

NO. 62552-7-I

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

REC'D
JUN 28 2010
 King County Prosecutor
 Appellate Unit

STATE OF WASHINGTON,
 Respondent,
 v.
 CLIFFTON BELL,
 Appellant.

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

The Honorable Charles Mertel, Judge

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 COURT OF APPEALS
 STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

1. THE "PATTERN OF ABUSE" SPECIAL VERDICT SHOULD BE REVERSED.

a. RCW 9.94A.535(3)(h)(i) Is Overbroad Because It Regulates Protected Speech.

A criminal statute receives particular scrutiny under the First Amendment and may be facially invalid if it makes unlawful a substantial amount of constitutionally protected conduct. State v. Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). This is so even if the statute also has "legitimate application." Williams at 208 (quoting State v. Lee, 135 Wn.2d 369, 388, 957 P.2d 741 (1998)). Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny. Id. It is the government's burden to show that impairment of a constitutionally protected right is necessary to serve a compelling state interest. Williams at 208-09.

The state has not met its burden. It argues instead the pattern of abuse aggravator does not regulate speech at all, and to suggest otherwise is "far-fetched speculation." Brief of Respondent (BOR) at 72. However, RCW 9.94A.535(3)(h)(i) regulates speech on its face.

¹ This Reply does not address defense counsel's failure to move for a separate proceeding to determine the aggravating circumstance, the court's erroneous definition of the aggravating circumstance, and judicial comments in Jury Instructions 6 and 43. These issues are sufficiently presented in Bell's opening brief.

The position now advocated by the state directly contradicts its arguments vigorously asserted in the trial court.

RCW 9.94A.535(3)(h)(i) reaches a substantial amount of speech because the ordinary meaning of “abuse” involves speech directly. The definition of abuse includes, “to attack or injure with words.” Webster's Third New Int'l Dictionary, 8 (1993). The definition of “psychological” includes, “relating to...or acting through the mind.” Webster's Third New Int'l Dictionary, 1833 (1993). “Psychological abuse” thus includes the act of attacking or injuring someone’s mind “with words.” It is plain the aggravating circumstance regulates speech.

The state urged the jury to find Bell psychologically abused Freitas with words, characterized by the prosecutor as “hypocritical venom.” 10RP 103, 105. Focusing directly on Bell’s phone calls to Freitas from jail, the prosecutor argued Bell manipulated Freitas emotionally by telling her insincerely that he loved her. 10RP 103-06.²

² The prosecutor argued:

Jaimi wanted someone to love her. The defendant knew that. The defendant played that up. The defendant used that in every phone call. “I love you, baby. I want to marry you, baby. I just want to take care of you, baby.”

The state repeated these arguments for sentencing, urging the superior court to impose an exceptional sentence against Bell. The state argued Bell's words "reveal a sinister level of psychological abuse leveled at Jaimi." CP 360. The state argued Bell's speech merited an exceptional sentence because "The mind games the defendant plays against Jaimi, who at this point was a beaten, vulnerable victim, add yet another level of heinousness to the defendant's already despicable conduct." CP 361.

The state's appellate attempt to distance itself from its trial court arguments is unpersuasive. RCW 9.94A.535(3)(h)(i) punishes abusive speech without limiting its proscription to true threats. The statute is therefore facially overbroad. The special verdict in Bell's trial should be reversed. Brief of Appellant (BOA) at 66-68.

b. RCW 9.94A.535(3)(h)(i) Is Unconstitutionally Vague.

The state contends the aggravating circumstance is not vague because it includes a "requirement of degree" such that the psychological impact of the defendant's conduct "must constitute

He's right. He knows her soft spot.

10RP 105.

actual abuse.” BOR at 65-66. The state does not recommend a definition for “actual abuse.”

In fact, the aggravating circumstance includes no magnitude component, nor requirement of degree. “Abuse” may involve harm, or it may not. Abuse is present when words are used to “attack or injure.” Webster's Third New Int'l Dictionary, 8 (1993) (emphasis added). Therefore, words that attack but do not injure qualify as abuse. Coarse reproach and disparagement meet the definition of abuse, regardless of whether injury follows. Id. Similarly, a person who treats another “without consideration or fairness” engages in abuse. Id.

Some forms of abuse do involve harm, by definition. “Abuse” includes, “to use or treat so as to injure, hurt, or damage.” Id. For this subset of abuse, conduct causing harm, State v. Williams³ is on point. The statutory phrase “psychological abuse” offers no guidance for determining what acts that “injure, hurt, or damage” a person’s mind will subject a defendant to an exceptional sentence. As in Williams, the statute does not distinguish acts “which cause others mere

³ State v. Williams, 144 Wn.2d 197, 26P.3d 890 (2001)

irritation or emotional discomfort” from those “which cause others to suffer a diagnosable mental condition[.]” Williams, at 204.

RCW 9.94A.535(3)(h)(i) is thus impossibly vague on two levels. It does not distinguish acts that harm another’s mind from those that do not. In addition, the statute does not differentiate the infinite ways a person’s mind can be “hurt,” from minor annoyance to diagnosable mental health condition. Thus, “each person’s perception of what constitutes the mental health of another will differ based on each person’s subjective impressions.” Williams, at 206.

State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), does not preclude Bell’s vagueness challenge to RCW 9.94A.535(3)(h)(i). Baldwin’s holding is obsolete. After Blakely,⁴ Washington’s statutory aggravating circumstances are substantively different from those examined in Baldwin.

Baldwin concluded the discretionary nature of Washington’s former exceptional sentencing procedures involved no liberty interest susceptible to vagueness principles. Baldwin at 459-61. The court stated Washington’s sentencing guidelines did not “vary the statutory

⁴ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

maximum and minimum penalties assigned to illegal conduct by the legislature.” Baldwin at 459. The court explained:

A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties.

Baldwin at 459.

After Blakely, the sentencing guidelines do vary maximum and minimum statutory penalties because a standard sentence range fixes those parameters. Blakely, 124 S.Ct. at 2537-38. In addition, the guidelines do set penalties because the sentencing court is not authorized to exceed a standard range sentence unless facts authorizing the exceptional sentence are determined by a jury beyond a reasonable doubt. 124 S.Ct. at 2536-38. Indeed, after Blakely, due process requires notice of the state’s intent to prove an aggravating circumstance:

[T]o allow the defendant to prepare a defense against the aggravating circumstances listed in RCW 9.94A.535(3), the defendant must receive notice prior to the proceeding in which the State seeks to prove those circumstances to a jury.

State v. Powell, 167 Wn.2d 672, 681, 223 P.3d 493 (2009).⁵

⁵ In Powell, five justices concluded that, after Blakely, an aggravating circumstance is the functional equivalent of an essential element of a crime.

It is logical to conclude that if due process requires notice of aggravating circumstances, then due process vagueness principles must also apply to aggravating circumstances. Otherwise, the right to notice would be hollow. After Blakely, due process vagueness protections apply to aggravating circumstances.

c. Bell Was Denied His Right To A Unanimous Jury Verdict.

Citing State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991), the state asserts that “multiple acts” jury unanimity is inapplicable to the special verdict because RCW 9.94A.535(3)(h)(i) requires a “pattern” of abuse. BOR at 73. The state reasons a “pattern” constitutes a “continuing course of conduct” as a matter of law. The argument lacks merit because the statute explicitly requires proof of multiple acts. Furthermore, Crane confirms the “continuing course of conduct” exception is applicable.

RCW 9.94A.535(3)(h)(i) requires proof of “multiple incidents over a prolonged period of time.” The aggravator therefore requires proof of multiple acts by definition. The explicit statutory language defeats the state’s “continuing course” theory.

In Crane, the Supreme Court held “multiple acts” analysis did not apply to a two-hour period during which the defendant inflicted

lethal injuries on a three-year-old child. The court explained that a continuing course of conduct may form the basis of a charge. Crane at 326. The court cautioned, however, “one continuing offense’ must be distinguished from ‘several distinct acts,’ each of which could be the basis of a criminal charge.” Crane at 326 (quoting State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)). Crane concluded the defendant’s acts during the two-hour period fit the “continuing course” exception:

We believe the appropriate analysis is to apply the “continuous conduct” exception to the time between 3 and 5 p.m. on May 15....Under this analysis, a unanimous jury verdict would not be required as to each incident of assault during this short period of time; instead, the jury would only need to be unanimous in its determination that the conduct occurred. *State v. Petrich, supra* 101 Wash.2d at 571, 683 P.2d 173.

Petrich requires an election or unanimity instruction in cases where evidence *supports several criminal acts* which would support conviction of a criminal offense. In this case, the evidence supports only a small time frame in which the fatal assault could have occurred. For this reason, a continuous course of conduct analysis is better suited to the evidence presented.

Crane at 330 (italics in original).

The “continuous conduct” exception applied in Crane does not fit the facts. The state alleged acts occurring over a period of years, not a “short period of time.” The acts alleged were not continuous: as

described by Freitas, they were distinct events occurring at different times and places. In addition, there was a one-year hiatus—following the balcony incident—during which Freitas and Bell each curtailed their consumption of drugs. Finally, as the state readily acknowledges, the alleged conduct consisted of “several distinct acts, each of which could be the basis of a criminal charge.” The state’s “continuous conduct” theory is without merit.

The state presents a second argument premised on its assumption that RCW 9.94A.535(3)(h)(i) is an “alternative means” statute. BOR at 75. No authority or argument is offered to support this assumption; it therefore does not merit consideration on appeal. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); In re Detention of Bergen, 146 Wn. App. 515, 525 n.8, 195 P.3d 529 (2008); State v. Bello, 142 Wn. App. 930, 932, 176 P.3d 554 (2008).

A party that chose to brief the issue in support of “alternative means” would face obstacles. Washington courts have held disjunctive statutory language does not trigger “alternative means” rules. See In re Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988) (methods of satisfying aggravating circumstance are not alternative means); State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (party “may not simply point to an instruction or statute that is phrased

in the disjunctive in order to trigger a substantial evidence review”); State v. Al-Hamdani, 109 Wn. App. 599, 36 P.3d 1103 (2001) (in rape prosecution, “mental incapacity” and “physical helplessness” are not alternative means). Statutes establishing alternative means typically do so by listing the alternatives in different subsections. See Smith, 159 Wn. 2d at 784 (subsections defining alternative means of committing assault); State v. Whitney, 108 Wn.2d 506, 510-11, 739 P.2d 1150 (1987) (subsections defining means of committing first degree rape); State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335 (2008) (“Typically, an alternative means statute will state a single offense, using subsections to set forth more than one means by which the offense may be committed.”)

Bell takes no position regarding the state’s assumption because it is inconsequential to this appeal. The state does not explain how or why “alternative means” principles erase the requirement of unanimity in a multiple acts case. In a multiple acts case, the existence of substantial evidence supporting each alleged act does not remove the unanimity requirement. It is illogical to suppose this principle disappears in a scenario where separate means are each supported by separate groups of multiple acts. The state offers neither authority nor reasoning for its theory that

“alternative means” trumps the unanimity requirement in a multiple acts case.

As Bell argued in his opening brief, the possible combinations of acts the jury could have relied on to find a pattern of abuse was enormous in number. The probability that twelve jurors relied unanimously on one combination without instruction to do so is infinitesimal. BOA at 71. Bell was denied his right to a unanimous jury verdict on the aggravating circumstance.

2. DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT BECAUSE HE FAILED TO MOVE TO SEVER THE RAPE CHARGE FROM THE OTHER THIRTEEN COUNTS.

Bell's trial counsel moved for severance on the morning of trial only at the insistence of his client. Defense counsel had not filed a written memorandum to support the motion, and counsel did not argue relevant legal authority. From the record, it appears counsel was unfamiliar with fundamental concepts underlying issues of joinder and severance. Given that the motion came at the last minute before trial and was not supported by relevant authority, it is not surprising the trial court summarily denied the motion without hearing from the state. 3RP 16-19. Contrary to the state's suggestion, these facts do

not distinguish this case from State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009).

The state's discussion of the factors governing severance is not persuasive. Sutherby's first factor addresses the relative strength of the state's evidence on the different counts. According to the state, the evidence was uniform across the board because the entire trial amounted to a credibility contest between Freitas and Bell. BOR at 25. This argument lacks substance. An abundance of corroborating evidence supported the charges in Counts 1-13, including audio recordings of Bell's own admissions, expert medical evidence, 911 evidence, and more. There was no corroborating evidence to support the rape count. Without doubt, the first factor sharply favored severance. BOA at 38-39.

The state argues the second factor, clarity of defenses, tilted to joinder because Bell defended the charges with a general denial. BOA at 26. The argument ignores the trial record. Bell's rape defense was weakened by his defenses to the other charges. He admitted he lied to Freitas on the phone concerning the assault counts because he sought her cooperation in dropping the charges. The admission likely weakened his credibility in denying Freitas's rape allegation. Joinder of all fourteen counts undermined the clarity of

Bell's defense to the rape charge. The second Sutherby factor also favored severance. BOA at 38-39.

Regarding the third factor, Sutherby teaches that a jury instruction to consider each count separately can be neutralized by prosecution tactics. In Bell's trial, the instruction to consider the counts separately was neutralized both by the state's tactics and by the court's other instructions. In closing argument, the state built the case for Freitas's credibility in its discussion of the evidence supporting Counts 1-13. Turning to the rape charge, Count 14, the prosecutor argued, "if you believe Jaimi, that's enough." 10RP 108. The state also reminded the jury of the uncharged rape—admitted for the aggravating circumstance charged with Count 1—as support for its theory explaining why Freitas did not report the charged rape accusation. In addition, the court instructed the jury to consider the 2006 charges in its evaluation of the 2007 counts. CP 207 (Instruction No. 43). The cross-fertilization of evidence argued by the state and instructed by the court overwhelmed the court's bland admonition to consider the counts separately. As in Sutherby, "there was no limiting instruction directing the jury that the evidence of one

crime could not be used to decide guilt for a separate crime.”
Sutherby at 886. The third Sutherby factor favored severance.⁶

The state essentially avoids the fourth factor, cross-admissibility, by limiting its discussion to catch-all language in the trial court’s written order admitting “other acts” evidence. BOR at 26-27. The state reasons the characterization of “other acts” as “context” and “background” evidence welds the fourteen counts together from an evidentiary perspective. The argument lacks merit because it fails to address cross-admissibility. The state is silent as to how the 2007 charges would be admissible to prove the 2006 rape allegation. The state does not argue the uncharged rape allegation would be admissible to prove the charged rape accusation. The state does not argue the 2007 witness tampering evidence would be admissible in a separate trial of the 2006 rape charge. The state does not argue the 2006 assault allegations would be admissible to prove the rape charge. Finally, the state presents no argument suggesting the rape charge would be admissible in a separate trial for Counts 1-13. The fourth Sutherby factor favored severance.⁷

⁶ This factor also addresses the “ability to compartmentalize” concept discussed by the state in its Response. BOR at 24.

⁷ The state discusses a fifth factor: “the admissibility of other charges not joined for trial.” BOR at 24. This formulation does not appear in the authorities cited by the

Finally, it is implausible that the failure to renew the severance motion was a legitimate defense tactic intended to exploit credibility issues. As summarized above, the evidence corroborating Counts 1-13 undoubtedly bolstered Freitas's credibility, and no reasonable attorney would conclude otherwise. There was no legitimate tactical reason from the defendant's point of view to join the Count 14 rape with the other charges.

3. FOUR OF BELL'S FIVE WITNESS TAMPERING CONVICTIONS SHOULD BE DISMISSED.

a. Under State v. Hall There is a Single Unit of Prosecution For Witness Tampering.

The state concedes that three of the witness tampering convictions must be vacated and dismissed. BOR at 45. The state contends two units of prosecution remain, based on dicta in the Supreme Court's decision in State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010) (holding multiple attempts to induce a single witness not to testify constitute a single unit of prosecution). BOR at 44-47. The state argues Bell adopted a new methodology for placing phone calls to Freitas beginning on October 3, 2007. According to the state, the new methodology involved contacting Freitas via three-way calling, a

state and appears to stem from an erroneous reading of those authorities.

tactic implemented by blowing into the phone. The state argues this new methodology launched a new course of conduct for unit of prosecution purposes. BOR at 47-48.

The argument fails because it has no factual basis. Bell used the three-way calling technique and associated blowing action as of September 24, 2007, the first day covered under the first tampering charge, Count 4 (September 24 through October 3). 6RP 53-56 (6/24/08 Report of Proceedings).⁸ The “clear break” claimed by the state does not exist, and Bell’s conduct was consistent throughout the period covered by the state’s five tampering charges. Whether a shift in methodology for placing phone calls supports a new tampering charge is an issue not before this Court.

The state also argues entry of a no contact order generates a new unit of prosecution. The argument is without merit under Hall. As the state acknowledges, Bell’s conduct was not affected by the order. The state could have sought a separate prosecution for violating the order, but as Hall makes clear, it cannot multiply tampering charges.

⁸ In a different argument, the state acknowledges this fact. BOR at 50-51.

Under Hall, Bell's tampering activity supports one unit of prosecution. Four of Bell's five tampering convictions should be reversed and dismissed with prejudice.

4. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT BOTH ALTERNATIVE MEANS OF WITNESS TAMPERING PRESENTED IN COUNTS 5-8.

The parties disagree whether sufficient evidence supported both alternative means of witness tampering presented in Counts 5-8. The two alternatives presented to the jury were: attempting to induce a witness to (1) testify falsely or withhold testimony, or (2) absent him- or herself from an official proceeding.⁹

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 Wn. App. (2006). Evidence is sufficient to support a conviction when, viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Id. However, the existence of a fact cannot rest upon guess, speculation, or conjecture.

⁹ Bell concedes there was sufficient evidence to support both means for Count 4. Bell argued in his opening brief there was insufficient evidence support the "absent herself" alternative. The state points out in a footnote there was such evidence played for the jury, but not successfully transcribed. BOR at 52 n.15. Appellant's counsel initially overlooked this portion of the non-transcribed evidence and now concedes this point.

Id. Evidence must be substantial: “it must attain that character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

The evidence supporting Count 5 consists of Bell’s request to his mother to offer money to Freitas to “drop it.” The state argues these two words satisfy the “testify falsely” and “absent herself” alternatives. BOR at 53. Bell submits it is self-evident “drop it” cannot rationally be assigned two different meanings to satisfy two alternative means. There was insufficient evidence to prove the two alternative means presented for Count 5.

Count 6 involved Bell’s statements to Delano on October 12. Bell tells Delano that Freitas could be offered “five bills” to “just take all this shit and fuck off.” 6RP 120-21.¹⁰ The conversation continued:

CLIFTON BELL: [S]he could call in and be, like, fucking, I want to take it all back. She could do that. Do you hear me?

MALE SPEAKER: (Inaudible.)

CLIFTON BELL: And just call her and at first offer, like, five, and just, like, you know, what is it going to take to get this heat off?

6RP 121.

The state contends Bell's "fuck off" comment satisfies the "absent herself" alternative means. BOR at 54. The argument is not persuasive because the only action Bell suggests is that Freitas be paid to "call in" and announce, "I want to take it all back." Because no evidence supports the state's interpretation of Bell's "fuck off" comment, the evidence was insufficient to support the "absent herself" means of witness tampering for Count 6.

The tampering evidence for Count 7 consisted of Bell's comment to Delano that if Freitas "doesn't show," the prosecution would not be able to "move forward." Ex. 5. The state argues this evidence satisfies both alternative means. BOR at 54-55. The argument is not convincing because, as with Count 5, the state assigns two different meanings to a single phrase. Bell and Delano discussed the prospect that Freitas might absent herself. They did not discuss the substance of her testimony. Count 7 should be reversed.

Count 8 involves Bell's statement to Delano that if Freitas did not "show up... All that shit goes away." Ex. 6. Again, the state argues a single phrase can be assigned two meanings to satisfy the

¹⁰ Bell cites the transcript for June 24, 2008 as "6RP"; the state uses "5RP."

tampering statute and due process. Bell submits it is self-evident this argument is without merit. Count 8 should be reversed.

5. DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT FOR FAILURE TO OBJECT TO THE NURSE'S TRIAGE NOTES.

The state argues the Confrontation Clause would not exclude the nurse's triage notes for 23 September 2007 because Freitas testified at trial. BOR at 37. The argument is flawed because Freitas was not the author of the notes. The nurse who authored the notes did not testify at trial. Therefore, a defense objection to the notes on confrontation grounds would have been sustained. State v. Hopkins, 134 Wn. App. 780, 142 P.3d 1104 (2006).

In a footnote, the state implies Hopkins permits the admission of a nurse's report if the patient testifies at trial. BOR at 38 n.9. In fact, Hopkins held a nurse's report violated the defendant's right of confrontation. Hopkins, at 791. Elsewhere, the court explained that the patient's statements to the nurse identifying the defendant as her abuser came within the medical diagnosis exception to the rule against hearsay. Evidence of these statements did not violate the Confrontation Clause because the patient testified at trial and identified the defendant as her abuser. Hopkins, 788-89, 792. The court concluded the error in admitting the nurse's report was

harmless, in part because the evidence was “duplicative.” Hopkins at 792.

The triage report admitted in Bell’s trial included the domestic violence questionnaire described in Bell’s opening brief. The nurse recorded that Freitas responded to that questionnaire by stating she had been raped. Unlike the situation in Hopkins, Freitas’s rape comment is not covered under the medical diagnosis exception. The state does not argue otherwise.

Bell’s counsel was ineffective in failing to object to the triage report. Freitas’s rape response to the domestic violence questionnaire bolstered the credibility of her Count 14 rape allegation through sheer repetition. It was the only evidence supporting the rape charge extrinsic to Freitas’s otherwise uncorroborated trial testimony. Acquiescing to this evidence was not a legitimate trial strategy.

6. THE TRIAL COURT ERRED BY ADMITTING FREITAS’S STATEMENT TO OFFICER NORTON OVER BELL’S HEARSAY OBJECTION.

The state incorrectly asserts Officer Norton was permitted to use Freitas’s statement at the hospital on 23 September 2007 to refresh his recollection of statements she made earlier that day. BOR at 39. The record does not support the state’s claim.

Norton testified he took a statement from Freitas. 5RP 23.¹¹ When asked about the substance of what Freitas told him, Norton testified, "*Without the statement in front of me*, I couldn't tell you offhand what she said." 5RP 23 (emphasis added). Norton was allowed to refresh his recollection with Freitas's handwritten statement. 5RP 24-25. He then prefaced his description of what Freitas told him:

Okay. What -- when I stood by and was taking -- watching her write the statement, she told me that she had been dating Mr. Bell for about two and half years....

5RP 26. Norton continued to relate what Freitas told him, as previously described in Bell's opening brief. 5RP 26. The prosecutor then asked Norton, "Where did you take this statement?" 5RP 26. Norton responded, "We were at Northwest Hospital." 5RP 26.

The record belies the state's claim that Norton was describing statements made by Freitas earlier that day, before she arrived at the hospital. Norton's testimony relating what Freitas told him at the hospital violated the rule against hearsay. The trial court erred by admitting this evidence over Bell's hearsay objection.

¹¹ The state cites to the transcript for June 23, 2008 as "4RP."

7. COUNTS 1-3 INVOLVED THE SAME CRIMINAL CONDUCT FOR CALCULATING BELL'S OFFENDER SCORE.

Counts 1-3, the 2007 charges, involved the same criminal conduct for calculating Bell's offender score. Bell was convicted of two assaults and one count of unlawful imprisonment arising from an uninterrupted sequence of acts committed during the course of a single domestic violence incident. The two assaults occurred within seconds of each other. Freitas testified Bell punched her, and she fell to the floor. She testified Bell then pinned her to the floor and squeezed her throat. Clearly, the two assaults occurred at the same time and place, were committed against the same victim, and involved the same intent. The offenses were "committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective." State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).

Shortly after these assaults, Bell prevented Freitas from leaving the apartment, telling her she wasn't going anywhere. Without question, the assaults furthered Bell's act of unlawful imprisonment. The imprisonment was part of a scheme or plan with one objective: the physical expression of anger and intimidation toward Freitas in a domestic violence incident. "The relevant inquiry for the intent prong

is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.” State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Viewed objectively, Bell’s intent did not change during the commission of the crimes charged in Counts 1-3. The trial court abused its discretion by implicitly finding these counts did not involve the same criminal conduct.

The state argues the different scienter requirements for Counts 1-3 establish different criminal intents under same criminal conduct analysis. BOR at 91-92. The argument lacks merit: “intent” in this context “is not the particular *mens rea* element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990); accord Flake at 180. n.4.

Counts 1-3 arose from a single episode of domestic violence committed at the same time and place and against the same victim. The trial court’s implicit conclusion to the contrary was an abuse of discretion. Counts 1-3 should be considered the same criminal conduct for calculating Bell’s offender score.

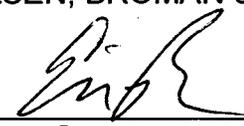
B. CONCLUSION

This appeal presents numerous errors for review. For the reasons argued in Bell's opening brief and in this Reply, Bell's convictions should be reversed.

DATED this 25 day of June, 2010.

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62552-7-1
)	
CLIFFTON BELL,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CLIFFTON BELL
DOC NO. 893908
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*