

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

STATE OF WASHINGTON,
Respondent,

v.

SCOTT MICHAEL HILL,
Appellant.

No. 38830-8-II

UNPUBLISHED OPINION

Van Deren, C.J. — A jury convicted Scott Michael Hill of multiple counts on charges of burglary, assault, attempted murder, and malicious mischief stemming from Hill’s attack on his girl friend, Jennifer Schlatter, and her family at the Schlatter home in August 2007. Hill challenges only his sentence and his conviction for second degree assault against Jennifer’s father, Terrance Schlatter.¹ (count IV). We affirm.

Facts

Hill and Jennifer started dating in March 2006 and moved in together three months later. But by May 2007, Jennifer had moved out of their shared apartment and back into her parents’ home. Despite a no-contact order, the couple continued to see each other.

¹ Because they share the same last name and to avoid confusion, we refer to Jennifer Schlatter, Terrance Schlatter, Christine Schlatter, and Kimberly Schlatter by their first names.

On Friday, August 3, 2007, Jennifer went to a Gig Harbor tavern with a female friend. Hill came to the tavern, but Jennifer told him that he should leave, and he did so. After Jennifer and her friend left the bar, Jennifer called Hill and had him pick her up at her friend's house. Hill took Jennifer to his parents' house in Gig Harbor, where they spent the night.

The following morning, Jennifer told Hill she wanted to end their relationship. Jennifer took her computer from Hill's parents' home and she asked Hill to return a \$5000 loan she had given him to buy his truck. Hill returned the money. He also tried to change Jennifer's mind by threatening to take his own life, but Jennifer insisted that the relationship was over. Jennifer returned to her parents' house.

Throughout the weekend, Jennifer and Hill continued to have telephone conversations in which Hill repeated his threat to commit suicide. On Sunday, during one of many telephone calls, Jennifer told Hill that she had reported him to the police for violating the no-contact order. During their final telephone conversation that night, at 10:12 pm, Jennifer told Hill that she had cheated on him with four other men during their relationship. Hill told Jennifer that she had ruined his life, he threatened to kill himself, and hung up. Thereafter, Hill did not answer any of Jennifer's calls.

Jennifer went to bed around 11:30 that evening. Jennifer's parents, Christine and Terrance, and sister, Kimberly, were also in the house and had gone to bed. Sometime around midnight, Hill drove to Jennifer's parents' neighborhood and parked his truck near the Schlatter residence. Hill donned gloves and broke into the house by slicing a hole in a kitchen window screen. Hill climbed in through the kitchen window, knocking over dishes in the sink, stumbling, and making a loud noise. He then went up the stairs to Jennifer's bedroom.

Jennifer heard her parents' dogs barking and the sound of breaking glass from downstairs. Suddenly, her door opened and Hill walked into her bedroom and said, "I'm going to fucking kill you, bitch." Report of Proceedings (RP) at 116. Hill then began to choke and strangle Jennifer. Jennifer believed she was going to die.

Jennifer's mother, Christine, got out of bed when she heard the glass break and her dogs bark. She went to Jennifer's room and saw Hill strangling Jennifer. Christine jumped on Hill and yelled, "What are you doing[?]" RP at 212. As Christine and Hill struggled, Christine yelled for her other daughter, Kimberly, to call the police.

Kimberly woke up when she heard the commotion, came out of her room, and saw Christine on her back on the floor of the hallway with Hill on top of Christine attacking her. When Hill saw Kimberly, he attacked her too.

Jennifer's father, Terrance, was also awakened by the commotion, saw Hill on top of Kimberly and pulled Hill off of her. As Terrance and Hill struggled with each other, Kimberly ran to her parents' room and called 911.

Hill told Terrance that he was going to kill him. Hill put his arms around Terrance's neck and attempted to strangle him. Terrance testified at trial that he was unsure whether he lost consciousness, but he remembered ending up on the floor where Hill repeatedly kicked him in the groin.

Hill left Terrance and again attacked Christine. Hill grabbed Christine and tried to throw her over the stair railing. Christine called to Terrance to get the shotgun and he ran to the master bedroom to retrieve it. While Jennifer's family struggled with Hill, Jennifer ran outside.

Before Terrance returned with the gun, Hill left Christine and went downstairs. Hill

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approached Kimberly, who had retreated to the kitchen during her 911 telephone call, but he left when Kimberly brandished a butcher knife. Hill opened the patio door and ran outside. Hill found Jennifer on the back patio and grabbed her as she tried to get away.

Hill beat and kicked Jennifer as she lay on the ground. He repeatedly told her, ““This is for fucking cheating on me.”” RP at 128. Hill finally fled when he heard Terrance cock the shotgun.

The entire Schlatter family went to the hospital for treatment of the injuries Hill caused. Hospital personnel x-rayed Terrance’s neck and treated him for a floater in one of his eyes, which he testified that he still suffered from at the time of the trial, some 16 months later. In addition to his eye injury, Terrance had injuries and pain in his groin area that lasted for several days. Terrance also had noticeable bumps and scratches that the police photographed when they arrived at the Schlatter residence.

While Jennifer and her family were at the hospital, Hill returned to the Schlatter residence and broke in again. He shattered the glass in the sliding patio door; ransacked the house; and shot bullets into Jennifer’s television, computer, and bedroom. Police exchanged numerous telephone calls with Hill over the next two days about whether he would turn himself in. They located and arrested him on Tuesday, August 7, 2008.

The State ultimately charged Hill with nine counts: first degree burglary (count I), attempted first degree murder (of Jennifer Schlatter) (count II), second degree assault (of Christine Schlatter) (count III), second degree assault (of Terrance Schlatter) (count IV), felony harassment (count V), fourth degree assault (of Kimberly Schlatter) (count VI), violation of a no-contact order (count VII), first degree burglary (count VIII), and first degree malicious mischief

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(count IX). The second amended information also charged Hill with committing counts VIII and IX (regarding the second break-in) while armed with a firearm.

Hill pleaded guilty to count VII, violation of a no-contact order. The trial court accepted Hill's guilty plea on that count and conducted a CrR 3.5 hearing prior to trial on the other charges. The jury found Hill guilty on all remaining counts. The jury also returned special verdicts, finding that Hill was armed with a firearm on counts VIII and IX.

At sentencing, Hill requested a low-end, standard range sentence, claiming that his only concern was for the victim. Specifically, defense counsel argued,

[Defendant] wanted to make sure that [Jennifer Schlatter] was -- whatever he tried to do, that she was at least recovering, and even more important, that she was safe. He was remorseful from the very, very beginning, and that did not change throughout these proceedings.

RP at 957.

The State requested the high end of the standard sentencing range. In making its determination, the trial court noted that, contrary to Hill's contention, he did not appear remorseful in his actions and words throughout the trial. The trial court sentenced Hill to a high end standard range sentence of 507 months in prison.² Hill appeals.

Discussion

Sentence

Hill first contends that, by imposing a high end standard range sentence, the trial court improperly punished him for exercising his constitutional right to go to trial. We disagree.

² The trial court sentenced defendant to 116 months for count I, 411 months on count II, 84 months on count III, 84 months for count IV, 60 months for count V, 116 months for count VIII and 57 months for count IX, to run concurrently, plus two firearm enhancements of 60 and 36 months on counts VIII and IX, respectively, to run consecutively to each other and to the other counts, for a total of 507 months.

A trial judge is “under no obligation to explain [her] reason for imposing a sentence at the high end of the standard range.” *State v. Mail*, 121 Wn.2d 707, 714, 854 P.2d 1042 (1993). Yet here, as in *Mail*, “it is [her] discretionary decision to do so that forms the basis for this appeal.” 121 Wn.2d at 714.

Generally, a party cannot appeal a standard range sentence. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003); *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003). This principle arises from the notion that, “so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length.” *Williams*, 149 Wn.2d at 146-47 (citing *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)); see also *State v. Medrano*, 80 Wn. App. 108, 111-12, 906 P.2d 982 (1995).

Notwithstanding the general prohibition against review of standard range sentences, a party may challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. *Williams*, 149 Wn.2d at 147 (citing *Mail*, 121 Wn.2d at 712). “Thus it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies.” *Williams*, 149 Wn.2d at 147 (citing *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999)); *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Consequently, we will review a standard range sentence resulting from constitutional error, procedural error, an error of law, or the trial court’s failure to exercise its discretion. See, e.g., *Williams*, 149 Wn.2d at 147; *Mail*, 121 Wn.2d at 713; *Ammons*, 105 Wn.2d at 183; *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002); *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997); *State v. Sandefer*, 79 Wn. App.

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178, 181, 900 P.2d 1132 (1995).

Hill argues that the record shows that the trial court imposed a high end standard range sentence because he exercised his right to a trial. To the extent he asserts a constitutionally improper basis for the sentence imposed, review is appropriate. *Sandefer*, 79 Wn. App. at 181.

Hill is correct that even a standard range sentence, if imposed merely to punish a defendant for exercising his right to a jury trial, would violate due process. *Sandefer*, 79 Wn. App. at 181. But due process is not implicated merely because a judge comments on a defendant's choice to exercise his right to trial. *Sandefer*, 79 Wn. App. at 180, 182-84. In *Sandefer*, a child molestation case, the trial court explained why it was imposing a sentence at the top of the standard range.

I frequently . . . in sentencing within the standard range give a defendant a more lenient sentence if the defendant has entered a plea of guilty. And the predominant reason I do that, not because I'm trying to be nice to a defendant, but I know that defendants who do enter pleas of guilty, in cases of this nature, it saves the parent and the child a lot of grief, in that they don't have to go through this experience, this heart rendering [*sic*] experience in the courtroom in having a poor little girl testify in front of a whole bunch of strangers about what happened to her.

Mr. Sandefer, if you entered a plea of guilty, I very possibly would have given you a more lenient sentence towards the lower end of the range, because of saving the victim being victimized by going through this court process. You didn't, and I'm not going to give you that break.

Sandefer, 79 Wn. App. at 180. Division One held that these remarks did not indicate improper consideration of the defendant's right to stand trial but, instead, were nothing more than a fair response to the defendant's objection to the State's recommendation for an exceptional sentence and the defendant's request for a low to mid standard range sentence. *Sandefer*, 79 Wn. App. at 179-80, 184. We agree.

Similarly, the trial court's comments here were in response to defense counsel's assertion

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that a low end standard range sentence was warranted because Hill had a genuine and abiding concern for his victim's welfare throughout the proceedings. The court indicated that Hill's conduct throughout the trial belied such concern, as did the fact that he put Jennifer and her family through the ordeal of a trial. The court also noted other considerations, including the "sheer terror" visited upon Jennifer and her family at Hill's hands on the night in question, the fact that the Schlatters would never feel safe in their own home again, and that, in light of the selfishness and callousness that Hill demonstrated at trial, everyone would be better off if Hill were kept in confinement as long as possible. RP at 962.

"While a judge may not sentence vindictively or punitively, he may have legitimate reasons for sentencing a defendant more severely. The court may properly consider the details, flavor and impact upon victims of the offense as presented at trial." *United States v. Carter*, 804 F.2d 508, 514 (9th Cir. 1986) (citation omitted). The *Carter* court also relied in part on the fact that the trial court stated it was not punishing defendants for going to trial. 804 F.2d at 513-14. Similarly, the trial court here acknowledged Hill's right to go to trial and noted other reasons for imposing a high end standard range sentence. Fairly read, the trial court's remarks in the present case indicate that it imposed a high end standard range sentence based on the crime's impact on the victims. Under these circumstances, we hold that the trial court did not err in imposing a high end standard range sentence.

Sufficiency

Hill next argues that the State's evidence was insufficient to convict him of second degree assault of Terrence Schlatter, count IV. We disagree.

The test for determining the sufficiency of the evidence is whether, after viewing the

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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). When the sufficiency of evidence is challenged in a criminal case, we must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

A person is guilty of second degree assault if the person intentionally assaults another and recklessly inflicts substantial bodily harm. RCW 9A.36.021(1)(a). One can also commit second degree assault by assaulting another by strangulation. RCW 9A.36.021(1)(g). The trial court instructed the jury that to convict on court IV, the State had to prove the following two elements:

- (1) That on or about the 6th day of August, 2007, the defendant:
 - (a) intentionally assaulted Terrance Schlatter and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted Terrance Schlatter by strangulation; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that element (2) and either element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements (1)(a) and (1)(b) are alternatives and only one need be proved.

Clerk's Papers (CP) at 52 (Instruction No. 28).³ The trial court also instructed the jury on the

³ The trial court also instructed the jury on the definition of substantial bodily harm and disfigurement.

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definition of strangulation: “Strangulation means to compress a person’s neck, thereby obstructing the person’s blood flow or ability to breath[e], or doing so with the intent to obstruct the person’s blood flow or ability to breathe.” CP at 49 (Instruction No. 26).

Notably, Hill argues only that the State failed to establish that Terrance was in fact substantially harmed in the assault. Hill fails to acknowledge that the jury was instructed that it had to find that either (1) Terrance suffered substantial bodily harm or that (2) Hill assaulted Terrance by strangulation.

The State presented sufficient evidence at trial to convince a reasonable fact finder that Hill strangled Terrance. Terrance and Christine testified that Hill said he was going to kill Terrance and attempted to strangle him. Hill put his hands around Terrance’s neck and applied pressure. Terrance testified that the next thing he remembered was ending up on the floor. Based on Terrance’s testimony, a jury could reasonably infer that Hill intentionally strangled Terrance. Viewed in the light most favorable to the prosecution, the evidence is sufficient for the jury to have reasonably found that Hill committed second degree assault by strangulation against Terrance.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Hunt, J.

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Penoyar, J.