NO. 31894-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

DEXTER BUSH,

Appellant.

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

The Honorable Brian Altman, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The two convictions for witness intimidation violate the prohibition against double jeopardy.

2. The evidence was insufficient to prove felony harassment.

3. The evidence was insufficient to prove the crimes of second degree assault and witness intimidation were committed with sexual motivation.

4. The trial court was without authority to require appellant to undergo a mental health evaluation as a condition of community custody. CP 223.

Issues Pertaining to Assignments of Error

1. Where, at the time appellant allegedly committed the witness intimidation offenses, it was reasonable to interpret the unit of prosecution as prohibiting a course of conduct, rather than each separate instance a threat was uttered, do appellant's multiple convictions violate the prohibition against double jeopardy, where they are based on two separate threats made during appellant's *ongoing and continuous attempt* to dissuade the complainant from disclosing appellant's allegedly criminal behavior?

2. Where the state presented evidence of a specific threat to kill during the charged period, but offered no testimony as to the complainant's state of mind in reaction to it, did the state fail to prove that the complainant reasonably feared *the threat* would be carried out, an essential element of felony harassment?

3. Where the state presented no evidence of sexual motivation *as manifested by the appellant's conduct* in the course of committing the second degree assault and intimidation offenses, is the evidence insufficient to support the sexual motivation enhancements for those offenses?

4. The trial court is authorized to order a mental health evaluation and treatment only where certain statutory prerequisites are satisfied. These prerequisites were not met in appellant's case. Should this community custody condition be stricken?

B. STATEMENT OF THE CASE

1. Procedural Facts

Following a jury trial in Klickitat county superior court, appellant Dexter Bush was convicted of the following ten counts, purportedly committed against his adult, adoptive daughter Fawn Bush: (1) first degree rape, committed between 7/15/10 and 8/15/10; (2) second degree rape, between 6/15/10 and 7/31/10; (3)

second degree rape, between 8/01/10 and 8/31/10; (4) second degree rape, between 9/01/10 and 11/15/10; (5) second degree rape, between 1/01/11 and 1/31/11; (6) second degree rape on 2/09/11; (7) second degree assault, between 7/15/10 and 8/15/10; (8) intimidating a witness, between 6/01/10 and 7/15/10; (9) intimidating a witness, between 9/01/10 and 12/31/10; and (10) felony harassment, between 6/15/10 and 8/15/10. CP 1-8, 13, 61, 178-202.

For each offense, the jury found an aggravating factor of domestic violence coupled with a pattern of abuse. CP 179, 182, 184, 186, 188, 190, 192, 195, 198, 201. For the assault and two counts of intimidating a witness, the jury also found the offenses were sexually motivated. CP 193, 196, 199.

At sentencing, the court calculated Dexter's[1] standard range sentence for first degree rape to be 240-318 months. CP 219. The court calculated the standard range for second degree rape to be 210-280 months. CP 218. Based on the aggravating domestic violence found by the jury, as well as Dexters' high offender score (due to the number of counts), the court imposed an exceptional sentence consisting of 582 months; essentially, the court imposed

the high end for first degree rape (318 months), concurrent with most of the other offenses, but consecutive to a 210-month sentence for one of the second degree rape convictions, plus 54 months for the enhancements.[2] CP 217-19. RCW 9.94A.712. Dexter timely appeals. CP 232-243.

2. Trial Testimony

While the offenses allegedly occurred while Fawn was an adult, the state was permitted to introduce evidence of incidents allegedly occurring when she was younger, before she, Dexter and Dexter's wife-to-be moved here to Washington. RP 11-12. The court ruled such evidence was relevant to the state's theory of forcible compulsion, the felony harassment charge and to explain the dynamics of the relationship. CP 12.

Dexter began dating Fawn's mother when Fawn was five years old, and they married two years later. RP 85. When Fawn was approximately 12 years old, Dexter legally adopted her. RP 86. Fawn claimed Dexter began having sex with her just before the adoption became final. RP 87-88. According to Fawn, the first

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[1] To avoid confusion, this brief will refer to Dexter Bush and Fawn Bush by their first names. No disrespect is intended.

[2] While the end result is the same, the court's calculations in arriving at the length of the exceptional sentence were a bit more complicated, as it broke the offenses into two separate groups so that the offender score for each group would be ten

time, Dexter held a serrated knife to her lip, told her to keep quiet and not to tell anyone or he would kill her. RP 89.

Fawn claimed Dexter had sex with her almost every day thereafter. RP 89-90. Fawn testified Dexter also made repeated threats to either kill her, or her mom in front of her, if she told. RP 89.

Fawn testified that when she was 14 years old, she tried to tell her mother about the abuse, but Dexter walked into the room. RP 90. Once Fawn's mother left, Dexter reportedly hit Fawn in the arm, grabbed her by the neck and told her she better not try that again. RP 90. Fawn claimed on one occasion, Dexter interrogated her as to whether she told anyone by hooking her up to an electrical stimulation machine, ordinarily used for physical therapy. RP 91-92.

When Fawn was 15 years old, she gave birth to Jared, Dexter's son. RP 91-92. Fawn testified Dexter continued to have sex with her, but now threatened to kill Jared in front of her if she told, or to have her declared an unfit mother and raise Jared himself. RP 93.

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points, reasoning that if the court then ran the sentence for each group consecutively, each offense would be accounted for. RP 217-18.

Fawn testified that on the occasions she resisted, Dexter hit or slapped her. RP 93-94. Fawn also detailed occasions where sex was not involved, but where Dexter was physically violent. RP 95-96, 98.

Eventually, when Fawn was 18 years old, her mother and Dexter split up. RP 96. They were living in Idaho at the time, and Dexter met a woman from Goldendale who would become his wife. RP 96-97.

In June or July 2009, Fawn, Jared and Dexter moved to Goldendale, Washington to be with Dexter's wife-to-be. RP 84-85. At some point before the summer of 2010, they all moved into a motor home at a trailer park. RP 102, 195.

Before moving to the charges at issue, the prosecutor was granted permission to question Fawn about each particular incident by directing her to the time frame charged. RP 101-102. The court denied the prosecutor's request to give Fawn a copy of the charging document to consult during her testimony, however. RP 100-101.

(i) Count One

For the first degree rape charge, the prosecutor asked whether Fawn remembered an incident involving Dexter, occurring

between 7/15/10 and 8/15/10. RP 110. Fawn testified she and Dexter had gone over to an empty motor home Dexter owned, across the way from where they lived. RP 110. Fawn was dating someone and Dexter was reportedly upset. RP 110. According to Fawn, Dexter told her to undress but she refused and started to cry. RP 111. Dexter reportedly hit her over the head with an empty beer bottle and knocked her unconscious. RP 111. When Fawn awoke, Dexter reportedly pulled her by the hair up some stairs to the driver's seat and raped her. RP 112.

(ii) Count Two

For the second degree rape charged in count two, the prosecutor asked if Fawn remembered an incident occurring between 6/15/10 and 7/31/10. RP 114. Fawn testified it started out like any other time, but when she started to cry, Dexter allegedly hit her in the eye. RP 114. Dexter reportedly had sex with Fawn, after telling her that was a warning. RP 114. Fawn testified her right eye was bruised for a couple of days. RP 114.

(iii) Count Three

For the next rape charged, the prosecutor asked if Fawn remembered anything happening between 8/01/10 and 8/31/10. RP 115. Prefacing what happened, Fawn testified she had been

dating somebody, but Dexter had told her "new guy wouldn't be able to protect me or Jared and I still better keep my mouth shut[.]" RP 115. Dexter also reportedly directed her not to have sex with the boyfriend. RP 115.

Fawn testified she and her boyfriend eventually did have sex, however. RP 115. Fawn claimed Dexter told her he intended to have anal sex with her, reportedly because that was not something she would willingly do with the new boyfriend. RP 116. According to Fawn, Dexter followed through with his stated intent, while they were in the other, empty motor home. RP 116.

Fawn testified Dexter told her:

> [T]o keep my mouth shut and not try and go anywhere, that if I tried to leave he could prove I was an unfit mother, if I tried to tell anyone my boyfriend couldn't protect me, he could come after me, and my son.

RP 116.

(iv) Count Four

For the next rape charged, the prosecutor asked if Fawn remembered anything happening between 9/01/10 and 11/15/10. RP 116. Fawn said she and Dexter were in the motor home where they lived and her son was asleep in the compartment above the driver and passenger seats. RP 117. Fawn testified Dexter

directed her to perform oral sex. RP 117. Afterward, he engaged in vaginal intercourse. RP 117. Fawn testified she did not protest because Dexter warned that, "if my son were to wake up things wouldn't go well." RP 117.

(v) Count Five

For the next rape charged, the prosecutor asked about an incident occurring between 1/01/11 and 1/31/11. Fawn testified Dexter raped her in a shower stall in the community bathrooms of the trailer park. RP 118-19.

(vi) Count Six

For the last rape charge, the prosecutor asked if anything happened on 2/09/11. Fawn said that was the last time Dexter had sex with her. RP 120. She didn't remember any specifics, except that it was two days before she stabbed him in the neck.[3] RP 120.

According to Fawn:

> That was – it was just another – same thing. I was told that I'd better keep my mouth shut or – if I tried to leave he would take my son. But it was – after so many times, (inaudible), it just seemed like the same thing over and over again.

RP 120.

[3] Fawn pled guilty to third degree assault for stabbing Dexter. RP 105. After serving her sentence, however, she accused Dexter of the current charges and

(vii) Count Seven

For the second degree assault charge, the prosecutor directed Fawn "back to summer again of 2010," specifically between 7/15/10 and 8/15/10, and asked whether Dexter ever hit her *without sex being involved*. RP 121. Fawn testified she, her son, Dexter and his wife were together in the motor home. RP 121. She remembered Dexter was not happy about her dating, but did not "know what brought it on." RP 121. Out of the blue, she saw his fist and elbow coming towards her face. RP 121. Fawn was not sure which made contact, but it felt like her left eye socket broke. RP 121. Fawn testified her face was swollen for two weeks. RP 122.

(viii) Count Eight

For the first intimidation charged, the prosecutor asked Fawn if, between 6/01/10 and 8/30/10, Dexter said anything to her about "reporting." RP 123. Fawn testified:

> Just with – like I had said, with me seeing the guy I was seeing, him telling me that I couldn't – he couldn't protect me, I better – not say anything – I'm sorry. That's all I –

RP 124.

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the state subsequently succeeded in having her conviction vacated. RP 105-106, 108-109.

With further prompting, Fawn added:

> That – things were going to continue, -- even though I was seeing my boyfriend that things actually weren't going to stop with Dexter, that – I better not try and keep him out of my life or Jared's life or he would take – he could prove I was an unfit mother and take my son from me, and that things were going to continue the way they had been all along, and I better just deal with it.

RP 124.

(ix) Count Nine

For the second witness intimidation charged, the prosecutor prompted: "Going to the fall of 2010, and late fall into winter, from September 1, 2010 through December 31, 2010, did Mr. Bush have a conversation with you about telling or talking?" RP 125. Fawn testified that when she told Dexter she missed her period, he directed her to start sleeping with her boyfriend to avoid any question of paternity. RP 126. According to Fawn, Dexter said that if she was pregnant and failed to convince people her boyfriend was the father, he would kill her "because there – couldn't be another child that – questionable paternity that could possibly look like him." RP 127.

(x) Count Ten

For the final count, harassment, the prosecutor directed Fawn to remember back to "earlier summer of 2010, June 15, 2010 through August 15, 2010," and asked if there was a specific incident where Dexter threatened to kill her. RP 127. Fawn testified:

> I was – hanging around with my boyfriend quite a bit at the time, and he was telling me that – what the rules were. I was constantly being asked if I had told. He told me that – he was sitting around with a bunch of friends and he said that he could kill me, my son and his wife without ever blinking an eye.

RP 127. Fawn testified Dexter said it to someone else in her presence but that she took it as a threat. RP 127-28. The prosecutor never asked whether Fawn feared Dexter would carry out this alleged threat. RP 127-28.

3. Defense Case

Dexter admitted he had sex with Fawn when she was 15 years old and fathered her child, Jared. RP 185-186. He admitted it was bad judgment on his part, but it was consensual. RP 186. Dexter admitted he and Fawn continued a sexual relationship over the years. RP 193, 211.

Again, however, the sexual relationship was never forced. RP 196, 200-204. Nor did Dexter ever threaten Fawn. RP 195-96, 200-205. Dexter also denied committing the abominable acts Fawn accused him of when she was younger, before they moved to Washington. RP 186-195.

The defense surmised Fawn's allegations were part of a strategy to regain parental control of Jared, as CPS had become involved after she stabbed Dexter. RP 271. Dexter testified Fawn was not a good mother, that she chose "partying" over Jared. RP 196, 210.

C. ARGUMENT

1. THE TWO CONVICTIONS FOR INTIMIDATING A WITNESS VIOLATE DOUBLE JEOPARDY.

In 2011, the legislature clarified the unit of prosecution for intimidating a witness, declaring: "For purposes of this section, each instance of an attempt to intimidate a witness constitutes a separate offense." RCW 9A.72.110(5) (2011); Laws of 2011, ch. 165, § 2. The law became effective July 22, 2011. Id.

Before this amendment, however, the statute was at least ambiguous as to the unit of prosecution. Because Dexter's offenses were committed in 2010 – before this statutory

amendment – and because the unit of prosecution could reasonably be interpreted as criminalizing *a course of conduct* at that time, Dexter's multiple convictions for witness intimidation violate double jeopardy.

Under the double jeopardy clause of the Fifth Amendment, multiple convictions under the same criminal statute are prohibited if the legislature intended only one unit of prosecution. U.S. Const. amend. V; State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The state constitutional provision, Wash. Const. art. I, § 9, offers the same scope of protection as its federal counterpart. Adel, 136 Wn.2d at 632. The unit of prosecution may be an act or a course of conduct. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). The unit of prosecution is designed to protect the accused from overzealous prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

An appellate court engages in de novo review of the statutory unit of prosecution, a question of law. State v. Ose, 156 Wn.2d 140, 144, 124 P. 3d 635 (2005). As the court stated in State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007):

> In a unit of prosecution case, the first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis

> as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

If the legislature has failed to denote the unit of prosecution, any ambiguity should be construed in favor of lenity. Tvedt, 153 Wn.2d at 711; Adel, 136 Wn.2d at 634-35. The remedy for a double jeopardy violation is to vacate any multiplicitous convictions. State v. Westling, 145 Wn.2d 607, 613, 40 P.3d 669 (2002).

In 2010, when the alleged charges took place, RCW 9A.72.110(1) provided:

> (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
> (a) Influence the testimony of that person;
> (b) Induce that person to elude legal process summoning him or her to testify;
> (c) Induce that person to absent himself or herself from such proceedings; or
> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.
> (2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.
> (3) As used in this section:
> (a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in RCW 9A.04.110(25).

(b) "Current or prospective witness" means:

(i) A person endorsed as a witness in an official proceeding;

(ii) A person whom the actor believes may be called as a witness in any official proceeding; or

(iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child.

(c) "Former witness" means:

(i) A person who testified in an official proceeding;

(ii) A person who was endorsed as a witness in an official proceeding;

(iii) A person whom the actor knew or believed may have been called as a witness if a hearing or trial had been held; or

(iv) A person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child.

(4) Intimidating a witness is a class B felony.

RCW 9A.72.110 (2010). An active investigation at the time of the threat is not required for conviction. State v. James, 88 Wn. App. 812, 946 P.2d 1205 (1997) (threat relied upon can occur before investigation is pending).

As indicated above, in 2011, the legislature amended the statute and added the following provision:

(5) For purposes of this section, each instance of an attempt to intimidate a witness constitutes a separate offense.

RCW 9A.72.110; Laws of 2011, ch. 165, § 2.

In enacting the new subsection, the legislature explained:

> In response to State v. Hall, 168 Wn.2d 726 (2010),[4] the legislature intends to clarify that each instance of an attempt to intimidate or tamper with a witness constitutes a separate violation for purposes of determining the unit of prosecution under the statutes governing tampering with a witness and intimidating a witness.

Laws of 2011, ch. 165, section 1.

In Hall, the Supreme Court addressed the unit of prosecution for witness tampering, RCW 9A.72.120, which provided:

> A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
>
> (b) Absent himself or herself from such proceedings; or
>
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120 (2010). The legislature has since amended the statute in the same manner as the witness intimidation statute. Laws of 2011, ch. 165, section 3.

Hall was convicted of three counts of witness tampering for phone calls he made to his girlfriend while in jail pending trial. Hall, 168 Wn.2d at 729. In the 1,200 phone calls, Hall attempted to persuade his girlfriend his legal woes were her fault and that she had a moral obligation not to testify or to testify falsely. Hall, 168 Wn.2d at 729. On review before the Supreme Court, Hall argued the multiple convictions violated double jeopardy, as his phone calls constituted one unit of attempting to induce a witness not to testify or to testify falsely. Hall, 168 Wn.2d at 728.

The Hall Court analyzed the criteria set forth in Varnell and resolved all three in Hall's favor. First, it concluded the plain language of the statute supported the conclusion that the unit of prosecution is the ongoing attempt to persuade a witness not to testify in a proceeding. Hall, Wn.2d at 734. Second, it concluded the legislative history was consistent with criminalizing the act of obstructing justice by tampering with a witness no matter how many calls are made in an attempt to accomplish the act. Hall, at 734-735. Third, it concluded Hall's course of conduct was continuous and ongoing, as it was aimed at the same person, in an attempt to

[4] State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010), superseded by statute, Laws of 2011, ch. 165, § 3.

tamper with her testimony at a single proceeding. Hall, 168 Wn.2d at 735-36.

The same resolution is required here. Just as the plain language of the tampering statute supported the conclusion that the unit of prosecution was the ongoing attempt to persuade a witness not to testify, the plain language of the intimidation statute (pre-amendment) supports the conclusion that the unit of prosecution is the ongoing attempt to dissuade someone from reporting criminal activity.

This construction is similarly supported by the legislative history. In 1994, the legislature amended the statute to make clear it was criminalizing threats made before a crime is reported:

> [The legislature finds] that the period before a crime or child abuse or neglect is reported is when a victim is most vulnerable to influence, both from the defendant or from people acting on behalf of the defendant and a time when the defendant is most able to threaten, bribe, and/or persuade potential witnesses to leave the jurisdiction or without information from law enforcement agencies.

Laws of 1994, ch. 217, sec. 204. This finding evidences the legislature was more concerned with combating a defendant's overarching attempts to dissuade victims or witnesses from coming forth, rather than combating the particular threat/s used in the

attempt to do so. As in Hall, the number of attempts is secondary. Hall, 168 Wn.2d at 731.

Again, if the statute clearly indicated the legislature was criminalizing each instance separately, there would have been no need for the 2011 amendment. Finally, turning to the third Varnell factor, as detailed in Fawn's testimony, Dexter's course of conduct was continuous and ongoing, and it was aimed at the same person, in an attempt to persuade her not to disclose the alleged abuse.

Because the Hall Court's reasoning applies with equal force to the intimidation statute (pre-amendment), and because Dexter's conduct was part of a continuous and ongoing effort to intimidate Fawn into remaining quiet, the multiple convictions violate Dexter's right to be free from double jeopardy. This Court should vacate one of the convictions.

This Court should also remand for resentencing, as Dexter's offender score included both counts. State v. Parker, 132 Wn.2d 182, 187, 937 P.2d 575 (1997) ("Imposition of an exceptional sentence is directly related to a correct determination of the standard range. That determination can be made only after the offender score is correctly calculated.") (quoting State v. Worl, 129 Wn.2d 416, 918 P.2d 905 (1996)).

2. THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF FELONY HARASSMENT.

In every criminal prosecution, due process requires that the state prove every fact necessary to constitute the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Hundley, 126 Wn.2d 418, 421, 894 P.2d 403 (1995). A reviewing court should reverse a conviction for insufficient evidence if, after viewing the evidence in the light most favorable to the state, no rational trier of fact could find all elements of the offense proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). Even under this generous standard, the state failed to prove beyond a reasonable doubt the elements required to convict Dexter of felony harassment.

RCW 9A.46.020 provides in relevant part:

> (1) A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . .
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . .
> (2) A person who harasses another ... is guilty of a class C felony if ... (b) the person

> harasses another person by threatening to kill the person threatened. ...

In State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003), the court held that to convict an individual of felony harassment based upon a threat to kill, the state must prove that the victim was placed in reasonable fear that the threat made is the one that will be carried out. In that case, C.G. appealed her conviction for threatening to kill her teacher, alleging that the state did not prove that the teacher was placed in a reasonable fear that C.G. would kill him. The court held:

> In order to convict an individual of felony harassment based upon a threat to kill, RCW 9A.46.020 requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense.

C.G., 150 Wash.2d at 612, 80 P.3d 594. Because there was no evidence that the teacher was placed in reasonable fear that C.G. would kill him, the court reversed C.G.'s conviction. C.G., 150 Wn.2d at 610.

Just as in C.G., the state here produced no evidence that Fawn was placed in reasonable fear that Dexter's threat to kill her that day would be carried out. Fawn testified that during the charged time frame, between June 15, 2010 and August 15, 2010,

Dexter said to someone in her presence that he could kill her, her son and his wife without "blinking an eye." RP 127. Fawn testified she took this as a threat. However, she never said she feared Dexter would carry out this threat. Whether it would be reasonable for a juror to assume that because Fawn feared Dexter enough not to resist his sexual advances, there is no evidence she feared Dexter would carry out the alleged threat to kill that he made on this day. Importantly, the statute requires the state to prove that the victim was placed in reasonable fear that *the threat made is the one that will be carried out*.

Moreover, any argument that the jury could have relied on some other threat to convict should be rejected as the state expressly relied on this threat and an alternative theory at this point would engender questions of jury unanimity, and possibly double jeopardy, as the charged periods for many of the offenses intersect. CP 1-8, 13, 61.

Because the state presented no evidence to prove the reasonable fear element, the conviction should be reversed and dismissed. Resentencing is also required, as this conviction was used in calculating Dexter's offender score. Parker, 132 Wn.2d at 187.

3. THERE WAS NO EVIDENCE THE ASSAULT OR INTIMIDATION OFFENSES WERE SEXUALLY MOTIVATED.

Like elements, sentencing enhancements be proved to a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt). In the abstract, almost anything anyone does could be considered sexually motivated. But the law requires more than some amorphous intent, however.

"Sexual motivation" means that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030(47). It is well settled that sexual motivation must be tied to the conduct in question:

> Inherent in this subsection [RCW 13.40.135(2)] is the requirement that the finding of sexual motivation be *based on some conduct* forming part of the body of the underlying felony. The statute does not criminalize sexual motivation. Rather, the statute makes sexual motivation *manifested by the defendant's conduct* in the course of committing a felony an aggravating factor in sentencing.

State v. Vars, 157 Wn. App. 482, 496-97, 237 P.3d 378 (2010) (adding emphasis, quoting State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993) (interpreting juvenile equivalent of the adult sexual motivation aggravator)).

There was nothing sexual about the defendant's alleged conduct in committing the second degree assault or witness intimidation offenses. Regarding the second degree assault, Fawn testified nothing sexual was involved, but that Dexter punched her out of the blue, in the presence of other people. RP 121. Similarly, regarding the intimidation charges, Fawn's testimony concerned conversations about "reporting" and her feared pregnancy. RP 123-24, 126-27.

In rebuttal closing, the prosecutor asserted these offenses were sexually motivated, because Dexter's overriding goal was to keep his sex partner available and compliant. RP 280. But such does not amount to sexual motivation under the law. This Court should vacate the sentencing enhancements for insufficient evidence.

4. THE TRIAL COURT ACTED OUTSIDE ITS AUTHORITY IN ORDERING A MENTAL HEALTH EVALUATION AS A CONDITION OF COMMUNITY CUSTODY.

A trial court may only impose a sentence authorized by statute. In re Post Sentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). An illegal or erroneous sentence may therefore be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). An accused has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998).

RCW 9.94B.080[5] provides:

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

[5] Although the heading to RCW 9.94B.080 indicates that it applies to crimes committed prior to July 1, 2000, the statute is applicable to crimes committed after that date. See Laws of 2008, ch. 231, § 55.

Thus, RCW 9.94B.080 authorizes a trial court to order a mental health evaluation as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). A court may not order an offender to participate in mental health treatment as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." Brooks, 142 Wn. App. at 850-52.

While the court did order a presentence report, the report only superficially addresses mental health. CP 203-216; RCW 9.94A.500(1).[6] And nowhere did the court make the statutorily mandated finding that Dexter is a mentally ill person as defined by RCW 71.24.025 and that a qualifying mental illness influenced his crime. The trial court thus erred in imposing the mental health

[6] RCW 9.94A.500(1) provides, in pertinent part:

> If the court determines that the defendant may be a mentally ill person as defined in RCW 71.24.025, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.

treatment condition. State v. Jones, 118 Wn.App. 199, 202, 76 P.3d 258 (2003).

D. CONCLUSION

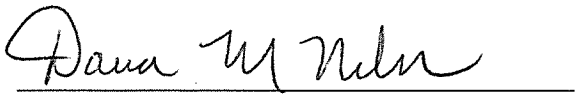
This Court should reverse and dismiss the second count of witness intimidation as it violates Dexter's right against double jeopardy. This Court should also reverse the felony harassment conviction for insufficient evidence. There was likewise no evidence to support the sexual motivation enhancements for assault and intimidation. They should therefore be reversed as well.

Finally, remand for resentencing is required to recalculate the offender scores for the remaining convictions. This Court should also remand with instructions to vacate the community custody condition requiring a mental health evaluation.

Dated this 31st day of December, 2013

Respectfully submitted

NIELSEN, BROMAN & KOCH



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State v. Dexter Bush

No. 31894-0-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 31st day of December, 2013, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing a copy of said document in the United States mail.

Klickitat County Prosecutor
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Signed in Seattle, Washington this 31st day of December, 2013.

x Patrick Mayovsky