

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38830-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SCOTT MICHAEL HILL, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Hill's due process rights when the judge improperly considered at sentencing the fact that Hill exercised his constitutional right to jury trial.
2. The trial court erred by convicting Hill of assault in the second degree of Terrance Schlatter without sufficient evidence that he suffered substantial bodily harm.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court violated Hill's due process rights when the judge improperly considered at sentencing the fact that Hill exercised his constitutional right to jury trial.
2. Whether the conviction for second degree assault of Terrance Schlatter is supported by sufficient evidence of substantial bodily harm where the sole testimony was that Schlatter had a few scrapes and bruises.

III. STATEMENT OF THE CASE

Scott Hill and Jennifer Schlatter had a tumultuous relationship, especially during the summer of 2007. Jennifer and Scott¹ started dating in March of 2006 and moved in together in June of 2006. RP-V 71. However, by May of 2007, Jennifer had moved out of their shared apartment and back in with her parents. RP-V 71.

Despite a restraining order Jennifer took out against Scott, the two continued to see each other, often at Jennifer's initiation. RP-V 92, 158. Jennifer even went on a trip to Chelan for several days with Scott during this time. RP-V 158.

On August 4, after spending the night with Scott at his parent's house, Jennifer told Scott she wanted to break up. RP-V 85-86. Scott was despondent and said he might suicide if she broke up with him, but Jennifer held firm. RP-V 86. Scott helped Jennifer load her computer into his truck, gave her money to repay a loan, and took her to her car. RP-V 87-88. Scott and Jennifer called each other throughout the day on August 4 and 5. RP-V 90, 95.

¹ Because the entire Schlatter family is involved in this case, it will be more clear for counsel to use first names to refer to the participants. No disrespect is intended.

Their final phone call was around 10:30 p.m. on August 5. RP-V 100. Jennifer was at her parent's house. Jennifer testified that during this call, she told Scott that she had cheated on him with several other guys, which she claimed at trial was not true, in an attempt to get him to be reconciled to her decision to end their relationship. RP-V 100. The call ended with Scott threatening suicide and Jennifer telling him to go ahead if he wanted to. RP-V 105. After that, she called him at least nine more times, but he did not answer. RP-V 105, 108.

Sometime around midnight, Scott cut the screen on the open kitchen window to the Schlatters' home and entered Jennifer's room. RP-VII 605. It is undisputed that he did this without invitation and was wearing gloves when he did so. RP-V 109, 116, 607-8. Scott said that he came to talk with Jennifer, to make up with her as they had on many prior occasions, although he admitted that he had not been invited to do so. RP-VII 601.

Scott testified that he entered the room and talked with Jennifer for a while, but became violent with her when she convinced him that she had cheated on him. RP-VII 613. Jennifer says that she was asleep when Scott entered her room, that he threatened to kill her, and began choking her. RP-V 115-116.

Jennifer's mother, Christine Schlatter, heard glass break and the dogs bark downstairs. RP-V 210. She thought Jennifer had let her friend in and went to investigate. RP-VI 265. She heard quiet talking in Jennifer's room, opened the door, and turned on the light. RP-V 212, RP-VI 266. She saw Scott choking Jennifer. RP-V 213.

Christine attacked Scott in an attempt to get him to release Jennifer. RP-V 213. She testified that Scott was crazed, not like himself, and unresponsive to her. RP-VI 252. Scott shook her off and went back to Jennifer. RP-V 214-15. Christine again jumped on him and she and Scott struggled. RP-V 215. Christine yelled for her husband, Terrance, and her other daughter, Kimblerly, to call 9-1-1. RP-V 215. She yelled to Jennifer to run away. RP-V 215. Jennifer ran from the room. RP-VI 394.

Kimberly came into the room and struggled with Scott, who pushed her back, or was perhaps dragged off her by Terrance. RP-VI 392, 398-99. Kimberly testified that Scott seemed crazed with anger. RP-VI 392. She ran downstairs and called 9-1-1. RP-V 222.

Terrance entered the bedroom and began to fight with Scott. RP-VI 301. Terrance also said that Scott seemed "crazed." RP-VI 301. He and Scott fought and, eventually, Scott got away from him and ran downstairs. RP-VI 303-308. Christine yelled to Terrance to get his gun and she ran downstairs, too. RP-V 221, RP-VI 310.

Downstairs, Scott saw Kimberly in the kitchen. RP-VI 400, RP-VII 622. Kimberly threatened him with a kitchen knife and yelled for him to get away. RP-VI 400. Scott then went out the patio door into the backyard. RP-VI 410, RP-VII 623.

Jennifer was running through the backyard when Scott came out. RP-VII 624. Scott grabbed her by the arm and began to beat her, kicking her in the head. RP-VII 624-627. Christine again tried to pull him away. RP-V 226. Scott repeatedly cursed Jennifer for cheating on him. RP-V 224. Finally, Scott broke away and ran off. RP-V 227.

Fortunately, although Jennifer was seriously injured, she was treated and released from the hospital a few days later and has recovered. RP-V 136-141.

Scott admitted that he broke into the Schlatters' vacant house a second time on August 6. RP-VII 636. He knew the Schlatters were at the hospital and not home. RP-VII 636. Scott said he was distraught over what had happened and planned to commit suicide in Jennifer's room. RP-VII 637. Scott brought a gun. RP-VIII 637. He shot at the patio door to enter the house. RP-VIII 637. Once inside, he shot at Jennifer's TV and computer, which had been purchased while they were together. RP-VIII 780. He left without being seen.

Scott was apprehended without incident on August 6 near his parent's house. RP-VI 445. He was charged with two counts of burglary in the first degree, attempted murder in the first degree (Jennifer), two counts of second degree assault (Christine and Terrance), felony harassment, assault in the fourth degree (Kimberly), violation of a no-contact order, and malicious mischief in the first degree. CP 10-14. In addition, one count of burglary and the malicious mischief charge were alleged to have been committed with a firearm. CP 10-14.

Scott Hill² pled guilty to violation of a no-contact order and a jury trial was held on the remaining charges. CP 15, 94. During trial, the only disputed issues were whether Mr. Hill had a premeditated intent to kill Jennifer Schlatter and whether Christine and Terrance Schlatter suffered substantial bodily harm—Mr. Hill admitted to all other charges. Mr. Hill made a half-time motion to dismiss the attempted first degree murder charge for lack of evidence. RP-VII 549. The jury convicted Mr. Hill on all charges and found he was armed in the commission of the burglary and malicious mischief. CP 76-83.

At sentencing, the parties agreed to Mr. Hill's standard range. CP 89-93. In sentencing Mr. Hill to the maximum of the standard range, the judge stated:

² From here on, he will be referred to as Mr. Hill.

[THE COURT]: I believe in the jury system, and you absolutely have a right to have a jury trial, and that's what this was about. Mr. Chin says you always had an abiding concern for Jenny from the first time he met you, and I can't help thinking, "Then why did you make her go through this trial?" How hard was it for her to come to court and have to relive every single second of that night? Every single second. She had to go over it all more than once. That's not care and concern for her.

I don't believe you. I think everything that you've done is pure selfishness.

THE DEFENDANT: I didn't want to go to trial, Your Honor.

THE COURT: Well, Mr. Chin is a fine lawyer, and I know I am not privy to any negotiations, and you absolutely have a right to go to trial, but it just doesn't square when you force her to relive that whole night. I don't want responses from you. This is my turn to talk. So at any rate, I just have a hard time believing any of that.

I am going to impose the high end of the range. If I could guarantee that you would never get out, that would be better for everybody, I think.

RPXI 963.

This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT VIOLATED MR. HILL'S DUE PROCESS RIGHTS WHEN THE JUDGE IMPROPERLY CONSIDERED AT SENTENCING THE FACT THAT MR. HILL EXERCISED HIS CONSTITUTIONAL RIGHT TO GO TO TRIAL.

As a preliminary matter, this court should find that Mr. Hill's sentence is appealable, even though it was the maximum of the standard range. Ordinarily, a standard range sentence may not be appealed. RCW 9.94A.585(1). However, errors of constitutional magnitude overcome the SRA's statutory prohibition. *State v. Mail*, 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993) (citing *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989)). The imposition of a penalty for the exercise of a defendant's constitutional right to trial violates due process. *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (1982). Therefore, a sentence imposed with this improper consideration, even if it is within the standard range, is appealable. See *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995).

At sentencing in this case, the defense and prosecution agreed that the sentence range would be from 404.25 months to 507 months.³ RP XI 943, CP 89-93. The defense argued for the minimum of the standard range and the prosecution argued for the maximum. RP XI. In imposing the maximum of the standard range, 507 months, the judge made the following statement:

³ This is calculated based on the sentence range for attempted murder in the first degree (308.25 months to 411 months) plus both firearm enhancements (96 months). CP 99.

[THE COURT]: I believe in the jury system, and you absolutely have a right to have a jury trial, and that's what this was about. Mr. Chin says you always had an abiding concern for Jenny from the first time he met you, and I can't help thinking, "Then why did you make her go through this trial?" How hard was it for her to come to court and have to relive every single second of that night? Every single second. She had to go over it all more than once. That's not care and concern for her.

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THE COURT: Well, Mr. Chin is a fine lawyer, and I know I am not privy to any negotiations, and you absolutely have a right to go to trial, but it just doesn't square when you force her to relive that whole night. I don't want responses from you. This is my turn to talk. So at any rate, I just have a hard time believing any of that.

I am going to impose the high end of the range. If I could guarantee that you would never get out, that would be better for everybody, I think.

RPXI 963. This statement by the judge raises the inference, unrebutted, that the judge punished Mr. Hill for exercising his right to jury trial.

"It is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial." *Medina-Cervantes*, 690 F.2d at 716 (citing *United States v. Capriola*, 537 F.2d 319, 321 (9th Cir. 1976); *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), cert. denied, 411 U.S. 948 (1973)), see also *State v. Sandefer*, 79 Wn. App. 178, 900 P.2d 1132 (1995). "The 'courts must not

use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.”

Medina-Cervantes, at 716, quoting *United States v. Stockwell*, 472 F.2d at 1187.

In *Medina-Cervantes*, in support of a sentence at the maximum of the standard range, the judge stated:

Well I'll tell you what you got to loose. It's obvious to me that this man wanted a trial, with all his constitutional rights, and he insisted upon then and he had them. To the cost to the government for the jury, with 40 jurors, \$30 a piece is \$1200, figure that transportation was \$1500, cost defenders, cost of Schoonover, who nobody would stipulate, the fingerprints on the card, no pictures having been made.

All I can see is he was just thumbing his nose at our judicial system, stands there he could (sic.) care less. Just a way of life, I guess. Be that as it may.

690 F.2d at 716. The 9th Circuit held that the trial judge's statements “clearly give rise to the inference that Medina-Cervantes was punished more severely because of his assertion of the right to trial by jury. Nothing in the record before us serves to dispel this inference.” 690 F.2d at 716-17. Consequently, without any further proof that the sentence was increased due to the trial, the 9th Circuit reversed the defendant's sentence and remanded for resentencing. 690 F.2d at 717.

In *State v. Montgomery*, 105 Wn. App. 442, 446, 17 P.3d 1237 (2001), the court held that it violated due process for the trial court to deny

the defendant a SSOSA because he caused his victim to go to trial. The appellate court held it was improper when the trial court stated that it was denying the SSOSA because “Montgomery’s taking the case to trial indicated his unwillingness to acknowledge his problem and thus he was not amenable to treatment.” 105 Wn. App. at 444.

Like in *Montgomery* and *Medina-Cervantes*, the trial judge here improperly based her sentencing decision on the fact that Mr. Hill exercised his constitutional right to jury trial. The trial judge’s statements that Mr. Hill was cruel to the victim by choosing to go to trial raised a clear inference that she was increasing his sentence due to the exercise of his constitutional rights. There is nothing in the record to rebut that inference. Therefore, as in *Medina-Cervantes*, this court should reverse Mr. Hill’s sentence and remand for re-sentencing.

ISSUE 2: THE CONVICTION FOR THE SECOND DEGREE ASSAULT OF TERRANCE SCHLATTER IS NOT SUPPORTED BY SUFFICIENT EVIDENCE OF SUBSTANTIAL BODILY HARM WHERE THE TESTIMONY WAS ONLY THAT HE HAD A FEW SCRAPES AND BRUISES.

Mr. Hill was convicted in count IV of the second degree assault of Terrance Schlatter. CP 6, 79, 97. An essential element of second degree assault is proof that the victim suffered “substantial bodily harm” as a result of the assault. RCW 9A.36.021(1)(a). “Substantial bodily harm,” for purposes of second degree assault, includes a bodily injury that causes

a temporary but substantial disfigurement, substantial impairment of the function of any bodily part, or a fracture of any bodily part. *State v. R.H.S.*, 94 Wn.App. 844, 846, 974 P.2d 1253 (1999).

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In this case, there is insufficient evidence that Mr. Schlatter suffered “substantial bodily harm.” Mr. Schlatter testified that he was “banged up” following the assault. RPVI 318. When pressed, he said his neck and jaw were sore, his groin area was sore, he had “some marks” around his mouth, and “a spot,” or “floater” in one of his eyes. RPVI 319-20. In order to convict Mr. Hill of second degree assault on Mr. Schlatter, the jury had to find beyond a reasonable doubt from the above testimony that Mr. Schlatter sustained “a temporary but substantial disfigurement, substantial impairment of the function of any bodily part, or a fracture of any bodily part.” *State v. R.H.S.*, 94 Wn.App. 844, 846, 974 P.2d 1253 (1999). Mr. Schlatter testified to temporary minor injuries and bruises. A

reasonable jury could not find beyond a reasonable doubt from the above that he suffered “substantial” impairment or disfigurement. Therefore, Mr. Hill’s conviction for the second degree assault on Mr. Schlatter must be reversed.

V. CONCLUSION

The trial judge violated Mr. Hill’s due process rights when she based her sentencing decision on Mr. Hill’s decision to go to trial. Thus, the sentence imposed must be reversed and remanded for re-sentencing.

Furthermore, Mr. Hill’s conviction for the second degree assault of Mr. Schlatter must be reversed because the State failed to present sufficient evidence of “substantial bodily harm.”

DATED: July 17, 2009

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COURT OF APPEALS
DIVISION II

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CERTIFICATE OF SERVICE

I certify that on July 17, 2009, 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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