IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD L. SALLEE, Appellant.	No. 39327-1-II UNPUBLISHED OPINION

Serko, J.P.T.[1] — Richard L. Sallee appeals his convictions of two counts of second degree assault with a deadly weapon and two counts of malicious harassment. He argues that (1) the evidence was insufficient to prove one count of second degree assault and both counts of malicious harassment, (2) his offender score is incorrect because some of his current offenses are same criminal conduct, and (3) his trial counsel rendered ineffective assistance of counsel in failing to argue that some of his current offenses are same criminal conduct. We affirm.

FACTS

I. Background

Some time between 10:30 and 11:00 pm on October 18, 2008, Edgar Consalo Rivas Marcus (Rivas) and his wife Maria Angelica Naranjo Aguilar (Naranjo), both of whom are from

[1] Judge Serko is serving as judge pro tempore of the Court of Appeals, Division II, under CAR 21(c).

Mexico, returned home after attending a party. As they entered their apartment building, they passed by Richard Sallee, one of the other building tenants, who was sitting on the steps outside the building. The couple had never seen Sallee before nor was Sallee familiar with them.

As the couple started up the stairs to their second floor apartment, Sallee began insulting them, yelling something to the effect of, "Mexican jerks, you should go back to your country." I Report of Proceedings (RP) at 91. Although the couple did not understand English well, they understood some of what Sallee said and his aggressive manner frightened them.

As they were going up the stairs, Rivas turned and saw Sallee pointing what appeared to be a rifle at them as he continued to yell insults in a loud voice. Afraid that Sallee was going to harm them, Rivas told Naranjo that Sallee had a gun and rushed her up the stairs. Although Naranjo did not see the gun, she became frightened and started to cry when Rivas told her that Sallee had a gun.

As they struggled to unlock their door, Rivas called Gloria R. Krise, an English-speaking family friend, on his cellular telephone for help because he did not think that he would be understood if he called the police directly.[2] Once inside the apartment, Rivas closed the door and told Krise that Sallee had said something to the effect of "kill fucking Mexicans" and pulled a gun on them, that he (Rivas) was afraid Sallee would shoot him from behind, and that he feared for his and Naranjo's lives. I RP at 74. Krise could hear Sallee, whom she knew and whose voice she recognized, in the background yelling, "'I'm gonna kill you fucking Mexicans.'" I RP at 72.

[2] Krise knew that the couple did not speak or understand English well and had previously told them to call her for assistance if they ever had a problem.

Krise kept Rivas, who sounded frightened and hysterical, on the line; called 911; and then drove to the couple's apartment to help them talk to the police.

Shelton Police Sergeant Les Watson responded to the 911 call, arriving at the apartment building within two to three minutes. Sallee approached him outside the apartment building and told him that there had been a "problem" or "disturbance" at the apartment building, that he (Sallee) had been involved, that one of his neighbors had spit on him, and that he was on his way to the police department to report the spitting incident when Sgt. Watson arrived.[3] II RP at 111-12, 119. Leaving Sallee with some other officers who had responded to the 911 call, Sgt. Watson and Officer Michael Fiola talked to Rivas and Naranjo, who had just come outside to meet them.

Although the couple could not initially communicate with the officers because of language issues, the officers believed that the couple were the victims because they appeared to be "frantic," nervous, and fearful and Naranjo was crying. II RP at 149. Once Krise arrived,[4] the couple told the officers that they had just returned to the apartment building after a dance when Sallee confronted them for no apparent reason, that Sallee had directed racial slurs at them and then pointed a gun at them, that they had been very scared, and that they did not know Sallee and had not had any contact with him before this incident.

After talking to the couple, Fiola talked to Sallee. Sallee told Fiola that he had been outside near the stairs when the couple arrived; that he suspected the couple had been drinking

[3] Sallee did not have a telephone.

[4] Krise later testified that when she arrived at apartment building about 10 minutes after Rivas called her, Naranjo was crying and Rivas appeared to be nervous and upset.

because Rivas had a red cup in his hand; that Rivas had spit on him as they passed by; and that he (Sallee) "had then feared that he was going to be assaulted, so he went inside his apartment," "wedged the door shut" with a shoe, armed himself, and then sat on his couch with a 12-gauge shotgun on his lap. II RP at 154.

Sallee allowed the officers to search his apartment. Inside the apartment, the officers found a shotgun and a rifle in closed gun cases in Sallee's bedroom. After finding the guns, Fiola asked Sallee if he had been outside his apartment with the guns, Sallee responded that he had not and asserted that he had not displayed the guns. When Fiola asked Sallee how, if he had stayed in his apartment, the victims were able to describe the gun, Sallee responded that his apartment door was open when he was sitting on the couch with the gun and that they "peeked their head in and they looked." II RP at157. Fiola arrested Sallee.

At the police station, Sallee gave a taped statement. In this statement, he did not say that he had wedged the door shut once he was inside his apartment. Instead, he stated that he had armed himself with the shotgun and that the victims "were stating to him this means war and they poked their heads in the apartment and that's how they saw the firearm." II RP at 161.

II. Procedure

The State charged Sallee with second degree assault with a deadly weapon and malicious harassment of Rivas (counts I and II), and second degree assault with a deadly weapon and malicious harassment of Naranjo (counts III and IV). Sallee pleaded not guilty.

The State's witnesses testified as described above. In addition, Naranjo testified that although her English skills were limited, she was aware that Sallee was yelling at them because of

their nationality and that she did not "like to experience discrimination." I RP at 82. Naranjo and Rivas both denied having done anything to Sallee to provoke him or having been drunk when they arrived home from the party. Rivas also denied spitting at Sallee.

In addition to testifying about his contacts with Rivas, Naranjo, and Sallee, Fiola also testified that he had not observed any evidence suggesting that Rivas, Naranjo, or Sallee had been drinking at the time of the incident. The officer also testified that Sallee had not shown him any evidence showing that someone had spat on him.

Sallee was the only defense witness. He testified that he had been sitting outside on the apartment building's steps smoking a cigarette when Rivas and Naranjo arrived and that Rivas had spat on him. Feeling "agitated," he approached Rivas and said, "[H]ow come you always spit on people for no reason." II RP at 178. Rivas turned around, looked at him, and then proceeded up the stairway.

Sallee asserted that he then went inside his apartment and closed the door, where he stayed for about six to eight minutes. He admitted that he was upset and was "probably getting a little loud from being agitated." II RP at 179. He testified that at one point, apparently after first entering his apartment, he was standing in his open doorway and could see Rivas peering out his (Rivas's) door and looking down to see where he (Sallee) was. Sallee admitted that he may have made derogatory racial comments because he was "upset, angry, and probably being afraid at the same time," but he denied having threatened to kill the couple, beat them up, or commit an act of violence. II RP at 186.

Sallee further testified that when he finally heard Rivas go back into his apartment, he

(Sallee) decided to get some tools out of his car. When he returned, Rivas was standing upstairs "calling [him] a F'ing Americano." II RP at 180. As Sallee went towards his apartment, he told Rivas to "sleep it off," because he thought Rivas was drunk. II RP at 180. He then went into his apartment, shut the door, and remained in his apartment for about 20 minutes cleaning his shotgun in preparation for an upcoming hunting trip. He stated that although he remained inside his apartment, he periodically opened his front door and, at one point, another neighbor, Diaz, looked into the apartment and said, "[Y]ou want a warrant, you got a warrant."[5] II RP at 181-82. Because the door was open, Diaz saw the shotgun. When Sallee heard Diaz go back into his apartment, which was across the hall, Sallee left for the police station "[b]ecause [he] felt [he had been] assaulted." II RP at 183.

In rebuttal testimony, Fiola testified that when he interviewed Sallee on the night of the incident, Sallee had not mentioned Diaz or the fact he went in and out of the apartment building after the spitting incident. Fiola also testified that there was no way Sallee could have seen Rivas in the upstairs doorway if he had remained in his own doorway. The jury found Sallee guilty as charged.

At sentencing, the trial court asked if the parties agreed that Sallee's offender score was 3 points[6] and that there were no same criminal conduct issues. Defense counsel responded:

> Well, I think that the—each individual that's alleged or that the jury found him of [sic] would not fit within a common—because there's two individual victims, I don't think anything merges as far as sentencing goes. So, I believe that he does have an offender score of three.

[5] Sallee believed Diaz was trying to get him to "go out and fight him or something." II RP at 182.

[6] Because Sallee had no known prior felony convictions, his offender score for each offense was 3 points, based entirely on his other current offenses.

II RP at 241.

Sallee appeals.

ANALYSIS

I. Sufficiency

Sallee first argues that the evidence was insufficient to prove (1) either malicious harassment charge, or (2) the second degree assault against Naranjo.[7] We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). And credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A. Malicious Harassment

To prove malicious harassment, the State had to prove that Sallee (1) "threatened a specific person"; (2) "placed that person in reasonable fear of harm to person or property"; (3) "acted because of [his] perception of the person's race, color, or national origin"; and (4) "acted maliciously and intentionally." Clerk's Papers (CP) at 47-48 (jury instructions 19 and 20); RCW 9A.36.080(1)(c). At the time of the offenses,[8] RCW 9A.04.110(27) defined "threat" as

[7] Sallee concedes that there was sufficient evidence to convict him of the second degree assault of Rivas.

[8] In 2010, the legislature amended the malicious harassment statute and added a specific definition of "threat" for purposes of the malicious harassment statute. Laws of 2010, ch. 119, § 1. Now,

communicating, directly or indirectly, the intent to "cause bodily injury *in the future* to the person threatened or any other person." RCW 9A.04.110(27)(a) (emphasis added). Additionally, the malicious harassment statute provides:

> Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

RCW 9A.36.080(1)(c). Sallee argues that the evidence did not establish that he threatened Rivas or Naranjo because (1) he merely insulted Mexicans and never threatened any harm, (2) any potential threat was a threat of immediate harm rather than future harm, and (3) Naranjo never saw the gun.

As to whether Sallee ever threatened any harm, the record belies Sallee argument. Krise testified that (1) when Rivas called her, he told her that Sallee had said something to the effect of "kill fucking Mexicans," before pulling the gun on him and his wife, I RP at 74; and (2) while she was on the telephone with Rivas, she could hear Sallee yelling, "I'm gonna kill you fucking Mexicans," in the background. I RP at 72. Furthermore, even though Naranjo may not have seen the gun, she testified that Sallee's demeanor and tone coupled with Rivas's sense of urgency made her feel threatened and afraid. Additionally, although Naranjo may not have seen the gun, Rivas told her about the gun, thus communicating the seriousness of Sallee's threats even if Naranjo could not understand everything that Sallee was saying. This evidence is sufficient evidence of a threat to cause bodily injury immediately or in the future.

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for purposes of the malicious harassment statute, "threat" is defined as the direct or indirect communication of the intent to "[c]ause bodily injury *immediately* or in the future to the person threatened or to any other person." RCW 9A.36.080(6)(b)(i) (emphasis added).

Sallee also argues that the evidence was insufficient to establish a threat against Rivas because his pointing the gun at Rivas communicated an intent to cause bodily injury in the present, not in the future. Sallee is correct that the applicable threat definition requires that the threat be threat of future harm.[9] RCW 9A.04.110(27). But because there was no evidence that Sallee followed Rivas and Naranjo upstairs, taking the evidence in the light most favorable to the State, a reasonable jury could have concluded that Sallee remained downstairs with the gun as he continued to yell threats at Rivas and Naranjo and that this constituted a threat of future, rather than immediate, harm. Accordingly, this argument fails.

Sallee further argues that the evidence did not establish that his threats placed Naranjo in reasonable fear of harm because she never saw the gun and was not aware of it until after Rivas told her about it. He contends that although Naranjo testified that she was upset and scared by his remarks, his words alone were not sufficient to show more than "menacing statements that per statute prohibit a conviction for malicious harassment." Br. of Appellant at 10. Although words alone cannot constitute malicious harassment, RCW 9A.36.080(1)(c), here there were much more than words. Rivas and Naranjo testified that Sallee's remarks were aggressive and frightening and, although Naranjo never personally saw the gun, she was aware of it. The surrounding circumstances here are sufficient to establish more than mere menacing words. Accordingly, Sallee does not show that the evidence was insufficient to support his malicious harassment convictions.

B. Second Degree Assault of Naranjo

[9] We note that the trial court did not provide the jury with an instruction defining the word threat.

To prove second degree assault with a deadly weapon of Naranjo, the State had to prove that Sallee intentionally assaulted Naranjo with a deadly weapon. RCW 9A.36.021(1)(c). Here, the trial court instructed the jury that:

> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a *reasonable apprehension and imminent fear of bodily injury* even though the actor did not actually intend to inflict bodily injury.

CP at 34 (jury instruction 6) (emphasis added). Sallee argues that because Naranjo never saw the gun and learned of the gun only when Rivas told her about it, the State failed to prove that he placed Naranjo in reasonable apprehension and immediate fear of bodily injury. We disagree.

Fear and apprehension experienced after the fact cannot establish assault. *State v. Bland*, 71 Wn. App. 345, 356, 860 P.2d 1046 (1993), *overruled on other grounds by State v. Smith*, 159 Wn.2d 778, 786-87, 154 P.3d 873 (2007). But the evidence here showed that Naranjo knew about the gun while she was still on the stairs and while Sallee was still yelling at them. This is sufficient to establish that Naranjo knew about the gun during, not after, the assault.

As to whether the State could prove reasonable apprehension and fear of imminent harm when the victim does not have firsthand knowledge of the threat but, rather, learns of the threat through a third party's statements, Sallee does not cite any authority suggesting the victim of an assault with a deadly weapon must have firsthand, direct knowledge that defendant had a firearm. Furthermore, to experience "apprehension", a person need only have a "[p]erception; comprehension; [or] belief" that they are in imminent danger of bodily harm.[10] Black's Law

[10] Similarly, *A Dictionary of Modern Legal Usage* defines apprehend as "to lay hold of with the intellect." Bryan A. Garner, A Dictionary of Modern Legal Usage 70 (2d ed. 1995).

Dictionary 117 (9th ed. 2009); *see also State v. Johnson*, 29 Wn. App. 807, 631 P.2d 413 (second degree assault with a firearm instruction was appropriate where the circumstances suggested although one of the five victims did not see the firearm the victim was aware of circumstances indicating that defendant had a firearm), *review denied*, 96 Wn.2d 1009 (1981). Naranjo's testimony was sufficient to establish that she comprehended that Sallee had a gun and that this comprehension placed her in fear of immediate harm regardless of whether she personally saw the gun. Accordingly, Sallee's sufficiency arguments fail.

II. Offender Score

Finally, Sallee challenges his offender score, arguing that it is incorrect because the offenses against each victim were same criminal conduct under RCW 9.94A.589(1)(a). Because defense counsel affirmatively agreed that Sallee's offender score was 3 and that there were no same criminal conduct issues, Sallee has waived his right to challenge offender score directly. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002); *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000). But he also argues that defense counsel was ineffective for failing to argue same criminal conduct at sentencing. This argument also fails.

To establish ineffective assistance of counsel, Sallee must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To show deficient performance, he must show that defense counsel's performance fell below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. To show prejudice, he must establish that but for the deficient performance there is a reasonable probability that the

result of his sentencing would have been different. *McFarland*, 127 Wn.2d at 335.

Under RCW 9.94A.589(1)(a), multiple current offenses count as a single offense for sentencing purposes if the trial court finds that these offenses encompass the same criminal conduct. Multiple offenses are same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). But when one of the current offenses is malicious harassment, the malicious harassment antimerger clause, RCW 9A.36.080(5), applies.[11] The antimerger clause, which states: "Every person who commits another crime during the commission of a crime under this section may be punished and prosecuted for the other crime separately," gives the trial court the discretion to count each offense separately even if those offenses would otherwise be considered same criminal conduct. RCW 9A.36.080(5).

Although the permissive language of the malicious harassment antimerger clause gave the trial court the discretion to treat the malicious harassment and assault offenses against each victim as same criminal conduct, *see State v. Robertson*, 88 Wn. App. 836, 849, 947 P.2d 765 (1997), *review denied*, 135 Wn.2d 1004 (1998), Sallee does not explain why the trial court would have exercised its discretion in his favor had his counsel asked the trial court to consider them same criminal conduct. Accordingly, Sallee does not show a reasonable probability that the trial court would have exercised its discretion differently and, thus, does not establish ineffective assistance of counsel.

We affirm.

[11] Sallee does not acknowledge this antimerger clause in his brief.

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.

Serko, J.P.T.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.