IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. TRAVIS SHANE HYAMS, Appellant.	No. 66332-1-I DIVISION ONE UNPUBLISHED OPINION FILED: June 4, 2012

Leach, C.J. — Travis Hyams appeals his convictions for domestic violence felony violation of a court order and unlawful imprisonment—domestic violence.[1] He claims the trial court should have granted his motion for a mistrial after the jury heard testimony regarding his custodial status. Hyams, however, cannot show that he suffered the prejudice necessary to warrant a new trial. Additionally, Hyams challenges his offender score, arguing his convictions constitute the same criminal conduct. Because Hyams did not commit the crimes with the same objective criminal intent, this claim also fails. We affirm.

Background

A November 2009 court order prohibited Travis Hyams from contacting his girlfriend, Colleen Aragon, for five years. Nevertheless, the couple continued

[1] RCW 26.50.110(1), (4); RCW 9A.40.040; RCW 10.99.020.

to live together in a duplex Hyams rented. On the evening of December 12, 2009, Hyams, Aragon, and Aragon's friend, Michelle Ruiz, were at the duplex drinking and preparing to leave for a party. Around 9 p.m., Hyams's friend and former girlfriend, Lia Hoolboom, arrived to babysit Hyams's daughter, and Hyams, Aragon, and Ruiz left for the party.

During the party, Hyams separated from Aragon and Ruiz. After 15 minutes, Hyams called Aragon and told her they had to leave immediately. When Hyams picked up Aragon and Ruiz in Aragon's car, Aragon noticed that Hyams was covered in blood and dirt. Aragon asked Hyams several times what had happened, but he only laughed and said, "Somebody's dead."

Hyams, Aragon, and Ruiz returned to the duplex at approximately 1 a.m. Once inside, Aragon again asked Hyams what had happened. When Hyams refused to answer, the two began arguing. Aragon and Hyams went into the bathroom to talk. There, the argument escalated. Hyams pushed Aragon into a sliding glass shower door, which broke, causing her to fall into the bathtub. Bleeding, Aragon stood up and said, "What are you doing? You can't hit me." When Aragon tried to leave, Hyams blocked the bathroom door and punched her in the face. Aragon yelled out to Ruiz, telling her to call 911. Ruiz briefly came into the bathroom and then left to call the police. Hyams yelled at Ruiz telling her to "[m]ind [her] own business" and followed her out of the bathroom.

After Hyams left the bathroom, Aragon fled through the duplex's back

door, which exited into an alley. Aragon heard Hyams behind her and began to run. By the time she reached the street, Hyams had caught up with her. He pulled her back into the alley by grabbing her hair and shirt. Aragon was on the ground kicking and screaming for help when a car stopped, and the driver told Aragon to get in. Aragon got into the back seat, but could not close the door because Hyams was still holding on to her. A second car pulled up, and Hyams ran away.

The State charged Hyams with two domestic violence offenses: felony violation of a court order and unlawful imprisonment. Each of these counts included a domestic violence aggravating factor, based on the State's allegations of an ongoing pattern of psychological, physical, or sexual abuse of the victim.[2] The trial court granted Hyams's motion to bifurcate trial on the underlying charges and the aggravating factors.

During trial on the underlying charges, Hoolboom, who testified for the State, told the jury that she had visited Hyams at the jail in the following exchange:

> Q. [S]ince this incident, have you had the opportunity to keep in touch with [Hyams]?
>
> A. Yes.
>
> Q. How do you do that?
>
> A. I go down and visit him down in the jail, and I get calls from him quite often and then we talk over the phone.
>
> Q. About how often are you talking on the phone?

[2] RCW 9.94A.535(3)(h)(i), (iii).

A. About two to three times per month.

. . . .

Q. About how many times do you think that [you] have spoken with him on the phone since the incident?

A. Probably more than ten times.

Q. What about in the first month visiting him?

A. About ten times.

Q. Now, since you are the one who packed up all his belongings, the clothing he's wearing right now, did you pick out his outfit for court?

A. Yes.

Q. Did you bring it over for him as well?

A. Yes.

Defense counsel did not object to this testimony at that time.

During closing arguments, the State asserted that the jury could find Hyams guilty based on the incidents occurring in the bathroom, in the alley, or in the bystander's car. The jury received a unanimity instruction as to each charge. It returned a guilty verdict on both counts. The verdict forms do not indicate on which of the multiple alleged acts it based the convictions.

After the jury returned its verdict, defense counsel moved for a new trial under CrR 7.5 based on Hoolboom's testimony. The trial court denied the motion, noting that the testimony related to Hyams's custodial status was minimal and that substantial justice had been achieved. In the second phase of the proceedings, the trial court found that the State had proved each of the elements of the aggravating factor beyond a reasonable doubt.[3]

[3] Hyams waived his right to a jury trial on the aggravating factor.

At sentencing, Hyams asked the court to reduce his offender score, arguing his convictions constituted the same criminal conduct. The trial court ruled that the offenses were separate, stating, "The mens rea is in fact different as is the objective intent. One of the crimes was committed inside and one was committed outside and they were therefore not one continuing course of conduct." The trial court then imposed a 60 month exceptional sentence. Hyams appeals.

Analysis

Reference to Custodial Status

Hyams first contends that the trial court should have granted his motion for a new trial, arguing that Hoolboom's reference to his custodial status undermined the presumption of innocence and deprived him of a fair trial. We review a trial court's denial of a motion for a mistrial for an abuse of discretion.[4] A trial court should grant a mistrial only if a defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly.[5] There must be a "substantial likelihood" that the prejudice affected the jury's verdict.[6] In evaluating whether a trial irregularity may have influenced the jury, we consider the seriousness of the irregularity, whether the comment was cumulative of the properly admitted evidence, and whether the irregularity could

[4] State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).
[5] State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).
[6] Russell, 125 Wn.2d at 85.

have been cured by an instruction to the jury.[7]

The state and federal constitutions guarantee criminal defendants the right to a fair and impartial trial.[8] In this right inheres the presumption of innocence, including the right to "the appearance, dignity, and self-respect of a free and innocent [person]."[9] Hyams argues that his right to a fair trial was violated when the jury heard evidence that he was in custody. In State v. Finch,[10] our Supreme Court held that the physical restraint of a defendant in the jury's presence may be unconstitutional. The court noted that in general, measures that single out a defendant as a particularly dangerous or guilty person—such as physical restraint or shackling—threaten his or her constitutional right to a fair trial.[11]

In State v. Mullin-Coston,[12] however, we rejected the analogy between physical restraint cases and references to a defendant's incarceration pending trial. In that case, several witnesses mentioned Mullin-Coston's jailed status when they recounted recent contacts with him.[13] Mullin-Coston argued these references violated his right to a fair trial.[14] We held the admission of the testimony mentioning the defendant's incarceration did not prejudice him,

[7] State v. Perez-Valdez, 172 Wn.2d 808, 818, 25 P.3d 853 (2011).
[8] U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 22.
[9] State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).
[10] 137 Wn.2d at 845.
[11] Finch, 137 Wn.2d at 845.
[12] 115 Wn. App. 679, 692, 64 P.3d 40 (2003), aff'd, 152 Wn2d 107, 95 P.3d 321 (2004).
[13] Mullin-Coston, 115 Wn. App. at 693.
[14] Mullin-Coston, 115 Wn. App. at 693.

stating, "[A]lthough references to custody can certainly carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial. Jurors must be expected to know that a person awaiting trial will often do so in custody."[15]

Therefore, the fact that the jury knows a defendant's custodial status is alone insufficient to warrant a mistrial. Here, beyond the fact that the challenged statements were made, Hyams has not demonstrated how those statements prejudiced him. Hyams claims, "That evidence informed the jury that the criminal justice system viewed Mr. Hyams as a particularly dangerous or guilty person." We, however, fail to see how Hoolboom's reference to Hyams's incarceration singled him out as particularly dangerous or culpable. As we noted in Mullin-Coston, "Many factors go into the determination of whether a defendant will be released pending trial, including the seriousness of the charged crime and the person's ability to pay bail."[16]

The jury could not have been surprised to hear that Hyams had been in jail, given the violent nature of his crime. Additionally, the exchange between the Hoolboom and the prosecutor was brief. Further, Hoolboom's testimony was meant to demonstrate her potential bias based on her close friendship with Hyams, not to show that Hyams was a particularly dangerous or guilty person. The prosecutor made no further mention of Hyams's jail time during the trial and

[15] Mullin-Coston, 115 Wn. App. at 693.
[16] Mullin-Coston, 115 Wn. App. at 693.

never referenced it in the context of his guilt or innocence. Given the strength of the evidence against him and the brief nature of the testimony, Hoolboom's statements did not change the outcome of the trial.

Hyams tries to distinguish Mullin-Coston because the defendant there was on trial for premeditated first degree murder. Thus, reasons Hyams, a reasonable juror hearing Mullin-Coston's case would know he was in jail, but a reasonable juror in Hyams's case "would not likely have the same understanding regarding incarceration pending trial for the charges here." We decline to limit Mullin-Coston to those cases where the defendant has been charged with murder. Mullin-Coston applies generally to situations where a defendant's custodial status has been revealed to the jury through testimonial references, rather than through physical restraint.

Hyams also tries to distance his case from Mullin-Coston based on our statement there that "the State should not mention that a defendant is or was in jail without first giving the trial court an opportunity to weigh that information's probative value against its prejudicial effect."[17] Here, however, the State did not mention that Hyams was in jail. Hoolboom did. And because Hyams did not object to the testimony when it occurred, the trial court did not have the opportunity to weigh the probative value of Hoolboom's statements against their potential for prejudice. Nor was the court able to give the jury a limiting instruction to disregard Hoolboom's references to jail.

[17] Mullin-Coston, 115 Wn. App. at 694 n.8.

Finally, Hyams claims the jury could have inferred that he had been in jail for a previous crime because Hoolboom's testimony was vague as to when she visited him in jail. In Mullin-Coston we stated, "Obviously a greater amount of prejudice would inhere if the jury were told that the defendant was previously incarcerated for another crime."[18] We disagree that the jury could have inferred from Hoolboom's statements that Hyams had been in jail on other criminal charges. Hoolboom's testimony was confined in time to the period immediately after the incident involving Aragon.

Hyams has not demonstrated that he was so prejudiced by Hoolboom's testimony that nothing short of a new trial could have ensured that he would be tried fairly. The trial court did not abuse its discretion by denying Hyams's motion for a mistrial. We reject his claim.

Hyams also claims that the prosecutor committed misconduct by eliciting Hoolboom's testimony. A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the prosecutor's conduct was both improper and prejudicial.[19] Because Hyams did not object to the prosecutor's questioning at the time it occurred, he must show that the conduct was "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[20] We do not find the prosecutor's conduct improper. The incarceration references occurred during

[18] Mullin-Coston, 115 Wn. App. at 694 n.7.
[19] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).
[20] Russell, 125 Wn.2d at 86.

questioning meant to explore whether Hoolboom was biased in Hyams's favor. Therefore, the questioning had a purpose outside of exposing the jury to the fact Hyams was in jail. Also, as discussed above, Hyams cannot demonstrate prejudice. We reject Hyams's prosecutorial misconduct claim.

Offender Score—Same Criminal Conduct

Hyams next argues that the trial court miscalculated his offender score when it refused to treat his convictions as the same criminal conduct. We review a trial court's determination of what constitutes the same criminal conduct for an abuse of discretion or misapplication of the law.[21] An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds.[22]

A court calculates an offender score for the purposes of sentencing by adding current offenses and prior convictions.[23] A defendant's "current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they 'encompass the same criminal conduct.'"[24] Offenses constitute the same criminal conduct for purposes of the statute if they are committed with the same objective criminal intent, at the same time and place, and against the same victim.[25] The legislature intended the phrase "same

[21] State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).
[22] State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).
[23] RCW 9.94A.589(1).
[24] State v. Nitsch, 100 Wn. App. 512, 520-21, 997 P.2d 1000 (2000) (quoting former RCW 9.94A.400(1)(a), recodified as RCW 9.94A.589 (Laws of 2001, ch. 10, § 6)).

criminal conduct" to be construed narrowly;[26] if any one of the factors is missing, the multiple offenses do not encompass the same criminal conduct.[27]

Our analysis of criminal intent does not depend on the mens rea element of a particular crime, but rather the defendant's objective criminal purpose in committing the crime.[28] The fact that one crime furthered commission of the other may indicate the presence of the same intent.[29] In State v. Dunaway,[30] our Supreme Court cited to statutory intent requirements when determining whether robbery and attempted murder required the same objective intent:

> When viewed objectively, the criminal intent in these cases was substantially different: the intent behind robbery is to acquire property while the intent behind attempted murder is to kill someone. The defendants have argued that the intent behind the crimes was the same in that the murders were attempted in order to avoid being caught for committing the robberies. However, this argument focuses on the subjective intent of the defendants, while the cases make clear that the test is an objective one.

Unlawful imprisonment contains no statutory intent requirement, but it occurs when a person restrains another person.[31] Viewed objectively, Hyams's intent in unlawfully imprisoning Aragon was to restrain her movements—whether to keep her from leaving the duplex or to prevent her from running away after she had escaped. Assault in violation of a court order, on the other hand, occurs

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[25] RCW 9.94A.589(1)(a).
[26] State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).
[27] State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).
[28] State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).
[29] Lessley, 118 Wn.2d at 777.
[30] 109 Wn.2d 207, 216, 743 P.2d 1237, 749 P.2d 160 (1987) (citations omitted).
[31] RCW 9A.40.040(1).

when a person violates the provisions of a court order by assaulting the protected person.[32] Hyams's intent in violating the court order, therefore, was to physically harm Aragon. Here, Hyams contacted Aragon despite the order prohibiting him from doing so and then restrained and assaulted her. Because these crimes were not committed with the same objective intent, they do not encompass the same criminal conduct.[33] The trial court properly calculated Hyams's offender score.[34]

Conclusion

Hyams was not deprived of a fair trial by a witness's testimony that she visited Hyams in jail. Therefore the trial court did not err by denying his motion for a new trial. And because Hyams's convictions did not constitute the same criminal conduct, the trial court did not abuse its discretion by refusing to reduce his offender score. We affirm.

Leach, C.J.

WE CONCUR:

[32] RCW 26.50.110.

[33] Hyams claims that he had a common purpose in committing the crimes, which he describes as "to dominate and perpetrate domestic violence upon Ms. Aragon." He contends that his restraint of Aragon allowed him to assault her. But like the defendants in Dunaway, Hyams's argument reveals his subjective, rather than objective, criminal intent.

[34] Given our disposition regarding objective criminal intent, we do not discuss Hyams's argument that the crimes occurred at the same time and place.

Schindler, J. Cox, J.