

66632-1

66632-1

NO. 66632-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE M. WHITE,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Is the unit of prosecution for double jeopardy purposes, under the statute's alternate ways of committing second degree assault, each separate and distinct assault upon a person?

2. Has defendant shown that counsel's assistance was ineffective, that defense counsel's representation was both deficient and prejudiced the defendant, by a) failing to raise a sentencing issue—an issue that would have required the sentencing court to make factual determinations and to exercise its wide discretion—specifically, failing to argue that the defendant's convictions for second degree assault and felony harassment constituted the "same criminal conduct" for sentencing purposes; b) failing to request a limiting instruction for drug-related evidence; or c) failing to object to the aggressor instruction?

3. Is the definition of "true threat" an element of felony harassment that needs to be included in the charging document; or is it merely the definition of the threat element of felony harassment that may be contained in a separate definitional instruction?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

The defendant and Raina Stevens met and started dating in April 2005. They began living together in early 2006. They moved to a house on Monte Cristo Drive, Everett, WA, in August 2006. Their daughter N. was born on July 16, 2007. Stevens and the defendant lived together at the Monte Cristo Drive residence until April 8, 2010, when Stevens moved out while the defendant was in Portland. RP 246-247, 349, 545, 548.

The defendant's use of prescription medication had been an ongoing issue during their five year relationship. Stevens described the defendant's behavior as erratic and extremely unpredictable when he used drugs. She thought the defendant was using the medications inappropriately. She also had concerns about what she termed "violence in our relationship" which included: The defendant's attempts at controlling her, threatening her, punching walls, spitting on her, grabbing the steering wheel and causing a roll-over accident, and pushing her when she threatened to move out in 2009. Instead of moving out in 2009, Stevens obtained a protection order; the order was later lifted. When Stevens found text and email messages on the defendant's phone indicating that

he was selling drugs, she became concerned for her safety and the safety of her daughter and realized that she needed to get N. out of the situation. On April 8, 2010, while the defendant was in Portland, Stevens began moving out. Stevens left half of N.'s belongings at the Monte Cristo residence because her plan was for N. to spend equal time there. RP 247-250, 260-261, 308, 329, 344-349, 404-405, 499-502, 547-551, 553, 585.

On April 10, 2010, Stevens' father, Bill Spies, was helping Stevens move. He found a handgun in the master bedroom while he was packing items. Concerned about how the defendant would react when he learned that Stevens had moved out of the residence, Spies suggested that Stevens bury the gun where the defendant would not find it. Stevens grabbed two white grocery bags from the kitchen, put the gun in the bags, and buried it in the corner of the yard behind an old shed. Stevens finished moving out on April 10, 2010. RP 122-125, 235, 251-260, 352-355, 406-407, 435-438.

On April 11, 2010, Stevens and Spies picked the defendant up at the Everett train station. Prior to meeting him at the station Stevens called and told him that she had moved out and the reasons why. The defendant seemed calm when she told him.

Stevens drove the defendant to the Monte Cristo residence. Her father followed in his car. The three of them sat on the couch and discussed the situation. RP 438-443, 554-555, 585-586.

After about an hour Spies left. The defendant called and spoke to his father. He then told Stevens that he wanted to have some time alone, so Stevens and N. left to get dinner. While they were getting dinner, the defendant called and asked, "Where are my guns?" Not knowing his state of mind, Stevens did not what the defendant to find the gun, so she told him that her father had it. He called Stevens' father and learned that he did not have the gun. When Stevens and N. returned to the residence, the defendant was focused on finding where his gun was. Stevens finally told him that she had buried the gun in the back yard. The defendant went downstairs. Stevens put N. in her car and left. RP 261-266, 443, 557-559.

Stevens noticed that the defendant was following her, so she pulled into a Fred Meyer's parking lot. The defendant pulled up next to her, got out of his car and said he wanted to talk. Stevens agreed to talk the next day. RP 266-270, 559-561.

On April 12, 2010, Stevens went back to the Monte Cristo residence to talk with the defendant. Stevens let him know that she

and N. would arrive around midday. They arrived between 1:30 and 2:00 p.m. while N. was napping. Stevens wanted to reach an amicable agreement regarding N. to avoid involving the court. The defendant was not amicable about any agreement regarding N. He wanted N. to live with him and did not want Stevens to take her from the house at all. During their conversation the defendant again became focused on the gun wanting to know where it was. Stevens went outside and showed him where she had buried the gun. When they returned to the house N. was waking up, so Stevens went into the bedroom and lay down next to her. Stevens could hear the defendant, his tone was different; he was not calm anymore. He was slamming doors and saying "fucking bitch" and "fucking idiot." RP 270-276, 561-563, 569-570.

After five or six minutes, Stevens carried N. out to the living room. The defendant was seated on the couch; Stevens sat facing him holding N. Because of his changed demeanor, Stevens suggested they try to work things out at another time. The defendant said no, this is what we are going to do: N. was going to stay at the residence with him, Stevens was never going to take her from the house, and if Stevens ever wanted to see N. Stevens would have to come there. Stevens replied that's not the way it's

going to work, “if we cannot work this out between us we will have to go to court.” RP 276-278, 397-398.

The defendant immediately stood up, pulled a gun from behind him, pointed it at Stevens, and said “no, that’s not the way it’s going to work. I’m going to fucking kill you.” He was loud and angry, Stevens was terrified. Stevens rolled N. onto the couch and stood up. The defendant grabbed Stevens by the hair and threw her face-first to the floor and began punching Stevens in the back of the head and neck telling her she was going to die. N. was screaming hysterically. RP 278-279, 283-284.

While trying to protect herself, Stevens managed to roll over and saw the gun lying by her feet. When Stevens tried to get up the defendant put both his hands around her neck and started choking her till she could not breathe. The defendant let go of Stevens and tried to reach for the gun. Stevens started getting up, so he put his knee on her neck to hold her down while he reached for the gun. When the defendant grabbed the gun, Stevens grabbed it; he had the handle, she had the barrel. He was trying to point the gun at Stevens; she was trying to redirect it. As they struggled over the gun Stevens kept saying “you’re going to hurt her, you’re going to hurt her.” The defendant finally said, “Okay,

stop, stop, stop. I'll let go if you let go." Stevens let go and grabbed N. who had been in their midst the whole time. The defendant still held the gun in his hand. RP 284-287.

Stevens sat back down on the couch holding N. and trying to comfort her. The defendant walked over to Stevens, still holding the gun, and began yelling that it was all her fault, slapped her in the face, and said she was "so fucking stupid." He then said that Stevens "better not even be thinking about calling the police because if you do I'm going to kill you and kill [N.] and kill myself. We're all going to die. If you ever leave here and call the police I will kill [N.] and I will kill myself." He next said, "If any of your family calls the police, I will kill ever single member of you family starting with your mother." The defendant added, "I know people right now that will kill you mother. Believe me, all I have to do is make a call." Stevens believed that the defendant would carry out his threats. RP 287-288, 308.

After a while Stevens said, "Jesse, just put the gun down. Just put it on the bar." The defendant put the gun down, but kept walking by it like he was going to grab it at any moment. Stevens said, "Please just leave the gun there and just leave it alone." He

continued blaming Stevens; she tried to appease him to get him to calm down. RP 288-289.

After talking for awhile, the defendant said that he was hungry and wanted some dinner. Stevens suggested that they all go together. He said that Stevens should go get some of N.'s things so she could spend the night and that he would take N. to the store to get some food and make dinner. Stevens did not want to leave without N. The defendant "ripped" N. out of Stevens arms, told her she had to go, pushed her out the door and locked it. Stevens could hear the terrified child screaming, "Mommy, please don't leave me." RP 301-302, 306-307.

Stevens got into her car and called her mother, Kathleen Johnson, and told her what had just happened. She was afraid to call the police because of the defendant's threat to kill N. and himself if she called the police. Stevens was frantic and terrified. Johnson persuaded Stevens to call the police. RP 307-310, 315, 462-464; Exhibit 22.

Deputy Herwick was dispatched to contact Stevens and met Stevens at her apartment. Stevens told Deputy Herwick what had happened. Deputy Herwick observed "fresh bruises on her neck and her arms" and photographed the injuries. Stevens declined

medical aid; her primary concern was for the safety of N. Deputy Herwick contacted and briefed her supervisor on the situation and other officers were dispatched to the Monte Cristo residence. RP 47-61, 319-320.

Deputies Weinbaum, Murphy, Phillips, Gilje and Officer Mekelburg responded to the Monte Cristo residence and set up containment. Deputy Murphy observed the defendant holding N. and running down a trail through the wooded ravine behind the house. Deputy Murphy identified himself as a police officer and told the defendant to stop. The defendant looked over his shoulder at Deputy Murphy, but continued running away. After a fifteen minute pursuit through the wooded ravine with the aid of a K-9, the defendant was apprehended at gun point. When N. saw the police officers she cried out, "Please hold me." The defendant stated, "Shoot me. Please shoot me." The defendant was searched incident to his arrest and a plastic tube with white residue inside was found on the defendant. Deputy Murphy identified the tube as a "tooter pipe" used to ingest Oxycontin, or cocaine. The defendant admitted "snorting" drugs. RP 79-80, 159-196, 198, 224-228, 231-234, 585.

N. was checked by medics at the scene and returned to Stevens. Other than bleeding from the scratches she received in the ravine N. had no other injuries. Stevens went to the emergency room the next day. Stevens' bruises and swollen forehead were consistent with her version of events. RP 67-71, 203-209, 221-223, 323-325, 420-432, 584.

A search warrant was obtained and the Monte Cristo residence was searched. A loaded revolver was found under some of the defendant's clothing in the main bedroom closet. Stevens identified the revolver as the gun found by her father when she was moving out of the residence; the defendant identified the revolver as the gun Stevens buried. A holster, a box of ammunition and two speed loaders for the revolver were also found in the closet. A sunglasses case containing hypodermic needles, a measuring spoon and Q-tips was also found. The defendant admitted that all the items found during the search belong to him. He claimed that the syringes were for selling drugs. RP 72-76, 80-94, 107-127, 234-236, 252, 556-557, 583, 585.

The defendant claimed he acted in self-defense. According to the defendant, he and Stevens started arguing during the discussion regarding custody of N. He wanted a break and asked

Stevens to leave for awhile. Stevens said that she was not leaving without N. He told her to “get the fuck out of my house.” Stevens responded by pulling a gun from her purse, pointing it at him and said, “Fuck you Jesse.” Trying to protect N., he got up and ran towards Stevens, so the gun was pressed under his chest. He grabbed Stevens arm and the gun at the same time trying to avoid being shot. He then pulled Stevens to the floor by her hair and straddled her. Stevens would not let go of the gun, so he choked her. When she finally let go of the gun, he grabbed it, stood up, and placed the gun on the bar. He insisted that Stevens leave. RP 572-576.

A few hours later the defendant saw police officers descending on his house. He was frightened because of his prior experiences with police. Scared for his safety and the safety of N., he took his daughter and ran out the back door and into the woods where he later surrendered to the police. RP 578-582.

B. CONVICTION AND SENTENCE.

The defendant was charged with first degree assault, second degree assault, felony harassment, second degree unlawful possession of a firearm, and reckless endangerment. The State alleged that he was armed with a deadly weapon during the

assaults; that the victims of the assaults, felony harassment and reckless endangerment were family or household members—domestic violence; and that the assaults and felony harassment occurred with the sight or hearing of N.—aggravated domestic violence. CP 110-111.

The jury found the defendant guilty of the lesser offense of second degree assault by use of a deadly weapon, second degree assault by strangulation, felony harassment, second degree unlawful possession of a firearm, and reckless endangerment. CP 25, 26, 30, 34, 38. The jury also found that he was armed with a deadly weapon when he committed the assaults and that the assaults, felony harassment and reckless endangerment were domestic violence offenses. CP 24, 28, 32, 33, 36, 37. Finally, the jury found that the assaults and felony harassment were aggravated domestic violence offenses. CP 27, 31, 35.

At sentencing the court found that the assaults were the same criminal conduct which gave the defendant an offender score of 2. The defendant was sentenced to a total confinement of 98 months on the felony counts comprised of the following: The court imposed concurrent standard range sentences for the four felonies—14 months on each assault, 12 months on the felony

harassment and 12 months on the unlawful possession of firearm; The court also imposed 36 months for firearm enhancements on the assaults, each to run consecutive; and 12 months for the aggravated domestic violence on the assaults and felony harassment, each to run concurrently—the total enhancement was 84 months. On the reckless endangerment the court imposed 365 days to run consecutive to the felony sentence. CP 1-4, 7-9; RP 688-693, 706-709.

III. ARGUMENT

A. DEFENDANT'S CONVICTIONS FOR TWO COUNTS OF SECOND DEGREE ASSAULT DID NOT VIOLATE DOUBLE JEOPARDY.

The double jeopardy clause of the Fifth Amendment protects a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The Washington Constitution provides the same protection. State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005); Adel, 136 Wn.2d at 632. The question of whether a defendant's double jeopardy protection has been violated is a question of law reviewed de novo. State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 933 (1996). A double jeopardy challenge may be raised for the first time on appeal. Adel, 136 Wn.2d at 632.

Double jeopardy principles prohibit multiple convictions under the same statute if the defendant commits only one “unit” of the crime. Adel, 136 Wn.2d at 632. If a defendant is convicted multiple times for violating the same statute, the court will examine the unit of prosecution intended by the legislature in defining the crime to determine whether there are impermissible multiple convictions. Graham, 153 Wn.2d at 404. The proper inquiry is what “unit of prosecution” the legislature intended to be punishable under the statute. Adel, 136 Wn.2d at 633-34. A “unit of prosecution” is analogous to a criminal act or course of conduct someone can be punished for. Adel, 136 Wn.2d at 634; State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005), aff’g State v. Tvedt, 116 Wn. App. 316, 319, 65 P.3d 682 (2003). “A unit of prosecution can be either an act or a course of conduct.” State v. Hall, 168 Wn.2d 726, 731, 230 P.3d 1048 (2010); State v. Thomas, 158 Wn. App. 797, 801, 243 P.3d 941 (2010). A defendant can be convicted only once if he committed only one “unit of prosecution.” Tvedt, 116 Wn. App. at 319. While a unit of prosecution issue “is one of constitutional magnitude on double jeopardy grounds, the issue ultimately revolves around a question of statutory interpretation and legislative intent.” State v. Ose, 156 Wn.2d 140,

144, 124 P.3d 635 (2005) (quoting Adel, 136 Wn.2d at 634). Appellate review is de novo. State v. Sutherby, 165 Wn.2d 870, 878, 204 P.3d 916 (2009).

If the legislature has failed to denote the unit of prosecution in the statute, any ambiguity should be construed in favor of lenity. Adel, 136 Wn.2d at 634-35 (citing Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. But it is not ambiguous merely because different interpretations are conceivable, and courts are not obligated to find ambiguity by seeking out alternate interpretations. McGinnis v. State, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004); State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996). "Without a threshold showing of ambiguity, the court derives the statute's meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity." State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

"The first step in the unit of prosecution inquiry is to analyze the criminal statute." Adel, 136 Wn.2d at 635. The jury found that the defendant committed two assaults under two different

provisions of former RCW 9A.36.021¹. CP 60, Instruction 14; CP 67, Instruction 21. The defendant was convicted under RCW 9A.36.021(1)(c) for assaulting Stevens with a deadly weapon and under RCW 9A.36.021(1)(g) for strangling her. The defendant contends that he committed only one assault by two alternate means. Appellant's Brief at 19.

Former RCW 9A.36.021 read in pertinent parts:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

Former RCW 9A.36.021(1) (emphasis added).

¹ Laws of 2011 ch. 166, § 1 amended this statute adding "or suffocation" in §§ (1)(g). The change does not affect the disposition of the present case.

The legislature defined the unit of prosecution by setting out specific alternative ways of committing the offense. There are seven distinct ways of committing second degree assault under the statute. Any one of the ways constitutes a single unit of prosecution. State v. Smith, 124 Wn. App. 417, 432, 102 P.3d 158 (2004) (assaulting another with a deadly weapon comprises the criminal activity measured by the unit of prosecution under second degree assault statute) aff'd, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Although there may be circumstances where two or more of the different ways of committing second degree assault occur simultaneously and result in only one offense, such facts are not presented in this case.

In the present case, when Stevens said they would have to get the court involved if they could not work out custody between them, the defendant immediately pulled the gun, pointed it at Stevens and said he was going to kill her. The defendant then grabbed Stevens by her hair, threw her face-down to the floor and began punching her in the back of the head and neck telling her she was going to die. During this assault, the defendant let go of the gun, put both his hands on Stevens' neck and began choking

her; Stevens could not breathe. The defendant did not use a deadly weapon to strangle Stevens. RP 272-286.

The language of the statute reveals that the legislature established specific alternative ways of committing second degree assault. Smith, 124 Wn. App. at 432. The fact that the assaults occurred sequentially and were separated by only a brief period of time does not turn them into a single act under a unit of prosecution analysis. State v. Soonalole, 99 Wn. App. 207, 213, 992 P.2d 541 (2000). Each assault is based on a different unit of prosecution; one assault relates to the defendant's use of a deadly weapon the other relates to his strangling Stevens with his hands. Thus double jeopardy is not implicated. State v. Gatlin, 158 Wn. App. 126, 135, 241 P.3d 443 review denied, 171 Wn.2d 1020, 253 P.3d 393 (2010). "One should not be allowed to take advantage of the fact that he has already committed one ... assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed." State v. Tili, 139 Wn.2d at 117 (quoting Harrell v. State, 88 Wis.2d 546, 565, 277 N.W.2d 462, 469 (1979)). The defendant's double jeopardy claim fails. His convictions for both assaults should be affirmed.

B. THE DEFENDANT HAS NOT SHOWN THAT COUNSEL'S ASSISTANCE WAS INEFFECTIVE.

The defendant argues that he was denied effective assistance of counsel. He claims that counsel was ineffective by not arguing that the assaults and felony harassment were the same criminal conduct for purposes of sentencing. Appellant's Brief 20-39. Additionally, the defendant claims that counsel was ineffective by not requesting a limiting instruction regarding drug-related evidence. Appellant's Brief 31-35. Finally, the defendant claims that counsel was ineffective by not objecting to the aggressor instruction. Appellant's Brief 36-39.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the

result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109

Wn.2d at 226. “The burden is on the defendant to show from the record a sufficient basis to rebut the ‘strong presumption’ that counsel’s representation was effective.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. In assessing performance, “the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Prejudice requires a showing that but for counsel’s performance it is reasonably probable that the result would have been different. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); Thomas, 109 Wn.2d at 226.

As shown below defense counsel’s representation in the present case did not fall below an objective standard of reasonableness. The defendant has not met his burden of rebutting the strong presumption that counsel’s representation was not deficient and that counsel’s conduct consisted of sound trial

strategy. Nor has the defendant shown that he was prejudiced by defense counsel's performance.

C. DEFENDANT'S CONVICTIONS FOR ASSAULT AND HARASSMENT DID NOT INVOLVE THE "SAME CRIMINAL CONDUCT" FOR SENTENCING PURPOSES.

The defendant contends that counsel was ineffective by not arguing that the assaults and felony harassment were the same criminal conduct for purposes of sentencing. Appellant's Brief 20-39. At sentencing the court found that the two assaults were based on the same criminal conduct. RP 688-693, 706.

It should be noted that the "same criminal conduct" analysis under the Sentencing Reform Act of 1981, and the "unit of prosecution" analysis under double jeopardy are distinct. The "unit of prosecution" analysis is involved during the charging and trial stages, focusing on the Legislature's intent regarding the specific statute giving rise to the charges at issue. The "same criminal conduct" analysis, on the other hand, involves the sentencing phase and focuses on (1) the defendant's criminal objective intent, (2) whether the crime was committed at the same time and place, and (3) whether the crime involved the same victim.

State v. Tili, 139 Wn.2d 107, 119 n.5, 985 P.2d 365 (1999)

(*citations omitted.*) Felony harassment and second degree assault do not constitute the same offense for purposes of double jeopardy.

State v. Mandanas, 163, Wn. App. 712, 720, 262 P.3d 522 (2011).

1. Same Criminal Conduct.

Failure to raise same criminal conduct at sentencing waives the right to appeal the issue. State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (DUI and reckless driving convictions); but see, State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) (convictions for rape and kidnapping). In Saunders the court found that the absence of details as to the sequence of events raised the possibility that the same intent existed for both the rape and the kidnapping of the victim, therefore, the failure to argue same criminal conduct under those facts constituted ineffective assistance of counsel. Saunders, 120 Wn. App. at 825. However, when the offenses do not involve the same criminal conduct counsels failure to argue same criminal conduct at sentencing is not ineffective assistance. State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (convictions for two counts of violating a no-contact order). Therefore, the defendant's ineffective assistance claim hangs on his argument that the assaults and felony harassment were the same criminal conduct.

“Same 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).

“Therefore, to constitute the ‘same criminal conduct’ for purposes of determining an offender score at sentencing, both crimes must involve: (1) the same criminal intent; (2) the same time and place; and (3) the same victim. If any one of these elements is missing, multiple offenses cannot be considered to be the same criminal conduct and they must be counted separately in calculating the offender score.

State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

When determining if two crimes share the same criminal intent, the only factor at issue here, the court focuses on whether the defendant's intent, viewed objectively, changed from one crime to the next, and whether commission of one crime furthered the other. State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003) aff'd, 153 Wn.2d 765, 108 P.3d 753 (2005). The court's focus is on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). First, the court objectively views each underlying criminal statute to determine whether the required intents are the same or different for each offense. State v. Price, 103 Wn. App. 845, 857, 14 P.3d 841 (2000). If the intents are the same, the court next objectively views

the facts usable at sentencing to determine whether the defendant's intent was the same or different with respect to each offense. Id. When dealing with sequentially committed crimes, this inquiry can be resolved in part by determining whether one crime furthered the other. Id.

2. The Defendant's Intent Changed Between the Crimes of Assault and Harassment.

Here, there is no question that the defendant committed the assaults and harassment at the same time and place, and against the same victim. The question is whether his intent, when viewed objectively, changed between the crimes, and whether the commission of one crime furthered the other. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 711-12, 887 P.2d 396 (1995). When the defendant assaulted Stevens with the deadly weapon he objectively intended to cause bodily harm and to create an apprehension of bodily harm. When he strangled her he objectively had the same intent. There was no discernible change in intent between the assaults; one furthered the other. The trial court correctly

concluded that the assaults encompassed same criminal conduct. Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future to the person threatened. State v. Wilson, 136 Wn. App. 596, 614-15, 150 P.3d 144 (2007); RCW 9A.46.020(1)(a)(i). Viewed objectively the underlying criminal statutes require a different intent for assault and felony harassment. Price, 103 Wn. App. at 857.

Not only do the crimes of second degree assault and felony harassment require different criminal intents, but also the defendant had completed the second degree assaults prior to threatening to kill Stevens and her family if the police were notified. The acts giving rise to the two assaults were separate from the acts comprising the harassment. The felony harassment was sequential to the assaults, not simultaneous or continuous with them. Wilson, 136 Wn. App. at 615; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). Neither crime furthered the commission of the other.

After he completed the assaults, the defendant decided that instead of ceasing his criminal conduct, he would commit a further criminal act by threatening to kill Stevens and her family. State v. Price, 103 Wn. App. 845, 858, 14 P.3d 841 (2000). The defendant

threatened to kill Stevens, their two-year-old daughter and himself if Stevens called the police, and to kill Stevens' family if they called the police. RP 288. The defendant had opportunity for completion of the assaults and ending his assaultive intent, followed by the formation of a new objective intent; to threaten thereby harassing Stevens. His intent changed; objectively his intent was to deter Stevens from reporting the prior assaults in an effort to avoid the consequences of the assaults. Committing a subsequent crime to escape the consequences of a prior crime does not further the goal of the prior crime. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987). Committing the felony harassment in an effort to escape the consequences of the assaults, in no way furthered the ultimate goal of the assaults. Clearly, the assaults did not further the felony harassment. Therefore, these crimes did not encompass the same criminal conduct.

While theoretically defense counsel could have argued same criminal conduct, the defendant has not shown a reasonable probability that the argument would have been successful. The defendant has not shown that counsel's representation fell below an objective standard of reasonableness, nor has he shown that but for counsel's performance, his sentencing would have been

different. Strickland, 466 U.S. at 678. His argument fails under both prongs.

D. COUNSEL'S ASSISTANCE WAS NOT INEFFECTIVE BY FAILING TO REQUEST A LIMITING INSTRUCTION.

The defendant claims his counsel provided ineffective assistance by failing to request a limiting instruction regarding drug-related evidence admitted under ER 404(b)². He argues that by not requesting a limiting instruction, the jury was allowed use of the evidence to evaluate the reasonableness of his claim that he acted to defend himself and N. Appellant's Brief 31. Although the trial court offered to give the jury a limiting instruction regarding the proper use of the ER 404(b) evidence, the defendant did not ask for such an instruction. Because no such request was made, the trial court did not err when it admitted the ER 404(b) evidence without a limiting instruction. State v. Cham, __ P.3d __, WL 6148731 (2011). In State v. Russell, 171 Wn.2d 118, 124, 249 P.3d 604 (2011) the Supreme Court held that a trial court is not required to give a limiting instruction for ER 404(b) evidence unless a party

² ER 404(b) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

requests one. “No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made.” State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976).

The defendant fails to show that there was no legitimate reason for not requesting a limiting instruction regarding the drug-related evidence. The court can presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize damaging evidence. State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (citing In re Rice, 118 Wn.2d at 888-89). The trial court admitted evidence related to the defendant’s misuse of his prescription medications showing that his behavior was erratic during the period of April 10 through April 12, and to explain Stevens’ fear of the defendant and why Stevens moved out of the Monte Cristo residence. RP 27-31. A limiting instruction would only have reemphasized this damaging evidence.

As the defendant points out, his counsel did consider and rejected requesting a limiting instruction. Appellant’s Brief at 33; RP 31. This supports the conclusion that counsel’s decision was a

matter of trial strategy. The defendant fails to overcome the strong presumption that defense counsel's performance was adequate. His ineffective assistance of counsel argument fails.

Additionally, the defendant fails to demonstrate that the outcome of his trial would have been different but for counsel's failure to request the limiting instruction. Stevens testified the defendant pulled the gun, pointed it at her and said he was going to kill her. He then grabbed Stevens by her hair, threw her face-down to the floor and began punching her in the back of the head and neck telling her she was going to die. During the assault, the defendant let go of the gun, put both his hands on Stevens' neck and began choking her so she could not breathe. Stevens' injuries were consistent with her testimony. RP 203-209, 221-223, 277-286, 428. After the assaults the defendant threatened to kill Stevens if she contacted the police and he threatened to kill her family if they contacted the police. Stevens feared the defendant would make good on his threats. RP 286-289, 307-308, 404. Compelling evidence supports the defendant's guilt.

The defendant argues that his state of mind at the time of the assaults was critical to the jury's analysis of his claim of self-defense. Appellant's Brief 35. However, at trial he did not argue

that he had an altered mental state or perception of reality; rather, he claimed that Stevens pulled the gun on him and that he acted in self defense. RP 572-576. The jury did not believe the defendant's claim that Stevens pulled the gun on him and that he acted in self defense. That was the jury's prerogative. State v. Koss, 158 Wn. App. 8, 16, 241 P.3d 415 (2010); State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992)(the trier of fact resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence). The defendant has not shown a reasonable probability that the outcome of the trial would have been different with a limiting instruction. He has failed to establish his claim of ineffective assistance of counsel.

E. COUNSEL'S ASSISTANCE WAS NOT INEFFECTIVE BY FAILING TO OBJECT TO THE AGGRESSOR INSTRUCTION.

The defendant also argues that trial counsel was ineffective by failing to object to the court's aggressor instruction. Appellant's Brief at 36-39. "While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction." State v. Riley,

137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). Aggressor instructions are not favored. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990) review denied, 115 Wn.2d 1010, 797 P.2d 511 (1990); State v. Wasson, 54 Wn. App. 156, 161, 772 P.2d 1039, review denied, 113 Wn.2d 1014, 779 P.2d 731 (1989). Nevertheless, it is not error to give an aggressor instruction when there was credible evidence from which the jury could reasonably have concluded that it was the defendant who provoked the need to act in self-defense. State v. Hughes, 106 Wn.2d 176, 192, 721 P.2d 902 (1986); State v. Kidd, 57 Wn. App. at 100; State v. Heath, 35 Wn. App. 269, 271-72, 666 P.2d 922, review denied, 100 Wn.2d 1031 (1983). If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. State v. Riley, 137 Wn.2d at 910; State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 584 (1987). An aggressor instruction is also appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005); State v. Riley, 137 Wn.2d at 910; State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992). "When determining if the evidence at trial was sufficient to support the giving of an instruction, the

appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.2d 1150 (2000). “Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.” State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997) (citing State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). “Failure to so instruct is reversible error.” Williams, 132 Wn.2d at 259 (citing State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)).

The evidence in the present case supported giving the aggressor instruction. Accordingly, because the aggressor instruction was properly given in the present case, counsel's performance was not deficient by failing to object to the aggressor instruction. Because the aggressor instruction was properly given, the defendant did not suffer prejudice when his attorney failed to object. His argument fails under both Strickland prongs. 466 U.S. at 687-89.

F. THE DEFINITION OF “TRUE THREAT” IS NOT AN ELEMENT OF FELONY HARASSMENT AND NEED NOT BE INCLUDED IN THE CHARGING DOCUMENT; THE DEFINITION MAY BE CONTAINED IN A SEPARATE DEFINITIONAL INSTRUCTION.

The defendant contends that a “true threat” is an essential element of the crime of felony harassment and, as such, must be included in the charging information.³ Appellant’s Brief at 39. Binding precedent indicates otherwise. This claim should be denied.

Harassment is defined by statute as follows:

- (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;
 - ... and
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. ...

RCW 9A.46.020(1)(a)(i) and (b).

The charging document in the present case set forth the elements of harassment as follows: “That the defendant, on or about the 12th day of April, 2010, without lawful authority, knowingly threatened to kill another, and by words or conduct placed the

person threatened in reasonable fear that the threat would be carried out" CP 110-111.

Washington courts have defined the term "threat" when used in statutes that prohibit threats as prohibiting only "true threats." State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001) (noting that the harassment statute is defined as prohibiting only true threats). Washington courts have repeatedly held that the definitions of elements are not elements themselves. State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (definition of threat does not create additional elements); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of "great bodily harm" does not add element to assault statute); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (definitional terms do not add elements to statute). In State v. Lorenz, 152 Wn.2d 22, 34-36, 93 P.3d 133 (2004), the Court held that "sexual gratification" is not an element of the crime of first degree child molestation, but a term that defines the element of "sexual contact." The court reasoned that: "Had the legislature intended a term to serve as an element of the crime, it would have placed 'for the purposes of sexual gratification' in RCW

³ The defendant does not challenge the language in the definition of "true threat" given to the jury, nor does he claim that there was insufficient evidence for the jury to have found that he made a "true threat."

9A.44.083.” Id. at 34. The legislature has not included “true threat” in the harassment statute, therefore, there is no basis to conclude that the legislature intended that term to be an element of that crime. Courts have applied the definition of “true threat” to the element of threat in order to ensure statutes do not run afoul of the First Amendment. Like other definitions, it does not add an element to the statute.

In State v. Tellez, this court considered and rejected the identical argument raised by the defendant in this case:

No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or “to convict” instruction. We decline to go any further than the Supreme Court because it is not necessary. So long as the court defines a true threat for the jury, the defendant's First Amendment rights will be protected.

State v. Tellez, 141 Wn. App. 479, 483, 170 P.3d 75 (2007). In State v. Atkins, the court again rejected the argument that “true threat” had to be included as an element in the information and the “to convict” instruction for the charge of felony harassment. State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010). In State v. Allen, the court reaffirmed Atkins and Tellez, holding:

Here, the to convict instruction required the jury to find the elements to convict Allen of the crime of felony harassment, including a knowing threat to kill. Also, the jury was instructed as to the definition of a true threat. As in Atkins and Tellez, this definitional instruction was sufficient to protect Allen's First Amendment rights. It ensured that the jury would convict Allen only if it deemed his threat toward Kovacs a true threat.

State v. Allen, 161 Wn. App. 727, 756, 255 P.3d 784 (2011), review granted, 172 Wn.2d 1014, 262 P.3d 63 (Sep 26, 2011).

In the present case, the “to convict” instruction included the element that the defendant knowingly threatened to kill Raina Stevens immediately or in the future. CP 72, Instruction 26.

Additionally, instruction 29 defined a true threat:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 75, Instruction 29. This instruction mirrors WPIC 2.24, which incorporates the constitutionally required mens rea. State v. Schaler, 169 Wn.2d 274, 288 n.5, 236 P.3d 858 (2010). The Court in Schaler declined to express an opinion on whether the definition

of true threat is an element of the crime of harassment, recognizing that Tellez is on point regarding the issue. Schaler, 169 Wn.2d at 288 n.6. Accordingly, Atkins, Allen and Tellez are dispositive on the issue that a true threat is merely the definition of the element of threat and may be contained in a separate definitional instruction. The court should reject the defendant's argument that "true threat" is an essential element of the crime of felony harassment that must be included in the charging information.

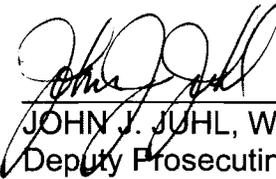
IV. CONCLUSION

For the reasons stated above, the appeal should be denied and the convictions and sentence affirmed.

Respectfully submitted on January 23, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:



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Deputy Prosecuting Attorney
Attorney for Respondent

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 24 AM 10:31

THE STATE OF WASHINGTON,

Respondent,

v.

JESSE M. WHITE,

Appellant.

No. 66632-1-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 23rd day of January, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 23rd day of January, 2012.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit