

NO. 43645-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN LONERGAN,

Appellant.

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

The Honorable Rich Melnick, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	1
1. Defense counsel’s failure to argue at sentencing that Mr. Lonergan’s convictions for assault in the second degree and felony harassment were same criminal conduct denied Mr. Lonergan his Sixth Amendment right to effective assistance of counsel.....	1
2. The trial court erred in calculating Mr. Lonergan’s offender score as the second degree assault and felony harassment were incorrectly scored as separate conduct.	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
1. RCW 9.94A.525 requires that where multiple crimes arise from the “same criminal conduct” they count as a single crime for purposes of calculating an offender score. Offenses are “same criminal conduct” at sentencing if the crimes were committed at the same time and place, involved the same victim, and have the same objective criminal intent. Where Mr. Lonergan’s convictions for assault and harassment arose from an incident involving the same victim at the same time and where the assault established the victim’s basis to fear the threat, did the offenses arise from the same criminal conduct?	1
2. The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. Mr. Lonergan’s counsel failed to argue that the harassment conviction arose from the same criminal conduct as the assault conviction. Where those offenses satisfy the criteria of same criminal conduct but were nonetheless counted as separate offenses in calculating his offender score, was Mr. Lonergan denied his right to the effective assistance of counsel?	2
C. STATEMENT OF THE CASE.....	2

D. ARGUMENT..... 6

**MR. LONERGAN WAS DENIED HIS SIXTH AMENDMENT
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT
SENTENCING..... 6**

**1. Mr. Lonergan has the right to effective assistance of counsel.
..... 6**

**2. By failing to argue that the harassment conviction arose from
the same criminal conduct as the assault conviction, Mr.
Lonergan’s trial counsel’s performance was both deficient and
prejudicial..... 7**

E. CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Page

Cases

<i>Adams v. United States ex rel. McCann</i> , 317 U.S. 269, 63 S.Ct. 2006, 32 L.Ed.2d 268 (1942).....	6
<i>Argersinger v. Hamlin</i> , 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)	6
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	6
<i>McCann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2nd 763 (1970).....	7
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932).....	6
<i>State v. Beasley</i> , 126 Wn. App. 670, 109 P.3d 849 (2005).....	8
<i>State v. Brown</i> , 159 Wn. App. 366, 245 P.3d 776, review denied, 171 Wn.2d 1025 (2011)	7
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	7
<i>State v. Nitsch</i> , 100 Wn. App. 512, 997 P.2d 1000 (2000).....	8
<i>State v. Palmer</i> , 95 Wn. App. 187, 975 P.2d 1038 (1999)	9
<i>State v. Wilson</i> , 136 Wn. App. 596, 150 P.3d 144 (2007).....	10, 11
<i>Strickland v. Washington</i> , 466 U.S., 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	6, 7

Statutes

RCW 10.99.020(5).....	5
RCW 9.94A.510.....	8, 11
RCW 9.94A.515.....	8, 11
RCW 9.94A.525.....	i, 1
RCW 9.94A.525(5)(a)(1).....	11
RCW 9.94A.525(21)(a).....	8
RCW 9.94A.589(1).....	9
RCW 9A.36.021(1)(g)	5
RCW 9A.46.020(2)(b)(ii)	5

A. ASSIGNMENTS OF ERROR

1. Defense counsel's failure to argue at sentencing that Mr. Lonergan's convictions for assault in the second degree and felony harassment were same criminal conduct denied Mr. Lonergan his Sixth Amendment right to effective assistance of counsel.

2. The trial court erred in calculating Mr. Lonergan's offender score as the second degree assault and felony harassment were incorrectly scored as separate conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 9.94A.525 requires that where multiple crimes arise from the "same criminal conduct" they count as a single crime for purposes of calculating an offender score. Offenses are "same criminal conduct" at sentencing if the crimes were committed at the same time and place, involved the same victim, and have the same objective criminal intent. Where Mr. Lonergan's convictions for assault and harassment arose from an incident involving the same victim at the same time and where the assault established the victim's basis to fear the threat, did the offenses arise from the same criminal conduct?

2. The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. Mr. Lonergan's counsel failed to argue that the harassment conviction arose from the same criminal conduct as

the assault conviction. Where those offenses satisfy the criteria of same criminal conduct but were nonetheless counted as separate offenses in calculating his offender score, was Mr. Lonergan denied his right to the effective assistance of counsel?

C. STATEMENT OF THE CASE

Marissa Cadman and John Lonergan met and began dating in February 2011. 1 RP at 44. Shortly thereafter, he moved into her home. It was a tumultuous relationship. 1 RP at 45. Just a few months later, by November, Mr. Lonergan had moved out for the last time. 1 RP at 126.

Even after Mr. Lonergan moved out, Ms. Cadman continued to frequently text and call Mr. Lonergan. 1 RP at 45. She still loved him and held out hope they could work out their problems. 1 RP at 46-47. She counted his suspected methamphetamine use as a problem for her. 1 RP at 45. On his part, Mr. Lonergan complained of Ms. Cadman's excessive alcohol consumption. 1 RP at 131-35.

Early morning on November 17, Ms. Cadman called 911 and reported that Mr. Lonergan strangled her and threatened to kill her. 1 RP at 55, 65, 101.

Clark County Deputy Osbourne responded to the call. When Ms. Cadman answered the door, she was crying, shaking, and upset. 1 RP at 101. She told Deputy Osbourne that Mr. Lonergan arrived at her home

intoxicated. She was worried about him driving in that condition so she invited him in. They sat and talked for about an hour. She got a text message from a guy. Mr. Lonergan demanded to see the text. She did not want him to see it. They struggled. Mr. Lonergan head-butted her a couple of times and “choked” her by putting his hands around her neck several times. 1 RP at 102-03. When he had his hands around her neck he also threatened to kill her. She took the threat seriously because he was angry and because he was strangling her and threatening to kill her at the same time. 1 RP at 101-03. Mr. Lonergan left after she got away from him and screamed loudly. 1 RP at 103.

Deputy Osbourne noted that Ms. Cadman had what he believed were fresh red marks on the sides of her neck and a small abrasion over her right eye. 1 RP at 106. He did not note any evidence that she had been drinking. 1 RP at 105.

Ms. Cadman testified that she was home when Mr. Lonergan suddenly appeared in her living room even though he no longer had a key to her home. 1 RP at 47. He was angry and she suspected he was high. 1 RP at 49. They talked for a short time but then she got a text message. Ms. Cadman did not want Mr. Lonergan to see the text. Mr. Lonergan thought the text was from a guy and was angry. 1 RP at 47-50. They struggled. He head-butted her and strangled (or “choked” her) with his

hands around her neck while threatening to kill her. He would stop and start while strangling her and threatening to kill her. She believed the threats because he made them while strangling her and because he was so angry. 1 RP at 51-53. There were times should could not breathe. 1 RP at 51. She threatened to call the police. Mr. Lonergan left. 1 RP at 54-55.

Mr. Lonergan testified he only went to Ms. Cadman's home after she invited him to do so. 1 RP at 129. When he arrived, she was not home but she had left a key for him under the door mat. 1 RP at 130-31. He was dirty from work earlier in the day so he took a shower and found clean clothes to change into. 1 RP at 131-32. While waiting for Ms. Cadman to return, he took books from his backpack and studied. 1 RP at 131.

Ms. Cadman came home drunk. She took a shower. 1 RP at 132-35. While she was showering, he saw on her phone that she received a text from Skeeter. 1 RP at 133. Ms. Cadman works with Skeeter. 1 RP at 54-55. Mr. Lonergan also noticed a text from Skeeter on Ms. Cadman's car's touch screen while he was looking for clothing in her basement garage. 1 RP at 151.

When Ms. Cadman got out of the shower, he confronted her about being drunk. She got mad. 1 RP at 135. He grabbed his backpack to

leave and pushed Ms. Cadman away after she leaned over him. 1 RP at 135. He did not strangled or head butt Ms. Cadman and he did not threaten to kill her. 1 RP at 136.

Mr. Lonergan was charged with domestic violence¹ offenses Assault in the Second Degree² and Felony Harassment.³ CP 1-2. A jury convicted him as charged. CP 3-5.

At sentencing, defense counsel agreed Mr. Lonergan had an offender score of eight points prior to including the current offenses in the offender score calculation. 2 RP at 231-32. Defense counsel did not argue that the assault and harassment were same criminal conduct. 2 RP at 231-44. The court counted the current offenses against each other and scored Mr. Lonergan as if he had an offender score of ten points. Mr. Lonergan received a 75 month sentence on the assault and a concurrent 51 month sentence on the harassment. 2 RP at 239; CP 9.

He filed a timely appeal. CP 21-35.

¹ RCW 10.99.020(5)

² RCW 9A.36.021(1)(g)

³ 9A.46.020(2)(b)(ii)

D. ARGUMENT

MR. LONERGAN WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Defense counsel failed Mr. Lonergan when she did not argue at sentencing that the second degree assault and felony harassment were same criminal conduct.

1. Mr. Lonergan has the right to effective assistance of counsel.

The Sixth Amendment guarantees the right to the effective assistance of counsel in criminal proceedings. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to afford defendant’s the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S., 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 2006, 32 L.Ed.2d 268 (1942)). If he does not have the funds to hire an attorney, a person accused of a crime has the right to have counsel appointed. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. *McCann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2nd 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. To prevail on a claim that he was denied this right the court must find that counsel's performance was deficient and that the deficient performance prejudice Mr. Lonergan. *Strickland*, 477 U.S. at 687. Ineffective assistance of counsel claims are reviewed de novo. *State v. Brown*, 159 Wn. App. 366, 370, 245 P.3d 776, review denied, 171 Wn.2d 1025 (2011).

2. By failing to argue that the harassment conviction arose from the same criminal conduct as the assault conviction, Mr. Lonergan's trial counsel's performance was both deficient and prejudicial.

Counsel's deficient performance is prejudicial if there is a reasonable probability that the result of the proceeding would have been different but for counsel's errors. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). When a defendant alleges a same criminal conduct error within the context of an ineffective assistance of counsel claim, this Court analyzes prejudice by determining whether the sentencing court would likely have concluded the current offenses were

the same criminal conduct if counsel had argued the issue. *State v. Beasley*, 126 Wn. App. 670, 686, 109 P.3d 849 (2005).

A sentencing court calculates a defendant's offender score by adding the defendant's prior convictions to his current offenses. RCW 9.94A.589(1). A sentencing court must count a defendant's current offenses separately in determining the offender score unless the sentencing court enters a finding that the current offenses are the same criminal conduct. *State v. Nitsch*, 100 Wn. App. 512, 520–21, 997 P.2d 1000 (2000).

Prior to scoring the current assault and harassment against each other, the trial court calculated Mr. Lonergan's standard range as eight points. CP 19-20. Scored as eight points, the assault standard range is 63-70 months and the harassment standard range is 43-57 months. RCW 9.94A.510; RCW 9.94A.515. As both the assault and the harassment were domestic violence crimes, each counted as two points against the other when calculating the standard range. RCW 9.94A.525(21)(a). Scored at 10 points, the assault standard range is 63-84 months and the harassment standard range 51-68 months. However, under RCW 9.94A.525(5)(a)(1), when multiple crimes arise from the "same criminal conduct" they count as a single crime for purposes of calculating the individual offender score. Thus, if counsel's performance was deficient in failing to argue same

criminal conduct, the prejudice prong is satisfied because the trial court could not have sentenced Mr. Lonergan to 75 months on the assault. Because the offenses arose from the same criminal conduct, counsel's performance was deficient.

Offenses are same criminal conduct if the crimes were committed at the same time and place, involve the same victim, and involve the same objective criminal intent. RCW 9.94A.589(1)(a); *State v. Palmer*, 95 Wn. App. 187, 190, 975 P.2d 1038 (1999). Ms. Cadman is the victim of both the assault and the harassment. The assault and the harassment occurred at the same time and place. Ms. Cadman testified to several instances of Mr. Lonergan putting his hands on her neck while simultaneously threatening to kill her. 1 RP at 51, 52. As she described it, Mr. Lonergan kept saying he was going to kill her while putting his hands around her neck. 1 RP at 52. Ms. Cadman also told the investigating officer that she took Mr. Lonergan's threat to kill her seriously "because she was being choked at the time." 1 RP at 103. Ms. Cadman testified, the "fact that he was saying that, it was even worse." 1 RP at 51.

Mr. Lonergan was charged with a single instance of harassment and assault for his conduct. CP 1-2. The jury was not instructed to treat each subtle stop and start of Mr. Lonergan's hands around Ms. Cadman's neck accompanied by the threat to kill her as a separate conduct.

Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury (sub. nom. 30). Instead, the conduct was treated as a single ongoing incident albeit two separate crimes of harassment and assault. Supp. DCP, Court's Instructions to the Jury (Instruction 5).

As to the same criminal intent, the jury was instructed that an element of the assault was that Mr. Lonergan assaulted Ms. Cadman by strangling her. Supp. DCP, Court's Instructions to the Jury (Instruction 10). The jury was instructed that assault is "an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury. Supp. DCP, Court's Instructions to the Jury (Instruction 9). For felony harassment, the State had to prove that Mr. Lonergan knowingly threatened to kill Ms. Cadman. Supp. DCP, Court's Instructions to the Jury (Instruction 17). Unlike in cases where the objective criminal intent necessarily changes between two criminal acts, these two intent elements are not mutually exclusive. Cf. *State v. Wilson*, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (finding distinct criminal conduct where the two crimes' respective statutes define different criminal intents).

There was also no opportunity for Mr. Lonergan to form a new intent from one crime to the next because the acts occurred

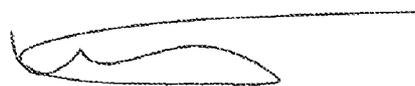
simultaneously. *Cf. Wilson*, 136 Wn. App. at 615 (the two acts were separated in time, providing an opportunity for the completion of the assault and the formation of a new intent to re-enter the house and harass the victim). These circumstances strongly suggest that Mr. Lonergan's primary objective was to frighten Ms. Cadman. Thus, if counsel had argued the issue, the trial court should have counted the assault and harassment of Ms. Cadman as the "same criminal conduct." Under RCW 9.94A.525(5)(a)(1), the felony harassment and assault would have been calculated as a single offense. Consequently, Mr. Lonergan's offender score, at eight points, would have a maximum standard range of 70 months which was below the 75 months sentence he received on the assault. The reduced score of eight on the harassment charge encompassed the 51 months the court imposed on the mistaken belief that Mr. Lonergan scored as having ten points. RCW 9.94A.510; RCW 9.94A.515.

Defense counsel's failure to argue the offenses arose from the same criminal conduct deprived Mr. Lonergan of his right to the effective assistance of counsel at sentencing and requires reversal of his sentence.

E. CONCLUSION

Mr. Loneragan's case should be remanded to the trial court for resentencing.

Respectfully submitted this 1st day of February 2012.



LISA E. TABBUT/WSBA #21344
Attorney for John Loneragan

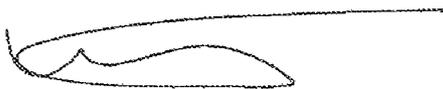
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Brief to: (1) Abigail Bartlett, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to John S. Lonergan, DOC#335500, Clallam Bay Corrections Center, 1830 Eagle Crest Way Clallam Bay, WA 98326

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

Signed February 1, 2013, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right from the top of the signature.

Lisa E. Tabbut, WSBA No. 21344
Attorney for John Lonergan

COWLITZ COUNTY ASSIGNED COUNSEL

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