68619-4

68619-4

NO. 68619-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW LOPEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S **REVISED** OPENING BRIEF

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1. The trial court abused its discretion in granting 49 continuances of Mr. Lopez's trial while he remained in custody.

2. The 49 continuances violated Criminal Rule 3.3.

3. The granting of 49 continuances without sufficient consideration or explanation on the record deprived Mr. Lopez of his due process right to a sufficient record.

4. The information lacked the essential element of true threat.

5. The to-convict instruction lacked the essential element of true threat.

6. The trial court abused its discretion in concluding the convictions for assault and felony harassment did not encompass the same criminal conduct.

7. The judgment and sentence erroneously fails to reflect the trial court's finding that the terms of confinement on counts one and two run concurrently.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal Rule 3.3 requires an accused person held in custody be brought to trial within 60 days of arraignment. Though this period may be extended due to unforeseen and unavoidable circumstances as

well as continuances required in the administration of justice, the court must find support for such continuances on the record. Any delay must not substantially prejudice the accused person in the presentation of his or her defense. Moreover, due process entitles a criminal defendant to an adequate record of proceedings. While Mr. Lopez remained in custody, the trial court extended his trial on 49 different occasions without offering explanation other than simply that the prosecutor was in another trial (42 continuances) or lack of judicial availability (7 continuances).

a. Did the granting of 49 continuances violate the speedy trial rule?

b. Did the trial court's failure to inquire into the need for or explain the justification for the 49 continuances on the record violate Mr. Lopez's right to due process?

2. Due process requires that all essential elements of a crime be included in the charging document and to-convict jury instruction. To prove the crime of felony harassment, the State is required to prove, among other things, that the threat was a "true threat"—that is, the alleged threat is a statement that a reasonable person would foresee would be interpreted as a serious expression of intention to inflict

bodily harm upon or to take the life of another. Where the information and to-convict instruction lacked the element of true threat, was Mr. Lopez denied due process?

3. Where multiple crimes arise from the "same criminal conduct," they count as a single offense for purposes of calculating the individual's offender score. Offenses constitute the same criminal conduct at sentencing if the crimes were committed at the same time and place, involved the same victim, and involved the same criminal intent. Where the alleged assault and harassment occurred during the same course of conduct, were inflicted on the same victim, and derived from a single continuous criminal intent, did the offenses arise from the same criminal conduct?

3. At sentencing, the court clearly imposed concurrent terms of confinement. The judgment and sentence is silent as to whether the terms run concurrently or consecutively. The matter should be remanded to the trial court to correct the judgment and sentence to reflect the ruling at sentencing.

C. STATEMENT OF THE CASE

Sophia Mohnani and Andrew Lopez were in a committed relationship. 3/27/12RP 71-72; 3/28/12RP 60.[1] They have a young son together. 3/27/12RP 71-72; 3/28/12RP 60, 76-77.

The couple got into an argument one morning. 3/27/12RP 61, 72; 3/28/12RP 61-62. According to Ms. Mohnani, she fell to the ground in their bedroom, at which point Mr. Lopez put his hands around her neck and applied pressure. 3/27/12RP 54-55, 79, 80-81. While he was doing so, he told her he was going to kill her. 3/27/12RP 54-55, 80-81.

Ms. Mohnani got up and they argued throughout the apartment. 3/27/12RP 81-82. They ended up in the bathroom, where Ms. Mohnani again fell to the ground. 3/27/12RP 83-85. Mr. Lopez again got over her, put his hands around her neck, and applied pressure as he threatened to kill her. 3/27/12RP 84-86.

Ms. Mohnani got herself out from underneath Mr. Lopez, remained in the apartment, and called her mother. 3/27/12RP 87-90, 117-20; 3/28/12RP 26, 28-31. Her mother called the police, who came to the apartment. 3/27/12RP 91-92; 3/28/12RP 26, 31-32. When the

[1] Each volume of the verbatim reports of proceeding is referred to by the first hearing date transcribed.

police arrived, Ms. Mohnani was not in need of any medical aid. 3/27/12RP 59, 62-63.

The State charged Mr. Lopez with assault in the second degree and felony harassment. CP 1, 24. Mr. Lopez was held in custody with an initial trial expiration date of December 19, 2011. CP 90 (initial arraignment); 10/20/11RP 1-5. The matter was continued once "in the administration of justice" because the prosecutor was in another trial. CP 92 (order for continuance). There is no further record of the basis for the extension; nonetheless the speedy trial date was reset to January 18, 2012. *Id.* Beginning on December 20, 2011, the court entered 49 additional continuances. Seven of these were based on lack of judicial availability but entered without any record other than merely an indication of "court congestion." The remaining 42 continuances were entered due to the prosecutor being engaged in other trials. Mr. Lopez moved to have the case dismissed, which the trial court denied. CP 21; 2/8/12RP 3-7; 3/26/12RP 2-6, 13-15.

When the case eventually was tried, a jury convicted Mr. Lopez as charged. CP 67-70. At sentencing, Mr. Lopez argued the assault and harassment convictions encompassed the same criminal conduct because the intent, time, place, and victim coincided. 4/13/12RP 2-3.

But the court disagreed. 4/13/12RP 3. Thus each offense counted against the other as an "other current offense," and Mr. Lopez was sentenced based on an offender score of two rather than zero. CP 78.

Additional facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. Because Mr. Lopez was denied his right to a speedy trial by 49 trial continuances, including 7 unexplained continuances for lack of judicial availability or court congestion, the convictions should be reversed and the charges dismissed.

The extensive course of continuances violated Criminal Rule 3.3 and the lack of record created violated Mr. Lopez's constitutional due process right.

a. Criminal Rule 3.3 protects an accused person's constitutional right to a speedy trial.

An accused is guaranteed the right to a speedy trial by both the federal and state constitutions. *Barker v. Wingo*, 407 U.S. 514, 531-32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22. This right "'is as fundamental as any of the rights secured by the Sixth Amendment.'" *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009) (quoting *Barker*, 407 U.S. at 515 n.2).

The right to a speedy trial is also a fundamental right under Washington's speedy trial rule. *State v. Ross*, 98 Wn. App. 1, 4, 981 P.2d 88 (1999). Criminal Rule 3.3 sets a definite time line in which a trial must occur; it requires that a defendant who is in custody be brought to trial within 60 days, or the trial court must dismiss the charge.

The trial court must ensure a defendant receives a timely trial under CrR 3.3. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009); CrR 3.3(a)(1) ("It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."). Certain periods may be excluded in computing the time for trial, including valid continuances granted by the court pursuant to CrR 3.3(f) and unavoidable or unforeseen circumstances. CrR 3.3(e)(3), (8). "If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). The court is required to state the reasons for the delay on the record. CrR 3.3(f)(2); *Kenyon*, 167 Wn.2d at 139.

Although the rule is "not a constitutional mandate," its purpose is to protect the constitutional right to a speedy trial. *Kenyon*, 167

Wn.2d at 136. Under CrR 3.3(a)(1), "it is the trial court which bears the ultimate responsibility to ensure a trial is held within the speedy trial period." *State v. Jenkins*, 76 Wn. App. 378, 382-83, 884 P.2d 1356 (1994) (emphasis in original). This responsibility "underscore[s]... the importance" of the speedy trial rule. *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009). The State also bears responsibility for seeing that the defendant is timely tried and must uphold its duty in good faith and act with due diligence. *Ross*, 98 Wn. App. at 4.

The application of the speedy trial rule to the facts of a particular case is reviewed de novo. *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009); *see, e.g.*, *Kenyon*, 167 Wn.2d 130 (speedy trial violation found through de novo review of the court's compliance with the rules regarding the continuance decision, not the discretionary decision itself). Although the application of CrR 3.3 is reviewed de novo, a trial court's factual determination to grant a continuance is reviewed for abuse of discretion. *Kenyon*, 167 Wn.2d at 135.

As discussed below, the trial court violated the speedy trial rule by repeatedly granting continuances without substantive inquiry on the

record about the need for the continuances and alternatives that could be pursued to bring Mr. Lopez to trial in a timely manner.

b. The seven continuances granted for lack of judicial availability should not count as an excluded period because they were ordered without inquiry or explanation.

Routine court congestion is not a permissible reason for a continuance. *State v. Mack*, 89 Wn.2d 788, 576 P.2d 44 (1978). Delay based upon court congestion is "contrary to the public interest in prompt resolution of cases, and excusing such delays removes the inducement for the State to remedy congestion." *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005).

Where a continuance is based on docket congestion or courtroom management, the speedy trial rule is violated unless (1) good cause is shown on the record for the finding and (2) the finding is tied to specific, articulable facts, rather than a generalized assertion. *Kenyon*, 167 Wn.2d at 134 (reversing where trial court continued trial because trial judge was in a criminal trial and second county judge was on vacation; the "trial court should have documented the availability of pro tempore judges and unoccupied courtrooms" because, pursuant to CrR 3.3(f), it is "required to 'state on the record or in writing the reasons for the continuance' when made in a motion by the court or by

a party"); *State v. Cannon*, 130 Wn.2d 313, 327, 922 P.2d 1293 (1996) (reaffirming that a generalized assertion of docket congestion is not good cause for continuance); *State v. Smith*, 104 Wn. App. 244, 251-52, 15 P.3d 711 (2001) (routine court congestion not good cause for continuance); *State v. Warren*, 96 Wn. App. 306, 309, 979 P.2d 915 (1999) (courtroom unavailability is synonymous with court congestion) (citing *State v. Kokot*, 42 Wn. App. 733, 737, 713 P.2d 1121 (1986)). Specifically, "[w]hen the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance and the availability of visiting judges to hear criminal cases in unoccupied courtrooms." *Flinn*, 154 Wn.2d at 200.

Our Supreme Court has continued to apply this requirement. In *Kenyon*, on the eve of the confined defendant's speedy trial deadline, the trial court granted a continuance due to the unavailability of a judge—the presiding judge was presiding over another criminal case and the other county superior court judge was on vacation. 167 Wn.2d at 134. The court made no other findings, but extended the speedy trial date during the continuance period. *See id.* Mr. Kenyon's motion to dismiss on speedy trial grounds was denied. *Id.* Relying on the above-

cited precedent, the Court noted court congestion and courtroom unavailability are not valid bases for a continuance. *Id.* at 137. The Court held "simply because the rule now allows 'unavoidable or unforeseen circumstances' to be excluded in computing the time for trial does not mean judges no longer have to document the details of unavailable judges and courtrooms." 167 Wn.2d at 139. Because the record contained no information on the number or availability of unoccupied courtrooms or regarding the availability of visiting or pro tempore judges to hear criminal cases, the defendant's speedy trial right was violated. *Id.* at 137, 139.

Like in *Kenyon*, here the trial court continued Mr. Lopez's trial seven times without once discussing the availability of courtrooms and visiting or pro tempore judges. The written orders provide no evaluation of the circumstances constituting "court congestion" or "no judicial availability." CP 93, 95, 105, 125-26, 131-32. Hearings were held on only three occasions, the transcripts of which provide no further explanation or consideration of availability. 3/1/12RP 3-4.

In short, court congestion may only justify a delay if the trial court first conducts a searching examination on the record of the availability of courtrooms and pro tempore judges. *Kenyon*, 167 Wn.2d

at 139. Here, the trial court failed to conduct such an inquiry on seven separate occasions. Those continuances were improper under CrR 3.3

c. The trial court abused its discretion by granting 42 other continuances based on the prosecutor's unavailability without evaluating alternatives to continuing to delay Mr. Lopez's trial while he remained in custody.

The trial court further abused its discretion and prejudiced Mr. Lopez's right to a speedy trial by entering 42 continuances, each "in the administration of justice" while the prosecutor tried the cases of other accused persons.

Under CrR 3.3(f)(2), the court may continue a trial if it finds "such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." But the court may not simply declare that the delay is required in the "administration of justice." *Saunders*, 153 Wn. App. at 220. Though a continuance may be justified in the administration of justice, the mere invocation of the words do not suffice absent a legitimate reason to delay an accused person's trial. *State v. Nguyen*, 131 Wn. App. 815, 820-21, 129 P.3d 821 (2006) (continuance not justified where granted to "track" defendant's case with unrelated charges). The court must also assess on the record the reasons for the delay and the prejudice to the defense. *Saunders*, 153 Wn. App. at 220.

No hearings were transcribed or recorded when continuances were entered on December 14, 21, 22, 27, 28, or 29, 2011. *See* CP 92 (December 14 continuance), 93 (minutes from December 21), 95 (December 22 continuance), 96 (December 27 continuance), 97 (December 28 continuance), 98 (December 29 continuance). In 2012, no hearings were held for continuances granted on January 2, 4, 5, 9, 11, 13, 17, 18, 23, 24, 26, 30, 31, February 1, 2, 7, 8, 15, 22, 23, March 5, 6, and 15. CP 99 (January 2 continuance), 100 (January 4 continuance), 101 (January 5 continuance), 102 (January 9 continuance), 103 (January 11 continuance), 105 (January 13 continuance), 106 (January 17 continuance), 107 (January 18 continuance), 109 (January 23 continuance), 110 (January 24 continuance), 111 (January 26 continuance), 112 (January 30 continuance), 113 (January 31 continuance), 111 (February 1 continuance), 114 (February 2 continuance), 116 (February 7 continuance), 117 (February 8 continuance), 119 (February 15 continuance), 121 (February 22 continuance), 122 (February 23 continuance), 127 (March 5 continuance), 128 (March 6 continuance), 133 (March 15 continuance). Moreover, the written orders provide no specification other than "plaintiff's counsel in trial."

With regard to the continuances which were granted "in the administration of justice" after a hearing on the record, the court failed to assess the reasons for the delay and the prejudice to the defense. The sum total of the court's inquiry, findings, explanation and evaluation is:

- "Mr. Simmons is in trial in Judge Shaffer's court. Continued to February 13 in the administration of justice." 2/8/12RP 3; CP 118.

- "We'll set that over to 2/15 because the prosecutor is in trial." 2/8/12RP 3; CP 119.

- After a non-searching inquiry about the prosecutor's trial schedule, the court stated to Mr. Lopez "I don't blame you for being impatient. I would be, too. It's not fair, what's going on. . . . If you want to know why it's happening this way, it's because there aren't enough lawyers. And I don't have an answer for you. I don't have a simple way – I don't have a way to resolve it. There just aren't enough lawyers on both sides." 2/8/12RP 6-7; CP 120.

- "Mr. Simmons is in trial in Judge Shaffer's court. Continue to February 28th in the administration of justice." 2/8/12RP 10-11.

- "Mr. Simmons is in trial in Judge Shaffer's court. Continue to February 29th in the administration of justice." 2/8/12RP 11; CP 123-24.

- "Mr. Simmons is in trial in Judge Spearman's court. Continued to March 13th in the administration of justice." 3/1/12RP 3; CP 129-30.

- "Mr. Simmons is in trial in Judge Robinson's court. Continued to March 20th in the administration of justice." 3/1/12RP 4-5.

- "Mr. Simmons is in trial in Judge Robinson's court. Continue to March 22nd in the administration of justice." 3/1/12RP 5; CP 135.

- "Mr. Simmons is in trial in Judge Robinson's court. Continue to March 26th in the administration of justice." 3/1/12RP 5; CP 136-37.

The trial court and the State have a responsibility to timely bring an accused person to trial. The State is further required to responsibly manage its prosecutors' caseloads and vacations. *State v. Heredia-Juarez*, 119 Wn. App. 150, 154, 79 P.3d 987 (2003). To ensure the State fulfills its duties and the accused is timely brought to trial, the trial court "is entitled to determine whether reassignment is feasible and necessary in a particular situation." *State v. Chichester*, 141 Wn. App. 446, 455, 170 P.3d 583 (2007). Thus in *State v. Kelley*, this Court affirmed a trial court's continuance for a prosecutor's pre-scheduled vacation where the State considered reassignment; considered available deputy prosecutors, courtrooms, and judges; and responsibly scheduled prosecutor vacations and where the court inquired into the State's efforts and limitations on the record, including the availability of the 14 deputy prosecutors and a colloquy with the Assistant Chief Criminal Deputy Prosecutor in charge of assigning cases. *State v. Kelley*, 64 Wn. App. 755, 758, 764-67, 828 P.2d 1106 (1992).

The trial court here failed to even remotely approach this level of thorough inquiry. Though actual reassignment of a case to the next most qualified prosecutor may not be per se required, where the accused is in custody and the trial has been continued repeatedly because of various other trials by the prosecutor, the court must at least inquire on the record to determine when the case might realistically go to trial and whether the prosecutor's office has or should consider reassigning the case to ensure a more speedy trial. *See* CrR 3.3(f)(2); *Saunders*, 153 Wn. App. at 220. Surely the court should have done so here prior to entering 42 separate continuances with minimal or no record.

d. The failure to create a record of the basis for the trial continuances violated Mr. Lopez's constitutional due process right.

Due process entitles a criminal defendant to a "record of sufficient completeness" to present errors to the appellate court. *E.g.*, *Draper v. Washington*, 372 U.S. 487, 497, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963); *Saunders*, 153 Wn. App. at 219-21 (continuances granted without adequate explanation were abuse of discretion); Const. art. I, § 3; U.S. Const. amend. XIV. Further, CrR 3.3(f)(2) requires the court state the reasons for a continuance on the record or in writing.

The trial court granted 49 continuances of Mr. Lopez's trial—while he remained confined in jail. The vast majority of the continuances were at the request of the State because the prosecutor was in another unspecified trial for an unspecified period of time. The court provided Mr. Lopez no further explanation for the delay or understanding of when his trial might realistically begin. A smaller subset of the continuances was granted due to judicial unavailability. But these continuances are similarly without record as to what the unavailability was and whether it could be resolved. To the extent that the court failed to make an adequate record of the reasons to continue the case, Mr. Lopez's due process rights were violated. His convictions should be reversed and dismissed with prejudice.

2. The information and to-convict instruction on felony harassment were erroneous because they omitted the true threat element.

The requirement that the threat made be a "true threat" was not included in the information or the to-convict instruction. CP 1-2 (information), 20 (amended information), 25 (second amended information), 59 (instruction # 21). Though a separate jury instruction defined "threat" to include true threats, the error requires reversal of the conviction. *See* CP 56 (instruction # 56).

a. A charging document or to-convict instruction violates due process if it omits an element of the crime charged.

The to-convict instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error because it relieves the State of its burden under the Due Process Clause to prove each element beyond a reasonable doubt. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); *see In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. *Smith*, 131 Wn.2d at 262-63. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." *Id.* at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction "obviously affect[s] a defendant's constitutional rights by violating an

explicit constitutional provision or denying the defendant a fair trial through a complete verdict." *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Due process also requires that the essential elements of a crime be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amend. VI; Const. art. I, § 22; *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). In *Goodman*, this Court relied on *Apprendi v. New Jersey* to hold that all facts essential to punishment must be pled in the information and proved beyond a reasonable doubt. *Goodman*, 150 Wn.2d at 785-86 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. *Id.* at 784; *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An information omitting essential elements charges no crime at all. *State v. Courneya*, 132 Wn. App. 347, 351, 131 P.3d 343, *review denied*, 149 P.3d 378 (2006).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial or a guilty verdict. *Kjorsvik*, 117 Wn.2d at 102. The reviewing court determines whether the necessary facts appear in the information in any form. *Goodman*, 150 Wn.2d at 787-88; *Kjorsvik*, 117 Wn.2d at 105-06. "If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice." *Courneya*, 132 Wn. App. at 351.

b. That the threat was a true threat was an essential element that had to be included in the information and to-convict instruction.

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.'" *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)). "A criminal statute that 'sweeps constitutionally protected free speech activities within its prohibitions' may be overbroad and thus violate the First Amendment." *State v. Stephenson*, 89 Wn. App. 794, 800, 950 P.2d 38 (1998) (quoting *City of Seattle v. Abercrombie*, 85 Wn. App. 393, 397, 945

P.2d 1132, *review denied*, 133 Wn.2d 1005, 943 P.2d 663 (1997)). "Overbreadth analysis is intended to ensure that legislative enactments do not prohibit constitutionally protected conduct, such as free speech." *City of Seattle v. Ivan*, 71 Wn. App. 145, 149, 856 P.2d 1116 (1993) (citing *City of Tacoma v. Luvene*, 118 Wn.2d 826, 827 P.2d 1374 (1992)).

Though speech is generally protected by the First Amendment, a "true threat" is not protected. A true threat is "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 individual].'" *State v. Knowles*, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (quoting *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990)). The communication "must be a serious threat, and not just idle talk, joking or puffery." *State v. Kilburn*, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004) (citing *State v. J.M.*, 144 Wn.2d 472, 478, 28 P.3d 720 (2001)). Whether a true threat occurs "is determined under an objective standard that focuses on the speaker." *Id.* at 44.

In *Kilburn*, our Supreme Court considered a First Amendment challenge to RCW 9A.46.020, the felony harassment statute alleged

here. The Court noted that because the statute "criminalizes pure speech," it "'must be interpreted with the commands of the First Amendment clearly in mind.'" 151 Wn.2d at 41 (quoting *State v. Williams*, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001); *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). The Court held that in order to "avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only 'true threats.'" *Kilburn*, 151 Wn.2d at 43; *accord State v. Johnston*, 156 Wn.2d 355, 363-65, 127 P.3d 707 (2006).

The Washington Supreme Court recently reiterated that "true threat" is an element of felony harassment. In *Schaler*, the Court reversed the defendant's felony harassment conviction because the trial court did not instruct the jury that it could only convict if it found the defendant issued a true threat. 169 Wn.2d at 278, 292-93. The full definition of "true threat" was neither in the to-convict instruction nor in a standalone instruction. *Id.* at 284-86. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker's *conduct*, it was not instructed on the necessary means rea as to the *result*. *Id.* at 285-86. "True threat" includes the latter—that a reasonable speaker would foresee that the statement would be

interpreted as a serious expression of intention to inflict harm. *Id.* at 286-87.

The Court went on to explain that "the omission of the constitutionally required mens rea from the jury instructions . . . is analogous to [a situation] in which the jury instructions omit an element of the crime." *Schaler*, 169 Wn.2d at 288. And although it declined to reach whether true threat language must appear in the to-convict instruction, it noted, "[i]t suffices to say that, *to convict*, the State must prove that a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." *Id.* at 289 n.6 (emphasis added).

The Washington Supreme Court has taken up the issue left open in *Schaler* by accepting review in *State v. Allen*, 161 Wn. App. 727, 255 P.3d 784 (2011); Supreme Court No. 86119-6. In *Allen*, this Court adhered to its own precedent in the face of *Schaler*. 161 Wn. App. at 753-56. The Court thus held that the lack of "true threat" element in the information and to-convict instruction was not erroneous. *Id.* at 756. In light of *Schaler* and the additional authority discussed herein, Mr. Lopez submits the *Allen* court's holding was incorrect.

c. Because the essential true threat element was not pled in the information reversal is required.

Where the information lacks any reference to an element, prejudice is presumed and "reviewing courts reverse without reaching the issue of prejudice." *Courneya*, 132 Wn. App. at 351. *Vangerpen*, 125 Wn.2d at 791-93 (remedy for insufficient information is reversal and dismissal of charge without prejudice); *State v. Cochrane*, 160 Wn. App. 18, 25-26, 253 P.3d 95 (2011) (following *Vangerpen* and reversing conviction where information omitted essential element).

Here, no version of the information bore any language about a true threat. *See* CP 1-2 (information), 20 (amended information), 25 (second amended information). In relevant part, the information charged merely:

> That the defendant ANDREW SIMON LOPEZ in King County, Washington, on or about October 4, 2011, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Sophia Mohnani, by threatening to kill Sophia Mohnani, and the words or conduct did place said person in reasonable fear that the threat would be carried out; . . . .

CP 25; *see also* CP 1-2, 20 (containing same language but with different spelling of alleged victim's name). Because the necessary element is "neither found nor fairly implied in the charging document, prejudice is presumed" and this Court should "reverse without reaching

the question of prejudice." *Courneya*, 132 Wn. App. at 351. Consequently, Mr. Lopez's felony harassment conviction must be reversed and the charge dismissed without prejudice.

d. Because the essential true threat element was not included in the to convict instruction, reversal is required.

In the alternative, reversal is required because the essential true threat element was not included in the to-convict instruction. The United States Supreme Court has held that under the federal constitution, harmless error analysis applies where the trial court omits an element from the to-convict instruction. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). But our state constitutional right to a jury trial is stronger, requiring automatic reversal where the court omits an element from the to-convict instruction.

Article I, section 21 provides that "[t]he right of trial by jury shall remain inviolate." Const. art. I, § 21. There is no equivalent federal provision, and therefore our Supreme Court has repeatedly held that the state constitution provides a stronger right to a jury trial than the United States Constitution. *E.g.*, *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); *Sofie v. Fibreboard*, 112 Wn.2d 636,

644-50, 771 P.2d 711 (1989); *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982).

Furthermore, in looking to the law regarding the specific issue raised here, our state courts have required automatic reversal for this type of error for over 100 years. In 1890, during our first year of statehood, the Supreme Court held in *McClaine v. Territory*, 1 Wash. 345, 25 P. 453 (1890), that the omission of an element from what we would now call the to-convict instruction required reversal. The court noted that a problem with a definitional instruction could possibly be considered harmless in light of other instructions, but that the omission of an element from the "to-convict" instruction required reversal, without any reference to how much evidence was presented on that element or whether the outcome would have been the same with the proper instruction. *Id.* at 354-55.

Many cases over the next century reaffirmed the rule that automatic reversal is required where the to-convict instruction omits an element. The Supreme Court so held in the 1953 case of *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953), as well as much later cases like *Smith,* 131 Wn.2d at 265 ("Failure to instruct on an element of an offense is automatic reversible error."). And this Court as

recently as the year 2000 stated, "A harmless error analysis is never applicable to the omission of an essential element of the crime in the 'to convict' instruction. Reversal is required." *State v. Pope*, 100 Wn. App. 624, 630, 999 P.2d 51 (2000).

Although our Supreme Court has acknowledged *Neder* as the federal standard, its decisions in *Brown* and *Recuenco* indicate that it will not follow that standard under the Washington Constitution. In 2002, the *Brown* court recognized *Neder* and applied it in that case, but it did not perform an independent state constitutional analysis and it continued to cite prior Washington cases for the proposition that "[a]n instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

More recently in the *Recuenco* series of cases, the United States Supreme Court held that a *Neder* harmless error standard must be applied to *Blakely*[2] errors because the failure to instruct on an element is indistinguishable from a failure to instruct on a sentence enhancement. *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct.

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[2] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

2546, 165 L. Ed. 2d 466 (2006). But on remand, our Supreme Court held that automatic reversal was required under Washington law, because the sentence imposed was not supported by the jury's actual verdict, notwithstanding what a jury might have found if properly instructed. *Recuenco*, 163 Wn.2d at 441-42. The Court cited Article I, section 21 of our state constitution, reiterated that it provides stronger protection than the federal constitution, and stated "our right to a jury trial is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Id.* at 435. Accordingly, automatic reversal was required.

Similarly here, this Court should hold that automatic reversal is required because the to-convict instruction omitted an essential element of the crime. *See* CP 59.

However, even if the court declines to follow the automatic reversal rule, Mr. Lopez's conviction must be overturned on the facts of this case. The to-convict instruction provided the jury a yardstick by which it could measure the evidence in determining Mr. Lopez's guilt or innocence. *Emmanuel*, 42 Wn.2d at 817; CP 57. But the to-convict instruction lacked any true threat language. *See* CP 57. It is not sufficient that a separate definitional instruction refers to the true threat

requirement because here the to-convict instruction "purport[s] to include all the essential elements of the crime." *Emmanuel*, 42 Wn.2d at 817. Where the court "[i]n effect . . . furnished a yardstick by which the jury were to measure the evidence in determining appellant's guilt or innocence of the crime charged," it is "not a sufficient answer [to the claim that an element is missing from the to-convict instruction] to say that the jury could have supplied the omission of this element . . . by reference to the other instructions." *Id.* at 819. A jury "requires a manifestly clear instruction." *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), *abrogated on other grounds by O'Hara*, 167 Wn.2d at 101. Like in *Emmanuel*, the to-convict instruction purported to contain all essential elements. CP 57. The jury thus had a right to "regard [it] as being a complete statement of the elements of the crime charged." *Id.* In summation, the prosecutor emphasized that Ms. Mohnani believed Mr. Lopez's "threats." 3/28/12RP 119-20, 129-30. But there was no discussion of the true threat requirement—that a reasonable person in Mr. Lopez's position would foresee that a listener would interpret the threat as serious. Further supporting the lack of true threat, even Ms. Mohnani testified that the first time Mr. Lopez made the statements, she did not interpret them as a serious threat.

3/27/12RP 84-85, 103; *see* 3/28/12RP 130 (prosecutor emphasizes same in closing argument). Moreover, Ms. Mohnani did not leave the apartment, but remained there after the assault and alleged threatening conduct. 3/27/12RP 117-18. If the actual listener did not interpret them seriously, it is hard to imagine Mr. Lopez could reasonably foresee the words would be interpreted seriously. But the jury was not told this was an element of the crime because it was omitted from the to-convict instruction.

In sum, Mr. Lopez was prejudiced by the failure to include the essential true threat element in the to-convict instruction. Therefore, reversal is required even if not automatically warranted.

3. The trial court abused its discretion in ruling the two counts did not constitute the same criminal conduct for sentencing purposes.

a. Two offenses constitute the same criminal conduct upon coincidence of time, place, victim, and intent.

A person's offender score may be reduced if the court finds two or more of the current offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* Thus, when determining same criminal conduct for purposes of calculating an

offender score, courts look for the concurrence of intent, time and place, and victim.

The State has the burden to prove the crimes did not occur as part of a single incident. *State v. Dolen*, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) ("If the time an offense was committed affects the seriousness of the sentence, the State must prove the relevant time.").

The standard of review applied to a finding of same criminal conduct is subject to debate. In *State v. Torngren*, 147 Wn. App. 556, 562-63, 196 P.3d 742 (2008), Division Three of this Court applied de novo review because the test calls for application of objective standards. Other courts have applied an abuse of discretion standard. *E.g.*, *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999); *Dolen*, 83 Wn. App. at 364. The issue is currently on review before the Washington Supreme Court. *State v. Graciano*, No. 86530-2 (oral argument heard May 24, 2012). Mr. Lopez does not concede the abuse of discretion standard applies, however even under the more stringent standard, the trial court's determination was improper here.

b. The assault and harassment occurred at the same time and place, were perpetrated on a single individual, and resulted from a single intent.

The assault and threats to kill undoubtedly occurred at the same time and place and against the same person. The evidence in support of the State's allegations showed Mr. Lopez held Ms. Mohnani's neck while threatening to kill her once in the bedroom and once in the bathroom during the course of an argument. The State conceded the correlation of time, place and victim. 4/13/12RP 2-3.

At sentencing, the State contested the coincidence of Mr. Lopez's intent. 4/13/12RP 2-3. In determining whether the criminal intent prong of the same criminal conduct analysis is satisfied, the question is whether the defendant's criminal intent, objectively viewed, changed from one crime to the next. *Tili*, 139 Wn.2d at 123; *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), *amended by* 749 P.2d 160 (1988); *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). As part of the intent inquiry, courts examine whether the defendant substantially changed the nature of his criminal objective from one offense to another and whether one crime furthered the other. *Tili*, 139 Wn.2d at 123; *Dunaway*, 109 Wn.2d at 215.

As used in this analysis, intent "is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). In other words, each crime is not viewed solely on the basis of the statute but in the objective context of the facts of the case. The proper examination focuses on to "what extent did the criminal intent, when viewed objectively, change from one crime to the next." *Tili*, 139 Wn.2d at 123.

Thus, objective intent coincides when one crime furthered the other or if both crimes were part of a recognizable scheme or plan. *Dunaway*, 109 Wn.2d at 215; *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992); *State v. Israel*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). To constitute separate conduct, the record must show a substantial change in the nature of the criminal objective. *State v. Calloway*, 42 Wn. App. 420, 423-24, 711 P.2d 382 (1985). The mere fact that distinct methods are used to accomplish the crimes does not prove a different criminal intent. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

Here, the evidence against Mr. Lopez alleged that he strangled Ms. Mohnani while threatening her. 3/27/12RP 80-81; 3/27/12RP 84-

86, 103; 3/28/12RP 12. The offenses thus occurred simultaneously. There was no break in time for Mr. Lopez to change his intent. Though harassment and assault could be committed with different objective intents, the facts here—viewed objectively—demonstrate coincidence of intent. An objective perpetrator who assaults a victim while threatening to kill him or her does so to dominate the victim and instill fear. The assault and the threat accomplish the same goals.

The case law compels a finding of same criminal conduct here. For example, where this Court held a same criminal conduct finding to be proper it appeared the defendant's primary motivation for crimes of rape and kidnapping was to dominate the victim and cause her pain and humiliation. *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004). Likewise, in *Tili*, the Washington Supreme Court reviewed three convictions for rapes that occurred in rapid succession over a two-minute time span. 139 Wn.2d at 124. Coupled with the defendant's pattern of conduct, objectively viewed, the virtually uninterrupted sequence rendered it unlikely the defendant formed a separate criminal intent for each rape. *Id.* Accordingly, the crimes constituted the same criminal conduct. *Id.* Finally, in *State v. Taylor*, this Court held that where an assault and kidnapping occurred

simultaneously, "it is not possible to find a new intent to commit a second crime after completion of the first crime." 90 Wn. App. 312, 322, 950 P.2d 526 (1998).

In sum, because the crimes were committed against the same victim, as part of a single event and with the same criminal purpose, the trial court abused its discretion in refusing to find same criminal conduct. The trial court's erroneous finding prejudiced Mr. Lopez because he received an offender score of two based on each conviction counting as an "other current offense" against the other. RCW 9.94A.030(20); RCW 9.94A.525(1), (5)(i), 21(a); RCW 9.94A.589(1)(a); RCW 10.99.020(5); CP 78. Mr. Lopez's sentence should be reversed and remanded.

4. The judgment and sentence fails to reflect the finding that the terms of confinement on counts one and two run concurrently.

At sentencing, the court ruled that the term of confinement for each count should run concurrently with the other. 4/13/12RP 13-14 ("I am imposing four months and 12 months to run concurrently."). However, the judgment and sentence omits this ruling. CP 80 (marking neither that terms run concurrently nor consecutively).

The matter should be remanded so that the trial court can amend the judgment and sentence to properly reflect its ruling that the terms of confinement for each count run concurrently.

E. CONCLUSION

Mr. Lopez's convictions should be reversed and the charges dismissed for violation of the speedy trial rule. In the alternative, the lack of record regarding the 49 continuances resulted in a denial of due process. Additionally, the felony harassment conviction should be reversed because an essential element was neither pled in the information nor included in the to-convict instruction.

If the convictions are upheld, the sentence should be reversed and remanded because the convictions encompassed the same criminal conduct and the judgment fails to comport with the court's ruling that the sentences run concurrently.

DATED this 6th day of December, 2012.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. ANDREW LOPEZ, Appellant.	)))))))))	NO. 68619-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **MOTION TO FILE CORRECTED OPENING BRIEF OF APPELLANT (BRIEF ATTACHED AS EXHIBIT)** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF DECEMBER, 2012.

X_____

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