

NO. 36720-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GREGORY L. BONDS, Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY _____
DEPUTY

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the State's motion to admit evidence of Mr. Bonds' prior convictions that were more than 10 years old.
2. The trial court erred by denying the defense's motion to treat Mr. Bonds' two convictions as the same criminal conduct.
3. The trial court erred by finding that Mr. Bonds' two convictions were not the same criminal conduct.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. DID THE TRIAL COURT ERR BY PERMITTING EVIDENCE OF MR. BONDS' THREE PRIOR CONVICTIONS WHERE THOSE CONVICTIONS WERE MORE THAN TEN YEARS OLD AND WERE NOT PROBATIVE OF CREDIBILITY.
2. DID THE TRIAL COURT ERR BY FAILING TO FIND THAT MR. BOND'S TWO CONVICTIONS—SECOND DEGREE ASSAULT AND FELONY HARASSMENT—CONSTITUTED THE SAME CRIMINAL CONDUCT.

III. STATEMENT OF THE CASE

Factual History:

In the early hours of the morning of September 19, 2006, an argument between Gregory Bonds and his wife, Antoinette Weekly-Bonds, led to a telephone call to the police. RP 32. Ms. Weekly-Bonds had called 911 during the argument, still yelling at Mr. Bonds during the call, which ended abruptly. RP 208-9. Mr. Bonds left the house at that time. RP 209.

When police arrived at the couple's home, Ms. Weekly-Bonds told them that her husband had punched her, choked her, and put a gun in her mouth, threatening to kill her. RP 34. Ms. Weekly-Bonds had only minor injuries visible—a cut on her upper lip and a scrape on the elbow. RP 34, 50-52, 63. There were no visible marks on her throat or face and no visible swelling. RP 50-52. Ms. Weekly-Bonds had no trouble talking and refused medical treatment. RP 35, 395. She told the police that she was not in any pain. RP 35. The room in which she said the altercation occurred did not appear disheveled. RP 65.

Veatrice Jordan, Ms. Weekly-Bonds' daughter, was present at the beginning of the altercation and testified that she saw her mother and Mr. Bonds arguing and saw Mr. Bonds hit Ms. Weekly-Bonds. RP 567. She then immediately left the house and did not come back until a few hours

later. RP 571. When she left again the next morning, she saw Mr. Bonds at a neighbor's house. RP 573. She did not call the police to report the incident.

Mr. Bonds testified that he and his wife had been arguing that night. RP 615. However, he testified that Ms. Weekly-Bonds had attacked him when he turned to leave the house. RP 617. He struck her only once in the face—when she would not desist. RP 617. He denied choking or kicking his wife. RP 631. When Ms. Weekly-Bonds turned to call 911, he thought it best that he take the opportunity to leave. RP 619.

Procedural History:

Mr. Bonds was charged with Assault in the Second Degree, Felony Harassment, and Unlawful Possession of a Firearm in the First Degree. CP 7-9. He was arraigned on September 20, 2006. CP 1-2.

Seven continuances, totaling more than 6 months, were granted over Mr. Bonds' objection, and he was finally brought to trial on June 11, 2007. Supp. CP 125-132.

A jury trial commenced, in which Mr. Bonds testified in his own defense. Following Mr. Bonds' testimony, the State moved to admit evidence of Mr. Bonds' prior convictions for Robbery in the Second Degree, Attempted Burglary in the Second Degree, and Theft in the First Degree, all of which were more than ten years old. RP 654-55. The

defense objected. RP 651. The Court ruled that because Mr. Bonds had a criminal record, and because credibility was at issue, the prior inadmissible convictions would be admissible on the issue of credibility. RP 654-56. The prosecutor subsequently introduced these convictions into evidence. RP 691-92.

The jury was unable to reach a verdict on the charge of Unlawful Possession of a Firearm and declined to find that a weapon was involved in the remaining crimes. RP 912-914. Mr. Bonds was convicted of Assault in the Second Degree and Felony Harassment. RP 912, CP 88. Although the standard range for these convictions were 63-84 months and 51-60 months, respectively, Mr. Bonds was sentenced to an exceptional sentence of 96 months on count one, concurrent with 80 months on count two. CP 89-92.

This appeal timely followed.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY PERMITTING EVIDENCE OF MR. BONDS' THREE PRIOR CONVICTIONS WHERE THOSE CONVICTIONS WERE MORE THAN TEN YEARS OLD AND WERE NOT PROBATIVE OF CREDIBILITY.

Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt, and is very prejudicial to the defendant because it may lead the jury to believe the defendant has a propensity to commit crimes. *State v. Hardy*, 133

Wn.2d 701, 706, 946 P.2d 1175 (1997) (*citing* 5 Karl B. Tegland, Washington Practice, Evidence § 114, at 383 (3rd ed. 1989)). A “narrow exception to this rule”¹ is set out in ER 609, which states in relevant part:

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of punishment.

(b) Time Limit. *Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.*

“‘[P]rior conviction evidence is inherently prejudicial’ when the defendant is the witness because it tends to shift the jury focus ‘from the merits of the charge to the defendant’s general propensity for criminality.’” *Hardy*, 133 Wn.2d at 710 (*quoting State v. Jones, State v. Jones*, 101 Wn.2d 113,

¹ *Hardy*, at 706.

120, 677 P.2d 131 (1984). The burden is on the State in this case to prove that the probative value of the prior old convictions outweigh their prejudicial effect. *Hardy*, at 712; *Jones*, at 122.

When assessing probative value, it is critical to understand “the sole purpose of impeachment evidence [under ER 609] is to enlighten the jury with respect to the defendant’s credibility as a witness.” *State v. Jones*, 101 Wn.2d 113, 118, 677 P.2d 131 (1984). Prior convictions are therefore only probative under ER 609 to the extent they are probative of the witness’s truthfulness.

In this case, the trial court decided that because Mr. Bonds had other convictions spanning the 10 years between his old “crimes of dishonesty,” his otherwise inadmissible prior convictions became admissible. RP 654-55. ER 609(b) required the court to exclude these convictions unless it could find, on the record, that, “in the interests of justice, that the probative value of the conviction[s] supported by specific facts and circumstances substantially outweigh[their] prejudicial effect.”

Here, the trial court does not explain how merely having a criminal record, without other circumstances, makes these old convictions probative of credibility, when the rule accords them little probative value in evaluating his credibility. The trial court’s stated the following in support of the admission of the prior convictions:

Now, there is a reasonably strong presumption, however, against, convictions more than ten years old for the reason that if someone has not been dishonest, if you will, more than ten years, there is kind of the presumption of, well, it goes to credibility, that kind of goes out the window because it may well be that the person has reformed their behavior. Why punish them if it doesn't truly indicate something about their ability for truthfulness or honesty?

Now, having said all of that, I'm certainly sympathetic with the fact that, nevertheless, although those things occurred in the '80s and the '90s and the early part of this decade, there have been a number of convictions for Mr. Bonds for lots of other things. *It would suggest his ability not to conform with the law to some extent.*

We have in this case, to some extent, a close case in the sense that it is—a jury has to choose between two versions of events, one presented by Mrs. Weekly-Bonds from the State and the other by Mr. Bonds, the defendant, for the defense. Certainly, credibility is critical in every case. It is particularly critical here. While I have some sympathy for the idea that, at some point, it no longer represents the character of someone with all of the other convictions that have occurred here and problems with the law that Mr. Bonds has had and given a closeness of the matter, it seems to me that it is important to credibility, and that a jury can weigh its age in the context of all this themselves.

I will permit all of those convictions.

RP 653-55.

The only explanation for the court's ruling is that the court decided that person with a long criminal record is inherently not a credible witness, a position that is disallowed by the law. *See Jones*, 101 Wn.2d at 119 (“Simply because a defendant has committed a crime in the past does not

mean the defendant will lie when testifying.”) The court does not identify any other “specific facts and circumstances” about the intervening crimes, other than their very existence, that would “outweigh [the] prejudicial effect” of the prior old convictions. Because the State did not meet its burden of showing through specific facts and circumstances how these old convictions were more probative than prejudicial, it was error for the court to allow the State to put this evidence before the jury.

Reversal for errors under ER 609 is required if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Hardy*, 133 Wn.2d at 712 (*quoting, State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)). That is the case here. The trial court specifically noted that credibility was a central issue in this case. RP 654-55.

The jury apparently did not fully believe Ms. Weekly-Bonds’ version of events, as evidenced by its inability to agree that a firearm was involved in the crime, contrary to Ms. Weekly-Bonds’ testimony. RP 912-914. Therefore, there is a reasonable probability that without the evidence of Mr. Bonds’ prior convictions distracting them from the facts of the case, the verdict would have been different.

ISSUE 2: THE TRIAL COURT ERRED BY FAILING TO FIND THAT MR. BOND'S TWO CONVICTIONS, FOR SECOND DEGREE ASSAULT AND FELONY HARRASSMENT, CONSTITUTED THE SAME CRIMINAL CONDUCT.

At sentencing, defense counsel asked the court to find that Mr. Bonds' two convictions for assault and harassment constituted the same criminal conduct. RP11 938. The court did not formally rule, but the judgment and sentence reflects the court's decision to treat the two convictions as separate offenses. CP 89.

If concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purposes of calculating the offender's sentence. RCW 9.94A.400(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.400(1)(a). All three prongs must be met, and the absence of any one prong prevents a finding of "same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

The relevant inquiry for finding the objective criminal intent is "the extent to which the criminal intent, objectively viewed, changed from one crime to the next. . . . This, in turn, can be measured in part by whether one crime furthered the other." *State v. Vike*, 125 Wn.2d at 411 (citations omitted).

Here, there is no question that the two Mr. Bonds' two convictions—assault and harassment—occurred at the same time and place, and against the same victim. The entire physical altercation was said to have lasted only a few minutes. RP 39. The question is whether his intent, when viewed objectively, changed between the crimes, and whether the commission of one crime furthers the other. Second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 711, 887 P.2d 396 (1995). Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future to the person threatened. RCW 9A.46.020(1)(a)(i). Mr. Bonds' objective intent was either to create an apprehension of bodily harm or to cause bodily harm. There was no discernible change in intent between the crimes. Moreover, inflicting bodily harm and threatening to kill Ms. Weekly-Bonds furthered the crime of creating apprehension of more bodily harm. Because one crime furthered another, and because Mr. Bonds' criminal intent did not change from one crime to another, his actions encompass same criminal conduct. Therefore, the trial court abused its discretion in finding otherwise. The remedy is to vacate the sentence and remand for resentencing based on same criminal conduct.

V. CONCLUSION

The trial court erred by permitting the State to introduce evidence of Mr. Bonds' three prior convictions of dishonesty where those convictions were more than 10 years old and irrelevant to credibility. Further, there is a reasonable probability that this error influenced the jury and led to a different result in the trial. Therefore, Mr. Bonds' two convictions should be reversed and he should be granted a new trial.

If the court concludes that the convictions should stand, then the court should find that the trial court erred by failing to find that Mr. Bonds' convictions constitute the same criminal conduct and remand for re-sentencing.

DATED: April 23, 2008

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CERTIFICATE OF SERVICE

I certify that on April 23, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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