

NO. 47687-8-II

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

STATE OF WASHINGTON, Respondent

v.

ANDRES SEBASTIAN FERRER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00656-0

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court did not abuse its discretion when it determined that the assault and harassment were not the same criminal conduct since the objective intent of the crimes was different.**
- II. **The trial court did not abuse its discretion when it imposed an exceptional sentence based on the finding that these were aggravated domestic violence offenses that were committed within the sight or sound of the victim's three minor children.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Andres Ferrer was charged by third amended information with Assault in the Second Degree¹ and Harassment – Death Threats for an incident occurring on or about March 22, 2014 with his wife Kristina Ferrer. CP 10-11. Each charge also contained a special allegation that the crime was one of domestic violence and the aggravating circumstance that the crime occurred within sight or sound of the victim's or the offender's minor children. CP 10-11; RCW 9.94A.535(3)(h). The case proceeded to trial before The Honorable Gregory Gonzales, which commenced on May 11, 2015 and concluded on May 13, 2015 with the jury's verdicts. RP 197-819.

¹ This count alleged "strangulation or suffocation and/or . . . did recklessly inflict substantial bodily harm." CP 10; RCW 9A.36.021(1)(a), (1)(g).

The jury found Ferrer guilty as charged,² to include the aggravators and the trial court sentenced Ferrer to an exceptional sentence of 50 months based on those aggravators. CP 69-74, 78-87, 91; RP 815-18, 864-66. Ferrer filed a timely notice of appeal. CP 94 .

B. FACTUAL HISTORY

Kristina Ferrer³ and Andres Ferrer began dating in 2008, got married in 2010, and had two daughters together, but by January of 2014 the couple had separated with Kristina taking the family home while Ferrer stayed with his sister. RP 287, 289, 621-23. By that time, Kristina and Ferrer's daughters were two and three-years-old. RP 228-29, 287. Kristina had another daughter from a previous relationship named Autumn Crawford, who had turned 18-years-old by the time of the trial. RP 218-19, 288.

On the evening of March 22, 2014, Autumn was at the family home while Kristina had taken her younger daughters to a friend's barbeque. RP 222, 289. At some point, Autumn unexpectedly ran into Ferrer who was at the home removing some items. RP 224-25. She then

² On the Assault in the Second Degree conviction the jury was a unanimous yes on the "substantial bodily harm" alternative and not unanimous on the "strangulation" alternative. CP 71.

³ For clarity purposes Ms. Ferrer will be referred to as Kristina. No disrespect is intended.

believed that he had left because she heard his car leave the house. RP 223-25.

After Ferrer left, Autumn noticed that the internet was not working. RP 225. When she went into the room where the router was located she noticed that the power cord had been unplugged from it. RP 226. Autumn also called her mother, Kristina, after Ferrer left because she wanted to let her mother know that he was gone and to ask why he was there in the first place. RP 226, 291-92. At that point, Autumn thought she was once again home alone, but heard some rustling, which scared her and caused her lock herself in her bedroom. RP 227.

Ferrer, meanwhile, had returned to the home. RP 596-97, 638-39. At around 10:30 p.m., he parked his car somewhere down the street because he did not want Kristina to see that he was at the home and thought she would not come in the house if she knew he was there. RP 639, 669-70, 679-80. Ferrer then walked to the home and let himself in utilizing a punch code on the outside of the garage. RP 640-41. Ultimately, Ferrer would make his way into Kristina's bedroom, crouch down, and hide in a closet. RP 642-44, 675.

Kristina left the barbeque around 10:30 or 11:00 p.m. and arrived home sometime after 11:00. RP 289, 291-92, 335. When she returned

home, she could not get inside because the garage door was not working. RP 292-93, 336. She called Autumn to assist in getting the door open and Autumn noticed the garage door was set to lock on the inside panel. RP 227-28, 272, 292-93. It was abnormal for the garage to be locked. RP 293. The two little girls were both asleep in Kristina's car so Kristina and Autumn each grabbed one, carried them up to Kristina's bedroom, and set them on the bed. RP 228-29, 273-34, 292-93, 336. Next, Autumn ran back downstairs to unload some groceries from the car and headed back up towards her mother's room. RP 230-31.

Kristina, still in her bedroom, noticed some things were missing to include a picture of one of her daughters. RP 293-94. She opened the closet to see if anything in there was gone when she saw Ferrer squatting in the bottom of the closet with a crazed and angry look on his face. RP 294, 338-39. Ferrer said to her "where did you take my kids bitch" and popped out of the closet, jumping at Kristina. RP 295. Kristina described his demeanor as pure anger. RP 295. Autumn had made it to the hallway outside of the bedroom when she saw Ferrer jump out of the closet, yelling, and threatening Kristina. RP 230-31. She immediately ran downstairs, but could still hear Ferrer yelling, some banging, and her mother's screams, which she called "screams of terror." RP 232, 267. Autumn quickly called 911. RP 232-34.

After Ferrer jumped out of the closet he asked again about where Kristina had taken the kids and she told him she had taken them to a barbeque. RP 295. He began pushing her towards the bed by chest bumping her, but then grabbed her, pushed her onto the bed, grabbed her around the neck, started punching her, and asked if she wanted to die. RP 296, 340-41. This woke up the girls, who were still on the bed, and they began to scream and cry. RP 304-05. Ferrer next got on top of Kristina, with his hands around her neck, and began squeezing and intermittently punching her. RP 297-99, 301, 341. Kristina could not breath, started to see stars, have tunnel vision, and felt her head pounding. RP 298, 341. At this point, she lost control of her bladder and bowels and Ferrer once again asked her if she wanted to die. RP 299.

Kristina began pushing back and made attempts at shielding her girls from the attack. RP 299-300, 341. She managed to get to her feet, but Ferrer pushed her to the floor and delivered more punches to her head. RP 300-01, 342. Ferrer returned to strangling Kristina who was again having trouble breathing and having vision problems. RP 301-02, 342. She feared she was going to die. RP 307-08. The attack continued, but when Kristina was able get herself back to her feet, Ferrer finally stopped. RP 303, 305. He then turned on the light, turned to the girls, and said: "this is the last time you'll see Daddy. Sorry ladybug." RP 307. Following that statement

he said to Kristina, “try to divorce me and you die” and then walked out of the bedroom, into the hallway, and punched the pictures and picture frames that lined the hallway leaving shattered glass on the ground. RP 307-08. Before leaving, however, he looked at Kristina and said “the next time I see you, you’re dead.” RP 308. Kristina believed him and called 911. RP 307-09. The jury got to hear that call as well as Autumn’s. RP 309-14.

As Ferrer exited the home, he saw Autumn outside and on the phone with 911. RP 234, 279, 663. He told her that she “better go check on your mom. She might be dead.” RP 234. Ferrer walked towards the street while Autumn ran inside to check on her mother. RP 236-37. She found her mom crying and holding the kids who were also crying. RP 236-37. When the responding officer arrived and made it inside the home he found Autumn crying and afraid, and went upstairs to find Kristina and two children on the bed crying hysterically. RP 457-58, 466. He also noticed Kristina’s face was puffy and red, she had a bump on the back of her head, and dried blood coming out of her ear. RP 459.

Following the attack, Kristina’s head was swollen, she had headaches, bruising and bleeding in an ear, and severe bruising on her neck and the side of her head. RP 317, 369, 513-15. The bruising on her

neck developed over two and one half to three weeks and was photographed by police as it progressed. RP 320, 499-02, 513-15. One officer explained that the bruising was unusual in its severity while another testified that based on his training and experience the bruising on the neck was consistent with fingers. RP 505, 513-15. Aside from the headaches, Kristina complained that she suffered from jaw and neck pain, as well as vision problems for a couple months after the assault. RP 321. She had to take four weeks off work. RP 320.

Attempts to contact Ferrer after the incident were unsuccessful until he turned himself in the next night at a police station. RP 591. The officer who would end up talking with Ferrer that night was told that Ferrer was there wanting to turn himself in for an assault the night before. RP 593. Ferrer explained to the officer that on the day of the attack he was at the house talking with Kristina when she said something that upset him. RP 596. He told the officer that he went back to his sister's house following that encounter but returned to Kristina's house when she was not home, entered the house, and hid in a closet in the bedroom to wait for her to return home. RP 596-97. Ferrer thought he could catch Kristina returning home with another man. RP 597. Ferrer told the officer that when Kristina opened the closet door they yelled at each other, he got in her face, and she pushed him, which enraged him and caused him to push

her onto the bed, get on top of her, and hit her on the head a couple times. RP 597, 686. He also told the officer that he broke the picture frames in the hallway, left the home on foot, and was very sorry for what had happened. RP 597-98.

Ferrer testified at trial, confirming that he parked his car away from the house so that Kristina would not know he was in the house, entered the house knowing Kristina was not there, hid in the closet in her bedroom, that following her discovery of him in the closet he punched her multiple times, and that the two young children were in the room during the entire altercation and were crying. RP 638-80. He would also try to explain that he was at the house because he wanted to talk with Kristina about the kids and where their relationship was going at that point, that he was “shocked and hurt and . . . scared” when Kristina found him in the closet, that he acted in self-defense when he punched Kristina because she was the aggressor, and that he had to continue to hit her because he could not get away from her and felt trapped in the room. RP 638-80. He denied strangling her. RP 658.

ARGUMENT

I. The trial court did not abuse its discretion when it determined that the assault and harassment were not the same criminal conduct since the objective intent of the crimes was different.

When a defendant is convicted of two or more crimes the sentencing court “may enter[] a finding that some or all of the current offenses encompass the same criminal conduct.” RCW 9.94A.589 (1)(a). A finding that the offenses did not encompass the “same criminal conduct” will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). In addition, when a party to an appeal is the respondent and seeks no affirmative relief that party is “entitled to argue any grounds supported by the record to sustain the trial court’s order.” *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000); RAP 2.4(a), 5.1(d); *State v. McNally*, 125 Wn.App. 854, 863, 106 P.3d 794 (2005) (“The State is entitled to argue any grounds to affirm the court's decision that are supported by the record.”)

A court will consider two or more crimes the “same criminal conduct” if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). The absence of any one of the prongs prevents a finding

of “same criminal conduct.” *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts “must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct.” *State v. Price*, 103 Wn.App 845, 855, 14 P.3d 841 (2000); *State v. Wilson*, 136 Wn.App 596, 613, 150 P.3d 144 (2007). If the sentencing court finds that the crimes encompass the same criminal conduct, however, “then those . . . offenses shall be counted as one crime.” RCW 9.94A.589(1)(a).

“The relevant inquiry for the [criminal] intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.” *State v. Tili*, 139 Wash.2d 107, 123, 985 P.2d 365 (1999) (citations omitted). The objective intent of a defendant can be determined by whether one crime furthered the other. *Vike*, 125 Wn.2d at 411. Where crimes are “sequential, not simultaneous or continuous,” a defendant is generally deemed to have sufficient time to form a new criminal intent. *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1999); *In re Rangel*, 99 Wn.App. 596, 600, 996 P.2d 620 (2000). On the other hand, a defendant’s criminal intent may not have changed when he or she engages in an “unchanging pattern of conduct, coupled with an extremely close time frame” *Tili*, 139 Wash.2d at 125.

Tili and *Grantham* are instructive. Both cases involved multiple rapes of one victim in a very short period of time. In *Grantham*, there was “evidence that Grantham completed the first rape before commencing the second; that after the first and before the second he had the presence of mind to threaten L.S. not to tell; that in between the two crimes L.S. begged him to stop and to take her home; and that Grantham had to use new physical force to obtain sufficient compliance to accomplish the second rape.” 84 Wn.App at 859. Based on this evidence, *Grantham* held that defendant:

upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. The evidence also supports the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other.

Id. In *Tili*, there was evidence of three separate penetrations occurring over a two-minute period. 139 Wn.2d at 119. Consequently, *Tili* concluded that “[i]n contrast to the facts in *Grantham*, *Tili*'s three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame -- approximately two minutes. This extremely short time frame, coupled with *Tili*'s unchanging pattern of

conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration.” *Id.* at 124.

Here, when objectively viewing the facts usable at sentencing, Ferrer’s objective intent was different with respect to each count. First, there is no persuasive evidence that one crime depended upon the other or furthered the other. As the trial court correctly reasoned, “Mr. Ferrer’s objective intent in assaulting Ms. Ferrer was to harm her, to establish some bodily injury not to legitimize the threat to kill. . . . [A]lthough the conduct was similar one crime was not – or did not further the other.” RP 857-58

The evidence supports this conclusion as it shows that, like the defendant in *Grantham*, Ferrer had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. This is exemplified by the fact that Ferrer, after terminating his attack of Kristina, turned on the light in the bedroom, turned to one his young children, and said: “this is the last time you’ll see daddy. Sorry ladybug.” before turning back to Kristina and saying “try to divorce me and you die” and then walking out of the bedroom, into the hallway, and looking at Kristina while he said “the next time I see you, you’re dead.” RP 307-08. The above shows that Ferrer formed a new criminal intent to put Kristina in fear that she would be killed in the future. The trial court specifically made such a finding when it held that “[t]he

Assault II was completed before the last threat was made. The Defendant's intent at that time shifted from placing Ms. Ferrer in . . . apprehension of imminent fear during the assault to placing her in apprehension of future harm by making the last threat. RP 857.⁴

Thus, because Ferrer, after attacking Kristina, could have stopped there rather than threatening to kill her in the future, the assault and the harassment were sequential⁵ and each crime was complete in itself. As a result, Ferrer did not have the same objective intent when he committed the two crimes and they do not encompass the same criminal conduct. Moreover, given the abuse of discretion standard and the fact that courts "must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct" it cannot be said that the trial court abused its discretion when it found that the crimes at issue were not the same criminal conduct. *Price*, 103 Wn.App. at 855. Thus, this court should affirm the trial court's offender score calculation.

⁴ The trial court further remarked "[h]e made statements quite clear to the victim that he would kill her if he [sic] divorces her that he was going to kill her. That is a separate intent – that's different from Assault II." RP 858.

⁵ The State acknowledges that Ferrer did also threaten Kristina during the assault, but that fact does not mean that the criminal intent was the same for each crime nor does it change the fact the assault was completed when Ferrer made very clear threats on Kristina's life. RP 296-97, 299, 307-308, 341.

II. The trial court did not abuse its discretion when it imposed an exceptional sentence based on the finding that these were aggravated domestic violence offenses that were committed within the sight or sound of the victim's three minor children.

To reverse an exceptional sentence a review court must find under an abuse of discretion standard that the sentence is clearly excessive or clearly too lenient. *State v. Law*, 154 Wn.2d 85, 93, 100 P.3d 717 (2005); RCW 9.94A.585(4).⁶ “The sentencing court may exercise its discretion to determine the precise length of the exceptional sentence appropriate on a determination of substantial and compelling reasons supported by the jury’s aggravating factor finding.” *State v. Kolesnik*, 146 Wn.App. 790, 805, 192 P.3d 937 (2008) (citing *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)). A clearly excessive sentence is one based on untenable grounds or for untenable reasons. *State v. Kolesnik*, 146 Wn.App. at 805. Importantly though, “[w]hen a sentencing court does not base its sentence on improper reasons, we will find a sentence excessive only if its length, in light of the record, ‘shocks the conscience.’” *Id.* (quoting *State v. Ritchie*, 126 Wn.2d 388, 396, 894 P.2d 1308 (1995) (emphasis added)).

⁶Ferrer does not claim there is insufficient evidence in the record to support the reasons for imposing the exceptional sentence, i.e., that the victims minor children were within the sight or sound of the crimes. Br. of App. at 22.

Here, because the exceptional sentence was based on proper reasons, the jury's findings that the offenses were aggravated domestic violence offenses that were committed within the sight or sound of the victims three minor children, Ferrer must show that the sentence imposed shocks the conscience. CP 91. He cannot make this showing. The trial court carefully, and on the record, reviewed the testimony of Kristina, her daughter Autumn, and Ferrer—finding Ferrer not credible—before imposing the exceptional sentence of 50 months. CP 91; RP 859-65. Not only did Ferrer commit his crimes in front of *a* minor child, he did it in within sight and sound of three minor children, and he committed what the trial court deemed a “brutal[] attack[]” on Kristina in close proximity to children ages two and three who were screaming and crying while the crime was ongoing. RP 862-865.

Ferrer's crimes were aggravated and atypical. This was not a situation where two people got into an argument and the crimes of assault in the second degree and felony harassment occurred. Rather, Ferrer planned his attack by parking his car away from the home so that Kristina would not know he was in the home, likely disabled the garage door and internet while in the home, and then hid in the closet in the main bedroom to lie in wait for Kristina. RP 225-26, 227-28, 292-93, 596-97, 669-70, 679-80. When she opened the closet door he, enraged, jumped out at her,

yelled at her, and then assaulted her by punching her in the head and neck, while strangling her and threatening to kill her, all while on the same bed his two and three-year-old children were located. RP 228-31, 294-304, 597, 686. Kristina's other child, Autumn, saw Ferrer leap from the closet; she then ran downstairs, heard her mother screaming "screams of terror" and bumping sounds, called 911, and then was told by Ferrer as he left that she should check on her mother because she might be dead. RP 231-34, 267. Both Autumn and the police entered the main bedroom to find Kristina huddled up with the two little girls who were all crying hysterically. RP 236-37, 458, 466, 831-32. In fact, when police arrived Autumn was crying and afraid as well. RP 457-58.

Additionally, testimony at trial and sentencing established the effects the assault had on the kids to include continued fear and anxiety. RP 831-32, 838-39. Consequently, the trial court did not impose a clearly excessive sentence, and certainly did not impose a sentence that shocks the conscience given the "substantial and compelling reasons supported by the jury's aggravating factor finding." *Kolesnik*, 146 Wn.App. at 805. This court should affirm Ferrer's sentence.

CONCLUSION

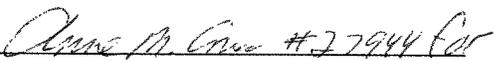
For the foregoing reasons, the State requests this Court affirm the trial court's offender score calculation and sentence imposed.

DATED this 2nd day of November 2015.

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