

65646-5

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NO. 65646-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALVIN GEORGE WALKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Crimes are the same criminal conduct only when they are committed against the same victim, at the same time and place, and with the same intent. Walker was convicted of assault in the second degree by strangulation, rape in the second degree, and felony harassment for threatening to kill the victim while holding a knife to her throat. The acts took place over approximately an hour, each in a different room of an apartment. Does Walker's claim of ineffective assistance fail because each crime requires a separate objective intent, therefore, Walker was not prejudiced by counsel's failure to argue that the crimes were the same criminal conduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Walker was charged with assault in the second degree (strangulation), rape in the second degree, and felony harassment, all with the domestic violence designation. CP 24-25. A jury found him guilty as charged. CP 61-63. Walker appeals from standard-range sentences on the assault and harassment charges and an indeterminate sentence on the rape charge. CP 69-79.

2. SUBSTANTIVE FACTS

Defendant Walker and B.M. had a non-exclusive dating relationship for several months in late 2007 through mid-June of 2008, during which they both used cocaine. 1RP 240-41.¹ As the relationship progressed, Walker became increasingly possessive and abusive; shortly before this incident, B.M. told Walker that she wanted to end the relationship. 1RP 242-44.

The night of June 11, 2008, Walker asked B.M. to come to a friend's apartment where they had been staying. 1RP 246. Walker was not at the apartment when B.M. arrived, so she went out to buy cocaine and returned to the apartment around 1:00 a.m.. 1RP 246, 274. Moments later, she heard Walker kicking and banging on the door, demanding to be let in. 1RP 246-47. B.M. opened the door and Walker grabbed her and pushed her down on the kitchen floor. He took two knives from the dishwasher, held them to B.M.'s throat, and told her that he was going to kill her because she was leaving him. 1RP 247, 249-50.

Walker eventually let B.M. get up. She walked into the living room, where Walker grabbed her and threw her on to the couch.

¹ The Report of Proceedings consists of four sequentially paginated volumes for the jury trial, cited herein as 1RP, and two separate volumes, one for a pretrial motion (not cited), the other for the sentencing hearing, cited herein as 2RP.

1RP 247. Walker sat across from B.M. in a chair, smoking crack cocaine and speaking to her, then he jumped up and strangled her on the couch, alternately squeezing and releasing her neck. 1RP 247-48.

When Walker stopped strangling B.M., she told him that she needed to use the bathroom. Walker allowed her to do so, however, he appeared in the bathroom moments later and strangled B.M. again, straddling her as she sat on the toilet.

1RP 251. B.M. became lightheaded and started having a panic attack; Walker stopped strangling her and left the bathroom.

1RP 252. As B.M. walked down the hall from the bathroom, Walker pulled her into the bedroom, threw her face-down on to the bed, sat on top of her, and began punching the back of her head. 1RP 252.

When Walker got off of B.M., he pulled her to her feet and yanked her pants down; he then inserted his fingers into her vagina and accused her of having sex with someone else. 1RP 252. B.M. asked him why he was doing that to her and tried to push his hands away. Id. After raping B.M., Walker went to the bathroom, which allowed B.M. to escape by jumping off the balcony. 1RP 253. B.M.

fled to another apartment in the complex and the resident of that apartment called 911. 1RP 259.

Additional facts are incorporated in the argument section.

C. ARGUMENT

1. WALKER CANNOT SHOW THAT HIS COUNSEL WAS DEFICIENT OR THAT HE WAS PREJUDICED BY THE FAILURE TO ARGUE THAT HIS CRIMES WERE THE SAME CRIMINAL CONDUCT.

Walker stipulated to his offender score at sentencing, including the current offenses. 2RP 4-5. When a defendant affirmatively agrees with his offender score at sentencing, he waives the issue on appeal, because only an illegal or erroneous sentence is reviewable for the first time on appeal. State v. Nitsch, 100 Wn. App. 512, 522-23, 997 P.2d 1000 (2000). However, the failure to argue same criminal conduct may be raised for the first time on appeal as a claim of ineffective assistance of counsel. See State v. Allen, 150 Wn. App. 300, 316, 207 P.3d 483 (2009).

To establish ineffective assistance of counsel, a defendant must show that (1) his trial counsel's performance was deficient; and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). There is a strong presumption that counsel is competent and provided proper, professional assistance. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). A defendant can show neither deficient performance nor prejudice when counsel fails to make a meritless motion. State v. Kirwin, 137 Wn. App. 387, 394, 153 P.3d 883 (2007).

Here, Walker cannot show that counsel's performance was deficient or that he was prejudiced by counsel's failure to argue same criminal conduct because counsel likely recognized that the argument was meritless, but even if counsel had made the argument, it would have failed under this record and the law regarding same criminal conduct.

In the context of trial and sentencing as a whole, counsel was effective; he raised issues that would impact Walker's offender score, such as whether any of Walker's convictions had washed. 2RP 4-5. Walker and his attorney discussed the merits of seeking a continuance of the sentencing because they had not met since trial. 2RP 5-7. Although the trial court was willing to continue the sentencing, the court and defense counsel acknowledged that a

continuance was unlikely to change the outcome, given the State's low-end recommendation on the rape charge. 2RP 6.

The judge, having heard all the evidence presented at trial, stated that she had "looked at this...but in terms of my decisions, I don't think I have a huge amount of discretion here." 2RP 6-7. Although the trial court was not required to reach a factual issue that defense did not identify,² the trial judge stated that she had considered the case and a continuance was unlikely to make a difference in her decision. Thus, it appears unlikely that the court would have found that the offenses were the same criminal conduct, had counsel made the claim; thus, Walker cannot show that he was prejudiced.

Regardless of whether the trial court or defense counsel had identified the issue, case law does not support Walker's claim that his crimes were the same criminal conduct. Therefore, Walker cannot show that counsel was ineffective or that he was prejudiced by counsel's failure to so argue.

² See Nitsch, 100 Wn. App. at 523.

2. WALKER'S CRIMES WERE NOT THE SAME CRIMINAL CONDUCT BECAUSE THE CRIMES WERE COMMITTED OVER AN HOUR PERIOD, IN DIFFERENT ROOMS, AND WALKER FORMED A SEPARATE INTENT FOR EACH CRIME.

The sentencing court shall count all current convictions separately for purposes of computing the offender score unless the court finds that the offenses encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i). Two or more crimes are considered the same criminal conduct if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). All three factors must be present and the absence of any one of these factors prevents a finding of same criminal conduct. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The court must narrowly construe the same criminal conduct rule to "disallow most assertions of same criminal conduct." State v. Price, 103 Wn. App. 845, 846, 14 P.3d 841 (2000) (citation omitted).

Crimes committed in a continuing, uninterrupted sequence of conduct may satisfy the test for same time and intent. Porter, 133 Wn.2d at 186. Here, Walker's crimes were all committed against the same victim, B.M., but were committed over an hour period, in various rooms of the apartment. Starting around 1:00 a.m. and

ending just before 2:00 a.m., Walker threatened B.M. with the knives in the kitchen, strangled her in the living room and bathroom, and raped her in the bedroom. See 1RP 96, 185, 247-52, 274.

Whether acts occurred at the same time and place is generally obvious. Compare State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); State v. Tili, 139 Wn.2d 107, 123, 984 P.2d 365 (1999) (crimes all occur in the same room) with Price, 103 Wn. App. at 846-47 (not same place when first crime occurs in parking lot and subsequent crime occurs during pursuit on freeway). Whether crimes that occur within an hour, in different rooms of the same apartment happen at the same time and place is less clear. But even if Walker's crimes were committed at the same time and place, the intervening periods between the crimes, during which Walker and B.M. moved between rooms, or Walker stopped assaulting B.M. to smoke cocaine, preclude the factor of same intent, because Walker had the opportunity to reflect on his actions after each crime and form new intent for the subsequent crime. See State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

In determining whether two or more crimes involve the same intent, the court focuses "on the extent to which the defendant's

criminal intent, as objectively viewed, changed from one crime to the next." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). Objective intent may also be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

In Grantham, the defendant raped the victim twice within a short period, by different means. But after the first rape, the defendant threatened the victim and used new physical force to accomplish the second rape. 84 Wn. App. at 859. This Court held that the brief intervening period between crimes precluded a finding of same criminal conduct because the defendant had the opportunity to reflect and either cease his criminal activity or proceed to commit another criminal act; thus, the forming a new objective intent for the subsequent crime. Compare with Tili, 139 Wn.2d at 123 (three rapes committed against same victim in rapid succession, though by different means occurred at the same time for same criminal conduct).

Here, although the assault, rape, and harassment were related to some degree, each offense required a different objective intent. To commit felony harassment, the objective intent was

threaten to cause bodily injury to B.M. by threatening to kill her. RCW 9A.46.020(1), (2). Walker did so by holding knives against B.M.'s throat while making verbal threats. Then, after a brief intervening period where Walker smoked cocaine, Walker strangled B.M. in the living room and again in the bathroom. See RCW 9A.36.021(1)(g). By strangling B.M., Walker necessarily intended to compress B.M.'s neck in a manner that would obstruct her blood flow or ability to breathe. RCW 9A.04.110(26). Walker later committed rape in the second degree by digitally penetrating B.M. by forcible compulsion in the bedroom after B.M. came out of the bathroom. RCW 9A.44.050(1)(a); RCW 9A.44.010(6). Walker formed a separate objective intent for each crime because he had the opportunity to reflect after threatening B.M. on the kitchen floor, before strangling her in the living room and bathroom. When he left the bathroom, Walker again had the opportunity to formulate his next move, and decided to assault B.M. in the bedroom, where he raped her.

Moreover, each crime was complete upon its commission and none of Walker's crimes depended upon or furthered the other. Crimes further each other when the commission of the former crime provides a means to the latter. See, e.g., State v. Collins, 110

Wn.2d 253, 751 P.2d 837 (1988) (burglary furthered rape and assault); Saunders, 120 Wn. App. at 824 (kidnapping furthered rape, but not robbery and murder). Crimes do not further each other when a subsequent crime is committed to escape the consequences of a previous crime, or to further a broad objective. See State v. Dunaway, 109 Wn.2d 207, 216-17, 743 P.2d 1237 (1988) (attempted murder and robbery did not further each other when purpose of attempted murder was to avoid arrest for the robbery, but kidnapping furthered robbery); State v. Calloway, 42 Wn. App. 420, 711 P.2d 382 (1985) (despite having the same goal of obtaining money, two burglaries were not same course of conduct).

Nonetheless, Walker argues that the intent for all the crimes was the same, because the crimes furthered each other and the three crimes were part of a single recognizable scheme or plan, because Walker's motivation to commit the crimes were the same. Walker's arguments are contrary to case law and must be rejected.

Here, each crime was complete upon its commission and one crime did not aid or enable other crimes. Walker claims that the harassment and assault furthered the rape by overcoming B.M.'s resistance, and that the assault and rape furthered the

harassment by contributing to her fear that the threat to kill would be carried out. Walker's claim is not supported by the law or the facts here. For felony harassment, the requisite fear is that which flows from the threatening words or conduct, based on the victim's knowledge at the time of the threat. See RCW 9A.46.020(1)(b); State v. E.J.Y., 113 Wn. App. 940, 952-53, 55 P.3d 673 (2002); State v. Cross, 156 Wn. App. 568, 584-85, 234 P.3d 288 (2010) (victim's fear was reasonable, based on knowledge of defendant's conduct prior to and at the time of the threat).

Here, the harassment occurred first and was complete when Walker abandoned the knives and allowed B.M. to get up. Although B.M. likely remained afraid that Walker would kill her as he strangled her, the relevant fear is that caused by the threat with the knives. Walker's intent then changed from threatening B.M. with a knife to assaulting her by compressing her neck. Both the harassment and strangulation were complete when Walker pulled B.M. to her feet and raped her in the bedroom; B.M. tried to block Walker's hands with her own, but Walker overcame her resistance. Had Walker raped her while she was pinned on the kitchen floor, the couch, or the toilet, the harassment or assault might have

furthered the rape by restraining B.M., but that is not what happened here.

Walker relies on Saunders and Collins, *supra*, and State v. Mandamas, 168 Wn.2d 84, 228 P.3d 13 (2010),³ but those cases are distinguishable. As discussed above, Saunders and Collins involve rapes that followed the commission of a burglary or kidnapping. The burglary and kidnapping in those cases were the means by which the defendants accessed or restrained their respective victims, allowing the defendants to commit the rapes. Saunders, 120 Wn. App. at 824; Collins, 110 Wn.2d 262-63.

But these cases do not stand for the proposition that any sequence of crimes committed against the same victim within a short period in the same location is same criminal conduct. In Saunders, the defendants were also convicted of murder and robbery; the Court held that defense counsel was ineffective for failing to argue that the rape and kidnapping were same criminal conduct because the kidnapping arguably furthered the defendants'

³ In an unpublished opinion, this Court held that felony harassment for pointing a gun at the victim, and assault for hitting the victim with the same gun, were the same criminal conduct, but that the enhancement statute mandates the imposition of multiple enhancements despite the fact that the enhancement-eligible offenses were the same criminal conduct. State v. Mandamas, 139 Wn. App. 1017, 2007 WL 1739702 (2007). The supreme court granted review solely on the enhancement issue, and affirmed the Court of Appeals. Mandamas, 168 Wn.2d at 90.

goal of raping the victim, either to punish her for her refusal to comply with Saunders's sexual demands, or to allow Saunders to accomplish his sexual agenda, or both. However, counsel was not ineffective for failing to argue that the murder and robbery were the same criminal conduct. Saunders, 120 Wn. App. at 824-25.

The fact that Walker was upset over B.M. breaking up with him may have motivated his violent acts against her, but it is too broad to demonstrate the same intent for same criminal conduct analysis, which is to be narrowly construed to disallow most assertions of same criminal conduct. See Price, 103 Wn. App. at 846. This Court has rejected the argument that crimes were the same course of conduct when the overarching motivation for sequential crimes was to get money for drugs. Calloway, 42 Wn. App. at 424. Unlike in Saunders, *supra*, where the kidnapping and rape were motivated by Saunders's sexual agenda, Walker's upset over the break up speaks to his subjective intent to commit the crimes, rather than the objective intent required by case law. Id.; Dunaway, 109 Wn.2d at 216. If a defendant's anger at his victim or general desire to retaliate was sufficient to show a single intent, then any sequence of crimes committed against the victim at the same time and place would be the same criminal conduct.

In sum, even if Walker committed the crimes against B.M. at the same time and place, each crime required a different objective intent and did not further any of the other crimes. Walker had the opportunity to reflect between each crime and form new objective intent to commit a subsequent criminal act. Therefore, Walker is not entitled to a new sentencing hearing because he cannot show that counsel was deficient for failing to argue that his crimes were the same criminal conduct or that he was prejudiced by counsel's failure to do so.

D. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Walker's judgment and sentence.

DATED this 23 day of February, 2011.

Respectfully submitted,

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