IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66554-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MARLOW TODD EGGUM,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 14, 2013
	)	

Lau, J. — Marlow Eggum challenges his five convictions and 20-year sentence on appeal. He claims the sentencing court miscalculated his offender score and erred by imposing a sentence that was exceptional in two respects based on a single aggravating factor. Eggum also argues that the domestic violence aggravating factor was subsumed in the elements of stalking and challenges the special verdict instructions. Eggum raises numerous additional issues in a pro se supplemental brief. Finding no error, we affirm.

Between 2007 and 2009, Eggum was serving a sentence imposed following his guilty plea to two counts of felony stalking and one count of felony harassment. The

victim of these offenses was Eggum's former spouse, Janice Gray. In 2009, before his scheduled release date, the State filed a new criminal complaint against Eggum based on letters he wrote while in prison. In some cases, the recipient of Eggum's letters provided the letters to law enforcement. The charges were also based on letters Eggum wrote to his mother that were copied and sent to the Whatcom County Sheriff's Office by the Department of Corrections (DOC).

Following a jury trial, Eggum was convicted of five charges based on his letters: two counts of intimidating a public servant (counts I and III), two counts of felony harassment (counts IV and V), and one count of felony stalking (count VI).[1] The new offenses involved three victims: Gray; Eric Richey, the prosecutor who handled two prior prosecutions of Eggum; and Community Correction Officer (CCO) Melissa Hallmark. The State alleged and the jury found an aggravating factor with respect to each count. As to the three counts involving the CCO and the prosecutor, the jury found that Eggum committed the crimes against a public official or court officer in retaliation for performance of his or her duties to the criminal justice system. See RCW 9.94A.535(3)(x). As to the two crimes involving Gray, the jury found the crimes were part of an ongoing pattern of psychological abuse manifested by multiple incidents over a prolonged period of time. See RCW 9.94A.535(2)(h)(i).

Based on Eggum's four prior felony convictions, the top of the standard range was 60 months on the stalking count and 57 months on all other counts. The trial court

[1] The jury acquitted Eggum of count II, an additional count of felony harassment.

found that each aggravating factor was a substantial and compelling reason to impose an exceptional sentence and sentenced Eggum to a total term of 240 months' imprisonment.

Same Criminal Conduct

Eggum argues that his offender score was 6, not 8. He contends that the conduct underlying the two offenses involving the prosecutor, constituted the same criminal conduct.

Except in the circumstance of serious violent crimes, the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, directs a trial judge to count the other crimes being sentenced as part of the offender score, but then run the sentences concurrently with each other. RCW 9.94A.589(1). This requirement is generally referred to as the "multiple offense policy." State v. Batista, 116 Wn.2d 777, 787, 808 P.2d 1141 (1991). There is an exception to the rule that each crime must be counted separately to determine the offender score if the sentencing court finds that multiple current offenses constituted the "same criminal conduct." RCW 9.94A.589(1)(a).

Multiple offenses encompass the same criminal conduct if the crimes involve the same (1) objective criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a). Courts narrowly construe the statutory language to disallow most assertions of same criminal conduct. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). If any one of the above elements is missing, multiple offenses do not constitute the same criminal conduct and each conviction must be counted separately in calculating an offender score. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996

(1992). A sentencing court's determination of same criminal conduct will be reversed only for a clear abuse of discretion or misapplication of law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

The criminal conduct underlying counts III and IV did not occur at the same time. The charge of intimidating a public servant was based on a letter Eggum wrote to Richey on June 7, 2009, after he learned that a new criminal complaint had been filed against him. The charging period for this count was the month of June 2009.

The felony harassment charge was based on several different letters Eggum wrote between 2007 and 2009. None of these letters were written on June 7, 2009. One of the letters containing threats against Richey was dated June 14, 2009, and the rest were written many months earlier, mostly in 2008.

Eggum points out that the jury could have relied on his June 14 letter to support the felony harassment charge and, in that case, the criminal conduct underlying both counts would have taken place within a single week. He therefore suggests that the incidents satisfy the same time element because they were part of the same uninterrupted criminal episode. See State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997) (sequential drug sales that occurred “as closely in time as they could without being simultaneous”). But even accepting this assumption, at a minimum, Eggum’s threatening letters were separated by seven days. This temporally separate conduct cannot be characterized as an uninterrupted criminal episode. See Lessley, 118 Wn.2d at 778 (kidnapping that occurred in various locations in the hours following a burglary at the victim's home did not occur at the same time and place as the

burglary). While Eggum maintains that the harassment furthered his attempt to influence Richey, when a defendant has time to "pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act" and makes the decision to proceed, the defendant has formed a new intent to commit the second act. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

Eggum also fails to establish that the crimes involving Richey involved the same objective criminal intent. The conviction for intimidating a public servant involved Eggum's intent to influence the prosecutor's charging decision. His harassment conviction involved a different independent intent, the intent to knowingly communicate a threat to kill the prosecutor.

Eggum argues that the offenses involving Gray similarly involved the same objective criminal intent to intimidate Gray. While these offenses both involved Gray and arguably could have been based on a single letter, they encompassed different objective criminal intents. Eggum's felony harassment conviction required proof that he knowingly communicated a threat to kill Gray, while his stalking conviction required proof that he "intentionally and repeatedly harassed" her. See RCW 9A.46.020(2)(b); RCW 9A.46.110(1)(a). We cannot conclude that the sentencing court abused its discretion in declining to treat Eggum's convictions as the same criminal conduct.

Imposition of Both Consecutive and Nonstandard Range Sentence

The trial court imposed sentences above the standard range on two counts. On count I, the court imposed 120 months, 63 months above the top of the standard range. On count IV, the court imposed 60 months, 3 months above the top of the range. The

court ordered these two exceptional sentences to run consecutively to each other and consecutively to the 60-month standard range sentence imposed on count VI.[2] Eggum argues that the trial court was required to base each exceptional component on a separate aggravating factor and could not impose a sentence that is both above the standard range and consecutive based on a single aggravating factor.

A court may impose a sentence outside the standard sentence range for an offense if it finds there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The statute explains, "A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section . . . ." RCW 9.94A.535. RCW 9.94A.589(1)(a) states, "Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." Accordingly, the SRA provides that a sentence may be exceptional in two different respects—it may be outside the standard range or it may be consecutive to another sentence. Nothing in this statutory scheme requires a separate basis to impose a sentence that is exceptional in both respects.

Eggum cites three decisions of Division Three of this court in support of his position that a sentence that is exceptional in two respects cannot be based on a single aggravating factor. State v. McClure, 64 Wn. App. 528, 827 P.2d 290 (1992); State v.

[2] Thus, the sentence imposed on count IV is both above the standard range and consecutive.

Quigg, 72 Wn. App. 828, 866 P.2d 655 (1994); In re Pers. Restraint of Holmes, 69 Wn. App. 282, 848 P.2d 754 (1993), overruled on other grounds by State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995). But these decisions are no longer persuasive in light of our Supreme Court's decision in State v. Smith, 123 Wn.2d 51, 864 P.2d 1371 (1993), overruled in part on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

In Smith, the defendant relied on Batista to argue that the trial court could not impose a sentence that was both outside the standard range and consecutive on the same count. Smith, 123 Wn.2d at 57. The court disagreed:

> Petitioner cites language from Batista: "If a presumptive sentence is clearly too lenient, this problem could be remedied either by lengthening concurrent sentences, or by imposing consecutive sentences." Batista, at 785-86.
>
> However, petitioners fail to read this passage in context. Other sections of that opinion make it clear that "[w]here multiple current offenses are concerned, in addition to lengthening of sentences, an exceptional sentence may also consist of imposition of consecutive sentences where concurrent sentencing is otherwise the standard." Batista, at 785-86. Indeed, in State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986), we upheld an exceptional sentence which was both beyond the standard range and consecutive. The SRA itself supports no other result. Thus, we hold that it is permissible to impose an exceptional sentence which includes both sentencing components.

Smith, 123 Wn.2d at 57–58.

Eggum's reliance on McClure and its progeny is no longer viable. Nevertheless, Eggum claims that in State v. Stewart, 72 Wn. App. 885, 901, 866 P.2d 677 (1994), we affirmed that the McClure line of cases remains sound even after Smith. This is not the case. In Stewart, we rejected the defendant's argument that the trial court erred by imposing a sentence that was both above the range and consecutive based on a single

aggravating factor. In doing so, we observed that Stewart's premise was flawed because the trial court actually relied on more than one aggravating factor and "[w]here numerous aggravating factors are present, more than one exceptional sentence may be imposed." Stewart, 72 Wn. App. at 901 (citing McClure, 64 Wn. App. at 534). In noting this general principle of RCW 9.94A.535, we did not need to and did not, in fact, decide that each type of exceptional sentence must be based on a separate aggravating factor. Eggum fails to establish that the court legally erred by imposing a sentence that is exceptional in more than one aspect based on a single aggravating factor.

Domestic Violence Aggravating Factor

Eggum challenges the exceptional sentence imposed on counts V and VI. With respect to these counts, the jury found that the crimes involved domestic violence and an ongoing pattern of psychological abuse manifested by multiple instances over a prolonged period. Eggum claims that the aggravating factor is redundant when applied to the crime of stalking because stalking requires proof of intentional and repeated harassment. See RCW 9A.46.110; RCW 9.94A.535(3)((h)(i).

In applying the SRA, the aggravating factors cited by a court as a basis for imposing an exceptional sentence may not be a "mere reference to the very facts which constituted the elements of the offense proven at trial." State v. Ferguson, 142 Wn.2d 631, 648, 15 P.3d 1271 (2001). Here, Eggum claims that the basis for imposing the exceptional sentence is inherent in the crime itself such that the legislature already considered it in establishing the standard range for the crime. See Ferguson, 142 Wn.2d at 647-48.

A person commits stalking in violation of RCW 9A.46.110(1) if he or she (1) intentionally and repeatedly harasses or follows another, (2) places that other person in reasonable fear of injury, and (3) knows or should have known that the other person would feel frightened, intimidated, or harassed. A person "harasses" another by engaging in a "knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose." RCW 10.14.020(1). According to the statutory definitions, such harassment may consist of annoying or alarming behavior and need not necessarily rise to the level of abuse. Repeated harassment for purposes of the stalking statute does not require proof that the crime involves domestic violence or proof of a pattern of psychological abuse. The domestic violence aggravating factor does not contain elements necessarily considered by the legislature in establishing the standard range for stalking.

Unanimity Instruction

Relying on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Eggum argues the court erred in instructing the jury that in order to answer "no" on the special verdict forms the jury had to be unanimous. But in State v. Guzman Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012), our Supreme Court concluded that for aggravating circumstances under the SRA, the legislature "intended complete unanimity to impose or reject an aggravator." Nuñez, 174 Wn.2d at 715. Accordingly, the trial court did not err in instructing the jury it had to be unanimous to either answer "yes" or "no."

Statement of Additional Grounds

Sufficiency of the Evidence

Eggum challenges the sufficiency of the evidence supporting each of his five convictions.[3] When reviewing a challenge to the sufficiency of the evidence, we view all the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). The appellant thus admits the truth the State's evidence and all reasonable inferences that can be drawn from it. Kintz, 169 Wn.2d at 551. We also "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

1. Intimidating a Public Servant (Counts I and III)

Intimidating a public servant requires proof of (1) an attempt to influence a public servant's vote, opinion, decision, or other official action (2) by use of a threat. RCW

[3] Eggum filed a statement of additional grounds that is approximately 300 pages, including attachments. We grant the State's motion to strike portions of Eggum's brief. We address only the arguments raised in the 50-page main brief, the allowable page limit according to the Rules of Appellate Procedure. RAP 10.10(b). We do not consider additional legal arguments raised in appendices or any exhibits containing documents not in the record. In addition, we address only identifiable legal issues raised in the main brief. To the extent that Eggum is speculating about ulterior personal motives behind the charges filed against him and raising arguments related to seizure of property in prior criminal proceedings, his 2005 dissolution proceedings, and the evidence supporting prior convictions, these issues are not before us in this appeal of his 2011 judgment and sentence. Also, in addition to his pro se supplemental brief, Eggum has filed numerous subsequent motions, briefs, and letters raising additional issues and arguments. But Eggum is represented by counsel on appeal and apart from a pro se statement of additional grounds under RAP 10.10(a), he is not authorized to file additional briefing or addenda in connection with this appeal. State v. Romero, 95 Wn. App. 323, 327, 975 P.2d 564 (1999).

9A.76.180(1). A threat for purposes of this statute includes a threat to "expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule." RCW 9A.04.110(28)(e).

Eggum's conviction involving the CCO was based on a letter he wrote to her in 2009 after she denied approval of his proposed release address. Eggum accused Hallmark of denying approval in order to thwart his plan to sell his movies containing images of Gray upon release. He threatened to file suit against Hallmark for her unlawful actions and also to release 1,000 films in Gray's hometown in Newfoundland, Canada in retaliation for her decision. He further stated, "For every month my release date is delayed past my ERD, I am going to release an additional thousand free promotional movies into the St. Johns [Newfoundland] market." Eggum also told Hallmark that if his elderly mother died while his release was delayed because of her actions, "I'[ll] hold you personally responsible." Exhibit (Ex.) 25.

A separate June 2009 letter forms the basis for Eggum's conviction for intimidating a public servant involving the prosecutor. In this letter, Eggum told Richey he should be less concerned about his business plans upon release and more concerned about the fact that if he remains in prison, he will continue to sell pornographic videos to fellow inmates on McNeil Island, many of whom are sex offenders. He wrote, "And here you are filing new charges against me, keeping me in prison where I tell everyone my story. Doesn't make sense." Ex. 26. He told Richey he believed the new charge was baseless and offered to relocate to Snohomish County, stay out of the town where Gray lives, and withdraw a bar complaint filed

against Richey in exchange for dismissal of the charge.

Eggum alleges that the CCO and prosecutor were part of a conspiracy to interfere with his business of selling sexually explicit videos. Therefore, they acted outside of their statutory authority, abused their power, and were not acting as public officers. But while Hallmark admitted that she eventually learned, prior to Eggum's scheduled release date, that he was not required to submit his release address for approval, there is no evidence that her denial based on victim concerns was a pretext. No evidence or authority supports Eggum's claim that Hallmark and Richey were not acting as public servants.

Eggum also claims that the threat to sell or release videos of Gray cannot constitute a threat to expose a secret because the underlying activity is legal. He maintains that because the material had been previously publically disseminated, as a matter of law, threatened exposure cannot be the basis for criminal liability.

Despite Eggum's insistence, no evidence in the record establishes the legality of his dissemination of tapes depicting Gray.[4] The only evidence on the matter was Gray's testimony about a 2005 court order entered in the dissolution proceedings. This order awarded all videos seized by the Whatcom County police to Gray and prohibited Eggum from disseminating any images or films of Gray remaining in his possession. Apart from Eggum's self-serving assertions, there is no evidence that the videos were previously sold or distributed to the public. Gray testified only that during the marriage,

[4] Eggum repeatedly refers to a Canadian court ruling, but there is no evidence of any such decision in the record.

she understood that Eggum had written letters attempting to trade videos with others. And regardless, as the trial court correctly ruled, the legality of Eggum's proposed business was not an issue the jury was required to consider or resolve. Gray expressly testified that the films were a secret with respect to her family and neighbors, she did not want the material to be made public, and that exposure would cause her to be embarrassed and isolated.

Eggum claims his letter to Richey contains no threats, but was merely an offer to negotiate. However, Eggum's letter can also be read as an attempt to influence the prosecutor's official charging decision by threatening to disseminate the sexually explicit films of Gray to prison inmates, thereby exposing a secret that would subject her to humiliation and embarrassment.

2. Felony Harassment (Counts IV and V)

Eggum challenges the sufficiency of evidence supporting his convictions for felony harassment. In order to convict Eggum as charged in count IV, the jury had to find that he knowingly threatened to kill Richey and placed him in reasonable fear that the threat would be carried out. RCW 9A.46.020(2)(b). According to Eggum, rather than threatening to kill the prosecutor, his letters actually conveyed the message that he would not need to resort to violence so long as he retained possession of the sexually explicit tapes of Gray.

But here again, Eggum's suggested interpretation of his letters is not the only reasonable interpretation. For example, one of the letters to Eggum's mother states:

Richey takes a movie out of my hand and puts a gun there instead? Pretty

> fucking shortsighted, don't you think? I'm not a gambling man, but if doing that creates a 95% chance that someone is going to end up getting killed, then I don't want to be the person who stands to get killed. Too fucking risky. So why is [Gray's dissolution attorney] & Richey stupid enough to do that? Answer is, they believe that only Janice stands to be hurt or killed. Not them.

Ex 6. In another letter Eggum writes:

> Remember I told you about Shawn Roe getting killed by those cops? That's because of a corrupted government interfering in the lives of its people, sticking its nose in places government has no business.
>
> Kind of like the Prosecutor's Office breaking into my house, 2 times, without search warrants, and then letting [Gray's dissolution attorney] falsify charges against me. Why did they do that? Answer is: Because they could, and because no one has ever tried stopping them. Had Whatcom County done to Timothy McVeigh what they've done to me, the Whatcom County Courthouse would be blown-up and leveled, instead of the Murrah Building.
>
> . . . .
>
> The other day I saw a television show where this female prosecutor had her 6 year-old child kidnapped from daycare, and the police were searching her case history to see if she had ever screwed someone to the point where they'd kidnap her child, to get even. She only knew of one or two possibilities.
>
> Weeks later, the child turns up, cut into several pieces, which of course devastates her. But there are no clues as to who abducted her child. Then the phone rings at her house one night, and its one of the people she had illegally screwed over. He calls to remind her of what she has done to him. But he says nothing about her child, other than he heard, and feels sorry for her, telling her he knows how much it must hurt. Then he calls on her child's birthday every year, and calls her on the anniversary of her child's disappearance, letting her know that he was the one who did it. Taunting her. Making her pay.
>
> What a show! My god, if that doesn't make one stop to think!

Ex. 9. Finally, in a June 2009 letter, after his release date had been delayed, Eggum wrote to his mother, "Tell you what, if you die while I'm in here, Richey will have bigger problems than he's ever imagined. An eye for an eye, a tooth for a tooth. And here he is escalating into the extremely dangerous zone." Ex 10.

Richey testified that he believed Eggum held him responsible for his

imprisonment and for the loss of many of his tapes of Gray. Richey interpreted Eggum's statements as thinly veiled threats to kill. Eggum's statements amply support the inference that he was threatening to kill Richey or someone close to him in revenge.

In a similar vein, with respect to count V, Eggum points to one letter he wrote to his pastor and claims that he did not threaten to kill Gray but merely asserted his right to self defense if she were to provoke a confrontation. In making this argument, Eggum simply ignores the content of most of his letters admitted into evidence. For the most part, in Eggum's letters to his mother, he strenuously urges her to contact Gray to convince her that she is in serious jeopardy unless she cooperates and agrees to engage with him in person. In several letters, Eggum declares that he still considers Gray to be his wife and predicts that a dire "prophecy" will be fulfilled if she ever dates or remarries. Ex 6. He points out that O.J. Simpson's warning to stay away from his wife was unheeded and suggests that if his mother does not intervene, the situation will likely end the same way. Ex. 7.

In one letter to his pastor, Eggum recounted the story of someone who used to work for him and was later killed by her husband. He said the victim had predicted her husband would kill her someday because the "'system'" had her using no-contact orders to play "games" with her husband. Ex 22. Eggum believed he could have prevented the death if he had counseled the victim to contact her husband, apologize, and have the no-contact orders dropped. He wrote: "No contact orders can be very dangerous, getting people killed everyday." Ex 22. Based on this evidence, the trier of

fact could readily find that Eggum was not merely asserting a right to protect himself but was threatening to kill Gray.

Eggum points out that none of the letters relied upon to support either of the felony harassment charges was sent to the intended victims—Gray and Richey. But the harassment statute does not require that the defendant communicate the threat directly to the victim or even to know that the threat will be relayed to the victim. The statute requires only that the threat is communicated and the victim actually finds out about the threat. State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001). Eggum does not dispute that he "knowingly communicated" and that Gray and Richey became aware of his statements when police showed them his letters.

3. Stalking (Count VI)

A person commits felony stalking if he or she "intentionally and repeatedly harasses" another person and the person being harassed "is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person." RCW 9A.46.110(1)(a), (b). The offense imports the definition of "harassment" from RCW 10.14.020, the civil unlawful harassment statute. See RCW 9A.46.110(6)(c). A person "harasses" another by engaging in a "knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose." RCW 10.14.020(2). This course of conduct "would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress" to the person. RCW 10.14.020(2).

Eggum claims he could not "intentionally and repeatedly harass" Gray because he did not contact her and while he might have known that the DOC would monitor his outgoing mail and possibly reject it, he could not anticipate that his letters would be preserved and shared with Gray. But while it is true that Eggum did not communicate directly with Gray, and even assuming he did not suspect his threats would reach her through the DOC, he clearly intended for the recipients to communicate with Gray. His consistent message was that Gray must be told of the threat to her safety and his plans to release videos. Eggum's conduct was clearly directed at Gray, and his threats were sufficient to cause a reasonable person to suffer emotional distress and did actually cause Gray emotional distress when she became aware of them.

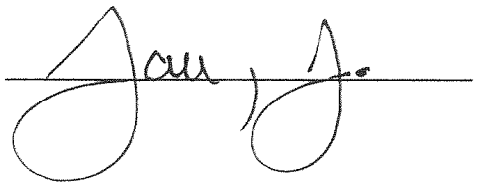
Motion in Limine

Although not entirely clear, Eggum appears to challenge the trial court's pretrial ruling excluding evidence of the content of the tapes, beyond the fact that they are of a sexual nature and were created during the marriage. Eggum claims the trial court disallowed evidence about whether the films had been previously marketed for sale, whether Gray contractually agreed to market the films, and whether he had offered her marketing rights during the dissolution. He claims these rulings amounted to a denial of his right to present a defense and to testify.

But the record reveals only that the court excluded evidence about the specific content of the tapes and Eggum fails to establish the materiality of that information. No ruling prohibited Eggum from asking Gray about her knowledge of past marketing of the

tapes and in fact, she did testify about that issue. Eggum was not denied the right to present a defense and or his right to testify in his defense.

We affirm the judgment and sentence.



WE CONCUR: