FILED
Court of Appeals
Division III
State of Washington
8/17/2023 3:57 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
8/18/2023
BY ERIN L. LENNON
CLERK

102282-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 38765-8-III

STATE OF WASHINGTON, Respondent,

v.

BRANDY J. HOOD, Petitioner.

PETITION FOR REVIEW

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
1360 N. Louisiana St. #A-789
Kennewick, WA 99336
Tel: (509) 572-2409
Email: Andrea@2arrows.net
Attorney for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Federal:

Washington State:

Constitutional Provisions

Statutes

Court Rules

I. IDENTITY OF PETITIONER

Brandy Hood requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on June 6, 2023 as follows:

- Concluding that the trial court abused its discretion by finding three convictions constituted the same criminal conduct on the grounds that there was insufficient evidence in the record that the charges occurred at the same time, notwithstanding that the jury returned verdicts specifically finding that all three charges occurred on or about January 10, 2020 and the evidence permitted the conclusion that they occurred during the same criminal episode;
- Concluding that Ms. Hood waived an appellate challenge to the separate scoring of convictions for

assault or harassment when the evidence at trial plainly established that they occurred at the same time and against the same victim; and

- Concluding that convicting Ms. Hood for four counts of fourth degree assault in addition to multiple counts of second degree assault did not violate double jeopardy when the State failed to establish the timeline of events sufficient to show that each charge constituted a separate unit of prosecution.

A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision conflicts with the standard established in *State v. Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2013) that a sentencing court's determination that crimes constitute the same criminal

conduct may only be reversed when the evidence supports only a single interpretation of the facts.

2. Whether, notwithstanding that challenges to an offender score can be raised for the first time on appeal under *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999) and should be reviewed when necessary for consistent and proportionate sentencing under *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), a defendant waives an argument that two convictions facially constituting the same criminal conduct based on evidence presented at trial should be scored as one point by not raising the argument below.
3. Whether the State's failure to establish a coherent timeline of the events comprising the charges it filed prohibits multiple convictions under the Double Jeopardy clause because it did not prove separate units of prosecution.

IV. STATEMENT OF THE CASE

The case arises from seven convictions that took place over approximately one week in January 2020: Two counts of second degree assault, four[1] counts of fourth degree assault, and one count of felony harassment. CP 32-34. Although the complaint distinguished the charges by the dates of occurrence, the evidence at trial, as conceded by the State, failed to establish specific dates; instead, "they kind of happened all within this short timeframe without really an exact date." II RP 735. Nevertheless, the jury instructions directed the jury to convict if they found the charge was committed on or about the date alleged in the information. CP 180, 183, 186, 188, 190-93.

At sentencing, the trial court found that counts 4, 5, and 6 constituted the same criminal conduct. II RP 818; CP 33-34. These charges, which were alleged and found to have occurred on or about January 10, 2020 – the earliest of all the charged

[1] The State charged a fifth count of fourth degree assault but the jury acquitted Ms. Hood of that charge. CP 209.

incidents – consisted of one count of second-degree assault by strangulation and two counts of fourth-degree assault alleging hair-pulling and a punch in the eye. CP 33-34, 188, 190-91. The trial testimony supporting these charges came from the victim A.S. and her sister S.H. A.S. described an incident on the stairs where Ms. Hood shoved her down and held her with one hand on her neck, which caused her to start blacking out. I RP 410, 421. S.H. described Ms. Hood grabbing A.S. by the hair, throwing her onto the stairs, and then choking her. I RP 316. A.S. also testified that punching and hair-pulling occurred all the time during this week in January, starting "[r]eally early on." I RP 192-93, 194, 197.

As a result of these decisions, Ms. Hood was sentenced to 43 months in prison under an offender score of "6" despite having no prior criminal history. CP 272-73, 275. Both parties appealed from the judgment and sentence. CP 312, 329. Ms. Hood argued that under *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 329 P.3d 78 (2014), the State failed to prove

separate assaultive acts warranting separate misdemeanor charges as independent units of prosecution because it could not establish its alleged timeline at trial. *Appellant's Brief*, pp. 16-19. Ms. Hood also argued for the first time on appeal that count one, a charge of second degree assault with scissors, and count 2, a charge of felony harassment, constituted the same criminal conduct based on the testimony of both A.S. and S.H. that Ms. Hood told A.S. she could kill her while poking her with a pair of scissors in the dining room. CP 32; RP 198-200, 313, 315. *Appellant's Brief*, pp. 22-23. In its appeal, the State argued that the sentencing court abused its discretion in finding three counts to be the same criminal conduct because the evidence only showed they all occurred during the single week in January. *Respondent's Brief*, pp. 15-18.

The Court of Appeals rejected all of Ms. Hood's arguments and accepted the State's. On the one hand, the Court of Appeals concluded the evidence established sufficiently distinct incidents to conclude that the fourth degree assaults

occurred separately from each other and from each of the other charges. *Opinion*, at 13-15. On the other hand, the Court of Appeals concluded the evidence did not establish sufficiently distinct incidents to uphold the sentencing court's finding that three of the charges were the same criminal conduct. *Opinion*, at 16-17. The Court of Appeals declined to consider whether counts one and two – second degree assault with scissors and felony harassment – constituted the same criminal conduct, holding that because such a determination is discretionary, there is no discretionary act for the court to review if the issue is not raised for the first time in the sentencing court. *Opinion*, at 15. Under the Court of Appeals' decision, Ms. Hood will be resentenced with an offender score of 8, which increases her standard range sentence to 53-70 months in prison for a first-time offense. The Court of Appeals denied Ms. Hood's motion for reconsideration by order dated July 18, 2023.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The case implicates a significant question of constitutional magnitude under the double jeopardy clause of the U.S. and Washington constitutions: When the State presents evidence of an assaultive course of conduct over a period of time but fails to establish distinct events, does convicting the defendant of multiple counts of misdemeanor and felony assault serve to cumulatively punish the defendant "for every punch thrown in a fistfight"? *State v. Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999). The case also conflicts with *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017) holding that courts should afford relief on appeal when necessary to promote proportionality and consistency in sentencing as well as with *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013), holding that events not occurring simultaneously may be the same criminal conduct when they are part of a

continuous transaction or uninterrupted episode. Accordingly, review should be granted under RAP 13.4(b)(1) and (3).

A. Review should be granted to evaluate the sufficiency of the *Villanueva-Gonzalez* factors to determine whether multiple charged acts constitute separate units of prosecution when the State's evidence establishes an extended course of conduct and is ambiguous as to when the specific events occurred in relation to each other.

Under the federal and Washington State constitutions, a person cannot receive multiple punishments for the same conviction without running afoul of the prohibition against double jeopardy. U.S. Const. Amend. V; Wash. Const. art. I, § 9; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). The guarantee against double jeopardy protects persons from multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (*citing Wahlen v. U.S.*, 445 U.S. 684, 688, 100 S. Ct. 1432, 1436, 63

L.Ed.2d 715 (1980)). Double jeopardy prevents cumulative punishment if offenses are legally identical and are based on the "same act or transaction." *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) *(quoting Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932)).

When a defendant is convicted of multiple counts of the same statutory provision, courts evaluate what unit of prosecution the legislature intended to be punishable under the statute. *Tili*, 139 Wn.2d at 113 (*quoting State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). The unit of prosecution may be a single act, or a course of conduct. *State v. Morales*, 174 Wn. App. 370, 384, 298 P.3d 791 (2013). In answering whether a statute penalizes a discrete act or a continuing course of conduct, the courts have noted that "a unit of prosecution that results in additional charges based on variables that are secondary can result in convictions that are disproportionate to an offender's conduct." *Id.* at 387-88. Moreover, a defendant should not be convicted "for every

punch thrown in a fistfight." *Villanueva-Gonzalez,* 180 Wn.2d at 985 (*quoting Tili*, 139 Wn.2d at 116).

Once the unit of prosecution is determined, the court then analyzes the facts to decide whether more than one unit of prosecution has been established. *State v. Tvedt*, 153 Wn.2d 705, 717, 107 P.3d 728 (2005). Only when the facts support multiple units of prosecution can multiple convictions be maintained without violating double jeopardy. *Id.*; *see Morales*, 174 Wn. App. at 388.

In *Villanueva-Gonzalez*, the Washington Supreme Court considered whether convictions for fourth-degree assault and second-degree assault that arose from the same altercation violated double jeopardy. There, the defendant pulled his girlfriend out of a room and headbutted her, breaking her nose, and then grabbed her around the neck and held her down, causing her to have difficulty breathing. *Villanueva-Gonzalez*, 180 Wn.2d at 978. A jury convicted him of fourth-degree

assault for grabbing her neck, and second-degree assault for headbutting her. *Id.* at 979.

In concluding that the two convictions violated double jeopardy, the *Villanueva-Gonzalez* Court first rejected the conventional *Blockburger* "same elements" test in favor of the "unit of prosecution" test to evaluate what act or course of conduct the legislature intended to punish. *Id.* at 981-82, 986. It declined to adopt a bright-line rule to evaluate whether multiple assaultive acts constitute a single course of conduct, instead adopting a totality of the circumstances test. *Id.* at 985. It identified helpful factors, including the length of time over which the acts took place, whether they occurred in the same location, the intent or motivation for the various acts, whether the acts were interrupted by intervening events, and whether there was an opportunity for the defendant to reconsider his actions. *Id.* However, it also expressly rejected the notion that a mechanical balancing of the factors should drive the

determination, as well as the idea that any one factor is dispositive. *Id.*

Taken together, these authorities suggest, but do not outright state, that the State bears the burden of proving separate units of prosecution to sustain multiple criminal convictions arising from the same events. In this case, the State originally charged each crime separately by the date of occurrence, but its evidence at trial did not support the dates alleged. Instead, it only established generally that all of the events occurred during a single week in January 2020.

The *Villanueva-Gonzalez* test cannot even be applied under these circumstances. The State's evidence is so meager that determining when each event occurred in relation to the others, the motives for each act, and the existence of any intervening events cannot be evaluated. Yet, under the Court of Appeals' ruling, it is Ms. Hood who suffers the penalty of multiple convictions resulting from the State's decision to

charge discrete acts rather than a course of conduct. Because the *Villanueva-Gonzalez* test is unhelpful under these circumstances, this Court should grant review under RAP 13.4(b)(3) and hold that the State fails to establish separate units of prosecution when it charges separately for discrete acts occurring during a course of conduct but fails to show that each act is independent from the others.

B. Review should be granted to reconcile the Court of Appeals' decision not to review an obvious error in the offender score with this Court's direction in *McFarland* to do so when fundamental justice so requires, as well the *Ford* rule that sentencing errors can be raised initially on appeal.

It has long been established that offender score error can be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Nevertheless, in this case, the Court of Appeals concluded that Ms. Hood waived her

challenge to the offender score by not arguing below that counts 1 and 2 comprised the same criminal conduct, because determining whether crimes are the same criminal conduct is a discretionary decision and the trial court was never given the opportunity to exercise its discretion. *Opinion*, at 15. This is the same line of reasoning that this Court squarely rejected in *McFarland.*

In *McFarland*, this Court reversed the Court of Appeals' decision not to consider an argument relating to the failure to consider an exceptional mitigated sentence on the grounds that the sentencing judge "cannot have erred for failing to do something he was never asked to do." 189 Wn.2d at 49. Instead, this Court recognized that RAP 2.5(a) grants appellate courts authority to consider late-raised arguments that are necessary to produce a just resolution and directed courts to afford such relief to further the Sentencing Reform Act's goals of consistency and proportionality in sentencing. *Id.* at 57. Thus, when it is possible that the sentence would have been

different had the sentencing court been asked to exercise its discretion, remand is appropriate and should be ordered. *Id.* at 58-59.

Here, the evidence presented at trial plainly establishes that counts one and two for assault with scissors and felony harassment constituted the same criminal conduct. When multiple offenses are part of the same criminal conduct, they are counted as one offense and scored accordingly. RCW 9.94A.525(5)(a)(i); 9.94A.589(1)(a); *Tili*, 139 Wn.2d at 124-25. To constitute the same criminal conduct, the crimes must involve (1) the same objective criminal intent, considering whether one crime furthered another; (2) the same time and place; and (3) the same victim. RCW 9.94A.589(1)(a); *State v. Vike*, 66 Wn. App. 631, 633, 834 P.2d 48 (1992), *reversed on other grounds*, 125 Wn.2d 407, 885 P.2d 824 (1994). This standard may be met when the defendant commits multiple crimes against the same victim that further the commission of

the other crimes. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

Additionally, separate incidents may occur at the same time for purposes of the test "when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *State v. Young*, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999). They are not required to occur simultaneously to comprise the same criminal conduct. *State v. Price*, 103 Wn. App. 845, 856, 14 P.3d 841 (2000), *review denied*, 143 Wn.2d 1014 (2001) (*citing State v. Porter*, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997)).

With respect to the intent requirement, the standard evaluates whether the crimes served the same, or separate, criminal purposes. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013), *review denied*, 182 Wn.2d 1022 (2015); *see also State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (observing there is "one overall criminal purpose" in

multiple counts of delivering different controlled substances). The concern is not "the particular mens rea element of the particular crime, but rather is the offender's objective purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). The court considers, objectively, the extent to which the criminal intent changed from one crime to the next. *Dunaway*, 109 Wn.2d at 215. In considering this factor, courts may evaluate whether one crime furthered the other. *Vike*, 125 Wn.2d at 411.

Here, the evidence presented at trial established that the second degree assault with a deadly weapon – the scissors – happened contemporaneously with the threat to kill A.S. that comprised the harassment conviction. Both A.S. and S.H. testified that Ms. Hood told A.S. she could kill her while poking her with a pair of scissors in the dining room. I RP 198-200, 313, 315. Thus, they clearly occurred at the same time and place and involved the same victim. Moreover, there is no distinct criminal intent between the offenses as they both served

the same purpose of coercively controlling A.S. by placing her in a state of fear of her mother. Consequently, under the facts actually proven at trial, the second-degree assault conviction and the harassment conviction are the same criminal conduct. The Court of Appeals' failure to remand the case for reconsideration of the offender score when it is likely a different outcome would result deprives Ms. Hood of substantial justice, contrary to this Court's direction in *McFarland*. Thus, review should be granted under RAP 13.4(b)(1).

C. Review should be granted to reconcile the Court of Appeals' determination that the sentencing court abused its discretion in finding three convictions to comprise the same criminal conduct with the rule recognized in *Graciano* that same criminal conduct determinations may be disturbed if there is only one possible conclusion from the evidence presented.

On the State's cross-appeal, the Court of Appeals concluded that the sentencing court abused its discretion in finding that counts four, five, and six were the same criminal conduct because "the evidence at trial failed to establish specific dates for any of the charges except count 8." *Opinion*, at 16. Consequently, under this reasoning, the sentencing court lacked an adequate record to show that the crimes occurred at the same time and place. But this determination disregards the sentencing court's discretion to draw conclusions from the evidence, as *Graciano* squarely provides that the trial court has discretion to choose between multiple possible interpretations of the evidence. 176 Wn.2d at 537-38.

Here, the evidence was sufficient for a jury to conclude that all three crimes occurred on or about the same date. A.S. testified that "[r]eally early on" during the week in mid-January when she was being hit, "it would be like her punching me in the face, pulling my hair." I RP 192. Notably, the earliest charged events took place on January 10, 2020, allowing the

court to infer that "really early on" meant that date. CP 32-34 (information), 188, 190-91 (to convict instructions).

A.S. also testified that hair pulling happened "all the time" and "every day." I RP 192-93. She described how it would happen because her mother was "mad" and would be set off by minor things such as not putting the dishes away correctly. I RP 193, 196. A.S. contended that Ms. Hood would drag her into different rooms of the house by her hair and it happened multiple times. I RP 194. Similarly, A.S. stated that Ms. Hood punched her multiple times, mainly in the face. I RP 197. When S.H. testified, she described Ms. Hood grabbing A.S. by the hair, throwing her into the stairs, and then choking her. I RP 316.

Based on this evidence, the sentencing court was within its discretion to conclude that the misdemeanor assaults took place within the same continuous criminal episode as the second degree assault by strangulation and with the same

objective intent to assault A.S. S.H.'s testimony clearly places the hair-pulling charge in the same altercation as the strangulation and demonstrates that the hair-pulling furthered it. While the evidence of when the punch occurred is more equivocal, potentially supporting multiple interpretations, A.S. testified that it occurred "really early on" in the week and described it in conjunction with pulling her hair. This evidence is sufficient for the trial court to infer that the punching incident likely occurred during the same incident as the hair-pulling and the strangulation that occurred "really early on" in the week.

The Court of Appeals' disagreement with the sentencing court's same criminal conduct conclusion is not sufficient grounds to reverse it. Under *Graciano*, reversal is only permitted if the evidence unequivocally establishes that the charges could not have been the same criminal conduct. Review should be granted under RAP 13.4(b)(1) because the Court of Appeals' reversal in this case conflicts with *Graciano*'s standard.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1) and (3) and this Court should enter a ruling (1) remanding to vacate Ms. Hood's four convictions for fourth degree assault because the State failed to prove they were separate units of prosecution; (2) remanding to find that Ms. Hood's convictions for second degree assault and harassment constitute the same criminal conduct; and (3) affirming the sentencing court's determination that counts four, five, and six are the same criminal conduct.

This document contains 3,585 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17 day of August, 2023.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Lincoln County Prosecuting Attorney
PO Box 874
Davenport, WA 99122

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 17 day of August, 2023 in Kennewick, Washington.

Andrea Burkhart

Court of Appeals Opinion no. 38765-8-III (filed 6/9/2023)

APPENDIX A

FILED
JUNE 6, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. BRANDY J. HOOD, Appellant.	)	No. 38765-8-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — The State brought eight charges against Brandy Hood for assaulting and harassing her teenage daughter throughout several days in January 2020. The jury convicted Ms. Hood of seven of the charges.

Ms. Hood appeals four of her convictions on double jeopardy grounds. She also argues the trial court erred by not treating two other convictions as the same criminal conduct for sentencing purposes. The State cross appeals and argues the trial court erred in treating three convictions as the same criminal conduct for sentencing purposes. We disagree with Ms. Hood's arguments and agree with the State's. We reverse in part, remand for resentencing, and direct the trial court to correct two other sentencing errors.

FACTS

Report of abuse

On January 16, 2020, a Thursday, Reardan Police Chief Andrew Manke began investigating reports that Ms. Hood was physically abusing her teenage daughter, A.S.[1] A.S.'s seven-year-old sister, S.H., disclosed to school officials that their mother was physically assaulting her sister. A.S. had not been attending school that week.

On January 17, Chief Manke went to check on A.S. at her home. As he approached, Ms. Hood came out of the house, and he asked to speak with A.S. He told Ms. Hood there had been a report of an altercation between her and A.S., and he wanted to check on A.S. Ms. Hood denied there had been any problems. She said A.S. was not home, that she would return after the weekend, and declined Chief Manke's request to come inside the house.

Chief Manke returned on Monday, January 20, a school holiday, to speak with A.S. A.S. denied any abuse. Ms. Hood indicated A.S. would be back in school the next morning. Chief Manke intended to speak with A.S. alone at school the next day, but she

[1] We use initials to protect the children's privacy. Gen. Order 2012-1 of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

arrived late with Ms. Hood, who requested paperwork to transfer A.S. out of the school district.

On January 21, Chief Manke returned to Ms. Hood's home with a Child Protective Services investigator and arrested Ms. Hood. A.S. admitted the reports of Ms. Hood abusing her were true.

Charges

The State charged Ms. Hood with eight counts occurring on or about specific dates and alleged the "family or household member" aggravator for each count. *See* RCW 10.99.020. The counts, paraphrased for brevity, were:

Count 1: January 12, 2020, second degree assault (with scissors);

Count 2: January 10, 2020, harassment, threat to kill;

Count 3: January 11, 2020, fourth degree assault (punching face);

Count 4: January 10, 2020, second degree assault (strangulation);

Count 5: January 10, 2020, fourth degree assault (pulling hair);

Count 6: January 10, 2020, fourth degree assault (punching eye);

Count 7: January 16, 2020, fourth degree assault (holding butter knife below eye);

Count 8: January 20, 2020, fourth degree assault (punching eye).

See Clerk's Papers (CP) at 32-34.

Trial

Two years after her arrest, Ms. Hood proceeded to a jury trial. A.S. testified that she and her mother had a "toxic" relationship. 1 Rep. of Proc. (RP) (Jan. 12, 2022) at 190. A.S. recalled emotional abuse all her life, which became progressively more physical after her younger brother moved out. S.H. described the relationship between her sister and their mother as "bad and disappointing." 1 RP (Jan. 13, 2022) at 311.

A.S. recalled, before January 2020, her mother slapping her hard enough that her nose would bleed, but throughout approximately one week in mid-January 2020, the physical abuse suddenly escalated.

A.S. recalled that "[r]eally early on it would be like her punching me in the face, pulling my hair. Just—just pushing aggressively." 1 RP (Jan. 12, 2022) at 192. S.H. recalled: "My mom would yell at my sister every single day and would hit her . . . like kick her against the wall. . . . And then every single day it got worse and worse and worse." 1 RP (Jan. 13, 2022) at 312. The punching and hairpulling continued through the week. A.S.'s bruising was so severe that her mother kept her home from school for that week.

A.S. described her mother lashing out at "elevated moments." 1 RP (Jan. 13, 2022) at 408. When her mother was "at a 10," something minor would set her off and she

would assault A.S. 1 RP (Jan. 12, 2022) at 198. A.S. described minor things such as, "maybe the dishes weren't put away correctly or just I didn't do [S.H.]'s hair right one time." 1 RP (Jan. 12, 2022) at 196. Her mother blamed her for her brother moving out. To A.S., it seemed like her mother was taking all her sadness and anger out on A.S. A.S. described the abuse as constant:

> It would just be like from the morning like from the moment you wake up to like—to like 1:00 or 2:00 a.m. It would just be constantly. I—I didn't really eat. It was just so like fighting all the time. I couldn't get a break. . . . Every day [I] was questioning whether it's gonna stop or [if] I'm just not gonna be around anymore. . . . I thought I was gonna die."

1 RP (Jan. 12, 2022) at 210-11. S.H. could not remember how close together the incidents happened, other than the fact that her sister would get yelled at every day. She was "pretty sure that they were just separate." 1 RP (Jan. 13, 2022) at 319.

A.S. described her mother pulling her hair "all the time." 1 RP (Jan. 12, 2022) at 193. There was no exact reason or time, and it would happen "every day." 1 RP (Jan. 12, 2022) at 193. A.S. recalled: "[S]he would drag me into different rooms of the house with my hair, mainly in the front and just like drag me down and forward and like walk me into a room." 1 RP (Jan. 12, 2022) at 194. Her mother would rip her hair out of her head and it was thinning in the front.

A.S. recalled multiple instances of her mother putting her hands around A.S.'s neck and squeezing. It ranged from her mother just grabbing A.S. to her mother trying to strangle her. One time, A.S. was on the ground and her mother used both hands to push her down, and A.S. had difficulty breathing and started seeing black. Her mother would let up pressure and slap A.S. on the face and then return to pushing A.S. down. Other times, A.S.'s mother would push her up against the wall with one hand and push her neck. Once her mother pushed her down while she was walking up the stairs and held A.S. still with one hand and pushed against her neck with the other.

S.H. recalled her sister being strangled on the stairs, describing an incident where their mother grabbed A.S. by the hair, throwing her onto the stairs, and choking her. She recalled their mother using one hand to choke her sister.

A.S. recalled a "scissors incident" early in the week. 1 RP (Jan. 12, 2022) at 192. Something minor set her mother off while she was near her mother's craft area, and her mother pinned her against the window and stabbed her in the upper chest with the pointed end of a closed pair of scissors. She stabbed A.S. at least five times and broke the skin, causing her to bleed. A.S. still had a scar from the scissors at the time of trial. While stabbing A.S., her mother said, "I could kill you right now." 1 RP (Jan. 12, 2022) at 200. A.S. was terrified and did not know if she was going to live.

S.H. also recalled the incident, testifying that their mother had once put scissors to her sister's neck and said she would kill her. Because things had been getting worse every day, S.H. thought it was possible their mother would actually kill her sister.

S.H. recalled seeing her sister with a bloody nose and saw her skin turn red when their mother pushed her. S.H. saw her sister with a bloody nose multiple times. One time, she came downstairs and saw her sister in the bathroom with a bloody nose and their mother in the dining room smoking marijuana. She recalled another time when their mother, while in the kitchen, slapped her sister and caused her nose to bleed.

A.S. recalled multiple instances of her mother punching her, mainly on her face. Ms. Hood would also sometimes punch her arms and grab her. In one incident in the kitchen, her mother grabbed a butter knife and dragged it against her body, scraping her skin.

S.H. recalled their mother punching her sister in the eye so that she got a black eye. S.H. recalled seeing her mother punch A.S. in the eye once while in the dining room: "[M]y mom was yelling and then my sister was like up against the wall. And then my mom like punched her really hard in the eye and then it started like turning red. And then like a day after that, it like turned like yellow and purple." 1 RP (Jan. 13, 2022) at 342. S.H. remembered it happening before Chief Manke came to the house because, when he

arrived, her sister had to cover the bruising with makeup. The second time Chief Manke came, her sister did not have the black eye anymore. S.H. could not remember if her sister had a black eye more than once.

When Chief Manke first came to their house on January 17, the girls' mother hid A.S. in a closet. She made them clean up the house so it would look nice when he returned, during which time the abuse "mellowed out." 1 RP (Jan. 12, 2022) at 205. The girls' mother told A.S. what to say when Chief Manke came on January 20 and directed A.S. to wear long sleeves and makeup to cover the bruises. She also helped A.S. style her hair so that the thinning areas were less noticeable. Chief Manke recalled that A.S. appeared made up and was wearing a long sleeve shirt buttoned to her neck.

After Chief Manke left on January 20, Ms. Hood became mad that A.S. was not convincing enough. She pinned A.S. against the wall and punched her in the face, giving A.S. a black eye. Ms. Hood punched A.S. more than once in the face, but A.S. could not count how many times.

Teresa Forshag, a nurse practitioner specializing in child abuse, examined A.S. on January 22 and documented her injuries, photographs of which were introduced into evidence. She testified that A.S. came in with "a lot of bruising," including a "pretty significant" bruised left eye, bruising on her right temple and under her chin, bruising

across her chest, "extensive, heavy bruising on her arms," and bruising on her back. 1 RP at (Jan. 12, 2022) at 273. She was missing "a fair amount of hair," had broken blood vessels in her eye, and abrasions on her tongue and knee. 1 RP (Jan. 12, 2022) at 273.

A.S. told Nurse Forshag her mother had punched her in the eye on two occasions the previous week. The bruising on her arms occurred when her mother grabbed her and threw her into some furniture. She was missing hair because her mother had pulled her by her hair. She had bitten her tongue when her mother hit her under her chin. Her knee was scraped when her mother dragged her across the floor. Nurse Forshag was concerned that the broken blood vessels in A.S.'s eye were due to an airway obstruction that restricted her breathing, and A.S. disclosed her mother had choked her at least once over the last two weeks to the point she started losing consciousness.

Ms. Hood testified in her own defense. She denied stabbing A.S. with scissors, threatening to kill her, punching her in the face or eye, strangling her, or holding a butter knife to her throat. She denied pulling A.S. by the hair and blamed A.S.'s hair loss on eczema. She admitted she once slapped A.S. during an argument because she thought her daughter was about to headbutt her. She attributed A.S.'s injuries to a fall off a stepladder.

In closing argument, the State acknowledged the uncertainty as to the dates of each offense but emphasized that it had charged the crimes as "on or about" various dates in mid-January. 2 RP (Jan. 14, 2022) at 735.

The State argued counts 1 and 2, second degree assault with a deadly weapon and harassment, threat to kill, had been proved by the testimony about Ms. Hood's assault of A.S. with the scissors and threat to kill her. Count 4, second degree assault by strangulation, had been proved by testimony that Ms. Hood had put her hands around A.S.'s throat and caused her to have difficulty breathing.

As to the five counts of fourth degree assault, the State argued count 3 had been proved by the testimony about Ms. Hood punching A.S. in the face and the evidence from Nurse Forshag that A.S. had a bruise on her right temple. Count 5 had been proved by the testimony about Ms. Hood pulling A.S.'s hair and the evidence showing the bald patches on A.S.'s scalp. Count 6 had been proved by the testimony about the first time Ms. Hood punched A.S. in the eye. Count 7 had been proved by the testimony that Ms. Hood had held a butter knife against A.S.'s skin. Count 8 had been proved by the testimony about the second time Ms. Hood punched A.S. in the eye.

The jury found Ms. Hood guilty of all counts except count 7, the fourth degree assault with the butter knife. It also returned a special verdict finding that Ms. Hood and A.S. were members of the same family or household.

Sentencing

Ms. Hood argued that counts 2, 4, 5, and 6 were all the same criminal conduct for sentencing purposes, as were counts 1 and 3. She therefore calculated her offender score as a 4.

The trial court calculated Ms. Hood's offender score as 6 on counts 1, 2, and 4, the felony convictions. As part of its calculation, the court treated counts 4, 5, and 6—assault by strangulation, hair pulling, and punching A.S. in the eye—as the same criminal conduct because they all took place on the same day. It noted that acts did not have to be committed simultaneously to be treated as occurring at the same time. The State voiced its disagreement, arguing that "if there are time breaks in between the assaults, then they can't be at the same time." 2 RP (Feb. 22, 2022) at 819. It argued that the testimony at trial showed "that all of the assaults were separate acts. . . . [T]he Defendant formed a new intent." 2 RP (Feb. 22, 2022) at 820. The court interrupted, stating it agreed that the assaults were separate acts, "[b]ut they all took place the same day and the same

timeframe. And I think they're close enough to be treated as same criminal conduct." 2 RP (Feb. 22, 2022) at 820.

The State requested that the court order an evaluation for substance use disorder because there was testimony Ms. Hood was smoking marijuana in front of her children. It also requested that the court impose the $100 domestic violence penalty assessment. The court stated it would only impose mandatory legal financial obligations and agreed with the State that the domestic violence penalty assessment was mandatory.

The court sentenced Ms. Hood to a standard range sentence of 43 months of imprisonment followed by 18 months of community custody. It ordered Ms. Hood to undergo an evaluation for substance use disorder and to pay the $100 domestic violence penalty assessment.

Ms. Hood appealed and the State cross appealed.

ANALYSIS

DOUBLE JEOPARDY

Ms. Hood contends her fourth degree assault convictions—counts 3, 5, 6, and 8—violate principles of double jeopardy. We disagree.

The prohibition on double jeopardy includes protection against being punished twice for the same offense. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d

78 (2014). When a person has multiple convictions under the same statutory provision, whether they are punished twice for the same offense depends on what the legislature has defined as the punishable act or unit of prosecution. *Id.* at 980-81. For assault, the unit of prosecution is the course of conduct of assault rather than each assaultive act. *Id.* at 984.

To determine whether multiple assaultive acts constitute a single course of conduct, we look at:

- The length of time over which the assaultive acts took place,
- Whether the assaultive acts took place in the same location,
- The defendant's intent or motivation for the different assaultive acts,
- Whether the acts were uninterrupted or whether there were any intervening acts or events, and
- Whether there was an opportunity for the defendant to reconsider his or her actions.

Id. at 985. These factors are useful, but no one factor is dispositive. *Id.* Instead of mechanically balancing the factors, a reviewing court ultimately looks at the totality of the circumstances. *Id.*

We disagree that double jeopardy prevents Ms. Hood from being punished separately for the two convictions for punching A.S. in the eye, count 6 and count 8. The testimony at trial showed that there were two distinct incidents in which Ms. Hood punched A.S. in the eye. S.H. described A.S. being punched in the eye and covering up

the marks on her face with makeup before Chief Manke arrived on January 20. A.S. testified that her mother also punched her in the eye after Chief Manke visited that day.

A.S. described her mother assaulting her after small things would set her off; we can therefore infer that there were intervening periods of calm when she had time to reconsider her actions. There was no testimony indicating the punches to the eye were connected to the second degree assault and harassment involving the scissors or the second degree assault by strangulation. Based on the totality of the circumstances, the facts support that each incident of Ms. Hood punching A.S. in the eye was a separate course of conduct from the felony assaults of which Ms. Hood was convicted.

We also disagree that double jeopardy prevents Ms. Hood from being separately punished for the two convictions for pulling A.S.'s hair and punching A.S., counts 3 and 5. A.S. testified that her mother pulled her hair and hit her constantly every day for one week. Just because A.S. could not describe each and every attack throughout the week does not require these separate attacks to be sentenced as if they occurred together or as if they occurred during the felony assaults A.S. described. Reviewing the totality of the circumstances, as we must, it is obvious that the hairpulling and punching attacks started and stopped not just throughout one day, but throughout each and every day for

one week. By allowing counts 3 and 5 to be punished separately, we are confident that Ms. Hood is not being punished twice for any other attack.

SAME CRIMINAL CONDUCT

For the first time on appeal, Ms. Hood argues the trial court erred by not treating count 1 (assault with a deadly weapon) and count 2 (harassment, threat to kill), as the same criminal conduct for sentencing purposes. As explained below, Ms. Hood waived her challenge to this claim of error.

While a defendant cannot generally waive a challenge to a miscalculated offender score, "waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Whether multiple offenses are the same criminal conduct is a matter of trial court discretion. *State v. Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). We cannot evaluate whether the trial court abused its discretion when it was never given the opportunity to exercise it. We thus conclude Ms. Hood waived this challenge to her offender score and decline to review Ms. Hood's claim that count 1 and count 2 constituted the same criminal conduct.

In its cross appeal, the State argues the trial court erred in treating the three counts charged as occurring on or about January 10, 2020, as the same criminal conduct for sentencing purposes. We agree.

Whether two offenses constitute the same criminal conduct for sentencing is a different inquiry than whether the offenses violate double jeopardy. *State v. French*, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). Two crimes constitute the "same criminal conduct" if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The defendant has the burden of proving two crimes are the same criminal conduct, and we review the sentencing court's decision on the matter for an abuse of discretion or a misapplication of the law. *Graciano*, 176 Wn.2d at 537-38.

The trial court considered count 4, count 5, and count 6, assault by strangulation, hairpulling, and the first punch to the eye, respectively, as the same criminal conduct because they occurred on the same day. The trial court relied on the fact that the information charged all three assaults as occurring "on or about January 10, 2020." CP at 33-34. But the evidence at trial failed to establish specific dates for any of the charges except count 8, the second punch to the eye that occurred on January 20 after Chief Manke interviewed A.S. The testimony at trial made no temporal connection

between Ms. Hood strangling A.S. (count 4), pulling A.S.'s hair (count 5), and the first time Ms. Hood punched A.S. in the eye (count 6). Because the trial court's finding that the crimes occurred at the same time and place is unsupported by the record, it erred in treating these counts as the same criminal conduct.

OTHER SENTENCING ERRORS

Ms. Hood raises two additional sentencing errors; the State concedes both. We accept the State's concessions.

Ms. Hood first argues that the court erred in imposing the domestic violence penalty assessment because she is indigent. The State concedes the assessment should be struck, but disagrees it has anything to do with Ms. Hood's indigency. We agree with the State.

A domestic violence assessment is a penalty that a court may impose regardless of a defendant's indigent status and without consideration of the defendant's ability to pay. RCW 10.99.080(5); *State v. Smith*, 9 Wn. App. 2d 122, 127, 442 P.3d 265 (2019). It is discretionary, however, and not mandatory as the State argued during sentencing. Because the trial court clearly expressed its intent to impose only mandatory legal financial obligations, we agree with the parties that the assessment should be struck.

Ms. Hood next argues the trial court lacked authority to order a substance use evaluation and treatment. The State concedes the court lacked authority. We agree.

Under RCW 9.94A.703(3)(c), the trial court may order a defendant to engage in substance use treatment if the substance use was crime related. S.H.'s passing reference at trial to her mother smoking marijuana does not show that her mother's assaultive behavior was related to her marijuana use. A trial court may order participation in rehabilitative programs, including chemical dependency evaluation or treatment, when the court finds a defendant has a chemical dependency that contributed to the offense. RCW 9.94A.607(1). The trial court made no such finding here nor would the record support such a finding. We conclude that the trial court lacked statutory authority to order Ms. Hood to submit to substance use evaluation and treatment as a community custody condition.

Reversed in part and remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Staab, J.

BURKHART & BURKHART, PLLC

August 17, 2023 - 3:57 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	38765-8
Appellate Court Case Title:	State of Washington v. Brandy J. Hood
Superior Court Case Number:	20-1-00003-2

The following documents have been uploaded:

- 387658_Petition_for_Review_20230817155737D3763970_8686.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Nina.Fisk@atg.wa.gov
- todenrider@co.lincoln.wa.us

Comments:

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
1360 N. LOUISIANA ST. #A-789
KENNEWICK, WA, 99336-8113
Phone: 509-572-2409

Note: The Filing Id is 20230817155737D3763970