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NO. 63046-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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COURT OF APPEALS DIV #1
STATE OF WASHINGTON
FILED

STATE OF WASHINGTON,
Respondent,

v.

QUENTIN CAMPBELL,
Appellant.

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

APPELLANT'S OPENING BRIEF

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT.

Quentin Campbell's state and federal double jeopardy protections, as well as his right to receive a fair trial and sentence were violated when he was punished repeatedly for the same conduct.

Specifically, Mr. Campbell was sentenced for two separate counts of assault in the second degree as well as for one count of felony harassment, all resulting from one single course of criminal conduct.

B. ASSIGNMENTS OF ERROR.

1. Mr. Campbell's two convictions for assault in the second degree, based on a single course of conduct directed toward the same victim, violated state and federal constitutional double jeopardy provisions.

2. The trial court abused its discretion in finding Mr. Campbell's two convictions for assault in the second degree constituted separate conduct, and in counting each conviction separately in his offender score.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The double jeopardy clauses of the U.S. Constitution and the Washington Constitution protect against multiple punishments for

the same offense. Here, the two convictions for assaulting Toma Campbell were part of the same unit of prosecution for purposes of double jeopardy. Did Mr. Campbell's two convictions for second degree assault therefore violate state and federal double jeopardy protections?

2. To determine a defendant's offender score, offenses are counted together when they constitute the "same criminal conduct." RCW 9.94A.589(1)(a) defines "same criminal conduct" as offenses that have the same victim, occur at the same time and place, and share the same criminal intent. Here, Mr. Campbell was convicted of assault in the second degree for conduct against the same victim, at the same time and place, and based on the same general *mens rea*. Did the trial court err in finding the two offenses did not constitute the same criminal conduct?

D. STATEMENT OF THE CASE.

Quentin Campbell was charged and convicted of assault in the second degree and felony harassment, due to an altercation that took place with his wife on the morning of May 21, 2008. CP 28-30.¹

¹ The verbatim report of proceedings consists of seven volumes of transcripts from January 15, 2009, through February 15, 2009. The proceedings will be referred to herein by the date of proceeding followed by the page number, e.g. "1/13/09 RP ___." References to the file will be referred to as "CP."

Evidence at trial showed that on the morning of May 21, 2008, Ms. Toma Campbell reported to police that Mr. Campbell had threatened her with a gun, called her names, and had repeatedly covered her mouth and nose with his hands. 1/21/09 RP 42-53. She also testified that their two year-old daughter was sitting on her lap or the bed near her during much of the incident. Id. at 46.

Ms. Campbell's twelve year-old son, Brenden, who was home that morning, also testified to seeing his stepfather point a gun at his mother's head and at other points of her body. 1/21/09 RP 93-97. Brenden testified that he saw his mother on the verge of losing consciousness several times during the incident. Id. at 93.

Following a jury trial, Mr. Campbell was convicted of two counts of assault in the second degree and one count of felony harassment. CP 28-30. He was also convicted of being armed with a firearm during the commission of counts I and II. CP 26-27.

Mr. Campbell had no prior criminal history. Because the jury found the crime took place in the presence of Ms. Campbell's two children, the court imposed an exceptional sentence on both counts I and II, even though it also found that count II, felony harassment, merged into count I, second degree assault based on a threat with a deadly weapon. 2/13/09 RP 28. The standard

range for count I was 48 to 50 months, and the court imposed 74 months as an exceptional sentence; it imposed a 50-month term for count II (felony harassment) as an exceptional sentence; and a concurrent standard range term of 14 months for count III (additional count of assault in the second degree). CP 54-61.

E. ARGUMENT.

1. MR. CAMPBELL'S TWO CONVICTIONS FOR SECOND DEGREE ASSAULT, BASED ON A SINGLE UNIT OF PROSECUTION, VIOLATE DOUBLE JEOPARDY.

- a. Double jeopardy principles bar a defendant from being convicted more than once for the same criminal conduct.

The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense."

U.S. Const. amend. 5; Const. art. 1, § 9. The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v.

Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); Gocken, 127 Wn.2d at 100. While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. Freeman, 153 Wn.2d at 770-71

The double jeopardy provisions of the United States and Washington Constitutions provide that a person may not be convicted more than one time under the same criminal statute if he or she has committed only one "unit" of the crime. State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006). The unit of prosecution

is designed to protect the accused from overzealous prosecution.

State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution may be an act or a course of conduct. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). The unit of prosecution is determined by examining the statute's plain language. Leyda, 157 Wn.2d at 342. If the legislature has not specified the unit of prosecution, or if legislative intent is unclear, this Court resolves any ambiguity in favor of the accused. Tvedt, 153 Wn.2d at 711.

b. The two convictions for the assault of Ms. Campbell were part of the same unit of prosecution for purposes of double jeopardy, and must merge. When a defendant is convicted for violating one statute multiple times, the court must determine what unit of prosecution the legislature intended within the particular criminal statute. State v. Sutherby, 165 Wn.2d 870, 878-88, 204 P.3d 916 (2009) (analyzing unit of prosecution based on strict statutory construction and the rule of lenity); State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998); State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007).

Ultimately, analyzing the unit of prosecution is an issue of statutory construction and legislative intent. State v. Adel, 136

Wn.2d at 634. To determine legislative intent, courts look to the plain meaning of the applicable statute, which is derived from the language of the statute. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). Statutes are construed to effect their purpose and avoid unlikely or absurd results. State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). If a statute does not clearly and unambiguously identify the unit of prosecution, then any ambiguity is resolved under the rule of lenity to avoid “turning a single transaction into multiple offenses.” Adel, 136 Wn.2d at 634-35 (quoting Bell v. United States, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955)).

The relevant portion of the statute at issue, RCW 9A.36.021(1), defines assault in the second degree as follows:

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
 - (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
 - (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
 - (c) Assaults another with a deadly weapon; or

- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
- (e) With intent to commit a felony, assaults another; or
- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
- (g) Assaults another by strangulation.

The statute does not specifically define the unit of prosecution.

Since the statute defining second degree assault does not define the unit of prosecution, the rule of lenity must be applied, resolving any ambiguity in Mr. Campbell's favor. Adel, 136 Wn.2d at 635; Bell, 349 U.S. at 84.

Although there appears to be scarce direct precedent defining the unit of prosecution for assault in the second degree, the Washington Supreme Court, in dicta, has stated that all acts occurring during the course of an assault are part of the same unit of prosecution. See Tili, 139 Wn.2d at 116-17 (distinguishing the rape statute from the assault statute in this regard, noting that a defendant cannot be charged for every punch thrown in a fistfight without violating double jeopardy).

Here, during a single incident with his wife, which lasted between approximately thirty minutes to an hour, Mr. Campbell reportedly threatened her with a weapon and attempted to suffocate her. Without any pause in the action or change of scene, this one incident was artificially broken into multiple convictions, in an offense to double jeopardy protections. Taken to its logical result, the approach taken by the State in breaking this event into separate charges would allow the State to charge each individual shove, tap, or punch as a separate assault, creating an absurd result. This is exactly what the Supreme Court was discussing when it held that “the Legislature clearly has not defined ‘assault’ as occurring upon any physical act.” Tili, 139 Wn.2d at 116-17.

Because Mr. Campbell’s two convictions for assault in the second degree involving the same victim and same proceeding constitute a single unit of prosecution, these convictions violate his right to be free from double jeopardy. One of the convictions must be vacated and the case remanded for a new sentencing hearing. Leyda, 157 Wn.2d at 351.

2. THE TWO ASSAULT IN THE SECOND DEGREE OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING MR. CAMPBELL'S OFFENDER SCORE, AS THEY OCCURRED AT THE SAME TIME AND PLACE, INVOLVED THE SAME VICTIM, AND WERE COMMITTED WITH THE SAME CRIMINAL INTENT.

- a. Crimes occurring at the same time and place,

involving the same victim, and having the same overall criminal objective, constitute the same criminal conduct for sentencing

purposes. Under RCW 9.94A.589(1)(a), when a defendant is to be sentenced for two or more current offenses, generally the offender score for each current conviction is determined by using all other current convictions as if they were prior convictions. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 120, 985 P.2d 365 (1999). The resulting offender score is used to determine the sentencing range applicable for each conviction. Tili, 139 Wn.2d at 120. Sentences are then imposed for each current conviction, which are served concurrently, unless an exceptional sentence is imposed, as it was here. Id.

An exception exists for current offenses if the sentencing court expressly finds that the offenses "encompass the same criminal conduct." RCW 9.94A.589(1)(a). Such convictions are counted as one crime in the offender score. Id.

The Sentencing Reform Act (SRA) defines “same criminal conduct” as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). All three prongs of the same criminal conduct test must be met; the absence of any one of the prongs prevents a finding of “same criminal conduct.” State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The State bears the burden of proving by a preponderance of the evidence that two or more offenses amount to separate criminal conduct. RCW 9.94A.500(1); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996).

A trial court’s determination of what constitutes the same criminal conduct for sentencing purposes must be reversed on appeal where the court has abused its discretion or misapplied the law. Tili, 139 Wn.2d at 122. This Court reviews the sentencing court’s calculation of an offender score *de novo*. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). However, the appellate court will defer to the sentencing court’s determination of whether offenses constitute the same criminal conduct and will reverse only for abuse of discretion or misapplication of the law. Id.

Although this definition is narrowly construed by the courts, “there is one clear category of cases where two crimes will encompass the same criminal conduct – ‘the repeated commission of the same crime against the same victim over a short period of time,’” State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997), citing 13A Seth Aaron Fine, Washington Practice Sec. 2810 at 112 (Supp. 1996) (emphasis omitted).

b. The two assault in the second degree offenses constituted the same criminal conduct and should have counted as the same offense in Mr. Campbell’s offender score. Here, there is no dispute that both assaults were committed sequentially and practically simultaneously against the same victim, Ms. Campbell. The sentencing court concluded that the two assaults did not constitute the same criminal conduct, only because the methods of assault differed – the court thus accepted the State’s argument, in the absence of any briefing on the subject. 2/13/09 RP 6. The court’s determination is not supported by the facts, and was a misapplication of the law.

i. The two offenses occurred at the same time and place, against the same victim. The State charged and prosecuted the two assault charges as a single continuing offense, occurring at

the same place over the same time period, against Mr. Campbell's wife, Toma. The State alleged that Mr. Campbell threatened and attempted to suffocate Ms. Campbell at approximately 10:00 a.m. on May 21, 2008, and that he moments later took a gun from the closet and held it to her body and her head. 1/21/09 RP 43-54.

This entire incident was one continuing course of conduct, which took place inside the couple's bedroom, all within the time span of less than an hour. Id. at 43-53. Ms. Campbell's son, Brenden, estimated that the time period of the entire incident was perhaps closer to thirty minutes. Id. 98.

In sum, there should be no dispute that the two assault in the second degree offenses occurred at the same time and place, to the same victim, and that the first and second prongs of the same criminal conduct test are therefore satisfied.

ii. The two offenses involved the same objective criminal intent. To determine whether two crimes involve the "same criminal intent" for purposes of the "same criminal conduct" analysis, the relevant inquiry is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. Tili, 139 Wn.2d at 123; Porter, 133 Wn.2d at 183; State v. Vike, 125 Wn.2d at 411 (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237,

749 P.2d 160 (1987)). To constitute separate conduct, the record must show a substantial change in the nature of the criminal objective. State v. Calloway, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985).

The test for “same criminal intent” is an objective one that is not dependent on the offender’s subjective intent beyond the requisite mental state for the commission of the offense. Calloway, 42 Wn. App. at 424. Intent, as used in this analysis, “is not the particular *mens rea* of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

Where two crimes occur simultaneously (or nearly simultaneously) and have the same statutory mental element, the question is whether the crime “occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme.” State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (quoting State v. Porter, 133 Wn.2d at 185-86). For simultaneous crimes, courts do not ask whether one crime furthered the other, as that test applies only to sequentially committed crimes. Haddock, 141 Wn.2d at 114.

iii. The two assaults were part of a continuous event, and thus constitute the same criminal conduct. Two offenses need not even be simultaneous in order to fit the definition of same criminal conduct. Porter, 133 Wn.2d at 182-83. In Porter, two sequential drug sales were made to an undercover officer, approximately 25 minutes apart. Id. at 179-80. The court concluded that the two “sequential drug sales occurred as closely in time as they could without being simultaneous,” and thus fit the “same time and place” portion of the same criminal conduct test. Id. at 183.

Just as the court need not interpret the “same time” requirement to mean simultaneously, the “same place” requirement should not be interpreted too literally. See State v. Longuskie, 59 Wn. App. 838, 840-42, 847, 801 P.2d 1004 (1990) (although defendant took child to three separate hotels in three cities over seven day period, Court of Appeals remanded for resentencing as same criminal conduct); State v. Taylor, 90 Wn. App. 312, 315, 321-22, 950 P.2d 526 (1998) (Court found assault and kidnap occurred at same time and place when defendants entered car of third party and ordered them to drive to particular park, where passenger was assaulted).

The assaults in this case occurred during one argument between Mr. Campbell and his wife, in the confines of their bedroom, in approximately thirty minutes to an hour. Mr. Campbell's assaults occurred at the same time and place for purposes of the same criminal conduct analysis.

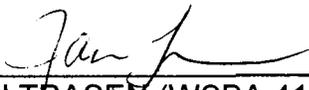
c. Mr. Campbell's case must be remanded for sentencing within the correct standard range. The trial court improperly calculated Mr. Campbell's offender score, based upon its conclusion that the two assault in the second degree convictions counted separately. 2/13/09 RP 27-28; CP 75-82. Because the offender score was improperly calculated, the case must be remanded for sentencing. Tili, 139 Wn.2d at 128; State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

F. CONCLUSION.

For the foregoing reasons, Mr. Campbell respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 23rd day of September, 2009.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorney for Appellant