

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 65675-9-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
LAZARO ISAIAS NICIA)	
AKA LAZARIO ISAIAS NICIA,)	
)	
Appellant.)	FILED: July 2, 2012

Schindler, J. — A jury convicted Lazaro Isaias Nicia of domestic violence assault in the second degree and domestic violence felony harassment of Karina Wood. For the first time on appeal, Nicia contends the trial court erred in admitting evidence under ER 404(b) and claims the information omitted an essential element of the crime of felony harassment. Nicia also alleges ineffective assistance of counsel by failing to argue same criminal conduct and challenges the calculation of his offender score. We accept the State’s concession of error with regard to the calculation of the offender score and remand for resentencing and to correct a scrivener’s error in the judgment and sentence. In all other respects, we affirm.

FACTS

A few weeks after they started dating, Lazaro Nicia and Karina Wood went to the

Muckleshoot Casino on December 31, 2009 to celebrate New Year's Eve with a group of friends. Everyone in the group was drinking except for the designated driver, Jose Ricardo Aguirre. During the course of the evening, Nicia became increasingly agitated.

As the group was leaving the casino, Wood pointed to a man who was wearing a shirt she considered buying for Nicia earlier that day. Nicia flew into a jealous rage. He repeatedly accused Wood of wanting to sleep with the man. Wood tried to explain that she was only remarking on the shirt.

When Nicia's friend Aguirre had trouble starting the ignition interlock device in the car, Nicia berated him. During the forty minute drive back to West Seattle, Wood and Nicia sat in the backseat of the car, and Nicia continued to verbally attack her. Nicia leaned against Wood and pinned her in the corner by holding his arm across her chest, and pointed his finger in her face. Wood told Nicia that he was hurting her. Wood's friends said they feared for her safety.

The next day, Wood told Nicia if he behaved that way again, she would end the relationship. Nicia apologized and brought her flowers. Nicia explained that he gets "out of control" when he drinks, and promised he would not treat Wood that way again.

On January 3, 2010, Wood, Nicia, and many of the same friends went to a bowling alley. Wood saw a relative she had not seen in a long time leaving the bowling alley with his wife. Once again, Nicia angrily accused Wood of wanting to sleep with the man.

As they were preparing to leave, Nicia berated his friend who had difficulty with the ignition interlock device. In the car, Nicia was "ranting and raving," threw things,

and banged on the ceiling of the car in anger.

When the couple reached Wood's house, Nicia continued to argue with Wood. Wood went into the kitchen to cook sausages to avoid a confrontation. Wood called her friend Olivia Castro. Wood told Castro that Nicia was behaving the same way he had on New Year's Eve. Nicia yelled at Wood to hang up and told Wood that he could "own" her and her " 'slutty friend.' " Nicia then slapped the phone out of Wood's hand. Wood put the phone back together and called Castro again. The fight between Nicia and Wood continued to escalate. When Wood told Nicia the relationship was over, he told her, " 'I'll kill you.' "

Wood tried to get away from Nicia by moving from room to room in the house. After Wood returned to the kitchen, Nicia kept lunging at her. When Wood drained the water from the pan, Nicia hit the pot, splashing hot water on her arm. A few moments later, Wood ran into a hallway. Nicia grabbed her by the throat and slammed her against a wall. When Wood slid down the wall, Nicia continued to choke her with his hands and used his body to restrain her. Eventually, Wood was unable to make any sound. Wood said it was like drowning, and that she briefly lost consciousness. The next thing Wood remembered was looking up from the floor and seeing Nicia talking on his cell phone. Wood picked up her cell phone. Castro was still on the line and told Wood that the 911 dispatcher was also on the line.

When Nicia started coming toward her again, Wood told him the police were on the way. Nicia responded by again threatening to kill her. Before the police arrived, Nicia's friend came to get him. When Nicia went out to the porch, Wood locked the

door behind him. Nicia pounded on the door but Wood refused to let him back in.

The State charged Nicia with domestic violence assault in the second degree by strangulation and domestic violence felony harassment. Nicia entered a plea of not guilty.

At trial, Nicia testified that as they left the casino on New Year's Eve, Wood pointed out a man and said to her friend, " 'Oh, look at him, he's so hot. That's what I want.' " Nicia claimed that Wood physically attacked him on the night of January 3 and that she and Castro concocted the allegations against him. Nicia testified that while at the bowling alley, Wood made rude and disrespectful comments about some other females. According to Nicia, when they returned to Wood's house she hit him, scratched him, and threatened him with a knife because she believed he was defending the other females. Nicia testified that Wood told her, " 'Who they gonna believe, you or me?' " and " 'I take your freedom, motherfucker.' " The defense also pointed out that Wood did not have any visible injuries.

Based on Nicia's testimony that he was "not a woman beater," the trial court allowed the State to impeach him with his prior convictions for domestic violence assault in the second degree and domestic violence assault in the fourth degree. The jury convicted Nicia as charged of domestic violence assault in the second degree and domestic violence felony harassment. The court imposed a standard range sentence.

ANALYSIS

Evidence about New Year's Eve

For the first time on appeal, Nicia argues that the trial court erred when it

admitted evidence about New Year's Eve under ER 404(b) without balancing the probative value against the prejudicial effect of the evidence. Nicia also claims that admission of the evidence was irrelevant and unfairly prejudicial.

But the objection Nicia raised below was not based on ER 404(b). Rather, Nicia's objection below was based solely on relevance. It is well-established that a party who objects to evidence on one ground may not raise a different ground for that objection on appeal. See State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (defendant's objection at trial solely on relevancy grounds did not preserve an ER 404(b) challenge on appeal).

To convict Nicia of domestic violence felony harassment, the State had to prove Wood reasonably feared he would carry out a threat to kill or injure. RCW 9A.46.020(1)(b). Nicia objected to allowing Jasmine Quiroz to testify about New Year's Eve on relevancy grounds. Nicia argued that the prior incident involved neither physical violence nor threats to harm Wood and therefore was not relevant to determining whether Nicia physically assaulted or threatened Wood on January 3.¹ The trial court ruled that the evidence was relevant to show that Wood reasonably feared that Nicia would carry out his threats of violence. The court also ruled that the evidence was admissible to explain the dynamics of the relationship. Because the evidence was relevant to determining whether Nicia's threats to kill Wood on January 3 placed her in reasonable fear that he intended to carry out his threats, the trial court did

¹ Although Nicia did not repeat his objection with respect to the other witnesses who testified about New Year's Eve, there was no need to do so in light of the trial court's definitive ruling that testimony about the incident was relevant and admissible.

not abuse its discretion. See State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (affirming trial court's ruling that defendant's statements about prior violent conflicts was relevant to harassment charge).

Charging Document

For the first time on appeal, Nicia asserts that the information did not allege that he made a "true threat." The premise of Nicia's argument is that a true threat is an essential element of the crime of domestic violence felony harassment.

A charging document must allege "[a]ll essential elements of a crime, statutory or otherwise," to provide a defendant with sufficient notice of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). The primary purpose of the rule is to give the defendant sufficient notice of the charges so he can prepare an adequate defense. State v. Tandeckj, 153 Wn.2d 842, 846, 109 P.3d 398 (2005).

Where, as here, the defendant has failed to challenge the sufficiency of an information at trial and instead raises his challenge for the first time on appeal, we liberally construe the document in favor of validity. State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). In making that determination, we engage in a two-part inquiry: (1) Whether the essential elements appear in any form, or can be found by any fair construction, in the information; and (2) if so, whether the defendant nonetheless was actually prejudiced by the inartful language used. Brown, 169 Wn.2d at 197-98.

Here, the information charging Nicia with the crime of domestic violence felony harassment alleged:

[T]hat [Nicia] knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Karina Wood, by threatening to kill Karina Wood, and the words or conduct did place said person in reasonable fear that the threat would be carried out.

Under 9A.46.020(1), a person commits harassment if, “[w]ithout lawful authority, the person knowingly threatens” to cause “bodily injury immediately or in the future to the person threatened or to any other person,” and “by words or conduct places the person threatened in reasonable fear that the threat will be carried out.”

A statute that makes a threat a crime must proscribe only “true threats.” State v. Schaler, 169 Wn.2d 274, 283-84, 236 P.3d 858 (2010); State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007). Our supreme court defines a “true threat” as:

“[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.”

Schaler, 169 Wn.2d at 283 (quoting State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)² (quoting State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001))). “The speaker of a true threat need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious.”

Schaler, 169 Wn.2d at 283.³

In Schaler, the jury convicted the defendant of two counts of felony harassment. On appeal, Schaler challenged the jury instructions defining the crime of felony harassment. Schaler, 169 Wn.2d at 281-82. Because the definition of threat was not limited to a true threat, the court concluded the jury could have erroneously convicted

² (Internal punctuation and quotation marks omitted.)

³ (Internal quotation marks and citation omitted.)

Schaler based on “something less than a ‘true threat’ ” and reversed. Schaler, 169 Wn.2d at 287-88. However, the court expressly notes that the opinion does not address the question of whether a true threat is an essential element of the crime of felony harassment that must be alleged in the charging document. Schaler, 169 Wn.2d at 289, n.6.

The situation is not identical to omitted-element cases. Whether the constitutionally required mens rea is an “element” of a felony harassment charge is a question that we need not decide. (We note that there is a Court of Appeals opinion on point, State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007), but we express no opinion on the matter.)

Schaler, 169 Wn.2d at 289, n.6.⁴

In Tellez, this court rejected the argument that a true threat is an essential element of the crime of felony harassment that must be pled in the charging document. Tellez, 141 Wn. App. 483-84 (construing analogous felony telephone harassment statute RCW 9.61.230(2)(b)). We held that the true threat concept is definitional and “limits the scope of the essential threat element” but “is not itself an essential element of the crime.” Tellez, 141 Wn. App. at 484; see also State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010); State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784 (2011), review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011). Nicia fails to establish that the charging document does not contain the essential elements of felony harassment or that he was prejudiced by the language used in the charging document.⁵

⁴ (Emphasis in original.)

⁵ Further, the information expressly alleged that Nicia knowingly threatened to kill Wood and the words or conduct placed her in reasonable fear that the threat would be carried out. Consistent with Schaler, the language in the charging document “satisfies the ‘know or foresee’ mens rea element” as to the result of intending the hearer’s fear. Allen, 161 Wn. App. at 755. “Knowingly threaten” may be “understood to require that the speaker be aware that his words or actions frightened the hearer—after all, how can one knowingly threaten without knowing that what one says is threatening to another?”

Ineffective Assistance of Counsel

Nicia claims his attorney provided ineffective assistance of counsel by failing to argue that the conviction for domestic violence assault in the second degree and domestic violence felony harassment were the “same criminal conduct” for sentencing purposes.

To establish ineffective assistance of counsel, Nicia must show (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. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

When two or more crimes constitute the same criminal conduct, the sentencing court must count them as one offense in computing the defendant's criminal history if the crimes (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts narrowly construe the statutory requirement for same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000). If any one of the three elements is missing, multiple offenses do not constitute the same criminal conduct and each conviction must be counted separately.

Schaler, 169 Wn.2d at 286.

Lessley, 118 Wn.2d at 778. Two crimes do not contain the same criminal intent when the defendant's intent objectively changes from one crime to the other. State v. King, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002).

Nicia cannot establish a reasonable probability that a same criminal conduct argument would have been successful if made. According to Wood, Nicia threatened to kill her at numerous points during the fight. She specifically testified that Nicia threatened to kill her before the physical assault began, and afterwards when she told him the police were coming. Wood's testimony did not suggest that Nicia made any threats while choking her. The conduct and intent that gave rise to the separate charges of domestic violence assault in the second degree by strangulation and domestic violence felony harassment is distinct and separated in time. Nicia had the opportunity, after completing each offense, to reflect and form a new intent to commit an additional crime. See State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (where defendant had time to complete the assault and form a new intent to threaten the victim, the crimes of assault and felony harassment had different objective intents); State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (after first rape, defendant had time to form new intent to commit the second, so the two sequential rapes counted separately).

The two crimes also involved a different objective criminal intent. Nicia clearly had the intent to physically harm Wood when he choked her. The threat to kill had a different independent objective. See Wilson, 136 Wn. App. at 615 (defendant had different objective intent in assaulting and threatening the victim, so crimes counted

separately).

Because Nicia fails to meet his burden of showing that the result of sentencing probably would have been different had counsel argued for findings of same criminal conduct, the claim of ineffective assistance of counsel fails.

Offender Score

The court calculated the offender score based on a 2000 conviction for domestic violence assault in the second degree and a 2002 conviction for felony harassment. Nicia contends that his felony harassment conviction was improperly included in his offender score because the class C felony conviction washed out. The State concedes the 2002 conviction for felony harassment washed out.

We accept the State's concession and remand for resentencing based on the corrected offender score.⁶ On remand, the court shall also correct a scrivener's error in the judgment and sentence as to the date of the domestic violence felony harassment crime.

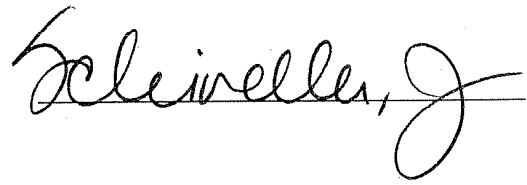
Statement of Additional Grounds

Nicia raises several issues in a statement of additional grounds for review. However, because Nicia fails to specifically identify any court rulings or conduct that he is challenging, we cannot review his claims. Further, with respect to Nicia's assertions regarding the conduct of his trial counsel, it appears that his claims largely involve

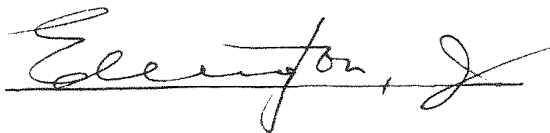
⁶ A prior class C felony generally is not included in a defendant's offender score if the defendant has spent five consecutive years in the community without committing another crime that results in conviction. RCW 9.94A.525(2)(c). Because more than five years elapsed between Nicia's release from confinement on the felony harassment charge (July 9, 2003) and his commission of a new crime (December 19, 2008), the 2002 felony harassment conviction should not have been included in the offender score.

matters outside the trial court record. On direct appeal, we cannot consider matters outside the record. See McFarland, 127 Wn.2d at 338, n.5.

We remand for resentencing based on a corrected offender score and for correction of the scrivener's error in the judgment and sentence. In all other respects, we affirm.

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WE CONCUR:

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