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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	**No. 29654-7-III**
Respondent,	
v.	
	UNPUBLISHED OPINION
ANTONIO GARCIA VALLE,	
Appellant.	

Korsmo, C.J. — A Grant County crime spree resulted in eight convictions and an exceptional sentence for Antonio Garcia Valle. He challenges the sufficiency of the evidence to support several of the convictions as well as the exceptional sentence. We reverse one misdemeanor conviction, but affirm the other convictions and the exceptional sentence.

FACTS

A detailed review of the factual basis for several of the crimes is necessary in light of the arguments presented. On July 28, 2010, officers were seeking Mr. Valle in

connection with a burglary that had occurred the day before. A van driven by the male burglar was registered to Misty Gonzalez, Mr. Valle's girl friend. She told a deputy sheriff that Mr. Valle had used the van the day before.

Officers conducting surveillance on Mr. Valle's suspected residence saw a car drive away from the house; Mr. Valle was a passenger. Two police cars started following the car and it pulled off to the side of the road. Mr. Valle jumped out of the car and started running.

Quincy Police Department Sergeant Paul Snyder pursued Mr. Valle on foot, yelling, "Stop. Police." Mr. Valle fled into a corn field and officers started setting up perimeter surveillance of the field. A crop dusting plane on a routine spraying job swooped low and sprayed the field with pesticides, soaking Mr. Valle. He took off his shirt and used it to clean his face. A police helicopter then located Mr. Valle in the field and he started running with the officers again giving chase on foot.

Mr. Valle fled into a nearby house, where Leticia White was house-sitting for her in-laws along with her three children. Her eleven-year-old daughter was sleeping in an adjoining bedroom, while her five-year-old son and nine-year-old daughter were with her in the living room. Mr. Valle walked in to the room, soaking wet and appearing anxious. He told her not to tell the police he was in the house. Upon realizing he was hiding from

the police, Ms. White became concerned for her children and began thinking of ways to get them out of the house. She was afraid to move for fear it would make Mr. Valle angry.

When he went to the kitchen for water, Ms. White placed the younger children in the bedroom with their sister and had them lock the door. Mr. Valle began pacing and again commanded her not to tell the police he was there. He went in and out of the master bedroom several times and continued his pacing. Ms. White was feeling more afraid. An officer appeared outside and Ms. White gestured that Mr. Valle was in the house. She opened the door and several officers entered and subdued Mr. Valle after a struggle. Ms. White subsequently discovered that the door to the master bedroom had broken hinges and the closet in that bedroom had been disturbed, although nothing was missing.

Nine charges were submitted to the jury that heard the trial. The jury acquitted Mr. Valle of the third degree malicious mischief charge related to the damaged bedroom door at Ms. White's residence. The jury convicted Mr. Valle of five felony counts and three gross misdemeanor offenses. The felonies included residential burglary and second degree theft on July 27, and residential burglary of Ms. White's residence the following day, along with unlawful imprisonment and intimidating a witness. The jury also found

that Mr. Valle committed third degree malicious mischief on July 27 and obstructing a public servant and coercion on July 28.

The trial court included 14 prior juvenile and adult felonies when computing the offender score on the felony counts, and also determined that Mr. Valle had 30 prior misdemeanor or gross misdemeanor convictions. He also was on community supervision at the time of the current crimes. The offender score was calculated at 16 for the two residential burglary convictions[1] and 11.5 for the remaining felonies. The court also found that the second degree theft[2] conviction constituted the same criminal conduct as the residential burglary in count one, while the unlawful imprisonment constituted the same criminal conduct as the residential burglary in count two.[3]

The court imposed an exceptional sentence on each of the two residential burglary

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[1] In accordance with the scoring rules found in RCW 9.94A.525(16).

[2] The second degree theft conviction is listed and sentenced as count five on the judgment and sentence, but mistakenly referred to as count four when it was determined to be the same criminal conduct as count one. Clerk's Papers at 390.

[3] When accounting for the other current offenses, it appears the actual offender scores should have been 18 for the residential burglary convictions (2 points for the prior adult residential burglary, 7 points for the 8 remaining adult convictions—one of which was same criminal conduct with the prior adult burglary conviction—5 points for the juvenile burglary offenses, 1 point for community placement, 2 points for the other current residential burglary, and 1 point for the intimidating a witness conviction) and 13.5 for the remaining felonies (8 points from the 9 prior adult felonies, 2.5 for the prior juvenile burglaries, 1 point for community placement, and 2 points for the other 4 current felonies, only 2 of which would count in scoring any of the remaining offenses because of the same criminal conduct determinations).

charges by imposing consecutive 120-month terms on each. Lesser concurrent standard range sentences were imposed on the three remaining counts. The court's written findings reflect two bases for the exceptional sentence: (1) the unscored misdemeanor convictions resulted in a sentence that was clearly too lenient, and (2) the defendant's high offender score would result in some of the multiple current offenses going unpunished. The court's remarks at sentencing addressed the unpunished multiple offenses that would result from a standard range sentence. RP (Jan. 10, 2011) at 14.

Mr. Valle then timely appealed to this court.

ANALYSIS

This appeal challenges the decision to charge Mr. Valle's flight as obstructing a public servant rather than resisting arrest, the sufficiency of the evidence to support the malicious mischief conviction and four of the July 28 offenses, and the exceptional sentence. With the exception of the malicious mischief count, we will address the claims in the order stated.

Obstructing a Public Servant

Mr. Valle argues that the prosecutor charged the wrong offense, alleging that resisting arrest was the specific offense applicable to his behavior in fleeing Sergeant Snyder. Because he had not yet been arrested, the charge of resisting arrest was

inapplicable to Mr. Valle.

The general rule is that when a specific statute punishes the same conduct punished under a general statute, the statutes are concurrent and the State must charge only under the specific statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Statutes are concurrent if the general statute is violated every time the specific statute is violated. *Id.* This court determines whether two statutes are concurrent by examining the elements of each statute to determine whether a person can violate the special statute without necessarily violating the general statute. *State v. Heffner*, 126 Wn. App. 803, 808, 110 P.3d 219 (2005).

A person is guilty of obstructing a law enforcement officer if he "willfully hindered, delayed, or obstructed" a law enforcement officer in the discharge of his official duties. RCW 9A.76.020. A person resists arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him. RCW 9A.76.040.

It is not necessary for this court to address whether these are concurrent statutes because the State could not have properly charged Mr. Valle with resisting arrest here since he was not under arrest when he began running from the police. The record shows that Mr. Valle jumped out of the van and started running before the police car had even attempted to pull the van over. Sergeant Snyder yelled, "Stop. Police." He did not tell

Mr. Valle that he was under arrest. The sergeant had merely been conducting surveillance for another department and had no other involvement with the case when Mr. Valle fled. On this record, it is uncertain whether officers even had probable cause to arrest Mr. Valle on the July 27 crimes at the time they attempted to contact him the next day.

In Washington, a person is under arrest "when, by show of authority, his freedom of movement is restrained." *State v. Holeman*, 103 Wn.2d 426, 428, 693 P.2d 89 (1985) (citing *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). Merely following a person in a car does not constitute an arrest. Mr. Valle then attempted to flee, leading the sergeant to command that he halt. There was no arrest at that time.

The charge of resisting arrest did not apply to Mr. Valle's flight into the corn field. The decision to charge obstructing a public servant was proper.

Sufficiency of the Evidence

Mr. Valle challenges the sufficiency of the evidence to support the jury's verdicts on several of the charges. We will first review the challenges to the July 28 charges before addressing the one July 27 charge at issue. Well-settled standards govern our review of these challenges.

Evidence is sufficient to support a verdict if the trier-of-fact has a factual basis for finding each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

Residential Burglary. Mr. Valle asserts that the evidence does not support the "intent to commit a crime" element of the burglary statute because he entered the building to hide from the police rather than to commit a crime. A person commits residential burglary when "with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1).

Mr. Valle's argument itself establishes the challenged element of the residential burglary charge when he argues that his intent was merely to hide from the pursuing police officers. His argument shows that he entered the house with the intent to continue his obstruction of the police by concealing himself. That activity would itself further hinder or delay the police, the gravamen of the crime of obstructing a public servant. RCW 9A.76.020.

His behavior also showed the apparent intent to commit the crime of theft. He

disturbed the master bedroom closet, apparently looking for something to steal. He was in need of clothing after having been saturated in pesticides. Given these facts, the jury was likewise free to conclude he intended to commit theft when he fled into the White home. The evidence supports the jury's decision.

Coercion. Mr. Valle's argument on the coercion, witness intimidation, and unlawful imprisonment counts is related—his statements to Ms. White did not constitute threats, thus rendering elements of those crimes unproved. We will address each claim separately.

RCW 9A.36.070(1) provides that a person is guilty of coercion if he compels or induces a person, by use of a threat, to abstain from conduct which she has a legal right to engage in. Threat in this context means "[t]o communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." RCW 9A.36.070(2)(a). Threat may also mean to directly or indirectly communicate the intent "(a) [t]o cause bodily injury in the future to the person threatened or to any other person; or (b) [t]o cause physical damage to the property of a person other than the actor; or (c) [t]o subject the person threatened or any other person to physical confinement or restraint." RCW 9A.04.110(28)(a)-(c); RCW 9A.36.070(2)(b).

The determination of whether an action constitutes an indirect communication of

intent to cause physical harm under former RCW 9A.04.110(27)[4] depends on the totality of the circumstances. *State v. Harvill*, 169 Wn.2d 254, 260, 234 P.3d 1166 (2010) (considering whether conduct constituted an indirect threat under former RCW 9A.04.110(27) in the context of duress). The absence of "or else" language is not dispositive because it only proves that no direct threat occurred. *Id.* However, the victim's perception of the indirect threat must be reasonable under the circumstances. *Id.* at 262.

Mr. Valle argues that his statements to Ms. White were not threats, but were merely requests that she refrain from alerting authorities. A jury was free to conclude otherwise given all of the circumstances. Mr. Valle had entered the house without invitation and without apparent fear of the woman and young children he encountered inside. He paced the premises, repeatedly entering the master bedroom, and used the kitchen without hesitation. Having young children in her care, Ms. White was not in a position to put them at risk by contesting Mr. Valle's statements. The jury could conclude that Mr. Valle had taken control of the house and that his directives to Ms. White were commands to refrain from acting. Under the circumstances, the jury could conclude that his statements were indirect threats.

[4] This statute, which defines threat and is incorporated by reference in the statutes defining the crimes of coercion and witness intimidation, is now RCW 9A.04.110(28).

The implied threats had the effect of making Ms. White abstain from leaving the house. The evidence thus supported the jury's verdict on the coercion count.

Witness Intimidation. For similar reasons, Mr. Valle argues the evidence does not establish that he committed witness intimidation because he did not threaten Ms. White. To convict Mr. Valle of intimidating a witness, the jury was required to find that he used a threat against a prospective witness to induce that person not to report information relevant to a criminal investigation. RCW 9A.72.110(1)(d).

For the reasons just stated, the jury was entitled to find that Mr. Valle's words constituted a threat against Ms. White. Telling her to not contact the police was clearly a directive that she not report information relevant to a criminal investigation. Thus, the evidence was sufficient to find the elements of the offense were established.

Unlawful Imprisonment. This crime required the State to prove that Mr. Valle knowingly restrained Ms. White. RCW 9A.40.040. "Restraint," in turn, includes restricting "a person's movements without consent and without legal authority." RCW 9A.40.010(1). A "restraint" is "without consent" when it is accomplished by intimidation. *Id*.

Mr. Valle's argument is similar to the two previous "threat" arguments—his words did not intimidate Ms. White, so he is not guilty of unlawful imprisonment. However, the

concept of intimidation is not limited to mere words, but includes conduct. *State v. Lansdowne*, 111 Wn. App. 882, 46 P.3d 836 (2002) (construing intimidation in unlawful imprisonment context). "'Intimidate' is defined as: 'to make timid or fearful: inspire or affect with fear: frighten . . . to compel to action or inaction (as by threats).'" *Id*. at 891 (citing Webster's Third New International Dictionary 1184 (1993)).

In light of Mr. Valle's previously described behavior, his words telling Ms. White that she was not to tell the police about his presence could constitute intimidation that restrained her. She was a mother protecting young children and could not easily flee the scene. She testified that she was frightened and did not believe she could leave the house. On these facts, we believe a jury could find that Mr. Valle restrained Ms. White by intimidation.

Mr. Valle also argues that the unlawful imprisonment was incidental to his burglary and should be dismissed on that basis. This court recently construed the "incidental restraint" doctrine in *State v. Butler*, 165 Wn. App. 820, 269 P.3d 315 (2012). There, we concluded that this doctrine is properly analyzed under the merger doctrine described in *State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). *Butler*, 165 Wn. App. at 831. The issue presented under the merger doctrine is whether the legislature intended separate punishment. *Id*. at 831-32. In the case of burglary, that is easily

answered by the burglary anti-merger statute, which provides that a burglar who commits an additional crime "may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050 (partial).

The incidental restraint doctrine is inapplicable to this case. The evidence supports the conviction for unlawful imprisonment.

Third Degree Malicious Mischief. Mr. Valle also challenges the sufficiency of the evidence to support his conviction for third degree malicious mischief, although this challenge presents a different question than normal. We agree that the evidence did not support the crime considered by the jury.

In the course of driving away from the scene of the July 27 burglary, Mr. Valle struck an antique tractor and damaged it. He was charged with second degree malicious mischief, but the charge was reduced to third degree malicious mischief during trial. The jury was instructed that one element the State needed to prove was that the damages were in excess of $50, but less than $750. Clerk's Papers (CP) at 145 (instruction 21).[5]

Third degree malicious mischief is codified in RCW 9A.48.090 (2009). As it currently exists, and as it existed at the time of these offenses, the statute applies to instances in which the property damage is less than $750. RCW 9A.48.080(1)(a),

[5] The same elements instruction was used for the third degree malicious mischief count on which the jury acquitted. CP at 160 (instruction 36).

.090(1)(a). Prior to amendment in 2009, third degree malicious mischief was a gross misdemeanor if the property damage exceeded $50, but a misdemeanor if the damage was less than that figure. *See* former RCW 9A.48.090 (2008).

The third degree malicious mischief elements instructions used in this case mistakenly used the $50 damage threshold that had been abolished in 2009, even while they recognized the higher upper limit ($750) enacted at that time. The State produced evidence showing the damages to the tractor, but failed to adduce any evidence that the damage exceeded $50.

The State argues that the error is harmless. While it is true that the failure to prove an unnecessary element does not harm the defendant in the least, the harmless error doctrine does not avail the prosecution here. Whenever the State undertakes to prove an extraneous element, that element becomes the law of the case when it is included in a jury instruction and an appellate court's sufficiency review includes the additional element. *State v. Hickman*, 135 Wn.2d 97, 101-05, 954 P.2d 900 (1998). That is the situation here.

The State undertook to prove that the tractor damage was in excess of $50, but failed to adduce any valuation evidence on this count.[6] Under *Hickman*, that failure was

[6] The prosecutor admitted he had not obtained valuation testimony from the victim. That failure was the reason the court reduced the charge from second to third degree malicious mischief. RP (Oct. 21, 2010) at 169-71.

fatal to the malicious mischief count despite the fact that Mr. Valle was not harmed by the unchallenged error. Accordingly, the conviction for third degree malicious mischief is reversed.[7]

EXCEPTIONAL SENTENCE

Mr. Valle also challenges the exceptional sentence, arguing that it was in part the product of an invalid aggravating factor. The State concedes that the reliance on the unscored misdemeanor offenses was improper, but argues that the court would have imposed the same sentence without that finding. We agree.

An exceptional sentence may be imposed if the trial court finds "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. The trial court must enter written findings of fact and conclusions of law if it does impose an exceptional sentence. *Id*. A nonexclusive list of mitigating factors is recognized by statute. RCW 9.94A.535(1). However, an exceptional sentence above the standard range must be based on a recognized statutory factor. RCW 9.94A.535(2), (3).

Either party may appeal an exceptional sentence. RCW 9.94A.585(2). The statutory scheme for review of an exceptional sentence has long been in place. An exceptional sentence is reviewed to see if either (a) the reasons for the exceptional

[7] Any restitution related to this offense must also be reversed.

sentence are not supported by the record or do not justify an exceptional sentence, or (b) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4). Thus, appellate courts review to see if the exceptional sentence has a factual basis in the record, is a legally justified reason, and is not too excessive or lenient. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Differing standards of deference or non-deference apply to those three issues. *Id*.

In limited circumstances, trial judges can impose aggravated exceptional sentences without a jury's factual finding. RCW 9.94A.535(2). Two of those exceptions are cited in the court's written findings: prior unscored misdemeanor convictions and multiple current offenses that are unpunished due to the multiple offense policy. RCW 9.94A.535(2)(b), (c). A court can rely upon the former exception when the unscored offenses result in a sentence that is "clearly too lenient." RCW 9.94A.535(2)(b).

Mr. Valle argues that the "clearly too lenient" component of this factor runs afoul of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). This court previously has agreed with his analysis. *State v. Saltz*, 137 Wn. App. 576, 154 P.3d 282 (2007). There we concluded that the "clearly too lenient" language of RCW 9.94A.535(2)(b) could not be found by a trial judge, but needed to be a jury determination. *Id*. at 580-84. Under *Saltz*, we agree that the court erred by relying upon

this aggravating factor.

The remaining question is whether this error requires a new sentencing proceeding. An exceptional sentence will be upheld even if some of the aggravating factors are invalidated if the reviewing court is convinced that the trial court would impose the same sentence on the basis of the valid factor. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993); *Saltz*, 137 Wn. App. at 586.

The court's written findings do not include the common statement that any one of the aggravating factors standing alone would justify the exceptional sentence. Nonetheless, we do not believe the court would change its mind if this matter were returned for a new sentencing hearing. The trial court's oral remarks address only the multiple current offenses that would go unpunished from imposing a standard range sentence. The court also expressed its concern that Mr. Valle would immediately reoffend upon release. RP (Jan. 10, 2011) at 14. The oral remarks do not address the unscored misdemeanor offenses, even though the prosecutor stressed them repeatedly in argument. Instead, the court's only acknowledgement of that factor was in the written findings that the prosecutor had prepared and brought with him to sentencing. The judge entered them at that time.

In light of this history, the invalidation of one aggravating factor does not require

resentencing.

The judgment is affirmed in part, reversed in part, and remanded to correct the judgment form in light of this decision.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, C.J.

WE CONCUR:

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Brown, J.

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Sweeney, J.