

NO. 47680-1-II

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

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STATE OF WASHINGTON, Respondent

v.

ERIC CHRISTOPHER MARTIN, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01274-1

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

The trial court did not abuse its discretion in finding Martin's convictions for felony Harassment and Assault in the Second Degree do not constitute same criminal conduct.

### **STATEMENT OF THE CASE**

Malory Wilson was working and living in Vancouver, Washington in July 2012. 2 RP at 209<sup>1</sup>. She lived with her young daughter. 2 RP at 209. Ms. Wilson had previously dated Eric Martin (hereafter 'Martin') on and off for four years. 2 RP at 211. In July 2012 she was trying to work things out with Martin. 2 RP at 211. Ms. Wilson spent the day of July 16, 2012 with Martin, ending the evening at her apartment to watch a movie and spend a romantic evening together. 2 RP at 212-13. They had consumed alcohol and cocaine that evening. 2 RP at 214. Ms. Wilson and Martin went to bed, which was located in the living room of the apartment. 2 RP at 215-16.

At approximately 4 a.m. Ms. Wilson woke up and found Martin was not beside her in bed. 2 RP at 216. She found him in the bathroom

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<sup>1</sup> The record from the first direct appeal was transferred to this appeal. The verbatim report of proceedings consists of the original trial transcripts in 3 separate volumes referred to by the State as 'Vol #, RP at Page #.' The resentencing transcript consists of one volume and is referred to as 'Sent RP at Page #.'

holding tinfoil and a lighter with a straw in his mouth. 2 RP at 217. Ms. Wilson believed him to be smoking crack. 2 RP at 217. This upset Ms. Wilson and she asked him to leave her apartment. 2 RP at 218. Martin became angry and grabbed Ms. Wilson by the neck with two hands and slammed her up against the shower door. 2 RP at 219. Martin's hands were on the side of her neck and he had her feet off the ground. 2 RP at 220. Ms. Wilson was trying to get Martin off of her, telling him to stop, but he wouldn't. 2 RP at 220-21. Her vision was going blurry and she felt he was going to kill her. 2 RP at 221. Martin then suddenly dropped her, and instantly grabbed her around the front of her neck with one hand. 2 RP at 221. Ms. Wilson was trying to push Martin off of her and thinking of getting to her cell phone to get help. 2 RP at 222. Ms. Wilson couldn't breathe as Martin had one hand around her neck. 2 RP at 221. During this incident Ms. Wilson does not remember Martin saying anything to her. 2 RP at 220.

Martin suddenly let go of Ms. Wilson's neck and she tried to grab her phone off the bathroom window sill, but Martin knocked it out of her hand, and grabbed her by the hair at the back of her head and lifted her up. 2 RP at 222. Ms. Wilson said she was calling the police and Martin told her she wasn't and knocked the phone out of her hands. This happened multiple times. 2 RP at 223. Martin told Ms. Wilson he was not going to

jail and was not going to let her call the police. 2 RP at 223. At this point in time Martin was not making any threats towards Ms. Wilson. 2 RP at 224. Martin left the room and then came back. This time Martin grabbed Ms. Wilson again by the neck and said he would kill her before he went to jail. 2 RP at 224. Ms. Wilson believed Martin when he made the threat and thought he would kill her. 2 RP at 225, 231. Martin had been violent with Ms. Wilson several times in the past. 2 RP at 225-31.

Martin left Ms. Wilson's home after hiding her cell phone, taking her mace and her keys. 2 RP at 232. Ms. Wilson locked the door with the deadbolt and within seconds Martin kicked in the door and grabbed Ms. Wilson and threw her to the ground. 2 RP at 232. Martin was yelling at Ms. Wilson and accused her of calling the police. 2 RP at 232. He hit Ms. Wilson while she laid on the floor. 2 RP at 232. Martin then grabbed something out of Ms. Wilson's purse and left. 2 RP at 232. Ms. Wilson believes he took money out of her purse. 2 RP at 233. Martin left, but Ms. Wilson went after him because she needed the money he took to pay her rent. 2 RP at 237-38. Martin then threw her to the ground outside. 2 RP at 238. A neighbor called out to them and Martin got into his vehicle and fled. 2 RP at 238.

Ms. Wilson was scared and did not immediately call police, but attempted to contact a close friend instead. 2 RP at 239-40. Ms. Wilson

did call 911 later and the 911 call was admitted and played for the jury. 2 RP at 242-51. Throughout the call Ms. Wilson was coughing because her throat hurt from the attack. 2 RP at 254-55. Ms. Wilson's neck was red, and she had marks on her arms from the attack. 2 RP at 255-56.

Photographs of Wilson's injuries were taken and admitted into evidence. 2 RP at 256-57; 266-69. Police came that night and took Ms. Wilson's statement, and the next day her neck hurt and she was having trouble breathing so she went to the hospital. 2 RP at 258-59. Ms. Wilson was very sore and could not stop coughing; she had pain while swallowing. 2 RP at 260. Ms. Wilson was sore for several weeks and her neck still hurt at the time of trial. 2 RP at 274-75. She had to wear a neck brace for a time to help with her neck pain. 2 RP at 276.

Martin was arrested and tried to contact Ms. Wilson at least three times from the Clark County jail. 2 RP at 261. One of the calls was admitted into evidence and played for the jury. 2 RP at 262-64.

The State charged Martin with two counts of Assault in the Second Degree, Burglary in the First Degree, Robbery in the First Degree, Felony Harassment, Assault in the Fourth Degree, and Malicious Mischief in the Third Degree. CP 1-3.

The jury convicted Martin of Burglary in the First Degree, two counts of Assault in the Second Degree, Felony Harassment, Assault in

the Fourth Degree, and Malicious Mischief in the Third Degree. CP 5-11. The jury found Martin not guilty of Robbery in the First Degree and did not return the special verdict finding Martin and Ms. Wilson were family or household members. CP 6, 12.

At his original sentencing, Martin did not ask the trial court to consider any of the present convictions as same criminal conduct. 3 RP at 423-26. Martin was sentenced to a standard range sentence. CP 107-14. Martin then appealed to this Court; on appeal, the State conceded that two felony assault convictions violated double jeopardy and this Court accepted the State's concession and remanded to the trial court to vacate one conviction and resentence Martin. CP 13-27. This Court did not reach Martin's same criminal conduct argument. CP 24.

At resentencing, Martin argued the remaining Assault in the Second Degree conviction and the Felony Harassment comprised the same criminal conduct. CP 26-32; Sent. RP 4-15. The trial court found the Assault and Harassment did not constitute the same criminal conduct and scored each crime separately. Sent. RP at 15. Martin was sentenced to a standard range sentence. CP 140-154. This appeal follows.

## ARGUMENT

### **I. Martin’s convictions for assault in the second degree and harassment do not constitute same criminal conduct.**

Martin argues his convictions for Assault in the Second degree and Harassment should have been considered as same criminal conduct by the trial court for sentencing purposes. The trial court properly considered the argument and properly found that the Assault and Harassment convictions were not same criminal conduct. Martin’s offender score was properly calculated and he was sentenced within the standard range. The trial court should be affirmed.

This Court reviews a trial court’s finding that two crimes do or do not constitute “same criminal conduct” for an abuse of discretion. *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013) (internal citations omitted). “Under this standard, when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result. *See State v. Rodriguez*, 61 Wn.App. 812, 816, 812 P.2d 868 (1991). But where the record adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 537-38. RCW 9.94A.589(1)(a) provides that “[s]ame criminal conduct’ as used in this subsection, 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). This statute is construed narrowly and disallows most assertions of “same criminal conduct.” *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). There are three factors which must be present for two crimes to be considered “same criminal conduct:” 1) committed at the same time and place; 2) involve the same victim; and 3) require the same criminal intent. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

To determine whether the two crimes committed involve the same criminal intent purposes for determining “same criminal conduct,” the court must examine each statute and compare them to determine whether the required intents are the same or different for each crime. *State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). When a defendant’s intent objectively changes from one crime to the other, the two crimes do not contain the same criminal intent. *State v. King*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1015 (2003). To determine where two crimes constitute “same criminal conduct,” a reviewing court should look to whether one crime furthered the other, or whether both crimes were part of a scheme or plan. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). If one crime can be said to have been completed before commencement of the second, then the two crimes involved different intents and do not constitute the same

criminal conduct. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

In *State v. Wilson*, the court of appeals reversed the trial court's finding that an assault and harassment convictions were the "same criminal conduct." *State v. Wilson*, 136 Wn. App. 596, 616, 150 P.3d 144 (2007). The facts at trial showed that Wilson had forcibly entered his and the victim's home, grabbed the victim by her hair and pulled her out of bed, and kicked her. *Id.* at 601. Wilson then left the house to speak with friends outside, then immediately returned to the home, picked up a piece of wood and threatened to kill the victim. *Id.* The Court of Appeals found that Wilson had separate criminal intents for the two acts, in part because there was a period of time, albeit short, wherein Wilson was able to reflect and form a new intent upon reentering the home to harass the victim. *Id.* at 615. The Court reasoned it must construe RCW 9.94A.589(1)(a) narrowly and disallow most assertions of "same criminal conduct." *Id.* The court found the defendant had time to complete an assault and form a new intent to threaten the victim, and therefore the crimes of assault and harassment were not the same criminal conduct as the defendant had different objective intents. *Wilson*, 136 Wn. App. at 615. The same is true here. Martin had time after he completed the assault on the victim to reflect and form a new intent to threaten her. These two crimes do not constitute the

same criminal conduct and the trial court did not err in counting the assault and harassment convictions against each other for scoring purposes.

Here, the assault on Ms. Wilson was completed before the harassment occurred. The evidence at trial showed that the strangulation occurred on Ms. Wilson in the bathroom and no threats were made while the assault occurred. 2 RP 217-22. Martin then left the bathroom and came back and then said that he would kill her before he went to jail while grabbing her by the neck again. 2 RP at 224. This was after Ms. Wilson had indicated she was going to call the police. 2 RP at 223. Martin leaving the room and returning shows Martin had time to stop, reflect on his actions, and form a new intent to prevent her from calling police by threatening to kill her. The trial court considered this and argument on this fact from the State and from Martin. Sent. RP 5-15. It is clear the trial court properly considered the law, properly considered the facts and came to a well-considered conclusion that the harassment and assault did not constitute same criminal conduct. Sent. RP 15. When the record adequately supports a finding that two convictions do not constitute same criminal conduct, then the matter lies in the court's discretion. *See Graciano*, 172 Wn.2d at 538. The trial court did not abuse its discretion. Martin's sentence should be affirmed.

**CONCLUSION**

The trial court properly considered the law and the facts of this case and found that the two convictions for assault and harassment do not constitute same criminal conduct. The fact that assault and harassment have different criminal intents by definition supports a conclusion that they are not the same criminal conduct. That along with the facts of this case, the long history of domestic violence abuse, and the severity of this attack show that the trial court below properly found these offenses did not constitute same criminal conduct. Martin's sentence should be affirmed.

DATED this 10th day of February 2016.

Respectfully submitted:

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**February 10, 2016 - 2:18 PM**

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