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66332-1

NO. 66332 - 1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS HYAMS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE TIMOTHY BRADSHAW

BRIEF OF RESPONDENT

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A. **ISSUES PRESENTED**

1. A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion and will not be disturbed in the absence of a clear abuse of discretion. The trial judge is best suited to judge the prejudice of a statement.

Although references to custody can carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial. Did the trial court properly exercise its discretion in denying Hyams' motion for a new trial based on alleged prosecutorial misconduct and due process violations where (1) a witness who was biased toward Hyams made a brief reference to visiting him in jail and later stated that she "brought over" his outfit for court and (2) defense counsel declined to object or request a curative instruction?

2. Two offenses constitute the same criminal conduct when they have the same criminal intent, occur at the same time and place, and involve the same victim. The trial court found that the offenses involved a different criminal intent. The offenses also involve a different victim. Did the trial

court properly exercise its discretion when it scored each crime separately?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Travis Hyams with Domestic Violence Felony Violation of a Court Order in violation of RCW 26.50.110(1), (4) and Unlawful Imprisonment - Domestic Violence in violation of RCW 9A.40.040. CP 1-2. The State amended the information for trial to add an aggravating factor to each count for the current offenses involving a crime of domestic violence that was part of a pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time under RCW 9.94A.535(3)(h)(i), (iii). CP 8-9. Hyams moved to bifurcate the underlying charges from the aggravating factors and moved to suppress his statements, prior bad acts, prior convictions, and a 911 call. CP 19-28. During the pretrial hearing, Hyams also moved to admit prior bad acts of Colleen Aragon. CP 24. Hyams did not move to exclude the fact of his arrest. See CP 19-28. Judge Rietchel heard testimony from Aragon, Hyams, Michelle Ruiz, and Sergeant Joel Sweetland. 6/28/10 RP 70-132; 6/29/10 RP 6-83. After hearing testimony and argument, the court

bifurcated the underlying charges from the aggravating factor, admitted Hyams' post-arrest statements, convictions for crimes of dishonesty and prior bad acts, admitted the 911 recording with several redactions, and admitted some of Aragon's prior bad acts. CP 10-3, 29-43. A jury found Hyams guilty as charged. CP 59, 60. Hyams waived jury trial as to the aggravating factors. CP 62. Hyams then moved for a new trial or mistrial under CrR "7.5(1), (2), (5), and (7)." 8/5/11 RP 24-5. Hyams argued that the motion was based upon (1) the prosecutor eliciting testimony on Hyams' custodial status from Colleen Aragon; (2) testimony that the photographs of Hyams were taken in a holding cell; and (3) the court's admission of excited utterances by Aragon. 8/5/10 RP 25-6. The court then heard testimony on the aggravating factor from Aragon, Deputy David Mendez, Michelle Ruiz, Thomas Barkley, Hyams, and Lia Hoolboom. 8/5/10 RP 31-128; 8/10/10 RP 5-91. The court heard argument on Hyams' motion for a new trial. 8/11/10 RP 6-20. In addition to the bases set forth the day before, Hyams also moved for a new trial based on an off-hand statement from Ruiz that she was scared because Hyams had assaulted Aragon in the past and statements by Hoolboom that she had visited Hyams in jail and brought his clothes for court over to him.

8/11/10 RP 6-12. The court denied Hyams' motion for a new trial.
8/11/10 RP 23-5. The court found that the State proved all of the elements of the aggravating factor beyond a reasonable doubt.
8/11/10 RP 26-35. At sentencing, Hyams argued that the two crimes of which he was convicted constituted the same criminal conduct. 11/29/10 RP 5. Hyams also requested the court impose a sentence under RCW 9.94A.655, the Family Offender Sentencing Alternative (FOSA). 11/29/10 RP 6. The court denied Hyams' request for a FOSA sentence, found the crimes for which he was convicted did not constitute the same criminal conduct, and sentenced Hyams to an exceptional sentence of 60 months.
11/29/10 RP 19-21; CP 91-101. Hyams timely appealed. CP 109.

2. SUBSTANTIVE FACTS

Travis Hyams and Colleen Aragon dated for two and a half years and lived together for the last several months of their relationship at a house in West Seattle. 8/3/10 RP 116. There is a history of reported and unreported domestic violence by Hyams against Aragon resulting in Hyams' convictions for assault in the third degree - domestic violence and malicious mischief in the third degree - domestic violence arising out of the incident on April 5, 2009. Exhibit 18, 19. At the time of Hyams' sentencing on

November 13, 2009 for these crimes, the court entered a no contact order prohibiting Hyams from any contact with Aragon. 8/3/10 RP 90, 117-19; Exhibit 7A. The order is valid for five years. 8/3/10 RP 90, 119; Exhibit 7A.

By September of 2009, Aragon had returned to Hyams and resumed living with him at his home in West Seattle. 8/3/10 RP 119. Late in the evening on December 12, 2009, Hyams, Aragon, and her friend, Michelle Ruiz, were all drinking and getting ready to go to a party in the Green Lake neighborhood. 8/3/10 RP 14-16, 64-66, 124-25. They left Hyams' daughter at home with his ex-girlfriend, Lia Hoolbloom, and headed out. 8/3/10 RP 14-16, 64-66, 124-25.

At the party, Hyams separated from Ruiz and Aragon for about 15 minutes. 8/30/10 RP 19,128. He called Aragon upset and told her they needed to leave right then. 8/3/10 RP 128. When Aragon and Ruiz met up with Hyams at the car, they noticed he had blood on his hands and face and was covered in dirt. 8/3/10 RP 20,129. He sped off from the party, saying, "people are dead." 8/3/10 RP 130. Alarmed by Hyams' driving, demeanor, and appearance, Aragon pleaded with Hyams to pull over so that Ruiz could drive. 8/3/10 RP 21-2, 130-31. Hyams refused. 8/3/10 RP

21-2, 130-31. Aragon asked Hyams what had happened. 8/3/10 RP 21-2, 130-31. He refused to tell her. 8/3/10 RP 21-2, 130-31.

In the early morning hours of December 13, 2009, the three arrived back at Hyams' house where Hyams' daughter and Hoolboom were waiting. 8/3/10 RP 22, 131. Aragon continued to inquire about what had happened to Hyams at the party. 8/3/10 RP 23, 132. The two got into an argument and went into the bathroom to continue their argument away from Ruiz and Hoolboom. 8/3/10 RP 23, 132. The argument escalated to Hyams shoving Aragon into the shower door, breaking it. 8/3/10 RP 24-5, 133. Scared of what he might do next, Aragon tried to leave but Hyams blocked the door and hit her in the face. 8/3/10 RP 133-36. Aragon screamed for Ruiz to call the police. 8/3/10 RP 133. When Ruiz went to make the call, Hyams ran after her, and Aragon fled out the back door. 8/3/10 RP 27-8, 133-37. When Hyams heard the back door, he left Ruiz to chase after Aragon. 8/3/10 RP 27, 137.

Hyams chased Aragon down the alley behind his house and caught her near the end of the alley. 8/3/10 RP 137. Hyams grabbed Aragon by the hair, pulling her back towards the alley as Aragon screamed for help. 8/3/10 RP 137. A car drove by and the female driver yelled for Aragon to get in. 8/3/10 RP 138-39.

Aragon tried to get away from Hyams and get in the car but he would not release her. 8/3/10 RP 32-3, 139. Kerry McKee was taking out her trash a block away when she heard Aragon's screams, panicked and fearful. 8/2/10 RP 28-9. McKee did not know Aragon or Hyams and did not have any subsequent interaction with them after this incident. 8/2/10 RP 35. McKee jumped into her car and drove over to the corner of 36th Avenue S.W. and S.W. Dakota Street where she saw Hyams pulling Aragon from the car. 8/2/10 RP 32-3. The driver of the first car got out and confronted Hyams. 8/3/10 RP 34, 139. As McKee drove up, Hyams released Aragon. 8/2/10 RP 34, 8/3/10 RP 139. McKee asked if she should call the police and Hyams responded, "No." McKee then stated that she had heard the screaming from her home and thought they may need additional assistance. 8/2/10 RP 34. Hyams responded, "I can scream like that too" before fleeing the scene on foot. 8/2/10 RP 34.

Meanwhile, Ruiz had called the police and while on the phone with the 911 operator, made her way up the street to Aragon. 8/3/10 RP 34. When she got there, she saw that Aragon was bleeding from the face. 8/3/10 RP 31, 39. Ruiz and McKee remained at the scene until police arrived. 8/2/10 RP 36, 8/3/10 RP

39. The woman who first stopped to allow Aragon to get into her car left the scene once Ruiz arrived. 8/2/10 RP 36.

Police spoke with Aragon, Ruiz, and McKee at the scene. 8/3/10 RP 109-10. While officers were back at the house, Hyams walked through the door. 8/3/10 RP 176. Sergeant Joel Sweetland immediately identified and arrested Hyams for assault. 8/3/10 RP 177. He took photos of Aragon and Hyams as well as photographs of damage to the house where Aragon reported Hyams had previously knocked her through the wall. 8/3/10 RP 175-80.

Sergeant Sweetland transported Hyams to the precinct and advised him of his Miranda warnings. 8/3/10 RP 178. Hyams stated he understood. 8/3/10 RP 178. Hyams told Sergeant Sweetland, "I didn't touch her. I wasn't even with her." 8/3/10 RP 178.

Additional facts are set forth in the relevant argument sections.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING HYAMS' MOTION FOR A NEW TRIAL.

Hyams contends that the trial court abused its discretion in denying his motion for a mistrial or new trial because testimony

regarding his custody status violated his due process right to a presumption of innocence or constituted an irregularity in the proceedings requiring reversal.

A trial court's denial of a motion for a new trial is reviewed under an abuse of discretion standard and will not be disturbed in the absence of a clear abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The trial judge is best suited to judge the prejudice of a statement. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). "In a criminal proceeding, a new trial is necessitated only when the defendant 'has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.'" Bourgeois, 133 Wn.2d at 406 (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

- a. Any prejudice that may have resulted from a one-time reference to Hyams' custody status at some point between the incident and trial did not impact his right to a fair and impartial trial.

A criminal defendant is guaranteed a fair and impartial trial by the Fourth and Fourteenth Amendments to the United States

Constitution and article 1, sections 3 and 22 of the Washington State Constitution. A part of this guarantee is the presumption of innocence. State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). In Finch, the court reaffirmed the principle that the right to a fair trial can be violated where a defendant appears before the jury in physical restraints. "Measures which single out a defendant as a particularly dangerous or guilty person, such as physical restraint or shackling, threaten his or her constitutional right to a fair trial." Finch, 137 Wn.2d at 845. References to custody, on the other hand, can carry some prejudice, but they do not carry the same suggestive quality of a defendant shackled to his chair during trial. State v. Mullin-Coston, 115 Wn. App. 679, 693, 64 P.3d 40 (2003). Jurors must be expected to know that a person awaiting trial will often do so in custody. Id.

In Mullin-Coston, the jury heard testimony regarding four conversations Mullin-Coston had while in jail after his arrest. 115 Wn.2d at 693. The first conversation occurred when one of the State's witnesses visited Mullin-Coston in jail. Id. The second occurred when Mullin-Coston called that same witness from jail. Id. The third and fourth conversations occurred when Mullin-Coston

called a different State's witness from jail. Id. Mullin-Coston argued on appeal that testimony that he was in jail pending trial violated his right to a fair and impartial trial. Id. At 692-93. The court found that "Mullin-Coston's analogy to physical restraint cases [was] misplaced, and cases from other states that have drawn the same analogy [were] not persuasive." Id. at 693. The court held that the references to Mullin-Coston's custody status were properly admitted and affirmed his conviction. Id. at 695.

Here, Hyams challenges the following exchange excerpted in part in Appellant's Brief at 7-8 and 16-7:

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

A: Yes.

Q: 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.

Q: About how often are you talking on the phone?

A: About two or three times per month.

Q: And after December 13, 2009, do you recall when it was that you were able to get in touch with him?

A: The first time I got in touch with him was about the end of July -- January, I'm sorry.

Q: Was that by phone or was that in person?

A: In person.

Q: About how many times do you think that you have spoken with him on the phone since the incident?

A: Probably more than ten times.

Q: What about in the first month visiting him?

A: About ten times.

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 for him as well?

A: Yes.

8/3/10 RP 63-4. Defense counsel did not object after either question or response Hyams challenges on appeal. 8/3/10 RP 63-4. Instead, counsel proceeded to cross examine Hoolboom, the State conducted a redirect examination of Hoolboom, defense counsel re-cross examined Hoolboom, the State put on four more witnesses, the parties closed, and the jury returned verdicts of guilty as charged. See 8/3/10 RP 64-185; 8/4/10 RP 4-56. The State did not mention Hyams' custody status in closing argument the next day. See 8/4/10 RP 19-32. Then, two days later, when

the parties were preparing to begin the aggravator phase of the bifurcated proceedings, defense counsel moved for a mistrial or new trial challenging the questions and answers above. 8/5/10 RP 24-5; 8/11/10 RP 6-20.

The one time reference to visiting Hyams in jail at some point after the incident and potential inference that Hoolboom brought Hyams' clothing for court to the jail rather than the courthouse or his home, did not violate Hyams' right to a fair and impartial trial. Hoolboom did not specify when she visited Hyams in jail. The jury heard testimony that Sergeant Sweetland arrested Hyams and transported him back to the station. 8/3/10 RP 177-78. Defense counsel did not object to that testimony and Hyams does not challenge that testimony on appeal. Thus, the jury could easily infer from Hoolboom's one-time reference to visiting Hyams in jail, that the visit occurred that same evening. Moreover, the jury heard testimony that there was a no contact order in place protecting Aragon from Hyams for five years and that order was issued by a judge a month prior to this incident. Exhibit 7A; 8/3/10 RP 90. That coupled with the allegations of Hyams' assaultive conduct witnessed by an uninvolved third party would be more indicative of his dangerousness than the challenged reference above.

Similarly, Hoolboom's testimony regarding Hyams' outfit for court and that she "[brought] it over for him," did not violate his right to a fair trial. Although Hyams inserts the words "to the jail" when quoting the transcript testimony, that is inaccurate. See Brief of Appellant at 8 and 17. The State asked, "Did you bring it over for him as well?" 8/3/10 RP 64. As the trial court found, there are a number of possible inferences the jury could make from this inartfully worded question. 8/11/10 RP 22-3. And, if defense counsel had objected, the trial court would have sustained the objection, stricken the response, and offered a curative instruction. 8/11/10 RP 23. But that is not the remedy that was requested. Instead, defense counsel waited two days until after the jury returned its verdicts to note his objection. Under the circumstances in which the testimony arose and in the context of the entire trial, the one-time reference to jail and potential inference that Hyams' court clothing was brought over to the jail did not violate Hyams' right to a fair and impartial trial.

Nonetheless, Hyams relies on State v. Gonzalez, 129 Wn. App. 895, 120 P.3d 645 (2005), State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999), and State v. Jaime, 168 Wn.2d 857, 233 P.3d 554

(2010) to argue that the above testimony violated his right to a fair trial. In Gonzalez, the trial court instructed the jury,

Mr. Gonzalez has been unable to post bail and is being held in custody. Thus, pursuant to the policy I have explained, he will be handcuffed during transport to the courtroom but is not handcuffed at this point, obviously.

129 Wn. App. at 898. In Finch, the defendant appeared in court in shackles throughout the trial and special sentencing proceeding and was also handcuffed during the testimony of two key witnesses. 137 Wn.2d at 842. Finally, in Jaime, the trial court held Jaime's trial in a jailhouse courtroom rather than across the street at the courthouse itself. 168 Wn.2d at 860. The fact that a defendant is in custody pending trial does not carry the same prejudice as the sight of a defendant in shackles during trial. Mullin-Coston, 115 Wn. App at 692. Similarly, holding trial in the jail rather than the courthouse right across the street sends the message to the jury that the defendant presents a present danger of harming someone during the trial. As the Mullin-Coston court noted, the analogy between a defendant's custody status pending trial and physical restraint during trial in out-of-state cases is not persuasive. Id. at 694. Hyams right to a fair and impartial trial was not violated.

- b. Hyams has failed to show flagrant, ill-intentioned, and incurable misconduct warranting a new trial.

In the alternative, Hyams contends that eliciting the challenged testimony quoted above constituted prosecutorial misconduct warranting a new trial.

A defendant who alleges improper conduct on the part of the prosecutor bears the burden of establishing the prosecutor's improper conduct and its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is only established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Id. (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A failure to object to the improper statements constitutes a waiver unless the statements are so flagrant and ill-intentioned that they evince an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Id. Curative instructions have been held sufficient to overcome any prejudice that might have otherwise arisen from inadvertent observations of a defendant in shackles. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). Where the defendant objects or moves for a mistrial on the basis of the alleged prosecutorial misconduct, the court will give deference

to the trial court's ruling on the matter, since the trial court is in the best position to determine if prosecutorial misconduct prejudiced the defendant's right to a fair trial. Stenson, 132 Wn.2d at 719.

Here, Hyams challenges two of the prosecutor's questions: (1) "How do you do that [keep in touch with Hyams]?" and (2) "Did you bring [his outfit for court] over for him as well?" Hyams further alleges that the surrounding questioning "intensified its impact." Brief of Appellant at 17. Because trial counsel declined to object at the time of the challenged questioning, Hyams bears the burden of showing the questioning was flagrant, ill-intentioned, and incurably prejudicial. He fails to do so. First, when trial counsel finally did raise an objection to the questioning after the jury returned its verdicts, the trial court found that the prosecutor's conduct was not flagrant or ill-intentioned 8/11/10 RP 23-4. The trial court further found after presiding over the trial that a curative instruction would have overcome any prejudice to Hyams. 8/11/10 RP 24. This court gives deference to the trial court's findings. Hyams fails to show that the trial court abused its discretion.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING THE OFFENSES DO NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.

Hyams contends that his convictions for Felony Violation of a Court Order and Unlawful Imprisonment constitute the same criminal conduct and that the trial court abused its discretion by concluding otherwise.

To determine a defendant's sentencing range, the trial court must first calculate the defendant's offender score. State v. Victoria, 150 Wn. App. 63, 206 P.3d 694, review denied, 167 Wn.2d 1004 (2009). The trial court counts both the defendant's current offenses and prior convictions, unless two or more of the defendant's current offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. For the same criminal intent prong, the standard is "the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). The trial court will count each offense separately unless all three of the statutory elements of same criminal conduct exist. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

The trial court's determination on same criminal conduct will be upheld on appeal unless it is based on a

"clear abuse of discretion or misapplication of the law."

State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

When the facts in the record support a finding either way on one of the three elements of same criminal conduct, the proper standard of review is an abuse of discretion. State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003), (affirming trial court's finding that first degree assault and first degree robbery did not constitute same criminal conduct because the evidence supported both the defendant's argument of same intent and the trial court's finding of different intent), aff'd on other grounds, 153 Wn.2d 765, 108 P.3d 753 (2005).

Here, Felony Violation of a Court Order and Unlawful Imprisonment do not constitute the same criminal conduct because there were different criminal intents and victims for the two crimes.

First, the criminal intent for each crime is different. The intent for Felony Violation of a Court Order is the intent to be where the court order prohibits the defendant from going. The intent for Unlawful Imprisonment is the intent to

restrain the victim, keep her from leaving the house, and then return her to the house against her will.

Second, no contact orders issued pursuant to RCW 10.99 and 26.50 are issued by a *court* in conjunction with the charging and sentencing of a criminal case. Although a protected party may request that the order not be issued or recalled once it is issued, it is within the court's discretion to issue the order over the protected party's objection. See RCW 10.99.040. It is not a defense to the charge of violation of a court order that a person protected by the order invited the contact. RCW 10.99.040(4)(b); 26.50.035(1). As such, there are two "victims" of a court order violation: (1) the protected party over whose objection the order may have been issued and (2) the court that issued the order. Two crimes cannot be the same criminal conduct if one involves two victims and the other involves only one. State v. Davis, 90 Wn. App. 776, 782, 954 P.2d 325 (1998). Because the "victim" of the Felony Violation of a Court Order was both the issuing court and Aragon and the victim of the Unlawful Imprisonment charge was just Aragon, the crimes do not constitute the same criminal conduct.

As both the criminal intents and victims differ, the trial court properly exercised its discretion in finding the crimes did not constitute the same criminal conduct.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests this court find that the trial court properly exercised its discretion in denying Hyams' motion for a new trial and finding the offenses did not constitute the same criminal conduct.

DATED this 28th day of November, 2011.

RESPECTFULLY submitted,

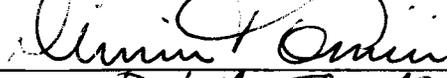
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. TRAVIS HYAMS, Cause No. 66332-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name Dawn Tomasi
Done in Kent, Washington

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