

FILED
Court of Appeals
Division III
State of Washington
8/28/2019 4:05 PM

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 36428-3-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TIMOTHY BRYANT BLOCHER,

Defendant/Appellant

Respondent's Brief

Jodi M. Hammond
WSBA #43885
205 W. 5th Ave, Ste. 213
Ellensburg, WA 98926
(509) 962 – 7520
Attorney for Respondent

TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR.....1

B. ISSUES PRESENTED.....2

C. STATEMENT OF THE CASE.....4

D. ARGUMENT13

E. CONCLUSION.....33

TABLE OF AUTHORITIES

Cases

<u>In re Marriage of Schneider</u> , 173 Wn.2d 353, 268 P.3d 215 (2011)	19
<u>In re Pers. Restraint of Finstad</u> , 177 Wn.2d 501, 301 P.3d 450 (2013)	32
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781 (1979).....	13
<u>State v. Adel</u> , 136 Wn.2d 629, 965 P.2d 1072 (1998)	18
<u>State v. Allen</u> , 150 Wn. App. 300, 207 P.3d 483 (2009)	31
<u>State v. Barbee</u> , 187 Wn.2d 375, 386 P.3d 729, 733 (2017)	19
<u>State v. Brown</u> , 159 Wn. App. 1, 248 P.3d 518 (2010)	30
<u>State v. Carver</u> , 122 Wn. App. 300, 93 P.3d 947 (2004, Div II)	15
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	24
<u>State v. Crawford</u> , 159 Wn.2d 86, 147 P.3d 1288 (2006).....	25
<u>State v. Fisher</u> , 139 Wn. App. 578, 161 P.3d 1054 (2007, Div. I).....	23
<u>State v. Fredrick</u> , 123 Wn. App. 347 (2004).....	15
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	13
<u>State v. Hall</u> , 168 Wn.2d 726, 230 P.3d 1048 (2010).....	30
<u>State v. Hughes</u> , 166 Wn.2d 675, 212 P.3d 558, 567 (2009).....	19
<u>State v. Jones</u> , 183 Wn.2d 327, 352 P.3d 776 (2015).....	24
<u>State v. Kintz</u> , 169 Wn.2d 537, 238 P.3d 470 (2010).....	14
<u>State v. Kyлло</u> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	25

<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	24
<u>State v. O’Brien</u> , 164 Wn. App. 924, 267 P.3d 422 (2011, Div. I).....	20
<u>State v. Ortiz-Lopez</u> , 2011 Wash. App. LEXIS 1492 (2011) (unpublished)	20
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (2005).....	31
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	14
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052 (1984)	24
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	14
<u>State v. Tvedt</u> , 153 Wn.2d 705, 107 P.3d 728 (2005).....	18
<u>State v. Varnell</u> , 162 Wn.2d 165, 170 P.3d 24 (2007).....	19
<u>State v. Vasquez</u> , 178 Wn.2d 1, 309 P.3d 318 (2013)	14
<u>State v. Westling</u> , 145 Wn.2d 607, 40 P.3d 669 (2002)	18

Statutes

RCW 9A.76.170 (1)	14
RCW 9A.76.170 (3) (c)	14
RCW 9.94A.525 (1).....	32
RCW 9.94A.589 (1) (a)	22
RCW 9.94A.595(3).....	33
RCW 26.50.110	30
RCW 26.50.110(5).....	28

WPICS

WPIC 36.51.02..... 28

Washington State Constitution

CONST. art. I, § 22 24

United States Constitution

U.S. CONST. amend. VI..... 24

A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The state's evidence was sufficient on the bail jumping charges when the defendant was given notice of a future date to appear and failed to appear, even without the state proving direct knowledge on the part of the defendant of the exact date.
- b. In bail jumping, the unit of prosecution should be interpreted as per case, therefore when a defendant fails to appear on the same date on different cases, there is no violation of double jeopardy, however, they are the same "criminal conduct" and should not count against each other in calculating the offender score.
- c. The defendant's attorney was not ineffective in representation of his client when he made repeated and vigorous arguments about his interpretation of the law, although his interpretation was incorrect.
- d. There is sufficient evidence of violation of a no contact order when a valid no contact order exists prohibiting electronic contact and the defendant creates a Facebook group and adds the victim to that

group without their knowledge or consent,
particularly when the group only includes two people
– the defendant and the victim.

- e. The unit of Prosecution for violating a No Contact Order is per contact, therefore setting up a Facebook group and adding a protected person to it and then also posting content to the group are two separate and distinct contacts; counts one and two do not violate double jeopardy.
- f. The court can impose consecutive sentences for two separate cause numbers that are sentenced on different dates so long as they expressly order the sentences be run consecutively as required under the law.

B. ISSUES PRESENTED

- a. Does the state have to prove a defendant had notice of a particular date or is proof sufficient under the current bail jumping statute when a defendant knows of his future appearance and fails to appear?
- b. Is the proper unit of prosecution for bail jumping per cause number when a defendant fails to appear on the

same date for two cases and proof of each charge requires separate evidence?

- c. Is a defense attorney ineffective in representing his client when he makes a strenuous argument to the court based on his interpretation of the law, even though he is incorrect?
- d. Is there sufficient evidence of a violation when a defendant creates a Facebook group and adds the victim to the group without her knowledge or consent when the order prohibits electronic communication?
- e. Because the unit of prosecution for a no contact order violation is per contact, is setting up a Facebook group and adding the victim to it and then posting lyrics to the group directed at the victim two separate violations and does charging both crimes by the defendant violate double jeopardy?
- f. When a defendant is sentenced on two separate cause numbers on two different dates, are consecutive sentences are allowed when the judge specifically orders the cases run consecutively to each other?

C. STATEMENT OF THE CASE

The defendant was charged with four counts of felony violation of a DV protection order (based on two prior convictions) via Information on August 19, 2016. (CP at 1 – 2). He was arraigned on those charges on October 26, 2016 (CP at 4). While this case was pending, the defendant had a second case (16-1-00102-4) also pending that went to trial and was set for sentencing on March 5, 2018. The case currently being appealed (16-1-00215-2) was also set for a status hearing on March 5, 2016 and had also been noted by the defense attorney for several hearings on March 5, 2018 (CP 153; RP at 185 - 6).

On March 5, 2018 the case was called for status and the defendant was not present, although his attorney was present and indicated to the court that he had spoken to Mr. Blocher that day. The defense attorney confirmed that according to his information, the defendant was in the hospital potentially facing amputation of his foot. (CP TBD¹; RP at 188). A notice of hearing was filed, setting the

¹ At the time of filing the response brief, the state will also file a motion to supplement the clerk's papers and exhibits with a few items to assist the Court in its review. Because the state previously sought an extension on the brief and the supplemental clerk's papers and exhibits were minor; this brief is filed with reference with those things the state anticipates being added when the Superior

case to March 26, 2018 (CP TBD). On March 26, 2018 the defendant failed to appear again and his attorney argued that he was hospitalized, the state requested a warrant be issued and the court issued a bench warrant for the defendant's arrest based on the non-appearance. (CP at 57; 155 – 56; RP at 193). The defense attorney indicated he had spoken with Mr. Blocher “three weeks ago,” about Mr. Blocher's district court probation² and that he was required to get in touch with his probation officer, Ms. Lindsay Buntin “right away” when he was released. (RP at 194). The defense attorney objected to the warrant and asked about getting some written proof to the court from the hospital about Mr. Blocher's presence there and status. (RP at 195). The record shows no paperwork filed by Mr. Blocher's attorney regarding the hospital stay or status.

After he was arrested on the warrants, on August 23, 2018 the defendant appeared in court and the pending

Court Clerks supplements the record. The state will file a request to amend its brief then, adding the proper citations to the record, instead of what appears in this original brief as “CP TBD.”

² Mr. Blocher was also facing punishment on a pending district court (City of Ellensburg) case while the Superior Court cases were being adjudicated and references to the misdemeanor charges, probation, his probation officer (who actually testified at trial), and his custody status on those misdemeanor/district court cases are consistent throughout the record on this case. (RP at 35, 80 – 82, 186, 189, 192, 194, 198 – 99, 202).

warrants in both cases were quashed. (CP 157 – 158; RP at 197). Mr. Blocher was present at the hearing and his attorney indicated that during the time the warrant had been active, he had kept in “consistent contact” with the defendant and that the defendant was still “undergoing surgeries and [was still] in treatment at Harborview or University of Washington.” (RP at 197, 199, 201). A new sentencing date was set in the other cause number and a trial date was set in this case (RP at 208; CP at 160).

On October 5, 2018, the Information was amended and two additional charges for bail jumping were added for the defendant failing to appear in both cause numbers (one charge for each case) on March 26, 2018. (CP 168 – 170).

Mr. Blocher went to trial on all six counts: the original felony domestic violence no contact order violations (four counts) and the two added bail jump charges. At trial, Jeanne Malinosky testified that she and the defendant had met, played and written music together, and been in a romantic relationship that ended in November, 2015 and resulted in her obtaining a no-contact order against the defendant (RP at 279 – 281). Ms. Malinosky testified that Mr. Blocher had

been convicted of violating the no contact order on two occasions prior to this particular case (RP at 282).

Ms. Malinosky testified that in August, 2016 there was a Facebook group that had been made called “Hope you Guys are Alright” and Tim Blocher sent messages to Ms. Malinosky within that group on Facebook (RP at 286). The jury saw a picture taken of the messages as they appeared on Ms. Malinosky’s phone when she reported to the police in August, 2016 (Ex 6, 7, 8; RP at 284 – 286). She testified that when she got the message, she thought the defendant started the group and was contacting her again, in violation of the order (RP at 288). On August 3, there was a message in the group that she knew to be song lyrics written by the defendant that had special meaning to the two of them and she doubted the message was sent to anyone else besides her, particularly because she and the defendant were the only two members of the group at the time (RP at 288 – 289, 291, 325, 328, 330). She had been added to the group without her permission and although originally the feed showed someone additionally had left the group, from what her phone showed her about the group, she and the defendant were the only

group members (RP at 289). Also posted within the group was “miss ya” by Timothy on August 4th and a thumbs up by Timothy on August 5th. (Ex 9, 10; RP at 291, 330). All of the contact was unwanted by Ms. Malinosky. (RP at 320, 331 – 32).

On August 18, 2016 Jeanne Malinosky called the police to report the violations of the no contact order and Officer Josh Ingraham responded (RP at 337). Officer Ingraham testified that the order prohibited electronic communication, so he investigated the Facebook group creation and messages as a violation of the order. (RP at 337). He testified that he has been trained on “open source” investigations on social media platforms like Facebook and investigated this case based on that training and experience with how Facebook works. (RP at 340 – 41). He testified that because Ms. Malinosky’s security settings were very low Mr. Blocher was able to add her to the group “Hope you’re Alright” without her permission or because she had previously been a part of that group (RP at 342, 343, 369). He called Mr. Blocher and verified Mr. Blocher’s Facebook account information and photo, confirming it was Mr.

Blocher's account that had communicated with Ms. Malinosky. (RP at 345). Officer Ingraham confirmed that he had photographed the messages from Ms. Malinosky's phone (RP at 346). He also investigated the time period Mr. Blocher would have been able to access computers, knowing there was a period of time he had no access to computers, and the time he knew Mr. Blocher to have access matched the timeframe of the group formation and the posts in the group to Ms. Malinosky (RP at 352, 356). He also testified extensively about how Facebook works as a social media platform, including its purpose, how groups are made and formed, how communication within Facebook and the Facebook Messenger app works, and that he regularly used Facebook for investigations and had been trained on doing so. (RP at 339, 340 – 343, 345, 348, 350 – 51, 364 – 66).

Lindsay Buntin, a Kittitas County probation officer testified that in March, 2018 she was supervising Mr. Blocher on probation through city court (RP at 374). She testified that he was in jail in early March, 2018 but was released pursuant to a Furlough order for medical reasons (RP at 374 – 75; Ex. 1). The release order (dated March 2,

2018) released the defendant from jail because he needed medical treatment, but ordered that he report to probation within 24 hours of release from medical care. (RP at 375, Ex. 1). That order also set a review hearing on April 5, 2018 @ 8:30 a.m. (RP at 375, Ex. 1). Ms. Buntin testified that Mr. Blocher did not ever report to her after being released from the hospital (RP at 376).

Kittitas County Superior Court Deputy Clerk Jan McElroy also testified about the clerk's minutes taken by the clerks during court proceedings in Superior Court and the court files: this case(16-1-00215-2) and the case where the defendant was pending sentencing after trial (16-1-00102-4) (RP at 377 – 78). She specifically testified that the cases were both the State of Washington versus Timothy Blocher and that on March 26, 2018 in both cases Mr. Blocher was not present, but was represented by his attorney at the hearing, Robert Moser who was present. (RP at 379 – 80; 382 – 83; Ex. 4, 5). The minute entries were admitted and reflect that the defendant was not present in court on March 26, 2016 (Ex. 4, 5). The clerk also identified a court order setting hearings in the same cases for March 5, 2016 @ 1:30

pm. (RP at 381; Ex. 14). The clerk reviewed the court file from both cases and in case 16-1-00102-4 found that the entry setting the case for hearing (along with 16-1-00215-2) happened after the second day of a trial. (RP at 390 – 91). The file indicated the defendant was present on the first day of the trial but did not reflect the defendant’s presence or non presence on the second day, although the clerk indicated it would be very unusual on a second day of trial for a defendant not to be present and that if he were not present, that would have been noted (RP at 391). She testified that from her experience, her testimony was that Mr. Blocher was present with the order setting sentencing for March 5 was entered (RP at 392). She testified that the docket notes from March 5 reflect that the defendant was not present on that day and the matter was re-set to March 26 (RP at 392).

The defendant testified that he posted the song lyrics in the group, identified from the picture the police took of Ms. Malinosky’s phone, but that he didn’t expect her to see it; he testified he was sending it to Don Glenn (RP at 426 – 27; Ex. 9). He testified that the “miss ya” was also intended for Don Glenn and the thumbs up was “inadvertently” sent

when he turned his phone off; he testified he didn't know he sent it and he didn't mean to send it (RP at 431 – 32).

The jury found the defendant guilty of Counts 1, 2, 3, 5, and 6 and not guilty of Count 4. (RP 530 – 31; CP 252, 253, 254, 255, 256). At sentencing, Mr. Blocher's attorney requested the court overturn the jury verdict on the bail jump charges, arguing there was no evidence the defendant was given notice of the date charged for his non-appearance (RP at 544). The attorney discussed tactical approaches to his arguments and case presentation about the bail jumping, including deciding not to call the prior attorney as a witness (RP at 545). The court referenced the to-convict instructions for the bail jumping charge, finding the state had met all of the required elements for the statute (RP at 549 – 51). The motion to arrest judgement was denied (RP at 553). The court imposed a standard range sentence of forty-one months on counts one, two, and three; twenty-nine months on counts five and six; running all prison terms in each count in this case concurrently for a total confinement period of forty-one months (RP at 571; CP at 261 – 271). The court did not run

the sentences for 16-1-00215-2 and 16-1-00102-4
concurrently as requested by defense (RP at 571 – 72).

D. ARGUMENT

- a. The state does not have to prove a defendant had notice of a particular date because the proof is sufficient under the current bail jumping statute when a defendant knows of his duty to appear in the future and fails to appear, even on a different date?

To determine whether there is sufficient evidence to support a criminal conviction, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). When a criminal defendant challenges sufficiency of the evidence, “all reasonable inferences from the evidence must be drawn in favor of the State

and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

"'Circumstantial evidence and direct evidence are equally reliable' in determining the sufficiency of the evidence." State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (quoting State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). However, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

Bail jumping as charged in RCW 9A.76.170

(1) and (3) (c) requires proof by the state that:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

...

(3) Bail jumping is:

...

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony.

A person is guilty of bail jumping, a Class C felony, if he or she (1) was being held for, charged with, or convicted of a Class B or Class C felony; (2) he or she was released by court order or admitted to bail; (3) he or she was required to make a subsequent personal appearance; and (4) he or she knowingly failed to appear as required. A plain reading of the current version of RCW 9A.76.170, requires that the State must prove only that Carver was given notice of his court date--**not that he had knowledge of this date every day thereafter.** State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947, 950 (2004, Div II) (emphasis added).

The defendant's reliance on State v. Fredrick, 123 Wn. App. 347 (2004) is misplaced. In Fredrick, the issue presented was when the statutory affirmative defense is not raised by a defendant at trial, is there a burden on the state to disprove the defense because it may negate the "knowing" element with regard to the

defendant's knowledge regarding appearing in court in the future. Id. at 353. That was not the issue in this case; instead State v. Carver is right on point – the state must prove the defendant knew he had to come back to court; there is no requirement for knowledge of the specific date; this reflects a statutory change as discussed in the Carver case; the statute was changed and a plain reading of the statute does not require knowledge of a specific date. This argument being put forth by the defendant that knowledge of the specific date has expressly been rejected by the court before and must be rejected now again.

The evidence is sufficient in this case – the state proved that the defendant was present in trial on the 16-1-00102-4 case, at the conclusion of which, the court entered an order setting that case for sentencing and this other case (16-1-00215-2) for status, both on March 5, 2016. The clerk's testimony was that the hearing on March 5, 2016 was re-set at the request of defense attorney to March 26, 2016, at which point

the defendant failed to appear. This is also clear from the note up filed by the defense attorney.³

The state made this argument in trial to the jury – the defendant knew he had to come back. He had been convicted of a crime and needed to be sentenced and had the additional charges still pending; a case which needed to be set for trial. His knowledge of his future appearance was supported by the evidence presented by the state. Additionally, the evidence from his district court probation officer about the furlough for medical purposes was circumstantial evidence that his non-appearance was willful – he was also ordered to come back to court in that case and to contact his probation officer; he did not do so. Although it was a different case, the evidence is circumstantial that the defendant was acting willfully with his failure to appear. The judge did not abuse his discretion in denying the motion to arrest judgment by following the law and finding that looking at the state’s evidence regarding the

³ The note up was not originally designated part of the record on appeal, but the state will move to supplement the record by adding it.

defendant's knowledge of his requirement to appear at a future hearing was sufficient.

- b. The proper unit of prosecution for bail jumping is per cause number or case and when a defendant fails to appear on the same date for two different cases and proof of each charge requires separate evidence does not violate double jeopardy.

Double jeopardy is violated when a person is convicted multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). When the convictions are under the same statute, the court must ask what “unit of prosecution” the legislature intended as the punishable act under the specific criminal statute. Id. Both the Federal and the Washington State constitutions protect a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (quoting State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)). Thus, while a unit of prosecution inquiry is “one of constitutional

magnitude on double jeopardy grounds, the issue ultimately revolves around a question of statutory interpretation and legislative intent.” Adel, 136 Wn.2d at 634. State v. Barbee, 187 Wn.2d 375, 382, 386 P.3d 729, 733 (2017).

Statutory interpretation requires a court to carry out the intent of the legislature. In re Marriage of Schneider, 173 Wn.2d 353, 363, 268 P.3d 215 (2011). For a court to determine the particular legislative intent of a statute and define the proper unit of prosecution, the statute's plain meaning is the starting point. State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007); Adel, 136 Wn.2d at 635. If the plain meaning of the statute is ambiguous, a court can find legislative intent by reviewing legislative history. State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558, 567 (2009). After determining the unit of prosecution, the court must perform a factual analysis to ascertain whether the facts in a particular case reveal that more than one “unit” is present. Varnell, 162 Wn.2d at 168. If, however, the legislature failed

to denote the unit of prosecution or if its intent is unclear, the rule of lenity requires any ambiguity be resolved against turning a single transaction into multiple offenses. Tvedt, 153 Wn.2d at 711.

The unit of prosecution for bail jumping has been addressed by the court of appeals in several cases, but never regarding the issue presented here – does the unit of prosecution refer to different cases on which the defendant fails to appear.

In State v. O'Brien, the court discussed in a single case where a court entered multiple orders that were all violated by the defendant ordering him to appear at a future court date. 164 Wn. App. 924, 929 – 30, 267 P.3d 422, 424 – 25 (2011, Div. I). In that case the court found that the statute did not define the unit of prosecution, but that regarding the facts of that case, it was not clear if the legislature meant to punish multiple orders in one case with separate offenses and found the rule of lenity required the court to find multiple counts from multiple orders in one case violated double jeopardy. Id. In State v. Ortiz-

Lopez, the court found that in the same cause number, a failure to appear for two different dates, because the crimes were committed three weeks apart and involved completely separate failures to appear were not one offense and did not violate double jeopardy. 2011 Wash. App. LEXIS 1492 (2011) (unpublished). In that case, the court mentions, in dicta, the facts of this case noting “this is not a case where the same act of failing to appear at the same time for two cause numbers resulted in multiple bail jumping charges.”

The question remains with the facts of this case – does a failure to appear on multiple cause numbers on the same date constitute the same unit of prosecution? The state urges this court to find that it does not. Specifically because although the proof is similar with regard to knowledge and intent, the evidence used to present those facts are distinct. The state was required to provide certified copies of minute entries on both cause numbers, thus the proof for each count was distinct and double jeopardy does not attach.

- c. Counts of bail jumping may constitute same criminal conduct

RCW 9.94A.589 (1) (a) provides that

“whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. ... ‘Same criminal conduct,’ as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...”

The “same criminal conduct” requires two or more crimes to involve (1) the same criminal intent, (2) the same time and place, and (3) the same victim. “If any one of these elements is missing, the offenses must be individually counted toward the offender

score.” A sentencing court's determination of same criminal conduct will be reversed only for a clear abuse of discretion or misapplication of law. State v. Fisher, 139 Wn. App. 578, 585-586, 161 P.3d 1054, 1058 (2007, Div. I).

Because the bail jumping occurred at the same time and place, involved the same criminal intent, and had the same victim (arguably, the state, or this is a non victim case); the state concedes they should not have counted against each other to calculate Mr. Blocher’s offender score and should only be counted as one point towards the other felony convictions in this case. Mr. Blocher should be resentenced for this case with the correct offender score on this issue only.

- d. A defense attorney is effective in representing his client when he makes a strenuous argument to the court based on his interpretation of the law, even though he is incorrect.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to

effective assistance of counsel. *See* U.S. CONST. amend. VI; CONST. art. I, § 22. The court reviews ineffective assistance of counsel claims de novo. State v. Jones, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015). Washington has adopted Strickland v. Washington's two-pronged test for evaluating whether a defendant had constitutionally sufficient representation. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim. Strickland, 466 U.S. at 687; Jones, 183 Wn.2d at 339.

Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that “but for counsel's deficient performance, the outcome of the proceedings would

have been different.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); Strickland, 466 U.S. at 694. The defendant must affirmatively prove prejudice and show more than a “conceivable effect on the outcome” to prevail. State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 693). At the same time, a “reasonable probability” is lower than a preponderance standard. Strickland, 466 U.S. at 694; Jones, 183 Wn.2d at 339. Rather, it is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. There is also a strong presumption that counsel's representation was reasonable. Kylo, 166 Wn.2d at 862. Performance is not deficient if counsel's conduct can be characterized as legitimate trial strategy or tactics. Id. at 863.

The *Strickland* court warned against mechanical application of these guidelines. It reminded that “a court should keep in mind that the principles we have stated do not establish mechanical rules. ... [T]he ultimate focus of inquiry must be on

the fundamental fairness of the proceeding whose result is being challenged.” Strickland, 466 U.S. at 696.

In this case, Mr. McBride made arguments to the court based on his interpretation of the bail jumping statute that are similar in nature to the arguments made by appellant counsel – he believed the state needed to prove that the defendant had knowledge of a particular date. Based on that belief, he argued to the court that he made tactical and trial decisions not to call Mr. Blocher’s former attorney and although not mentioned specifically by Mr. McBride in his argument to the court, one can infer perhaps not to even ask Mr. Blocher about his whereabouts when he missed court – Mr. McBride did not believe the state had met the burden he thought was required under the law.

Mr. McBride’s interpretation of the law was incorrect – the state did not have to prove knowledge of the particular date and the state made that argument to the court. Mr. McBride was wrong about

what he believed the law was and preserved that issue for appeal, but that does not make him ineffective.

Any other errors (for example, incorrectly calculating the defendant's offender score by not asking the bail jump charges to be the "same criminal conduct") are harmless and do not amount to deficient performance.

In reading the record, there are several times during trial when Mr. McBride makes vehement and eloquent arguments on evidence to the court and a thorough review of his performance shows that he was a zealous advocate, even if he was not perfect in his reading of the law.

- e. There is sufficient evidence of violation of a no contact order when a valid no contact order exists prohibiting electronic contact and the defendant uses the internet to create a Facebook group and adds the victim to that group without their knowledge or consent, particularly when the group only includes two people – the defendant and the victim.

The standard of review for sufficiency of evidence is cited above and also applies to this

argument; the state will not recite (again) the standard (See Argument “a” section above).

As stated in the statute and the WPIC, a felony no contact order violation requires proof:

- (1) That on or about (date), there existed a protection order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

RCW 26.50.110(5); WPIC 36.51.02. Here the evidence presented by the state was that on August 3rd (for counts one and two) there existed a valid NCO. The victim testified about obtaining the NCO for the first time in November, 2016 and maintaining one from that point forward, including the day she testified. The order was admitted as an exhibit at trial. The defendant acknowledged the order and identified his own signature on it, meeting the first two elements.

The argument from defense seems to be that creating the group and adding Ms. Malinosky to the group cannot be a violation. The order expressly prohibits electronic communication – the defendant used the internet (either a computer or a phone), accessed a social media platform and then used the structure of that platform (the “group” feature) to make contact with the victim. He used the application known for sending messages and notifications to a person to start a “group” and to add the victim, without her knowledge or permission to that group. The state argued to the jury that this was an electronic communication and the evidence supports this argument. Officer Ingraham testified to the jury about how the social media platform, Facebook, works based on his training in open source investigation and that users can create groups to send messages, etc. That is exactly what the state’s evidence showed the defendant did. Furthermore, his creating and adding her to the group facilitated his further crime, the additional posts in the group that

were clearly intended for the victim (counts two and three).

- f. Because the unit of prosecution for a no contact order violation is per contact, setting up a Facebook group and adding the victim to it and then also posting lyrics to the group directed at the victim are two separate violations and charging both crimes by the defendant does not violate double jeopardy.

The legal argument regarding double jeopardy analysis is also summarized above (Argument b).

The unit of prosecution for a crime can be either an act or a course of conduct. State v. Hall, 168 Wn.2d 726, 731, 230 P.3d 1048 (2010). RCW 26.50.110 punishes “a violation of a no-contact order.” State v. Brown, 159 Wn. App. 1, 10, 248 P.3d 518 (2010).

This court has reasoned that use of the word “a” in the statute renders each violation of a protection order one unit of prosecution. State v. Brown, 159 Wn.

App. at 10-11. In other settings, the Supreme Court has consistently interpreted the legislature's use of the word “a” in a criminal statute as authorizing

punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously. State v. Ose, 156 Wn.2d 140, 147, 124 P.3d 635 (2005); State v. Brown, 159 Wn. App. at 11. In State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (2009), Leif Allen sent two e-mails on different days that the victim viewed at the same time, and he was convicted of two no-contact order violations. Allen argued that because the victim viewed the e-mails at the same time, one of his convictions violated double jeopardy. The court disagreed because the statute focuses on the defendant's actions, not the victim's. Each act of sending an e-mail constituted a statutory violation.

Here, the analysis is clear – the unit of prosecution in this offense is the contact, each time the defendant contacts the victim, it is a separate crime. Count one was for creating the group, count two was for posting the song lyrics, count three was for posting “miss ya,” and count four (not guilty) was alleged to have been posting the thumbs up in the

same group. It's analogous to calling someone repeatedly; each phone call is a violation. There is no double jeopardy violation.

- g. When a defendant is sentenced on two separate cases on two different dates, consecutive sentences are allowed when the judge specifically orders the cases run consecutively to each other.

While the SRA does not formally define “current offense,” the term is defined functionally as convictions entered or sentenced on the same day. RCW 9.94A.525 (1). “Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses.’”) Generally, sentences on current offenses are presumed to be served concurrently rather than consecutively. RCW 9.94A.589 (1) (a). Nothing in the SRA suggests that sentences issued on different days would not be presumptively served consecutively. In re Pers. Restraint of Finstad, 177 Wn.2d 501, 507-508, 301 P.3d 450, 453 (2013).

At the time of sentencing in this case, the defendant had been found guilty in 16-1-00102-4 and had already been sentenced. RCW 9.94A.595(3) requires the court to “expressly” order sentences in separate cause numbers, sentenced on different dates be consecutive, which is what the court did in this case. The defendant does not need to be resentenced.

CONCLUSION

For the reasons stated, the defendant’s convictions should be affirmed. The case may be remanded to the Superior Court to correctly calculate the defendant’s offender score because the bail jumping charges should be included as the same criminal conduct under the SRA.

Dated this 28th day of August, 2019.

Jodi M. Hammond
WSBA #43885
Attorney for Respondent

PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 28th day of August, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

DENNIS W. MORGAN
WSBA #5286
Attorney for Defendant/Appellant
PO Box 1019
Republic, WA 99166
Telephone: 509-775-0777
Fax: 509-775-0776
nodblspk@racabletv.com

/s/ Jodi M. Hammond,
WSBA #43885
Attorney for Respondent
Kittitas County Prosecuting Attorney's Office
205 W 5th Ave
Ellensburg, WA 98926
509-962-7520
prosecutor@co.kittitas.wa.us

KITTITAS COUNTY PROSECUTOR'S OFFICE

August 28, 2019 - 4:05 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36428-3
Appellate Court Case Title: State of Washington v. Timothy Bryant Blocher
Superior Court Case Number: 16-1-00215-2

The following documents have been uploaded:

- 364283_Briefs_20190828160221D3486935_0951.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Respondent Brief.pdf

A copy of the uploaded files will be sent to:

- greg.zempel@co.kittitas.wa.us
- nodblspk@rcabletv.com
- prosecutor@co.kittitas.wa.us

Comments:

Sender Name: Theresa Burroughs - Email: theresa.burroughs@co.kittitas.wa.us

Filing on Behalf of: Jodi Marie Hammond - Email: jodi.hammond@co.kittitas.wa.us (Alternate Email:)

Address:
205 West 5th Ave
Ellensburg, WA, 98926
Phone: (509) 962-7520

Note: The Filing Id is 20190828160221D3486935