

64548-0

64548-0

NO. 64548-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MURSCH,

Appellant.

2010 MAY 28 PM 4:49

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The State did not prove each element of harassment beyond a reasonable doubt.

2. Robert Mursch was deprived his Sixth Amendment right to the effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State prove each element of an offense beyond a reasonable doubt. To prove a person committed the crime of harassment the State must prove the person made a threat, i.e., communicated an intent, to harm another person. Additionally, the First Amendment requires that "threat" be a "true threat." Where the State's evidence establishes only that Mr. Mursch stated "I ought to kill you" and that the hearer of that statement did not believe Mr. Mursch intended to kill him, did the State prove the elements of harassment?

2. 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 the individual's offender score. Offenses can be considered the "same criminal conduct" at sentencing if the crimes were committed at the same time and place; involved the

same victim; and involved the same objective criminal intent.

Where Mr. Mursch's convictions of assault and harassment arose from a 30-second episode involving the same victim, where the assault established the victim's basis to fear the threat did the offenses arise from the same criminal conduct?

3. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. Mr. Mursch's counsel failed to argue his harassment conviction arose from the same criminal conduct as his assault convictions. Where those offenses satisfy the criteria of RCW 9.94A.525, but were nonetheless counted as separate offenses in his offender score, was Mr. Mursch denied his right to the effective assistance of counsel?

C. STATEMENT OF THE CASE.

Danny Swart had repeatedly refused to pay his brother-in-law, Mr. Mursch, money for rent owed from an earlier several-month stay in Mr. Mursch's home.¹ 11/3/09 RP 13, 23. Mr. Swart

¹ Both Mr. Swart and his girlfriend, Sarah Yourcheck, testified they believed they were not legally required to pay rent for the last 30 days of their stay because Mr. Mursch had given them 30-days notice. 11/3/09 RP 23, 116.

later attended a family party at Mr. Mursch's house. Id. at 17-18.

Mr. Swart and Mr. Mursch were both drunk. Id. at 114.²

The subject of the money Mr. Swart owed came up during the evening, and Mr. Swart, Ms. Yourcheck and Mr. Mursch went to the garage to discuss the matter. 11/3/09 RP 21-22. Ms. Yourcheck left the garage when it seemed the matter had been resolved for the evening. Id. at 24-25.

Mr. Swart claimed Mr. Mursch unexpectedly punched him, knocked him to the ground, kicked and ultimately began choking him. 11/3/09 RP 26-28. Mr. Mursch repeatedly said he wanted his money. 11/3/09 RP 32. Mr. Swart testified that while Mr. Mursch choked him he said "I should kill you." Id. at 36. Mr. Swart testified he did not believe Mr. Mursch intended to kill him but, because Mr. Mursch was drunk, Mr. Swart feared he might accidentally kill him. Id. 37, 59-60.

Following his arrest by police officers called to the house, Mr. Mursch told officers that Mr. Swart owed him money. 11/3/09 RP 152.

² Ms. Yourcheck described Mr. Swart's intoxication on a scale of one to ten as a 9, with ten being the most intoxicated. 11/3/09 RP 114.

The State charged Mr. Mursch with one count second degree assault. CP 1-4. On the eve of trial, the State amended the Information to add a charge of third degree assault and felony harassment. CP 5-6.

A jury convicted Mr. Mursch as charged. CP 40-42.

At sentencing the trial court found the assault charges arose from the same criminal conduct. CP 78. Neither the court nor the parties addressed whether the harassment charge too arose from the same criminal conduct.

D. ARGUMENT.

1. THE STATE FAILED TO PROVE THE CRIME OF HARASSMENT BEYOND A REASONABLE DOUBT

a. Due Process required the State prove the crime beyond a reasonable doubt. In a criminal prosecution, the Due Process Clause of Fourteenth Amendment requires the State prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Green, 94 Wn.2d at 221.

b. The state did not prove Mr. Mursch made a threat to kill Mr. Swart and thus did not prove each element of the crime beyond reasonable doubt. RCW 9A.46.020 provides in relevant part:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
 - (ii) To cause physical damage to the property of a person other than the actor; or
 - (iii) To subject the person threatened or any other person to physical confinement or restraint; or
 - (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety;³ and
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out
- (2) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no- contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by

³ Subsection (1)(a)(iv) was held unconstitutionally overbroad in criminalizing threats to mental health. State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001).

threatening to kill the person threatened or any other person.

A “threat” is a direct or indirect communication of the intent to do an act. RCW 9A.04.110(27).

In addition to the statutory elements, and to avoid violating the First Amendment, the State must also prove that

under circumstances [of the case] a reasonable person in [the speaker’s] position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death.

State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). The

State did not prove Mr. Mursch threatened Mr. Swart nor that any alleged threat was a true threat as required by the First Amendment.

Beginning with Mr. Mursch’s words themselves, he said “I should kill you.” 11/3/09 RP 36. His use of the auxiliary “should” as opposed to “will” or some other definitive term undercuts any view that his words were a communication of an intent to do anything. The relevant definition of “should” provides “used in auxiliary function to express condition” Webster’s Third New International Dictionary, p. 2104 (1993). “*Should*. . . is . . . used, however, to mean ‘ought to’”

<http://grammar.ccc.commnet.edu/grammar/auxiliary.htm>. The term is necessarily not an expression of an intent.

And in fact, Mr. Swart knowing his brother-in-law and hearing those words, even as he was being choked, did not believe Mr. Mursch intended to kill him. 11/3/09 RP 59-60. Mr. Swart did momentarily believe that due to Mr. Mursch's intoxication he might accidentally kill him. Id. However, fear of an unintended result does not transform Mr. Mursch's statement into an expression of intent to achieve that result.

The State did not prove Mr. Mursch communicated a serious intent to cause death. Therefore the State failed to prove Mr. Mursch committed harassment.

c. The Court must reverse Mr. Mursch's conviction of harassment. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State

failed to prove Mr. Blowers obstructed a law enforcement officer
the Court must reverse his conviction and dismiss the charge.

2. MR. MURSCH WAS DENIED HIS SIXTH
AMENDMENT RIGHT TO THE EFFECTIVE
ASSISTANCE OF COUNSEL

a. Mr. Mursch had the right to the effective assistance of counsel. The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. See 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 accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 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. 236, 87 L.Ed.2d 268 (1942)). If he does not have 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. McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 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 claim that he was denied this right the court must find that counsel performance was deficient and that deficient performance prejudiced Mr. Mursch. Strickland, 466 U.S. at 687.

b. By failing to argue that his harassment conviction arose from the same criminal conduct as the assault conviction Mr. Mursch's trial counsel's performance was both deficient and prejudicial. Mr. Mursch's trial counsel argued the two assault convictions arose from the same, and the trial court agreed. Yet, despite the fact the entire episode lasted no more than 30 seconds, counsel did not argue the harassment offense similarly arose from the same criminal conduct. As made clear below, that offense occurred at the same time and place, against the same victim, and shared the same objective criminal intent as the assault charges.

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 error. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a reasonable probability that the trial court would have found the harassment charge arose from the same criminal conduct resulting in the subtraction of one point from Mr. Mursch's offender score, with a corresponding decrease in his standard range from 22 to 29 months to 15 to 20 months. RCW 9.94.510; RCW 9.94A.515; RCW 9.94A.525. Thus, if counsel's performance was deficient, the prejudice prong is satisfied. Because, the offense arose from the same criminal conduct counsel's performance was deficient.

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 the individual's offender score. Offenses must be considered to have arisen from the "same criminal conduct" if the crimes were committed at the same time and place; involved the same victim; and involved the same objective criminal intent. RCW 9.94A.525; State v. Palmer, 95 Wn.App. 187, 190, 975 P.2d 1038 (1999). Whether sequentially committed crimes share the same objective intent can be determined by examining whether one crime furthered the other. State v. Price, 103

Wn.App. 845, 857, 14 P.3d 841 (2000). The Supreme Court has said:

in construing the "same criminal intent" prong, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.. This, in turn, can be measured in part by whether one crime furthered the other. [.

(Internal citations omitted.) State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this context, intent is not the 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).

Here, there is no question that the assault and harassment offense occurred at the same time against the same victim. Mr. Swart described the entire episode as lasting 30 seconds. Further, Mr. Mursch stated the threats of to kill him were made while he was being assaulted. Specifically, it was the fact that those threats were made while Mr. Mursch was strangling him, that caused Mr. Swart to believe Mr. Mursch might unintentionally kill him. The crimes occurred simultaneously and were part of a single, and relatively brief, criminal episode. The crimes shared the same objective intent.

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

E. CONCLUSION.

For the reasons above this court should reverse Mr. Mursch's conviction of harassment and his sentence for both offenses.

Respectfully submitted this 28th day of May 2010.



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