

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

STATE OF WASHINGTON,

Respondent,

v.

DELBERT NICHOLS,

Appellant.

No. 51445-1-II

MOTION TO WITHDRAW AS
COUNSEL PURSUANT TO
ANDERS v. CALIFORNIA, RAP
15.2(i) & RAP 18.3(a)(2)

I. IDENTITY OF PARTY

Kristen V. Murray, court-appointed appellate counsel for Mr. Delbert Nichols, is the moving party and seeks the relief designated in Part II.

II. RELIEF REQUESTED AND GROUNDS FOR RELIEF

Appellate counsel seeks an order allowing her withdrawal as counsel. This motion is based on RAP 15.2(i), RAP 18.3(a)(2), and *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1977).

III. ISSUES THAT COULD BE ARGUED IF THEY HAD MERIT

Counsel has reviewed the trial record, reviewed the transcripts, researched potential issues, discussed the case with the trial counsel and

other attorneys, and sought Mr. Nichols' input. After such actions, counsel has determined there are no non-frivolous issues to raise on appeal.

As required by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970) and Rule of Appellate Procedure 18.3 (a)(2), possible issues that could be argued (if they had merit) are set forth below:

- a. Whether sufficient evidence supported the charge for violation of a civil anti-harassment order (Count II)?
- b. Whether Mr. Nichols' convictions for both felony harassment and violation of a civil anti-harassment order violated the double jeopardy clauses of the Washington State and United States Constitutions?
- c. Whether the trial court erred in excusing jurors for hardship over defense objection?
- d. Whether Mr. Nichols received ineffective assistance of counsel for trial counsel's failure to make evidentiary objections during testimony?
- e. Whether the court properly included Mr. Nichols' prior conviction in the offender score for purposes of sentencing?

IV. RELVANT FACTS AND REFERENCES TO THE RECORD

Mr. Nichols was charged in Lewis County Superior Court No. 17-1-00421-21 with one count of felony harassment in violation of RCW

9A.46.020 and one count of violation of a civil anti-harassment order in violation of RCW 10.14.120 and 10.14.170. CP 1-3. The State alleged Mr. Nichols committed both offenses on June 26, 2017. *Id.* The case proceeded to trial resulting in jury verdicts of guilty for both counts. CP 74-75. A sentencing hearing was held on January 31, 2018. CP 85-92; RP 278-300. The Notice of Appeal was filed on February 7, 2018. CP 110-118. An order finding Mr. Nichols indigent was filed on February 5, 2018. CP 108-109.

At the conclusion of jury selection, the defense raised an objection to the trial court's excusal of jurors for hardship. RP 82.

Your Honor, I'm not sure that there's a particularly good remedy for this, but I did want to put on the record my objection to the court excusing a number of jurors apparently for hardship. And the basis for my objection is most of those jurors excused during that section was largely an economic issue, if appeared to be, and I am concerned that that creates a situation where the balance of the veneer is economically better off, and that can have an impact on fairness to my client. He is an economically disadvantaged individual. So I'm not sure what remedy to suggest short of a mistrial, which I'm not asking for, so I'm just putting that on the record.

RP 82-83. No objection was raised at the time the court actually excused jurors for hardships. RP 41. The defense objection was made after the jury had been empaneled and removed from the courtroom. RP 81-82.

During trial, the State called Bruce Norris as its first witness. RP 94. Mr. Norris identified Mr. Nichols as his neighbor and testified he had known him for about two years prior to becoming his neighbor. RP 95. At the time of trial, they had been neighbors for about two and a half years. *Id.*

Mr. Norris testified he had an easement across Mr. Nichols' property. RP 95. The easement caused issues between them. RP 96. When asked to describe the issues, Mr. Norris testified, "Constant harassment, constant death threats, threats to burn down my home. Probably over 100 to 200 incidents in the last two -and-a-half years." *Id.*

Prior to buying the property next to Mr. Nichols, he and Mr. Norris had a friendly relationship. *Id.* The relationship changed "very shortly after we bought the property[.]" *Id.* Mr. Norris then again described the past issues with Mr. Nichols. "[T]hese issues that I call criminal – they may be civil, but some are criminal – of threatening to burn our house down, conveying death threats, blocking the driveway, permanently blocking it with two different vehicles and that kind of thing." RP 97.

Mr. Norris went to the courthouse to get a restraining order against Mr. Nichols. RP 98-99. He obtained the order because he "felt in fear for my life and my family." RP 99. According to Mr. Norris:

[H]e was just acting worse and worse, and he already recently conveyed death threats to my entire family in front of my entire family and had threatened to destroy our home. Then the very next night at 4:00 a.m., there were two fires set on our property, one right at our bedroom window, and so it was clear what their intent was.

Id.

Mr. Norris obtained the order on June 26, 2017. RP 100-101. He tried to obtain the order the previous Friday but “they said I couldn’t get one until Monday.” RP 103. Over the weekend, fires were set on his property. RP 103. Mr. Norris’s family “were all sleeping in this bedroom right next door to this shed that he set on fire. Or not he. His son was convicted of burning the buildings but Delbert Nichols is the one that’s made most of the threats about burning our house several times.” RP 104.

The following Monday, Mr. Norris went to the courthouse for a hearing involving Mr. Nichols’ son. RP 105. This was on June 26, 2017.

Id. “I think Joshua Nichols was being arraigned at that time[.]” *Id.*

He saw Mr. Nichols outside the courtroom. “Delbert Nichols and evidently a tenant or friend of his were standing between the seating area and the courtroom door, and we . . . my whole family, just went and sat down there quietly, never said a word to him.” RP 106-7. Mr. Norris sat down approximately five feet away from Mr. Nichols. RP 107. According to Mr. Norris:

Mr. Nichols was “staring at me and my family most of the way down the hall, glaring, and continued looking around as we sat down and glaring at me. And I heard him clearly say that, “I’m gonna kill him,” something like, “I swear I’m gonna kill him.” I believe he said it three times in a fairly loud voice. It was not a screaming voice.

Id. Mr. Norris then reported the incident to the authorities. RP 108.

According to Mr. Norris, he did not feel he was in imminent harm “but I knew what his attitude was and that he may very well do something later if he’s going to announce that in a public building after he’d been served with a restraining order.” RP 108-9. He believed Mr. Nichols would “kill me or my entire family.” RP 111. Mr. Norris testified he believed Mr. Nichols was talking to him when the statements were made. RP 109. “He was clearly talking to me. He was glaring straight at me when he’s saying this, and he’s saying it in a clearly audible voice and in a clearly angry voice.” *Id.* Mr. Norris was concerned Mr. Nichols would carry out the threat because “to me he had already proven what level he would go to by these threats to kill my entire family and by, in my opinion – and absolutely I believe it 100 percent – by working with his son to set those fires and try to kill us all.” RP 112.

Mr. Norris’s wife, Sheryl Norris, also testified. RP 122. She described the fire that occurred at her home. RP 128. After the fire, she and her husband went to the courthouse for a hearing. RP 130. Her two

children were also with them. *Id.* She saw Mr. Nichols at the courthouse. RP 131. Mr. Nichols was standing outside the courtroom door while she and her family sat. RP 132. While they were sitting, “He said he’s going to kill my husband. So it scared us.” RP 132. She didn’t remember exactly what Mr. Nichols said. “I can’t remember, like gonna kill my husband.” *Id.* During cross-examination, she agreed Mr. Nichols said, “I’m going to kill him.” RP 137; 139. She believed Mr. Nichols was referring to her husband when he made the statement. RP 139. She believed he would carry out the threat. RP 142-43.

Deputy Skylar Eastman testified he served Mr. Nichols with a temporary anti-harassment order on June 26, 2017. RP 146. He did not read the entire order to Mr. Nichols but reviewed the basic terms. RP 147; 150-51. Mr. Nichols did not ask any questions after the order was provided to him. RP 152. According to Deputy Eastman, he served Mr. Nichols at approximately 2:50 p.m. RP 151.

Later that same day, Deputy Eastman was told to respond to the courthouse. RP 148-49. The deputy estimated this was about 4 p.m. RP 151. A little over an hour after he had served Mr. Nichols with the order. *Id.* The deputy saw Mr. Nichols. RP 150. He did not see Mr. Norris but was told he was in the courtroom. *Id.*

Benjamin Curtis testified he was at the courthouse with Mr. Nichols on June 26, 2017. RP 156. He rode to the courthouse with Mr. Nichols. RP 157. According to Mr. Curtis, Mr. Nichols did not want to go to the courthouse by himself. *Id.*

Mr. Curtis did not see the deputy at Mr. Nichols' house. *Id.* "I was in the motor home, but as we were leaving to head to Josh's arraignment, he had showed me the anti-harassment order that he had in the truck." *Id.* Mr. Nichols told him he was just served. RP 157-58. Mr. Curtis read the paperwork and saw Bruce Norris's name. RP 158.

When they got to the courthouse, he did not see Mr. Norris or his family. RP 159. Mr. Curtis was standing by the courtroom when Mr. Nichols said, "something like, 'The asshole is here,' and I said, 'What?' and he said, 'Bruce is here,' so I looked over down the hallway, and there's Bruce and his family standing there." RP 159. Mr. Curtis saw the Norris family sit "down in the bench right across the way." *Id.* According to Mr. Curtis, Mr. Nichols said "'I'm gonna kill him,' or something like that." RP 160. Mr. Curtis believed Mr. Nichols was speaking to "Bruce and his family" when he made the statement because "that's the way he was looking." RP 161-62.

Mr. Curtis testified that he spoke with Mr. Nichols on a later date about the case. “He had said something like, oh, he was talking about killing Josh or something like that. I didn’t say nothing. Just went about my business.” RP 162-63. Mr. Curtis added, “But that’s not the fact, because he was looking at Bruce.” RP 163.

During cross-examination, Mr. Curtis testified Mr. Nichols did not seem angry or frustrated on the way to the courthouse. RP 168. “He was quiet.” *Id.* Mr. Nichols did seem upset that his son was in jail.

Detective Michael Mohr responded to the courthouse on June 26, 2017 around 4 p.m. RP 180. Upon arriving, Bruce Norris immediately approached him. RP 181. “He approached me quickly. He seemed shaken, asked me if I was here about Delbert.” *Id.* According to the detective, Mr. Norris seemed “worried, a little bit panicky.” *Id.* Mr. Norris told the detective “that Mr. Nichols threatened to kill him.” RP 182. Mr. Nichols was then arrested. RP 182-83.

Mr. Nichols testified in his own defense. RP 190. He identified Bruce Norris as his neighbor and testified “[t]here is a driveway easement issued[.]” RP 191-92. Mr. Nichols and Mr. Norris have had disagreements over the use of the easement. RP 192. These disagreements have caused tension between the two men. *Id.* Mr.

Nichols agreed he has argued several times with Bruce Norris but denied ever threatening him. *Id.*

Mr. Nichols testified he was standing in the hallway at the courthouse on June 26, 2017. *Id.* His son was scheduled to appear in court. *Id.* While waiting outside the courtroom, “Bruce Norris walked up the hallway behind me, and I turned around, you know. I was talking to Benjamin at that time about my son, how angry I was, that I was going to kill him.” RP 196. Mr. Nichols testified he threatened to kill his son but did not mean it. *Id.* “It’s just a way of releasing my anger, I guess.” *Id.*

Mr. Nichols agreed he looked over at Mr. Norris while they were in the hallway. RP 197. “I understood I had a restraining order. I didn’t talk to the guy.” *Id.* Mr. Nichols testified that Benjamin may have thought he was talking about Bruce and not his son “because I turned around and looked at Bruce Norris when I was talking to him.” RP 204-205. Mr. Nichols admitted he said, “I’m going to kill him” and might have said it when he was looking at Bruce Norris. RP 207.

Mr. Nichols spoke with Benjamin about the order he received on June 26, 2017. RP 197. “[W]e were talking in the truck on the way to the courthouse, and he kind of explained to me what the restraining order was about, because I can’t read, write or spell. I have a hard time

understanding. So I asked Benjamin to kind of explain it to me.” *Id.*

Benjamin told Mr. Nichols that he was “not supposed to talk to him or associate with him, to stay away from him. But I was in the hallway in front of the door, and he walked up behind me. I didn’t walk up to him.”

Id.

During closing arguments, the State argued Mr. Nichols willfully disobeyed the anti-harassment order by threatening to kill Mr. Norris. RP 244. “So you have the defendant knew of the existence of the order, he knew that he wasn’t supposed to have contact with Bruce, and he was speaking to Bruce when he stated, ‘I’m going to kill him.’” RP 245. The State then argued Mr. Nichols’ statement also constituted harassment. RP 245. “Here the defendant knowingly threatened to kill Bruce Norris immediately or in the future. We’re talking about the same phrase, so the phrase, ‘I’m going to kill him.’” *Id.* The State further argued, “[W]e’re kind of splitting this here, that the phrase that was used not only violated the order when he had contact with him but was a threat to kill.” RP 250. The defense argued Mr. Nichols never threatened Mr. Norris. “[N]obody testified that Delbert was speaking to Bruce Norris, because he says, ‘I’m going to kill him.’ Third person. He didn’t say, ‘I’m going to kill you.’ *** He was talking to Ben Curtis.” RP 254.

At sentencing, the State provided proof of Mr. Nichols' prior conviction for indecent liberties in 1986. RP 279; CP 93-107. The trial court found the prior conviction existed for purposes of calculating the offender score. RP 280. Defense then argued the prior conviction should not be included in Mr. Nichols' offender score.

I don't think that this conviction would constitute a sex offender under the current statute. I think it would still count as a felony, but it would be a Class B felony, which, because of the passage of time and lack of intervening criminal convictions, would wash.

RP 281. Citing RCW 9A.44.900 and 9A.44.901, the trial court found the prior conviction did not wash and should be included in the offender score.

RP 282-283.

These two statutes basically take anything that was a sex offense back then and make them a sex offense now. So I know it's a little bit obscure, but I'm finding that based on those statutes, indecent liberties is a sex offense, and so I'm going to count it in his offender score.

RP 283. Mr. Nichols was then sentenced to three-months confinement for his felony harassment conviction. RP 295. The trial court commented, "even if I had found that the prior offense did not count, I would . . . have imposed a three-month sentence. I look at this case as a three-month case, whether the range was one to three months or three to eight months." RP 295-96.

V. CITATIONS OF AUTHORITY TO RELEVANT ISSUES¹

a. Sufficiency of Evidence to Support Count II

The sufficiency of the evidence can be challenged for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 9, 904 P.2d 754 (1995). When considering facts in a challenge to sufficiency of the evidence, courts will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court will reverse a conviction for insufficient evidence only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. *Id.* An accused whose conviction has been reversed due to insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

b. Double Jeopardy Analysis

The double jeopardy clauses of both the Washington State Constitution and the United States Constitution protect against multiple punishments for the same offense. Wash. Const. Art. I, §9; US Const. Amend.V and XIV. “Where a defendant’s act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must

¹ As required by RAP 18.3(a)(2), counsel here presents citations of authority without argument.

determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The standard of review for a claim of double jeopardy is de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Double jeopardy is not offended if the legislature authorized punishments for both crimes. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753, 756 (2005). However, if the legislative intent is not clear, the *Blockburger* test is applied. *Id.* at 772. “*Blockburger* is another rule of statutory construction specifically designed to determine legislative intent in the context of double jeopardy.” *Id.* at 776. “Under *Blockburger*, ‘where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.’” *State v. Nysta*, 168 Wn. App. 30, 45, 275 P.3d 1162 (2012). Simply comparing the elements is not the complete analysis. “We are to consider the elements of the crimes both as charged and proved.” *Id.* at 47. Accordingly, convictions may violate double jeopardy if they are the same in fact even if they are not the same in law. *Id.* at 48. Double jeopardy is not violated if each offense required proof

of a fact the other did not.” *Id.*

c. Removal of Jurors for Hardship

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to trial by an impartial jury. *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012). However, a defendant does not have a right to be tried by a particular juror or jury. *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). The standard of review for excusal of jurors is abuse of discretion. *State v. Tingdale*, 117 Wn.2d 595, 600-601, 817 P.2d 850 (1991). “Where the selection process is in substantial compliance with the statutes, the defendant must show prejudice. If there has been a material departure from the statutes, prejudice will be presumed.” *Id.* at 601.

Objections must be timely so as to afford the trial court an opportunity to correct the error. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). “A motion for new trial is not a substitute for raising a timely objection that could have completely cured the error.” *State v. Jones*, 185 Wn.2d 412, 426, 372 P.3d 755 (2016).

d. Ineffective Assistance of Counsel

A defendant is guaranteed the right to effective assistance of

counsel. U.S. Amend. 6 & 14; Wash. Const. Art. 1 Sect. 22. Courts presume counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment." *State v. Bauer*, 98 Wn. App. 870, 878, 991 P.2d 668 (2000).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). "Competency of counsel is determined based upon the entire record below." *State v. McFarland*, 127 Wn.2d at 335 (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Trial counsel's failure to properly execute a trial strategy may constitute ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003). This includes the failure to object to the

admission of impermissible evidence. Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). Legitimate tactics or strategy will not support a claim of ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

e. Calculation of Offender Score

A standard range sentence is calculated by appropriately scoring prior felony convictions and/or other current offenses. *In re Goodwin*, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (inclusion of "washed out" prior convictions); *State v. Weber*, 127 159 Wn.2d 252, 149 P.3d 646 (2006) (whether juvenile adjudications can be included in the offender score without violating *Apprendi/Blakely*). Prior sex offenses are always included in the offender score. RCW 9.94A.525(2)(a).

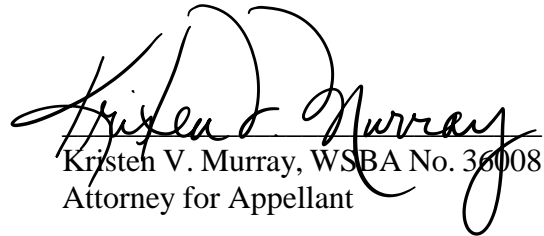
RCW 9.94A.030 defines what constitutes a sex offense and includes felony convictions in violation of Chapters 9A.44, 9A.64.020 and 9.68A. RCW 9.94A.030(47). The statute specifically defines a sex offense to be, *inter alia*, "[a]ny conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection." RCW 9.94A.030(47). Mr. Nichols

was convicted of indecent liberties in 1986. CP 93-107. In that case, the State alleged he had sexual contact with someone who was not his spouse and less than fourteen years of age. *Id.*

VI. CONCLUSION

Based on the above, it is respectfully requested that this Court independently review the record to determine whether this appeal is “wholly frivolous”. *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1977).

Respectfully submitted this 31st day of August, 2018.


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