

73755-4

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FILED  
June 20, 2016  
Court of Appeals  
Division I  
State of Washington

No. 73755-4-I

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**ROBERT LEE KING, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether two counts of cyberstalking should only be one because the unit of prosecution for cyberstalking is per electronic communication no matter how many persons are threatened where the statute provides that with intent to harass any other person, the defendant "makes an electronic communication" "threatening to inflict injury on the person ... called or any member or his or her family."
2. Whether the case should be remanded for resentencing to address whether any or all of the offenses were the same criminal conduct where the matter should be remanded for resentencing to address the offender score due to two counts of cyberstalking being one unit of prosecution and where defense counsel failed to raise the issue at sentencing but where a colorable argument could be made that some of the offenses were the same criminal conduct.
3. Whether appellate costs should not be awarded since the State has conceded that the matter should be remanded for sentencing and therefore is not a substantially prevailing party.

**C. FACTS**

**1. Procedural facts**

On January 16, 2015 Appellant Richard King was charged with one count of Threat to Bomb or Injure Property, in violation of RCW 9.61.160, a class B felony, one count of Stalking, in violation of RCW 9A.46.110, a class C felony, and three counts of Cyberstalking, in violation of RCW 9.61.260, class C felonies, for his actions on January 6<sup>th</sup>

through 8<sup>th</sup>, 2015. CP 1-4, 21-24. He was found guilty at trial by a jury of all counts. CP 59-60. He also was charged with and was found to have committed the offenses against a family or household member. CP 21-24, 61-62.

## **2. Substantive Facts**

The State accepts the Statement of the Case as set forth in Appellant's brief for the purposes of this concession response.

## **D. ARGUMENT**

King argues, and the State agrees and concedes, that two of the cyberstalking counts, counts IV and V, violated double jeopardy because the unit of prosecution for cyberstalking is per electronic communication, not per person threatened to be killed. The matter should be remanded for vacation of one of those two counts and King should be resentenced. Given that concession and that the offender score needs to be revisited, the State has no objection to the matter being remanded as well to provide defense counsel an opportunity to argue that some or all of the offenses constituted the same criminal conduct at the resentencing, even though defense counsel failed to make such argument at the time of sentencing. Furthermore, given the State's concession, appellate costs should not be awarded.

**1. Two convictions based on the one electronic communication threatening to kill the daughters violated double jeopardy because the unit of prosecution for cyberstalking is per electronic communication.**

King asserts that the unit of prosecution for the offense of cyberstalking under RCW 9.61.260(1), (3)(b) as charged in this case is each “‘electronic communication’ sent with the requisite intent and containing a threat to kill”. Appellant’s Brief at 14. The State agrees. The prosecutor here argued in closing that the jury could find King guilty of two counts of cyberstalking, counts IV and V, based on the electronic communication “You girls gone get rape (sic) and die” because the threat to kill related to Ms. Penter’s two daughters. However, the person to whom the message was communicated was Ms. Penter, the message was never communicated to her daughters, and therefore Ms. Penter was the person harassed, although the threat to kill was as to both of her children. The State agrees that the unit of prosecution for cyberstalking is per electronic communication and thus one of those two counts should be vacated. The matter should be remanded for a resentencing as the vacation will affect King’s offender score.

While a unit of prosecution issue “is one of constitutional magnitude on double jeopardy grounds, the issue ultimately revolves around a question of statutory interpretation and legislative intent.” State

v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). In order to determine legislative intent, the court first looks to the statute's plain meaning. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). If the legislature's intent is not clear from the plain language of the statute, under the "rule of lenity" any ambiguity is "resolved against turning a single transaction into multiple offenses." *Id.* "Even where the Legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one 'unit of prosecution' is present." In re Davis, 142 Wn.2d 165, 176, 12 P.3d 603 (2000).

Generally, if statutes are clear on their face, the courts give effect to the plain meaning of the language. State v. Chapman, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) *cert. denied*, 531 U.S. 984 (2000). "Words in a statute are given their ordinary and common meaning absent a contrary statutory definition. ... Courts may resort 'to dictionaries to ascertain the common meaning of statutory language.'" Budget Rent A Car Corp. v. State, Dept. of Licensing, 144 Wn.2d 889, 899, 31 P.3d 1174 (2001) (citations omitted). The outcome of a plain language analysis may be corroborated by validating the absence of an absurd result. Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007); *see also*, State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (reading of statute that results in

absurd result must be avoided because legislature would not intend an absurd result).

As asserted by King, courts “have consistently interpreted the legislature’s use of the word “a” in criminal statutes as authorizing punishment for each individual instance of criminal conduct.” Ose, 156 Wn.2d at 147-48 (legislature’s use of the indefinite article “a” before “stolen access device” indicated its intent that the unit of prosecution for possession of stolen access device be for each access device defendant unlawfully had in his or her possession); *see, e.g., State v. Graham*, 153 Wn.2d 400, 406-08, 103 P.3d 1238 (2005) (unit of prosecution for reckless endangerment was for each person endangered where statute stated that the risk of death or physical injury created was to “another” person); State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003) (a sentence enhancement is to be imposed for each weapon involved where statute regarding deadly weapons provided for an enhancement where defendant was armed with “a” firearm or “a” deadly weapon.); State v. Westling, 145 Wn.2d 607, 611-12, 40 P.3d 669 (2002) (where legislature used words “a fire” unit of prosecution under arson statute was for each fire defendant caused).

The State agrees that the case of Westling is instructive in determining the unit of prosecution for cyberstalking. In that case, the

court addressed the unit of prosecution for second degree arson was per fire set or caused by the defendant. Westling, 145 Wn.2d at 611-12. The court found that, as charged in the case, the statute provided that one was guilty of second degree arson if s/he “knowingly and maliciously causes a fire or explosion which damages ... any ... automobile.” Id. at 611. Although more than one automobile had been damaged, the court found that under the plain language of the statute, “one conviction [was] appropriate where one fire damages multiple automobiles, i.e., by use of the word ‘any’ the statute speaks in terms of ‘every’ and ‘all’ automobiles damaged by the one fire.” Id. at 611-612. The court then found that since the defendant had only caused one fire, even though it damaged multiple vehicles, the three convictions violated double jeopardy and remanded for resentencing on one count of second degree arson. Id. at 612.

As charged and instructed in this case, the State had to prove:

- (1) That on or about the 6<sup>th</sup> day of January, 2015 to the 8<sup>th</sup> day of January, 2015, the defendant *made an electronic communication to another person*;
- (2) That at the time the defendant made the electronic communication the defendant intended to harass, intimidate, torment or embarrass any other person;
- (3) That the defendant *threatened to kill* the person to whom the electronic communication was made or *any member of the family or household of the person to whom the electronic communication was made*; and
- (4) That the electronic communication was made or received in the State of Washington.

CP 54-55 (Inst. 24, 25) (emphasis added). Under the rationale of Westling, the unit of prosecution would be per electronic communication made, with intent to harass or intimidate a person, which communication contained a threat to kill either the person to whom the communication was made or any member of that person's family, no matter how many threats to kill were contained within the electronic communication.

The prosecutor argued that counts IV and V were based on the electronic communication "Watch if I go after kids. Your girl is going to get raped and die."<sup>1</sup> RP 512. There was one electronic communication that contained a threat to kill the girls, Ms. Penter's daughters. The jury convicted King of two counts, one for each daughter, as argued by the prosecutor. RP 512. The two counts violate double jeopardy because the unit of prosecution for cyberstalking is per electronic communication. One of the two counts should be vacated and the matter remanded for resentencing on a revised offender score.

**2. The trial court should make a determination as to whether any or all of the offenses constitute the same criminal conduct.**

King asserts that his convictions all encompass the same criminal conduct. Although he waived this issue by failing to raise it at sentencing,

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<sup>1</sup> These were in fact two separate messages. The one, "You girls gone get rape and die bitch," was made about 5 minutes before the message "Ok watch call val and see ask her if I'm go after kids." Ex. 52, 53, 66.

he asserts he is entitled to a new sentencing hearing because his defense counsel was ineffective in not asserting it at sentencing. Given that King is entitled to be resentenced because of the unit of prosecution issue, the State does not object to the issue being remanded to the trial court for the judge to determine whether the offenses constituted the same criminal conduct. The judge is in the best position to make this discretionary, factual determination given that he heard all the testimony, observed the demeanor of the witnesses, and given a determination will need to be made as to whether the offenses occurred at the “same time” and whether the defendant’s objective intent changed from one offense to the next.

The determination as to whether offenses constitute the same course of criminal conduct involves both factual findings and court discretion, and a defendant waives the ability to challenge his offender score by failing to argue offenses constituted the same criminal conduct. State v. Beasley, 126 Wn. App. 670, 685-86, 109 P.3d 849 (2005); *see also*, In re Shale, 160 Wn.2d 489, 158 P.3d 588 (2007) (where defendant “failed to ask the court to make a discretionary call of any factual dispute regarding the issue of ‘same criminal conduct’” and did not contest the issue at trial, defendant could not challenge his offender score on appeal).

An appellate court reviews decisions regarding “same criminal conduct” for abuse of discretion or misapplication of the law. State v.

Graciano, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). If the record adequately supports either a finding of same criminal conduct or separate conduct, “the matter lies in the court’s discretion.” *Id.* at 538; *see also*, State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, *rev. den.*, 118 Wn.2d 1006 (1991) (if the facts support both a finding that the criminal intent was the same and that it was different, the determination regarding “same criminal conduct” is left to the trial court’s discretion). The defendant bears the burden of proving that the offenses encompassed the same criminal conduct. Graciano, 176 Wn.2d at 539-40. If the record is unclear as to whether all the factors of same criminal conduct have been met, the trial court does not abuse its discretion in concluding that the defendant failed to meet his/her burden. *Id.* at 541. If defense counsel is ineffective for failing to argue that offenses constituted the same criminal conduct, the remedy is remand for a new sentencing hearing where defense counsel can make the argument. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

Under the Sentencing Reform Act (“SRA”), offenses are presumed to be separate unless the court makes a specific finding that they encompass the same criminal conduct. RCW 9.94A.400(1)(a) (1994); State v. Nitsch, 100 Wn. App. 512, 520-21, 997 P.2d 1000, *rev. den.*, 141 Wn.2d 1030 (2000). In determining the offender score, all other current

offenses are counted as prior offenses, unless the court enters a finding that the other current offenses encompass 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”. RCW 9.94A.589(1)(a); *see also State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (“Same criminal conduct” is conduct that involves the same victim, the same objective intent, and occurs at the same time and place). The absence of any one of these factors precludes a finding of “same criminal conduct.” *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). In order to make this determination, courts are to consider whether one offense furthered the other. *Graciano*, 176 Wn.2d at 540. The “same criminal conduct” phrase is “construed narrowly to disallow most claims that multiple offenses constitute the same criminal act...” *Porter*, 133 Wn.2d at 181.

While simultaneity is not required to show “same time,” incidents that occur close in time are separate and distinct if they are not part of an uninterrupted, continuous sequence of conduct. *State v. Price*, 103 Wn. App. 845, 856-57, 14 P.3d 841 (2000), *rev. den.* 143 Wn.2d 1014 (2001). Frequently the issue of “same time” will be intermingled with the question

of “same intent” when there is a course of criminal activity over a period of time. State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990).

A defendant’s intent is to be viewed objectively, not subjectively. Rodriguez, 61 Wn. App. at 816. The court is to decide whether the intent, when viewed objectively, changed from one crime to the next. Tili, 139 Wn.2d at 123. The court first determines whether the underlying statutes involve the same intent. Rodriguez, 61 Wn. App. at 816. If the statutory intents are the same, then the court determines whether the specific defendant’s intent changed from one crime to the next under the facts of the case. *Id.*

The formation of a new, independent intent after the commission of one crime constitutes a different objective intent. The formation of a new intent is supported if the evidence shows that the criminal acts “were sequential, and not simultaneous or continuous.” Tili, 139 Wn.2d at 124, (quoting State v. Grantham, 84 Wn. App. 854, 856-57, 932 P.2d 657 (1997)). If the evidence shows that the defendant had the “time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” then, objectively, the defendant formed a new, independent criminal intent when he committed his next criminal act. *Id.* at 123-24 (quoting Grantham, 84 Wn. App. at 859). However, if the evidence shows that the criminal acts were uninterrupted,

continuous and committed within an extremely short period of time, it is unlikely that the defendant formed a new criminal intent. Tili, 139 Wn.2d at 124. A defendant's choice to commit another criminal act after facing the question as to whether or not to continue her criminal activity substantiates a finding of successive or sequential intents and not one continuous intent. Grantham, 84 Wn. App. at 860-61; *accord*, Price, 103 Wn. App. at 858.

Here, King argues that all the offenses included the same intent, the intent to harass Ms. Penter over a three day period. However, with respect to the offense of Threatening to Bomb or Injure Property, the prosecutor emphasized that King's conduct fell under subsection (a) of the to-convict instruction, which requires no intent to alarm or harass anyone, and not subsection (b). RP 507, CP (Inst. 15). While the threat-to-injure-property messages the prosecutor relied upon in argument occurred over a two day period and some of them were communicated around the same time as the cyberstalking count that threatened Ms. Penter's daughters, the messages occurred at least three hours after the cyberstalking count regarding the threat to kill Ms. Penter. The three: "I hear there more coming," "I hear fire next" and "Burn" all occurred the next day, more than 12 hours after the threat regarding the daughters. King certainly had time within that three and/or twelve hour period to reconsider his actions

and form a new intent, and in fact did, the intent to threaten harm to Ms. Penter's home.

The trial court is in the best position to determine whether King's objective intent changed from one offense to the next over the three days that he texted and stalked Ms. Penter. It is also in the best position to determine whether the offenses occurred at the "same time," within that three day time period as alleged by King, or not as the State alleges with respect to at least some, if not all, of the counts. Given that King needs to be resentenced because the two cyberstalking counts are the same unit of prosecution, the State does not object to a remand in order to allow defense counsel an opportunity to argue that the offenses constitute the same course of criminal conduct.

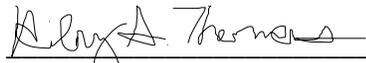
**3. Appellate costs should not be awarded.**

Given the State's concession regarding the unit of prosecution issue and its lack of objection to remand for consideration of whether any or all of the offenses constitute the same criminal conduct, the State agrees that appellate costs should not be awarded. The State will not be seeking them as it would not be asserting that it is the prevailing party in this case.

**E. CONCLUSION**

The State respectfully requests this Court to remand this matter for a new sentencing hearing to address the offender score due to the unit of prosecution regarding cyberstalking and to permit defense counsel to argue that some or all of the offenses constitute the same course of criminal conduct.

Respectfully submitted this 24th day of June, 2016.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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