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No. 67778-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DERRICK A. VALENTINE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MR. VALENTINE'S FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF WAS VIOLATED WHEN MS. CASON RELAYED HIS CUSTODIAL STATEMENT TO THE JURY AFTER THE TRIAL COURT HAD RULED THE STATEMENT WAS INADMISSIBLE

The State contends Ms. Cason's testimony relaying Mr. Valentine's custodial statement to the jury did not violate his Fifth Amendment rights because it was not the same statement the trial court had earlier suppressed. SRB at 17. But the only reasonable way to read the record is that the statement Ms. Cason testified about was the same statement the trial court had already ruled was inadmissible.

At the pretrial hearing, Officer Anderson testified that, as he and Officer Sunquist were talking to Ms. Cason in the hallway, Mr. Valentine appeared through the rear door at the other end of the hallway. 8/29/11RP 8, 18. Mr. Valentine stopped about five feet from his apartment door and Officer Anderson and Officer Sunquist walked up to him. 8/29/11RP 18-19. Mr. Valentine did not say anything as the officers approached. 8/29/11RP 20. When Anderson and Sunquist arrived at the door and contacted Mr. Valentine, Anderson asked whether he was Derrick Valentine and Valentine said he was.

8/29/11RP 25. Anderson then asked whether Valentine could tell him what happened. 8/29/11RP 25. Mr. Valentine immediately responded that he and Ms. Cason were arguing but he did not put his hands on her that day. 8/29/11RP 32. The officer then asked if there had been any physical contact at all that day, and Mr. Valentine responded that he and Ms. Cason had argued the night before and had pushed each other. 8/29/11RP 32. He also said Ms. Cason had pushed over the bookcase. 8/29/11RP 32. Officer Anderson then asked further about the pushing and whether Mr. Valentine had threatened to kill Ms. Cason. 8/29/11RP 32. At that point, Mr. Valentine “appeared very agitated, turned his back towards me and put his hands together behind his back in a cuffing position, and he said you might as well arrest me then.” 8/29/11RP 35.

According to Officer Anderson’s testimony, Mr. Valentine made no statements until after the officer asked whether he was Derrick Valentine. 8/29/11RP 20-21, 25. He did not put his hands behind his back and say, “you might as well arrest me,” until after the officer asked him about the incident the night before. 8/29/11RP 35. At no other time did Mr. Valentine say anything about being arrested or make any gesture of putting his hands behind his back.

At trial¹, Ms. Cason testified that “[a]s soon as [Mr. Valentine] came through the door he said, oh, you come to arrest me. He put his hands on the wall, turned to put his hands on the back.” 8/30/11RP 57. Although the words Ms. Cason remembered Mr. Valentine saying were not the exact words Officer Anderson remembered, they are similar. Also, Mr. Valentine’s gesture of putting his hands behind his back that Ms. Cason testified about is very similar to the gesture Officer Anderson testified about. Given Officer Anderson’s testimony that he and Officer Sunquist immediately approached Mr. Valentine when he walked in the door, that Mr. Valentine did not say anything until Anderson asked if he was Derrick Valentine, and that Mr. Valentine did not put his hands behind his back or say “you might as well arrest me” until after the officer questioned him about the incident the night before, the two witnesses must have been referring to the same statement. It is unreasonable to conclude Ms. Cason was referring to a different statement in her testimony.

At the pretrial hearing, defense counsel specifically objected to admission of Mr. Valentine’s statement “go ahead and arrest me.” 8/29/11RP 48. The trial court specifically ruled Mr. Valentine’s statement “why don’t you just arrest me” was inadmissible. 8/29/11RP

¹ Ms. Cason did not testify at the CrR 3.5 hearing.

48-49. The trial court's ruling covers the statement that Ms. Cason referred to in her trial testimony.

Even if Ms. Cason was referring to a different statement, it was still inadmissible under the trial court's ruling. The court ruled *all* of Mr. Valentine's statements made after he entered the hallway and before he was read his Miranda rights were inadmissible:

it's clear to me that at the time that the defendant happened upon the arresting officer and the alleged victim that he was a suspect, the only suspect in a crime, that the officer had probable cause to arrest him. And that he was, while there was some different perspective expressed by the officer, it's clear to the Court that he was not free to leave at that time. Therefore, I'm going to hold that the statement that the defense is objecting to, words to the effect, why don't you just arrest me, is not admissible under Rule 3.5.

8/29/11RP 48-49. The court clarified, "[a]ll the statements that were given to Officer Anderson pre-Miranda are not admissible under 3.5."

8/29/11RP 49 (emphasis added).

At the sidebar during trial, the court confirmed that Mr. Valentine's statement that Ms. Cason referred to in her testimony was covered by the court's pretrial ruling. The attorneys and the court held a sidebar immediately after Ms. Cason's testimony and before Officer Anderson testified. 8/31/14RP 14. Later the court explained on the record, outside the presence of the jury, that the prosecutor had "asked

for a side bar to request that [Officer Anderson] be allowed to testify about the defendant's gestures pre-Miranda, sticking out his hands and saying – be arrested [sic]." 9/01/11RP 11. The prosecutor had argued "Ms. Cason testified to that so it should come in." 9/01/11RP 11. But "[t]he Court denied that [request] in accordance with its pretrial 3.5 ruling." 9/01/11RP 11.

The State contends that even if the testimony was excluded by the pretrial order, Mr. Valentine had an obligation to object during Ms. Cason's testimony in order to preserve the issue for appeal. SRB at 17 The State cites no authority for the proposition that this general rule applies to admission of statements that violate an accused's Fifth Amendment right to silence.

It is plain that admission of Mr. Valentine's custodial statement violated the court's pretrial ruling. The issue was raised and ruled upon and therefore is preserved for appeal. In addition, because admission of the evidence violated the trial court's pretrial ruling and Mr. Valentine's Fifth Amendment right, the error was manifest and of constitutional magnitude. As argued in the opening brief, the error was prejudicial. Mr. Valentine may raise the issue under RAP 2.5(a).

2. THE CONVICTIONS FOR FELONY HARASSMENT AND SECOND DEGREE ASSAULT WERE THE “SAME CRIMINAL CONDUCT” AND SHOULD HAVE COUNTED AS ONLY ONE POINT IN THE OFFENDER SCORE

The State contends Mr. Valentine waived his right to object to his offender score by affirmatively agreeing with the State’s calculation of the offender score at sentencing. SRB at 26. That argument is inconsistent with the Washington Supreme Court’s decision in State v. Mendoza, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009).

As argued in the opening brief, in Mendoza, the court reaffirmed “the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing” in order to constitute a waiver of the right to challenge the offender score on appeal. Mendoza, 165 Wn.2d at 928. The mere failure to object to the prosecutor's factual assertions underlying the offender score calculation does not constitute an acknowledgement of those facts. Id. “Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation.” Id. In other words, a defendant who agrees with the State's calculation of the

offender score does not thereby “affirmatively agree” with the implicit factual assertions underlying that calculation.

In State v. Lucero, the Supreme Court clarified that this is what Mendoza stands for: the defendant must explicitly agree to the prosecutor's asserted facts in order to waive his right to challenge them on appeal. State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010). In Lucero, at sentencing, the defendant recited a standard sentencing range that was apparently based on the inclusion of a California burglary conviction in the offender score. Id. at 787. But he did not “affirmatively acknowledge” that his California conviction was comparable to a Washington felony. Id. at 789. At most, he *implicitly* acknowledged that his offender score included the California burglary conviction. Id. But “[t]hat is not the ‘affirmative acknowledgement’ of comparability that Mendoza requires.” Id. Instead, the defendant must *explicitly agree* the prior conviction is comparable in order to waive his right to challenge comparability on appeal. Id.

Similarly, a defendant must *explicitly agree* with the implicit factual assertions underlying the State’s conclusion that two offenses should be counted separately in the offender score in order to waive the right to argue same criminal conduct on appeal.

The State relies upon In re Personal Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007), but that case is distinguishable. In Shale, the Supreme Court held the defendant waived his right to argue same criminal conduct because he agreed with the State's offender score calculation as part of his plea bargain and did not challenge the offender score computation at the trial court level. The court acknowledged the general rule that a defendant pleading guilty does not waive his right to challenge legal errors occurring in the calculation of his offender score, but clarified that “those cases involved pleas, convictions, or sentences that were invalid on the face of the judgment and sentence.” Id. at 496. In Shale, by contrast, no invalidity was apparent because the police reports and statement of probable cause showed “the separate nature of each charge.”² Id.

Shale is distinguishable because here, the record does not show the separate nature of each charge. As argued in the opening brief, the felony harassment and second degree assault involved the same victim, the same time and place, and the same objective criminal intent. In

² Documents signed as part of a plea agreement, including police reports and the statement of probable cause when used to establish the factual basis for the plea, may be considered in determining facial invalidity if those documents are relevant in assessing the validity of the judgment and sentence. In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002).

addition, Mr. Valentine did not agree with the State's calculation of the offender score as part of a written plea agreement.

The State contends defense counsel was not deficient for failing to argue same criminal conduct because there was a legitimate tactical reason for failing to do so. According to the State, if counsel had raised the issue, he would have emphasized the history of ongoing violence between Mr. Valentine and Ms. Cason. This argument makes little sense. If counsel had succeeded in persuading the court that the felony harassment and the assault were actually the same conduct, this would have *deemphasized* the seriousness of the crimes.

The State also argues counsel had a legitimate reason not to argue same criminal conduct because even if the court counted the two offenses as one point in the offender score, Mr. Valentine would not have benefitted because he had already served almost all of the low end of the standard range. The State ignores the possible *future* benefit Mr. Valentine would receive if the court found the two offenses were the same criminal conduct. RCW 9.94A.525(5)(a)(i) provides that “[p]rior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score.” Thus, if Mr. Valentine is

convicted of another crime, the future sentencing court would be bound by the present court's determination of same criminal conduct.

The State also argues Mr. Valentine cannot show prejudice from counsel's failure to argue same criminal conduct because the trial court would have been compelled to find the two offenses involved separate objective criminal intents. As stated in the opening brief, an attorney's failure to argue same criminal conduct at sentencing amounts to ineffective assistance if the evidence is sufficient for the trial court to find that multiple offenses are the same conduct. State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004). Here, the evidence was sufficient for the court to find the two offenses involved the same objective criminal intent.

In determining whether two crimes involve the same objective criminal intent, a court may ask whether one crime furthered the other. Id. at 824-25. One crime furthers another if the first crime facilitates commission of the second. Id.

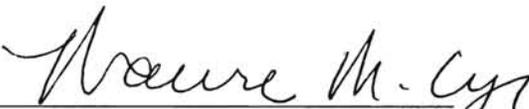
Here, there should be no question that the court could have found the assault facilitated the felony harassment by making it more likely Ms. Cason would take the threat to kill seriously. Ms. Cason testified she believed Mr. Valentine's threats because he had actually

assaulted her in the past after threatening to do so. 8/30/11RP 28-31.
Thus, the present assault undoubtedly made it more likely Ms. Cason
would believe the threat to kill.

B. CONCLUSION

The State concedes the convictions for second degree assault
and fourth degree assault violate Mr. Valentine's constitutional right to
be free from double jeopardy. Therefore, the fourth degree assault
conviction must be vacated. In addition, for the reasons given above
and in the opening brief, admission of Mr. Valentine's custodial
statement violated his Fifth Amendment right not to incriminate
himself, which prejudiced him. His other convictions must be reversed
and remanded for a new trial. In the alternative, his convictions for
felony harassment and second degree assault should have counted as
only one point in the offender score. He is therefore entitled to be
resentenced.

Respectfully submitted this 20th day of July 2012.


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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JULY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JULY, 2012.

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