

64548-0

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NO. 64548-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

Robert Mursch,

Appellant.

2010 JUL 23 PM 1:06

~~COURT OF APPEALS OF THE STATE OF WASHINGTON~~

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARAVAS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. **EVIDENCE OF A CONVICTION IS SUFFICIENT WHEN A RATIONAL JURY, DRAWING INFERENCES FAVORABLE TO THE STATE, COULD CONCLUDE THAT ALL ELEMENTS OF THE CHARGE WERE SATISFIED. THE JURY HEARD TESTIMONY THAT THE DEFENDANT THREATENED THE LIFE OF THE VICTIM AND THAT THE VICTIM REPORTED BELIEVING HE WAS GOING TO DIE AT THE DEFENDANT'S HANDS. WAS THE EVIDENCE SUFFICIENT?**

2. **A SAME CRIMINAL CONDUCT ARGUMENT FOR SENTENCING PURPOSES IS NOT REVIEWABLE FOR THE FIRST TIME ON APPEAL. NOR DOES IT BECOME REVIEWABLE BY WRAPPING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AROUND IT. THE DEFENDANT RAISES THIS ISSUE FOR THE FIRST TIME ON APPEAL USING JUST SUCH A CLAIM. SHOULD THIS COURT DECLINE TO REVIEW IT?**

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was tried for one count of assault in the second degree, one count of assault in the third degree, and one count of harassment (each charge further designated as Domestic Violence). CP 5-6. Testimony during the State's case was that the defendant punched (assault third degree), strangled (assault second degree), and threatened to kill (harassment) his brother-in-

law, Daniel Swart, over some disputed money he believed he was owed. 11/03/09 RP 3-181. The defendant's own testimony was that his brother-in-law unexpectedly attacked him and he punched and strangled in self defense. His defense to the harassment charge was general denial. 11/04/09 RP 29-54.

The jury convicted him as charged. CP 40-42. His trial counsel successfully argued that the two assault charges constituted the same criminal conduct. 12/04/09 RP 5-17. He agreed with a standard sentencing range that included the harassment charge as another current offense. 12/04/09 RP 38. The court declined the defendant's plea for an exceptionally low sentence requested on the basis of his failed self-defense strategy. 12/04/09 RP 20-21.

2. SUBSTANTIVE FACTS

The defendant is the 32 year old brother-in-law of 23 year old Daniel Swart. 11/04/09 RP 29. For a time in mid-2009, Daniel Swart was out of work and needed a place to live along with his girlfriend. They were invited to move in with the defendant and his wife, Daniel Swart's sister. They stayed in a basement room with a

ceiling of bare insulation and installed their own carpet. The defendant initially demanded no rent, then \$200, \$400, and finally \$800 per month for the several months they were there. After 5 months, when they refused to pay the rent increase to \$800, the defendant cut off their electricity and ordered them to leave. Daniel Swart's girlfriend called police, who instructed the defendant to turn the power back on and give them 30 days to move out. 11/03/09 RP 5-14.

After they moved out, relations remained tense. However, Daniel Swart and his girlfriend returned to attend a birthday party. 11/03-09 RP 14- 17. At the same time, Daniel Swart's girlfriend was hoping to retrieve a pay check that had been previously mailed to the defendant's address. The defendant did not want to let Daniel Swart and his girlfriend have the check addressed to them because he believed they still owed him money. 11/03/09 RP 113-120.

The three of them went out to the garage rather than disputing it in front of the rest of the party. 11/03/09 RP 21. After Daniel Swart's girlfriend went back inside the house, Daniel Swart reported that the defendant punched him to the ground, kicked him, got on his back, wrapped an arm around his neck, and strangled

him while threatening, "I should end it now" and "I should kill you."

11/03/09 RP 24-36.

By the time the case came to trial, Daniel Swart equivocated. The court admitted photographs showing his black eyes, bruising, and petechiae (small burst blood vessels beneath the surface) from the assault. He responded, "I hadn't slept that much" (11/3/09 RP 44) and, "I think my eyes are dark naturally." 11/3/09 RP 46. In contrast, the Prosecutor had Daniel Swart stand before the jury with his eyes open and closed so they could examine for themselves whether his eyes and eyelids normally looked like they had been photographed by investigators after the crimes. 11/3/09 RP 71.

The investigating Detective and an Emergency Room Physician both testified that the photographs illustrated bruising around the neck, blackening around the eyes, and petechia in Daniel Swart's eyeballs and on his eyelids. 11/3/09 RP 74-99.

The Detective's background included service as a Medic in the Army and specialized training as an investigator assigned to the King County Sheriff's Office Domestic Violence Unit. He testified that petechiae such as displayed in the photographs of Daniel Swart only occurred in about 10% of strangulation cases because

of the great deal of force required to cause them. 11/3/09 RP 74-81.

At sentencing, the defendant's extended family attended to plead for an exceptionally low sentence or a treatment alternative. Victim Daniel Swart addressed the court to request leniency on behalf of the rest of the defendant's family's. 12/04/09 RP 25-28.

C. **ARGUMENT**

1. **THE EVIDENCE PRESENTED TO THE JURY AT TRIAL WAS SUFFICIENT TO SUPPORT THE HARASSMENT CONVICTION.**

The defendant argues that "I should kill you" could not reasonably be understood as a threat to kill because it contains the word "should" instead of "will." BrApp 6-7. However, RCW 9A.46.020 splits no such grammatical hair in defining the charge of harassment. Nor does any published case citing to this statute. Importantly, the defendant does not challenge the correctness or completeness of the court's instructions to the jury before deliberation, including the elements of the crime. After considering all of the circumstances and testimony presented at trial, the jury concluded that the defendant really did threaten to kill the victim. CP 41.

A conviction is sufficiently supported by the evidence if a rational jury could conclude that all elements of the crime were satisfied after drawing any reasonable inferences in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Jurors are permitted to rely equally upon both circumstantial and direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Jurors decisions about the credibility of testimony are not reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990).

In this case, the jury was in the best position to decide how to interpret 23 year old victim Daniel Swart's demeanor and minimizations during his own testimony. The 32 year-old defendant's 14 and 15 year old children (victim's niece and nephew), wife (victim's sister) and mother-in-law (victim's mother) were identified in front of the jury as present in the courtroom observing his testimony. 11/3/09 RP 6. Under these conditions, Daniel Swart testified, "I don't want to be here, I don't want to testify against [the defendant]." 11/3/09 RP 42.

Daniel Swart wouldn't even acknowledge that the defendant threatened to kill him until after the Prosecutor confronted him with his own prior statement to the Detective. 11/3/09 RP 33-36. Daniel

Swart acknowledged that the defendant punched him to the ground and kicked him repeatedly. Then the defendant knelt on Daniel Swart's back while strangling him with an arm around his neck. 11/03/09 RP 26-33. As Daniel Swart lost his peripheral vision and "saw crazy lights", the defendant threatened "I should kill you." 11/03/09 RP 91-92. When asked why he had not fought back, Daniel Swart responded, "Because he is my brother." 11/3/09 RP 42. Probably to soften the impact of this incriminating testimony, Daniel Swart equivocated about whether he was in any real danger and suggested that he only worried that the defendant might "accidentally" pull up too hard on his neck. 11/03/09 RP 33.

The jury also had an opportunity to interpret Detective Belford's explanation of Daniel Swart's earlier statement. The Detective explained to the jury that Daniel Swart reported: "[H]is attacker [the defendant] was telling him that he was going to kill him the whole time" and "he was afraid he was going to die and he said 'I was literally praying to God right there.'" 11/03/09 RP 91-92.

Finally, during the defendant's testimony at trial, he did not explain away the grammar choice of the word "should" in the threat. Instead, he denied saying anything at all about killing his brother-in-law. 11/03/09 RP 39, 53. The jury was entitled to reject this

complete denial of the harassment charge. 11/03/09 RP 39, 53.

Therefore, the jury was presented with sufficient evidence to support the conviction for the harassment threat to kill.

2. THE DEFENDANT'S SENTENCE SHOULD STAND.

- a. The same criminal conduct claim waived at sentencing may not be raised for the first time on appeal.

RAP 2.5(a)(3) allows a claim of constitutional error to be raised for the first time on appeal. However, the defendant cites no authority raising this RCW 9.94A.589(a) same criminal conduct issue to constitutional magnitude. In fact, he waived it at sentencing. Instead, now the argument is cloaked as a claim of ineffective assistance of counsel. BrApp 8-12.

- i. The defendant waived the claim that the assault and harassment were the same criminal conduct.

For the first time on appeal, the defendant claims that the court should have sentenced the assault and harassment charges together as part of the same criminal conduct rather than as separate charges. BrApp 10. Following trial, the defendant initially faced sentencing for the two counts of assault plus one count of harassment as determined by the jury. His trial counsel successfully argued that the two assault charges arose from the

same criminal conduct. The court agreed and sentenced him on only one of the assault charges and on the harassment charge. 12/04/09 RP 5-17; CP 78.

The defendant's trial counsel additionally argued for an exceptionally low sentence on the basis of a failed self-defense claim. 12/04/09 RP 17-19. However, the defendant never argued that the harassment charge should be similarly disregarded as part of the same criminal conduct.

This court declined to review a similar claim of same criminal conduct that had been waived at sentencing in State v. Nitsch, 100 WnApp 512, 997 P.2d 1000 (2000). This court explained:

This is not an allegation of pure calculation error, as in Ford and McCorkle. Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion. A defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they "encompass the same criminal conduct." Offenses encompass the same criminal conduct when they are committed against the same victim, in the same time and place, and involve the same objective criminal intent. The trial court's determination on the issue is reviewed for abuse of discretion

Nitsch, 100 WnApp at 520-521 (citations omitted).

Like the defendant in Nitsch, the defendant in this case acknowledged at sentencing that his offender score for the assault charge included a point for the harassment charge as a concurrent offense. At sentencing, the Prosecutor specifically asked, “[D]oes defense agree with the offender score and standard range calculation?” The defendant’s trial counsel agreed, “Yes.” 12/04/09 RP 38. The Judge signed the Judgment and Sentence, which counted the harassment as a current offense for purposes of determining the score for the assault. CP 78-86. Thus he waived the issue.

- ii. Claiming ineffective assistance of counsel does not make this a constitutional claim.

An ineffective assistance of counsel claim does not elevate a non-constitutional issue into a constitutional issue. State v. Davis, 60 WnApp 813, 808 P.2d 167 (1991). In Davis, the defendant’s underlying claim was an error in the jury instructions. This court explained,

We note that Davis raises ineffective assistance of counsel only in support of his claim that the trial court erred in giving an aggressor instruction. Independent claims of ineffective assistance of counsel are of constitutional magnitude and, by their nature, may be reviewed for the first time on appeal. However,

instructional errors that do not directly implicate a constitutional right may not be transformed into errors of constitutional magnitude by claiming that they resulted from ineffective assistance of counsel. We conclude Davis's claim that the trial court erred in giving the aggressor instruction was not of constitutional magnitude. Because the claimed error was not raised below, we decline to review it on appeal.

Davis, 60 Wn.App. 813, 822-823 (emphasis added, citations omitted).

Similarly in this appeal, the defendant's non-constitutional sentencing argument is the only context in which he accuses his trial attorney of ineffectiveness. Therefore, this should not be reviewed for the first time on appeal.

- b. The Threat to Kill and the Assault were correctly sentenced as separate crimes

Even if this issue had been properly preserved for appellate review, the defendant was correctly sentenced. The defendant claims that the threat to kill in the harassment charge constitutes the same criminal conduct as the punching and strangulation in the assault. He is mistaken because the criminal intents do not match.

Current and prior convictions raise the offender score and resulting sentence for each charge. However, our Legislature

provided an exception for crimes that constitute the “same criminal conduct” as follows:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

RCW 9.94A.589(a).

Our Washington Supreme Court held that crimes only constitute the same criminal conduct when they are committed with:

(1) The same criminal intent; (2) at the same time and place; and (3) against the same victim. State v. Vike, 125 Wn.2d 407, 410 (1994). The Washington Practice Manual notes that all three conditions must be satisfied; explaining that the same criminal conduct rule is narrowly construed and only applies in relatively few situations. Concurrent Offenses – Same Criminal Conduct, Seth Aaron Fine, 13B WAPRAC § 3510 (citing State v. Porter, 133 Wn.2d 177, 181 (1997)). The standard of review is abuse of discretion. State v. Fisher, 139 Wn.App 578 (2007).

In this case, although the defendant assaulted and threatened the same victim during the course of the same incident,

the intent elements differ. The intent element for the assault charge was to inflict pain or injury by strangulation. CP 5-6. The intent element for the threat to kill was to place the victim in fear for his life. CP 6. Therefore, even if the same criminal conduct issue had been raised at sentencing, the defendant would not have prevailed.

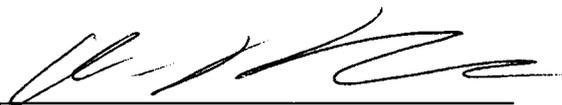
D. CONCLUSION

The defendant's harassment conviction should be affirmed because it was supported by the evidence presented to the jury. This court should decline to review the additional sentencing argument raised for the first time on appeal because it does not raise any constitutional issue.

DATED this 22nd day of July, 2010.

RESPECTFULLY submitted,

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