70358-7

70358-7

NO. 70358-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WARREN EUGENE BELL, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY ROBERTS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Does sufficient evidence support both alternative means of committing cyberstalking as charged and found here?

2. Is the defendant's vagueness challenge to one of two sentence aggravators moot where the trial court held that either aggravator would support the exceptional sentence imposed?

3. Has the defendant shown that the Supreme Court case holding that a vagueness challenge cannot be raised as to sentencing aggravators is "incorrect and harmful"?

4. Is the language of the sentencing aggravator that states that the current domestic violence offense "was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time," unconstitutionally vague?

6. Has the defendant shown that his trial counsel was ineffective where, at sentencing, she did not raise a "same criminal conduct" argument regarding two of his current convictions because the defendant's offender score was already six points over the maximum on the sentencing grid, and the only question before the court was whether or not to impose an exceptional sentence above the standard range?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with Second-Degree Assault (count I), Felony Harassment (count II), and Felony Cyberstalking (count III) – with all three counts alleged to be domestic violence offenses. CP 25-28. All three counts included the aggravating factor that the crimes were part of an ongoing pattern of psychological, physical or sexual abuse of the victim or multiple victims. Id.; RCW 9.94A.535(3)(h)(i). Counts I and II included the aggravating factor that the crimes were committed within sight or sound of the victim's minor child. Id.; RCW 9.94A.535(3)(h)(ii).

The jury found the defendant guilty as charged. CP 105-16. On count I, the defendant's offender score was a 15, with a standard range of 63 to 84 months. CP 160. On counts II and III, the defendant's offender score was an 11, with a standard range of 51 to 60 months. Id. Based on the jury's finding of the aggravating factors, the court imposed an exceptional sentence on count I of 120 months. CP 159, 162. The sentence on count I was concurrent with 60-month standard range sentences on counts II and III. CP 162. The court indicated that it "would impose the

same sentence on the basis of any one of the aggravating circumstances." Id.

2. SUBSTANTIVE FACTS

Kimyata Bell and the defendant have known each other since 1982, when they were just six years old. RP 384. In 1999, the two became involved in a romantic relationship that culminated in marriage in 2000. RP 384-85. They have two children together, Kal. Bell, age 10, and Kam. Bell, age 6. RP 382-83. The relationship, however, was marked with a history of violence and threats of violence. RP 387.

In September of 2002, the police responded to the couple's home after the defendant assaulted Kimyata and then tore up the house. RP 388. The defendant was convicted of malicious mischief for this offense. RP 388.

Shortly thereafter, in another incident, the defendant assaulted Kimyata and threw her out the window while she was pregnant. RP 388. At the time of the assault, there was a no-contact order in place prohibiting the defendant from having any contact with Kimyata. RP 389.

In July of 2003, officers responded to another domestic violence offense. RP 389. This time, the defendant slapped and

kicked Kimyata, and when a friend interceded, he was assaulted and the window of his car was broken. RP 389-90. The defendant was convicted of violation of a no-contact order for this offense. RP 390.

In March of 2006, Kimyata went to the hospital after the defendant beat her severely about the head. RP 392. The defendant was convicted of assault for this offense. RP 392. Another no-contact order was put in place. RP 392.

Over the course of their relationship, the defendant would repeatedly threaten that if Kimyata ever left him, she would not be leaving anywhere ever again. RP 392. He told her that if she ever cheated on him, "he'd fuck me up." RP 392. Kimyata said she never thought of cheating or leaving, but that it was weird because the defendant always accused her of it. RP 392.

In October of 2007, the defendant was again convicted of domestic violence offenses, violation of a no-contact order and attempted tampering with a witness. RP 393.

Asked why she continued to stay with the defendant, Kimyata responded that although it was a "sick thing," she still loved the defendant, hoped he would change, and they had children together. RP 394. It was like "a bad drug habit," she

testified, "you don't realize how sick you are when you are in the middle of it." RP 394.

The only breaks Kimyata got were when the defendant was incarcerated. RP 394. After almost ten years of abuse, Kimyata finally separated from the defendant. RP 396. Despite no-contact orders, the defendant continued to contact Kimyata. RP 396. When he would call, Kimyata would talk to the defendant because to do otherwise would result in his anger building up and "[t]hat was not the thing to do." RP 400-01.

In 2011, Kimyata began dating Gabe. RP 397-98. In August of 2012, Kimyata was living in a house with her two children and James Denslow, the son of a friend of hers who needed a place to stay. RP 402.

On August 6, 2012, the current offenses occurred. Gabe, Kimyata, and her children spent the evening playing and barbecuing in the backyard. RP 402-03. After Gabe left for the evening, Kimyata and the children were downstairs when there was a loud knock at the door. RP 404. When Kimyata opened the door, the defendant reached out, grabbed Kimyata by the neck and yelled, "[w]hy the fuck are my kids calling this dude dad?" RP 404.

Kimyata, who could smell alcohol on the defendant, tried to run upstairs. RP 404-05. The defendant grabbed Kimyata by the hair and drug her down the stairs where she hit her head on the concrete landing. RP 407. As he yelled at the children to "get the fuck away," the defendant reached his hand down Kimyata's pants to touch her vagina to see if she smelled like another man. RP 408-09.

As Kal. yelled "stop, stop, stop," the defendant began kicking Kimyata in the head and chest. RP 410-11. He then grabbed her neck with both hands and began to strangle her. RP 415. He yelled at her, "bitch, you're going to die, I don't know who the fuck you think I am, you got somebody else calling, you got my kids calling this white motherfucker daddy." RP 415-16, 459. Kimyata believed she was going to die. RP 148.[1]

The assault continued until Denslow just happened to arrive home. RP 419. Upon being interrupted, the defendant stopped his assault on Kimyata and chased Denslow into the front yard.

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[1] Both children testified that they witnessed the assault. RP 620-49. Six year old Kam. testified that all he could do was watch because if he tried to help, "he would be hurting me." RP 630. Kal. testified that after he saw the defendant drag his mom down the stairs by the hair, he tried to call 911 but the defendant broke the phone and told him that you don't call 911 on your father. RP 481-83, 489.

RP 419-20. Once there, the defendant picked up a metal scooter, threw it at Denslow, and then fled in an old van. RP 419-20.

After leaving the scene, the defendant sent Kimyata a threatening text message. RP 433-37, 594-95; Exhibit 12. The text read:

> Bitch I hope u show them this bitch u want to control me ill kill u and them whenever they don't know shit tell them to go home or else its on.

Kimyata was transported to the hospital by ambulance. RP 432. She had abrasions to her neck and petechiae around her eyes – ruptured blood vessels that are a symptom of strangulation. RP 183, 185, 199-200. She also suffered a possible rib fraction. RP 208.

The defendant testified and claimed that he acted in self-defense. He claimed that he went over to Kimyata's house to drop a present off for one of his kids, but that when Kimyata told him that she wanted him back and he rebuffed her, she attacked him, jumped on his back, and that he had to fight her off to get out of the house. RP 705-06, 709-10. When confronted with the text message, the defendant testified that it was his "crude way" of explaining that someone was committing a crime against him. RP 718, 736.

On cross examination, the defendant admitted that he is 5 foot 10, and a fit 270 pounds. RP 723. On the other hand, as a result of a prior automobile accident, Kimyata had a metal plate in her back after having had surgery for a spinal injury. RP 181, 237.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. SUBSTANTIAL EVIDENCE SUPPORTS BOTH ALTERNATIVE MEANS OF COMMITTING CYBERSTALKING

The defendant contends that his conviction for cyberstalking must be reversed because the jury was instructed that it could convict him based on two alternatives of committing the crime, yet the evidence was insufficient to prove each of the alternative means. The defendant is incorrect, substantial evidence supports each alternative means.

Under the alternative means doctrine, where a single offense may be committed in more than one way, jury unanimity is required only as to guilt. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Jury unanimity is not required on each alternative so long as substantial evidence supports each method by which the single crime could have been committed. Kitchen, 110 Wn.2d at 410. On review, the question is whether the jury "could have found

each means of committing the crime proved beyond a reasonable doubt." Kitchen, at 411.

Here, the jury instructed on two alternative means of committing the crime of cyberstalking. Specifically, along with the other elements of the offense not relevant here, the jury had to find that with intent to harass, intimidate or torment Kimyata Bell, the defendant made an electronic communication to her (1) "using lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of a lewd or lascivious act," or (2) "threatening to inflict injury on the person of Kimyata Bell." CP 27, 89; RCW 9.61.260(1)(a) and (c).[2] The defendant contends that there was insufficient evidence to find that the text message that he sent to Kimyata used "lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of a lewd or lascivious act." The defendant is incorrect.

On the same night he assaulted and strangled Kimyata, the defendant sent her the following text message:

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[2] The statute contains a third alternative; that with intent to harass, intimidate, torment, or embarrass, the person makes an electronic communication to such other person "anonymously or repeatedly whether or not conversation occurs." RCW 9.61.260(b). The jury was not provided with this alternative means of committing the crime. See CP 89.

> Bitch I hope u show them this bitch u want to control me ill kill u and them whenever they don't know shit tell them to go home or else its on.

RP 736; Exhibit 12. This message provides sufficient evidence to support the conviction. The case of State v. Lansdowne[3] is directly on point.

Jacqueline Lansdowne called her daughter's school because one of the teachers had taken away her daughter's cell phone. While speaking to a school secretary, Lansdowne said that if the teacher, Toddette McGreevy, so much as touched that phone, she would "send someone to beat the shit out of Mrs. McGreevy." She said she would "nail her to the cross and set fire to it" and "take care of that bitch." She also said that "Mrs. McGreevy had better not touch my child or I will personally see that the bitch pays for it." Lansdowne, 111 Wn. App. at 889.

Lansdowne was charged with telephone harassment under one alternative means that required the State to prove that she used "indecent or obscene words with the intent to harass."

[3] 111 Wn. App. 882, 46 P.3d 836 (2002).

RCW 9.61.230(1)(a); Lansdowne, at 290.[4] Like here, Lansdowne alleged that the words she used did not fit the elements of the alternative means charged. The Court held otherwise, finding that,

> The second issue is whether the words "shit" and "bitch" are indecent or obscene language. "Indecent" is defined as: "not decent: ... altogether unbecoming: contrary to what the nature of things for which circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly." Websters, supra, 1147. "Obscene" is defined as: "marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage." Websters, supra, 1557. Ms. Lansdowne used the word "bitch" not in reference to a female dog, but in reference to a female human being. Such usage is both indecent and obscene as those words are commonly defined. A rational trier of fact could have determined that Ms. Lansdowne's words were indecent or obscene.

Lansdowne, at 891-92.

The defendant here used the same pertinent words in the same manner that the Court held in Lansdowne a reasonable jury could find met the elements of the crime of telephone harassment.

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[4] As pertinent here, the telephone harassment statute uses almost identical language in regards to the indecent or obscene language alternative means. The statute provides that:

> (1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
>
> (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act;

RCW 9.61.230(1)(a). The only pertinent differences between the two statutes is that the cyberstalking statute removed the term "profane," and added the term "images."

There is no distinguishing fact here that would lead to a different result. Thus, the defendant's claim that there is not sufficient evidence to support the challenged alternative means fails.

2. THE DEFENDANT'S CHALLENGE TO HIS EXCEPTIONAL SENTENCE IS MOOT AND WITHOUT MERIT

Under RCW 9.94A.535(3)(h)(i), a court may impose an exceptional sentence upon a jury finding that the current offense involved domestic violence and that "[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." The defendant contends this sentencing aggravator is unconstitutionally vague. His argument should be rejected for three reasons, (1) the issue is moot, (2) a defendant may not raise a vagueness challenge to a sentencing aggravator, and (3) the statute is not unconstitutionally vague.

a. The Issue Is Moot

A claim is moot if the court can provide no effective relief. In re Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). An alleged sentencing error is rendered moot when the reviewing court can provide no relief and the alleged error would not bind a future

court in a sentencing determination. See State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (finding that an appeal was moot where it could not "provide [appellant] with any effective relief, i.e., less confinement due to a lower offender score"); State v. Vike, 125 Wn.2d 407, 409 n.2, 885 P.2d 824 (1994) (recognizing that an appellant's challenge to the sentencing court's "same criminal conduct" finding was not mooted by his release from confinement in this case because that determination would bind a future sentencing court under then-existing statutes).

Here, the court imposed an exceptional sentence based on two aggravating factors, the jury's finding that "[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time," ***and***, the jury's finding that "[t]he offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years." RCW 9.94A.535(3)(h)(i) and (ii); CP 108-15, 160. The court indicated that it was the latter, that the abuse occurred within sight and sound of Kimyata's young children, that affected her the most. RP 941. The court noted how incredibly harmful it is for children to witness such abuse and that it is extremely hard to remedy.

RP 941.[5] The court also ruled that it "would impose the same sentence on the basis of any one of the aggravating circumstances." CP 160.

An appellate court may uphold an exceptional sentence if it finds that any of the reasons given by the sentencing court when imposing the sentence are valid. State v. Vaughn, 83 Wn. App. 669, 675, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997). Where the trial court states that either of two aggravating factors would justify the exceptional sentence and where the reviewing court affirms that the exceptional sentence was based on one of the factors, the reviewing court need not reach the validity of the other factor. State v. Osalde, 109 Wn. App. 94, 97, 34 P.3d 258 (2001).

With the court here specifically ruling that it would impose the exact same sentence on either aggravating factor, the issue as to whether the one aggravating factor is vague becomes moot. This court can provide no relief. Further, no future court is bound by the decision of the trial court in regards to this ruling.

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[5] The defendant did not object to the issuance of a no-contact order with his children, telling the court that he never wanted to see them again. RP 946.

b. A Defendant May Not Raise A Vagueness Challenge To A Sentencing Aggravator

Under the Due Process Clause, a statute is void for vagueness if (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

The Supreme Court has previously held that aggravating circumstances are not subject to vagueness challenges under the Due Process Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459. "A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." Id. The Court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline

statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." Id. at 461.

The defendant argues that, in light of Blakely v. Washington,[6] and Apprendi v. New Jersey,[7] the Court's decision in Baldwin is incorrect and harmful. However, the defendant fails to explain why the fact that a jury, rather than a judge, decides whether the facts exist to support an exceptional sentence, compels the result that Baldwin is wrong and must be overruled. The change in the finder of fact is the only pertinent change that resulted from Blakely and Apprendi.

Prior to Blakely, upon a conviction for a felony offense, a trial court could impose an exceptional sentence above the standard range based on a judge finding that the "current offense that involved domestic violence and which 'was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time' was an aggravating circumstance." State v. Zatkovich, 113 Wn. App. 70, 81, 52 P.3d 36 (2002) (citing former RCW 9.94A.390(2)(h)). In 2005, the legislature amended the Sentencing

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[6] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[7] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Reform Act (SRA) to comply with Blakely's requirement that a jury, not a judge, must find the facts used to support an exceptional sentence. The statutory amendments were designed to codify the existing common-law aggravating factors. Laws of 2005, ch. 68, § 1.

The Court's analysis in Baldwin remains valid after Blakely and Apprendi. The aggravating circumstances in RCW 9.94A.535 do not purport to define criminal conduct. As the Supreme Court has stated, "an aggravating factor is not the functional equivalent of an essential element." State v. Siers, 174 Wn.2d 269, 271, 274 P.3d 358 (2012). Instead, the statute lists accompanying circumstances that *may* justify a trial court's imposition of a higher sentence. But a jury's finding of an aggravating circumstance does not mandate an exceptional sentence. The trial court still has discretion in deciding whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence.[8] RCW 9.94A.535.

Additionally, while the defendant asserts that an aggravating circumstance changes the maximum penalty that can be imposed

[8] For example, in Siers, the jury found the existence of an aggravating factor but the trial court declined to impose an exceptional sentence. Siers, 174 Wn.2d at 272-73.

(a sentence above the standard range), this was true at the time the Court decided Baldwin. One thing and one thing only is different post-Blakely, Apprendi, and the resulting statutory amendments to the Sentencing Reform Act (SRA): the jury now must decide beyond a reasonable doubt the facts supporting an exceptional sentence--a function that once belonged to the sentencing judge.

The Court in Blakely held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." Blakely, 542 U.S. at 301. Thus, post-Blakely, the sentencing court could not find facts, not otherwise admitted, in imposing an exceptional sentence. As a result, the legislature amended the statutory sentence provisions of the SRA to provide for the jury to find the facts beyond a reasonable doubt that *could* support imposition of an exceptional sentence. The trial court could then impose an exceptional sentence "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Thus, the only consequence of Blakely and the resulting statutory amendments

was to shift the fact finding function of an exceptional sentence proceeding from the sentencing judge to the jury.

The doctrine of *stare decisis* provides that a court must adhere to a prior ruling unless the defendant can make "a clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970); see also State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (the court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful."). Because the defendant fails to show that the Court's decision in Baldwin is incorrect and harmful, this Court must adhere to the holding that exceptional sentence aggravating circumstances are not subject to a vagueness challenge.[9]

c. The Statute Is Not Vague

Even if the defendant could make a due process vagueness challenge to the statute, his argument should be rejected. The terms used in defining the aggravating circumstance are ones of common understanding. Under the particular facts of this case, the

[9] The defendant contends that a person is thus left with no ability to challenge a sentencing aggravator. This is incorrect. If a defendant believes certain words of a sentencing aggravator are vague, he can always propose clarified jury instructions. See State v. Duncalf, 177 Wn.2d 289, 296-98, 300 P.3d 352 (2013); State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006), rev. denied, 159 Wn.2d 1017 (2007).

defendant was on notice that his criminal conduct was aggravated where he spent the last 20 years abusing various women in domestic violence relationships.[10]

A statute is presumed to be constitutional. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). The party that challenges a statute's constitutionality for vagueness bears the burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague. City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

A statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes." Douglass, 115 Wn.2d at 179. It is not enough to hold a statute vague merely because "a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991) (quoting Seattle v. Eze,

[10] It should be noted that the defendant has not challenged the sufficiency of the evidence in regards to the aggravating factor. Under such a challenge, a reviewing court would view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstance beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). As the trial court noted at sentencing, the defendant's criminal history showed an uninterrupted pattern of assaultive abusive behavior dating back 20 years. RP 940. Along with the prior abusive acts admitted at trial under ER 404(b) that the jury was allowed to consider in determining the existence of the aggravator, the jury also had before it prior judgments showing abusive acts to other women. RP 909-10.

111 Wn.2d 22, 27, 759 P.2d 366 (1988). Afterall, "[s]ome measure of vagueness is inherent in the use of language." Haley, 117 Wn.2d at 740. The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. State v. Branch, 129 Wn.2d 635, 648, 919 P.2d 1228 (1996). The court will "consider whether a statute is vague as applied to the particular facts at issue, for a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Holder v. Humanitarian Law Project, 561 U.S. 1, 130 S. Ct. 2705, 2719, 177 L. Ed. 2d 355 (2010) (internal citation omitted).

The defendant equates the language of the aggravator at issue here with certain language contained in the harassment statute that was found unconstitutionally vague by the Supreme Court in State v. Williams.[11] A person can commit misdemeanor harassment if the person knowingly threatens "[m]aliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or ***mental health or safety***. RCW 9A.46.020(1)(a)(iv) (emphasis added). This provision of the statute was found to be unconstitutionally

[11] 144 Wn.2d 197, 26 P.3d 890 (2001).

vague because the phrase "mental health or safety" did not contain a meaningful definition, offered law enforcement no guidance beyond subjective impressions of what constituted a violation, and the average citizen would have no way of knowing what conduct was prohibited by the statute because each person's perceptions of the law may be different. Williams, 144 Wn.2d 197. Such is not the case here; a person of "ordinary intelligence" would understand to what the statute pertains.

RCW 9.94A.535(3)(h)(i) provides that the current offense be a domestic violence offense that is "part of an ***ongoing pattern of psychological, physical, or sexual abuse*** of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." (emphasis added). "Abuse" is defined as "a departure from legal or reasonable use; misuse [or] physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury." Black's Law Dictionary 10 (8th ed.2004). "Psychological," is defined as "relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind, esp. in its affected or cognitive functions." Webster's Third New Int'l Dictionary 1833 (1993). "Physical" is defined as "of or relating to the body." Id. at 1706. "Sexual" is defined as "of or relating to the

male or female sexes or their distinctive organs or functions." Id. at 2082. Thus, an ordinary person of common intelligence would understand that the statute pertains to mental, bodily or sexual abuse, acts that are not legal or reasonable. For example, corporal punishment of a child is not unlawful when such physical discipline is objectively reasonable. State v. Singleton, 41 Wn. App. 721, 723–24, 705 P.2d 825 (1985). This is not difficult to understand or apply.

While there may be "some possible areas of disagreement," or the "exact point" of defining a violation not completely evident, that does not make a statute unconstitutionally vague. Rather, the defendant must prove beyond a reasonable doubt that a person of ordinary intelligence would be unable to know what the statute proscribes. Douglass, 115 Wn.2d at 179. He fails in the burden here.

3. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM HAS NO MERIT

The defendant claims his trial counsel was constitutionally ineffective because she did not raise a "same criminal conduct" argument at sentencing. Specifically, the defendant claims his counsel should have argued that his second-degree assault

conviction and his felony harassment conviction constituted the "same criminal conduct" for scoring purposes; that together the two crimes should be counted as only a single crime. This claim should be rejected. Trial counsel recognized that with an offender score of 15, six points above the sentence grid maximum, the change of two points in the defendant's offender score meant nothing.

A determination of "same criminal conduct" at sentencing may affect the standard range sentence by altering the offender score. RCW 9.94A.589(1). "[I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1). Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1). "[I]t is the defendant who must establish [that] the crimes constitute the same criminal conduct." State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013).

Application of the same criminal conduct statute by a trial court is not mandatory and involves both factual determinations and the exercise of discretion. State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000). Because the

determination involves both judicial discretion and factual determinations, failure to raise the issue can constitute waiver. Nitsch, 100 Wn. App. at 523; accord In re Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (approving of the Nitsch waiver analysis). Even more than a failure to object, a defendant may not stipulate to his offender score before the sentencing court and then argue for the first time on appeal that his multiple convictions encompassed the same criminal conduct. In re Shale, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007).

Here, if the defendant were to claim on appeal that his convictions encompassed the same criminal conduct, the issue would be deemed waived based on the above case law and the following facts:

At sentencing, the State informed the court that it had calculated the defendant's offender score as a 15 for the second-degree assault conviction, and 11 points for the felony harassment and cyberstalking convictions.[12] RP 923. The prosecutor asked defense counsel to indicate on the record

[12] As a Class B felony with a 10 year maximum penalty and a seriousness level of IV, the second-degree assault conviction was the critical offense. See CP 160. The other two offenses are both Class C felony offenses with 5 year maximum penalties and a seriousness level of III. Id. The sentences imposed on the latter two offenses were to run concurrent to the greater offense, the sentence imposed on the second-degree assault conviction. CP 162.

whether there was any objection to the State's computation of the offender score. Counsel indicated there was not. RP 924. Further, when it was defense counsel's opportunity to provide a sentence recommendation to the court, defense counsel stated that the defendant's offender score was a 15, but indicated that it did not really matter because his score was "off the grid," and because the issue before the court was whether the court would impose an exceptional sentence above the standard range or a standard range sentence (a range that would not change based on the argument raised by the defendant on appeal). RP 935.

In an attempt to circumvent waiver, the defendant claims that his trial counsel was constitutionally ineffective for not raising a same criminal conduct issue. Under the facts of this case, that argument fails.

To establish ineffective assistance of counsel, the defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A reviewing court will

begin with the strong presumption that counsel was effective. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

The sentencing grid provides the standard range based on a defendant's offender score. RCW 9.94A.510. For example, a defendant with an offender score of 8, convicted of second-degree assault (seriousness level IV), would have a standard range of 53 to 70 months confinement. Id. However, the sentencing grid maxes out when someone has an offender score of a 9. That means that for a defendant convicted of second-degree assault, the standard range of a person with an offender score of "9 or more," is 63 to 84 months, regardless of how many points over 9 the person may be.

Here, if the defendant were to prevail, his offender score would change from a 15 to a 13. Nothing else would change. Therefore, not only would the issue be waived if brought directly, it would be moot.[13] Counsel cannot be said to have acted "below an objective standard of reasonableness," for failing to raise an issue

[13] The court can provide the defendant no relief and the trial court's ruling is not binding on a future court. Should the defendant be convicted of a felony offense in the future, the current sentencing court would be required to make its own independent determination as to whether these two offenses encompass the same criminal conduct for scoring purposes. RCW 9.94A.525(5)(a)(i).

that was of no consequence. Thus, the defendant's ineffective assistance of counsel claim fails.[14]

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 24 day of March, 2014.

Respectfully submitted,

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King County Prosecuting Attorney

By: _____
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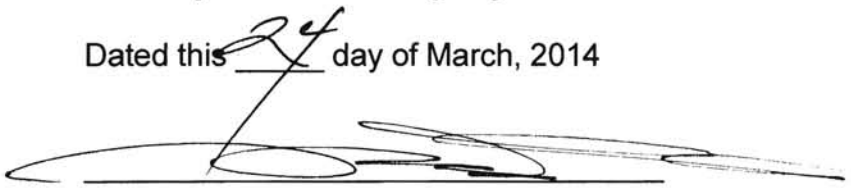
[14] The defendant would also be unable to prove the prejudice prong of the ineffective assistance of counsel test because his sentence would be unaffected by a favorable ruling on the issue.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BELL, Cause No. 70358-7 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 24 day of March, 2014



Name
Done in Seattle, Washington