

NO. 67616-4-I

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

REC'D
OCT 24 2012
King County Prosecutor
Appellate Unit

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STATE OF WASHINGTON,

Respondent,

v.

PERNELL FINLEY,

Appellant.

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

The Honorable Hollis R. Hill, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. FINLEY’S REQUEST TO PROCEED PRO SE WAS UNEQUIVOCAL.....	1
2. THE NO CONTACT ORDER WAS INAPPLICABLE TO FINLEY AS THE VIOLATION ALLEGED OCCURRED AFTER ONE OF THE EXPIRATION DATES LISTED ON THE ORDER.	9
3. FINLEY’S CONVICTION FOR FELONY HARASSMENT VIOLATES DOUBLE JEOPARDY.....	13
4. THE STATE FAILED TO PROVE THE COMPARABILITY OF THE FOREIGN OFFENSES.....	17
5. FINLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.....	23
C. <u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Seattle v. Edwards</u> 87 Wn. App. 305, 941 P.2d 697 (1997).....	10, 11, 13
<u>State v. Breedlove</u> 79 Wn. App. 101, 900 P.2d 586 (1995).....	9
<u>State v. DeRyke</u> 110 Wn. App. 815, 41 P.3d 1225 (2002).....	16, 24
<u>State v. DeWeese</u> 117 Wn.2d 369, 816 P.2d 1 (1991).....	7
<u>State v. Gallaher</u> 24 Wn. App. 819, 604 P.2d 185 (1979).....	20
<u>State v. Hernandez</u> 95 Wn. App. 480, 976 P.2d 165 (1999).....	25
<u>State v. Johnson</u> 92 Wn.2d 671, 600 P.2d 1249 (1979).....	13
<u>State v. Larkins</u> 147 Wn. App. 858, 199 P.3d 441 (2008).....	21, 22
<u>State v. May</u> 171 Wn.2d 847, 256 P.3d 1161 (2011).....	10, 11
<u>State v. Miller</u> 156 Wn.2d 23, 123 P.3d 827 (2005).....	10, 11, 12
<u>State v. Nysta</u> 168 Wn. App. 30, 275 P.3d 1162 (2012).....	16
<u>State v. Parker</u> 132 Wn.2d 182, 937 P.2d 575 (1997).....	19

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Parmelee</u> 108 Wn. App. 702, 32 P.3d 1029 (2001) <u>review denied</u> , 146 Wn.2d 1009 (2002).....	14
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	6, 7
<u>State v. Sweet.</u> 138 Wn.2d 466, 980 P.2d 1223 (1999).....	14
<u>State v. Truong</u> 168 Wn.App. 529, 277 P.3d 74 (2012).....	20
<u>State v. Walden</u> 67 Wn. App. 891, 841 P.2d 81 (1992).....	25
<u>State v. Woods</u> 143 Wn.2d 561, 23 P.3d 1046 (2001).....	8
<u>State v. Worl</u> 129 Wn.2d 416, 918 P.2d 905 (1996).....	19
 <u>FEDERAL CASES</u>	
<u>Blockburger v. United States</u> 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).....	14
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
FLA. STAT. § 810.02	21
FLA. STAT. § 812.13	19
RCW 9.94A.411	26
RCW 9A.44.010	14
RCW 9A.44.040	14

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9A.46.020	14
RCW 9A.52.020	21
RCW 9A.56.190	20
RCW 26.50.110	25, 26

A. ARGUMENT IN REPLY

1. FINLEY'S REQUEST TO PROCEED PRO SE WAS UNEQUIVOCAL.

In his opening appellate brief, Finley assigned error to the court's denial of his request to proceed pro se, as the denial was based largely on the court's unfounded characterization of Finley's request as *equivocal*. In support, Finley set forth the verbatim portion of the record in which the court explained to Finley – following his request to proceed pro se – that the court would not appoint a new attorney for him, to which Finley agreed without reservation:

THE COURT: Let me just say, Mr. Finley I am not, there is nothing that I am reviewing in this case that hasn't been provided to me in open court. I don't have anything else. What I'd like to do is take a recess. Give you an opportunity to have your attorneys explain to you, what disadvantage it is not to have counsel. We're not going to appoint a new attorney to you.

MR. FINLEY: You don't have to appoint an attorney to me.

RP 827 (emphasis added).

In an effort to support the court's unfounded characterization of Finley's request, the state ignores the verbatim report in favor of its own paraphrased interpretation. For instance, the first state focuses on the complaints Finley voiced concerning his attorneys. Brief of Respondent

(BOR) at 11 (citing 8RP 823-25, 834).¹ However, with one exception (RP 834), these complaints were voiced before the court indicated it would not appoint substitute counsel, and before Finley reiterated his desire to represent himself in light of this fact.

Moreover, the complaint Finley voiced thereafter (RP 834) was in response to the court's re-characterization of Finley's request to proceed *pro se*, *as an alternative to substitute counsel*:

THE COURT: All right Mr. Finley I've been considering your request to discharge counsel and proceed *pro se* and I want to finish hearing you out. I know there were other things that you wanted to say and we took a recess. I want to start with your request to, to discharge your attorneys and you can remain seated while you're, while you're talking. I'd like to ask you to tell me everything that you think I should know about that particular part of your request and I know you're also asking to proceed without counsel and I want to set that one aside right now and just focus on the request to discharge your attorneys. ...

RP 831. Accordingly, it was at the court's insistence that Finley further complained about counsel. But this complaint, too, was after he already indicated he did not need the court "to appoint an attorney to me." RP 827.

¹ For whatever reason, the state did not adopt Finley's method of referring to the record, despite the fact that the January 2011 transcripts – although in multiple bound volumes – were consecutively paginated. In any event, the state's "8RP" is Finley's "RP."

Next, the state focuses on statements made by Lois Tricky, one of Finley's attorneys, detailing various communication issues with Finley. BOR at 11 (citing 829-30). According to the state, "Finley's counsel asked, on the basis of their client's unhappiness with their performance and their difficulty in conveying information to him, to be discharged from representation." BOR, at 11. But the state omits one salient fact. Defense counsel asked to withdraw to "allow Mr. Finley to represent himself." RP 830 (emphasis added). Counsel's request is further evidence that Finley's request to proceed pro se was unequivocal. See also RP 823 (Trickey expressing Finley's desire to "represent himself in this case").

Finally, in support of the court's finding of equivocation, the state summarizes the remainder of the colloquy as follows:

The trial court asked Finley whether he indeed wanted to represent himself, or if he would be satisfied by appointment of new counsel. 8RP 835. Finley responded by asking if it would indeed be possible for him to have new lawyers. 8RP 835. When the judge repeated her question, Finley explained that he asked to represent himself only because he would not be provided with substitute counsel; he said that he would choose to proceed as his own attorney, though he admittedly lacked any legal training, if he were not eligible for new lawyers. 8RP 36.

To describe the state's characterization of the record as taking artistic license would be a profound understatement. Fortunately, the record will speak for itself.

As an initial matter, the court on its own introduced the idea of substitute counsel *after it said it would not appoint new counsel*. From Finley's responses to the court's questions regarding this new possibility, it is clear Finley is confused. Nonetheless, as the verbatim report indicates, Finley stuck to his guns and stood by his request to proceed pro se, regardless of the court's confusing questions:

THE COURT: Okay. All right so with respect to representing yourself is there anything you want to say to the Court about that request?

MR. FINLEY: In respect to representing myself and pro se?

THE COURT: And, and, or are you asking for a substitution of counsel?

MR. FINLEY: Can you do a substitution?

THE COURT: Are you asking for one?

MR. FINLEY: I can do either one.

THE COURT: Excuse me Dave can you get a little white notebook that's sitting on top of my desk, a three-ring binder? Thanks. Excuse me.

MR. FINLEY: Would you substitute somebody from their organization?

THE COURT: Well I'm just asking if that's your request or are you asking.

MR. FINLEY: Well you told

THE COURT: Or are you asking to represent yourself?

MR. FINLEY: Ma'am?

THE COURT: I just want to clarify your request at this point.

MR. FINLEY: Okay, when, when I first said okay I wanted to represent, wanted to go pro se I was of the understanding that, that there, there, there was no other method that I could use. As far as not having this counsel. That I had to go pro se.

THE COURT: Uh huh.

MR. FINLEY: So, as far as, that was my understanding and that's far as I know other than when you, when you, when you said to me that well I am not going to assign you new counsel or okay, so that's, I guess that's still my understanding so yes, and, I don't know anything different and from what you told me there isn't anything different. So yes, that's what I am going with.

RP 835.

Contrary to the state's rendition, Finley never explained that "he asked to represent himself only because he did not believe he would be provided with substitute counsel[.]" BOR, at 11-12. Rather, he explained he took it to heart when the court told him it would not appoint new counsel, and he therefore wanted to represent himself. It is clear from the record that any equivocation was on the court's part, not Finley's. It's as if the court was somehow asking Finley to disbelieve the court's earlier

statement that it would not appoint new counsel. In the absence of hearing anything to the contrary, however, Finley still took the court's earlier statement of no new counsel to heart and maintained his choice to proceed pro se.

And contrary to the state's rendition of facts, Finley never said "he would choose to proceed as his own attorney, though he admittedly lacked any legal training, if he were not eligible for new lawyers." BOR, at 12.

In reality, after Finley explained it was still his choice to proceed pro se, it was the court that discussed Finley's lack of legal training:

FINLEY: ... and I don't know anything different and from what you told me there isn't anything different. So yes, that's what I am going with.

THE COURT: Uh huh, okay. And you realize that you would be at a disadvantage if you represented yourself?

MR. FINLEY: If that's what you're telling me

THE COURT: Okay you don't have any legal training or anything of that sort?

MR. FINLEY: No, I don't.

RP 836.

The state's attempt to paraphrase its way into Stenson territory should be rejected. State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). There, the defendant orally moved to proceed pro se only after the

trial court denied his primary motion to substitute counsel. Stenson stated, “I would formally make a motion then that I be able to allow [sic] to represent myself. I do not want to do this but the court and the counsel that I currently have force me to do this.” Stenson, 132 Wn.2d at 739.

The trial court denied this motion. In a pleading drafted by Stenson filed several days later, he requested the appointment of new lead counsel and other relief but did not ask to represent himself. Our Supreme Court agreed that Stenson’s request was equivocal, observing that all of the conversation between the trial judge and the Defendant concerned his wish for different counsel. He repeatedly discussed which new counsel should be assigned. More importantly, he did not refute the trial court’s final conclusion that he “really [did] not want to proceed without counsel.” Stenson, 132 Wn.2d at 742.

In contrast, Finley mentioned substitute counsel only in response to the court’s confusing questions. And it was well after he made his pro se demand. Moreover, he subsequently clarified he maintained his decision to proceed pro se. And although Finley did express frustration with his attorneys in the midst of his request to proceed pro se, his expressed frustration did not render his request equivocal. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991) (defendant’s remarks that he had no

choice but to represent himself rather than remain with appointed counsel did not amount to equivocation).

Although the court has a large amount of discretion in ruling on motions to proceed pro se during trial, discretion is abused if the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State v. Woods, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001). Here, the court's primary reason for denying the request was its finding Finley's request was equivocal. RP 836-37. In light of the above, this was manifestly unreasonable and untenable. The trial court therefore abused its discretion.

And although the court further commented the request would hinder "the administration of justice" as they had "a jury sitting now for days hearing the evidence," it should be noted that Finley did not ask for a continuance or make his request to represent himself contingent upon one.

Moreover, as the state points out in its brief, following the denial of Finley's request, "the state then called two more witnesses, resting its case-in-chief the following day." BOR, at 12. These last two witnesses were Susan Emerson, who testified briefly about her encounter with Lock that morning and her telephone call to 911 (RP 852-866); and Officer Amanda Quinonez, who testified briefly about certain statements Lock

made that the court ruled were admissible for impeachment purposes (RP 954-977).

The only witness called by the defense after the state rested was the defendant, himself. Supp. CP __ (sub. no. 66A, Minutes, 1/5/11). Accordingly, considering how little there was left of the trial, there was little risk affording Finley his constitutional right to represent himself would hinder “the administration of justice.”

Finally, while the court also stated, “the request to some extent I’m finding is to gain tactical advantage (RP 836-37),” the qualifying language indicates this did not play a large part in the court’s exercise of discretion.

On the contrary, the record shows the court’s main reason for denying Finley’s request was its erroneous finding of equivocation. The court therefore abused its discretion in denying the request. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). Finley should receive a new trial on all counts.

2. THE NO CONTACT ORDER WAS INAPPLICABLE TO FINLEY AS THE VIOLATION ALLEGED OCCURRED AFTER ONE OF THE EXPIRATION DATES LISTED ON THE ORDER.

In the opening brief, Finley argued the no contact order he was charged with violating was inapplicable to the charged offense and therefore inadmissible. BOA, at 28-36; State v. May, 171 Wn.2d 847, 256

P.3d 1161 (2011). The state alleged he violated the order by contacting Lock on March 5, 2010. CP 23-26. Significantly, however, the order itself listed two expiration dates: May 29, 2009, which predated the charged violation; and May 29, 2011. Ex 2.

As Finley argued in detail in his opening brief, case law establishes an order is inapplicable to the charged offense where its ambiguous expiration date could be construed as pre-dating the charged violation. BOA, at 28-33; citing May, 117 Wn.2d at 854; State v. Miller, 156 Wn.2d 23, 30-31, 123 P.3d 827 (2005); City of Seattle v. Edwards, 87 Wn. App. 305, 941 P.2d 697 (1997), overruled in part, State v. Miller, 156 Wn.2d 23, 30-31 (2005).

The state makes several arguments in response, each of which should be rejected by this Court. First, the state asserts the ambiguity in expiration dates was “an obvious scrivener’s error.” BOR, at 16. However, the ambiguity in expiration dates in Edwards was likely scrivener’s error as well. On one portion of the pre-printed form, it indicated the order was effective for one year. Yet, on another portion, a box was checked indicating the order was in effect “until further order of the court.” Edwards, 87 Wn. App. at 308. Indeed, the court could have

made a scrivener's error checking that box, as opposed to the one providing for a fixed termination date. See Edwards, 87 Wn. App. at 309.

The problem is that the resulting ambiguity did not give Edwards fair notice of the proscribed conduct. See Edwards, 87 Wn. App. at 307-309. That is why the order was inapplicable to conduct occurring after what could be construed as its expiration date. Edwards, 87 Wn. App. at 311; Miller, 156 Wn.2d at 831; May, 171 Wn.2d at 854.

Next, the state asserts the appropriate remedy for the ambiguous expiration date is simply to excise it from the order:

[Finley] contends the trial court failed to perform its "gatekeeping" function by allowing the jury to consider the no-contact order, though he fails to specify what the appropriate remedy should be in the larger context of his trial and sentence. His failure, however, is immaterial. Even with the erroneous provision excised, the order remained otherwise applicable to Finley and prohibited him from engaging in conduct that he himself admitted to. The jury was entitled to consider the order in its deliberations.

BOR, at 16.

It's unclear where the state came up with the idea of excising "the erroneous provision" from the order – here, the arguable date of its expiration – and otherwise applying it to Finley's conduct. If the order can be construed as having expired prior to the conduct alleged to have been in violation of the order, the obvious remedy is dismissal, not exorcism of the

expiration date so that a virtual violation can be found. Miller, 156 Wn.2d at 31 (“Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed).

Similarly misplaced is the state’s reliance on the to-convict instruction:

[Finley’s] claim fails because it accounts neither for the second provision, which unambiguously prohibited him from coming within 500 feet of Lock’s residence and person until May 29, 2011, nor the court’s “to-convict” instruction regarding the crime of felony violation of a court order, which asked the jury to determine whether the State had sufficiently proved that Finley violated “a provision” of an order of which he was aware. By his own account, Finley was in violation of this order on March 5, 2010, when he engaged in sexual activity with Lock at her apartment and had, by his own admission, been living there for many months.

To be sure, Finley denied that, in the course of violating the order, his conduct was assaultive, which was an element of the charge of felony violation. (Finley testifying that Lock initiated their sexual activity). The jury, of course, had ample evidence to reject his claim and conclude that his conduct of penetrating Lock anally and pushing her down a flight of stairs both violated the ban on his coming within 500 feet of her person and residence *and* included unwanted harmful and offensive touching.

BOR, at 18-19 (emphasis in original, citations to record omitted).

Regardless of any to-convict instruction, the state does not get to cherry pick the expiration date listed on the order that would make Finley’s contact a crime. Otherwise, the result would have been different

in Edwards. What the state fails to understand is that if the order is inapplicable to Finley due to an ambiguous expiration date which could be construed as predating the allegations in this case, it matters not that he came within 500 feet of Lock's residence or engaged in harmful touching on March 5, 2010. And as eager as the state may be to focus attention on the abhorrent nature of the allegations, it really is irrelevant to whether the no contact order itself was applicable. As an aside, Finley was prosecuted separately based on the nature of the alleged contact.

Finally, the state has made no attempt to defend defense counsel's failure to object to the applicability of the order or argue that counsel's failure did not prejudice Finley. For the reasons stated herein and in Finley's opening brief, this Court should reverse his conviction for felony violation of a no contact order.

3. FINLEY'S CONVICTION FOR FELONY HARASSMENT VIOLATES DOUBLE JEOPARDY.

In his opening brief, Finley argued his conviction for felony harassment should have merged with his first degree rape convictions because the threat to kill was the force that overcame Lock's resistance to the alleged rapes. BOA, at 36-41; see e.g. State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979) (assault used to overcome resistance to rape

merges with the completed offense of first degree rape), overruled on other grounds, State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999).

The state spends much of its response focusing on the double jeopardy test set forth in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). BOR, at 21-22. Blockburger does not set forth the test for merger, however. As set forth in Finley's opening brief, crimes merge when proof of one is necessary to prove an element or the degree of another crime. State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001), review denied, 146 Wn.2d 1009 (2002).

Finley was convicted of two counts of first degree rape, under RCW 9A.44.040(1)(a), the uses-or-threatens-to-use a deadly weapon provision of that statute. But first degree rape also has a forcible compulsion element, which can be: "a threat, express or implied, that places a person in fear of death[.]" RCW 9A.44.010(6) (emphasis added). Similarly, felony harassment also involves a threat to kill, which places the person in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a). In other words, it likewise involves a threat, express or implied, that places a person in fear of death.

Indeed, the prosecutor argued the felony harassment was the forcible compulsion used to overcome Lock's resistance. RP 1156, 1170.

Thus, as charged and prosecuted in this case, proof of felony harassment was necessary to prove the forcible compulsion element of rape. For this reason, the offenses should have merged.

In its brief, the state does not address merger specifically, but argues instead that the felony harassment count could have been based on threats made after the fact, as opposed to the threat used to overcome Lock's resistance:

In this matter, the evidence of a threat to kill – the basis of the harassment count – was not limited to those statements that Finley made in order to complete his multiple rapes of Lock. He continued to threaten her after he was finished with those sexual offenses, which then led, as Lock explained to emergency room nurse Anna Hulse, to her flight from the apartment, naked and utterly terrified, as soon as she had an opportunity. 6RP 563. As Hulse stated, Lock told her that she “got back in bed and he kept telling me I ruined his life and that I was going to die. He got up and walked toward the patio door, and I took off running.” 6RP 563.

BOR, at 22.

The problem with the state's argument on appeal is that it was not how the state argued the case below:

What she said essentially was the defendant threatened to kill her, he's holding a knife, she had sex with him to try and calm him down and prevent him from killing her. . . . I mean it's sort of the equivalent of someone coming up and pointing a gun at somebody and saying I'm going to kill you and that person saying please don't kill me here's my wallet, my cell phone, take whatever you want. Just please

don't kill me. And the person is like, I'll take your wallet and cell phone and walks away and then says what are you talking about. I didn't rob this person, they gave me their stuff. That's crazy right? That's crazy. Ms[.] Lock was trying to save her life.

RP 1170; see also 1156 ("he's got this knife and he's threatening to kill her. And at this point she's doing whatever she can to survive. There's no question that that's forcible compulsion.")

The state's reliance on Nysta is misplaced, because the prosecutor there did not rely solely on the threat of death to prove forcible compulsion. He also argued physical force established forcible compulsion. State v. Nysta, 168 Wn. App. 30, 48-49, 275 P.3d 1162 (2012). In contrast, here, the evidence required to support the forcible compulsion was the threat of death.

Regardless, principles of lenity require the court to interpret an ambiguous jury verdict in favor of the defendant. State v. DeRyke, 110 Wn. App. 815, 41 P.3d 1225 (2002) (where defendant was convicted of kidnapping and attempted first degree rape but it was unclear whether the jury relied on the use of a deadly weapon or kidnapping to find the defendant guilty of attempted first degree rape, the kidnapping and rape offenses merged because: "[p]rinciples of lenity require us to interpret the ambiguous verdict in favor of DeRyke[.]" and to assume the jury based its

verdict on DeRyke's kidnapping of the victim rather than on his use of a deadly weapon).

For the reasons stated herein and in Finley's opening brief, the felony harassment was part and parcel of the rape and therefore violates double jeopardy.

4. THE STATE FAILED TO PROVE THE COMPARABILITY OF THE FOREIGN OFFENSES.

As an initial matter, the state on appeal does not appear to be calculating Finley's offender score in the same manner as it did below, the manner that was ultimately adopted by the court. Particularly, the state does not appear to be including the 1991 robbery against Margaret Larkin. See BOR, at 26 n. 5 ("It is unclear from the record why a superimposed score of 14 was handwritten over the printed "12" on the judgment and sentence.").

As explained in Finley's opening brief (BOA, at 23 n.9), the state below likewise did not include this conviction – *at least initially*. CP 394-395. However, by the time of sentencing, the state asserted Finley's offender score was 14 (RP 1262), which can be arrived at only by including the 1991 Larkin robbery. CP 290-293. Plus, the state offered identification evidence about this conviction at sentencing. RP 1252 (fingerprint testimony concerning 91309CFAES); CP 290-293.

While the state's omission on appeal appears to be in Finley's favor, it nevertheless appears the trial court did in fact include this second 1991 robbery offense in arriving at a score of 14. CP 368. Accordingly, if the matter must go back for resentencing, it's the court's calculation that will be at issue. Moreover, Finley does not wish to waive his challenge to a conviction he asserts is not comparable, but was included in his offender score.

Turning to the merits of the comparability issues, the state concedes the Florida escapes are not comparable to Washington felonies. BOR, at 35-37. The state concedes remand for resentencing on counts 3 (felony harassment) and 5 (witness tampering) is necessary, reasoning the offender score calculation and concomitant standard ranges for these offenses are different, once the escapes are excluded.² BOR, at 38.

Regardless of whether the standard range changes once the escapes are properly excluded, remand is nonetheless the appropriate remedy for counts 1, 3 and 5, because the court imposed the statutory maximum on each of these counts. CP 368, 371-372. It is possible the additional escape convictions impacted the court's exercise of discretion when imposing the maximum for these offenses. See, e.g., State v. Parker, 132

Wn.2d 182, 187, 937 P.2d 575 (1997) ("Imposition of an exceptional sentence is directly related to a correct determination of the standard range. That determination can be made only after the offender score is correctly calculated.") (quoting State v. Worl, 129 Wn.2d 416, 918 P.2d 905 (1996)).

Finley maintains resentencing on all counts is necessary, however, due to the improper inclusion of the Florida robbery and burglary convictions. Regarding the Florida robberies, Finley contends the state failed to prove their comparability because Florida does not require the use of *immediate* force or fear, whereas Washington does. BOA, at 44-49.

As indicated in Finley's opening brief, robbery in Florida means the taking of money or other property from the person or custody of another, "when in the course of the taking there is the use of force, violence, assault, or putting in fear." FLA. STAT. § 812.13. As also indicated, under Florida robbery law, "An act shall be deemed in "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." FLA. STAT. § 812.13.

² Again, however, it does not appear the state is taking into account the other 1991 robbery. Granted, the offender score calculations listed on the judgment and sentence for the non-serious violent offenses were not altered in the same fashion as count I.

Finley argued this is antithetical to Washington's robbery statute, which requires that the force or fear be *immediate*, i.e. "to obtain or retain possession of the property, or to prevent or overcome resistance to the taking[.]" BOA, at 46-47; RCW 9A.56.190; see also State v. Gallaher, 24 Wn. App. 819, 822, 604 P.2d 185 (1979) (robbery jury instruction which included threats of harm taking place after the robbery is error).

The state responds that because RCW 9A.56.190 contemplates force used to *retain* possession of property, it is no different than Florida's "*in the course of*" language. BOR, at 28-29. However, Florida's "in the course of" language doesn't necessarily contemplate that the force used will be to retain possession of the property. No such nexus is required. On the contrary, the subsequent force used qualifies so long as it and the taking are a continuous series of acts. The Florida statute therefore differs significantly from Washington's and indicates a more extensive reach of liability for robbery than in Washington. See e.g. State v. Truong, 168 Wn.App. 529, 277 P.3d 74, 77 (2012) (under transactional analysis of robbery, the force or threat of force need not precisely coincide with the taking; the taking is ongoing until the assailant has effected an escape). Because the legal elements are not the same, and the state presented no additional information about the offenses from which comparability could

Nevertheless recognizing there are crimes in Washington that are generally considered victimless, the state asks this Court to speculate, based on the fact Finley was charged in the same charging instrument with one count of robbery and one count of burglary, both against Judy Lee, that robbery had to have been the crime intended to be committed “therein.” Again, however, this is precisely the type of judicial fact-finding this Court held to be unauthorized in State v. Larkins, 147 Wn. App. at 865-66.

The state recognizes as much but attempts to distinguish Larkins on grounds “Finley was armed with a very unusual piece of lumber.” BOR at 34. According to the state:

It would appear to be an eminently reasonable conclusion – and one the trial court should be allowed to make – that Finley did not carry a piece of lumber all day, choosing to victimize Lee at two distant points in time using the same weapon, but that he equipped himself with a piece of wood and then unlawfully entered Lee’s home with the intent to deprive her of her purse and her money, a crime he then completed.

BOR, at 35.

Reasonable supposition aside, it is equally possible Finley was homeless, carried the piece of lumber for protection, unlawfully entered Judy Lee’s home to consume illegal drugs, and encountered Judy Lee only after vacating the premises. There is simply no way to know what

happened, based on the state's evidence. And it is the state's burden to prove comparability, regardless of how "hyper-technical" or absurd the state may consider its obligation. Because the state did not prove the comparability of the Florida priors, resentencing is required.

5. FINLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

As argued in Finley's opening appellate brief, "assuming arguendo the court correctly found the 1991 Florida robbery and burglary involving Judy Lee comparable to Washington felonies, the offenses constituted the same criminal conduct." BOR, at 57. As also indicated, this was in essence the state's argument in favor of comparability. BOA, at 57-58; CP 401 ("Clearly, the defendant committed a burglary intending to and successfully committing a robbery against the owner of the home, Judy Lee, by depriving her of her purse and its contents – a crime against a person"). CP 401.

In response to Finley's argument counsel performed deficiently in failing to make this argument, the state asserts counsel's failure was tactical, because "the trial court would have needed to engage in consideration of specific facts that would have assuredly required Finley to disclose details of the events in Florida in 1991 beyond what was contained in the indictment." BOR, at 42.

The state's argument is utterly disingenuous, considering it was the trial prosecutor who urged the court to find facts beyond what was contained in the indictment in order to find comparability in the first place. Having done so, the court would have been hard pressed not to find same criminal conduct as well.

Regarding the current offenses, Finley argued his attorney was ineffective in failing to argue the felony harassment counted as the same criminal conduct as the rapes. BOA, at 59. As set forth above, the prosecutor argued the threat to kill was the forcible compulsion that overcame resistance to the rapes. In response, the state claims "it is by no means certain that Finley's conviction for harassment rested entirely upon the threats he uttered during his forcible rape of Ms. Lock." BOR, at 45. According to the state, the jury could have relied the nurse's testimony recounting Lock's statement Finley threatened her after-the-fact. Id. Again, however, that is not how the case was argued to the jury. RP 1156, 1170.

And regardless, as indicated in the double jeopardy section, an ambiguous verdict must be interpreted in favor of the accused. State v. DeRyke, 110 Wn. App. 815, 41 P.3d 1225 (2002). The felony harassment

was part and parcel of the rape. If it did not merge on double jeopardy grounds, it should have counted as same criminal conduct.

Finally, Finley argued his attorney was ineffective in failing to argue the FVNCO constituted the same criminal conduct as the rape. BOA, at 59. As indicated in Finley's opening brief, the violation was charged as a felony, not because of prior convictions, but because it reportedly involved an assault. In fact, the prosecutor argued the assault constituting the no contact order violation was the rape itself: "And did he assault her? Of course he assaulted her. Rape is clearly a type of assault." RP 1155.

In response, the state argues the convictions cannot constitute the same criminal conduct because violating a no contact order has a statutory intent element whereas rape does not:

The intent necessary for the crime of violating a court order that, as in the instant matter, specifically restricts where the subject party may be present is the intent to be where the order prohibits the defendant from going." See RCW 26.50.110(1). In contrast, rape does not contain an element of intent. See State v. Walden, 67 Wn. App. 891, 894, 841 P.2d 81 (1992). Where one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999).

BOR, at 46 (footnote omitted, emphasis added).

First, the statute cited by the state – RCW 26.50.110(1) – does not set forth the “intent” element asserted by the state. Rather, it provides that when an order is issued, and the person restrained knows of the order, a violation of any of the provisions set forth will be a crime. RCW 26.50.110. Accordingly, the state’s argument that violating a court order requires some sort of specific intent should be rejected.

Finally, without citation to authority, the state also asserts that “the victim of the rape – Ms. Lock – is different than the victim of the FVNCO, i.e. the court whose order was knowingly violated by the court.” BOR, at 46. The state’s unsupported argument should be rejected, as domestic violence court order violation is defined by statute as a crime against person. RCW 9.94A.411.

For the reasons stated herein and in Finley’s opening appellate brief, defense counsel provided ineffective assistance of counsel in failing to make these same criminal conduct arguments at sentencing.

C. CONCLUSION

Because Finley was wrongly deprived of his right to represent himself, his convictions should be reversed. Alternatively, the FVNCO should be reversed, because the order was inapplicable to the charged offense. The felony harassment conviction likewise should be reversed as

violative of Finley's right to be free from double jeopardy. Whether this Court affirms some or all of Finley's convictions, resentencing is nonetheless required, because the state failed to prove the comparability of the Florida convictions, and Finley received ineffective assistance of counsel at sentencing.

Dated this 24th day of October, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67616-4-1
)	
PERNELL FINLEY,)	
)	
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 OCTOBER 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] PERNELL FINLEY
 DOC NO. 331302
 AIRWAY HEIGHTS CORRECTIONS CENTER
 P.O. BOX 2049
 AIRWAY HEIGHTS, WA 99001

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

x *Patrick Mayovsky*

2012 OCT 24 PM 1:28
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE