IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MALCOLM ROY HOLLINGSWORTH, Appellant.	No. 67229-1-I DIVISION ONE UNPUBLISHED OPINION FILED: October 1, 2012

Leach, C.J. — Malcolm Hollingsworth appeals his convictions for felony harassment and promoting prostitution. He challenges his offender score calculation and alleges ineffective assistance of counsel because his attorney failed to argue that the two convictions constituted the same criminal conduct for sentencing purposes. He also challenges the sufficiency of the information and argues that the court imposed a sentence in excess of the statutory maximum sentence for the crime of promoting prostitution in the first degree. In a statement of additional grounds, Hollingsworth contends that the court incorrectly calculated his offender score by counting two nonviolent juvenile felony convictions as though they were adult convictions.

We accept the State's concession that the sentence imposed exceeds the statutory maximum. We remand for resentencing and for consideration of Hollingsworth's same criminal conduct claim. Otherwise, we affirm.

Background

On November 22, 2010, Desiree Larsh and her boyfriend, Malcolm Hollingsworth, were on the telephone arguing. Hollingsworth had been angry because Larsh became pregnant, and in the telephone conversation he became angry because Larsh "disrespected" him. The argument escalated, and Hollingsworth threatened to kill both Larsh and the baby. Larsh's father overheard that part of the conversation and called the police.

The King County Sheriff's Office responded. Deputy Robert Nishimura spoke with Larsh. She appeared nervous and expressed fear that Hollingsworth was coming to kill her. She told Nishimura that she had known Hollingsworth for four years, that he was a known pimp, and that she had been his prostitute for several years. She stated that he repeatedly abused her to force her to continue prostituting, including specific details about times when he broke her nose, choked her unconscious, dislocated her shoulder, and poured boiling water on her. Nishimura wrote a statement summarizing her account, and Larsh willingly signed it. Another deputy took a written statement from Larsh's father.

Officers arrested Hollingsworth later that morning. The courts issued two no-contact orders prohibiting Hollingsworth from contacting Larsh, but he called her repeatedly from jail to tell her to continue prostituting and to order her not to cooperate with the State's case against him.

The State charged Hollingsworth with felony harassment, first degree

promoting prostitution, two counts of violating a no-contact order, and two counts of witness tampering with Larsh and her father. Larsh did not cooperate with the prosecution, and her statements to Nishimura were admitted as excited utterances. On the last day of trial, she appeared in court and denied making those statements against Hollingsworth to Deputy Nishimura. She testified that Hollingsworth never assaulted her and that they argued on the phone because he wanted her to stop prostituting. She admitted to speaking to Hollingsworth several times after his arrest but denied that he ever told her to lie about their conversations.

The next day, the prosecutor learned that Hollingsworth had called Larsh from jail the night before she appeared in court and told her what to say. The court admitted a recording of that conversation and several other phone calls between the two. The jury acquitted Hollingsworth of witness tampering regarding Larsh's father but convicted him of all other charges. The court imposed the maximum concurrent standard range sentence of 120 months' confinement. It also imposed a 12-month community custody sentence on the promoting prostitution charge. Hollingsworth appeals.

Analysis

Same Criminal Conduct/Ineffective Assistance of Counsel

When calculating a defendant's offender score, the trial court must count each of a defendant's current offenses separately unless it finds that some or all of the current offenses "encompass the same criminal conduct."[1] Hollingsworth

did not ask the trial court to make a finding of same criminal conduct, and it did not make one. The court counted the harassment and promoting prostitution offenses separately and calculated an offender score of nine. If the court had counted the two offenses as the same criminal conduct, his offender score and standard range sentence would have been lower. Hollingsworth now contends for the first time that the two convictions should have counted as one offense. He argues that he received ineffective assistance of counsel because his trial counsel failed to raise this issue at sentencing.

The State responds that Hollingsworth waived his "same criminal conduct" claim by failing to ask the trial court to make the necessary factual determination and by agreeing to his offender score and standard range at the sentencing hearing. We agree that Hollingsworth waived his right to make this claim by failing to present it to the trial court.[2] But we agree with Hollingsworth that he received ineffective assistance of counsel, a manifest error affecting a constitutional right that he may raise for the first time on appeal.[3]

To prevail on his ineffective assistance of counsel claim, Hollingsworth must show that his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by that conduct.[4]

RCW 9.94A.589(1)(a) states,

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[1] RCW 9.94A.589(1)(a).
[2] State v. Nitsch, 100 Wn. App. 512, 518-19, 997 P.2d 1000 (2000).
[3] RAP 2.5(a).
[4] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." If any definitional element is missing, multiple offenses do not constitute the same criminal conduct and each conviction must be counted separately in calculating an offender score.[5]

When considering whether crimes encompass the same criminal intent, courts focus on the extent to which the criminal intent, viewed objectively, changed from one crime to the next.[6] "This analysis may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed."[7] Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode.[8]

As charged and proved at trial, Hollingsworth's actions promoting prostitution encompassed a series of acts that occurred from July 1, 2009, to December 27, 2010. His intent in promoting prostitution was to compel Larsh to earn money through prostitution. The felony harassment occurred during this

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[5] State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

[6] State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988).

[7] State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995).

[8] State v. Deharo, 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998).

period, on November 22, 2010, when he threatened to kill Larsh and her baby.

Hollingsworth argues that because the harassment occurred during his ongoing prostitution promotion, the acts occurred at the same time. He also argues that because Larsh lived with her father and grandmother at the time of the harassment and at other times off and on during the time she was prostituting for him, the crimes occurred at the same place. Finally, he claims that the purpose of the threat was to intimidate Larsh into continuing to prostitute for him. Had the trial court found that the two offenses comprised the "same criminal conduct," the record contains evidence sufficient to support that determination. It also contains sufficient evidence to support a contrary determination. Accordingly, the trial court should be given an opportunity to resolve the factual issues necessary for resolution of this issue.

Sufficiency of the Information

For the first time on appeal, Hollingsworth challenges the sufficiency of the information. He contends that it did not allege as an essential element of the crime of felony harassment that he made a "true threat" against Larsh.

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.[9] The primary purpose of the rule is to give the defendant sufficient notice of the charges so he can prepare an adequate defense.[10] When the defendant challenges the sufficiency of the

[9] State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).
[10] State v. Tandecki, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005).

information for the first time on appeal, we liberally construe the document in favor of validity.[11] 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 language used.[12]

Here, the information alleged

> [t]hat the defendant MALCOLM ROY HOLLINGSWORTH in King County, Washington, on or about November 22, 2010, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Desiree Correen Larsh, by threatening to kill Desiree Correen Larsh, and the words or conduct did place said person in reasonable fear that the threat would be carried out.

Under RCW 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."[13] 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."[14] "The speaker of a 'true

[11] State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010).
[12] Brown, 169 Wn.2d at 197-98.
[13] State v. Schaler, 169 Wn.2d 274, 283-84, 236 P.3d 858 (2010).
[14] State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (alteration in

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."[15]

In State v. Tellez,[16] 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." We affirmed this holding in State v. Atkins[17] and State v. Allen,[18] holding each time that a "true threat" is not an essential element of felony harassment based on threat to kill and, thus, need not be included in the information.

Hollingsworth relies on State v. Schaler.[19] There, the Washington Supreme Court reversed the defendant's felony harassment conviction because the trial court did not instruct the jury that it must find the defendant's threat to be a "true threat."[20] Hollingsworth argues that Schaler's analysis telegraphs the Supreme Court's belief that true threat is an essential element of the crime of felony harassment. But the court explicitly declined to consider whether an information must allege a true threat.[21] Thus, Tellez is dispositive, and we hold the information was sufficient to provide Hollingsworth with notice of the charges against him.

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original) (internal quotation marks omitted) (quoting State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)).

[15] Schaler,169 Wn.2d at 283 (citation omitted).

[16] 141 Wn. App. 479, 484, 170 P.3d 75 (2007).

[17] 156 Wn. App. 799, 806-07, 236 P.3d 897 (2010).

[18] 161 Wn. App. 727, 755-56, 255 P.3d 784, review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011).

[19] 169 Wn.2d 274, 236 P.3d 858 (2010).

[20] Schaler, 169 Wn.2d at 292-93.

[21] Schaler, 169 Wn.2d at 288, n.6.

Sentencing Error

Hollingsworth alleges, and the State concedes, that the court erred by exceeding the 10-year statutory maximum sentence for promoting prostitution. A court "may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime."[22] Promoting prostitution is a class B felony with a maximum 10-year term of confinement.[23] Because first degree promoting prostitution is a "crime against a person,"[24] the court also sentenced Hollingsworth to serve 1-year community custody.[25] However, RCW 9.94A.701(9) provides, "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021."

"When a trial court exceeds its sentencing authority under the SRA [Sentencing Reform Act of 1981, chapter 9.94A RCW], it commits reversible error."[26] In such a situation, the proper remedy is to remand for resentencing.[27] Accordingly, we accept the State's concession and remand to the trial court for a correction of Hollingsworth's sentence.

Statement of Additional Grounds

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[22] RCW 9.94A.505(5).
[23] RCW 9A.20.021(1)(b).
[24] RCW 9.94A.411(2)(a).
[25] RCW 9.94A.701(3)(a).
[26] State v. Hale, 94 Wn. App. 46, 53, 971 P.2d 88 (1999).
[27] State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004).

In a statement of additional grounds, Hollingsworth argues that the court miscalculated his offender score by counting two residential burglaries committed in 2001 as adult convictions, even though he committed the crimes at age 17. However, because the charges were adjudicated in the adult division of King County Superior Court, there is no error in the court's calculation.

Conclusion

We accept the State's concession that the trial court erred by imposing both 10 years' confinement and 1-year community custody. We remand for correction of Hollingsworth's sentence and consideration of his "same criminal conduct" claim in accordance with this opinion. Otherwise, we affirm.

Leach, C.J.

WE CONCUR:

Spearman, J.

Cox, J.