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NO. 66332-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS HYAMS,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 23 PM 1:59

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. ARGUMENT IN REPLY 1

 1. MR. HYAMS' RIGHT TO CONSTITUTIONAL DUE
 PROCESS WAS VIOLATED WHEN THE
 PROSECUTOR REPEATEDLY ELICITED EVIDENCE
 REGARDING MR. HYAMS' CUSTODIAL STATUS 1

 2. THE TRIAL COURT ABUSED ITS DISCRETION IN
 RULING THE TWO COUNTS DID NOT ENCOMPASS
 THE SAME CRIMINAL CONDUCT 4

F. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987),
amended by 749 P.2d 160 (1988) 5

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999)..... 1, 3

State v. Heddrick, 166 Wn.2d 898, 215 P.3d 201 (2009) 3

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999)..... 5

Washington Court of Appeals Decisions

State v. Adame, 56 Wn. App. 803, 785 P.2d 1144 (1990)..... 5

State v. Calloway, 42 Wn. App. 420, 711 P.2d 382 (1985)..... 5

State v. Gonzalez, 129 Wn. App. 895, 120 P.3d 645 (2005)..... 3

State v. Israel, 113 Wn. App. 243, 54 P.3d 1218 (2002) 5, 6

State v. Mullin-Coston, 115 Wn. App. 679, 64 P.3d 40 (2003) 2

State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004)..... 6

State v. Walden, 69 Wn. App. 183, 847 P.2d 956 (1993)..... 5

State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005) 4

Other Decisions

Haywood v. State, 107 Nev. 285, 809 P.2d 1272 (1991) 1

Statutes

RCW 26.50.110..... 6

RCW 9.94A.589 4

A. ARGUMENT IN REPLY

1. MR. HYAMS' RIGHT TO CONSTITUTIONAL DUE PROCESS WAS VIOLATED WHEN THE PROSECUTOR REPEATEDLY ELICITED EVIDENCE REGARDING MR. HYAMS' CUSTODIAL STATUS.

“Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.” State v. Finch, 137 Wn.2d 792, 845, 975 P.2d 967 (1999). In his opening brief, Mr. Hyams’ argued his right to a fair trial was violated when the prosecutor asked Lia Holboom a series of questions that lead to the introduction of repeated testimony that Mr. Hyams was incarcerated. Op. Br. at 7-17; see 8/3/10RP 63-64. That evidence informed the jury that the criminal justice system viewed Mr. Hyams as a particularly dangerous or guilty person. E.g., Haywood v. State, 107 Nev. 285, 809 P.2d 1272, 1273 (1991) (“Informing the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom.”).

The State concedes that the evidence of Mr. Hyams’ custodial status should have been excluded. Resp. Br. at 14. However, the State relies on Mullin-Coston to support its view that no constitutional error occurred, but as set forth in Mr. Hyams’

opening brief, that case is distinguishable. Resp. Br. at 10-11; State v. Mullin-Coston, 115 Wn. App. 679, 64 P.3d 40 (2003). The defendant in Mullin-Coston was charged with first degree murder. It was on that basis that this Court reasoned “[i]n *this case*, a reasonable juror would [already] know that a defendant in a first degree murder trial was not likely to be released pending trial unless he paid a substantial amount of bail, regardless of whether he was later found to be innocent.” 115 Wn. App. at 693 (emphasis added); see Resp. Br. at 10 (relying on same to argue all jurors must be expected to know that any person awaiting trial will often do so in custody). In Mullin-Coston, furthermore, the prosecutor raised the issue first outside the presence of the jury and the court conducted a balancing inquiry under ER 403. Id. at 694 n.8. Finally, this Court recognized “a greater amount of prejudice” inheres if the jury is told the defendant was incarcerated in relation to a previous crime rather than on the instant charges. Id. at 694, n.7. The vagueness of the testimony here left the jury free to conclude that Mr. Hyams had been incarcerated for a previous crime when Ms. Holboom had contact with him.

The State also tries to argue that the jury could have drawn “a number of possible inferences” from Ms. Holboom’s testimony

that she brought clothes for trial to Mr. Hyams. Resp. Br. at 14 But the State fails to provide any reasonable explanation for why Ms. Holboom would be bringing trial clothes to Mr. Hyams other than that he was in jail at the time.

Mr. Hyams' convictions should be reversed because reversing the presumption of innocence constitutes structural error. State v. Gonzalez, 129 Wn. App. 895, 904-05, 120 P.3d 645 (2005); see State v. Heddrick, 166 Wn.2d 898, 910-11, 215 P.3d 201 (2009). In the alternative, the error is presumed prejudicial, and the State can uphold the conviction only by demonstrating affirmatively that the error is harmless beyond a reasonable doubt. Finch, 137 Wn.2d at 859. The State has not done so. See Resp. Br. at 13-14. The trial here focused on whether Mr. Hyams was a threat to Ms. Aragon so that the jury could find beyond a reasonable doubt that he committed the crimes in question. By eroding the presumption of innocence, the jury prejudicially viewed Mr. Hyams as a threat to society and Ms. Aragon. In fact, the jury heard repeatedly that Mr. Hyams was such a threat that he needed to be held in jail. Because the State's introduction of such evidence violated Mr. Hyams' right to a fair trial, his conviction should be reversed.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THE TWO COUNTS DID NOT ENCOMPASS THE SAME CRIMINAL CONDUCT.

In the alternative, Mr. Hyams' sentence should be reversed and remanded because the trial court abused its discretion in ruling that the unlawful imprisonment and felony violation of a no-contact order did not encompass the same criminal conduct. Same criminal conduct "means 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).

Notably, the State does not dispute that the two counts here were committed at the same time and place. See Resp. Br. at 19-21 (arguing only differing intent and victims). Accordingly, the State has conceded that factor weighs in favor of a finding of same criminal conduct. See State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (issue conceded where no argument made in response).

The State's argument that different criminal intents formed the basis of each count relies on an improper legal premise. See Resp. Br. at 19-20. The State argues that the mens rea element for each crime is different. Id. (arguing mens rea for violation of no-

contact order regards “intent to be where the court order prohibits” and for unlawful imprisonment the mens rea is “intent to restrain the victim”). But the same criminal conduct test looks at the *offender’s objective criminal purpose*, not the particular mens rea element of the crime. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), amended by 749 P.2d 160 (1988); State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993); State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

According to the State’s theory at trial, Mr. Hyams had the same primary motivation for the unlawful imprisonment and the felony violation of a no-contact order: The commission of each act was part of a common plan to dominate and perpetrate domestic violence upon Ms. Aragon. See State v. Israel, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002) (same objective intent where both crimes were part of a recognizable scheme or plan). Likewise, Mr. Hyams had no time in between criminal acts to form a new intent. See 8/3/10RP 27-28, 133; State v. Calloway, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985) (finding of separate conduct requires substantial change in criminal objective). Finally, Mr. Hyams’ restraint of Ms. Aragon furthered the assault, which formed the

basis for the felony violation of a no-contact order conviction. See, e.g., 8/4/10RP 22-26; State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (same objective intent where one crime furthered the other); Israel, 113 Wn. App. at 295. Under the objective criminal intent test, each crime involved the same intent.

The State's separate argument that each crime involved different victims is illogical and is asserted without any citation. The State argues that the crimes cannot constitute the same criminal conduct because the felony violation of a no-contact order count had two victims—Ms. Aragon and the court that issued the order. Resp. Br. at 20. The State cites no authority, and Mr. Hyams is aware of none, that designates the issuing court as the victim of a violation of a no-contact order. The lack of authority is unsurprising because the argument is illogical. To the extent the issuing court is “harmed” by violation of a no-contact order, the court's remedy is contempt, not a felony prosecution. RCW 26.50.110(3) (a violation of a no-contact order “shall also constitute contempt of court, and is subject to the [separate] penalties prescribed by law”). Moreover, particularly where an assault against the protected party, Ms. Aragon, forms the basis of the felony charge, the protected party is the de facto victim of the crime. The court is not victimized by an

assault. The State's argument that each crime had different victims is unavailing. Ms. Aragon was the victim of each crime as prosecuted.

Because the two crimes had the same victim, occurred at the same time and place and resulted from the same objective criminal intent, the trial court abused its discretion in denying Mr. Hyams' request to find the same criminal conduct.

C. CONCLUSION

Mr. Hyams' convictions should be reversed because the jury received evidence of his custodial status in violation of his right to a fair trial. In the alternative, this Court should reverse the trial court's ruling that the crimes did not constitute the same criminal conduct and remand for resentencing.

DATED this 23rd day of December, 2011.

Respectfully submitted,



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