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NO. 66632-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JESSE WHITE,

Appellant.

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

The Honorable Ronald L. Castleberry, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY¹

1. THE FELONY HARASSMENT AND ASSAULTS
CONSTITUTED THE SAME CRIMINAL CONDUCT.

White argued trial counsel was ineffective for failing to argue the felony harassment and assaults were the same criminal conduct for sentencing purposes. Brief of Appellant (BOA) at 20-31. The State concedes the harassment and assaults occurred at the same time and place. Brief of Respondent (BOR) at 24-25. It contends, however, that White's criminal intent changed. Because this contention is based on flawed reasoning, this Court should reject it.

The prosecutor first cites State v. Price² for the proposition a court first "objectively views each underlying criminal statute to determine whether the required intents are the same or different for each offense." BOR at 24. Only if the intents are the same does the court proceed to examine the facts available at sentencing. BOR at 24-25.

The prosecutor thus asserts offenses cannot be found to encompass the same criminal intent if they require different statutory mental

¹ White rests on the Brief of Appellant with respect to arguments 1, 4, and 5.

² 103 Wn. App. 845, 857, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014 (2001).

elements. This "per se rule" was created by Division Two of the Court of Appeals in State v. Rodriguez.³ The Rodriguez court held:

As far as we can tell from the Supreme Court cases, the process for doing this has two components. The first is to "objectively view" each underlying statute and determine whether the required intents, if any, are the same or different for each count. State v. Collicott, 112 Wn.2d at 405, 771 P.2d 1137 (plurality opinion); State v. Dunaway, 109 Wn.2d at 215, 743 P.2d 1237; State v. Lewis, 115 Wn.2d at 301, 797 P.2d 1141. If the intents are different, the offenses will count as separate crimes.

Rodriguez, 61 Wn. App. at 816. This rule is commonly used in Division Two, but not in divisions One or Three. State v. S.S.Y., 170 Wn.2d 322, 332-33 n.5, 241 P.3d 781 (2010). Citing State v. Dunaway,⁴ the Court in S.S.Y. suggested the "per se" rule is contrary to its own precedent. State v. S.S.Y., 170 Wn.2d 322, 332-33 n.5, 241 P.3d 781 (2010); see also State v. Baldwin, 63 Wn. App. 303, 307, 818 P.2d 1116 (1991) (recognizing Supreme Court rejected rule in Dunaway).

In divisions One and Three, "intent" for purposes of determining "same criminal conduct" means the offender's objective criminal purpose for committing the crime rather than the statutory mens rea element of the particular crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990); accord State v. Flake, 76 Wn.

³ 61 Wn. App. 812, 812 P.2d 868, review denied, 118 Wn.2d 1006 (1991).

⁴ 109 Wn.2d 207, 213-17, 743 P.2d 1237 (1987).

App. 174, 180 n.4, 883 P.2d 341 (1994). The State's implicit argument to the contrary should be rejected.

The prosecutor nevertheless goes on to argue White's intent changed between the crimes of assault and harassment. Assault requires the intent to either cause bodily harm or to create an apprehension of such harm. Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future. BOR at 25-26. From this the prosecutor baldly asserts the law "requires a different intent for assault and harassment." BOR at 26.

This is not correct. White objectively intended to cause reasonable fear of death or bodily injury and apprehension of bodily harm by assaulting Stevens with a gun throughout the incident. He strangled her to retain possession of the gun and to further his intent to place her in such fear. That intent remained constant throughout the entire domestic violence episode. The assault by strangulation was the physical manifestation of the threat to kill Stevens. White also threatened to kill Stevens to add to her fear of bodily injury and apprehension of harm. Meanwhile, White's overall purpose was to force Stevens to allow their child to live with White. White's objective criminal intent remained the same throughout the incident.

The prosecutor also contends White completed the assaults before he threatened to kill Stevens and her family if the police were called. BOR at 26. The primary threat to kill, however, occurred at the outset of the incident, just after White displayed the gun. In what Stevens said was a "terrifying" tone, White said, "I'm going to fucking kill you." RP 278. The prosecutor emphasized the primacy of that threat by beginning his closing argument with that exact quote. RP 598.

Later, while discussing the elements of felony harassment during closing argument, the prosecutor said White "knowingly threatened to kill Raina Stevens. She [Stevens] said that he told her if she called police he would kill her, [their child] and himself." RP 610. This threat, as well as White's threat to kill Stevens' family, came after White and Stevens physically disengaged, but at a time White maintained possession of the gun and just after he yelled at Stevens and slapped her in the face. RP 287-88. In other words, the assault with a gun had not ended before these threats. Only sometime thereafter did White put the gun down. RP 288-89.

The assault was therefore not over before the felony harassment. White's objective intent to place Stevens in reasonable fear and apprehension of bodily harm did not change. This Court should reject the

State's argument to the contrary and find the harassment and assaults encompassed the same criminal conduct.

2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION THAT WOULD HAVE LIMITED THE JURY'S USE OF DRUG-RELATED EVIDENCE.

On appeal, White argued trial counsel was ineffective for failing to propose an instruction limiting the jury's use of drug-related evidence after unsuccessfully attempting to preclude admission of the evidence before trial. BOA 31-35. The prosecutor responds the record indicates counsel's failure was a strategic trial decision. The prosecutor also contends White did not show there was a reasonable probability the outcome of the trial would have been different with a limiting instruction. BOR at 28-31.

The prosecutor overlooks the rule that only *legitimate* trial strategy or tactics constitute reasonable performance. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). Counsel's failure to request a limiting instruction was not a reasonable tactic. There was no downside to proposing the instruction. A limiting instruction would not have unduly highlighted damaging testimony. The drug-related evidence came in at

various points during trial, and the prosecutor referred to it in closing argument. It was thus already highlighted.

As for resulting prejudice, the failure to propose a limiting instruction allowed jurors to use the drug-related evidence to assess White's subjective state of mind during the incident. See AOB at 35. This assessment was crucial to White's defense of self-defense as to the assaults, because the jury was properly instructed in part as follows:

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

CP 62 (instruction 16). The trial court also properly instructed jurors that "[a] person is entitled to act on appearances in defending himself"

CP 63 (instruction 17).

After hearing evidence suggesting White might have been injecting drugs, a reasonable juror could have concluded that White's perception at the time was so impaired he could not have reasonably acted in self-defense, or that he did not accurately recount events during his testimony. This is the prejudice. Because White established deficient performance and resulting prejudice, this Court should find counsel was ineffective for failing to propose a limiting instruction.

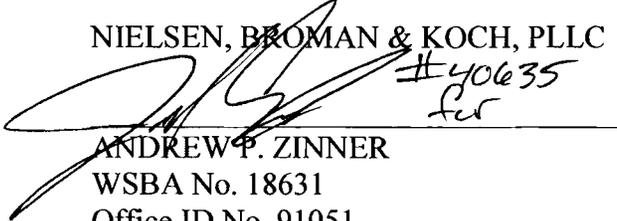
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, this Court should direct the trial court to vacate one of White's two second degree assault convictions, reverse the remaining convictions and remand for a new trial, or find the acts underlying the assault and felony harassment convictions constituted the same conduct and remand for resentencing.

DATED this 24th day of February, 2012.

Respectfully submitted,

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DIVISION ONE**

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| STATE OF WASHINGTON |) | |
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| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 66632-1-II |
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| JESSE WHITE, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF FEBRUARY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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- [X] JESSE WHITE
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WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF FEBRUARY, 2012.

x *Patrick Mayovsky*