IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SCOTT P. LESHOWITZ, Appellant.	No. 41309-4-II UNPUBLISHED OPINION

Penoyar, J. — A jury convicted Leshowitz of first degree assault and harassment. The jury also found, by special verdict, that his conduct during the commission of the crime manifested deliberate cruelty to the victim and that he had committed an aggravated domestic violence offense. Leshowitz now appeals and raises a CrR 3.3 speedy trial issue, arguing that the trial court erred by declaring a mistrial and resetting his trial start date. Leshowitz also argues that the State did not prove the aggravating factors beyond a reasonable doubt, that the aggravating factors are unconstitutionally vague, and that the trial court erred by imposing alternative terms of community custody. We affirm Leshowitz's convictions but remand for resentencing.

Facts

Kollene Kipp moved in with her boyfriend, Leshowitz, in April 2009. On December 12, 2009, Kipp told Leshowitz she was moving out. In response, Leshowitz hit Kipp and threatened to burn the house down.

Less than an hour later, Leshowitz emptied a container of gasoline on Kipp, covering her hair and back. He then threw matches, one lit, and three pieces of firewood at Kipp. Kipp tried to run away, but Leshowitz caught up to her and slammed Kipp's head into the metal kitchen

door. Leshowitz then punched Kipp multiple times in the back of her head, Kipp fell to the floor, and Leshowitz kicked her repeatedly while she lay on the ground. Leshowitz ordered Kipp to get in the shower and he washed the gasoline off of her. Leshowitz told Kipp he wanted to have sex; when she refused, he punched her in the ribs. Kipp then had sex with Leshowitz. A few hours later, Kipp convinced Leshowitz to let her call the police.

Leshowitz was originally charged on December 16, 2009. On February 19, 2010, Leshowitz executed a voluntary waiver of his speedy trial rights with a new commencement date of March 19, 2010, and a last allowable date for trial of June 30, 2010. The trial court set a jury trial to begin on May 25, 2010. Leshowitz did not object to these dates.

On May 6, 2010, Leshowitz filed a motion to continue the jury trial, arguing that he needed additional time in order to adequately prepare. On May 7, 2010, the State filed a response objecting to the continuance. On May 7, 2010, the court held a hearing and granted Leshowitz's motion over the State's objections. The court struck the May 25-26 trial dates and re-set the trial for July 27, 28, and 29, 2010. Leshowitz did not object to these trial dates.

On July 27, 2010, the court commenced jury selection, but declared a mistrial for several reasons, one being a lack of jurors. After declaring the mistrial, the trial court held a hearing on July 30, 2010 to set a new trial date. At the July 30 hearing, defense counsel objected to any new trial setting, arguing that Leshowitz's "time for speedy trial has expired." Report of Proceedings (RP) (July 30, 2010) at 5.

The new trial began on August 25, just 29 days after the July 27 mistrial. On September 3, the jury convicted Leshowitz of harassment and first degree assault. The jury also found by special verdict that his conduct during the commission of first degree assault manifested deliberate

cruelty to the victim and the crime of first degree assault an aggravated domestic violence offense. In Leshowitz's judgment and sentence, the court ordered, "The defendant shall be on community custody for the longer of: (1) the period of early release. RCW 9.94A.728(1)(2); or (2) the period imposed by the court, as follows: Count(s) II 36 months for Serious Violent Offenses." Clerk's Papers (CP) at 193. Leshowitz appeals.

analysis

I. Criminal Rule 3.3

Leshowitz contends that the trial court violated his CrR 3.3 time for trial rights when the court declared a mistrial on the first day of trial, July 27, 2010. We disagree.

We review applications of the CrR 3.3 speedy trial rules de novo. *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003); *State v. Nelson*, 131 Wn. App. 108, 113, 125 P.3d 1008 (2006). We review a trial court's decision to grant a CrR 3.3 continuance for a manifest abuse of discretion. *State v. Cannon*, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

CrR 3.3(b)(1) provides that "[a] defendant who is detained in jail shall be brought to trial within the longer of (i) 60 days after the commencement date specified in this rule, or (ii) the time specified under subsection (b)(5)." CrR 3.3(b)(5) provides that "[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(e) provides that "[t]he following periods shall be excluded in computing the time for trial: . . . (3) *Continuances*. Delay granted by the court pursuant to section (f)." CrR 3.3(f) provides:

> Continuances or other delays may be granted as follows:
>
> . . . .
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> (2) *Motion by the Court or a Party*. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

Leshowitz focuses his brief on the trial court's decision to declare a mistrial at the commencement of trial on July 27, 2010, arguing that the trial court erred by doing so over the defendant's objection. Leshowitz's contention fails on at least two bases. First, the record of the July 27, 2010 proceeding at which the trial court declared a mistrial contains no objection by defense counsel regarding the mistrial ruling. In fact, defense counsel advised the court, "I think that the Court's probably on good grounds here." RP (July 27, 2010) at 48. Defense counsel noted for the record "in no way is Mr. Leshowitz waiving or giving up his right to a speedy trial *as those rules exist*." RP (July 27, 2010) at 48 (emphasis added). That is not an objection to the trial court's declaration of a mistrial, but merely an acknowledgement that Leshowitz continued to rely on the CrR 3.3 speedy trial rules. Notably, those rules provide that the occurrence of a mistrial resets the commencement date of the speedy trial period. CrR 3.3(c) provides:

> (2) *Resetting of Commencement Date*. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.
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> . . . .
>
> (iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

Finally, by focusing on the alleged error of declaring a mistrial, Leshowitz ignores the directive of CrR 3.3(b)(5), which trumps all of Leshowitz's contentions. As noted, the trial granted Leshowitz's motion for a continuance on May 7, 2010, changing his May 25 trial date to July 27. By doing so, the period of time from May 25 to July 27 was excluded from his "allowable time for trial" period and provided a 30-day window thereafter for which the allowable time for trial period could not expire. *See* CrR 3.3(b)(5). After the trial court declared a mistrial on July 27, it reset Leshowitz's trial commencement date 29 days later, still within the 30 day "allowable time for trial" window CrR 3.3(b)(5) provides. Accordingly, even if the trial court erred by declaring a mistrial, any such error did not result in a violation of Leshowitz's rule-based speedy trial right. We hold there is no violation.

II. Sufficiency of the Evidence of the Aggravating Factors

Next, Leshowitz argues that the State did not present sufficient evidence to support the aggravating factors. Specifically, Leshowitz asserts that the State did not prove that Leshowitz had manifested deliberate cruelty during the commission of first degree assault or that he had committed an aggravated domestic violence offense[1] because the State failed to present evidence establishing what conduct or degree of violence is normally associated with first degree assault. We conclude that sufficient evidence exists to support the aggravating factors.

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[1] Deliberate cruelty is an element of both aggravating factors. The following circumstance is an aggravating circumstance: "The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim." RCW 9.94A.535(3)(a). The following circumstance is an aggravating circumstance, "The current offense involved domestic violence, as defined in RCW 10.99.020" and the "offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim." RCW 9.94A.535(3)(h)(iii).

"'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. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884 (2011) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). 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.

"'Deliberate cruelty' requires a showing 'of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. . . . [T]he cruelty must go beyond that normally associated with the commission of a charged offense or inherent in the elements of the offense.'" *Gordon*, 172 Wn.2d at 680 (quoting *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003)).

The trial court provided the jury with several instructions explaining assault and deliberate cruelty. The trial court defined first degree assault, "A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon or by any force or means likely to produce great bodily harm or death." CP at 111 (Instr. 30). The trial court also provided the jury with an instruction defining great bodily harm, a first degree assault to-convict instruction, and an instruction defining assault. Finally, the trial court provided the jury with an instruction defining deliberate cruelty: "'Deliberate cruelty' means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime." CP at 149 (Instr. 61).

The instructions set forth the elements required to convict Leshowitz of first degree

assault. In order to conclude that Leshowitz had acted with deliberate cruelty, the jury merely had to find that Leshowitz's conduct had inflicted gratuitous violence or physical, psychological, or emotional pain as an end in itself and that his conduct went beyond what is inherent in the elements of first degree assault. The State was not required to present evidence establishing what conduct or degree of violence is normally associated with first degree assault; the jury could determine what is inherent in the elements of the crime by reading the instructions.

Leshowitz emptied a container of gasoline on Kipp, threw matches and firewood at Kipp, and slammed her head against a metal door. Leshowitz then punched Kipp multiple times in the back of her head and kicked her repeatedly while she lay on the ground. Leshowitz ordered Kipp to get in the shower and he washed the gasoline off of her. Kipp testified that Leshowitz then told her he wanted to have sex; when she refused, he punched her in the ribs. Kipp then had sex with Leshowitz. There was sufficient evidence to support the jury's finding that Leshowitz had acted with deliberate cruelty.

III. Vagueness of Aggravating Factors

Leshowitz further argues that RCW 9.94A.535(3)(a) and RCW 9.94A.535(3)(h)(iii) are unconstitutionally vague. The State contends that Leshowitz cannot challenge these aggravating factors on vagueness grounds. We agree with the State.

"[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). To survive a vagueness challenge, a statute must be clear enough to give fair warning of what conduct is proscribed and it must have ascertainable standards of guilt to prevent arbitrary enforcement. *State v. Baldwin*, 150 Wn.2d

448, 458, 78 P.3d 1005 (2003). Some measure of vagueness is inherent in the use of language, so impossible standards of specifity are not required. *City of Seattle v. Abercrombie*, 85 Wn. App. 393, 399, 945 P.2d 1132 (1997). A defendant whose conduct clearly falls within the prohibitions of the statute lacks standing to challenge the constitutionality of the statute on vagueness grounds. *State v. Lee*, 135 Wn.2d 369, 393, 957 P.2d 741 (1998).

In *Baldwin,* our Supreme Court held that the "sentencing guideline statutes" at issue there were "not subject to a vagueness analysis" because they did not create a constitutionally protectable liberty interest. 150 Wn.2d at 461. There, the sentencing statutes at issue were former RCW 9.94A.120(2) (2000), which provided for the imposition of a standard range sentence unless the trial court found substantial and compelling reasons to impose an exceptional sentence, and former RCW 9.94A.390(2)(d) (2000), which characterized a crime that was a "major economic offense" as an aggravating circumstance that could justify an exceptional sentence under former RCW 9.94A.120(2). *Baldwin*, 150 Wn.2d at 458–59. The *Baldwin* court stated that "the due process considerations that underlie the void-for-vagueness doctrine" did not apply to these sentencing guideline statutes because these statutes did not (1) define conduct, (2) allow for arbitrary arrest and criminal prosecution, (3) inform the public of penalties attached to criminal conduct, or (4) vary the legislatively imposed maximum and minimum penalties for any crime. 150 Wn.2d at 459. Because nothing in these guideline statutes "require[d] a certain outcome," they did not create a constitutionally protectable liberty interest. *Baldwin,* 150 Wn.2d at 461.

Leshowitz argues that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403

(2004), affect *Baldwin*'s holding. Even assuming, without deciding, that these cases apply, Leshowitz lacks standing to challenge the constitutionality of the statute on vagueness grounds because his conduct so clearly manifested deliberate cruelty. *See Lee*, 135 Wn.2d at 393.

IV. Community Custody

Finally, Leshowitz contends that the trial court erred by imposing a variable term of community custody. The State properly concedes that the trial court erred; accordingly, this court should remand for resentencing.

"Under [RCW 9.94A.701[2]], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing." *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). Here, the sentencing court ordered, "The defendant shall be on community custody for the longer of: (1) the period of early release. RCW 9.94A.728(1)(2); or (2) the period imposed by the court, as follows: Count(s) II 36 months for Serious Violent Offenses." CP at 193. The trial court did not have the statutory authority to sentence Leshowitz to a variable term of community custody contingent on the amount of earned release. Accordingly, we remand to the trial court for resentencing.

The State cross-appeals contending the trial court abused its discretion by ordering the victim advocate to not escort the victim into and out of the courtroom. The State admits the issue is moot and we decline to address the matter. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (case is moot if court can no longer provide effective relief).

[2] Under RCW 9.94A.701(1)(b), "If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years: A serious violent offense."

We affirm Leshowitz's convictions but remand for resentencing.

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.

Penoyar, J.

We concur:

Armstrong, J.

Johanson, J.