

67229-1

67229-1

NO. 67229-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MALCOLM ROY HOLLINGSWORTH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE REGINA CAHAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Should this Court reject the defendant's claim that his convictions for promoting prostitution and felony harassment constitute "same criminal conduct" for scoring purposes?

2. Can the defendant challenge his offender score for the first time on appeal when he agreed to his offender score below?

3. Should this Court reject the defendant's claim that, contrary to existing case law, the definition of a "true threat" is really an element of the crime of harassment?

4. As to count II--promoting prostitution, the State concedes that the term of confinement and community custody exceed the statutory maximum for the offense and thus remand is required for the sentencing court to correct this problem.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

A jury found the defendant guilty of the following charges:

Count I: Felony Harassment based on a threat to kill.

Count II: First-Degree Promoting Prostitution

Count III: Misdemeanor Violation of a No Contact Order

Count IV: Misdemeanor Violation of a No Contact Order

Count V: Tampering with a Witness

CP 10-13, 49, 55, 63, 64, 67, 37A, 37B, 37D, 37E, 37F. The jury acquitted the defendant on count VI, another count of Tampering with a Witness. CP 13, 69, 37G.

With 10 prior felony convictions and an offender score of 9, the defendant received a standard range sentence of 60 months on count I, 120 months on count II and 60 months on count V, concurrent with each other and concurrent to 12 month concurrent sentences on the two misdemeanor counts--count III and IV. CP 201-12. The court imposed a 12 month term of community custody on count II. CP 205; 8RP¹ 18.

2. SUBSTANTIVE FACTS

DL met the defendant when she was only 15 years old. 5RP 28. The defendant was 22 years old. 5RP 29. By the time DL turned 19 years old, the defendant had been forcing her to

¹ The verbatim report of proceedings is cited as follows: 1RP--12/20/10 & 4/19/11, 2RP--4/20/11, 3RP--4/21/11, 4RP--4/25/11, 5RP--4/26/11, 6RP--4/27/11, 7RP--4/28/11 and 8RP--5/20/11.

prostitute herself for years.² 3RP 63-64; 5RP 29. He had assaulted her over 40 times, broken her nose, dislocated her shoulder, poured boiling water on her, and choked her to unconsciousness. 3RP 63-64, 68. Still, at the time of trial, DL professed her love for the defendant and said that she appeared for court in order to help the defendant. 5RP 26-27, 29.³

On November 22, 2010, officers responded to a "threats to kill" 911 call with the perpetrator enroute. 3RP 38-39. The call came from the house of DL's grandmother, where DL and her father, Richard Larsh, were staying. 3RP 38-39; 5RP 30-31. When the first officer arrived on scene, he observed DL in the carport hiding in the shadows. 3RP 42. When DL saw that it was the police, she came out to talk with the officer. 3RP 42. DL told the officer that she was six months pregnant. 3RP 44. She explained that she had been talking with the defendant on the phone and they

² The charging period for the prostitution charge spanned the time period from July 1, 2009, through December 27, 2010. CP 55.

³ DL's appearance at trial surprised both the prosecutor and the defendant's trial counsel. 5RP 20-23. Her whereabouts were unknown until she walked into the courtroom on the last day of trial. *Id.* It was subsequently discovered that the defendant had called DL from jail the prior evening, had directed her to appear in court, and had told her what to say. 6RP 6-9; Exhibit 17; Exhibit 18 (Exhibit 18 is a *partial* transcript of the call as recorded in Exhibit 17. Due to the discovery of the call so late into trial, the State was unable to get a full transcription completed for the jury.).

got into an argument because he did not believe the child was his. 3RP 44. The argument escalated and the defendant threatened to kill DL, her baby, and if he "caught a charge," her father and grandmother. 3RP 44. If he was jailed, he threatened that his family would do the job. 3RP 44.

While providing a statement to the officer, DL spoke in a trembling voice and kept looking over her shoulder towards the street. 3RP 46. When another squad car pulled into the cul-de-sac, DL ducked down in the back seat of the police car she was sitting and exclaimed, "that's him, he is here." 3RP 47. After telling the officer what had happened that evening, DL provided the officer with the history of her relationship with the defendant, how he had forced her into prostitution, how he had repeatedly assaulted her, the fact that he carried knives around and had access to guns. 3RP 63-64. DL said that she was afraid for her life and the life of her child. 3RP 64.

When DL testified at trial, as stated above--at the defendant's direction--she denied that the defendant threatened her at all, she denied ever saying he threatened her, and she said that she signed the statement written by the officer without reading it. 5RP 42-43. She also claimed that she never prostituted herself for

the defendant, that she was never assaulted by him, and that the whole incident on November 22 was just a misunderstanding.

5RP 37, 39, 42, 54.

While multiple jail phone calls were introduced⁴ in which the defendant seems to direct DL to prostitute herself and put money on his books at the jail, DL had an explanation for what she was doing. DL testified that the defendant had sold DVD's to various persons and that they owed the defendant money for the DVD's. 5RP 50-51. She said that in the conversations with the defendant, she merely agreed to go collect the money owed from these people and deliver the money to the defendant at the jail. 5RP 50-51. She added that the defendant did not want her to be involved in prostitution and that he warned her it could be dangerous. 5RP 66.

The defendant did not testify. Additional facts are included in the sections they pertain.

⁴ See Exhibits 13B, 14B, 15B (the CD's) and Exhibit 16 (the transcript of the calls).

C. ARGUMENT

1. HAVING AGREED TO HIS OFFENDER SCORE BELOW, THE DEFENDANT IS BARRED FROM RAISING A "SAME CRIMINAL CONDUCT" CLAIM. IN ANY EVENT, HIS CONVICTIONS ARE APPROPRIATELY COUNTED SEPARATELY.

For the first time on appeal, the defendant claims that his felony harassment conviction (count I) and his promoting prostitution conviction (count II) constitute the "same criminal conduct" for scoring purposes. However, this claim has been waived. In any event, the defendant cannot meet his burden of showing that no reasonable judge would have found that the two convictions do not constitute the "same criminal conduct." Finally, his ineffective assistance of counsel claim is merely a failed attempt to avoid waiver.

a. The Issue Has Been Waived.

If two current offenses encompass the "same criminal conduct," they count as one point in calculating a defendant's offender score. RCW 9.94A.589(1)(a). Crimes are considered the "same criminal conduct" if the trial court determines the crimes require the same criminal intent, are committed at the same time, the same place, and involve the same victim. RCW

9.94A.589(1)(a); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

A defendant can waive a "same criminal conduct" claim. The Supreme Court has stated "that waiver can be found where the alleged [sentencing] error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Shale, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (citing In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)).

In Shale, the defendant was informed when he pled guilty that the State calculated his offender score as a nine. Shale, 160 Wn.2d at 495. Shale argued on appeal that the sentencing court erroneously failed to treat some of his crimes as the "same criminal conduct," even though he never asked the sentencing court to make this part factual, part discretionary, determination. Id. The Supreme Court rejected Shale's claim that he could raise a "same criminal conduct" claim for the first time on appeal. Shale, at 495; see also State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000) (cited with approval in Shale, at 494-95, the same criminal conduct inquiry involves factual determinations and the exercise of discretion, and the "failure to identify a factual dispute for the court's resolution and... [the] failure

to request an exercise of the court's discretion," waives the challenge to the offender score); and State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (Jackson's failure to raise a same criminal conduct claim at his sentencing constitutes waiver of the right to appeal), rev. denied, 167 Wn.2d 1007 (2009).

Shale, Nitsch, and Jackson are directly on point. A defendant cannot raise a same criminal conduct claim on appeal when he agreed to his offender score or did not alert the sentencing court to the factual discretionary issues involved. That is exactly what occurred here. The defendant never asked the sentencing court to make a "same criminal conduct" determination. In fact, he specifically agreed that the State's calculation of his offender score was correct.

At the sentencing hearing, the State provided the court with a Presentence Statement wherein the defendant's offender score and standard range were fully expressed. CP 249-263. His offender score for the promoting prostitution charge was calculated as a nine--with his two other current felony convictions each counting as one point in his offender score. Id. This meant that the defendant's standard range was 108 to 120 months. Id. On appeal, the defendant argues his offender score should have been

an eight, making his standard range 87 to 116 months. See RCW 9.94A.510 and RCW 9.94A.515.

At the sentencing hearing, the prosecutor also orally recited the defendant's offender score and standard ranges for the court and counsel. 8RP 9. The State recommended a sentence of 120 months. When the court turned to defense counsel for a sentence recommendation, defense counsel stated:

Mr. Hollingsworth would be seeking the low end of the range, and I would ask that the Court impose the 108 months.

8RP 15. Thus, the defendant was agreeing to his offender score and standard range, and this non-constitutional part factual issue is waived.

b. The Defendant's Convictions Do Not Constitute The Same Criminal Conduct.

Even if the defendant could raise this issue for the first time on appeal, he cannot show that it would have been an abuse of discretion for the trial court to have found that his convictions did not constitute the same criminal conduct for sentencing purposes.

Here, in convicting the defendant of promoting prostitution, the jury found that during the time intervening between July 1, 2009

and December 27, 2010, the defendant knowingly advanced prostitution by compelling DL by threat or force to engage in prostitution or that he knowingly profited from prostitution that was compelled by threat or force. CP 55. In convicting the defendant of felony harassment, the jury found that on November 22, 2010, the defendant knowingly threatened to kill DL and that the words or conduct of the defendant placed DL in reasonable fear that the threat to kill would be carried out. CP 49.

As stated above, two crimes encompass the same criminal conduct if the crimes involve the same criminal intent, are committed at the same time, the same place, and against the same victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). In regards to the intent element, the court focuses on whether the defendant's intent, viewed objectively, changed from one crime to the next. State v. Grantham, 84 Wn. App. 858, 932 P.2d 657 (1997).

The absence of any single factor precludes a same criminal conduct finding. Vike, 125 Wn.2d at 410. Further, the statute is purposely narrowly constructed to disallow most assertions of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

A finding that two crimes do not arise from the same criminal conduct--necessarily a partly factual determination--will not be disturbed on appeal absent an abuse of discretion. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990). An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). If the facts are sufficient to support a finding either way, then the matter lies within the trial court's discretion, and an appellate court will defer to the trial court's determination. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991).

Here, the only common element is that the two crimes involved the same victim. Otherwise, the defendant's argument amounts to no more than a claim that because the crime dates overlapped, they occurred at the same time, because DL sometimes stayed at her grandmother's house, the crimes occurred at the same place, and because promoting prostitution as charged requires a threat, the defendant's intent in threatening her on

November 22, must be the same intent he had in forcing DL to prostitute herself. None of these factual assertions are supportable.

First, while DL testified that the defendant did not threaten her on November 22, the evidence shows that the two were arguing about DL's unborn child, that the argument escalated to the point where the defendant threatened to kill DL. 3RP 44. There is no evidence that the defendant's intent in threatening DL on November 22 was to compel her to prostitute herself for the defendant's financial gain. In contrast, in regards to the promoting charge, DL told responding officers that in the past, the defendant had assaulted her multiple times, that he carries knives and "forces" her to prostitute herself. From her statement, the defendant committed these prior acts with the intent to compel DL to prostitute herself for the defendant.

In regards to time and place, the defendant relies on the fact that promoting prostitution is a continuing course of conduct offense. See State v. Elliott, 114 Wn.2d 6, 785 P.2d 440 (1990). This does not mean, however, that the harassment occurred at the same time and place as the promoting charge. There is absolutely no evidence that on November 22 when DL was staying at her

grandmother's house, she prostituted herself for the defendant or the defendant attempted to compel her to do so. In fact, there is no evidence that at any time DL stayed at her grandmother's house, she prostituted herself for the defendant or that the defendant attempted to compel her to do so. There is no support for the defendant's contention that where you have a continuing course of conduct crime any other crime that happens to occur during that time period necessarily happens at the same time and same place as the continuing course of conduct crime.

Under these facts, it would not have been an abuse of discretion for a sentencing judge to rule the defendant's crimes were not the same criminal conduct.

c. A Failed Ineffective Assistance Of Counsel Claim.

In an attempt to avoid the clear waiver issue discussed above, the defendant claims that his trial counsel was constitutionally ineffective for failing to raise this single issue, an issue that if raised below would have involved a factual discretionary determination by the trial court. The defendant should not be able to raise a waived issue merely by recasting the single

issue under the pretext of a claim of ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first element is met by showing that counsel's conduct fell below an objective standard of reasonableness based on the entire record. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceedings would have been different. If the defendant fails to prove either element, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In making this determination, a reviewing court will not "second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim." In re Personal Restraint of Stenson, 142 Wn.2d 710, 733-34, 16 P.3d 1 (2001) (citing Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)). Nothing in the Constitution requires such a rigorous standard. Id.; see also City of Tacoma v. Durham, 95 Wn. App. 876, 882, 978 P.2d 514 (1999) ("Just as an appellate

lawyer is not considered ineffective for failing to raise every conceivable non-frivolous claim of error, a trial lawyer cannot be faulted for failing to make a record of every such allegation").

A finding that two crimes do not arise from the same criminal conduct--necessarily a partly factual determination--will normally not be disturbed on appeal absent an abuse of discretion. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990). An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284. Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Here, there is no case law directly on point supporting the defendant's position that his two crimes constitute the same criminal conduct. Further, at best, the issue presents factual questions and a discretionary decision by the trial court. As such, trial counsel can not be said to have been constitutionally ineffective for deciding not to raise this single issue involving a factual discretionary determination not clearly controlled by case law.

In addition, regarding the prejudice component of an ineffective assistance claim, a defendant must show that if his lawyer had raised the motion, there is a reasonable probability that the motion would have been granted. Durham, 95 Wn. App. at 882 (citing State v. McFarland, 127 Wn.2d 322, 337 n.4, 889 P.2d 1251 (1995)). The defendant cannot meet that standard here. At best, the defendant can argue a judge "could" have so ruled. This is not the standard he is required to meet. The defendant's claim must be rejected.

2. THE TERM "TRUE THREAT" IS NOTHING MORE THAN A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF ANY CRIME.

The defendant contends that it is error not to include the following language in every charging document involving a verbal threat:

A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.

He argues that this language is not merely definitional, but is an element of every criminal statute involving a verbal threat. This is inconsistent with existing case law. See e.g., State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010); State v. Allen, 161 Wn. App. 727, 255 P.3d 784, rev. granted, 172 Wn.2d 1014 (2011). The term "true threat" is a term of art used to describe the permissible scope of threat statutes for First Amendment purposes. The language describing what constitutes a true threat is definitional, no different from language used to define "intent," "recklessness" or "great bodily harm." This language need not be included in the charging document.

a. The Charging Document.

In count I of the Information, the State alleged that the defendant "knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to [DL], by threatening to kill [DL], and the words or conduct did place said person in reasonable fear that the threat would be carried out." CP 10; RCW 9A.46.020.

b. The Elements Of The Crime Of Harassment.

A charging document is sufficient if it sets forth all elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). As charged and convicted here, a person commits the crime of felony harassment if he knowingly threatens to kill immediately or in the future the person threatened, and the words or conduct place the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. The statute sets out all the elements of the crime.

In defining the constitutional limits of the harassment statute, the Supreme Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Kilburn, 151 Wn.2d at 43.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, at 44. The relevant question is whether a reasonable person in the defendant's position would foresee that, taken in context, a listener would interpret the statement as a serious threat. Kilburn, at 46.

Here, the Information contained all the essential elements of the crime. The trial court gave an instruction defining "threat" that incorporated that definition of a "true threat." CP 52. This is all that is required.

This is consistent with Tellez, supra, Atkins, supra, and Allen, supra, wherein courts have repeatedly rejected the argument that the language defining a "true threat" must be charged in the information and/or included in the "to convict" jury instruction. See also State v. Sloan, 149 Wn. App. 736, 205 P.3d 172, rev. denied, 220 P.3d 783 (2009); State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170 (2008), rev'd. on other grounds, 169 Wn.2d 274 (2010).

In this case, the State does not dispute that it was required to prove that the defendant's threat was a "true threat." As instructed here, the jury was required to find beyond a reasonable doubt that the defendant "knowingly threatened to kill [DL]" and that the threat occurred "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 intent to carry out the threat rather than as something said in jest or idle talk." CP 49, 52. The defendant has cited no case, and the State has found none, holding that the language defining a "true threat" is a separate element that must be included in the charging document for felony harassment, or for any other crime that contains a threat element.⁵ The defendant was properly charged and the jury was properly instructed on all the elements of the crime of felony harassment. The jury found beyond a reasonable doubt that his threat to kill DL was a "true threat." The defendant's argument should be rejected.

⁵ The defendant's position is similar to that of a person charged with (for example) first-degree assault, which requires the intent to inflict "great bodily harm." See RCW 9A.36.011(1). The charging document and the "to convict" instruction must contain the statutory element of "great bodily harm," which will be defined for the jury as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." See WPIC 2.04, 35.04. See also State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) (generally a trial court must define technical words or expressions used in the jury instructions). But no case requires that the definition of the term be included in the charging document.

3. THE STATE CONCEDES THAT THE TRIAL COURT SENTENCED THE DEFENDANT BEYOND THE STATUTORY MAXIMUM TERM ON COUNT II.

A court "may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime." RCW 9.94A.505(5). First-degree promoting prostitution is a class B felony with a maximum term of 10 years (120 months). RCW 9A.88.070; RCW 9A.20.021(1)(b). First-degree promoting prostitution is also a "crime against a person," and carries with it a 12 month term of community custody. RCW 9.94A.411; RCW 9.94A.701(3)(a).

Here, as to count II, the court imposed a 120 month term of confinement and a 12 month term of community custody. The State concedes that the sentence exceeds the statutory maximum and thus this Court must remand this case back to the sentencing court to correct this error. RCW 9.94A.701(9); State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011).

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction. This Court should remand this case so that

the sentencing court can correct the sentencing error as discussed
in section C 3 above.

DATED this 26 day of March, 2012.

Respectfully submitted,

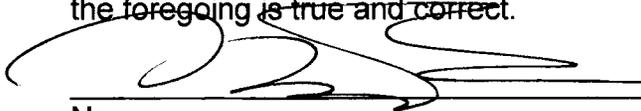
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HOLLINGSWORTH, Cause No. 67229-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

08 / 26 / 12
Date