

NO. 66332-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS HYAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ~~GRAY'S HARBOR~~ COUNTY

King

APPELLANT'S OPENING BRIEF

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FILED
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2012 AUG 31 PM 4:42
KING COUNTY

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A. SUMMARY OF ARGUMENT

Travis Hyams' convictions should be reversed because he was denied a fair trial when the prosecutor elicited evidence regarding his custodial status. The prolonged testimony that Mr. Hyams was in jail eroded the presumption of innocence, which is the foundation of our criminal justice system. The prejudice to Mr. Hyams requires reversal of his convictions.

In the alternative, Mr. Hyams' offender score was miscalculated because the trial court failed to treat the two current offenses as deriving from the same criminal conduct.

B. ASSIGNMENTS OF ERROR

1. Mr. Hyams' right to a fair trial was violated because evidence of his custodial status was introduced to the jury.

2. The trial court abused its discretion by denying Mr. Hyams' motion for a new trial based on irregularity in the proceedings.

3. The trial court abused its discretion by denying Mr. Hyams' motion for a new trial based on misconduct of the prosecution.

4. The trial court abused its discretion in concluding Mr. Hyams' convictions for unlawful imprisonment and felony violation

of a no-contact order did not encompass the same criminal conduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions guarantee criminal defendants the right to a fair trial. Inclusive of this right is the presumption of innocence. Because a jury commonly derives a negative inference about the accused from evidence regarding custodial status, the prosecution is generally prohibited from introducing such evidence. Was Mr. Hyams' right to a fair trial violated and a new trial required where a State witness testified repeatedly regarding contact with Mr. Hyams while he was in jail?

2. RCW 9.94A.589 requires that where multiple crimes arise from the "same criminal conduct" they count as a single crime for purposes of calculating the individual's offender score. Offenses should be considered the same criminal conduct at sentencing if the crimes were committed at the same time and place; involved the same victim; and involved the same objective criminal intent. Where the alleged assault comprising the felony violation of a no-contact order and unlawful imprisonment occurred during the same course of conduct, were inflicted on the same victim, and derived

from the same continuous criminal intent, did the offenses arise from the same criminal conduct?

D. STATEMENT OF THE CASE

Travis Hyams and Colleen Aragon dated for about three years. 8/3/10RP 116. Though they broke up for about five months, they began dating again for another two or three months before the incidents at issue here arose. 8/3/10RP 116. During much of their relationship, Mr. Hyams and Ms. Aragon lived together. 8/3/10RP 117. A no-contact order entered November 13, 2009 prohibited contact between Mr. Hyams and Ms. Aragon. Exhibit 7A; 8/3/10RP 118. However, the couple continued to live together into December 2009. 8/3/10RP 119-20. Mr. Hyams' daughter stayed with them every other weekend. 8/3/10RP 122.

On the evening of December 12, 2009, the couple went to a Christmas party with Ms. Aragon's friend, Michelle Ruiz. 8/3/10RP 13. When the three of them returned to Mr. Hyams' house after the party, Mr. Hyams and Ms. Aragon began fighting about events that transpired at the party and on their way home. 8/3/10RP 23 (fighting about why Mr. Hyams left the party and who should have driven home), 45-46 (Ms. Aragon was persistent in discussing events with Mr. Hyams). Ms. Ruiz testified that when she went to

check on the couple she saw them in the bathroom through an open door. 8/3/10RP 24-25. Ms. Ruiz heard something break and Ms. Aragon was getting up off the floor uninjured. 8/3/10RP 24-25, 46-47. She saw Mr. Hyams trying to give Ms. Aragon a kiss. 8/3/10RP 25. Ms. Ruiz thought to intervene but did not know what was going on between the couple and, instead, returned to the living room. 8/3/10RP 27. When Mr. Hyams followed Ms. Ruiz into the living room, Ms. Aragon ran out the back door. 8/3/10RP 27-28, 133. Mr. Hyams followed Ms. Aragon. 8/3/10RP 28.

When Ms. Ruiz again went to check on the couple—this time outside—she heard Ms. Aragon screaming from the end of the alley and saw Mr. Hyams trying to pull her from a vehicle. 8/3/10RP 30-31.

Ms. Aragon testified that in the bathroom Mr. Hyams pushed her, hit the side of her head and broke the sliding shower door. 8/3/10RP 132-33. She admitted her memory of what happened in the bathroom had changed from when she gave a statement to the police, when she reported Mr. Hyams had kicked the shower door rather than pushed her into it. 8/3/10RP 153-55. Her testimony at trial also differed from what she reported to the defense investigator—that Mr. Hyams had punched the shower door with

his fist. 8/3/10RP 155. She also testified that Mr. Hyams confined her to the bathroom against her will. 8/3/10RP 135-36. Ms. Aragon further testified that Mr. Hyams caught up with her when she reached the end of the alley near the street and started pulling her back towards the alley. 8/3/10RP 137-38. Ms. Aragon testified that the front of her nose was injured at this time. 8/3/10RP 146. Ms. Aragon tried to get into a vehicle that pulled up to let her in, but she testified Mr. Hyams pulled her until she got out. 8/3/10RP 139.

The jury also heard testimony from Lia Holboom, a good friend and former girlfriend of Mr. Hyams who was babysitting his daughter on the night of the party. 8/3/10RP 56-58, 65. She testified that Mr. Hyams, Ms. Aragon and Ms. Ruiz returned from the party after midnight. 8/3/10RP 66. Eventually, Mr. Hyams went to the back of the house and Ms. Aragon followed him and started screaming at him while he remained calm. 8/3/10RP 67-68, 76. Ms. Holboom did not witness any additional conduct between the couple. 8/3/10RP 78.

A neighbor who tried to assist Ms. Aragon after hearing screaming testified at trial. 8/2/10RP 24-25, 29. She noticed a man trying to pull a woman, who was screaming, out of a vehicle. 8/2/10RP 32, 42, 44. The woman had blood on her face and nose.

8/2/10RP 37. When the police arrived, Ms. Aragon was hysterically crying and had blood on her face. 8/3/10RP 102-03.

The State argued three alternative theories to the jury as to when the assault forming the basis of the felony violation of the no-contact order and the unlawful imprisonment charges occurred—in the bathroom, in the alley or when Mr. Hyams allegedly removed Ms. Aragon from the passerby's vehicle. 8/4/10RP 22-27. The jury was instructed it must be unanimous as to which alternative formed the basis for each crime, but a special verdict form was not used. CP 59-60 (verdict forms), 75, 82 (jury instructions). The jury found Mr. Hyams guilty of one count unlawful imprisonment and one count felony violation of a no-contact order. CP 59-60. In bifurcated proceedings where Mr. Hyams waived his right to a jury trial, the trial court concluded aggravating circumstances warranted an exceptional sentence. 8/11/10RP 35; 8/5/10RP 5-18; RCW 9.94A.535(3)(h)(i) (domestic violence offense part of ongoing pattern of psychological, physical or sexual abuse manifested by multiple incidents over prolonged period of time).

At sentencing, Mr. Hyams argued the felony violation of a no-contact order and unlawful imprisonment crimes constituted the

same criminal conduct. 11/29/10RP 5. The court, however, treated the crimes as separate offenses. 11/29/10RP 19-20.

Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. MR. HYAMS' RIGHT TO CONSTITUTIONAL DUE PROCESS WAS VIOLATED BY THE PRESENTATION OF EVIDENCE REGARDING HIS CUSTODIAL STATUS.

During its case-in-chief, the State called Lia Holboom, a close friend and former girlfriend of Mr. Hyams. 8/3/10RP 56-57.

In pertinent part, the prosecutor questioned Ms. Holboom as follows:

Q: And also since this incident, have you had the opportunity to keep in touch with Travis?

A: Yes.

Q: And how do you do that?

A: I go down and visit him down in the jail, and I get calls from him quite often and then we talk over the phone.

8/3/10RP 63. The prosecutor then asked several follow-up questions regarding the extent of Ms. Holboom's contact with the jailed Mr. Hyams. 8/3/10RP 63-64. Next, the prosecutor continued,

Q: Now, . . . did you pick out his outfit for court?

A: Yes.

Q: Did you bring it over [to the jail] for him as well?

A: Yes.

8/3/10RP 64.

At the close of the State's case-in-chief, Mr. Hyams moved for a mistrial based in part on the custodial status evidence. 8/5/10RP 24-30; 8/11/10RP 6-12. The trial court denied the motion. 8/11/10RP 20-25.

- a. Testimony that Mr. Hyams was in jail violated his due process right to a presumption of innocence and requires reversal.

An accused person's right to a fair trial by an impartial jury is a fundamental liberty secured by the Fourteenth Amendment's guarantee of due process. U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 3, 21, 22; Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). The presumption of innocence, although not explicitly stated in the constitution, is a basic component of this right to a fair trial. Estelle, 425 U.S. at 503 (holding it is inherently prejudicial to force a defendant to dress in prison garb); see State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) (presumption of innocence is fundamental foundation of our

justice system). It requires courts be vigilant to factors that may undermine the fairness of the factfinding process. Estelle, 425 U.S. at 504. An alleged violation is reviewed de novo. State v. Gonzalez, 129 Wn. App. 895, 900, 120 P.3d 645 (2005).

“The presumption of innocence guarantees every criminal defendant all ‘the physical indicia of innocence,’ including that of being ‘brought before the court with the appearance, dignity, and self respect of a free and innocent man.’” Id. at 901 (quoting State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)). The “key concern” is the jury’s awareness of a defendant’s custodial status. See id. at 901-02.

“Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.” Finch, 137 Wn.2d at 845. Thus, for instance, the appearance of restraints, such as shackles, may deny due process by reversing the presumption of innocence. E.g., id. at 844-45; Gonzalez, 129 Wn. App. at 901. Similarly, a trial court’s announcement to the jury that a criminal defendant was being held in jail because he could not post bail and explaining restraint and security procedures violates due process. Gonzalez, 129 Wn. App. at 905. Likewise, holding a criminal trial in a jailhouse courtroom

erodes the presumption of innocence and violates the defendant's right to due process. State v. Jaime, 168 Wn.2d 857, 867, 233 P.3d 554 (2010).

Several states have found that informing a jury that a defendant is in jail raises an inference of guilt, and can have the same prejudicial effect as bringing a shackled defendant into the courtroom. See, e.g., State v. Harrison, 136 Idaho 504, 37 P.3d 1, 3 (2001); State v. Tucker, 226 Conn. 618, 629 A.2d 1067, 1073 (1993) (court's fleeting reference to defendant as "the prisoner" violated due process but curative instruction proposed by court would have ameliorated prejudice); Haywood v. State, 107 Nev. 285, 809 P.2d 1272, 1273 (1991) ("Informing the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom."); State v. Spellman, 562 So. 2d 455 (La. 1990) (defendant's request to be tried in civilian garb in lieu of prison uniform carried sufficient constitutional weight to justify delaying proceedings); People v. Taylor, 31 Cal. 3d 488, 183 Cal. Rptr. 64, 645 P.2d 115 (1982) (forcing defendant to stand trial in jail clothes violated his rights to due process and presumption of innocence).

Like these defendants, Mr. Hyams' presumption of innocence was eroded when Ms. Holboom testified repeatedly regarding contact with Mr. Hyams in jail. In response to the prosecutor's questions concerning her ongoing contact with Mr. Hyams, Ms. Holboom testified, "I go down and visit him down *in the jail*, and I get calls from him quite often and then we talk over the phone." 8/3/10RP 63 (emphasis added). In addition to the testimony alerting the jury to Mr. Hyams' incarcerated status, evidence also informed the jury that Mr. Hyams would otherwise be limited to prison garb. The prosecutor asked Ms. Holboom whether she "pick[ed] out his outfit for court." 8/3/10RP 64. Adding further emphasis to the point, the prosecutor continued "Did you bring [the outfit] over [to jail] for him as well?" 8/3/10RP 64. Ms. Holboom responded affirmatively. 8/3/10RP 64.

By the end of this exchange, the jury likely no longer viewed Mr. Hyams as a presumed innocent person but as an inmate. Mr. Hyams was presumed dangerous rather than innocent. The introduction of such evidence thus violated his right to a fair trial.

This violation is readily distinguishable from the circumstances considered by this Court in State v. Mullin-Coston, 115 Wn. App. 679, 64 P.3d 40 (2003). In Mullin-Coston this Court

held the trial court's admission of testimony that defendant was in jail during conversations with State witnesses was not an abuse of discretion under ER 403 and did not violate that defendant's due process rights. 115 Wn. App. at 694. This Court's holding rested on several bases not present here. First, the defendant in Mullin-Coston was charged with first degree murder. Thus, this Court reasoned "[i]n this case, a reasonable juror would [already] know that a defendant in a first degree murder trial was not likely to be released pending trial unless he paid a substantial amount of bail, regardless of whether he was later found to be innocent." Id. at 693. A reasonable juror would not likely have the same understanding regarding incarceration pending trial for the charges here.

Second, in Mullin-Coston, this Court noted that evidence of incarceration should only be admitted after "giving the trial court an opportunity to weigh that information's probative value against its prejudicial effect." Id. at 694 n.8. Here, the prosecutor did not first address the issue outside the presence of the jury. Thus, unlike the trial court in Mullin-Coston, the court here did not conduct a balancing inquiry under ER 403 prior to admitting the testimony of custodial status or consider the evidence outside the presence of

the jury.¹

Finally, in Mullin-Coston, this Court recognized “a greater amount of prejudice” inheres if the jury is told the defendant was incarcerated in relation to a previous crime rather than on the instant charges. 115 Wn. App. at 694, n.7. The vagueness of the testimony here left the jury free to conclude that Mr. Hyams had been incarcerated for a previous crime when Ms. Holboom had contact with him. In light of these distinctions, the holding in Mullin-Coston is not dispositive. As discussed, the testimony regarding Mr. Hyams’ custodial status eroded the presumption of innocence under the circumstances of this case.

Reversing the presumption of innocence constitutes structural error. Gonzalez, 129 Wn. App. at 904-05. Where an error is structural, this Court need not engage in harmless error analysis because prejudice is presumed. See State v. Heddrick, 166 Wn.2d 898, 910-11, 215 P.3d 201 (2009). Consequently, Mr. Hyams’ convictions must be reversed. See Gonzalez, 129 Wn. App. at 905.

¹ The evidence here is readily excludable under ER 403 because the fact that Ms. Holboom’s contacts with Mr. Hyams occurred while he was in jail is irrelevant to the issue of the witness’ bias. See 8/11/10RP 17 (prosecutor’s argument that questioning was pursued to show bias).

Even if the constitutional harmless error standard applies, the convictions must be reversed. Under constitutional harmless error analysis, error is presumed prejudicial. E.g., Finch, 137 Wn.2d at 859. The burden rests with the State to overcome the presumption, which it can do only by demonstrating affirmatively that the error is harmless beyond a reasonable doubt. Id. The State cannot do so here because this trial focused on whether Mr. Hyams was a threat to Ms. Aragon so that the jury could find beyond a reasonable doubt that he committed the crimes in question. By eroding the presumption of innocence the jury prejudicially viewed Mr. Hyams as a threat to society and/or Ms. Aragon (requiring incarceration) due to evidence it should not have received.

- b. In the alternative, testimony that Mr. Hyams was in jail caused an irregularity in the proceedings and constituted prosecutorial misconduct requiring reversal.

The trial court must grant a mistrial where an irregularity or prosecutorial misconduct occurs and as a result the defendant's right to a fair trial is so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986); see CrR 7.5(2) & (5). Thus,

where defendant moves for a mistrial based on these grounds, the court must determine whether the irregularity or misconduct prejudiced the defendant's right to a fair trial. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

This Court considers three factors in determining whether a defendant's fair trial right was prejudiced: (1) the seriousness of the irregularity; (2) whether it was cumulative of properly admitted evidence; and (3) whether it could have been cured by an instruction. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987) (new trial warranted where assault complainant testified that the defendant "already has a record and had stabbed someone"); Weber, 99 Wn.2d at 165-66.

First, the irregularity was serious here. Ms. Holboom's testimony alerted the jury that Mr. Hyams was incarcerated over a prolonged period of time. 8/3/10RP 63 (testifying she visits him in jail and they talk two or three times per month, or about 10 times total). Moreover, in response to questioning from the prosecutor, Ms. Holboom further indicated that Mr. Hyams remained in jail at the time of trial. 8/3/10RP 64. A reasonable juror, therefore, would likely conclude Mr. Hyams is a dangerous and threatening man as

well as a potential repeat offender (having possibly been incarcerated for a previous crime).

Moreover, Ms. Holboom's prejudicial testimony was directly elicited and prolonged by the prosecutor. The line of questioning began:

Q: And also since this incident, have you had the opportunity to keep in touch with [Mr. Hyams]?

A: Yes.

8/3/10RP 63. The prosecutor continued by directly eliciting testimony of Mr. Hyams' incarceration:

Q: How do you do that [keep in touch with Mr. Hyams]?

A: I go down and visit him down in the jail, and I get calls from him quite often and then we talk over the phone.

8/3/10RP 63. A colloquy then ensued wherein the prosecutor asked extensive questions regarding the frequency of Ms. Holboom's contacts with the incarcerated Mr. Hyams. 8/3/10RP 63-64. Even more egregiously, the prosecutor then also prompted Ms. Holboom to testify as to Mr. Hyams' current custodial status and remind the jury the extent to which his freedom was constrained:

Q: Now, since you are the one who packed up all his belongings, the clothing he's

wearing right now, did you pick out his outfit for court?

A: Yes.

Q: Did you bring it over [to the jail] for him as well?

A: Yes.

8/3/10RP 64; see 8/11/10RP 19 (prosecutor's acknowledgement that the jury likely concluded from testimony she had brought clothes to Mr. Hyams in jail). The extensive, prolonged and directly elicited nature of the testimony intensified its impact on the jury.

Second, the testimony was not cumulative. Though the arresting officer testified, there was no other evidence admitted that Mr. Hyams was ever booked in jail or otherwise held in custody.

Finally, a jury instruction would not have cured the taint.² Although it is presumed that juries follow an instruction to disregard testimony, "no instruction can 'remove the prejudicial impression created [by evidence] that' is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn. App. at 255 (alteration in original) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). Here, a jury

² Defense counsel did not request a limiting instruction. 8/11/10RP 19-20. But, as noted above, such an instruction would not have cured the taint and would have only called further attention to the evidence.

instruction would have called attention again to Mr. Hyams' custodial status and implied anew he is dangerous and, possibly, was previously convicted of other crimes. Moreover, the prejudicial nature of the prolonged testimony by Ms. Holboom, which was directly elicited by the prosecutor, could not have been cured by an instruction.

In sum, Mr. Hyams' convictions must be reversed and remanded for a new trial because he was denied due process when testimony regarding his custodial status reversed the presumption of innocence and the trial court abused its discretion in denying his motion for a mistrial.

2. MR. HYAMS' OFFENDER SCORE WAS IMPROPERLY CALCULATED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THE TWO COUNTS DID NOT ENCOMPASS THE SAME CRIMINAL CONDUCT.

At sentencing, Mr. Hyams moved the court to find the two counts constituted the same criminal conduct. 11/29/10RP 3, 5. The trial court denied the motion and counted each conviction as one point in Mr. Hyams' offender score. 11/29/10RP 20. The court presumed, without further explanation, that the mens rea for each crime was distinct and one crime occurred outside while the other

occurred inside, therefore there was no continuing course of conduct. Id. The trial court abused its discretion.

A person's offender score may be reduced if the court finds two or more of the current offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. Thus, when determining same criminal conduct for purposes of calculating an offender score, courts look for the concurrence of intent, time and place, and victim. E.g., State v. Bickle, 153 Wn. App. 222, 229-30, 234, 222 P.3d 113 (2009). As part of this inquiry, courts examine whether the defendant substantially changed the nature of his criminal objective from one offense to another and whether one crime furthered the other. Id.

The State has the burden to prove the crimes did not occur as part of a single incident. State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) ("If the time an offense was committed affects the seriousness of the sentence, the State must prove the relevant time."). The trial court's same criminal conduct determination is reviewed for an abuse of discretion or misapplication of the law. Id. at 364.

- a. The unlawful imprisonment and felony violation of a no-contact order occurred in uninterrupted sequence.

Multiple offenses need not occur simultaneously in order to meet the "same time and place" requirement of the same criminal conduct analysis. State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998). Where the crimes occurred sequentially, the question is whether they "occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme." Id. (quoting State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997)). Even separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. Porter, 133 Wn.2d at 183. A mere pause between criminal acts does not prevent a finding of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 975 P.2d 1038 (1999).

Here, the State argued that the crimes either occurred in a continuing, uninterrupted criminal episode or at the same time and place. Either of which requires a finding of same criminal conduct.

In closing argument, the prosecutor argued that the assault forming the basis for felony violation of a no-contact order occurred three alternative ways: in the bathroom when Mr. Hyams

allegedly punched her in the face, in the alley by dragging Ms. Aragon, or by physically removing her from a passerby's car near the alley. 8/4/10RP 22-23. With regard to the unlawful imprisonment count, the prosecutor argued the crime occurred either in the bathroom by Mr. Hyams enclosing Ms. Aragon in the room, in the alley by Mr. Hyams physically dragging her back towards the house, or by pulling her out of the passerby's vehicle. 8/4/10RP 26.

Thus, the three alternative locations were identical for each crime. The jury was instructed that the jurors must be unanimous as to the alternative means for each crime. CP 75, 82. However, the record does not reflect the alternative to which the jury was unanimous for each crime. The jury, consequently, could have found that the act of unlawful imprisonment and the assault forming the basis of felony violation of a no-contact order occurred at precisely the same time and place.

Even in the alternative, however, if the jury found that the assault occurred in the alley and the unlawful imprisonment in the bathroom, for example, the actions remained part of one continuous sequence of events. Throughout the alleged bathroom, alley and removal from the vehicle incidents, Mr. Hyams was

alleged to have pursued, harmed and tried to dominate Ms. Aragon. The incidents flowed together in an uninterrupted sequence.

State v. Dolen presented a similar situation. 83 Wn. App. 361. The Dolen Court reviewed evidence of six different incidents in which Mr. Dolen engaged in sexual intercourse and/or sexual contact with a child. The court determined it was unclear from the record whether the jury convicted him of the two offenses in a single incident or in separate incidents. Id. at 365. The court reasoned that if Mr. Dolen had been convicted of two offenses from a single incident, then they would have encompassed the same criminal conduct. Id. Because the State has the burden of proving a defendant's criminal history, the State had the burden of showing that Mr. Dolen committed these acts in separate incidents. Id. Ultimately, the court held: "the State failed to prove that [Mr.] Dolen committed the crimes in separate incidents[, c]onsequently, the trial court's finding that the two convictions did not constitute the same criminal conduct is unsupported." Id. Like in Dolen, the trial court's ruling here is unsupported.

b. The similarity of purpose for both crimes also supports a finding of same criminal conduct.

In determining whether the criminal intent prong of the same criminal conduct analysis is satisfied, the question is whether the defendant's criminal intent, objectively viewed, changed from one crime to the next. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), amended by 749 P.2d 160 (1988); State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). As used in this analysis, intent "is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). To constitute separate conduct, the record must show a *substantial* change in the nature of the criminal objective. State v. Calloway, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985). The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

Objective intent may be found when one crime furthered the other or if both crimes were part of a recognizable scheme or plan. State v. Israel, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). One

crime furthers another where the first crime facilitates commission of the other crime. State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004); State v. Collins, 110 Wn.2d 253, 263, 751 P.2d 837 (1988). In Saunders, for example, the kidnap arguably furthered the rape where a fact finder could find the perpetrators restrained the victim as retribution for her past noncompliance with Saunders' sexual demands, to allow Saunders to accomplish his sexual agenda, or both. 120 Wn. App. at 824-25. The court further held a fact finder could find the rape and kidnap were part of the same scheme or plan, where it appeared the defendant's primary motivation for both crimes was to dominate the victim and cause her pain and humiliation. Id. at 825. Similarly, in Collins, the Supreme Court concluded a burglary furthered a rape and assault, where the defendant committed the burglary in order to accomplish the attacks. Collins, 110 Wn.2d at 263.

Here according to the State's evidence, as in Saunders, Mr. Hyams had the same primary motivation for the unlawful imprisonment and the felony violation of a no-contact order. Consistent with the State's theory at trial, the commission of each act was part of a common plan to dominate and perpetrate domestic violence upon Ms. Aragon. Mr. Hyams, furthermore, had

no time in between criminal acts to form a new intent. See 8/3/10RP 27-28, 133 (when Mr. Hyams left bathroom to follow Ms. Ruiz, Ms. Aragon went out back door and Mr. Hyams turned around to follow her into alley). Moreover, Mr. Hyams' restraint of Ms. Aragon furthered the assault, which formed the basis for the felony violation of a no-contact order conviction. See 8/4/10RP 22-26.

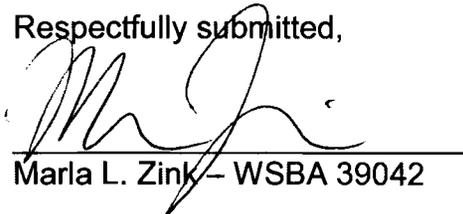
In sum, because the crimes were committed against the same victim, as part of an uninterrupted sequence of events and with the same criminal purpose, the trial court abused its discretion in refusing to find same criminal conduct. Mr. Hyams' sentence must be reversed and remanded.

F. CONCLUSION

Because Mr. Hyams' right to a fair trial was violated when the jury received evidence of his custodial status, his convictions must be reversed. In the alternative, this Court should reverse the trial court's ruling that the crimes did not constitute the same criminal conduct and remand for resentencing.

DATED this 31st day of August, 2011.

Respectfully submitted,



Marla L. Zink – WSBA 39042

Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66332-1-I
v.)	
)	
TRAVIS HYAMS,)	
)	
Appellant.)	

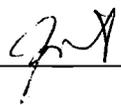
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> TRAVIS HYAMS 858428 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVER

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