was gonna die, the baby was gonna die.

RP 139. These clear statements of the Appellant's intent to kill the victim are significant and were relied upon by the finder of fact in reaching its verdict. RP 287. As the Court Trial Court explained, the Appellant's actions, coupled with these statements proved beyond any doubt that the Appellant was guilty of Attempted Murder in the First Degree:

The big question in this case is is [*sic.*] did you abduct Ms. McKay with an intent to kill her? Of course you did. How do we know that? Because you said so, Mr. Flinn. This time, is what you told her. This time you're gonna die for real. That's a pretty clear statement of intent. The other times were just varying degrees of assaultive behavior, but not this time. This one was different. This was final. This time you strangled her until you choked her out and she was blue and she soiled herself. And I believe at that moment that you thought you had killed her. That's why you asked, you okay?

It really was, in a true sense of the word, a game of cat and mouse in my opinion. And that phrase I think is often misused in situations where there's a move and some kind of a counter move and people describe it as a game of cat and mouse. Well, it's not. Cat pounces on its prey and terrorizes it for awhile before it kills it. In this sense, it was a true game of cat and mouse. Sometimes the mouse escapes, sometimes the cat gets tired of the game and gets up and moves on. But, his intent at the start of the game was nonetheless to kill the mouse, as was yours at the start of this abduction.

RP 287. The discussion of the Appellant's stated intent to kill his victim, their impact on the victim, and the Court's consideration of his stated intent to kill her are markedly missing from the factual recitation provided by the Appellant, but are an extremely significant part of the record.

II. ISSUES

- A. DID THE TRIAL COURT ERR IN FINDING THAT THE VARIOUS ASSAULTS CHARGED IN THIS MATTER WERE SEPARATE AND DISTINCT CRIMES?
- B. DID THE TRIAL COURT ERR IN FINDING PROOF BEYOND A REASONABLE DOUBT THAT THE APPELLANT INTENDED TO KILL HIS VICTIM?
- C. IS THE TRIAL COURT'S IMPOSITION OF NO-CONTACT ORDERS SUPPORTED BY THE FACTS OF THE CASE AND THE APPLICABLE LAW?

III. ARGUMENT

- A. THE TRIAL COURT'S FINDING THAT THE ASSAULTS CHARGED IN THIS MATTER WERE SEPARATE AND DISTINCT CRIMES IS SUPPORTED BY THE FACTS OF THE CASE AND THE APPLICABLE LAW.
- B. THE TRIAL COURT'S FINDING THAT THE APPELLANT INTENDED TO KILL HIS VICTIM IS WELL FOUNDED ON CLEAR EVIDENCE PRESENTED.
- C. THE NO-CONTACT ORDERS ENTERED BY THE TRIAL COURT ARE PROPER.

FINANCIAL ISSUES

DISCUSSION

- A. THE TRIAL COURT'S FINDING THAT THE ASSAULTS CHARGED IN THIS MATTER WERE SEPARATE AND DISTINCT CRIMES IS SUPPORTED BY THE FACTS OF THE CASE AND THE APPLICABLE LAW.

In the Appellant's first assignment of error he begins by arguing that his convictions for the various assaults violate federal

and state protections against double jeopardy. Brief, page 12. The Appellant apparently concedes that the Assault in the Fourth Degree and the Assault in the Second Degree charges are not “legally identical” but argues that they should be subject to merger. To this end, he argues that the Appellant cannot not be convicted “for every punch thrown in a fistfight.” Brief, page 14.

As a starting point, the repeated and separate savage beatings the Appellant inflicted on this helpless young woman and the cruel strangulations on his victim can in no way be characterized as a “fistfight.” More importantly the Appellant’s most cited case, State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014), is inapplicable to the present case and can be easily distinguished. In Villanueva-Gonzalez the defendant head-butted his victim “breaking her nose in two places and causing her to bleed profusely.” After head-butting her, the defendant grabbed her by the neck and restricted her breathing. Id. at 978. The prosecution in that case charged him with two counts of second degree assault, one count based upon the “strangulation,” and the second count based on the infliction of substantial bodily harm. Id. at 975. Prior to trial, the charges were amended to add fourth degree assault as lesser included charges on both of the second degree assault counts. Id.

The jury in that case rejected the specific “strangulation” allegation and only found the defendant guilty of a simple assault in regards to the first charged count, but found him guilty of second degree assault for the overall infliction of substantial bodily harm as charged in count 2. *Id.* The Court of Appeals reversed the assault four conviction on double jeopardy bases, stating:

Because assault is not defined in terms of each physical act against a victim, Villanueva–Gonzalez's actions constituted one single assault in fact.

State v. Villanueva-Gonzalez, 175 Wn. App. 1, 6, 304 P.3d 906, 908 (2013), *aff'd*, 180 Wn. 2d 975, 329 P.3d 78 (2014). The Supreme Court, while affirming the lower Court, specifically rejected its reliance on a “same evidence” analysis and instead applied the “unit of prosecution” test to the case. State v. Villanueva-Gonzalez, 180 Wn. 2d 975, 982, 329 P.3d 78, 81 (2014). The Court determined that as charged in the case assault is a “course of conduct offense” rather than a “separate act offense” and then went on to describe a number of factors to be considered in the preferred analysis. *Id.* at 985. One of these factors is the “defendant's intent or motivation for the different assaultive acts[.]” *Id.*

While no individual factor is dispositive, in the present case, unlike the fact pattern in Villanueva-Gonzalez, there is a clear distinction in the Appellant’s criminal intent and motivation. The

Appellant's intent in striking his victim was to inflict pain on her. When he strangled her he did so with the intent to cut off her breathing to either render her unconscious, or dead. Blows to the face with an open hand, and to the body with a closed fist, as the victim described, are factually distinct, and involve a different motivation than placing hands around a young woman's neck and squeezing, until she "turns blue."

As to the assaults which formed the basis of the charges in counts 1 and 2, and those in counts 5 and 6, the "criminal intent" can be said to be even more distinct. The record indicates that on these to occasions the Appellant was aware that his victim was pregnant. RP 40 - 42, 53 - 54. The blows that formed the basis of the assault in the fourth degree charges were, in part, directed at his pregnant victim's stomach and abdomen. *Id.* In so doing the Appellant openly stated that his intent was to cause harm to the unborn child. During the November incident (counts 1 and 2) [the Appellant said] "that he wanted the baby to die." RP 41 - 42. In January (counts 5 and 6) the Appellant was "saying that he wanted the baby to die[.]" RP 54. The Appellant's stated intent in striking his victim was not merely to inflict pain on her, but to injure or even kill her unborn child. On the other hand, when he placed his hands around his victim's throat and strangled her there was no stated intent to injure the child.

As for the other set of assaults, those embodied in counts 3 and 4, while there may not be as clear cut a stated different intent, there is an important difference in another aspect. The victim testified that during this incident the Appellant strangled her while she was in the car, prior to pulling into the garage. RP 47, Then, after strangling her, he broke off his assault, and pulled into the garage. RP 48. Once in the garage the Appellant reinitiated his attack on the victim:

He pulled into the garage and started hitting me more in the ribs um until I --- until I got out of the car he was swinging across the seat and hitting me and even at that point when I thought it had stopped, I had made a comment about that, like I thought --- I thought we were done with this and he said that he just --- he was --- he wanted to keep doing it.

RP 48. The fact that in the present case the December assaults took place in different locations and were separated by a break in the action and "an opportunity to reconsider his actions" are the very factors that the Villanueva-Gonzalez Court specifically noted as missing in that case. Villanueva-Gonzalez, at 985 - 986. The differing intents in the November and January assaults similarly are directly contrary to the facts and findings in that case. *Id.* at 986.

Further, unlike Villanueva-Gonzalez, where the Court was examining the parallels between two assaults, both based on the same general conduct - unlawful touching - our case involved a specific and narrowly defined acts - "strangulation or suffocation"

and “striking.” It must be noted that the jury in Villanueva-Gonzalez expressly rejected the distinctive allegation of strangulation or suffocation set out in the assault in the second degree charging language, and opted for the general allegation in the lesser included assault in the fourth degree. Also distinguishing the current case is the fact that the fourth degree assault in our case was never offered or considered as a lesser included offense of the second degree assaults. They were always discussed as stand alone charges. From the very outset, clear through to the verdict and finding of guilt, the assault in the fourth degree counts were specified as “intentionally striking” the victim. The assault second degree counts were distinctly described as occurring when the Appellant assaulted his victim “by strangulation or suffocation.” These are not the general “assault” language used in both the second degree and fourth degree convictions at issue in the Villanueva-Gonzalez case.

Division III of the Court of Appeals addressed a case which appears to be a far better match for the current fact pattern and concluded that double jeopardy would not bar multiple convictions. In State v. Gatlin, after a bench trial, the defendant was convicted of three counts of assault in the second degree all of which occurred over the course of a single incident. State v. Gatlin, 158 Wn. App. 126, 135, 241 P.3d 443, 448 (Div. III 2010),

reconsideration denied (Dec 13, 2010), *review denied* 171 Wn.2d 1020 (2011). In rejecting the double jeopardy challenge the Court of Appeals found that the criminal intent and the specific acts charged varied across the three different assaults:

Mr. Gatlin also argues the three assault convictions violate double jeopardy. But, each assault is based on different facts. As discussed above, one assault relates to bodily injury (punching/kicking) and one relates to strangulation. The last assault relates to gang intimidation. Thus, double jeopardy is not implicated.

Id. As was the case in Gatlin, in the present case the assault in the second degree charges were based “on different facts” than those charged in the fourth degree assaults.

A further consideration distinguishing Gatlin and the present case from Villanueva-Gonzalez is the nature of the fact finder.

Villanueva-Gonzalez was tried to a jury. Both Gatlin and our case involved bench trials. This is of great significance in that a jury answers the question of guilt in very narrow parameters, guilty or not guilty. There are inevitably questions as to what an individual juror may have considered to be the specific fact or distinct act underlying their verdict. These, as a rule, go largely unanswered and allow room for debate. At times a specific question or inquiry may be directed to the jury, but generally this is not the case.

In Villanueva-Gonzalez there is no record of any such inquiry or specific finding as to the multiple acts. The trial judge in

case now before this Court did make specific findings in this regard. The judge determined that the "striking" charged in the fourth degree assaults was in fact, "separate and distinct from the assault by strangulation or suffocation on this same Date." Finding of Fact and Conclusions of Law after Bench Trial. RP 157 - 158. The Court so found as to all of the sets of assaults. These findings were based on the evidence presented at trial and are well supported in the record.

Unlike the cases cited the Appellant where charges and verdicts were premised on imprecise general "assault" language, in the present case the assaultive acts were separately and narrowly set forth in the charging documents and in the verdict. The Appellant urges this Court to interject ambiguity into the case and struggle with defining where, within the incidents, the acts which constituted the specific crimes lay. This is not needed. No resort to the "rule of lenity" is called for when the charging language and verdict are precise. The prosecution tied its case to specific charging language. The evidence presented at trial supported the specific acts charged. The fact finder determined that the specific facts were proven supporting guilty verdicts on each distinct charge. At sentencing, the Trial Court found that the individual assaults were not "the same criminal conduct" and sentenced them separately. The charges do not violate double jeopardy, they do not

merge, and they are not the same criminal conduct for the purposes of sentencing.

B. THE TRIAL COURT'S FINDING THAT THE APPELLANT INTENDED TO KILL HIS VICTIM IS WELL FOUNDED ON CLEAR EVIDENCE PRESENTED.

The Appellant claims that insufficient evidence was presented at trial to support the verdict of guilty on Attempted Murder in the First Degree. Brief, page 27. “Talk is cheap” the Appellant argues, and “particularly when the related conduct demonstrates that the speaker is insincere.” Brief, 29. This flippant and inappropriate comment verges on outrageous when one considers the actual facts of this case. To tell a beaten young woman, who has been strangled to unconsciousness, bound hand and foot, viciously gagged, thrown into a car and driven into the vast and empty spaces of the county, with the stated purpose of killing her, that this was just “cheap talk” beggars the imagination.

Moving to the substance of the allegation of insufficient evidence to support the Trial Court’s finding that the Appellant committed the offense of Attempted Murder in the First Degree, the law and the record clearly support the Court’s finding.

In regards to this issue it must be noted that the Trial Court dedicated a good deal of thought and discussion to the issue, and specifically found:

A central question presented in this case is whether there was sufficient evidence provided to the Court which would support a finding that the Defendant abducted Ms McKay with the intent to kill her. In this regards the Court finds that the evidence is clear and irrefutable that the Defendant so intended. The Defendant's own statements to the victim prove this: "this time she was going to die for real," his statements about "needing a shovel," his statement that she would soon "meet God," and that she would "never see her child again."

The prior incidents consisted of varying degrees of assaultive behavior BUT the incidents on the lonely road on January 1, 2017 were different. They were intended to be final. This time the Defendant strangled his victim to the point of unconsciousness; this time he strangled her until, in his own words as related by Ms McKay, she turned "blue" and soiled herself. The Court finds that the evidence supports a finding that, in fact, the Defendant believed that at that point he had killed Ms McKay. The Defendant demonstrated this belief when he waited after he had strangled her and when she recovered asked "You good?"

As finder of fact, the Court finds that the testimonial, physical, and circumstantial evidence, demonstrate the Defendant's clear, premeditated intent to cause the death of Stacey McKay.

Finding of Fact and Conclusions of Law after Bench Trial, Finding

#4, CP 156 - 157. As the Court explained during its oral ruling on the issue:

The big question in this case is is [sic] did you abduct Ms. McKay with an intent to kill her? Of course you did. How do we know that? Because you said so, Mr. Flinn. This time, is what you told her. This time you're gonna die for real. That's a pretty clear statement of intent. The other times were just varying degrees of assaultive behavior, but not this time. This one was different. This was final. This time you strangled her

until you choked her out and she was blue and she soiled herself. And I believe at that moment that you thought you had killed her. That's why you asked, you okay?

RP 287. The Court's findings are well supported in the record here on appeal.

The law in this area also clearly supports the Trial Court's determination that sufficient evidence was provided to support the finding that the Appellant acted with the intent to kill his victim. As the State Supreme Court has set forth, in order to find a defendant guilty of attempted first degree murder, the State must prove that the defendant "(1) actually intended to take a life; and (2) took a substantial step toward the commission of the act." State v. Smith, 115 Wn. 2d 775, 782, 801 P.2d 975, 979 (1990). In this regard the Trial Court specifically found:

in an act separate and distinct from the conduct charged in assaults and abduction he committed against Stacey McKay on this same day, having bound and gagged her and drove her to a remote site, he beat and strangled Stacey McKay with the intent to cause her death.

Finding of Fact and Conclusions of Law after Bench Trial, Specific

Finding #8, CP 157. The fact that the Appellant took several "substantial steps" toward the killing of his victim is well supported in the record and that finding has not been challenged here on appeal. As such, the "substantial step" finding is a verity on

appeal. See: Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 941, 845 P.2d 1331 (1993).

It is the sufficiency of evidence to support the Trial Court's finding of his criminal intent that the Appellant challenges. When the sufficiency of evidence is called into question, the rule is that the evidence is sufficient if, after reviewing it in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In raising such a challenge the Appellant has admitted the truth of the State's evidence and all inferences that can reasonably be drawn from it. *Id* at 201. The law further provides that a finding of intent to commit a given crime may be inferred from conduct. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

It is axiomatic that the best indication of criminal intent is the defendant's own words. As has been noted statements made by the defendant may provide a reliable source of a factual basis to support a court's finding. See: In re Pers. Restraint of Fuamaila, 131 Wn. App. 908, 924, 131 P.3d 318, 325 (2006); In re Pers. Restraint of Keene, 95 Wn.2d 203, 210 n. 2, 622 P.2d 360 (1980). From the record it is clear that the victim took the Appellant at his word, as did the Trial Court.

Having personally heard the testimony of the victim in this case and considering her view of the situation and her chilling recitation of the Appellant's own words and actions, the Trial Court was absolutely convinced of the Appellant's intent to kill. A review of the record supports this conclusion. The law requires that a reviewing court, when examining the sufficiency of evidence, must give deference to the trier of fact's findings regarding the resolution of conflicting testimony and its evaluation of the persuasiveness of the evidence. State v. Elmi, 138 Wn. App. 306, 313, 156 P.3d 281, 284 (2007), *aff'd*, 166 Wn. 2d 209, 207 P.3d 439 (2009). When the facts and testimony are viewed through the lens dictated by the law, the Trial Court's finding of sufficient evidence must be upheld.

C. THE NO-CONTACT ORDERS ENTERED BY THE TRIAL COURT ARE PROPER.

The final assertion of error that is addressed by the State herein is the Appellant's assertion that the "No-Contact" orders in this case are improper. Specifically that:

no-contact orders against [the victim's] mother, "her family," and Cultler-Flinn's child, are not crime related and lack justification in the law.

Brief, page 18. In framing this argument, the Appellant appears to concede that the "life-time" no contact order regarding the victim

herself is proper. Rather, the Appellant asserts that such an order protecting the victim's mother is not authorized.

As a starting point it is clear that the law authorizes the issuance of a no-contact order as a crime-related prohibition that a trial court may impose as a sentencing condition. State v. Armendariz, 160 Wn.2d 106, 119, 156 P.3d 201 (2007). "Such orders reasonably include no-contact orders regarding witnesses like the order at issue in this case." *Id.* at 113. The victim's mother testified at trial in this matter. RP 143 - 157. Under the law, as set forth above, she can be protected by a no-contact order. As the most serious crime that the Appellant was convicted of is a "Class A" felony, lifetime duration is proper.

The Appellant next challenges the Sentencing Court's use of the term "family" in the Judgment and Sentence entered in this case. Referring to that document you will note a provision which includes a hand-written notation in paragraph 4.3 on page 4 of 10 which reads:

The Defendant shall not have contact with *the victim & her family* (name, DOB) _____ including, but not limited to, personal, verbal, telephonic, written or contact through a third party for "*Life*" years (not to exceed the maximum statutory sentence).

Judgment and Sentence, CP178 (*hand-written portion is italicized*).

The particular paragraph then provides: "Domestic Violence Protection Order is filed with this Judgment and Sentence." *Id.*

While it could be argued that the use of the term “family” in the section referenced may be somewhat vague or subject to various interpretations, all doubts are quickly dispelled by reference to the actual “Domestic Violence” no-contact order entered in this matter. The protected parties are listed with definite specificity:

This order protects: Stacey Jo McKay, C.A.M D.O.B. 09/01/2017, V.T.C. D.O.B. 02/07/2014.

Domestic Violence No-Contact Order, CP 170. Any argument that the order lacks clarity cannot stand in the face of this unequivocal statement.

The Appellant’s final attack on the no-contact orders concerns “his child” as a protected party. This child was an *in utero* victim of the Appellant’s assaults on her mother. The record in this case supports this protective provision. As set forth above, the victim’s testimony established that the Appellant specifically targeted the unborn child while attacking his then-pregnant victim. He told her, as he delivered blows to her mid-section that “he wanted the baby to die[.]” RP 54. This same child that the Appellant tried to kill, while in her mother’s womb, is “C.A.M D.O.B. 09/01/2017” which the Sentencing Court sought to protect in its no-contact order. Based upon the facts, the order was proper, and the Court should not deprive that child of the protection provided by the law.

FINANCIAL ISSUES

In addition to the actual disputed allegations, the Appellant challenges the financial obligations assessed in this case. The State would maintain that at the time these assessments were imposed the Trial Court followed the law and made the required inquiry. However, the standards have now changed and the State would concede that an order which reflects the current law regarding financial obligations should be entered.

IV. CONCLUSION

The Appellant asserts that Trial Court erred when it found that the various assaults charged in this matter were separate and distinct crimes. This finding is well supported in the record and in the law. From the very outset, the State set forth distinct and definite language which alleged that the crimes were committed by different mechanisms. The evidence produced at trial confirmed the mechanical distinctions between the various assaults. The evidence provided to the finder of fact supported differing intent and motivation for the various assaults. The evidence supported that at least in some instances there were different victims involved. Finally, at least some of the crimes occurred in distinctly different locations and at different times. Having heard all of the

evidence the Trial Court specifically found that each of the charged crimes were “separate and distinct .” This finding should not be overturned.

The Appellant argues that the Trial Court erred in finding proof beyond a reasonable doubt that the Appellant intended to kill his victim. In so doing, the Appellant concedes that he took several substantial steps toward the commission of murder, and admits that he told the victim that he was going to kill her. The statements of his intent to kill are disparagingly put down to “cheap talk.” The Trial Court had the opportunity to listen and observe as the victim recounted the impact and her interpretation of these statements. The Trial Court determined that the Appellant’s actions, and his words, as set forth in the record clearly bespoke an intent to kill. This determination should not be set aside on appeal.

The Appellant’s attacks on the no-contact orders in this case are not well taken. The order as to the victim’s mother is appropriate as she was a witness who testified at trial. The law provides protection for witnesses. The order regarding the victim and her “family” is not vague, it contains her name and the initials and dates of birth of all persons covered by the order. The child described as “C.A.M D.O.B. 09/01/27” though unborn at the time of the crimes should be subject to protection by the Courts. The

Appellant acted with the stated intent to kill this child during the assaults on her mother.

The Appellant's challenge to his financial obligations can be resolved through an agreed order at the Trial Court level and do not require reversal of any or all of the convictions herein.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Trial Court's findings, verdicts and, subject to revision of the financial assessments, Judgment and Sentence entered in this matter.

Dated this 29th day of November, 2018.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,

Respondent,

v.

TALON N. CUTLER-FLINN,

Appellant.

Court of Appeals No: 35807-1-III

DECLARATION OF SERVICE

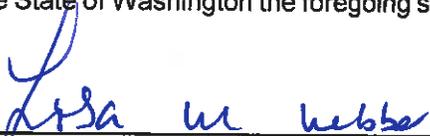
DECLARATION

On November 29, 2018 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

Andrea Burkhart
Andrea@2arrows.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on November 29, 2018.


LISA M. WEBBER
Office Manager

DECLARATION
OF SERVICE

ASOTIN COUNTY PROSECUTOR'S OFFICE

November 29, 2018 - 3:53 PM

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