

No. 95528-0

No. 75537-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL IAN BURNS,

Appellant.

FILED
Dec 27, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Deborra Garrett

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Michael Burns was charged with second degree assault and felony violation of a no-contact order. Despite Mr. Burns' unequivocal and timely motions to represent himself, the trial court refused to grant him his right to self-representation. The trial court also admitted testimonial hearsay of an absent witness where Mr. Burns had no prior opportunity to cross examine the witness. Mr. Burns is entitled to reversal of his convictions and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. Mr. Burns was denied his constitutional right to represent himself at trial.

2. Admission of Ms. Jackson's testimonial hearsay statements violated Mr. Burns' right to confrontation.

3. The trial court erred in refusing to find the convictions to be the same criminal conduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a constitutionally protected right to represent himself where he makes a timely and unequivocal request to represent himself. Here, on several occasions, Mr. Burns moved to represent himself, but the trial court refused to grant his request. Did the trial

court impermissibly deny Mr. Burns his right to represent himself, requiring reversal of his convictions?

2. The Confrontation Clauses of the state and federal constitutions bar the admission of testimonial hearsay statements absent an opportunity for the defendant to cross-examine. The trial court admitted the testimonial hearsay statements of Christine Jackson to a neighbor and a police officer where Mr. Burns had no prior opportunity to cross examine her. Did the trial court violate Mr. Burns' right to confrontation, requiring reversal of his convictions?

3. Where multiple offenses occur at the same time and place, involve the same victim, and involve the same criminal intent, upon request they should be scored as the same criminal conduct. The two offenses here occurred at the same time and place, involved the same victim, and involved the same criminal intent but the court refused to grant Mr. Burns' request to find them the same criminal conduct. Is Mr. Burns entitled to reversal of his sentence and remand for resentencing?

D. STATEMENT OF THE CASE

Michael Burns was charged with second degree assault for allegedly attempting to strangle Christine Jackson and felony violation of a court order.

At one of his first appearances, Mr. Burns moved to represent himself. 12/30/2015RP 7. He repeated his request at the next hearing one week later. 1/7/2016RP 12. On each of these two occasions, the court postponed a colloquy with Mr. Burns regarding his wishes. E.g., 1/7/2016RP 13.

On January 13, 2016, Mr. Burns for a third time expressed his wish to represent himself:

Yeah. Yeah, I would like to go pro se for reasons other than just becoming aware of certain things. And furthermore, I just, you know, I'd rather handle my own business considering certain matters especially when I've gotten lied to, threatened, and coerced into certain things that I wasn't aware of at the time but I am aware of now. So I would like to go pro se because of those certain aspects of things so.

1/13/2016RP 2-3. The court engaged in the required colloquy with Mr. Burns this time regarding his motion. The court advised Mr. Burns of the offenses with which he was charged and the maximum sentences for each offense. 1/13/2016RP 3-7. Mr. Burns noted he understood but still wished to represent himself:

Ma'am, I understand completely what you're talking about. I understand that there is some, I, you know, somebody could be charged and sentenced to a serious amount of time for those matters, but like I said, they do not pertain to me and I'm not going to allow this. I would like to relieve counsel of their duties so I can become pro se.

1/13/2016RP 7.

Apparently confused by Mr. Burns' response, the court again advised him of the relevant charges and maximum sentences.

1/13/2016RP 7-11. Mr. Burns repeated that he understood the difficulty he faced but nevertheless wanted to represent himself:

I completely understand everything that I'm up against, okay, Your Honor? I completely understand what is up, what sentencing may occur, all of that stuff. I completely understand all of that and it doesn't phase me a bit. And, you know, I just, I made a mistake on asking for a public defender because I, I have a right to be represented as I see fit and the only person that's going to represent me as I see fit is me so that's why I'm here today, Your Honor.

1/13/2016RP 13.

Mr. Burns' unconventional views troubled the court but not so much that the court ordered a psychological evaluation to determine his competency. The court subsequently refused to allow Mr. Burns to represent himself:

THE COURT: Counsel, I'm going to deny Mr. Burns' motion to proceed without counsel. I don't think that Mr. Burns understands the nature of the charges and the seriousness of the situation –

MR. BURNS: I have the right to waive my right –

THE COURT: Mr. Burns, you need to stop talking now so that I can say what I have –

MR. BURNS: -- and I have the right to not waive my right. And I have the right to say –

THE COURT: Mr. Burns, sit down.

MR. BURNS: -- I want to not have this woman as my counsel any longer, okay?

THE COURT: Mr. Burns, is not in my view competent to represent himself and so I'm going to deny Mr. Burns' motion to proceed without representation. I'll leave it to counsel to consider the competency concerns that I've raised here at this hearing but obviously I will rely on counsel's assessment as to those competency issues.

1/13/2016RP 22.

During Mr. Burns' trial, Carol Donovan, Christine Jackson's neighbor, testified about hearing noises outside her door, opening the door, and seeing Ms. Jackson climbing the stairs with Mr. Burns close behind. 6/14/2016RP 253. Over Mr. Burns' hearsay objection, Ms. Donovan was allowed to testify that:

I asked what happened and she said that she had gotten into a fight, they were in the bedroom. He choked her, she blacked out, she came to, she kicked him and she ran out of there and that's when I saw her on the stairway.

6/14/2016RP 260. The court admitted Ms. Jackson's hearsay statements as excited utterances.¹

Later, Officer Kent Poortinga, the responding police officer, during redirect questioning, was allowed to testify extensively about Ms. Jackson's statements to him about what had allegedly transpired inside her apartment between herself and Mr. Burns. 6/14/2016RP 299-301.

Ms. Jackson did not testify at trial.

At the conclusion of the jury trial, Mr. Burns was convicted as charged. CP 85, 87-88; 6/16/2016RP 510-11. At sentencing, Mr. Burns asked the court to find that the two offenses were the same criminal conduct. CP 92-94; 7/13/2016RP 370-71. The court refused the find the offenses to be the same criminal conduct:

In my view these crimes were two separate crimes. I believe the intent required for each of the crimes is different, certainly the conduct required for each of the crimes is different, and based on the evidence in the record, and I realize we were all at a disadvantage because the complaining witness was not present, but based on all the evidence in the record it was clear to me that the violation of the No Contact Order was a course

¹ ER 803(a)(2) provides that a statement is not excluded as hearsay if it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007).

of conduct rather than a single event. The assault of course was a single event and in my view they were two separate events so should be treated as such.

7/13/2016RP 372.

E. ARGUMENT

1. **The court denied Mr. Burns' constitutionally protected right to represent himself.**

a. *Mr. Burns may waive his right to counsel and represent himself.*

The Sixth Amendment provides that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967).

The Sixth and Fourteenth Amendments to the United States Constitution allow criminal defendants to waive their right to assistance of counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).² The Washington Constitution also guarantees the right to self-representation. Art. I, sec. 22; *State v. Silva*, 107 Wn.App.

² The Sixth Amendment's right to counsel carries with it the implicit right to self-representation. *Faretta*, 422 U.S. at 818. Article I, section 22 of the Washington Constitution creates an explicit right to self-representation. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

605, 620-21, 27 P.3d 663 (2001). Courts regard this right as “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” *Madsen*, 168 Wn.2d at 503. An improper denial of the right requires reversal regardless of whether prejudice results. *Madsen*, 168 Wn.2d at 503.

To exercise the right to self-representation, the criminal defendant must knowingly and intelligently waive the right to counsel; that waiver should include advice about the dangers of and disadvantages of self-representation. *Faretta*, 422 U.S. at 835. A thorough colloquy on the record is the preferred method of ensuring an intelligent waiver of the right to counsel. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984); *State v. Dougherty*, 33 Wn.App. 466, 469, 655 P.2d 1187 (1982). The colloquy should, at a minimum, consist of informing the defendant of the nature and classification of the charge and the maximum penalty upon the conviction. Moreover, the defendant must be informed that technical rules apply to the defendant’s presentation of his case. *Acrey*, 103 Wn.2d at 211. Courts should engage in a presumption against waiver of the right to counsel. *State v. Lawrence*, 166 Wn.App. 378, 390, 271 P.3d 280 (2012). The defendant has the right as a matter of law when the request is made

well before trial. *State v. Vermillion*, 112 Wn.App. 844, 855, 51 P.3d 188 (2002).

This presumption does not give courts *carte blanche* to deny a motion to represent oneself. Courts are limited to finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. *Madsen*, 168 Wn.2d at 504-05. A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel. *Id.*

b. *Mr. Burns' request to proceed pro se was timely and unequivocal.*

Mr. Burns' motion was six months before trial began and he was clear and unequivocal in his desire to represent himself. The trial court's discretion in granting a request for self-representation lies at a continuum and is based on the timeliness of the request. *Vermillion*, 112 Wn.App. at 855. Given his timely request and unequivocal desire, the trial court erred in failing to allow Mr. Burns to represent himself.

The trial court did not clearly express why it denied Mr. Burns' motion to represent himself. To the extent the court denied the request

because Mr. Burns originally requested new counsel prior to moving to represent himself, that was not a valid basis for denial. An unequivocal request to proceed *pro se* is valid even if combined with an alternative request for new counsel. *Madsen*, 168 Wn.2d at 507; *State v. Stenson*, 132 Wn.2d 668, 741, 940 P.2d 1239 (1997).

Mr. Burns' unconventional views did not form a valid basis for denying his motion to proceed *pro se*. "The value of respecting the right to self-representation outweighs any resulting difficulty in the administration of justice." *Madsen*, 168 Wn.2d at 509. Further, the court may deny self-representation only where it finds the purpose of the motion was to delay the trial or obstruct justice. *State v. Vermillion*, 112 Wn.App. 844, 851, 51 P.3d 188 (2002); *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995). The court made no finding, and there was no evidence from which to infer, that Mr. Burns' motion to represent himself was done with anything other than the desire to represent himself.

The court's ruling could have been based on a concern regarding Mr. Burn's mental competency to represent himself. But in the absence of a competency evaluation, this was nothing more than a concern over Mr. Burns' judgment. The defendant's "skill and

judgment” is simply not a basis for rejecting a request for self-representation. *State v. Hahn*, 106 Wn.2d 885, 890 n. 2, 726 P.2d 25 (1986).

Finally, to the extent the court denied Mr. Burn’s motion to represent himself based upon a determination that he was not sufficiently mentally competent, the court utilized the wrong standard; the standard is the same whether one has mental health concerns or not:

[A] defendant’s mental health status is but *one* factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel[.]

In re Rhome, 172 Wn.2d 654, 665, 260 P.3d 874 (2011) (emphasis added). But, “concern regarding a defendant’s competency alone is insufficient” to deny a *pro se* request. *Madsen*, 168 Wn.2d at 505.

The defendant in *Rhome* was allowed to represent himself despite a significant mental health history and continuing questions about his competency:

Rhome’s mental competency became an issue at trial. Since early childhood, Rhome has been treated for psychiatric disturbances, including several in-patient stays at psychiatric hospitals. Personal Restraint Petition (PRP), Ex. A at 2. He received multiple diagnoses during those stays, including psychotic disorder, delusional disorder, oppositional defiant disorder, mild mental retardation, obsessive-compulsive personality traits, and

pervasive development disorder (Aspergers disorder). *Id.*
at 4.

Id., at 656–57.

Mr. Rhome repeatedly moved to represent himself prior to trial.

In response:

Judge Kessler considered a renewed request from Rhome to proceed pro se. He advised Rhome of the risks of representing himself and engaged in a colloquy to determine if Rhome understood the significance of his undertaking. Rhome’s mental health issues were not specifically addressed during the colloquy. At the conclusion of the hearing, Judge Kessler granted Rhome’s request to proceed pro se, and appointed standby counsel. VRP (Aug. 30, 2005) at 12.

Rhome, 172 Wn.2d at 657. The Supreme Court ruled that the trial court did not abuse its discretion to allowing the Mr. Rhome to represent himself in light of the judge’s colloquy with him and despite Mr. Rhome’s mental health history. *Id.* at 668-69. The Court did caution that, if the court has mental health concerns, it must conduct a “searching inquiry” into the defendant mental health status. *Id.*

Here, the court failed to inquire into Mr. Burns’ mental health status at all. The court engaged in the colloquy with Mr. Burns, who clearly stated he understood the court the difficult task ahead of him, but nonetheless desired to represent himself. Again, the court’s concern appeared to be that Mr. Burns lacked the skill necessary to represent

himself. As argued, that was simply not a sufficient ground no matter the well-meaning the desire of the court. *Faretta*, 422 U.S. at 835; *Rhome*, 172 Wn.2d at 669.

The trial court erred in denying Mr. Burns the right to represent himself. He is entitled to reversal of his conviction and remand for a new trial. *Madsen*, 168 Wn.2d at 503.

2. In the absence of an opportunity to cross-examine, the admission of Ms. Jackson’s testimonial hearsay statements violated Mr. Burns’ right to confrontation.

- a. *The Washington and United States Constitutions bar admission of testimonial hearsay absent an opportunity to cross-examine.*

The Sixth and Fourteenth Amendments to the United States Constitution guarantee an accused person the right to confront adverse witnesses. U.S. Const. Amends. VI, XIV. The Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A statement is testimonial if “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822,

126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). A Confrontation Clause analysis is separate from analysis under the rules of evidence. *Crawford*, 541 U.S. at 51.

The admission of testimonial hearsay statements of a witness who does not appear at a criminal trial violates the Confrontation Clause of the Sixth Amendment unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 53-54; *State v. Beadle*, 173 Wn.2d 97, 107, 265 P.3d 863 (2011).

Whether a statement is admissible as an exception to the hearsay rule is no moment to the confrontation clause. *See Crawford*, 541 U.S. at 61 (even hearsay with an applicable exception is inadmissible in violation of the clause if it is *testimonial* hearsay).

A claim of a violation of the confrontation clause is reviewed *de novo*. *State v Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

b. *Statements establishing past events are testimonial and inadmissible.*

In general, where a statement is functionally trial testimony, it is testimonial; where it is just a casual statement made to a friend, it is not testimonial. *Crawford*, 541 U.S. at 51. An out-of-court statement is testimonial if, in the absence of an ongoing emergency, the primary

purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

c. *Ms. Jackson's statements were regarding past events, thus testimonial and inadmissible.*

i. *Ms. Jackson's statements to Officer Poortinga were testimonial.*

The case consolidated with *Davis*, *Hammon v. Indiana*, controls Ms. Jackson's hearsay statements to Officer Poortinga. In *Hammon*, the police responded to a report of a domestic disturbance at the home of Hershel and Amy Hammon. *Davis*, 547 U.S. at 819. One officer spoke with Hershel while the other spoke with Amy. *Id.* The officer who listened to Amy's account had her sign an affidavit, in which she wrote that Hershel hit and shoved her. *Id.* at 820. Hershel was later charged with domestic battery. Amy was subpoenaed, but did not appear at trial. *Id.* Over Hershel's objection, the trial court admitted the police officer's testimony about Amy's statements to him under the excited utterance exception to the hearsay rule, and admitted Amy's affidavit as a present-sense impression. *Id.*

Under these facts, the United States Supreme Court held that Amy's statements to the officer and the statements in her affidavit *were* testimonial because she was speaking about past criminal conduct:

There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime - which is, of course, precisely what the officer *should* have done.

Id. at 829-30 (citations omitted, emphasis in original).

The facts in this case are extremely similar to those in *Hammon*. Ms. Jackson was safe in her neighbor's apartment and Mr. Burns had fled, thus there was no emergency in progress. *Id.* The officer neither saw nor heard any evidence of an assault when he first arrived. Thus, the sole purpose of the officer's questioning of Ms. Jackson was in investigating the possible crime of assault that had already allegedly occurred. As such, Ms. Jackson's statements to the officer were testimonial and were inadmissible. *Id.*, at 822.

Further, the fact that the officer obtained Ms. Jackson's statement in a less than formal setting such as the police station simply does not matter. The formality or lack of formality of the police interrogation is of no import in determining whether the statements were testimonial:

Formality is not the sole touchstone of our primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to "establish or prove past events potentially relevant to later criminal prosecution," informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

Michigan v. Bryant, 562 U.S. 344, 366, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) (internal citations omitted).

Finally, the fact Ms. Jackson may have begun her statement by describing present facts that were not testimonial does not make the entirety of her statement non-testimonial. Statements from a witness may begin as non-testimonial in order to determine whether an emergency exists or assistance is needed but may evolve into questions of past events, thus evolving into testimonial statements. *Davis*, 547 U.S. at 828. That is precisely what happened here. The officer initially determined whether any emergency assistance was needed, then began questioning Ms. Jackson about what *had* occurred.

Ms. Jackson's statements to the officer were testimonial and should have been excluded.

ii. Ms. Jackson's statements to Ms. Donovan were similarly testimonial.

Ms. Jackson's hearsay statements were equally testimonial as those statements made to the officer as they described past events and it was reasonable for Ms. Donovan to believe these statements would be available for a later criminal trial.

The *Crawford* court declined to define "testimonial statements" but did identify three examples of statements that would be testimonial, one of which is relevant here: statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Crawford*, 541 U.S. at 51-52.

Here, Ms. Donovan brought Ms. Jackson into her home after seeing her being pursued up the stairs by Mr. Burns. Ms. Donovan saw that Ms. Jackson had been the victim of a crime. In light of this fact, Ms. Donovan immediately contacted 911 for assistance for Ms. Jackson. It seems readily apparent that Ms. Donovan, an objective witness, would have reasonably believed that Ms. Jackson's statements to her about what had happened between Ms. Jackson and Mr. Burns in

Ms. Jackson's apartment would be available for use at a later criminal trial.

In addition, Ms. Jackson was aware that 911 had been called when Ms. Donovan reached out to help her, thus she objectively understood her statements about what happened in the apartment would be available for a later prosecution. *Bryant*, 562 U.S. at 367.

Ms. Jackson's statements to Ms. Donovan were testimonial and in the absence of Mr. Burns' ability to cross examine. The court erred in finding them admissible.

d. *The error in admitting Ms. Jackson's testimonial hearsay statements constituted a manifest error affecting a constitutional right.*

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Constitutional errors are treated specially because they often result in serious injustice to the accused. *Id.* at 686.

Under RAP 2.5(a)(3), an "appellate court may refuse to review any claim of error which was not raised in the trial court," but there are exceptions to this general rule. One exception is that "a party may raise

... manifest error affecting a constitutional right” for the first time on appellate review. *Id.* To qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. *State v. Lamar*, 180 Wn.2d 576, 582-83, 327 P.3d 46 (2014). The defendant must make a plausible showing that the error resulted in actual prejudice, which means the claimed error had practical and identifiable consequences in the trial. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). “[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100.

The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred. The purpose of RAP 2.5(a)(3) serves a gatekeeping function that bars review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred.

Lamar, 180 Wn.2d at 583.

The constitutional error here is the right guaranteed under the United States and Washington Constitutions to confront the witnesses against you. The error is manifest as Ms. Jackson's hearsay statements were the only evidence of the assault, and had an objection been lodged, the trial court could have excluded the statements, thus avoiding the constitutional error.

The confrontation issue is properly before this Court as Mr. Burns may raise this issue for the first time on appeal.

e. The violation of Mr. Burn's right to confrontation must result in reversal as it was not harmless.

“Confrontation Clause errors [are] subject to *Chapman* harmless-error analysis.” *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Under this standard, the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The State cannot meet its burden. Ms. Jackson's hearsay statements were the only evidence of the assault. Ms. Donovan did not observe the alleged assault; no one did that testified. Ms. Donovan merely saw Ms. Jackson climbing the stairs with Mr. Burns close behind. Ms. Jackson's throat injuries do not alter the analysis because

no witness testified that Mr. Burns was seen inside the apartment immediately preceding the alleged assault.

3. The assault and violation of a court order convictions were the same criminal conduct.

Mr. Burns committed the second degree assault and the felony violation of a court order at the same time and place and against the same victim. The only issue was whether he committed these offenses with the same criminal intent. The trial court erroneously concluded they did not.

- a. *The two offenses occurred at the same time and same place and involved the same victim.*

A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. 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." *Id.*

The "same time" element does not require that the crimes occur simultaneously. *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997). Individual crimes may be considered the same criminal conduct if they occur during an uninterrupted incident. *Porter*, 133 Wn.2d at 185-86.

The information and the jury instructions both list the date of occurrence as the same date. Thus, the two offenses occurred

concurrently at the same place. In addition, the offenses involved the same victim, Christine Jackson.

b. *The two offenses shared the same intent.*

In the same criminal conduct context, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame*, 56 Wn.App. 803, 811, 785 P.2d 1144 (1990). The "same criminal intent" element examines whether the defendant's objective intent changed from one act to the next. *State v. Dolen*, 83 Wn.App. 361, 364-65, 921 P.2d 590 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo*, 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998). "This analysis may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan, and whether the criminal objectives changed." *State v. Calvert*, 79 Wn.App. 569, 578, 903 P.2d 1003 (1995).

Here, the offenses were committed with the same criminal intent. The felony violation of a court order and the second degree assault were part of a continuing, uninterrupted sequence of conduct. *Porter*, 133 Wn.2d at 185-86. Mr. Burns' objective criminal purpose was to assault Ms. Jackson: he allegedly grabbed her and attempted to

strangle her in her apartment. Thus, the felony violation of a court order furthered the offense of second degree assault as he was in violation of the court order, where he was prohibited from being and where the assault occurred. *See State v. Phuong*, 174 Wn.App. 494, 548, 299 P.3d 37 (2013) (where defendant dragged the victim from her car, through the garage, and upstairs to his bedroom, the court could determine that defendant's convictions for unlawful imprisonment and attempted rape constituted the same criminal intent).

The two offenses shared the same criminal intent and should have been found to be the same criminal conduct.

c. *Mr. Burns is entitled to reversal of the sentences and remand for resentencing.*

The remedy for an incorrect offender score is reversal of the sentence and remand to the trial court for resentencing. *State v. Haddock*, 141 Wn.2d 103, 115-16, 3 P.3d 733 (2000).

Since the trial court erred when it failed to find the two offenses to be the same criminal conduct, Mr. Burns is entitled to the reversal of his sentence and remand for resentencing.

4. The Court should exercise its discretion and deny any request for costs on appeal.

Should this Court reject Mr. Burns' arguments on appeal, he asks this Court to rule that no costs on appeal be ordered due to his continued indigency. *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair*, 192 Wn.App. at 388, *quoting Nolan*, 141 Wn.2d at 628.

In addition, a defendant found to be indigent is presumed to remain indigent "throughout the review" unless there is a finding that the defendant is no longer indigent. RAP 15.2(f); *Sinclair*, 192 Wn.App. at 393. Mr. Burns had previously been found indigent prior to trial and on appeal, and there has been no showing that Mr. Burns' circumstances have so changed that he is no longer indigent. In fact, the opposite is true; he has been incarcerated since his arrest.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an “individualized inquiry” regarding the defendant’s ability to pay. *Id.* at 391, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Because of his current and presumed continuing indigency, Mr. Burns asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

F. CONCLUSION

For the reasons stated, Mr. Burns asks this Court to reverse his convictions and remand for a new trial.

DATED this 27th day of December 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 75537-4-I
)	
MICHAEL BURNS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF DECEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF DECEMBER, 2016.

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