71628-0

71628-0

NO. 71628-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DARYL LAMAR BERRY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The erroneous admission of ER 404(b) evidence is harmless where there is not a reasonable probability that the verdict would have been different had the error not occurred. Although the victim in this domestic violence case was erroneously permitted to testify about a prior assault by the defendant, she did not imply that the defendant had been charged or convicted, the physical evidence and officers' observations strongly corroborated the victim's account and contradicted the defendant's account, the defendant admitted that he lied to responding officers at the scene, his trial testimony was not credible, and had the error not occurred, the jury would still have learned of a history of domestic violence through the defendant's testimony. Was the erroneous admission of the ER 404(b) evidence harmless?

2. A defendant's affirmative acknowledgment of his offender score renders further proof of the facts supporting that score unnecessary. The defendant disputed the State's contention that two points should be added to his offender score because of his other current offense, but otherwise affirmatively agreed with the State's calculation of his offender score, which included one point for being on community custody at the time of the crimes.

Did the trial court properly include a point for the defendant's community custody status without further proof of that fact by the State?

3. An error in calculating a defendant's offender score is harmless if the trial court applies the correct score in the end. Although the trial court erroneously included a point in the defendant's offender score for a 2006 misdemeanor domestic violence offense, the trial court committed an offsetting error as to count two, and as a result applied the correct final score on that count. Was the trial court's error in including a point for the 2006 misdemeanor conviction harmless as to count two?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Daryl Lamar Berry, by amended information with one count of burglary in the first degree – domestic violence, one count of domestic violence felony violation of a court order, and an aggravating circumstance of having committed the offenses shortly after being released from incarceration. CP 7-8. A jury found Berry guilty as charged on both counts, and found that the State had proven the aggravating

circumstance. CP 65-68, 71-72. The trial court calculated Berry's offender score as seven on the burglary charge and six on the felony violation of a court order, and imposed concurrent sentences at the top of the standard range for each charge. CP 81, 83. Berry timely appealed. CP 89-90.

2. SUBSTANTIVE FACTS.

Jessica Stump was home with her three children on May 2, 2013, when Berry, the father of two of Stump's children, began knocking on the front door of her apartment. 5RP[1] 60-61; 6RP 47-48. Berry had just been released from jail that day, and had come to Stump's home in violation of an active no contact order that prohibited him from coming within 500 feet of Stump's residence. 6RP 119-21; 8RP 117; Ex. 3. Knowing that it was Berry at the door, Stump did not answer, even when Berry tossed things at her window and called her name. 5RP 61-62. The knocking continued intermittently for at least 45 minutes. 5RP 62.

After the knocking finally stopped, Stump opened the door to confirm that Berry had left. 5RP 62. Berry then came into view and

[1] The ten volumes of the Verbatim Report of Proceedings will be referred to as 1RP (December 3, 2013), 2RP (December 4, 2013), 3RP (December 5, 2013), 4RP (December 9, 2013), 5RP (December 10, 2013), 6RP (December 11, 2013), 7RP (December 12, 2013), 8RP (December 16, 2013), 9RP (January 31, 2014), and 10RP (February 7, 2014).

quickly approached the door. 5RP 62. Stump told him "I don't want you here" and tried to close the door, but Berry pushed his way into the apartment, knocking Stump off her feet. 5RP 63. Berry then repeatedly struck Stump until she managed to grab a picture frame off the mantel and break it over Berry's head. 5RP 63-66. As Stump tried to get away, Berry grabbed her wrist and attempted to restrain her. 6RP 56-57. Stump managed to crawl to the door of her balcony, opened it, and screamed for someone to call the police. 5RP 65.

A passerby heard Stump screaming and called 911. 5RP 69; 6RP 111-12. Stump's nine-year-old daughter also called 911 from an old cell phone that she had been given as a toy, and handed the phone to her crying mother so that Stump could give the 911 operator the address. 5RP 69; Ex. 13. King County Sheriff's Deputy Benjamin Miller was nearby, and responded to Stump's apartment within approximately one minute of the 911 calls. 6RP 106, 112. Miller observed Berry and Stump standing on the balcony outside Stump's apartment. 6RP 110.

Because Berry was visibly bleeding from a wound on his head, Miller called to Berry to come down and talk to him, which Berry did. 6RP 111. Berry told Miller that "a woman" had inflicted

his injury, but that she had already left. 6RP 112. Berry was calm, and denied that Stump was the woman he was talking about. 6RP 112. Miller then had his partner stand with Berry while Miller went up to the apartment to talk to Stump. 6RP 113.

When he reached her, less than five minutes after the initial 911 call, Miller observed that Stump was crying and out of breath, her face was red, and she had marks on her wrist and a large lump behind one ear. 6RP 113-14. Stump explained what Berry had done and that there was a no contact order between them. 6RP 115-18. Miller photographed Stump's injuries, the open sliding door to the back balcony, and the broken picture frame on the floor inside the apartment. 6RP 113, 117.

Stump, Miller, and Berry all testified at trial. 5RP 51-69; 6RP 44-66, 103-22; 7RP 11-20, 39-122. Additional facts are included below in the sections to which they pertain.

C. ARGUMENT

1. ANY ERROR IN THE ADMISSION OF THE VICTIM'S TESTIMONY ABOUT PRIOR ASSAULTS WAS HARMLESS.

Berry contends that his convictions should be reversed because the trial court erroneously admitted evidence of prior

domestic violence by Berry against Stump. This claim should be rejected. Because any error was harmless, Berry's convictions should be affirmed.

a. Relevant Facts.

At trial, Stump and Miller testified to the facts set out above in section B.2 (with the exception of the fact that Berry had just been released from jail[2]). 5RP 51-69; 6RP 44-66, 103-22. When asked how she knew Berry, Stump visibly cried on the stand and testified that Berry used to be her best friend and was the father of some of her children. 5RP 52. In addition to Stump's testimony about the charged offenses, the trial court's pre-trial rulings allowed the State to elicit testimony from Stump about certain prior instances of violence by Berry against her. 4RP 44-45. The jury was instructed that it could use the prior incidents "only for the purpose of assessing the credibility of the alleged victim." CP 39.

Stump testified in general terms about the fact that Berry had hurt her physically and emotionally in the past, and stated that "the burns, the scratches, the scars -- all that stuff, it's long gone. But the things that have happened in my head and my heart I'm still

[2] Berry's recent incarceration was not referenced until Berry volunteered it during his own testimony. 7RP 45.

trying to repair and just get passed [sic]." 5RP 54. Stump also testified about one specific prior incident in October of 2012, seven months before the charged incident, which had resulted in the no contact order that Berry was charged with violating in the current case. 5RP 55-56. In the October incident, Stump explained, Berry had punched her while driving down the freeway, and then had pulled over and wrestled with her, pulling her shirt off in the process, before leaving Stump and her children by the side of the road. 5RP 55-56.

Stump made no reference to any charges or convictions stemming from the October 2012 incident, but merely said that a "restraining order" was issued as a result, and identified the no contact order admitted at trial as that order. 5RP 55-56. The copy of the no contact order that was admitted was redacted to remove all references to "domestic violence," and did not indicate in any way that Berry had been charged with a crime. Ex. 3. No records of Berry's prior conviction were offered or admitted at any point during the trial.

After the State rested, Berry's uncle testified that as far as he knew, Berry had resided with Stump at the apartment when the uncle had last visited them in the spring of 2013, prior to May of

that year. 7RP 14-16. Berry testified in his own defense, stating that he resided with Stump at the apartment, though he did not know the street address. 7RP 40-41. He denied ever knocking on Stump's door that day, and claimed to have entered with his own key. 7RP 42.

Berry volunteered on direct examination that he had "just got[ten] out of jail," and had gone to the apartment planning to get his belongings and leave, "because we had a no contact order." Two questions later, Berry denied ever having been aware of the no contact order between him and Stump. 7RP 46. When defense counsel invited him to clarify, he gave a confusing explanation in which he referenced a 2002 no contact order between them. 7RP 47.

Berry denied grabbing or striking Stump, and claimed that she did not have any visible injuries when he left the balcony to talk to Miller. 7RP 51, 56-58. Berry denied that the signature on the no contact order was his, though he admitted on cross-examination that he had been in court on March 22, 2013, when it was issued. 7RP 70-71. Berry also denied knowing that the order prohibited from going to Stump's residence, stating that the judge had only told him to stay away from Stump. 7RP 71.

The first indication that Berry had been charged with or convicted of a crime for the October 2012 incident occurred when Berry volunteered on cross-examination that the incident that led to the no-contact order "was Assault IV," but said that "it wasn't even much a DV."[3] 7RP 70, 72. When asked if the judge had explained the provisions of the no contact order to him, Berry responded, "[W]ell, the judge -- he explained it to me. The judge didn't explain nothing to me. He just asked me how did I plead." 7RP 72. Berry went on to insist that his guilty plea on the day the no contact order was issued was not for assaulting Stump in October 2012, but for attempting to assault her in 2002. 7RP 78.

Throughout Berry's testimony, he frequently gave directly contradictory answers within a short period of time, on issues such as whether it was his signature on a certified copy of his driver's license, whether it was his signature on the no contact order, and whether he would be surprised to learn that a recording of the hearing in which the no contact order was issued contains his voice stating that he understood he was being ordered to stay away from Stump's residence. 7RP 73, 80-82. When shown a copy of the

[3] These statements were made in response to a question about whether Berry understood language in the no contact order prohibiting him from coming within 500 feet of Stump's residence. 7RP 70.

no contact order and asked to confirm that the order indicated it had been issued "in open court with the defendant present," Berry refused to answer because the order was from a different case and "d[id]n't have [any]thing to do with this case." 7RP 84.

Soon thereafter, Berry stopped responding to any questions posed to him, including those by his own attorney on redirect, and simply talked over his attorney, stating that his rights were being violated and that he wasn't being allowed to testify, until the jury was removed from the courtroom. 7RP 87-91.

b. Any Error Was Harmless.

In light of the Washington Supreme Court's recent decision in State v. Gunderson, No. 89297-1, 2014 WL 6601061 (Wash. Nov. 20, 2014), it appears that the trial court erred in admitting evidence of prior domestic violence by Berry against Stump under ER 404(b) in the absence of any inconsistent conduct or statements by Stump. However, the erroneous admission of ER 404(b) evidence is a non-constitutional error and is therefore harmless if there is no reasonable probability that the result of the trial would have been different had the error not occurred.

Gunderson, 2014 WL 6601061 at *4; State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Here, there is not a reasonable probability that the jury's verdict would have been different had the victim not testified about the prior assaults. Deputy Miller's observations that Stump was crying, out of breath, and had visible injuries on her wrist and head strongly corroborated Stump's version of events, and directly contradicted Berry's claim that Stump assaulted him without provocation and had no injuries when Miller arrived. 6RP 113-14. The 911 recording played for the jury also corroborated that Stump was crying prior to Miller arriving at the residence. 5RP 69; Ex. 13. Furthermore, Miller's testimony established that the account of events Stump gave him at the scene was consistent with her account at trial, while Berry had lied to Miller at the scene when he denied that Stump had caused his head wound. 5RP 60-66; 6RP 112, 117-18; 7RP 51-52.

Berry's entire testimony was riddled with contradictions and evasions, with Berry frequently giving opposite answers to the same question within moments of each other. 7RP 73, 80-82. When confronted with evidence that directly contradicted his claim that he didn't know about the no contact order, Berry flat out

refused to answer the question, and instead inexplicably asserted that the no contact order had nothing to do with this case. 7RP 84.

In finding Berry guilty beyond a reasonable doubt of burglary in the first degree and felony violation of a court order, the jury clearly found Berry's account of events not credible. CP 65-66. That conclusion was a natural, and perhaps inescapable, result of the complete lack of consistency within Berry's testimony and between Berry's testimony and Deputy Miller's unbiased observations. In light of that, Stump's testimony that Berry had assaulted her in the past, devoid of any indication that Berry had ever been charged with or found guilty of such a thing, would not have played a significant role in the jury's assessment of Stump's and Berry's relative credibility. There is thus no reasonable probability that the jury's assessment of Berry's and Stump's relative credibility would have been different had they not been permitted to use Stump's testimony about prior assaults to evaluate Stump's credibility.

Finally, even if Stump had not testified about any prior assaults by Berry, the jury would still have been aware of a history of violence in the relationship, because Berry volunteered unresponsive comments about having pled guilty to an attempted

assault on Stump in 2002 and a no contact order having been issued in that year. 7RP 47, 51, 68, 78. In light of all of the above, there is no reasonable probability that the jury's verdict would have been different had the ER 404(b) evidence not been admitted. See, e.g., Jackson, 102 Wn.2d at 695-96 (erroneous admission of prior bad acts harmless as to one count where circumstantial evidence supported victim's account, and harmless as to other count where defendant's account was implausible and conflicted with observations of independent witnesses). Any error was therefore harmless, and Berry's convictions should be affirmed.

2. THE TRIAL COURT APPLIED THE CORRECT OFFENDER SCORE ON COUNT TWO, BUT BERRY IS ENTITLED TO BE RESENTENCED ON COUNT ONE BECAUSE AN EXTRA POINT WAS IMPROPERLY INCLUDED IN HIS OFFENDER SCORE ON THAT COUNT.

Berry contends that his sentences are unlawful because the trial court improperly included one point for a prior domestic violence misdemeanor that should not have counted toward his offender score, and improperly included one point for Berry being on community custody at the time of the offenses in the absence of sufficient proof of that fact. These claims should be partially rejected. The trial court properly included one point for Berry's

community custody status after Berry affirmatively acknowledged that a point should be included in his offender score for that fact. The trial court's error in improperly including a point for a pre-2011 domestic violence misdemeanor was harmless as to count two, because a second, offsetting, error caused the court to reach the correct offender score on that count. Berry should be resentenced on count one.

a. Relevant Facts.

During pre-trial motions, the State put Berry on notice that it had just learned that he was still on community custody at the time of the charged crimes, and would therefore be calculating his offender score as one point higher than previously indicated. 1RP 51. Berry objected, arguing that the State needed to allege his community custody status in the information and that the State had not given sufficient notice that it would seek to include a point in his offender score for his alleged community custody status. 1RP 51-52. Berry never disputed that he was in fact on community custody at the time of the charged crimes. 1RP 51-55.

In the State's pre-sentencing documents, the State calculated Berry's offender score as seven on count one, domestic violence burglary in the first degree. CP 100. That total was reached by including one point for each of Berry's three prior adult felony convictions, one point for a 2006 misdemeanor harassment domestic violence conviction, one point for Berry being on community custody at the time of the current offense, and two points for count two, the "other current offense" of domestic violence felony violation of a court order, pursuant to RCW 9.94A.525(21)(a). CP 100.

The State calculated Berry's offender score on count two, domestic violence felony violation of a court order, in the same manner, except that the State mistakenly included only one point for count one, the "other current offense" of burglary in the first degree, instead of two, for a total offender score of six. CP 101.

Berry's pre-sentence report argued that the two current offenses constituted the same criminal conduct and should not score against each other, for a total offender score of five on each count.[4] CP 76-80. Berry did not indicate exactly where each of

[4] Berry also argued that count two merged into count one and should therefore be vacated. CP 76-78.

those five points came from, but gave no indication that he disagreed with the State's calculation that Berry had three points from prior felonies, one point from a prior domestic violence misdemeanor, and one point from being on community custody. CP 76-80.

The trial court ruled that the two current offenses did not merge and were not same criminal conduct, and noted Berry's offender score as seven on count one and six on count two, as calculated by the State. 10RP 23; CP 81, 100-101. Although the jury's finding that Berry committed the offenses shortly after being released from incarceration authorized the imposition of an exceptional sentence, the trial court sentenced Berry within the standard range on each charge. CP 71-72, 81, 83.

b. The Trial Court Properly Included A Point In Berry's Offender Score For Berry's Community Custody Status At The Time Of The Crimes.

If an offender was on community custody at the time he committed the current offense, an additional point is added to his offender score. RCW 9.94A.525(19). The State ordinarily must prove a defendant's community custody status by a preponderance

of the evidence. RCW 9.94A.500(1); State v. Jackson, 150 Wn. App. 877, 891, 209 P.3d 553 (2009). However, a defendant's affirmative acknowledgement of his offender score renders further proof unnecessary. State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004). This Court reviews a sentencing court's calculation of an offender score de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

Although Berry did not explicitly state that he was on community custody at the time of the current offenses, he explicitly argued that his offender score was five, and argued that the State's asserted score of seven was incorrect because it was improper to include two points for the other current offense. CP 76-79. Under that argument, Berry's asserted score of five can only be arrived at by including a point for being on community custody, making his asserted score of five an affirmative acknowledgement that he was on community custody at the time of his offenses.[5] See State v. Nitsch, 100 Wn. App. 512, 522, 997 P.2d 1000 (2000) (affirmative assertion of a particular standard range is equivalent to assertion that offenses were not same criminal conduct, where that standard

[5] Berry's criminal history contains no prior convictions that might possibly count toward his offender score other than the four scored by the State. CP 102.

range could only be arrived at by counting the offenses separately) (cited with approval in In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002)).

Because Berry affirmatively agreed with the portion of the State's offender score calculation related to his prior offenses and community custody status, no further proof of his community custody status was required, and the trial court properly included the community custody point in Berry's offender score. Ross, 152 Wn.2d at 233. In the event that this Court decides that the trial court erred in this regard, the State may present additional evidence of Berry's community custody status at a resentencing hearing. RCW 9.94A.530(2); State v. Jones, No. 89302-1, 2014 WL 6687186, at *4-5 (Wash. Nov. 26, 2014) (holding that the rule announced in State v. Lopez[6] prohibiting additional evidence on remand was not constitutionally based and was validly overruled by amendments to RCW 9.94A.530(2)).

[6] 147 Wn.2d 515, 55 P.3d 609 (2002).

c. The State Concedes That The Trial Court Erred When It Included A Point For Berry's 2006 Misdemeanor Domestic Violence Conviction.

As of August 1, 2011, when a defendant is sentenced for a felony offense where domestic violence has been pled and proven, one point is included in his offender score for each prior adult conviction for a "repetitive domestic violence offense" where domestic violence was pled and proven after August 1, 2011. RCW 9.94A.525(21)(c). "Repetitive domestic violence offense" is defined as any one of an enumerated list of misdemeanor domestic violence offenses, and includes misdemeanor domestic violence harassment. RCW 9.94A.030(41)(a)(iv). Additionally, two points are included for certain prior adult felony convictions where domestic violence was pled and proven after August 1, 2011; the list of applicable offenses includes burglary in the first degree and felony violation of a court order. RCW 9.94A.525(21)(a).

There is no provision in the scoring statute that allows a misdemeanor domestic violence offense for which domestic violence was not pled and proven after August 1, 2011, to be included in the defendant's offender score. See RCW 9.94A.525. For that reason, it was error for the trial court to include a point in

Berry's offender score for his 2006 misdemeanor harassment domestic violence conviction. Id.

When calculating Berry's offender score on each count, the trial court should have omitted that point, and only included one point for each of Berry's three prior felony convictions, one point for being on community custody at the time of the offenses, and two points for the other current conviction,[7] for a total score of six on each count. RCW 9.94A.525(2), (19), (21)(a).

i. The error was harmless as to count two.

When calculating Berry's offender score on count two, the State, and subsequently the trial court, erroneously included only one point for the other current conviction instead of two points as required by statute. CP 81, 101; RCW 9.94A.525(21)(a). This error offset the erroneous inclusion of a point for Berry's 2006 misdemeanor domestic violence conviction, causing the trial court to sentence Berry under the correct offender score of six. CP 81. The trial court's error in including the 2006 misdemeanor conviction in the offender score was therefore harmless as to count two, and

[7] Other current convictions are treated as prior convictions when calculating a defendant's offender score. RCW 9.94A.589(1)(a). Both offenses for which Berry was being sentenced were adult felonies where domestic violence was pled and proven after August 1, 2011. CP 7-8, 67-68.

Berry's sentence should be affirmed on that count. See State v. Priest, 147 Wn. App. 662, 673, 196 P.3d 763 (2008).

ii. Berry should be resentenced on count one.

The erroneous inclusion of a point for Berry's 2006 misdemeanor domestic violence conviction caused the trial court to calculate Berry's offender score on count one as seven instead of six. CP 81, 101. The trial court then sentenced Berry to 89 months on that count, the top of the resulting standard range. CP 81, 83. It is possible that the trial court would have imposed the same sentence even if it had properly calculated Berry's offender score, because the jury's finding that Berry had committed his crimes shortly after being released from incarceration authorized the imposition of an exceptional sentence above the standard range. CP 72; RCW 9.94A.535(3)(t). However, it is not clear that the trial court would have done so; this Court should therefore remand the case for resentencing on count one. State v. Cabrera, 73 Wn. App. 165, 170, 868 P.2d 179 (1994).

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Berry's convictions and his sentence on count two, and to remand this case for resentencing on count one.

DATED this 9th day of December, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Daryl Lamar Berry, Cause No. 71628-0, 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 9th day of December, 2014.

Name:
Done in Seattle, Washington