

NO. 34600-1

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

STATE OF WASHINGTON, RESPONDENT

v.

JERRY JOHN UTANIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming, Judge

No. 04-1-04882-8

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the prosecutor committed misconduct where her statements in closing were proper argument which drew reasonable inferences based on the evidence presented at trial?
2. Has the defendant failed to meet his burden of showing ineffective assistance of counsel when the record does not reveal any deficient performance or resulting prejudice?
3. Under State v. Pillatos, is defendant's exceptional sentence proper when his trial began after the Legislature amended the SRA to comply with the provisions of Blakely and the jury found the aggravating factor beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

On October 18, 2004, the State charged JERRY JOHN UTANIS, hereinafter "defendant," with one count of attempted murder in the first degree in violation of RCW 9A.32.030(1)(a), and one count of burglary in the first degree in violation of RCW 9A.52.020(1)(b). CP 1-4. The State charged both crimes as acts of domestic violence as defendant attacked his girlfriend a few days after she ended their relationship. CP 1-4.

On January 3, 2006¹, the State moved to amend the information to include an aggravating factor on the attempted murder charge, specifically that the crime occurred within sight or sound of the victim's minor children, as provided in RCW 9.94A.535. CP 23-25; RP 4-5. The court granted the State's motion to amend, with no objection from defendant. RP 5. Defendant pleaded not guilty to the amended information. RP 5.

Immediately after the State's motion, the court held a 3.5 hearing, to determine whether defendant's out of court statements could be used at trial. The responding officers, Sumner Patrol Officer James Boulay and Sergeant Matthew Kurle, testified at the hearing. RP 27, 50. Based on the officers' testimony, the court found defendant's statements admissible. CP 56-62; RP 67.

Trial commenced on January 5, 2006. RP 87. On January 13, 2006, the jury returned guilty verdicts on both counts and found that the crimes were acts of domestic violence. CP 167-68, 170-71; RP 621. Additionally, the jury found that defendant committed the crime of attempted murder in the first degree within sight or sound of the victim's minor children. CP 169; RP 621.

¹ The court granted several continuances between November 29, 2004, and December 2, 2005. CP 12, 221-23. The continuances between January 18, 2005, and June 14, 2005, were granted in relation to defendant's request for a mental evaluation. CP 222-23. Continuances after that date involved new defense counsel's need to familiarize himself with the case. CP 12.

On March 3, 2006, the court sentenced defendant to an exceptional sentence of 300 months on the attempted murder charge, together with 41 months on the burglary charge to run concurrently. CP 175-87; RP 655. The standard range for the attempted murder charge was 203.25 to 270.25 months. CP 175-87. The court entered Findings of Fact in support of its decision to impose an exceptional sentence. CP 211-14.

Defendant filed this timely notice of appeal. CP 197-210.

2. Facts

On October 17, 2004, Sumner Police Sergeant Matthew Kurle responded to a 911 open-line call to an apartment complex at 5011 157th Avenue Court E, in Sumner, Washington. RP 178-79. When he arrived at the building, Sergeant Kurle noticed that the door to one of the units was open and there was damage to the doorframe. RP 180-81. Sergeant Kurle waited outside the apartment until Sumner Patrol Officer Joseph Boulay arrived, approximately one minute later. RP 180, 217. After Officer Boulay's arrival, Sergeant Kurle called into the apartment, identifying himself as a Sumner police officer and ordering whoever was inside to come out. RP 181, 221. Sergeant Kurle heard a male voice respond to his shout. RP 181.

Defendant came out of the apartment and immediately turned around and put his hands behind his back, telling the officers to, "take me to jail." RP 182, 221. Sergeant Kurle started to ask why, but before he could get the question out, defendant blurted out, "I killed her. I almost

did. I think I killed her.” RP 182. Defendant then indicated that “she” was in the back bedroom, dead or unconscious. RP 183, 222.

The officers observed that defendant was calm and nonchalant. RP 182, 222. Officer Boulay observed that defendant had not been crying, nor did he appear confused. RP 222. Officer Boulay did not recall smelling any intoxicants on defendant. RP 224.

Officer Boulay detained defendant while Sergeant Kurle went to into the apartment. RP 183, 222. Officer Boulay placed defendant in handcuffs and read him the Miranda² warnings from a prepared card. RP 183. Defendant indicated that he understood his rights and that he wished to speak to the officers. RP 223. When Officer Boulay asked defendant what was going on, defendant responded, “I tried to choke her to death,” and, “I came here knowing what I was doing.” RP 224-25.

Defendant told Officer Boulay that the victim was his ex-girlfriend, Erin Williams. RP 225. Defendant had spoken to Paul Cardenas, another of the victim’s ex-boyfriends, who told defendant that Ms. Williams did not love defendant anymore. RP 225. Defendant stated that he went into a rage after hearing what Paul had to say. RP 225. Defendant told the officer he kicked in Ms. Williams’ door and assaulted her with his hands. RP 225. Defendant also informed Officer Boulay that,

² Miranda v. Arizona, 348 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

“a voice in his head told him to kill Ms. Williams.” RP 225. Defendant never mentioned the voice in his head again. RP 225.

Officer Boulay transported defendant to the Sumner Police Department. RP 227. On the way to the station, Officer Boulay noticed that defendant had scratches on his neck. Defendant told Officer Boulay that the scratches were not important because, “she was just defending herself.” RP 228.

Officer Boulay again advised defendant of his rights after they reached the station and defendant indicated that he understood his rights. RP 228-230. Defendant agreed to provide a written statement, but asked for Officer Boulay’s help with the writing. RP 230-31. Defendant was forthcoming about what happened, and Officer Boulay did not have to ask many questions of him. RP 231. As defendant was speaking, Officer Boulay wrote the statement in defendant’s own words. RP 232. When defendant finished, Officer Boulay read the statement aloud with defendant reading along. RP 235. Officer Boulay had defendant initial each line and sign at the bottom of both pages. RP 233-35.

Defendant made the following statement to Officer Boulay:

Sometime this evening I called Paul to find out what was going on between him and Erin. Paul told me she doesn’t love me, get over it. He said she called him last night and told him she still loved him. That made me feel angry. Then I called her. Erin said she didn’t say anything like that to Paul. I thought she was lying. I got off the phone, had a few more beers, and went home. I smoked two cigarettes. I thought about if I was going to hurt her or not.

Then I just went and did it. I kicked in the door. She was in front of the dryer doors on the phone. I lunged towards her. I took her to the ground. I tried to take her Adams apple out of her throat with my hands and break her neck. I squeezed her windpipe with my left hand. My right hand was trying to break her neck by pulling her chin at an angle. She tried to hit my nuts and grabbed at my throat. I made up my mind when I was in my apartment that I wanted to kill her. I choked her until I heard somebody coming. It was the police.

CP 224-25; RP 234; Appendix A.

Sergeant Kurle remained at the scene and looked for Ms. Williams. RP 183. When he got to the back bedroom, he saw Ms. Williams on the floor, laying face down, with her head tilted to the side. RP 183. Ms. Williams was unconscious and unresponsive to verbal or physical stimulus. RP 186. Sergeant Kurle pushed Ms. Williams' hair back from her face and noticed that Ms. Williams was very pale. RP 184. Ms. Williams' eyes were bulging, her right eye was flickering, and she was drooling from her mouth. RP 184. Ms. Williams was not breathing in, but appeared to be releasing a long breath. RP 184. Sergeant Kurle turned her over to open her airway, and Ms. Williams slowly started to breathe again, but her breaths were very wheezy. RP 185-86. She started to respond to Sergeant Kurle after approximately 30 to 40 seconds. RP 185. She went in and out of consciousness about three times in Sergeant Kurle's presence. RP 213.

After getting a response from Ms. Williams, Sergeant Kurle went to check on her children. RP 186. Ms. Williams had two children, ages

two and four. RP 149. The door to the children's room was approximately a foot away from Ms. Williams' bedroom. RP 187. Sergeant Kurle found both kids awake, frightened, and hidden under their blankets. RP 187.

Sergeant Kurle went back to Ms. Williams and called for medical aid. RP 189. The emergency medical response team arrived five to ten minutes later and Sergeant Kurle stayed to watch the children until Ms. Williams' mother arrived. RP 189-90.

Paramedic Jeff Berry arrived in response to Sergeant Kurle's call for medical aid. RP 313. Mr. Berry found Ms. Williams still on the floor with her eyes closed, but coherent and awake. RP 314. Mr. Berry examined Ms. Williams for injuries. RP 315-17. Ms. Williams complained of difficulty breathing, and head and neck pain. RP 315. Mr. Berry noticed Ms. Williams left ear lobe was bleeding, she had pain and redness on her neck, an abrasion over the jugular area of her neck, and she had lost bladder control. RP 317. Ms. Williams' injuries appeared consistent with having been choked. RP 319-20. The paramedics transported Ms. Williams to the hospital. RP 321.

Ms. Williams described the nature of her relationship with defendant and the events leading up to the attack. Ms. Williams and defendant had been dating for approximately one and a half months. RP 133. She and defendant lived in the same apartment complex, but did not live together in the same unit. RP 133. Ms. Williams had regular contact

with her ex-boyfriend, Paul Cardenas, because they had a child together. RP 132. She had told defendant about Mr. Cardenas, but never gave him Mr. Cardenas' phone number. RP 134. Defendant would become angry whenever she would talk about Mr. Cardenas. RP 134-35. Approximately a month after they started dating, Ms. Williams ended her relationship with defendant. RP 138. Ms. Williams and defendant continue to spend time together, but a week later, she informed defendant that she did not want to see him anymore. RP 139.

The following day, defendant came to her apartment to play cards. RP 140. Ms. Williams told him again that she did not want to see him anymore. RP 140. Defendant became upset, and kicked a child's plastic table. RP 140-41. Defendant kicked the table out of the apartment and into the grassy area behind the building. RP 141. Defendant calmed down and returned to Ms. Williams' apartment. RP 141.

When defendant finally went to leave for the night, he told Ms. Williams that he would have to plug her phone back in. RP 141. Ms. Williams was unaware that he had unplugged it. RP 141. He told her that he had unplugged the phone because he was afraid she was going to call the police. RP 141. After he left, Ms. Williams saw defendant sitting on his own porch, across from her apartment. RP 144. Defendant sat on his porch most of the night. RP 144.

The following morning, October 16, 2004, defendant returned to Ms. Williams' apartment with a coffee and some household items for her.

RP 143. Ms. Williams noticed that defendant looked drawn out, as if from lack of sleep. RP 144. Defendant asked Ms. Williams if he could say goodbye to her kids and Ms. Williams agreed. RP 144. Defendant then went back to his apartment and Ms. Williams noticed that he spent most of the day sitting on his porch, staring into space. RP 144-45.

At approximately 7:00 p.m. that evening, defendant returned to Ms. Williams' apartment, this time he asked if he could use her phone. RP 145. Defendant used the phone and left. RP 145-46. At 11:30 p.m. that night, defendant called Ms. Williams and demanded to know "what was going on." RP 146. She and defendant spoke on the phone for approximately five minutes, mostly about the end of their relationship. RP 146. Defendant wanted to know if Ms. Williams still loved him; she said no. RP 146.

Mr. Cardenas called Ms. Williams at about midnight on October 17, 2004. RP 147. Mr. Cardenas told Ms. Williams that defendant had called him, demanding to know what Ms. Williams told him about the relationship. RP 147. Defendant also asked Mr. Cardenas if he was still seeing Ms. Williams. RP 147. Mr. Cardenas called Ms. Williams again at 2:30 a.m. to make sure she was okay. RP 147.

After Mr. Cardenas' second call, Ms. Williams got up to use the restroom. RP 147. She had the phone with her in case Mr. Cardenas called back. RP 147-48. As she was heading back to bed, she heard pounding on the sliding glass door at the back of her apartment. RP 149.

Ms. Williams knew it was defendant and decided to pretend she had not heard him, in the hope he would go away. RP 149. A couple of minutes later, defendant broke through the front door of Ms. Williams' apartment. RP 149.

Defendant entered Ms. Williams' apartment and approached her as she stood in her bedroom. RP 150. When he entered the room, he said, "what the fuck is going on," and pushed Ms. Williams face down on her bed. RP 152. Defendant grabbed her in a headlock and delivered four to five punches to the left side of Ms. Williams' head. RP 150. Ms. Williams had her phone in her hand during the attack and was able to dial 911. RP 150-52. After she dialed, defendant took the phone and threw it, asking, "what did you do that for?" RP 152. The 911 operator could hear Ms. Williams' screams over the open line. RP 150.

After punching Ms. Williams, defendant put his hand on her throat and started to choke her. RP 153. Ms. Williams fought back, but defendant continued to choke her and she finally started to lose consciousness. RP 154. Ms. Williams said, "my children," and defendant responded, "I'm not gonna hurt your kids, just you." RP 154. Ms. Williams had seen defendant demonstrate a choke hold before, and defendant had maintained that he could kill someone using it. RP 172. She felt she was going to die and mentally said goodbye to her children. RP 154-55. She lost control of her bladder and blacked out. RP 154.

As a result of the attack, Ms. Williams suffered from bruises to her face, ear, shoulders, and leg, as well as the abrasions on her neck. RP 166, 317. She had a hard time speaking and breathing after the attack and continued to have problems with her voice and throat through the time of trial. RP 170.

C. ARGUMENT.

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHERE HER STATEMENTS IN CLOSING WERE PROPER ARGUMENT WHICH DREW REASONABLE INFERENCES BASED ON THE EVIDENCE PRESENTED AT TRIAL.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962). A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert.

denied, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986), State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), rev. denied, 128 Wn.2d 1015 (1996).

If a curative instruction could have remedied the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

The prosecutor has wide latitude during closing argument to draw and express reasonable inferences from the evidence. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

In the present case, defendant alleges that the prosecutor committed misconduct in closing argument by misstating facts, specifically to the State’s characterization of defendant’s phone call to Ms. Williams where the prosecutor argued:

... He then calls Erin around 11:30 at night. What does he call her about? Do you love me? I still love you. He wants an answer. He wants it to work out. Another sign of rejection. She tells him, no, I don’t love you.

See Appellant's Brief at 11; RP 528. Defendant also generally challenges the State's theory that defendant was obsessed with Ms. Williams after their breakup. See Appellant's Brief at 11-14. A review of the record shows that defendant did object to either argument to which he now assigns error. RP 528, 533-34. Thus, any error is considered waived unless this court can find that the challenged remarks were so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

During closing argument, the State painted a picture of an obsessed man, angered by rejection, and ready to make Ms. Williams pay for her rejection. RP 522. The prosecutor's statements were based on evidence presented at trial. Ms. Williams testified that after she broke up with defendant, he returned to her house several times, each time wanting to talk about their relationship. RP 139-46. When defendant was not at Ms. Williams' apartment, he was sitting on his porch, which was directly across from Ms. Williams' apartment, "staring into space." RP 144. When Ms. Williams saw defendant up close, he looked "drawn out," like he had not had any sleep. RP 144.

Several days after the initial break up, defendant called Ms. Williams' ex-boyfriend, Mr. Cardenas, whom he had never met, to ask him about Ms. Williams and her feelings for Mr. Cardenas and her feelings for defendant. RP 300-01. Because neither Mr. Cardenas nor Ms.

Williams had ever given defendant Mr. Cardenas' phone number, defendant had to track down the number by using Ms. Williams' caller ID. RP 298. After calling Mr. Cardenas, defendant called Ms. Williams late at night, demanding to know what was going on, wanting to know if she loved him, and wanting to talk about the relationship. RP 146. He thought she was lying to him when he confronted her with information from his conversation with Mr. Cardenas. CP 224-25; Appendix A.

After speaking to both Ms. Williams and Mr. Cardenas, defendant went home and thought about whether or not to hurt Ms. Williams. CP 224-25; Appendix A. He went to her apartment just before 3:00 a.m. and, when she did not answer to his pounding on her back door, broke in through her front door. RP 149.

The prosecutor's contention that defendant was obsessed with Ms. Williams is a reasonable inference that is supported by the evidence admitted at trial. Defendant's behavior indicated that he was upset about the breakup, he wanted to know where Ms. Williams' affections were directed, and he was unhappy with the fact that she did not want to be with him anymore. Clearly, defendant's behavior could reasonably be characterized as "obsessive."

During closing, the prosecutor also paraphrased defendant's conversation with Ms. Williams. RP 528. Defendant argues that the prosecutor's statement, "I still love you," was a misstatement of the facts admitted at trial. See Appellant's Brief at 11. While Ms. Williams could

not remember if defendant ever told her he still loved her, defendant's behavior in pursuing Ms. Williams supports an inference that defendant was still in love with her. Again, the prosecutor's statement was proper argument, which expressed a reasonable inference from the evidence.

Defendant has failed to show how the prosecutor's remarks were so flagrant and ill intentioned that a curative instruction could not remedy the error. In fact, defendant's arguments are inconsistent regarding the value of a curative instruction. Compare Appellant's Brief at 14, with Appellant's Brief at 15.

The jury instructions stated that arguments made by trial counsel were not to be considered as evidence in the case. CP 120-66 (Jury Instruction 1). The jury was reminded to "[d]isregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." CP 120-66 (Jury Instruction 1). The jury is presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). If defendant had objected to the prosecutor's statements, the court could have stricken the statements, required the prosecutor to abandon her theme of defendant's obsession, or reminded the jury that the prosecutor's argument was not evidence and should be disregarded if unsupported by the evidence. Such an instruction would have been sufficient to eliminate any prejudice.

2. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s

representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); Thomas, 109 Wn.2d at 226. The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. Judicial

scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694. A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, the defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). In this case defendant cannot make either showing.

a. Prosecutor's closing argument

In the present case, defendant is alleging that he received ineffective assistance of counsel because defense counsel did not object to

the prosecutor's "misstatements" in closing argument. See Appellant's Brief at 15. As argued above, the prosecutor did not misstate the evidence presented at trial when she drew reasonable inferences from the evidence in support of her argument that defendant was obsessed with Ms. Williams. A defense counsel's performance is not deficient when he does not object to proper argument.

Counsel's performance did not fall below an objectively reasonable standard of reasonableness. At closing, defendant seized on the prosecution's theme of obsession as a basis to refute the State's claim of premeditation. RP 581. Counsel argued that defendant was fixated on Ms. Williams, he was enraged and hurt by Ms. Williams' rejection, and he wanted to hurt her back. RP 572, 592. It was not disputed that defendant had broken into Ms. Williams' apartment, nor was it disputed that he attacked her, the only strategy counsel had at trial was to argue that this was a crime of passion, with no planning or premeditation to kill. RP 582-85, 592. Additionally, counsel had to attack the credibility of defendant in order to negate the evidence of defendant's statements where he said he planned and intended to kill Ms. Williams. RP 588-89. Clearly counsel had a legitimate strategic and tactical rationale for his decision not to object to the State's argument which supported his theory of the case. Given counsel's need to negate evidence that defendant intended to kill Ms. Williams by arguing that defendant committed a crime of passion,

counsel's performance in not objecting to the prosecution's characterization of defendant as obsessive was objectively reasonable.

Defendant's argument that counsel's failure to object had an effect on the outcome of the trial is also without merit. If defendant had objected, it is unlikely that the objections to proper argument would have been sustained and the outcome of the case would have been the same. Even if defendant's objection had been sustained, the outcome would not have been different. The jury would have been admonished to disregard any statements the prosecutor made which were unsupported by the evidence. There was sufficient evidence presented at trial for the jury to infer that defendant intended to kill Ms. Williams when he broke into her apartment, put his hands around her neck, choked her into unconsciousness, and admitted to the police that he meant to kill her.

b. Exceptional sentence

Defendant also claims that he received ineffective assistance of counsel during sentencing when defense counsel did not object to the court's imposition of an exceptional sentence. See Appellant's Brief at 43-48. Defendant based his contention on the fact that counsel did not object to the court's following the procedures set forth in RCW 9.94A.537, and he did not object to improper argument by the prosecutor in support of the exceptional sentence. Defendant has failed to meet his burden of showing ineffective assistance of counsel during sentencing.

As argued the following section, the Washington Supreme Court issued a decision in State v. Pillatos³, ___ Wn.2d ___, ___ P.3d ___ (2007) (2007 Wash. LEXIS 62), which established that RCW 9.94A.537 applied retroactively to all defendants who had not gone to trial at the time of its implementation. In this case, the trial court properly applied RCW 9.94A.537, so defendant cannot show deficient performance or resulting prejudice. Additionally, counsel ensured that the court followed the provisions of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), which determined that the jury, not the judge, had to find the aggravating factors beyond a reasonable doubt. Defense counsel acted to protect defendant's Sixth Amendment rights.

Finally, defendant claims that counsel should have objected to the prosecutor's argument that defendant showed lack of remorse and statements defendant made during his competency evaluation in support of the State's request for an exceptional sentence. Defendant misstates the record.

The State requested the court to impose an exceptional sentence, over the high end of the standard range. RP 635. The State began its argument with its reasons for requesting the high end of the standard range:

³ The Washington Supreme Court issued State v. Pillatos on January 25, 2007. A discussion of the court's ruling can be found in the State's Response Brief in section 3, which deals with defendant's contention that his exceptional sentence must be vacated.

With that, Your Honor, if I could address the basis for the standard range high end first. There are several different factors which the State bases that on, one of which is the defendant's criminal history

...

Furthermore, it is the State's position that the defendant has exhibited a lack of remorse in this case.

RP 635. The prosecutor went on to discuss the statements defendant made during the competency evaluation:

And defense and I have discussed the statements that the defendant made to Dr. Danner at the time of his competency evaluation. Those were not before the Court during the trial. But, as for as considering for the standard range sentence only, defense and I both agree that the Court can consider those statements, but you cannot consider them as a basis for an exceptional. So, when I make the following argument, I want to ensure that the Court knows I am only doing it to support the high end of the standard range.

RP 636-37 (emphasis added). Clearly the State did not use these arguments to support an exceptional sentence, but presented proper argument as to the imposition of the high end of the standard range as was appropriate should the court decline to impose an exceptional sentence.

It is clear the trial court did not base its exceptional sentence on improper reasons. The court entered findings of fact and conclusions of law in support of its determination to give an exceptional sentence. CP 211-14. The court based its determination of the jury's finding that defendant committed the crime within sight or sound of the victim's minor

children. CP 211-14. The court did not consider any other reason in making its determination.

Defendant has failed to prove that he received any ineffective assistance of counsel, or even that counsel's performance was deficient in any way.

3. UNDER STATE V. PILLATOS, DEFENDANT'S EXCEPTIONAL SENTENCE IS PROPER WHEN HIS TRIAL BEGAN AFTER THE LEGISLATURE AMENDED THE SRA TO COMPLY WITH THE PROVISIONS OF BLAKELY AND DEFENDANT WAS SENTENCED UNDER RCW 9.94A.537.

Defendant also claims that his exceptional sentence must be reversed because defendant committed his crime when there was no statutory scheme in place for the imposition of an exceptional sentence. See Appellant's Brief at 16-43. Defendant committed his crime approximately three months after the United States Supreme Court issued its opinion in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 1868, 159 L.Ed.2d 403 (2004), but before the Washington State Legislature amended the affected portions of the SRA. However, defendant did not go to trial until after the Legislature amended the SRA with the enactment of RCW 9.94A.537.

In 2005, the Legislature passed laws amending the SRA which were designed to "create a new criminal procedure for imposing greater punishment than the standard range" in an effort to "restore the judicial discretion that has been limited as a result of the Blakely decision." Laws

of 2005, c. 68, §1. The amendments took effect on April 15, 2005, and were codified as RCW 9.94A.537. Id., see also RCW 9.94A.537.

Defendant also argues against retroactive application of RCW 9.94A.537. However, in the recent case of State v. Pillatos, ___ Wn.2d ___, ___ P.3d ___ (2007), the Washington Supreme Court held that the amendments to the SRA in response to Blakely, “applies to all cases where trials have not begun or where pleas have not been accepted” at the time of its enactment. The court held that, because the amendments were procedural in nature, they did not increase the amount of punishment a defendant faced and could therefore be applied retroactively. Id. The court also held that the amendments were constitutional, as they did not violate due process, ex post facto provisions, or chill the right to a trial. Id.

RCW 9.94A.537(1) requires that “prior to trial or entry of guilty plea... the state may give notice that it is seeking a sentence above the standard sentencing range” and that the notice “shall state aggravating circumstances upon which the requested sentence will be based.” Under RCW 9.94A.535:

The court may impose a sentence outside the standard sentence range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence.

...

(3) . . . [T]he following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

. . .

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

. . .

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years if the offense is an act of domestic violence as defined in RCW 10.99.020.

The State gave defendant notice of its intention to seek a sentence above the standard range pursuant to RCW 9.94A.535, alleging that the current offense was an act of domestic violence as defined in RCW 10.99.020, and was aggravated by the fact that the "offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years." CP 23-25; Appendix B. Defendant was given proper notice pursuant to RCW 9.94A.537.

Secondly, RCW 9.94A.537(2) requires:

The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

Here, the jury was given special verdict forms and instructed that if it found defendant guilty of attempted murder in the first degree, that it was to answer the question in the special verdict forms; it was further instructed that it had to be unanimously satisfied beyond a reasonable doubt to answer the question “yes.” CP 120-66 (Jury Instruction 35). The jury returned a special verdict finding the factual basis supporting the aggravating circumstance. CP 169. Based upon this finding, the court imposed an exceptional sentence on Count I, attempted murder in the second degree. CP 211-14, 175-87; RP 655. The court’s action complied with both the statutory provisions and constitutional requirements.

The Washington Supreme Court held that the exceptional sentence provisions of the SRA are not facially unconstitutional in the wake of Blakely. State v. Hughes, 154 Wn.2d 118, 126, 110 P.3d 192 (2005). Because the exceptional sentence provisions were still constitutional, defendant’s due process rights were not violated as he would have had notice that he could still receive an exceptional sentence if, under the provisions of Blakely, a jury found aggravating factors beyond a reasonable doubt. This is exactly the procedure the court followed in this case.

In light of the court’s decision in Pillatos, defendant has failed to show any impropriety in the procedures used below, this court should affirm the imposition of the exceptional sentence after a jury found beyond a reasonable doubt the existence of the aggravating factor.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's conviction and exceptional sentence.

DATED: February 6, 2007.

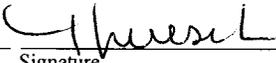
GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Kimberley DeMarco
Rule 9 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.

2-7-07 
Date Signature

FILED
COURT OF APPEALS
DIVISION II
07 FEB -8 PM 1:49
STATE OF WASHINGTON
BY _____
DEPUTY

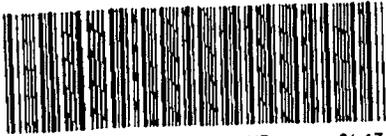
APPENDIX “A”

Plaintiff's Exhibit 59 (Statement Form)

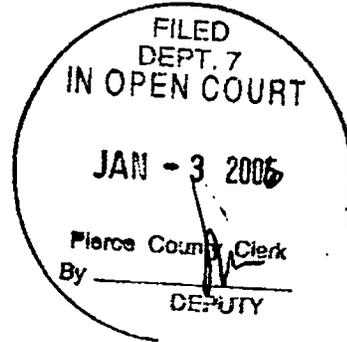
APPENDIX “B”

Amended Information

ORIGINAL



04-1-04882-8 24391431 AMINF 01-17-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04882-8

vs.

JERRY JOHN UTANIS,

AMENDED INFORMATION

Defendant.

DOB: 11/2/1975
PCN#: 538240893

SEX : MALE
SID#: 15745163

RACE: WHITE
DOL#: UNKNOWN

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JERRY JOHN UTANIS of the crime of ATTEMPTED MURDER IN THE FIRST DEGREE, committed as follows:

That JERRY JOHN UTANIS, in Pierce County, Washington, on or about the 17th day of October, 2004, did unlawfully and feloniously with intent to commit the crime of MURDER IN THE FIRST DEGREE, as prohibited by RCW 9A.32.030(1)(a), take a substantial step toward the commission of that crime, contrary to RCW 9A.28.020, a domestic violence incident as defined in RCW 10.99.020, and pursuant to RCW 9.94A.535 (g)(i), the crime was aggravated by the following circumstance: the offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; and against the peace and dignity of the State of Washington.

The elements of the complete crime of MURDER IN THE FIRST DEGREE are:

And feloniously, with premeditated intent to cause the death of another person, cause the death of such person or a third person, a human being, contrary to RCW 9A.32.030(1)(a).

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JERRY JOHN UTANIS of the crime of BURGLARY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same

AMENDED INFORMATION- 1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
2 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
one charge from proof of the others, committed as follows:

3 That JERRY JOHN UTANIS, in the State of Washington, on or about the 17th day of October,
4 2004, did unlawfully and feloniously, with intent to commit a crime against a person or property therein,
enter or remain unlawfully in a building, located at 5011 157th Ave. Ct. E #D, and in entering or while in
5 such building or in immediate flight therefrom, the defendant or another participant in the crime did
intentionally assault Erin Kathleen Williams, a person therein, contrary to RCW 9A.52.020(1)(b), a
6 domestic violence incident as defined in RCW 10.99.020, and pursuant to RCW 9.94A.535 (g)(i), the
7 crime was aggravated by the following circumstance: the offense occurred within sight or sound of the
victim's or the offender's minor children under the age of eighteen years; and against the peace and
8 dignity of the State of Washington.

9
10 DATED this 30th day of December, 2005.

11 SUMNER POLICE DEPARTMENT
WA02702

GERALD A. HORNE
Pierce County Prosecuting Attorney

12
13 lak

By: 
14 LORI KOOIMAN
Deputy Prosecuting Attorney
WSB#: 30370

1 NO. 04-1-04882-8
2 SUPPLEMENTAL DECLARATION FOR DETERMINATION OF PROBABLE CAUSE

3
4 LORI KOOIMAN, declares under penalty of perjury:

5 That I am a deputy prosecuting attorney for Pierce County and I am familiar with the
6 police report and/or investigation conducted by the SUMNER POLICE DEPARTMENT, incident
number 0402129;

7 That the police report and/or investigation provided me the following information;

8 That in Pierce County, Washington, on or about the 17th day of October, 2004, the
9 defendant, JERRY JOHN UTANIS, did commit the crimes of Attempted Murder in the First
Degree - DV and Burglary in the First Degree - DV.

10 This affidavit incorporates by reference the prior probable cause statement and adds the
11 following: The victim, Erin Williams, was interviewed by defense on December 21, 2005. During
12 that interview it was revealed that the bedroom shared by her children, S.W. (two years of age)
13 and K.W. (four years of age) is located right next to her bedroom, where the incident occurred.
Furthermore, their bedroom door was open at the time of the incident. She also state her son,
S.W. told her that he came into the room during the incident. He then went back to his room.

14 Furthermore, both S.W. and K.W., were found hiding under the blankets in their bedroom by the
15 police officer shortly after arriving. Also, when medical personnel carried out Williams, her
16 children were in the family room by the front door. When they carried her out, the stretcher had to
17 be placed standing straight up due to the doorway placement. According to Williams, at this time
both children were watching her. This information was not included in the police reports related
to this incident.

18 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
19 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

20 DATED: December 30, 2005
21 PLACE: TACOMA, WA

22
23 
24 LORI KOOIMAN, WSB# 30370

25
26
27
28
29 SUPPLEMENTAL DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -1

Office of the Prosecuting Attorney
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