

FILED  
7-27-16

Court of Appeals  
Division I  
State of Washington

NO. 73922-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

D'ANDRE CORBIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mariane C. Spearman, Judge

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BRIEF OF APPELLANT

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A. INTRODUCTION

D'Andre Corbin is appealing from his resentencing following remand from this Court. At his resentencing, his attorney wrongly directed the court it had no discretion to consider mitigating circumstances before imposing a new sentence. This was an incorrect statement of the law. Because there was a valid basis to depart from the standard range and because the court was affirmatively misdirected about its sentencing discretion, Corbin was prejudiced by his attorney's misstatement. Corbin asks this Court to reverse his sentence, as he received ineffective assistance of counsel at his resentencing.

B. ASSIGNMENT OF ERROR

Corbin was denied his constitutional right to effective assistance of counsel.

Issue Pertaining to Assignment of Error

Where Corbin presented a valid basis to depart from the standard range at resentencing, but defense counsel wrongly informed the court it had no discretion to consider mitigation, was Corbin deprived of his right to effective assistance of counsel?

B. STATEMENT OF THE CASE

Following a jury trial, D'Andre Corbin was convicted of attempted first degree assault of his wife Denise Corbin and two counts of felony cyberstalking of Denise Corbin. CP 13-21. Regarding the cyberstalking counts, the state alleged Corbin sent his wife a number of harassing text messages on December 14, 2012. CP 7.

Following the jury's verdicts, defense counsel Erick Spencer moved for funding to obtain a copy of Corbin's mental health records from the department of corrections (DOC). Supp. CP \_\_\_ (sub. no. 104, Motion for Expenditure of Public Funds, 6/13/13). In his declaration, counsel opined Corbin's bipolar disorder may have affected his ability to control his behavior and therefore may constitute grounds for a mitigated sentence:

4. The standard range for Attempted Assault 1 with an offender score of 7 is  $0.75 \times$  (178 to 236 months) or 133.5-177 months. Because attempted assault 1 is a class B felony, however, the maximum is 120 months. Mr. Corbin therefore faces a flat sentence of 120 months.
5. Counsel is attempting to find grounds for mitigation to justify a sentence below the presumptive sentence of 120 months.
6. Mr. Corbin's wife suffered only minor cuts and bruises from the incident. She has long suspected that Mr. Corbin has untreated

- mental health problems. She would prefer a sentence that focuses more on treatment than punishment and would like for Mr. Corbin to remain a presence in the lives of their children.
7. I learned that Mr. Corbin had been treated for bipolar disorder while he was last incarcerated in the Dept. of Corrections.
  8. I frequently encounter persons suffering from bipolar disorder and I know enough about its symptoms to know when a professional evaluation might be warranted. In Mr. Corbin's case I have observed that he has unrealistic expectations about his own abilities, that he talks fast, and impulsive. He seemed to also have periods characterized by difficulty making decisions, irritability and hopelessness. I believe that a professional evaluation is warranted.
  9. It is possible that Mr. Corbin's ability to control his behavior, and his judgment, were impaired by mental illness. Under Washington's sentencing reform act, it is grounds for an exceptional sentence below the standard range if the defendant, by reason of a mental disorder, was significantly impaired in his ability to conform his behavior to the requirements of the law.

Supp. CP \_\_\_ (sub. no. 104, Motion for Expenditure of Public Funds, 6/13/13). The court authorized the funding. Supp. CP \_\_\_ (sub. no. 103, Order Authorizing Expert Services, 6/20/13).

At a hearing on July 23, 2013, defense counsel indicated he had obtained the mental health records from DOC and had an expert on board to interview Corbin. The court therefore continued

sentencing so that the defense could present mitigation. RP (7/23/13) 13-14, attached as Appendix A.<sup>1</sup>

Thereafter, however, Erick Spencer of TDA was allowed to withdraw and ACA took over. Supp. CP \_\_ (sub. no. 111, Order, 7/30/13); Supp. CP \_\_ (sub. no. 114, Petition for New Trial, 8/23/13).

Sentencing took place on December 6, 2013, before the Honorable Mariane Spearman. CP 13-21. No mitigation was presented, although Denise Corbin's letter expressing a desire for a lesser sentence with counseling was read by the victim advocate RP (12/6/13) 8-10, attached as Appendix B.

Corbin's offender score was calculated as 12 points, which included a point for each of the cyberstalking counts. CP 14; Supp. CP \_\_ (sub. no. 131A, DPA Calculated Offender Score, 6/6/13). The court imposed 120 months on the assault and 60 months on the cyberstalking counts. CP 16.

Corbin appealed. His appellate attorney argued the sentencing court imposed sentences that exceeded the statutory maximum because the court ordered the statutory maximum period

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<sup>1</sup> Corbin is moving to transfer the record in his first appeal to this appeal contemporaneously with the filing of this brief.

of incarceration plus a 36-month period of community custody. See this Court's opinion in State v. Corbin, COA No. 71309-4-I, attached as Appendix C. This Court agreed resentencing was necessary. Appendix C at 5.

In his Statement of Additional Grounds, Corbin argued his offenses constituted the same criminal conduct. Appendix at 5. This Court agreed the cyberstalking offenses likely constituted the same criminal conduct. Because the sentencing court likely would have found the cyberstalking offenses to constitute the same criminal conduct – had the argument been made – this Court held Corbin received ineffective assistance of counsel. Appendix C at 6.

This Court's decision concluded:

The felony cyberstalking convictions are affirmed. The case is remanded for a new sentencing hearing in which Corbin may argue that the two cyberstalking offenses encompass the same criminal conduct. At resentencing, the court shall also ensure that the sentence does not exceed the statutory maximum.

Appendix C at 8.

On remand, Corbin submitted a pro se memorandum informing the court it had discretion to consider issues apart from the two identified by the Court of Appeals in its decision. CP 26-38 (citing State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993)).

Specifically, Corbin asked the court to consider whether there were grounds for an exceptional sentence below the standard range on grounds Denise Corbin was an initiator, willing participant or provoker of the incident. CP 29, 33 (citing RCW 9.94A.535(1)(a); State v. Whitfield, 99 Wn. App. 331, 994 P.2d 222 (1999)).

In support, Corbin attached a defense motion filed by his first attorney Erick Spencer in anticipation of trial:

The incident arose from an altercation Mr. Corbin had with his wife, Denise Corbin, on the evening of December 14, 2012. The altercation began with a series of mutually insulting and acrimonious text messages.<sup>[2]</sup> The acrimony of the text messages escalated as each party insisting on having the last word. Finally Mr. Corbin arrived at Ms. Corbin's place of employment at Hyatt Place at 110 6<sup>th</sup> Avenue North. Mr. Corbin was loud and insistent when asking hotel staff to speak with his wife. Ms. Corbin fled the scene because she did not wish to be embarrassed by Mr. Corbin, in the presence of her employer and guests. Video from the hotel lobby briefly shows Ms. Corbin running and Mr. Corbin following.

Ms. Corbin left the hotel through a back entrance and went around the corner and past a gas station. Mr. Corbin follows. It is not exactly clear what happened in the alley behind the hotel and in front of the gas station, as there are apparently conflicting witness accounts. It does appear, however, that at the gas station, several passersby

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<sup>2</sup> This Court's opinion in Corbin's first appeal notes that Denise Corbin texted back that she hated Corbin and called him a loser. Appendix C at 1. Denise Corbin also testified that she did not take Corbin's threats seriously because "she and Corbin had made similar threats to each other in previous arguments." Appendix C at 4.

separated Mr. And Ms. Corbin and tried to keep them apart. Mr. Corbin then walked away westbound and soon Ms. Corbin followed after him. It appeared that she caught up with him and he stopped, turned around, pushed her to the ground and struck her in the head several times.

CP 38.

In his memorandum, Corbin elaborated:

The State did not introduce the entire text transaction between the Corbin[s]. The State excluded the portions that clearly shows that Mrs. Corbin intentionally pushed Mr. Corbin[’s] buttons to elicit an angry response. Mrs. Corbin’s intent was to get Mr. Corbin to incriminate himself, so that she could use it against him in the up coming custody battle. She said as much in the text introduced by the State.

Defense counsel filed “Motion to Exclude Evidence; Objection to Amendment of Information (CrR 8.3; 4.7)” based on these factors. (Exh. “1” Motion). Mr. Spencer argued that the altercation began with a series of mutually insulting and acrimonious text messages. The acrimony of the text messages escalated as each party insisting (sic) on having the last word. Mr. Corbin threw something at Mr. Cobrin and he reacted with a few punches. Ms. Corbin suffered only minor injuries – essentially scratches and bruises. The defense contends that there is a cause and effect relationship between Ms. Corbin’s provocative conduct and the assault such that it constitutes mitigating circumstances to justify a downward departure from the standard range sentencing. (Exh. “1”).

CP 34.

At resentencing on July 24, 2015, the parties agreed the cyberstalking offenses constituted the same criminal conduct and jointly requested the court to strike the period of community custody:

[T]he parties are jointly moving the Court for an Order Amending the Judgment & Sentence to strike the period of community custody. The parties are further in agreement that Counts 2 and 3 are same criminal conduct for purposes of the scoring. That would make the Defendant's offender score for Count 1 a score of 11; for Counts 2 and 3, a score of 10. Because of his criminal score, that of course does not change the range that the Court imposed.

THE COURT: So, it's still 120?

MS. PETERSON [prosecutor]: It's still 120 on Count 1. And the range is 51 to 60 months on Counts 2 and 3. So, I believe the parties are asking the Court to simply strike the period of community custody and enter this Order reflecting the correct offender score.

RP (7/24/15) 2.

Defense counsel agreed and noted that although Corbin had filed his own memorandum asking the Court to consider mitigating circumstances, the appellate court only authorized consideration of the two issues:

MR. SHAW [defense counsel]: I should say, Your Honor, that's all accurate. There had been a request by Mr. Corbin to address mitigating circumstances at the sentencing. However, it was indicated that these were the two issues that the

appellate court had sent down, and these two issues have been resolved in agreement, which is to say no community custody and same criminal conduct. My client wants to submit a motion if he may, I think with regard to the mitigation issue.

RP 2.

The court agreed with defense counsel to consider only those issues indicated by the appellate court's decision:

THE COURT: Well, counsel already brought that up and I already explained that there's two issues we're gonna address today and two issues only. I'm not gonna revisit sentence except for what the Court of Appeals directed us to. And that's all we're talking about today.

RP 2-3.

The court therefore entered an order amending the judgment and sentence striking the period of community custody and changing Corbin's offender score to reflect that the cyberstalking offenses constituted the same criminal conduct. CP 39-40. The order further reflected that: "the sentence previously imposed on December 6, 2013, of 120 months on count I and 60 months on counts II and III run concurrently is unaffected and will continue to be this court's sentence." CP 40. This appeal follows. CP 41.

D. ARGUMENT

1. CORBIN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING.

Contrary to defense counsel's assertion to the court, the court on remand had discretion to consider whether mitigating circumstances justified a downward departure from the standard range. Counsel's failure to so inform the court constituted ineffective assistance of counsel.

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel at all critical stages of a case. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Sentencing is a critical stage of a criminal case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must show that: 1) counsel's performance was deficient "and not a matter of trial strategy or tactics;" and 2) the deficient performance prejudiced the defendant's case. State v. Mannering, 150 Wn.2d 277, 75 P.3d

961 (2003) (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) and Strickland, 466 U.S. at 687-89). A tactical decision at trial will be found deficient if it is not reasonable. Hendrickson, 129 Wn.2d at 77-78; Roe v. Flores-Ortega, 528 U.S. 470, 481, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000).

Failure to request an exceptional sentence may constitute deficient and prejudicial representation. In State v. McGill, 112 Wn. App. 95, 98, 47 P.3d 173 (2002), the defendant was sentenced within the standard sentence range for convictions on two cocaine delivery and one possession with intent to deliver counts. The drug purchases happened within a seven-day period and each involved a small amount of cocaine. Each delivery from McGill to a confidential informant (CI) occurred at the same location. Id. Each purchase was controlled by the investigating officers, who used the same CI. Based upon the purchases, officers obtained a search warrant and served it on McGill eight days after the first purchase. They seized two small bindles of cocaine from McGill. Id.

After McGill was convicted, his counsel failed to request an exceptional sentence below the standard range. Id. On appeal, McGill argued that failure to request the exceptional sentence was

ineffective assistance, relying on State v. Sanchez, 69 Wn. App. 255, 256-57, 848 P.2d 208, rev. denied, 122 Wn.2d 1007 (1993); and State v. Hortman, 76 Wn. App. 454, 886 P.2d 234 (1994), rev. denied, 126 Wn.2d 1025 (1995). This Court agreed, holding that failure to inform a sentencing court of the proper scope of its discretion when sentencing a defendant was ineffective and prejudicial. McGill, 112 Wn. App. at 101-02.

This Court expressly rejected Division Three's decision in Hernandez-Hernandez,<sup>3</sup> which held the failure to make the argument for an exceptional sentence is not ineffective because the trial court is free to reject it.

The Hernandez-Hernandez court held the failure to make the argument was not ineffective because the trial court was free to reject the Sanchez argument. We disagree. A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise.

McGill, at 102.

As argued by Corbin in his pro se memorandum, the circumstances of his case are strikingly similar to those in Whitfield. Samuel Whitfield was charged with third degree assault and

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<sup>3</sup> State v. Hernandez-Hernandez, 104 Wn. App. 263, 15 P.3d 719, rev. denied, 143 Wn.2d 1024, 25 P.3d 1020 (2001).

disorderly conduct. The charges arose when Whitfield assaulted his niece Lanetta. Whitfield and his extended family had gathered for dinner. Most of the adults, including Lanetta, were drinking alcohol. In Whitfield's presence, Lanetta repeatedly confronted Whitfield's fiancée Lisa Morris about other women Lanetta claimed Whitfield was seeing. After several unsuccessful attempts to extract themselves from the conversations, Whitfield and Morris decided to leave. They collected their belongings, took their child and left the house, heading toward their car. Lanetta followed them outside and continued to confront Morris. Whitfield, 90 Wn. App. at 332.

Whitfield responded by assaulting Lanetta. He repeatedly hit her in the face and body, causing bruising on her entire face and her left eye to swell completely shut. The assault stopped only when a relative heard the commotion, came outside and pulled Whitfield off Lanetta. Whitfield, 90 Wn. App. at 333.

Whitfield pled guilty to the charges. At sentencing, Whitfield acknowledged he should not have responded to Lanetta's verbal confrontation by hitting her but argued that to a significant degree, Lanetta provoked the incident. The court agreed and imposed an

exceptional sentence below the standard range. Whitfield, 90 Wn. App. at 333-34.

On appeal, this Court affirmed the mitigated sentence:

This principle of a failed defense as a mitigating factor, adopted by the Legislature and explained and applied by the Supreme Court, was properly applied by the trial court in this case. Whitfield did not claim self-defense; he never claimed that Lanetta's provocation legally justified or excused his conduct. But Lanetta's insistent verbal confrontation and provocation justifies distinguishing Whitfield's conduct from the typical third degree assault. If the Legislature or the Supreme Court chooses to prohibit application of the mitigating factor as a matter of law to instances involving only verbal provocation, it may do so. But we have no basis to do so.

Whitfield, 99 Wn. App. at 337.

Here, the altercation began when the Corbins exchanged mutually insulting text messages. As this Court noted in its opinion, Denise Corbin texted she hated Corbin and called him a loser. Denise Corbin admitted the two often threatened each other. Moreover, it appears (from defense counsel's memorandum) there was evidence that Corbin attempted to leave before the assault occurred, but Denise Corbin followed and caught up with him. Like Whitfield, Corbin reacted excessively. But also like Whitfield, Corbin was provoked to a significant degree by his wife. As in

Whitfield, this verbal confrontation justifies distinguishing Corbin's conduct from the typical attempted first degree assault. And significantly, Denise Corbin agreed a lesser sentence was appropriate under the circumstances.

Defense counsel at resentencing was incorrect when he stated the court could not consider Corbin's request for a mitigated sentence. Although the subject of an exceptional sentence was not raised on direct appeal, the sentencing court on remand has authority to exercise its independent judgment to revisit an issue that was not the subject of appeal. State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993) ("It is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal").

Whitaker's attorney failed to inform the court of the parameters of its authority to impose an exceptional sentence below the standard range. As indicated above, the court cannot exercise its discretion if it is not told it has discretion to exercise. Moreover, it appears the court – at least as indicated between the verdicts and the first sentencing – was not opposed to considering mitigation. This Court should reverse and remand for a new sentencing hearing.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Corbin was represented at all stages of the proceedings by appointed counsel. See e.g. CP 42-44; Supp. CP \_\_ (sub. no. 135, Order Authorizing Appeal in Forma Pauperis, 12/17/13). The trial court found him indigent for purposes of this appeal. CP 42-44. Under RAP 15.2(f), “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.”

In advance of Corbin’s first sentencing, defense counsel noted Corbin has sickle-cell anemia that “greatly impairs his ability to hold regular employment.” Supp. CP \_\_ (sub. no. 104). Corbin also received a lengthy sentence of 10 years. The court imposed only the mandatory DNA fee and VPA. CP 13-21.

Under RCW 10.73.160(1), appellate courts “*may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court

has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94. Based on Corbin’s indigence, illness and lengthy sentence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

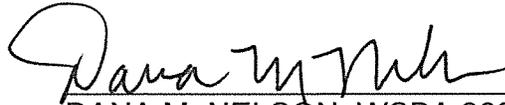
D. CONCLUSION

This Court should remand for resentencing because Corbin received ineffective assistance of counsel. Alternatively, this Court should exercise its discretion and deny any request for costs.

Dated this 27<sup>th</sup> day of July, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

# APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

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STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	No. 12-1-06159-5 SEA
vs.	)	COA No. 71309-4-I
	)	
D'ANDRE CORBIN,	)	
	)	
Defendant.	)	

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APPEARANCES:

JUDGE:	MARIANE SPEARMAN
FOR THE STATE:	PHILIP SANCHEZ
FOR THE DEFENSE:	ERICK SPENCER

DATE OF PROCEEDINGS: July 23, 2013

TRANSCRIBED BY: Mindy L. Suurs, CSR No. 2195

1 Seattle, Washington; July 23, 2013

2 8:40 a.m.

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4 --o0o--

5 THE COURT: Good morning.

6 MR. SANCHEZ: Good morning.

7 MR. SPENCER: Good morning, Your Honor.

8 THE COURT: You folks want to come up to the bar or --

9 VOICE: Whatever the Court prefers.

10 MR. SANCHEZ: Your Honor, Philip Sanchez on behalf of  
11 the State of Washington versus D'Andre Corbin, Cause No.  
12 is 12-1-06159-5, Seattle designation. Apologize on behalf  
13 (inaudible) for being late this morning. This is defense  
14 motion, and I'll defer to the defense at this time.

15 MR. SPENCER: Your Honor, this is a motion set at --  
16 Erick Spencer present with Mr. Corbin. This is a motion  
17 set at Mr. Corbin's request to discharge counsel. If it  
18 appears that there are going to be -- that future  
19 proceedings will be based on deficiencies of defense  
20 counsel, it would be inappropriate for me to go any further  
21 until the Court rules first on this issue. I would ask the  
22 Court to hear directly from Mr. Corbin so that he could  
23 explain the basis for the motion. I understand he's put a  
24 good deal of thought into it, and I want to make sure that  
25 his thoughts are heard by the Court.

1 My attorney, for not -- for not being available for  
2 me -- we never had the opportunity to look at that  
3 evidence, and that evidence was never brought forth, as you  
4 remember in trial that he never showed me that evidence  
5 either.

6 THE COURT: So Mr. Corbin, what exactly are you saying  
7 that he didn't do?

8 MR. CORBIN: I'm saying that my attorney was not  
9 available at the discovery, at the discovery hearing.

10 THE COURT: At the trial what did he -- are you saying  
11 was deficient about his performance?

12 MR. CORBIN: At the readiness hearing --

13 THE COURT: No, at trial.

14 MR. CORBIN: He did not -- he did not provide me with  
15 the evidence that was at that discovery hearing. That was  
16 the question to the -- to the prosecution --

17 THE COURT: What evidence?

18 MR. CORBIN: Mrs. Corbin's phone, the phone, the phone  
19 information --

20 THE COURT: So if he had provided that to you, then  
21 what? Everything came out at trial, all of the phone  
22 records.

23 MR. CORBIN: It did, but it was unauthorized. It  
24 never left -- it never left the court of Kessler's court.  
25 He never authorized it in Kessler's court, and it was

1 MR. CORBIN: I wanted --

2 THE COURT: There needed to be a motion made.

3 MR. CORBIN: I thought that all evidence supposed to  
4 be -- supposed to be authorized --

5 THE COURT: So what you need to show at this hearing  
6 is how you're saying your counsel's performance at trial  
7 was deficient. What happened before trial is only relevant  
8 if it affected something that occurred at the trial level.  
9 So I presided over the trial. I heard the evidence. I  
10 want you to tell me what would have been different if you  
11 had a different lawyer.

12 MR. CORBIN: What would have been different if --

13 THE COURT: At the trial.

14 MR. CORBIN: -- my counselor showed me the evidence or  
15 gave me -- properly informed me of the information that --  
16 that the counselor -- prosecution never -- that never got  
17 brought forth.

18 THE COURT: Okay. So if he showed it to you earlier,  
19 then what?

20 MR. CORBIN: Then I would have had -- I would have  
21 been properly informed.

22 THE COURT: And then what? How would that have  
23 changed the outcome of the trial?

24 MR. CORBIN: I also -- also thought that due to the  
25 fact that the evidence was unauthorized, it wasn't brought

1 get those, and they all were admitted at trial.

2 MR. CORBIN: All right. So me not having -- my -- my  
3 counselor not being present throughout the time before  
4 trial as I made it clear that we had a conflict of interest  
5 throughout the proceedings all the way up to trial, my  
6 counselor never talked to me, discussed with me, nothing  
7 about the text messages before trial. He never told me  
8 about the text messages before trial. Yes, that was my  
9 defense's strategy that I had no knowledge of up until the  
10 day -- the days before trial, which I believe that the  
11 evidence that's in question was retrieved from the  
12 prosecution from an unauthorized subpoena.

13 THE COURT: Okay. Mr. Sanchez, is there anything that  
14 you want to say on this matter?

15 MR. SANCHEZ: No, Your Honor.

16 THE COURT: So one of the things Mr. Corbin says is --  
17 were you present at the readiness hearing?

18 MR. SANCHEZ: I believe I was.

19 THE COURT: Okay. So one of the things Mr. Corbin  
20 says is that he wasn't present at the readiness hearing and  
21 neither was Mr. Spencer and that -- I think what he's  
22 trying to say is that he would have been offered a deal at  
23 the readiness hearing.

24 MR. CORBIN: Ma'am, I'm not saying I was offered a  
25 deal; I thought the evidence in question that was retrieved

1 evidence and 404 evidence, which he admitted the evidence  
2 in under impeachment. I thought that all evidence was to  
3 be discussed in Kessler's court about impeachment that --  
4 and that first one says it's supposed to be made by a  
5 omnibus court, by the omnibus court.

6 THE COURT: The 404(b) evidence refers to you, not  
7 your wife.

8 MR. CORBIN: Okay.

9 THE COURT: The 609 evidence of witnesses and  
10 exculpatory evidence by omnibus -- was there any?

11 MR. SPENCER: There was no 404(b), if I recall from  
12 the interviews he had done, indicated there had been some  
13 arguments before, but nothing physical had happened.

14 THE COURT: So was there any 609 of any witnesses?

15 MR. SPENCER: With regards to 609, I don't believe --  
16 I don't have a copy of that e-mail, but I don't believe  
17 there was any --

18 THE COURT: I don't recall any witnesses being  
19 impeached with any 609 evidence.

20 MR. SPENCER: No, Your Honor.

21 THE COURT: This would have been impeaching State's  
22 witnesses with prior convictions. There weren't any.

23 MR. CORBIN: The State was -- (inaudible) my wife,  
24 okay.

25 THE COURT: Does she have prior convictions?

1 effort, I got the mental health records from the Department  
2 of Corrections, and we have an interview scheduled at the  
3 jail on the 2nd of August.

4 THE COURT: Okay. So what -- how much of a  
5 continuance are you asking for?

6 MR. SPENCER: I think it will probably take  
7 approximately two weeks to get a report. I would ask for  
8 at least until the 16th of August.

9 THE COURT: I don't have a sentencing calendar  
10 available until 13th of September unless we do an 8:30.

11 MR. SPENCER: Well, although I may be making a request  
12 over my client's objection and as (inaudible) my duty to  
13 bring that to the Court's attention, I do believe that this  
14 attempt at mitigation is important, and I believe it's in  
15 Mr. Corbin's best interest to complete the evaluation and  
16 have sufficient time at sentencing to present that.

17 THE COURT: So do you want an 8:30 earlier, or do you  
18 want to wait until September 13th?

19 MR. SPENCER: September 13th (inaudible) it's  
20 necessary to bring the expert report?

21 THE COURT: Well, you know, that's a sentencing  
22 calendar where there will be a lot of people. If you're  
23 going to bring an expert, we probably need to special set  
24 it at a different -- so it's by itself because you'll only  
25 have about, you know, 20 minutes or so.

1 Mr. Corbin to articulate because I'm not sure that I --

2 THE COURT: Mr. Corbin, if you --

3 MR. SPENCER: -- understand.

4 THE COURT: Mr. Corbin, if you have any other motions  
5 that you want to make about what occurred, then you have a  
6 right to appeal after you're sentenced and you can have the  
7 appellate court address those.

8 MR. CORBIN: Okay. I just wanted to ask certain --  
9 certain (inaudible) stated for the record in this court.

10 THE COURT: Well, I guess your lawyer has put it on  
11 the record, and I'm telling you that it's something you  
12 should address on appeal.

13 MR. SPENCER: Okay. If Your Honor is ruling that  
14 the -- that the -- we raise the matter and --

15 THE COURT: Presumably -- I don't remember, but  
16 presumably it was also raised at the time the trial  
17 started. I don't remember, but I assume it was.

18 MR. CORBIN: No, it wasn't, ma'am. We (inaudible) and  
19 I realized by myself that Supreme Court held that in State  
20 versus (inaudible) that a trial court denial -- denial  
21 (inaudible) after a day of trial minimum is a (inaudible)  
22 discretion, and it's speedy trial rights violation.

23 THE COURT: Your objection is noted.

24 MR. CORBIN: Okay, thank you.

25 MR. SPENCER: Are you willing to sign the waiver of

CERTIFICATE

1

2 STATE OF WASHINGTON )

3 ) SS.

4 COUNTY OF KING )

5 I hereby declare under penalty of perjury that the

6 foregoing transcript of proceedings was prepared by me or

7 under my direction from video/audio tape recordings of the

8 proceedings and reduced to typewriting as monitored by me;

9 That the transcript is, to the best of my ability, a

10 full, true and correct reflection of the recording;

11 That I am neither attorney for nor a relative or

12 employee of any of the parties to the action; further, that

13 I am not a relative or employee of any attorney of counsel

14 employed by the parties hereto, nor financially interested

15 in its outcome.

16

17 DATE: March 28, 2014

18

19

20

21 \_\_\_\_\_

22 Mindy L. Suurs

23 Notary Public in and for the

24 State of Washington residing

25 at Bellevue

## **APPENDIX B**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

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STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	No. 12-1-06159-5 SEA
vs.	)	COA No. 71309-4-I
	)	
D'ANDRE CORBIN,	)	
	)	
Defendant.	)	

---

APPEARANCES:

JUDGE:	MARIANE SPEARMAN
FOR THE STATE:	PHILIP SANCHEZ
FOR THE DEFENSE:	KRIS SHAW

DATE OF PROCEEDINGS: December 6, 2013

TRANSCRIBED BY: Mindy L. Suurs, CSR No. 2195

1 Seattle, Washington; December 6, 2013

2 1:06 p.m.

3  
4 --o0o--

5 THE COURT: Have a seat. Ready on Mr. Corbin?

6 MR. SANCHEZ: Yes, Your Honor. I believe we are ready  
7 on Mr. Corbin. State of Washington versus D'Andre Corbin,  
8 12-1-06159-5, Seattle designation. Mr. Corbin is present  
9 in custody represented this afternoon by Mr. Kris Shaw.  
10 Philip Sanchez on behalf of the State.

11 Before we proceed with sentencing, Your Honor, should  
12 we address the defense motion? I believe that was  
13 submitted. I did receive a copy of that.

14 THE COURT: The defense has filed a petition for a new  
15 trial.

16 MR. SHAW: And presumptively that's been not honored?  
17 It's been denied?

18 THE COURT: I didn't know -- I did read your motion.  
19 I don't know if the State wants to respond.

20 MR. SANCHEZ: I do not want to respond, Your Honor. I  
21 did receive what appears to be the addendum provided by the  
22 defendant. I guess just in brief response to that, with  
23 regards to not receiving any 404(b) evidence, just to  
24 clarify that on the record, in this particular case, there  
25 was no 404(b) evidence that was introduced at trial

1 in the first -- Attempted Assault in the first degree,  
2 domestic violence. The seriousness level of that crime is  
3 a 12. Defendant's offender score is 12. Standard range,  
4 therefore, because it is an Attempted Class A felony, which  
5 would render it a Class B, is 120 months. The maximum term  
6 that could be imposed is 120 months and/or a \$20,000 fine.

7 THE COURT: So why is the standard range 120 to 120?

8 MR. SANCHEZ: Well, the defendant's standard range,  
9 had it not been attempted -- and I did reference this in my  
10 presentence memoranda -- the defendant's standard range,  
11 which would have been 75 percent --

12 THE COURT: Of --

13 MR. SANCHEZ: -- of attempted -- excuse me, 75 percent  
14 of the range of Assault 1 would have left him -- 75 percent  
15 of the range would have been 180 months to 238 and a half  
16 months.

17 THE COURT: 180 to 230.5?

18 MR. SANCHEZ: Correct. But because it is an Attempted  
19 and it's a Class A would then make it a Class B, and  
20 Class B, the maximum that could ever be imposed is 120  
21 months. And --

22 THE COURT: I guess my question, though, is why is his  
23 range -- that's not a range; that's just a number.

24 MR. SANCHEZ: Well, it's 120. I believe the Court is  
25 bound to impose either 120 as the low, essentially, and the

1 MR. SHAW: Indeed.

2 (End of recording at 1:13 p.m.)

3 (Recording begins 1:30 p.m.)

4 THE COURT: So have we resolved the --

5 MR. SANCHEZ: We have, Your Honor.

6 THE COURT: -- scoring issue?

7 MR. SANCHEZ: We were just trying to verify -- and  
8 just for the record, Philip Sanchez again on behalf of the  
9 State. We were just trying to verify the last date of  
10 release from incarceration for Mr. Corbin on his 2002  
11 charge, and I've just spoken to the Department of  
12 Corrections, and they confirm that Mr. Corbin was released  
13 in, I believe, November of 2009 but that subsequently went  
14 back and served some additional time due to violation  
15 hearings. And his last date of release from incarceration  
16 in relation to that 2002 conviction was June 25, 2011.

17 And so the underlying -- some of the underlying  
18 convictions from from '99 and 2001 do not wash, and so they  
19 do count as points towards the defendant's total score.  
20 And where I had left off, Your Honor --

21 THE COURT: Does Mr. Shaw agree with that?

22 MR. SHAW: It does appear as though he doesn't go any  
23 five-year period out of custody without legal trouble.

24 THE COURT: Right.

25 MR. SANCHEZ: And so, Your Honor, with regards to the

1 court dates and lawyers.

2 This was not our life -- our lives nine months ago.  
3 This is hard. I really want the Court to understand that I  
4 don't feel like my voice, meaning my take on the outcome of  
5 any of this, I don't feel like what I needed or wanted out  
6 of this was considered yet or heard or took into  
7 consideration. And as weird as it may sound, but for me to  
8 be saying this as the victim in this case, I, the one who's  
9 been the one embarrassed by this case, even though I'm  
10 deeply hurt by my husband's actions towards me and all this  
11 trouble it's brought to our lives, but I truly from the  
12 bottom of my heart and knowing this man for over 11 years  
13 feel like he was in his right mind at the time all this  
14 occurred, and I don't feel like he intended for things to  
15 get as bad as they did that night. I also believe and feel  
16 that with every action there is a reaction, and  
17 consequences do come with negative actions. I get that.  
18 But I think 10 to 20 years is excessive in his case and  
19 scary to the future of our family and just as traumatizing  
20 for me more than anything right now.

21 I wish some type of counseling with a lesser sentence  
22 structure was an option. I know his boys, our boys, miss  
23 him and ask about him every day, and Mr. Corbin's actions  
24 that night really didn't reflect the relationship we had  
25 together. It's hard now not to be able to talk to him or

1 my wife. I assaulted my wife, which is the dumbest thing I  
2 ever done. The text messages exchange that we had, in my  
3 mind, I believe that this is what I intended by the  
4 messages. What we was going through in our relationship, I  
5 felt that that was dead. Our communication was dead.

6 I didn't have no intent to try to hurt my -- my wife  
7 and my -- my wife, children -- the mother of my children.  
8 I didn't have no intent to cause her great bodily harm.  
9 That's it, Your Honor. I love my family, and -- and I  
10 really -- I really set out with the text message, I really  
11 set out today what them text messages meant.

12 THE COURT: As Mr. Shaw said, I don't have much  
13 discretion with a range of 120 to 120, so there you have  
14 it. 120 months, Count 1; 16 months Count 2 and 3 to run  
15 concurrent, waive all nonmandatory financial obligations.  
16 No contact with Ms. Corbin --

17 MR. CORBIN: Your Honor --

18 THE COURT: -- community custody, 36 months.  
19 Restitution to be determined.

20 MR. CORBIN: Your Honor, in the future with this 10  
21 years I have to spend, this 10-year conviction I have, how  
22 do I -- how do I see my family? How do I see my kids?

23 THE COURT: Well, someone else can bring your kids to  
24 see you.

25 MR. CORBIN: Okay. Thank you.



## **APPENDIX C**

STATE OF WASHINGTON  
2015 MAR 30 AM 9:51

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 71309-4-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
D'ANDRE JOVON CORBIN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 30, 2015
_____		

BECKER, J. — This appeal of a conviction for felony cyberstalking challenges the sufficiency of the evidence to prove a true threat. Notwithstanding the victim's testimony that she was not frightened, there was sufficient evidence to prove it was objectively foreseeable that the appellant's threats to kill would be taken seriously.

On December 14, 2012, appellant D'Andre Corbin conducted a long and hostile conversation via text messages with his wife while she was at work. The messages from Corbin stated that he was going to try to kill her that night. Several messages simply said, "Ur dead." Corbin's wife texted back that she hated him. She called him a loser. Corbin responded with promises that he was coming that night to hurt her, to knock her out, and to kill her. Exhibit 14 is a series of photographs of these and similar text messages between 7 and 8 p.m.

No. 71309-4-1/2

Corbin also left a voice mail message on his wife's phone that evening in which he expressed his intent to kill her.

Shortly after the text message exchange ended, Corbin appeared at his wife's workplace. She called 911. Corbin found her and chased her out the back door of the workplace and into a roadway where he was seen holding her hair and punching her with his arms and fists. Police intervened and took the victim to the hospital.

The State charged Corbin with one count of attempted first degree assault and two counts of felony cyberstalking. The jury was given the following to-convict instruction for felony cyberstalking, requiring proof that the defendant used electronic communication to threaten injury and that "the threat consisted of a threat to kill the other person":

To convict the defendant of the crime of felony cyberstalking, . . . each of the following five elements must be proved beyond a reasonable doubt:

(1) That on or about December 14, 2012, the defendant made an electronic communication to another person Denise Corbin;

(2) That at the time the defendant initiated the electronic message the defendant intended to harass, intimidate, torment, or embarrass that other person;

(3) That the defendant threatened to inflict injury on the person or property or of any member of the family or household of the person;

(4) That the threat consisted of a threat to kill the other person; and

(5) That the electronic communication was made or received in the State of Washington.

Instruction 16. A Petrich instruction was also given:

The State alleges in counts 2 and 3 that the defendant committed acts of cyberstalking on multiple occasions. To convict the defendant of any count of cyberstalking in either count 2 or

count 3, one particular act of cyberstalking must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of cyberstalking.

Instruction 22. The jury convicted Corbin as charged.

Where a threat to commit bodily harm is an element of a crime, the State must prove the threat was a "true threat." State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). This is because of the danger that the criminal statute will be used to criminalize pure speech and impinge on First Amendment rights. The test for determining a "true threat" is an objective test that focuses on the speaker. Kilburn, 151 Wn.2d at 54. The State need not prove the speaker actually intended to carry out the threat. The question is whether a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict the harm threatened. Kilburn, 151 Wn.2d at 46. True threats are not protected speech because of the "fear of harm aroused in the person threatened and the disruption that may occur as a result of that fear." Kilburn, 151 Wn.2d at 46.

Consistent with Kilburn, instruction 17 informed the jury that a statement or act, to be a threat, "must occur in the context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk." Kilburn, 151 Wn.2d at 43.

Felony cyberstalking is an offense with the potential to be based on protected speech. For that reason, this court conducts an independent

examination of the entire record to be sure that the speech in question actually falls within the unprotected category. Kilburn, 151 Wn.2d at 50.

Corbin argues that an examination of the record in this case shows that taken in context, his threats to kill were not true threats. His wife testified that she did not take the threats seriously because she and Corbin had made similar threats to each other in previous arguments. She said it was "something he said to get under my skin, to make me mad, and I know that. And it wasn't something where, immediately, it was, like, 'Okay, he's going to kill me; I'm scared.' That wasn't the case." A coworker testified that Corbin's wife did not seem alarmed when she received and read the text messages before Corbin arrived. Corbin argues that his wife's caustic and insulting replies to his messages supply additional context proving Corbin would not have reasonably foreseen that his threats to kill would be regarded as a serious expression of intent to carry out the threat.

We disagree. The jury was not obligated to accept the wife's testimony that Corbin's threats to kill were routine and familiar. The jury could have concluded that she was minimizing the threats, perhaps to protect Corbin. The fact that the wife called the police and ran outside screaming as soon as she saw Corbin entering her workplace contradicts her testimony that she did not take the messages seriously. The evidence supports an inference that a reasonable person in Corbin's situation would have foreseen that his threats to kill his wife would have been interpreted as a serious expression of intent to carry out the threats.

Corbin next argues that his sentence exceeded the statutory maximum for attempted first degree assault. The State concedes that because attempted first degree assault is treated as a Class B felony, the statutory maximum is 120 months. RCW 9A.28.020(3)(b); RCW 9A.20.021(1)(b). We accept the State's concession. The imposition of 36 months' community custody in combination with 120 months' imprisonment exceeds the statutory maximum. This must be corrected by resentencing.

Corbin has filed a statement identifying additional grounds for review pursuant to RAP 10.10.

First, Corbin asserts that the trial court violated his right to remain silent by compelling him to produce documentary evidence against himself. We find no basis for review.

Second, he alleges the State suppressed Brady<sup>1</sup> material and the result was ineffective assistance of counsel. This ground does not warrant further review.

Third, Corbin asserts that he received ineffective assistance of counsel when his attorney proposed a unanimity instruction on count 1 that misstated the law, relieving the State of its burden to prove specific intent. That unanimity instruction, instruction 13A, does not misstate the law.

Fourth, he asserts that he received ineffective assistance of counsel when his attorney failed to argue that the acts underlying all three convictions constituted the same criminal conduct. This ground does warrant review. At this

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<sup>1</sup> Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

court's request, the State provided a brief.<sup>2</sup> The brief was unresponsive to our request, in that it treated our inquiry about same criminal conduct as if it were an inquiry about a continuing course of conduct.

Two or more crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Count 1 was attempted assault in the first degree. Counts 2 and 3 were felony cyberstalking. Attempted assault and felony cyberstalking do not require the same criminal intent and, in this case, were not committed at the same time and place. The two convictions for felony cyberstalking do, however, likely satisfy the test for same criminal conduct.

It is the defendant who must establish that crimes constitute the same criminal conduct at sentencing. State v. Graciano, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). Here, the issue was not raised at sentencing. Nevertheless, it may be raised on appeal as an issue of ineffective assistance of counsel. See, e.g., State v. Brown, 159 Wn. App. 1, 16, 248 P.3d 518 (2010), review denied, 171 Wn.2d 1015 (2011).

A reasonable possibility exists that the sentencing court would have found that the two felony cyberstalking convictions constituted the same criminal conduct had Corbin's counsel argued that the two offenses were committed at the same time and place and involved the same victim and the same intent. Corbin received ineffective assistance of counsel with respect to this issue. He is

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<sup>2</sup> The State's motion for an extension of time to file this brief is granted.

entitled to a remand for a new sentencing hearing in which counsel may argue that the two cyberstalking offenses encompass the same criminal conduct.

Fifth, Corbin asserts that convictions for counts 2 and 3 violate double jeopardy under a unit of prosecution analysis, citing State v. Morales, 174 Wn. App. 370, 298 P.3d 791 (2013). This ground also warrants review.

No case has yet addressed the unit of prosecution either for felony cyberstalking, RCW 9.61.020, or for the similarly worded offense of telephone harassment, RCW 9.61.230. Morales provides a unit of prosecution analysis for the related, but differently worded, offense of harassment, RCW 9A.46.010.

Given the particular scenario in Morales, the court concluded the unit of prosecution was a threat to cause bodily harm to a single identified person at a particular time and place, regardless of how many times it is communicated. Morales, 174 Wn. App. at 387.

At this court's request, the State responded by pointing out that the cyberstalking statute states that a person is guilty when he or she "makes an electronic communication to such other person or a third party." RCW 9.61.260(1) (*emphasis added*). This is different from the wording of the statute in Morales. In the scenario here, this language suggests the legislative intent was that each distinct electronic communication amounting to a threat to kill would constitute a separate crime of felony cyberstalking. Accordingly, we conclude Corbin's assertion of a double jeopardy violation does not warrant further review.

Sixth, Corbin contends that the trial court miscalculated his offender score because it counted two juvenile criminal adjudications from 1994 and 1995, before he turned 15 years old. Prior to an amendment to the Sentencing Reform Act in 1997, juvenile offenses committed before the age of 15 were not included as prior offenses in the calculation of offender scores for current offenses. In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 4, 100 P.3d 805 (2004). However, a series of later legislative amendments and court cases established that for crimes committed after the legislature's 2002 amendments to the Sentencing Reform Act, criminal history includes all juvenile adjudications that have not since been vacated. State v. Varga, 151 Wn.2d 179, 191-95, 86 P.3d 139 (2004). Corbin was sentenced for offenses that occurred in 2012. Therefore, his statement does not provide a basis to review his contention that his 1994 and 1995 juvenile adjudications were improperly reflected in his offender score.

The felony cyberstalking convictions are affirmed. The case is remanded for a new sentencing hearing in which Corbin may argue that the two cyberstalking offenses encompass the same criminal conduct. At resentencing, the court shall also ensure that the sentence does not exceed the statutory maximum.

Becker, J.

WE CONCUR:

Jan, J.

Schindler, J.