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NO. 33735-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SUNG DO GO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable LINDA C.J. LEE

No. 05-1-02154-5

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

FILED
COURT OF APPEALS
DIVISION II
06 JUN 2 PM 2:04
STATE OF WASHINGTON
BY *cm*

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the defendant entitled to relief from his conviction for felony harassment when his counsel was ineffective in proposing jury instructions which did not clearly set forth the State's burden of proving that the defendant made a threat to kill the victim, and that the victim reasonably feared that the threat to kill would be carried out?
2. Were the defendant's convictions for harassment and second degree assault appropriate when each offense required proof of an additional fact which the other did not, and neither offense was necessary in order to convict for the other?

B. STATEMENT OF THE CASE.

On the afternoon of May 3, 2005, Mr. Eui Hwang, owner of the Teriyaki House in Sumner, Washington, made a business decision to let an employee go who had been causing trouble at work. RP 95, 101, 103-105. After lunch, Mr. Hwang took the employee, Sung Do Go, (hereinafter defendant), outside the restaurant and told him he had one month to find another job. RP 106. About fifteen minutes later, the defendant came back into the restaurant's kitchen, threw a lighter at a table and told Mr. Hwang he was going to leave in two weeks. RP 108-109. Mr. Hwang said that was okay, but the conversation continued to escalate into a heated argument. RP 109. The defendant became upset and started cursing at Mr. Hwang, which was considered improper in Korean culture because

Mr. Hwang was the defendant's elder. RP 109. Mr. Hwang responded to the defendant's actions by calling him crazy and a "jasik," which is a mild Korean curse meaning to treat someone as childlike. RP 198-199.

At some point in the argument, Ms. Sun J. Shin, another Teriyaki House employee, came into the kitchen and was shocked at the way the defendant was treating Mr. Hwang. RP 110-111. Ms. Shin asked the defendant how he could speak to his boss that way. RP 111. The defendant tried to hit Ms. Shin, then rammed his head into Mr. Hwang's chest and started repeatedly saying, "hit me... hit me." RP 111, 113. After pushing the defendant away, Mr. Hwang said he did not want to argue anymore and that the defendant needed to get off of Mr. Hwang's property. RP 112.

The defendant responded by stating that he was going to kill Mr. Hwang. RP 113. After the defendant's threat, Mr. Hwang followed the defendant because he was scared. RP 113-114. The defendant ran over to the sink and grabbed a knife with a five inch blade. RP 113-14, 204. As the defendant was turning to point the knife at him, Mr. Hwang managed to grab both of the defendant's wrists. RP 114-115. It was difficult for Mr. Hwang to hold the defendant's arms, but Mr. Hwang felt that if the defendant was able to get loose with the big knife it would be trouble. RP 116. Mr. Hwang felt at that time that he was going to die. RP 116. Mr.

Hwang was eventually able to hit the defendant's wrists against the sink causing him to drop the knife in the sink. RP 117. Mr. Hwang thought that the defendant would not try to get the knife again, because "[n]o matter how angry [the defendant was], once is enough." RP 196.

While Mr. Hwang was heading towards the door, the defendant grabbed the knife again. RP 117. The defendant then came up to Mr. Hwang and held the knife to his neck. RP 117. Ms. Shin yelled, "Don't do it. Don't do it." RP 118. The defendant pointed the knife at her and told her to shut up. RP 120. He then began growling and jabbed the knife at Mr. Hwang's stomach without cutting him. RP 118. Mr. Hwang was able to grab a cell phone off a shelf and started dialing numbers, telling the defendant that he wanted to call the police. RP 120. The defendant put the knife down and went outside. RP 122. Mr. Hwang had only pretended to call the police because he did not want to ruin the defendant's life. RP 121. Mr. Hwang felt like everything had calmed down and called his wife to come into work. RP 123. About a half an hour later, Mr. Hwang decided that he would call the police. RP 125, 205. Mr. Hwang then called the Sumner police department and reported that one of his employees had tried to kill him. RP 128.

On May 4, 2005, the State charged the defendant with two counts of second degree assault involving Mr. Hwang and Ms. Shin. CP 1-3.

The State also charged the defendant with one count of felony harassment involving only Mr. Hwang. CP 1-3. All three counts included a deadly weapon enhancement. CP 1-3. On July 27, 2005, the State filed an amended information adding another count of felony harassment with a deadly weapon enhancement involving Ms. Shin. CP 42-44. On July 27, 2005, the case came before the Honorable Linda C.J. Lee for a jury trial. RP 3.

On August 4, 2005, the jury found the defendant guilty of the second degree assault and harassment charges involving Mr. Hwang. CP 159, 163; RP 438. The jury also answered a special interrogatory by finding that the threat referenced in the harassment concerning Mr. Hwang was “a threat to kill the person threatened.” CP 165; RP 438. The jury found the defendant not guilty of the second degree assault and harassment charges involving Ms. Shin. CP 161, 170; RP 438. The defendant was sentenced within the standard range, and filed a timely notice of appeal. CP 189-201; 206-219.

C. ARGUMENT.

1. THE DEFENDANT IS ENTITLED TO RELIEF FROM HIS CONVICTION FOR FELONY HARASSMENT WHERE HIS COUNSEL WAS INEFFECTIVE IN PROPOSING INSTRUCTIONS WHICH DID NOT CLEARLY SET FORTH THE STATE'S BURDEN OF PROVING THAT THE DEFENDANT MADE A THREAT TO KILL AND THAT THE VICTIM REASONABLY FEARED THAT THE THREAT TO KILL WOULD BE CARRIED OUT.

Under the invited error doctrine, a defendant may not request that instructions be given to the jury and then complain upon appeal that the instructions are constitutionally infirm. State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990); State v. Boyer, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979). However, review is not precluded where invited error is the result of ineffectiveness of counsel. State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995).

To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335. It is deficient performance to propose instructions which

incorrectly set out the elements of the crime with which the defendant is charged. See State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); See also State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005) ("to convict' instruction[s] must contain all elements essential to the conviction.").

In order to convict the defendant of felony harassment based on a threat to kill, RCW 9A.46.020 requires the State to prove there was a threat to kill and "that the person threatened was placed in reasonable fear that the threat to kill would be carried out." Mills, 154 Wn.2d at 10-11(citing State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003)). In Mills, the "to convict" instruction did not include all of the elements of felony harassment; specifically, it described the elements of misdemeanor harassment, omitting the "threat to kill" element of felony harassment. Mills, 154 Wn.2d at 13-14. That instruction stated in pertinent part:

To convict the defendant of the crime of harassment, as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That . . . the defendant knowingly threatened:
 - (a) to cause bodily injury immediately or in the future [to the victim]. . . .
- (2) That the words or conduct of the defendant placed [the victim] in reasonable fear that the threat would be carried out.

Id. at 13.

While this instruction properly defined the base crime of misdemeanor harassment, the court failed to instruct the jury properly on

the "threat to kill" element of "felony harassment." Id. at 14. Specifically, it did not instruct the jury that it must find that the victim "was placed in reasonable fear the threat to kill would be carried out." Id. Instead, the special verdict instruction simply stated in relevant part, "If you find that the State has proved beyond a reasonable doubt that the defendant's threat to cause bodily harm was a threat to kill . . . it will be your duty to answer the special verdict form "yes." Id. at 13.

The court rejected the State's argument that the special verdict instruction referred to the "to convict" instruction, which required the jury to find that the defendant placed the victim in reasonable fear the threat would be carried out. Id. at 14. The court observed that "[a] jury might believe that [the defendant] placed the victim in reasonable fear of bodily injury without considering whether [the defendant] placed the victim in reasonable fear of being killed." Id. at 15. As such, it found the special verdict instruction inadequate because it did not sufficiently fill the gap between misdemeanor and felony harassment. Id. Accordingly, the instructions failed to meet the requirement "that all elements of the offense be clearly set forth." Id. (citing State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)).

In this case, the defendant claims his counsel was deficient in proposing instructions 21, 23, and the special interrogatory which fail to hold the State to proving all elements of felony harassment.

Instruction 21 states in pertinent part that:

A person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person, and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

CP 45-85.

Instruction 23 states in pertinent part that:

To convict the defendant of the crime of harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That . . . the defendant knowingly threatened to cause bodily injury immediately or in the future to Eui Hwang; and
- (2) That the words or conduct of the defendant placed Eui Hwang in reasonable fear that the threat would be carried out.

CP 45-85.

The special interrogatory stated that “[w]e, the jury, having found the defendant Sung Do Go, Guilty of the crime of Harassment, as charged in Count III, answer the Special Interrogatory as follows: Was the threat to do bodily injury to Eui Hwang a threat to kill Eui Hwang? ANSWER: (Yes or No).” CP 45-85.

The instructions in this case are similar to the Mills instructions and are equally inadequate in that they fail to meet the requirement that all elements of felony harassment be clearly set forth. 154 Wn.2d at 15.

Defense counsel's performance was deficient seeing as Mills was decided on April 7, 2005, while the defendant's trial did not start until July 27, 2005. 154 Wn.2d at 1; RP 1. Although legitimate trial strategy or tactics cannot be the basis for an ineffectiveness of counsel claim, State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994), there is no tactical reason for proposing jury instructions which contain less than all the elements essential for a conviction. The defendant was also prejudiced because there is a reasonable probability that, if all of the elements were instructed, the result of the proceeding may have been different. Accordingly, the felony harassment conviction should be reversed.

However, the jury determination on the base misdemeanor harassment conviction is unaffected by this instructional error. See C.G., 150 Wn.2d at 611 (finding "the State will still be able to charge one who threatens to kill with threatening to inflict bodily injury, in the nature of a lesser included offense..."). When the evidence is "sufficient to support conviction of a lesser degree crime, an appellate court may remand for entry of judgment and sentence on the lesser degree." State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996)). The evidence here is sufficient to show that the defendant committed misdemeanor harassment by threatening to kill Mr. Hwang, who thought the threat would be carried out. RP 113-116. Further, the "to convict" instruction in this case set forth the proper elements for misdemeanor harassment. Mills, 154 Wn.2d at 14. Therefore, the case should be remanded for a choice to either enter

a judgment and sentence for the misdemeanor harassment conviction or retry for felony harassment. See State v. Thomas, 150 Wn.2d 821, 849, 83 P.3d 970 (2004) (reversing the determination on an aggravated circumstance due to faulty jury instructions and remanding for either a new trial for the aggravated circumstance, or resentencing on the base crime).

2. THE DEFENDANT'S CONVICTIONS FOR HARASSMENT AND SECOND DEGREE ASSAULT ARE APPROPRIATE BECAUSE EACH OFFENSE REQUIRED PROOF OF AN ADDITIONAL FACT WHICH THE OTHER DID NOT.

Claims of double jeopardy, which are questions of law, are reviewed de novo. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). A double jeopardy claim may be raised for the first time on appeal. Id.; RAP 2.5(a). The United States Constitution provides that a person may not be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. Similarly, the Washington State Constitution provides that a person may not be "twice put in jeopardy for the same offense." Wash. Const. art. I, § 9.

Washington courts look first to the statutory language to determine if it expressly permits multiple punishments for the applicable statutes. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). Because the second degree assault (RCW 9A.36.021) and harassment (RCW

9A.46.020) statutes do not expressly provide for punishment for the same act, the court turns to the same evidence rule. Id. at 778.

Under the same evidence rule, if each offense contains elements not contained in the other offense, the offenses are different and multiple convictions can stand.¹ Id. at 454. The test requires the court to determine "whether each provision requires proof of a fact which the other does not." Id. at 455 (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). The court looks not only at whether the offenses are related in fact, but also whether they are related in law. Calle, 125 Wn.2d at 778 (finding the offense of incest was not identical in law to the offense of rape because incest requires proof of relationship, while rape requires proof of force).

As instructed in this case, the elements of second degree assault are (1) an intentional assault² with (2) a deadly weapon. RCW 9A.36.021.

¹ The first prong of the test described in Calle derives from a United States Supreme Court case analyzing double jeopardy principles under the Sixth Amendment. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

² The term "assault" is not defined in the criminal code, and thus Washington courts have turned to the common law for its definition. State v. Aumick, 73 Wn. App. 379, 382, 869 P.2d 421 (1994); State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263, review denied, 110 Wn.2d 1019 (1988). Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault]. State v. Bland, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993) (quoting State v. Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992)); Aumick, 73 Wn. App. at 382. The elements of assault as defined in common law and the elements of harassment are not the same. As mentioned above, to prove assault, the State is not required to prove a threat. Further, to prove harassment, the State is not required to prove a physical assault.

The pertinent elements of harassment are (1) a threat to cause bodily injury immediately or in the future, and (2) the person threatened was in reasonable fear that the threat would be carried out. RCW 9A.46.020. To convict the defendant of harassment, the State had to prove that he made an express threat to cause bodily injury to Mr. Hwang. The State was not required to prove a similar threat to convict him of second degree assault; rather, the State had to prove that the defendant assaulted Mr. Hwang with a deadly weapon. Nor did the State have to prove assault with a deadly weapon to convict the defendant of harassment. Because each offense includes elements not included in the other, the convictions do not satisfy the "same evidence" test set forth in Blockburger.

The defendant relies on In re Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004), where a double jeopardy violation was found under the same evidence test because "the evidence required to support a conviction upon one of the [charged crimes] would have been sufficient to warrant a conviction upon the other." (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)). In Orange, the court concluded that the evidence required to support the conviction for the attempted murder (a single gunshot) was sufficient to support the conviction for the crime of assault. 152 Wn.2d at 820.

Orange can be distinguished because the crimes in that case included a lesser-included crime that implicated the same facts and law. By contrast, the case here involves distinct crimes requiring different

factual elements. Unlike the charges in Orange which relied on the same act, the charges in this case relate to two separate acts: the defendant threatening to kill Mr. Hwang, and the defendant holding the knife up to Mr. Hwang. While a single gunshot was sufficient for the required evidence of both crimes in Orange, the defendant's actions of holding the knife up to Mr. Hwang would not have been sufficient for the crime of harassment, and the defendant's threat to Mr. Hwang would not have been sufficient for the crime of assault.

As alluded to above, the only evidence *required* to prove harassment was that the defendant threatened Mr. Hwang, and that Mr. Hwang thought the threat would be carried out. These requirements could have been satisfied before the defendant ever picked up the knife. The defendant threatened to kill Mr. Hwang, and then Mr. Hwang followed the defendant over to the sink because he was scared. RP 113-114. Accordingly, the evidence required to prove harassment was not sufficient to prove assault. Further, the only evidence required to prove second degree assault was that the defendant intentionally assaulted Mr. Hwang with a knife. These requirements could have been satisfied without evidence of the threat. Accordingly, the evidence required to prove second degree assault was not sufficient to prove harassment. In sum, double jeopardy does not preclude the defendant's convictions for second degree assault and harassment.

If the two statutes pass the "same evidence" test, multiple convictions may not stand if the legislature has "otherwise clearly indicated its intent that the same conduct or transaction will not be punished under both statutes." State v. Baldwin, 150 Wn.2d 448, 455-56, 78 P.3d 1005 (2003). The defendant has failed to present any evidence on this matter that would support his position. Conversely, the differing purposes served by the assault³ and harassment⁴ statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature's intent to punish them as separate offenses. See Calle, 125 Wn.2d at 780.

D. CONCLUSION.

For the foregoing reasons, this Court should affirm the defendant's second degree assault and misdemeanor harassment convictions. This

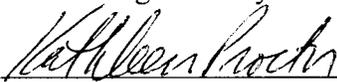
³ The assault statutes are directed at assaultive conduct. State v. Valentine, 108 Wn. App. 24, 28, 29 P.3d 42 (2001).

⁴ Purpose of harassment statute is to prevent "serious, personal harassment... designed to coerce, intimidate or humiliate the victim." RCW 9A.46.010.

court should also reverse the defendant's felony harassment conviction and remand for resentencing.

DATED: MAY 31, 2006

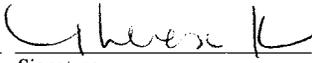
GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

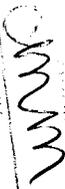
Levi Larson
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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