

No. 47687-8-II

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

STATE OF WASHINGTON

Respondent

vs.

ANDRES SEBASTIAN FERRER

Appellant

FILED
COURT OF APPEALS
DIVISION II
2015 DEC 21 PM 5:36
STATE OF WASHINGTON
BY MARK

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Greg Gonzales
Superior Court No. 14-1-00656-0

APPELLANT'S REPLY BRIEF

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I. ISSUES RAISED BY RESPONDENT’S BRIEF

1. For purposes of determining whether the assault count and the harassment count constituted the “same criminal conduct” under RCW 9.94 A. 589, did Mr. Ferrer’s intent change during the course of the incident?

2. Did the trial court abuse its discretion by the length of the exceptional sentence imposed here, where the sentence is quadruple the standard range for the crime of second degree assault?

II. ARGUMENT IN REPLY

A. The harassment count and assault count constituted the “same criminal conduct” for purposes of calculating the offender score.

The parties agree on a few things. The standard of review for determining whether the trial court erred in its determination that the two counts did not constitute the “same criminal conduct” is whether the trial court abused its discretion or applied an incorrect legal standard. Opening Brief at 16; Resp. Brief at 9. The state implicitly agrees that of the three prongs required to find “same criminal conduct”, two of them are present, since it does not argue that either that there was more than one victim, or that the two offenses did not happen at the same time and place. Where the parties disagree is whether the two offenses were committed with the “same intent.”

The state argues that Mr. Ferrer’s objective intent changed from the assault charge to the harassment charge, and also that the assault did not further the harassment charge. Both arguments should be rejected.

In her closing argument, the prosecutor acknowledged that the threats which formed the basis for the harassment charge began while the assault was in progress. She never argued or implied that the harassment charge was based solely on Mr. Ferrer's last comment:

Defendant contends that he did not threaten Kristina. She says he was hostile. He threatened her multiple times. He told her that he would kill her – he would kill her if she divorced him and when he left he said the next time I see you, you are dead. RP V 754.

The same concession is in the prosecutor's brief, at page 13, FN 5. The state should not be heard now to argue that the intent to threaten was formed only as Mr. Ferrer was leaving the upstairs hallway.

Similarly, the state has apparently abandoned any reliance on *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007), which it argued to the trial court, and properly so. *Wilson* supports Mr. Ferrer's position that the assault and harassment were a continuous course of conduct, and were not separated by any significant time break which would signal a change of intent from one crime to the next. As pointed out in Appellant's opening brief at 19-20, the defendant in *Wilson* was also charged with assault and felony harassment. After the assault was completed, Wilson left the house where the assault had taken place. He then warned his associates who were outside the house that the police were likely on the way. Then, he reentered the house, obtained a piece of wood to use as a weapon, and made the threat that constituted the harassment charge. The Court of Appeals held that the two offenses did not constitute the same criminal conduct because during the significant amount of time that passed while

Wilson left the house, warned his friends, obtained a weapon, and returned to the house, he had the time to reflect and form a new criminal intent. Unlike *Wilson*, the record here does not support the conclusion that there was a significant time break or other factors which indicate the formation of a new and different criminal intent.

The state now relies instead on a comparison between two case involving multiple counts of rape, *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1991) and *State v. Tili*, 139 Wn. 2d 107, 985 P.2d 365 (1999) to support its argument that there was an independent criminal intent that only was formed at the end of the incident.

In *Grantham*, there was an anal rape, followed by oral intercourse, both with forcible compulsion. The state argued there that the two different means of forced intercourse signaled a different criminal intent, and that there was a significant time gap between the two incidents. During that time gap, Grantham told the victim not to tell what had happened to her, and she in turn begged him to stop and let her go home. Grantham also had to apply new and significant force to induce the victim to comply with his demand for oral sex.

The panel decision rejected the argument that the two different means of forced intercourse signaled a new intent, but found convincing the argument that the time gap and intervening actions between the two people supported the trial court's determination that separate criminal conduct was involved.

Judge Morgan's concurrence is significant for analyzing *Grantham's* applicability to the present case. First, he points out that the jury was instructed it had to find two separate crimes took place. Secondly, he pointed out that the facts would have supported a trial court determination that the two rapes *did* constitute the same criminal conduct. *Grantham* at 862. Since the decision was a matter of trial court discretion, he concurred in the affirmance of the judgment.

Unlike *Grantham*, in the present case, the jury was *not* instructed it had to unanimously agree on a particular act of harassment in order to convict. The prosecutor argued strenuously against the need for such an instruction. See, *infra* at 7. Consequently, there was no jury determination that the harassment and assault were separate criminal conduct. Since Judge Morgan's concurrence suggests the decision could have gone either way, *Grantham* is not persuasive authority that the two crimes in the case at bar did not share a common intent.

The state also argues that *State v. Tili* is "instructive". *Tili*, like *Grantham*, involved multiple rape counts (three) based on penetration of different orifices that occurred over a short time frame, about two minutes. The Supreme Court, however, reached the opposite conclusion that the *Grantham* court had on relatively similar facts. Relying chiefly on the "continuous, uninterrupted" short time frame involved, the court held that the three rapes *did* constitute the "same criminal conduct" and reversed a trial court determination that they were "separate and distinct," which

would have required consecutive sentences pursuant to RCW 9.94A.400 (recodified as 9.94A.589).

Tili supports Mr. Ferrer's argument. First, as the state acknowledges in its footnote 5, the threats constituting harassment began during the course of the assault. Resp. Br. at 13. So according to the state's own evidence, Mr. Ferrer had already formed the intent necessary to make a felony level threat during the time that the assault was occurring. Second, there was "continuous and uninterrupted" conduct involved here. The evidence presented by the government through Kristina Ferrer was that *throughout* the assault, Mr. Ferrer threatened to kill her.¹ As he was leaving the bedroom, but before he did so, he reiterated the threat to kill her, and did so again before leaving the upstairs hall. RP II 308-309. Contrary to the state's current argument, the threatening behavior did not

¹ Q: This second time aside from asking you about the children being at Ann Maries did he say anything else to you?

A: *That I was going to die. He repeated that over and over again.*

Q: Did he threaten to kill you?

A: Yes.

Q: And how did he make that threat?

A: He said you're going to die – he didn't tell me how – he just said you're going to die.

Q: Did he ever tell you he was going to kill you if you divorced him?

A: Yes.

Q: And when did he say that?

A: After that second event somehow I got up again and again I was standing in front of the bed trying to shield the girls and kind of worked over towards the door – you know – again leading me somehow over onto the other side of the bed. *And again pushed me down on the bed and that – he said if you try to divorce me I'll kill you.*

RP II 303-304. emphasis added.

occur as an afterthought to the struggle in the bedroom; it was part and parcel of it. As in *Tili*, the conduct was continuous and uninterrupted. Unlike *Grantham*, or *Wilson*, there was no significant break of time or intervening events between the offenses which would signal a newly formed intent.

The fact that two acts follow sequentially, rather than being simultaneous, does not mean that they do not share the “same intent”. In *State v. Porter*, 133 Wn. 2d 177, 942 P.2d 974 (1997), the court considered whether two drug transactions which were not simultaneous, but were sequential, constituted the “same criminal conduct” because they shared the same intent. The state argued, as it does here, that the acts were “sequential” and that therefore Porter’s intent had changed. The court rejected the argument. It noted that the “same time/same place” prong should not be confused with the “same intent” prong. 133 Wn. 2d at 185. The Supreme Court reversed the trial court finding that the two transactions did not constitute the “same criminal conduct”:

The sentencing court misapplied the three part “same criminal conduct” test. Case law does not support the trial court’s treatment of back-to-back uninterrupted drug sales as separate criminal conduct merely because they were not “simultaneous.”

133 Wn. 2d at 186.

In determining the “same intent” issue, Washington courts have also considered as a *part* of the analysis, “the related issue[s] of whether one crime furthered the other.” *State v. Dunaway*, 109 Wn. 2d 207, 743 P.2d 1237 (1987). The state argues that there was “no persuasive

evidence” that the assault had furthered the harassment. Resp. Br. at 12.

This is simply not correct. The testimony demonstrates that at least as far as Kristina Ferrer was concerned, the assault charge *had* furthered the harassment charge:

A: ...as he walked down the stairs he looked at me and said the next time I see you, you're dead.

Q: Did you believe him?

A: Yes.

Q: Why did you believe him?

A: Because he just tried to murder me in the bedroom. RP II 308.

Kristina Ferrer's own testimony demonstrates that the assault in the bedroom had intensified her fear of Mr. Ferrer and had given his death threats credibility. The assault clearly furthered the intent to harass by reinforcing in Kristina's mind the threats that were made during the course of the incident before Mr. Ferrer had even left the upstairs hallway. The trial court also had apparently not noticed that Ms. Ferrer testified that at least one of the threats to kill her if she divorced Mr. Ferrer came during the middle of the struggle in the bedroom. RP 304 .(See italicized section above in FN 1).

Finally, the state argued strenuously against the necessity of a *Petrich*² instruction, claiming at trial that the harassment was a single continuous course of conduct.³ The trial court ultimately came to the same

² *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984)

³[Prosecutor]: I have Your Honor. So I guess I'll address them in order. On the first one – it's the *Petrich* for harassment. I'm only alleging one act of harassment here – that the Defendant only put the victim in fear once. *Harassment is an on-going thing* so there's no way for me to prove that he – there's a way to prove that he made multiple threats but there's

conclusion in denying the defense request for a *Petrich* instruction.⁴ The state's argument in its brief that the intent to harass only arose at the end of the incident should be rejected.

The prosecutor also argues for a "narrow construction" of the "same criminal conduct" determination, citing *State v. Price*, 103 Wn. App. 845, 855, 14 P.3d 841 (2000). The origin of this language comes from *State v. Baldwin*, 63 Wn.App. 303, 818 P.2d 1116 (1991). In a footnote, the *Baldwin* court said that the statutory term had originally been undefined before it was construed by the *Dunaway* court. The legislature essentially codified the *Dunaway* interpretation, which the *Baldwin* court claimed showed a legislative intent to "narrow" the category of cases where "same criminal conduct" applies. Notwithstanding this supposed "narrowing" of the category of cases to which "same criminal conduct" applied, the *Baldwin* court cited *Dunaway* with approval and observed that "it [*Dunaway*] has been treated as consistent with the amendment and an

not a way to prove all of the elements of harassment occurred multiple times because she is only in fear once if that makes sense. RP IV 572.

...

So again I – I don't think that a *Petrich* is necessary because I'm not alleging that he committed this crime on multiple occasions. RP IV 575.

⁴ [The court]: Based upon that statement and case law the *Petrich* instruction is denied. As I stated earlier *it's one continuous allegation that I will kill you – I will kill you if you leave – I will kill you if you divorce me.*

It's one continuous and my review of the notes again buttresses the court's decision that this is one continuous allegation of an assault by the Defendant upon the alleged victim. The *Petrich* instruction on the harassment is also denied. RP 692. (emphasis added)

appropriate guide to ascertaining same criminal conduct.” *Baldwin, supra* at 307.

Whether the statute is to be interpreted “narrowly” or not, the record in this case establishes that all three of the requirements for finding “same criminal conduct” were met. The trial court abused its discretion by not following the established case law for determining whether the third prong (“same intent”) of the “same criminal conduct” test had been met. It was met in this case because the assault furthered the harassment, the harassment occurred all during the actual physical assault, and because there was no significant time break between the two offenses. This court should reverse the trial court ruling that the assault count and harassment count were not the “same criminal conduct” for the purposes of determining the offender score, and vacate the sentence.

B. The remedy for an incorrect determination of the offender score is vacation of the entire sentence.

Mr. Ferrer argued in his opening brief at page 21 that the trial court’s error in calculating the offender score requires vacation of his sentence. The state has presented no argument or authority on this point, and thus apparently concedes this point. Since there is no indication in the record that the court would have reached the same result with a different offender score, this court should vacate the sentence and remand for resentencing, pursuant to *State v. Parker*, 132 Wn. 2d 182, 189, 937 P. 2d 575 (1997).

C. The trial court abused its discretion regarding the length of the sentence.

The parties agree that the standard of review for the length of an exceptional sentence is abuse of discretion. *State v. Ferguson*, 142 Wn.2d 631, 651, 15 P.3d 1271 (2001); *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2103); *State v. Law*, 154 Wn. 2d 85, 93, 110 P.3d 717 (2005).

As the prosecutor points out, Resp. Br. at 14, FN 6. Mr. Ferrer does not challenge the factual basis for an exceptional sentence here, since there was some evidence from which the jury could find that Autumn Crawford, Kristina's teenage daughter, could hear the fight between her mother and step-father, and also some evidence that the couple's toddler children were present and awake during some portion of the fight in the bedroom where they were sleeping.

The prosecutor argues that the abuse of discretion test for evaluating the length of an exceptional sentence becomes a question of whether the sentence "shocks the conscience" of the reviewing court. Resp. Br. at 14, citing *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008), quoting *State v. Ritchie*, 126 Wn. 2d 388, 396, 894 P.2d 1308 (1995). The majority of the remainder of the argument is devoted to the recitation of facts that do not themselves support the aggravating factor that the jury found in this case, namely the presence of others during the assault. Resp. Br. at 15-16.

The standard for review for whether a sentence is “clearly excessive” is abuse of discretion. While a trial court has broad discretion regarding the length of a sentence, it is not limitless. Otherwise, there would be no need for appellate review of the length of a sentence. But since the legislature has given no statutory guidance to the courts as to how to measure whether a sentence is “clearly excessive”, the case law has developed a fairly deferential attitude toward trial court discretion. The *Ross*⁵ court’s use of the colorful but vacuous phrase “shocks the conscience”, picked up and repeated by the *Ritchie* court, was not an attempt to analyze a sentence’s length, but merely a restatement of the “no reasonable person” portion of the abuse of discretion standard.

Measured against several objective indicators of the proper length of a sentence, this one was clearly excessive and would not have been adopted by a reasonable trial court. The maximum sentence for a second degree assault is 10 years, or 120 months. That represents a worst-case scenario for sentencing purposes. See *State v. Dyer*, 61 Wn.App. 685, 690, 811 P.2d 975 (1991). The sentence in this case was nearly 50% of the worst-case scenario.

One other objective measure of an appropriate sentence would be by comparing the sentence to the sentencing guidelines. A guideline sentence for a person convicted of second degree assault with an offender score of 9 is 63-84 months. The midpoint of such a sentence, 73.5 months,

⁵ *State v. Ross*, 71 Wn.App. 556, 861 P.2d 473 (1993)

is a year more than half the maximum sentence. In contrast, a person with no criminal history faces a sentence of 3- 9 months. This was Mr. Ferrer's situation, but the trial court's erroneous use of the harassment charge as an "other current offense" rather than "same criminal conduct" made the applicable standard range 6-12 months.

Another objective measure of an appropriate sentence would be to see what the Legislature has required for assaults committed with either a deadly weapon, a firearm, or sexual motivation. The legislature has required a 12 month enhancement for Class B felonies committed with a deadly weapon. RCW 9.94A.533 (4). For Class B felonies committed with a firearm, the enhancement is three years, or 36 months. RCW 9.94A.533 (3). For Class B felonies committed with sexual motivation, the enhancement is 18 months. RCW 9.94A.533 (8). The 36 month enhancement given to Mr. Ferrer, who used no weapon during his fight with his wife, is triple the deadly weapon enhancement, twice the sexual motivation enhancement, and equal to the firearm enhancement.

Another objective measurement of an appropriate sentence would be to compare the sentence given here with what the Legislature has required for the standard ranges for other categories of offenses. To have a standard range sentence as long as Mr. Ferrer received, a person convicted of first degree burglary, which has assault as an element, would have to have an offender score of 5. To be sentenced to 50 months, a person convicted of second degree manslaughter would have to have an

offender score of either 4 or 5. A person convicted of robbery in the first degree would have to have an offender score of 3 to be in the 50 month range. A person convicted of arson in the first degree would also have to have a criminal history offender score of either four or five.⁶ Mr. Ferrer, by contrast, was a first time offender.

By enhancing the sentence in this case 12 months for each child present, for a total of 36 months, the trial court imposed a sentence which was at once arbitrary and excessive, measured by any objective statutory benchmark for a sentence enhancement or standard range sentence. It is arbitrary because Mr. Ferrer was unaware at the commencement of the fight with his wife that either of his two children was present, and was unaware that his step daughter was in the house until he saw her as he was leaving. It is also arbitrary because the 12 month enhancement for each child seems to have “come out of thin air.” See *State v Pryor*, 56 Wn. App. 107, 782 P.2d 1076 (1989), *affirmed* 115 Wn. 2d 445, 799 P.2d 244 (1990). It is excessive because the sentence was equivalent to a second degree assault committed with a firearm, or which was committed by a person with significantly greater criminal history, namely 8 points.

III. CONCLUSION

The trial court erred in concluding that the assault and harassment were not the “same criminal conduct” by not following the

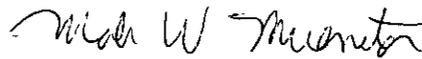
⁶ This approach to analyzing the length of an exceptional sentence was taken by the court in *State v. Brown*, 60 Wn.App. 60, 802 P.2d 803 (1990), *rev. denied*, 116 Wash.2d 1025, 812 P.2d 103 (1991)

established tests for determining the “same intent” prong. This resulted in an incorrect offender score, which fatally infected the sentence. This court should vacate the sentence and remand for resentencing with an offender score of zero.

The trial court’s exceptional sentence was “clearly excessive” under the facts and by comparison to any other statutory benchmarks or the standard range for the offense. This court should vacate the sentence and remand for resentencing.

Dated this 17th day of DECEMBER, 2015

LAW OFFICE OF MARK W. MUENSTER



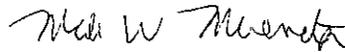
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Appellant.)	
_____)	

I hereby certify that I caused to be served a copy of: Appellant's Reply Brief on Aaron Bartlett, DPA and Andres Ferrer at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 17th day of December, 2015 with postage fully prepaid.

DATED this 17th day of December, 2015



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