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No. 36976-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

EDGAR TORREZ,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 19-1-00522-03

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. First Degree Burglary and Felony Violation of a No Contact Order are not “same criminal conduct” and the defense attorney was not ineffective for failing to request such a finding.
- B. The trial court did not abuse its discretion by not giving lesser included instructions for Criminal Trespass and Assault in the Fourth Degree.
- C. The defendant is correct. The Judgment and Sentence should have stated the RCW for First Degree Burglary as RCW 9A.52.020 (1)(b), rather than (1)(a).

II. STATEMENT OF FACTS

Some key dates are as follows:

September 5, 2018: A Post-Conviction Domestic Violence No Contact Order was issued by the City of Kennewick prohibiting the defendant coming within 250 feet of the residence of his mother, Carolina Diaz, 627 S. Beech St., Kennewick, WA or her person. The DV-NCO will expire in two years. See Ex. 13.

April 24, 2019: Ms. Diaz was getting ready to leave for work at around 6:00 P.M. RP¹ at 98. As she was leaving, the defendant came to the

¹ Unless otherwise indicated, “RP” refers to the verbatim report of proceedings from jury trial on 06/24/2019 to 06/25/2019.

residence at 627 S. Beech. RP at 96. She allowed the defendant to stay on the patio of the house, and gave him a blanket so he could sleep, but did not allow him to go inside. *Id.*

April 25, 2019 at about 7:30 A.M.: Ms. Diaz returned home from work. RP at 98. The defendant was sleeping on the patio. *Id.*

April 25, 2019 at around 8:30-9:00 A.M.: Ms. Diaz showered and went to bed. RP at 99. Before she fell asleep, she checked, and the defendant had left. *Id.*

April 25, 2019, sometime in the afternoon: Ms. Diaz awoke from hearing a noise outside. RP at 109. She got up and found the defendant was breaking out a window at her house. RP at 99. He told her that because she would not let him in the house, he would come in by breaking a window. RP at 99-100.

She told him she would call the police. RP at 100. When she grabbed her phone, the defendant threw a rock against the window and broke it. *Id.* She opened a sliding glass door so the defendant would not break it. RP at 106.

The defendant came in through the sliding glass door and, as Ms. Diaz described it, “threw himself on me.” RP at 100. He snatched her cell phone and threw it against the floor, causing the screen to shatter. RP at 101. He lunged at her purse, but Ms. Diaz was able to place it in her arm.

Id. He threw her on the floor. *Id.* The defendant began arguing with her, asking why she did not allow him to be there, that she had another house, and that she should not be there. RP at 110.

The defendant grabbed Ms. Diaz by the hair and dragged her outside. RP at 103. A neighbor, Maria Mendoza, happened to be outside at this time and saw the defendant throw Ms. Diaz “like a teddy bear against the grass.” RP at 88. The defendant then went into the house at 627 S. Beech and closed the door. *Id.*

Ms. Mendoza allowed Ms. Diaz to go into her house and use her phone. RP at 90. There, Ms. Diaz called 911 and then her daughter. RP at 103.

April 25, 2019, around 7:30 P.M.: The police were dispatched to 627 S. Beech St. RP at 32. Ms. Diaz pulled out a large clump of her hair while talking to Officer Cristelli. RP at 34. Officer Cristelli saw visible injuries on her including a bald spot on her head and blood on the front of her head. RP at 34-35.

The police attempted to extract the defendant from the house at 627 S. Beech and eventually the defendant responded. RP at 60. The defendant claimed that it was his house and that the police did not have permission to enter. *Id.*

The defendant was charged with Burglary in the First Degree, Felony Violation of Court Order, both with Domestic Violence notices, and he was convicted as charged. CP 63-66, 86-87.

Response to Specific Comments by Defendant's Statement of Facts:

“However, Diaz opened the sliding glass door in the dining room and let Torrez into the home.” Br. of Appellant at 4.

The defendant had just broken one window, and Ms. Diaz did not want him to break the slider. RP at 100, 106. She did not invite the defendant into the house. RP at 106-07.

“Diaz’s oldest son Emiliano Torrez takes care of the Beech Street home on weekends starting on Fridays, and sometimes allows Torrez to stay there.” Br. of Appellant at 5. This is a misreading of the testimony. In cross-examination, the defendant had this exchange with Yesenia Hernandez, the defendant’s sister, and Ms. Diaz’s daughter:

Q: Does your brother, Emiliano, does he kind of look after the house on Beech Street sometimes?

A: He—no.

Q: No?

A: As of the day that he arrived, yes. On the weekends. But that day that the incident occurred, no. As of yet he had not been there yet.

Q: Okay. It was a Thursday night to a Friday morning; right?

A: Yeah. So Friday night was his first time being there.

RP at 116.

All of these questions concerned Emiliano, not the defendant. The next question concerned the defendant:

Q: Okay. Does Emiliano let Edgar stay there, as far as you know?

A: No.

Q: Does not?

A: No.

Id.

Ms. Diaz testified that she had no knowledge that the defendant had stayed at 627 S. Beech since the No Contact Order was entered on September 5, 2018. RP at 106.

Q: And so sometimes Emiliano is the one kind of taking care of the house?

A: Well, not in charge of the house because I am the owner of the house and I am in charge of the house. But just like my other children, he can come over and stay.

Q: Okay. Does Emiliano allow Edgar to stay there (at 627 S. Beech)?

A: If he allows it. It's his brother.

Q: Okay. Is it the case that you are not necessarily aware of whether Emiliano lets Edgar stay there or not?

A: Well, I really don't know about their conversations.

Id.

There was no evidence or testimony that Emiliano had allowed the defendant to stay at 627 S. Beech, Kennewick, WA. Neither Emiliano nor the defendant testified.

“[W]hen she returned from work, [the defendant] was sleeping so he did not see Diaz go into the house.” Br. of Appellant at 5.

There is no evidence on whether the defendant knew his mother, Ms. Diaz, was at home. The defendant did not testify. On RP 98, Ms. Diaz confirms the defendant was sleeping when she arrived home in the morning on April 25, 2019. When she checked about an hour later, he was not at the house. RP at 99. No one asked Ms. Diaz to speculate on whether the defendant knew she was home.

“After Diaz opened the door to Torrez, he did not know why she was there; he expected Diaz to be at her other residence.” Br. of Appellant at 6.

The defendant did not testify, and no witness speculated about what he thought or expected. The defendant told Ms. Diaz “that I had another house to be at . . . for me to go over there,” but did not say that he was surprised because he expected his mother to be elsewhere. RP at 110.

Further, Ms. Diaz did not “open the (sliding glass) door to Torrez” in the sense of allowing him to enter the house. She did so to keep him from breaking the glass door. RP at 106.

III. ARGUMENT

- A. The defense attorney was not ineffective for not requesting that the Burglary in the First Degree be treated as “same criminal conduct” with the Violation of Court Order.**

1. Standard on review:

The defendant's citation to *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is correct. The defendant has the burden of showing deficient performance and a reasonable probability that it affected the verdict or sentence.

2. The defense attorney's performance was not deficient because Burglary in the First Degree and Felony Violation of a No Contact Order are not in the "same course of criminal conduct."

a. Standard on review regarding "same course of criminal conduct":

Courts construe RCW 9.94A.589 (1)(a) narrowly to disallow most assertions that two crimes are the "same criminal conduct." *State v. Wilson*, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). Two crimes do not contain the same criminal intent when the defendant's intent objectively changes from one crime to the other. *Id.* Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan. *Id.* Where the second crime is "accompanied by a new objective intent, one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct." *Id.* at 613-14.

b. The First-Degree Burglary and Violation of a Court Order were committed with

different criminal intentions and at different times.

This issue was dealt with in *State v. Spencer*, 128 Wn. App. 132, 114 P.3d 1222 (2005). The *Spencer* court concluded that a defendant could be prosecuted and separately punished for both a violation of the no-contact order and burglary. “Nothing in the burglary or domestic violence prevention statutes indicates an intention by the Legislature not to allow these two crimes to be charged separately.” *Id.* at 141.

The core purpose of the No-Contact Order law is to protect an individual from domestic abuse. *Id.* at 137. The core purpose of the Burglary statute is to outlaw a person entering a building with the intent of committing a crime against a person or property therein. RCW 9A.52.030. The crime is elevated to First-Degree Burglary if the perpetrator assaults a person in entering, while in the building or in immediate flight therefrom. RCW 9A.52.020.

Further, the defendant’s argument assumes that the only motive for his unlawful entry into Ms. Diaz’s residence was to assault her. But a jury could have concluded the defendant entered his mother’s, Ms. Diaz’s residence to steal her purse, since he made an attempt to grab it. RP at 101. The jury could also have concluded that once he was inside the residence, the defendant decided to smash Ms. Diaz’s cell phone. *Id.* The defendant

could have been found guilty of Burglary based on either of those motives and when he assaulted Ms. Diaz, his conduct rose to First-Degree Burglary. Not only is the criminal intent different for Burglary and Felony No Contact Order Violation, in this case the purpose of the Burglary may not have been to assault Ms. Diaz.

Also, the crimes were committed at different times. The defendant committed a Felony No Contact Order Violation when he dragged Ms. Diaz out of the house and threw her on the lawn. The assault outside the residence did not constitute a Burglary. Burglary occurs when a person unlawfully enters or remains in a building. RCW 9A.52.020. If the defendant “while in the building or in immediate flight therefrom” assaults a person, the crime is elevated to First-Degree Burglary. RCW 9A.52.020 (1)(b). The defendant’s assault of Ms. Diaz outside the residence does not constitute a Burglary.

Unlike Burglary, Violation of a No-Contact Order is a continuing offense. *Spencer*, 128 Wn. App. at 138. The defendant was in violation of the No-Contact Order when he stayed overnight on Ms. Diaz’s porch, even though she was at work. He was in violation when he broke out a bedroom window. He was in violation when he entered the house. He was in violation when he assaulted her in the house. And, he was in violation when he dragged her out of the house and threw her on the lawn.

Further, the Burglary anti-merger statute, RCW 9A.52.050, is important on this issue because the trial judge gave a strong indication that he would invoke that statute even if the crimes were in the same course of criminal conduct:

I was inclined to impose the middle of the range on this matter based on the facts that had come out during the trial. I was going to impose a sentence of 100 months as that was what was in my mind when I walked into this courtroom before I heard both sides. Frankly, it's only because of the fact the prosecutor's recommending the bottom of the standard range, and the basis for their recommendation is because of the victim in this matter who suffered at your hands, is recommending 87 months and would ask for that, that I'm imposing it.

RP 06/13/2019 at 18.

These comments are important because under the “prejudice” prong of an ineffective assistance argument, the defendant must show not that there is a possibility, but a probability, that the sentence would have changed had the trial attorney requested that the crimes be considered the same course of criminal conduct.

Finally, the defendant's citation to *State v. Phuong*, 174 Wn. App. 494, 299 P.3d 37 (2013), can be distinguished. The defendant in *Phuong* dragged his estranged wife from her car, through a garage, and into his bedroom to try to rape her. *Id.* at 500. The defendant's objective intent throughout was to rape his victim. The differences between that case and cases such as *Spencer*, which held that Burglary and No Contact Order

violation are not in the same course of criminal conduct, are: The defendant herein had different intentions; (1) to contact his mother in violation of a no-contact order; (2) to enter her residence to either assault her, steal her purse, or destroy her cell phone; and (3) to continue the violation of the no-contact order by assaulting her outside her residence. The assault outside the residence constitutes a Felony No Contact Order Violation but would not constitute a Burglary. There is an anti-merger statute applicable in this case. *Spencer* dealt specifically with the crimes herein and the *Phuong* case involves different crimes which could have been in the same course of criminal conduct.

Given the trial judge's statements that the bottom of the standard range was inadequate, that the purposes of Burglary and No Contact Order Violation are different, that the Felony No Contact Order, at least in part, occurred when the defendant assaulted his mother outside her residence, and the caselaw dealing with these exact crimes, there was no reason for the defense attorney to argue that they were in the same course of criminal conduct.

- B. The trial court correctly did not give jury instructions for Criminal Trespass and Fourth Degree Assault.**
 - 1. Standard for review of decision not to give lesser included instructions:**

There has to be a factual and legal basis for a lesser included instruction to be given. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). That is, the facts of the case must support an inference that only the lesser crime was committed, and the elements of the lesser offense must be included in the charged offense.

If the trial court declines to give a lesser included instruction on a factual basis, the decision is reviewed for abuse of discretion. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). A court must view the evidence in the light most favorable to the party requesting the lesser included instruction. *Id.* at 321. There must be some affirmative evidence supporting the lesser included offense, *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997), and it is not enough if the jury simply might disbelieve the State's evidence. *State v. Rodriguez*, 48 Wn. App. 815, 820, 740 P.2d 904 (1987).

Here, the trial court made its decision based on the factual prong. RP at 121-23. So, the issue is whether looking at the evidence in the light most favorable to the defendant, the trial court abused its discretion by not giving the lesser included instructions.

2. **The trial court did not abuse its discretion in not giving the lesser included instructions.**
 - a. **The defendant's argument is not supported by the facts.**

To fact-check the defendant's brief: "Torrez's theory of the case was that Diaz had another residence where she stayed. While Diaz was gone, Emiliano Torrez took care of the house, usually on the weekends, and allowed Torrez to stay there." Br. of Appellant at 19.

There was no evidence that Emiliano allowed the defendant to stay at the Beech Street house. The only people who testified on this point were Yesenia Hernandez, the defendant's sister and Ms. Diaz's daughter, who said Emiliano had not allowed the defendant to stay at the house, and Ms. Diaz, who said she did not know if Emiliano had ever allowed the defendant to stay there. RP at 106, 116. In fact, Yesenia stated that Emiliano had not looked after the house until the day after this incident. RP at 116.

"Torrez slept on the patio the night prior to this incident but never saw Diaz come home from work the next morning and had no reason to believe she was inside the home." Br. of Appellant at 19.

The defendant spoke with his mother, Ms. Diaz, the night before as she was heading to work. RP at 96. It is reasonable to assume the defendant would know Ms. Diaz would return to the house after completing her work. He may have deduced that she was home, based on the hour and Ms. Diaz's work schedule. But the defendant did not testify and there is no direct evidence that he did, or did not, know she was inside

the home before he started breaking a bedroom window. It is incorrect for the defendant on appeal to state that the record shows he did not believe his mother was home.

This point becomes irrelevant when the defendant broke the bedroom window and Ms. Diaz confronted him. Before he entered the house, he told her that because she would not let him in the house, he would come in by breaking a window. RP at 99-100. She was inside the house and he was locked out. He did not go into the house thinking it was vacant.

“Torrez left but returned later that night mistakenly believing it was Friday when Emiliano Torrez was in charge of the house.” Br. of Appellant at 19.

The defendant should have testified if he wanted to claim that he mistakenly believed it was Friday. There is no evidence on this point. There is also no evidence that Emiliano was taking care of the house at this point. His sister testified that Emiliano started taking care of the house after this incident. RP at 116.

The defendant’s trial attorney did not try to claim that the defendant was confused about whether it was a Friday. The most claimed at trial was that there was “confusing information from the family about what was going on with the oldest brother And how much permission

Edgar had to be there. . . . it was not clear to Edgar (the defendant) that he did not have permission to be there at the house per his older brother, Emiliano” RP at 151.

“This theory is supported by Diaz’s testimony that Torrez wondered why she was there.” Br. of Appellant at 19.

The evidence is not that the defendant “wondered” why Ms. Diaz was at the house. The evidence is that they argued with the defendant telling Ms. Diaz: why are you not allowing me to be in (the house); you have another house; go over there. RP at 110.

“Because Torrez had no reason to believe Diaz was in the house he did not intend to commit a crime against her once inside.” Br. of Appellant at 19.

The defendant knew Ms. Diaz was at the house the previous night, immediately before she went to work. He should have known she would return to the house after completing her work. But it is false to say that he had no reason to believe Ms. Diaz was in the house: they spoke to each other while he was breaking out a window. RP at 99-100.

As for “not intending to commit a crime against her once inside,” Ms. Diaz opened the sliding glass door so he would not break that also. RP at 106. He went into the house and tried to grab her purse, threw her cell phone to the floor, and dragged her by the hair outside the house. RP at

101. The burglary statute is not limited to the perpetrator's intent before he entered a building. The statute includes the perpetrator's intent while he "remains unlawfully" in the building. Whatever his intent before he entered, once inside the house he assaulted Ms. Diaz, damaged her cell phone and tried to steal her purse.

"Torrez's lack of intent is supported by Diaz's testimony that Torrez entered the home in the afternoon, yet she did not go to the neighbor's home until about 6:30 P.M. Thus, the jury could have believed Torrez remained in the home for a period of time without incident." Br. of Appellant at 19.

There is a discrepancy between Ms. Diaz's recollection of the exact time she called the police and the time the police say they were dispatched. RP at 32. Ms. Diaz stated the episode occurred "in the afternoon." RP at 109. Her daughter remembered getting a phone call from her mother, Ms. Diaz, at about "6:40-ish." RP at 113. But putting all the facts together, Ms. Diaz and Ms. Hernandez were probably under a great deal of stress, did not check the time, and, unlike the police, did not have the aid of dispatch logs or written reports to assist them.

Ms. Diaz estimated that less than five minutes elapsed from the time he broke the window to the time he dragged her outside. RP at 107. The neighbor, Maria Mendoza, testified that after the defendant threw Ms.

Diaz outside onto the yard, Ms. Diaz got up and asked to use her phone. RP at 88-89. Ms. Mendoza stayed with Ms. Diaz until the police arrived, which was in about 10 minutes. RP at 90.

After calling the police, Ms. Diaz called her daughter, Yesenia Hernandez. RP at 91, 103. While Ms. Diaz thought it took her daughter 20-30 minutes to arrive, Ms. Hernandez thought it took her about 10 minutes to get to her mother's residence. RP at 104, 113. The police were already there. RP at 114. Because the police were at the home before her, Ms. Hernandez's estimate of a call from her mother at "6:40-ish" was probably off.

The events happened in a rapid-fire succession and there is no evidence that the defendant was "in the home for a period of time without incident."

C. The actual facts establish that the trial court did not abuse its discretion in not giving the lesser instructions of Fourth Degree Assault and Criminal Trespass for Burglary in the First Degree.

The only testimony about the defendant being allowed to stay at the house was from Ms. Diaz and Ms. Hernandez. Ms. Diaz stated that she did not allow the defendant to stay at the house and told him he could not come in the night before this incident. RP at 96. She also stated she had no knowledge of Emiliano, another of her son's, allowing the defendant to

stay there. RP at 106. Ms. Hernandez stated that Emiliano did not allow the defendant to stay at the house. RP at 116.

Even setting aside this testimony, the No-Contact Order entered on September 5, 2018 specifically prohibits the defendant from entering 627 W. Beech St., Kennewick, WA. The defendant's citations to *State v. Stinton*, 121 Wn. App. 569, 89 P.3d 717 (2004) and *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007) are not on point. In *Stinton*, the issue was whether violation of a No-Contact Order could satisfy the element in Burglary of "intent to commit a crime against a person or property." *Stinton*, 121 Wn. App. at 574. In *Wilson*, the No-Contact Order did not specifically exclude the defendant from the residence. *Wilson*, 136 Wn. App. at 604.

Finally, how could the trial attorney have argued that the defendant did not commit a First-Degree Burglary, but did commit a First-Degree Criminal Trespass and Fourth-Degree Assault? If a defendant is in a building unlawfully and at some point forms the intent to assault an occupant of the building, she has just committed First Degree Burglary.

D. The State agrees that the Judgment and Sentence needs to list the RCW for Burglary in the First Degree as RCW 9A.52.020 (1)(b).

Kudos to the defendant for spotting the error.

IV. CONCLUSION

The conviction should be affirmed. The State agrees that Section 2.1 of the Judgment and Sentence listing the RCW for Burglary in the First Degree should be changed from RCW 9A.52.020 (1)(a) to (1)(b).

RESPECTFULLY SUBMITTED on April 13, 2020.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on April 13, 2020.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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