

December 18, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHARLES EDWARD PASCHAL,

Appellant.

In re the Personal Restraint of:

CHARLES EDWARD PASCHAL,

Petitioner.

No. 50136-8-II

Consolidated with:

No. 50746-3-II

UNPUBLISHED OPINION

Lee, J. — Charles E. Paschal appeals his exceptional sentence on remand, arguing that the sentencing court violated the appearance of fairness doctrine by not decreasing the length of his sentence following his successful appeal and that the sentencing court’s failure to decrease his imposed sentence created a presumption of vindictiveness. In a consolidated personal restraint petition (PRP), Paschal challenges the sufficiency of the evidence to support his first degree assault conviction and the aggravating circumstance that he assaulted his girlfriend within sight and sound of their minor children. We affirm Paschal’s sentence and deny his PRP.

FACTS

One evening in March 2013, Paschal and his then girlfriend, Katherine Martin, got into an argument in Martin's home. According to Martin, Paschal assaulted her for several hours that night.

Paschal first slapped Martin's face with an open hand. He then began punching her face and head with his closed fist. Martin described the blows as constant and could not keep count of the number of individual punches that Paschal levied. As he punched her, Paschal repeatedly told Martin that he was going to "rape [her], kill [her], and take all [of her] money." 3 Verbatim Report of Proceedings (VRP) (May 20, 2014) at 254. At one point, Paschal repeatedly slammed Martin's head into the staircase.

Later, Paschal forced Martin to perform oral sex on him. Afterward, he placed her in a "wrestling-type hold" and strangled her. 3 VRP (May 20, 2014) at 258. Paschal continued to tell Martin that he was going to rape her, kill her, and take her money. Paschal strangled Martin so tight that she could not move her legs or fingertips. He also placed his hand over Martin's mouth and nose, periodically letting go to allow Martin to take a couple of breaths, but then covered her face again and resumed strangling her.

During this entire incident, Paschal and Martin's two minor children, and Paschal's four year old daughter from a prior relationship, were inside the house. Two of the children were in the upstairs master bedroom. Martin and Paschal's infant son was asleep downstairs. All of the children were within earshot of Paschal and Martin the entire night.

As Paschal strangled Martin, the two children in the master bedroom opened the door and began screaming. Paschal released Martin and ran to the bedroom door. Martin got up and ran

out the back door to a neighbor's house. The neighbors called 911. Martin lost consciousness twice during the 911 call. One of the responding paramedics who treated Martin knew her socially, but he did not recognize her that night because the injury to Martin's face was so severe.

At trial, Martin testified to the facts discussed above. Paschal also testified and admitted that he hit Martin out of anger "five times with [his] back hand, pow, pow, pow, pow, pow." 5 VRP (May 22, 2014) at 706-07. He denied hitting Martin anywhere else aside from her "face and head area." 5 VRP (May 22, 2014) at 707.

A jury found Paschal guilty of first degree assault,¹ first degree rape,² unlawful imprisonment,³ and two counts of second degree assault.⁴ The jury also found that the special allegation that the offense involved domestic violence and occurred within sight or sound of either the victim or offender's minor children applied.⁵

The trial court sentenced Paschal to an exceptional sentence of 360 months confinement on the first degree rape conviction and 360 months confinement on the first degree assault conviction, with the sentences to run concurrently.⁶ The court found that a sentence above the

¹ RCW 9A.36.011(1)(a).

² RCW 9A.44.040(1)(c).

³ RCW 9A.40.040.

⁴ RCW 9A.36.021

⁵ RCW 9.94A.535(3)(h)(ii). RCW 9.94A.535 has been amended since the events of this case transpired. However, the amendments do not materially affect the statutory language relied on by this court. Accordingly, we refrain from including the word "former" before RCW 9.94A.535.

⁶ The trial court found that Paschal's two second degree assault convictions merged with Paschal's first degree assault conviction and vacated the two second degree assault convictions. The trial

standard range was justified for both the first degree rape and first degree assault convictions based upon the aggravating circumstance that the offenses involved domestic violence and occurred within sight or sound of the victim or offender's minor children. The court stated, "If this case were sentenced just on Rape I or just on Assault I, the sentence would be the same. It's 360 months." 7 VRP (Aug. 18, 2014) (Sentencing) at 926.

Paschal appealed, and we held that the trial court improperly admitted prior domestic violence evidence under ER 404(b). We also held that this error was harmless as to the first degree assault and unlawful imprisonment convictions, but not harmless as to the first degree rape conviction. As a result, we reversed and remanded Paschal's first degree rape conviction.

On remand, the State declined to proceed to a new trial on the first degree rape count. The judge who presided over Paschal's original sentencing again presided over his resentencing. The resentencing court vacated Paschal's rape conviction and resentenced him only on the first degree assault and unlawful imprisonment convictions. The court sentenced Paschal to an exceptional sentence of 360 months confinement on the first degree assault conviction and 12 months on the unlawful imprisonment conviction, to be served concurrently, for a total of 360 months confinement. The resentencing court entered findings of fact and conclusions of law supporting the exceptional sentence, again finding that a sentence above the standard range was warranted based on the aggravating circumstances that the offense involved domestic violence and occurred within sight or sound of the victim or offender's minor children.

court also sentenced Paschal to 366 days on the unlawful imprisonment conviction, to be served concurrently with the rape and assault sentences.

Paschal appeals his judgment and sentence. He also challenges the sufficiency of the evidence against him in a PRP.⁷

ANALYSIS

A. APPEARANCE OF FAIRNESS DOCTRINE

Paschal argues that the resentencing court violated the appearance of fairness doctrine when it imposed the same sentence following remand as it imposed prior to his first appeal. We disagree.

Paschal is correct that “ [t]he law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.’ ” *In re Pers. Restraint of Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (internal quotation marks omitted) (quoting *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992)). However, we presume that a judge acts without prejudice or bias. *Id.* “Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” *Post*, 118 Wn.2d at 619.

Here, Paschal cites to no evidence showing that the judge who sentenced him was biased or prejudiced against him. And the record does not contain any evidence of bias or prejudice. Paschal’s sole basis for his appearance of fairness claim appears to depend on his vindictive sentencing claim, which as explained below, is without merit. Therefore, Paschal’s challenge under the appearance of fairness doctrine fails.

B. VINDICTIVE SENTENCE

Paschal next argues that the presumption of vindictiveness applies here because the resentencing court did not reduce his sentence on remand even though it vacated his first degree

⁷ We consolidated Paschal’s PRP with his appeal.

rape conviction. Because the resentencing court did not increase Paschal's sentence on remand, we hold that the presumption of vindictiveness does not apply.

Increased sentences motivated by a judge's vindictive retaliation after reconviction following a successful appeal is proscribed by the due process clause of the Fourteenth Amendment to the United States Constitution. *State v. Franklin*, 56 Wn. App. 915, 920, 786 P.2d 795 (1989), *review denied*, 114 Wn.2d 1004 (1990). The *Franklin* court acknowledged that the United States Supreme Court has held that a more severe sentence on remand establishes a rebuttable presumption of vindictiveness. *Id.* Washington courts have applied this presumption, but have held that it does not arise when there is no increase in the sentence on remand. *See id.*; *State v. Larson*, 56 Wn. App. 323, 326, 783 P.2d 1093 (1989), *review denied*, 114 Wn.2d 1015 (1990).

Here, on remand, the resentencing court imposed the same sentence on Paschal's first degree assault conviction as it had prior to his successful appeal—360 months confinement. Contrary to Paschal's unsupported assertion, the resentencing court's failure to decrease his sentence does not equate to increasing it. At Paschal's original sentencing, the presiding judge explained, "If this case were sentenced just on Rape I or just on Assault I, the sentence would be the same. It's 360 months." 7 VRP (Aug. 18, 2014) at 926. Paschal's sentence remained the same, and therefore, there is no presumption of vindictiveness here. We affirm.

C. ATTORNEY FEES

Paschal asks that this court decline to impose appellate costs if the State prevails on appeal. The State represents that it will not seek appellate costs. We accept the State's representation and decline awarding appellate costs to the State.

D. PERSONAL RESTRAINT PETITION

Paschal argues that insufficient evidence supported his conviction for first degree assault because the resulting injuries to Martin were “minor” and did not result in great bodily injury. PRP at 9. He also argues that insufficient evidence supported the aggravating circumstance that the assault occurred within the sight and sound of their minor children. We disagree on both accounts.

1. Standard of Review

To be entitled to relief on a PRP, a petitioner must show that he or she is under unlawful restraint. RAP 16.4(a). Restraint is unlawful when, “[t]he conviction was obtained or the sentence or other order . . . was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.” RAP 16.4(c)(2). “A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment and thus results in unlawful restraint.” *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

At the same time, “[a] PRP is not a substitute for a direct appeal and the availability of collateral relief is limited.” *In re Pers. Restraint of Wolf*, 196 Wn. App. 496, 502, 384 P.3d 591 (2016). “Relief by way of a collateral challenge to a conviction is extraordinary, and the petitioner must meet a high standard before this court will disturb an otherwise settled judgment.” *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). A petitioner alleging a constitutional error must demonstrate “ ‘actual and substantial’ ” prejudice to obtain relief through a PRP. *In re Pers. Restraint Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990)).

2. Sufficiency of Evidence

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State’s evidence and all reasonable inferences that can be drawn from that evidence. *Id.* All such inferences “must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* Direct and circumstantial evidence are equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

a. First degree assault conviction

Paschal contends that his restraint is unlawful because his first degree assault conviction rests on insufficient evidence. Specifically, he argues that the State failed to present evidence that he intended to inflict great bodily harm and that Martin only suffered “minor injuries.” PRP at 8.

A person is guilty of first degree assault “if he or she, with intent to inflict great bodily harm . . . [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.” RCW 9A.36.011(1)(a). “Great bodily harm” is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c).

Here, the State presented evidence that over the course of several hours, Paschal repeatedly punched Martin’s face and head, slammed her head into a staircase, strangled her, and held his

hand over her face to prevent her from breathing. Paschal strangled Martin so tight that she was unable to move her legs or fingertips. And as Paschal assaulted Martin, he repeatedly told her that he was going to kill her, rape her, and take her money.

Martin lost consciousness twice while waiting for help to arrive. And even though one of the responding paramedics knew Martin socially, he did not recognize her because the injury to Martin's face was so severe. Paschal might characterize these injuries as "minor," but viewing this evidence in the light most favorable to the State, a reasonable fact finder could have easily found beyond a reasonable doubt that Paschal intended to inflict great bodily harm on Martin and that he assaulted her by force or means likely to produce bodily injury which created a probability of death. PRP at 8.

b. Aggravating circumstance—within "sight or sound" of minor children

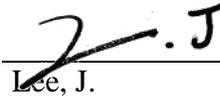
Next, Paschal argues that insufficient evidence supported the aggravating factor that the offense occurred within sight or sound of the victim or offender's minor children. He argues that the evidence was insufficient because the State failed to present any evidence that the minor children "saw or heard" him assaulting Martin. Motion to Amend PRP at 6.

The sentencing court may impose a sentence outside the standard sentencing range if a jury finds the aggravating circumstance that the offense involved domestic violence and "occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years." RCW 9.94A.535(3)(h)(ii). Contrary to Paschal's assertion, the plain language of this statute does not require the State to prove that a minor child witnessed the offense; it only requires the State to prove that the offense occurred "within sight or sound" of the victim's or the offender's minor child. RCW 9.94A.535(3)(h)(ii).

Here, it is undisputed that the children were inside of the house within earshot of Martin and Paschal throughout the assault. And Martin testified that the two children in the bedroom opened the door and started screaming while Paschal strangled her. In fact, the only reason Martin escaped Paschal was because the minor children opened the bedroom door and Paschal ran toward them. Viewing this evidence in the light most favorable to the State, the jury could have found beyond a reasonable doubt that Paschal assaulted Martin within sight or sound of their minor children.

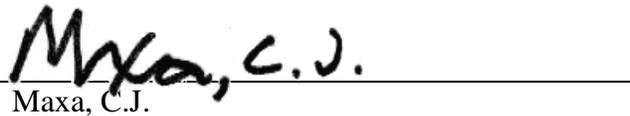
We hold that both of Paschal's sufficiency of the evidence challenges fail. Accordingly, we affirm Paschal's sentence and deny his PRP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

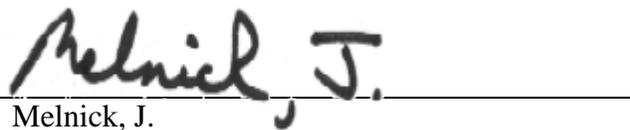


Lee, J.

We concur:



Maxa, C.J.



Melnick, J.