

No. 47680-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Eric Martin,

Appellant.

Clark County Superior Court Cause No. 12-1-01274-1

The Honorable Judge Scott A. Collier

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE AND ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2

ARGUMENT..... 4

**The court miscalculated Mr. Martin’s offender score, because
his assault and harassment convictions comprised the
same criminal conduct..... 4**

CONCLUSION 6

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013)..... 5, 6

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997)..... 5

State v. Williams, 135 Wn.2d 365, 957 P.2d 216 (1998)..... 5

State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007) 1, 2, 3, 4, 5

WASHINGTON STATUTES

RCW 9.94A.525..... 4

RCW 9.94A.589..... 5

ISSUE AND ASSIGNMENTS OF ERROR

1. The court erred by scoring Mr. Martin's felony assault and harassment convictions separately at sentencing.
2. Mr. Martin's felony assault and harassment convictions comprised the same criminal conduct.
3. The trial court erred by sentencing Mr. Martin with an offender score of three on the harassment charge and an offender score of four on the assault and burglary charges.

ISSUE: Multiple offenses score as the same criminal conduct if they occurred at the same time and place, against the same victim, and with the same criminal intent. Did the court err by scoring Mr. Martin's assault and harassment offenses separately when the evidence established that he repeatedly attempted to strangle Wilson while threatening to kill her if she called police?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Eric Martin and Malory Wilson were in a long-term relationship, though they broke up and reunited multiple times. RP (trial)¹ 211. In the early morning of July 16, 2012, the couple fought, verbally and physically. RP (trial) 215- 238. According to Wilson, Mr. Martin tried to choke her multiple times, and pushed her repeatedly to the floor and against a shower stall. RP (trial) 215- 238. Wilson said that during this, she threatened to call the police, at which point Mr. Martin he would hit the phone from her hand and threaten her. RP (trial) 215- 238. This took place in Wilson's duplex in the early morning², and stopped when a neighbor shouted and Mr. Martin drove away. RP (trial) 238-240.

The state charged Mr. Martin with burglary one, robbery one, two counts of assault two, harassment (felony), malicious mischief three, and assault four. CP 1-3. All of the charges carried with them an allegation that the crime was against a family or household member and comprised domestic violence. CP 1-3.

The jury found Mr. Martin not guilty of the robbery charge. CP 6. He was found guilty of burglary one, two counts of assault two,

¹The transcripts from the trial were transferred for consideration in this appeal of the sentence. They will be cited as RP (trial). References to the resentencing hearings will be cited as RP (sentencing).

² The state's closing argument referred to it as a 20 minute time period. RP (trial) 368.

harassment, assault four and malicious mischief three. CP 5, 7-11. The jury also concluded that Wilson and Mr. Martin did not have a domestic relationship and therefore the offenses were not domestic violence. CP 12.

The sentencing court concluded that none of Mr. Martin's offenses comprised the same criminal conduct, and imposed 65 months in prison. Judgment and Sentence filed 5/15/13, Supp. CP. Mr. Martin appealed.

On appeal, the state conceded that the two felony assault convictions violated double jeopardy. The Court of Appeals accepted the state's concession and remanded the case with instructions to vacate one conviction and resentence Mr. Martin. CP 13-27. Because it ordered a full resentencing hearing, the court declined to reach Mr. Martin's same-criminal-conduct argument. CP 24.

At resentencing, the defense argued that the remaining assault two and the felony harassment comprised the same criminal conduct and should not have added two points to Mr. Martin's offender score. CP 26-140; RP (sentencing) 4-15. The second-degree assault was committed by strangulation. There were multiple strangulation attempts throughout the entire incident. While these were ongoing, Wilson attempted to call police. Mr. Martin knocked her phone away and told her he would kill her

if she called the police, all while continuing to assault her. RP (trial) 215-238; RP (sentencing) 4-15; CP 26-140.

The court refused to consider the assault and harassment as the same criminal conduct, and scored each crime separately. RP (sentencing) 15. This gave Mr. Martin a score of four points on the assault and burglary charges, and three points on the harassment. The court sentenced him to 42 months. CP 140-154.

This timely appeal followed. CP 164-166.

ARGUMENT

THE COURT MISCALCULATED MR. MARTIN'S OFFENDER SCORE, BECAUSE HIS ASSAULT AND HARASSMENT CONVICTIONS COMPRISED THE SAME CRIMINAL CONDUCT.

Evidence at trial showed that Mr. Martin repeatedly attempted to strangle Wilson while telling her he'd kill her if she called the police. RP (trial) 215-238. This conduct resulted in convictions for second-degree assault and felony harassment. The two offenses comprised the same criminal conduct, and should have scored as one point in Mr. Martin's offender score.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. The sentencing judge must determine how multiple current offenses are to be scored. Offenses that comprise the "same criminal conduct" are "counted as one crime. RCW

9.94A.589(1)(a). “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.589(1)(a). Simultaneity is not required for a finding of same criminal conduct. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998).

The phrase “same criminal intent” does not refer to a crime’s *mens rea*. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013). Instead, courts consider how intimately related the crimes are, the overall criminal objective, and whether one crime furthered the other. *Id.* When objectively viewed, the intent for a “continuing, uninterrupted sequence of conduct” likely remains the same from one crime to the next. *See State v. Porter*, 133 Wn.2d 177, 186, 942 P.2d 974 (1997) (addressing sequential drug deliveries).

Mr. Martin’s assault and harassment convictions comprised the same criminal conduct. Both occurred at the same time and place, against the same victim, with the same overall criminal objective. He did not complete one crime, leave the scene, reflect, and return before committing the second. *Cf. State v. Wilson*, 136 Wn. App. 596, 615, 150 P.3d 144 (2007).

Mr. Martin’s assault and harassment charges comprised the same criminal conduct. RCW 9.94A.589(1)(a). The court abused its discretion

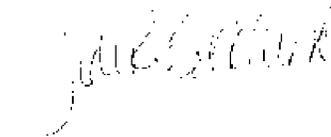
by scoring the two offenses separately in calculating his offender score. RCW 9.94A.589(1)(a). His case must be remanded for resentencing with a corrected offender score. *Phuong*, 174 Wn. App. at 494, 546-47.

CONCLUSION

The trial court erred by sentencing Mr. Martin with an offender score of four. His assault and harassment convictions comprised the same criminal conduct and should not have scored separately. The sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on November 12, 2015,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Eric Martin, DOC #366329
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

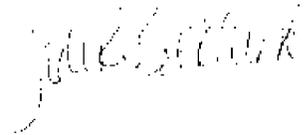
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on November 12, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

November 12, 2015 - 1:55 PM

Transmittal Letter

Document Uploaded: 1-476801-Appellant's Brief.pdf

Case Name: State v. Eric Martin

Court of Appeals Case Number: 47680-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion:

Answer/Reply to Motion:

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes:

Hearing Date(s):

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other:

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

prosecutor@clark.wa.gov