68619-4

68619-4

NO. 68619-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDREW LOPEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER
THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Washington's time-for-trial rule permits a case to be dismissed only when a defendant is not brought to trial within the time allowed by CrR 3.3. Where the court finds that the continuance is necessary in the administration of justice and a defendant will not be prejudiced, the rule provides that the time-for-trial does not expire until thirty days after the date to which the trial is continued. When the trial court delayed Lopez's trial, the court adjusted the expiration date only where it found continuances were necessary in the administration of justice. Did the trial court properly exercise its discretion in granting multiple continuances, pursuant to CrR 3.3(f)(2), based on the deputy prosecuting attorney's trial schedule?

2. A charging document must contain all essential elements of a crime. The Washington State Supreme Court recently ruled, consistent with pre-existing case law, that "true threat" is a definitional term in threat cases and is not an essential element. The charging document accusing Lopez of Felony Harassment did not define "true threat," although threat was defined in the jury instructions. Has Lopez failed to show any defect in the charging document?

3. Each of a defendant's convictions counts toward his or her offender score unless the defendant convinces the court that they involved the same criminal intent, time, place, and victim. Here, the trial court found that Lopez's separate crimes of Assault in the Second Degree (assault by strangulation) and Felony Harassment (threat to kill) did not constitute the same criminal conduct because the two crimes did not involve the same objective intent. Did the trial judge act within her discretion in declining to find Lopez's crimes constituted the same criminal conduct?

4. The trial court orally sentenced Lopez to terms of confinement on both Counts I and II, to run concurrently. The Judgment and Sentence is silent as to whether Counts I and II are to run consecutively or concurrently. Must the Judgment and Sentence be amended to state that the terms of confinement are to run concurrently?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Andrew Lopez was charged by Second Amended Information with Assault in the Second Degree (assault by strangulation) and Felony Harassment. CP 24-25. Both counts

included special allegations that the crimes were crimes of domestic violence committed "against a family or household member" and that the crimes of domestic violence were committed "within sight or sound of the victim's or the offender's minor child." CP 24-25. The named victim on both counts was Sophia Mohnani, the mother of Lopez's child.

A jury trial found Lopez guilty on both counts and found both special allegations for Counts I and II. CP 67-70. The trial court sentenced Lopez to a standard range sentence of 14 months on Count I and 12 months on Count II, to be served concurrently. CP 80; 8RP[1] 14.

2. SUBSTANTIVE FACTS.

In October 2011, Sophia Mohnani and Lopez had been in a relationship for four years and were "Islamically married." 5RP 72; 6RP 60. They shared an apartment together along with their two-year-old son. 5RP 72-73. Shortly before the date of the charged crimes, their relationship had been troubled. Lopez did not always

[1] There are 8 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (10/20/2011, 11/1/2011, 11/8/2011, 12/2/2011, 12/9/2011); 2RP (2/8/2012, 2/10/2012, 2/21/2012, 2/23/2012, 2/24/2012, 2/27/2012); 3RP (3/1/2012, 3/9/2012, 3/13/2012, 3/14/2012, 3/16/2012, 3/19/2012, 3/20/2012, 3/21/2012); 4RP (3/26/2012); 5RP (3/27/2012); 6RP (3/28/2012); 7RP (3/29/2012); and 8RP (4/13/2012).

stay at their shared apartment and their relationship was on "the verge of splitting up." 5RP 72.

On October 4, 2011, Lopez returned home from work in the early hours of the morning. 5RP 74. Mohnani read text messages on Lopez's cell phone and saw that he was communicating with a woman whom he called "baby." 5RP 75-76. Lopez claimed he was texting with a male and called Mohnani a "snoopy bitch." 5RP 77-78. Mohnani fell onto her back on the floor of their bedroom next to the bed where their son was sleeping. 5RP 77-79. Lopez got on top of Mohnani, threatened her with his fist, and cursed at her. 5RP 79-80. Lopez squeezed his hands around Mohnani's neck and began to say: "I'm going to fucking kill you and you're going to die right here." 5RP 80-81.

Mohnani eventually freed herself from Lopez and ran to the bathroom. 5RP 81. Lopez said that the other woman he had been texting with would be a better wife and mother to their child because she would be more obedient and knowledgeable. 5RP 83. In the bathroom, Mohnani fell on the floor, this time next to the toilet. 5RP 83-84. Lopez again straddled Mohnani and began to strangle her. 5RP 84. Mohnani was unable to breathe for several seconds, her eyes watered, and she urinated on herself.

5RP 84-88. While choking her, Lopez repeated: "I'm going to fucking kill you right here, right now. I'm going to kill you, you fucking bitch." 5RP 84. While lying on the floor of their bathroom, Mohnani believed she was going to die. 5RP 86.

Eventually, Mohnani was able to get up. 5RP 88-89. She grabbed their son from the bedroom, and locked herself and her son inside the bathroom. 5RP 88-89. Mohnani called her mother because she was scared and afraid to call the police. 5RP 89. Mohnani's mother called the police. 6RP 32-33. Lopez answered the door to the apartment when police officers arrived; Mohnani and their son were still locked inside the bathroom. 5RP 49. Mohnani was crying and shaking. 5RP 50; 6RP 28. She had visible red marks around her neck, upper chest, and arms. 5RP 57. Mohnani had a headache and was diagnosed with a neck sprain after the assault. 5RP 93-95; 6RP 14.

Lopez testified at trial. 6RP 60. He denied that the relationship had "fallen on rough times." 6RP 78-79. Lopez claimed that Mohnani became upset while he was texting about a business deal. 6RP 64. He said that he raised his voice because he was trying to calm Mohnani down because their son was waking. 6RP 68. Lopez testified that, after Mohnani became

upset, he attempted to leave to study at the mosque when Mohnani ran up on him "like a dog" and restrained him from leaving by taking his cell phone. 6RP 66-69, 94.

C. ARGUMENT

1. LOPEZ'S TRIAL BEGAN WITHIN THE ALLOWABLE TIME-FOR-TRIAL PERIOD BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONTINUING HIS TRIAL DATE MULTIPLE TIMES.

Lopez contends that the trial court abused its discretion by continuing his trial multiple times and that the continuances were granted based on an insufficient record. This argument should be rejected. First of all, Lopez waived any time-for-trial objection by failing to object in a timely manner before the trial court. In any event, there was no error. Under the time-for-trial rule, trial courts are allowed to grant continuances when they deem it necessary in the administration of justice. Here, the trial court properly exercised its discretion in granting a number of continuances primarily because the DPA was occupied in other trials.

a. Relevant Facts.

Lopez was held in custody pending his trial. Thus, CrR 3.3 required his trial be held within 60 days of the original commencement date. On the original trial date, December 14, 2011, the assigned Deputy Prosecuting Attorney (DPA) was in trial on another case and the court continued Lopez's case to December 19, 2011, pursuant to CrR 3.3(f)(2), and extended his time-for-trial expiration 30 days beyond the new trial date, pursuant to CrR 3.3(b)(5). CP 92.

From December 19, 2011 to March 26, 2012 (the first day of Lopez's trial), Lopez's time-for-trial expiration was continued on multiple occasions in the "administration of justice" due to the DPA being unavailable while in several different trials. See Appendix 1[2]; 2RP 5-6, 10; 3RP 3, 4; 4RP 9. One of the continuances during this period was granted due to both the DPA and defense counsel being in trial. CP 119. Although only one continuance was granted due to joint unavailability of both attorneys, Lopez's defense counsel noted that he was assigned out to other trials approximately three times during this period, but "the trials have

[2] The State has prepared a table of continuances for the Court's convenience. The table is attached as Appendix 1.

never lasted more than the morning... because they were resolved." 4RP 5.

From December 19, 2011 to March 26, 2012, the court continued the trial date on seven occasions due to judicial unavailability. Appendix 1. On these occasions, the court did not make a finding that the continuance was "required in the administration of justice" and these continuances did not reset Lopez's time-for-trial expiration date to a later date. CP 93, 95, 105, 125-26, 131-32. In every instance that Lopez's trial was continued due to judicial unavailability, his time-for-trial expiration date remained the same as when it was previously set. Id.

Lopez incorrectly asserts that the "vast majority of the continuances were at the request of the State." Brief of Appellant at 17. In fact, all of the motions for continuance granted by the court were brought by the court itself. CP 92-93, 95-137; Supp. CP__ (Sub # 78, Order Continuing Trial dated Feb. 13, 2012). Lopez's trial counsel correctly noted that the *only* motion for continuance brought by the State, due to witness unavailability, was denied by the court. 4RP 3.

On February 21, 2012, Lopez brought a motion to discharge his defense counsel before Chief Criminal Judge Ronald Kessler.

2RP 3-7. At the motion hearing, Lopez's defense counsel explained:

> Mr. Lopez has asked me on several occasions to do a motion to dismiss for a violation of his speedy trial. I've tried to explain to him that under the current court rule and the way the speedy trial rule is written, in effect there is no speedy trial rule. And he says that he needs a lawyer who understands the speedy trial rule. I said, "You're free to ask Judge Kessler, but I think he'll explain to you that there really is no teeth to our speedy trial rule." So here we are.

2RP 4-5. Lopez then told the court, "I just want to know what's going on, that's about it." 2RP 5. Lopez's defense counsel and the DPA informed the court, based on the DPA's other pending trials and the relative newness of Lopez's case, that the DPA would likely be sent out on three or four other trials before Lopez's trial. 2RP 5-6. Lopez then requested and was granted a bond hearing. 2RP 6. Lopez then withdrew his motion to discharge his defense counsel. 2RP 6. At this hearing, although Lopez asked for an explanation of why his trial had not yet commenced, Lopez did not object to any continuances granted under CrR 3.3 nor did he bring a motion to dismiss for a CrR 3.3 violation.

On March 26, 2012, Lopez's trial began with pretrial motions before Judge Sharon Armstrong; on that date, Lopez's time-for-trial expiration date was April 25, 2012. 4RP 2; CP 137. On the first

day of trial, Lopez brought a motion to dismiss, citing CrR 3.3. 4RP 2; CP 21-22. Lopez's defense counsel argued that "the court has continued to grant continuances and extended the defendant's speedy trial because the prosecutor has been in trial...the defendant is adamant that the local rule has been violated." 4RP 5. Addressing Lopez directly, Judge Armstrong explained that under the rule and case law, it is proper to continue a case when an attorney is unavailable in another trial. 4RP 8. Judge Armstrong continued to address Lopez:

> But, you know, pounding on the table and talking about the Sixth Amendment isn't really helpful, because it doesn't really focus on the legal issue that has to be resolved, okay? So your lawyer is a very experienced lawyer, I've known him for a long time, and I trust his explanation to you about the law that applies.

Id. After hearing further argument from both Lopez and the State, Judge Armstrong denied Lopez's motion to dismiss. 4RP 14. Although invited to point to a single continuance granted in violation of CrR 3.3, Lopez failed to do so.

b. Review Is Barred By RAP 2.5(a) Based On Lopez's Failure To Timely Object.

RAP 2.5(a) allows the appellate court to refuse to review any claim of error that was not raised in the trial court. RAP 2.5(a). The rule requires that a party must raise an issue at trial to preserve it for appeal unless the party shows that the issue was a manifest error affecting a constitutional right. State v. Fenwick,164 Wn. App. 392, 398, 264 P.3d 284 (2011) (citing State v. Robinson, 171 Wn.2d 292, 301, 304-06, 253 P.3d 84 (2011)). The purpose of the rule is to "encourage 'the efficient use of judicial resources' ... by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." Robinson, 171 Wn.2d at 304-05 (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). See also Fenwick, 164 Wn. App. at 398.

Review is barred by RAP 2.5(a) because no constitutional claim is raised and Lopez did not object under CrR 3.3 within the time required by the court rule. CrR 3.3(d)(3) requires a party to note an objection to a new trial date "within 10 days after the notice is mailed or otherwise given and move the court to set the trial within the time limits...A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced

on such a date is not within the time limits prescribed by this rule." See State v. Farnsworth, 133 Wn. App. 1, 130 P.3d 389 (2006) (reversed in part on other grounds at 149 Wn.2d 402, 68 P.3d 1065 (2003)).

Superior Court Criminal Rule 3.3 states that it is the "responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime." CrR 3.3(1). Once a trial date is set, the defense has the responsibility to object in a timely manner to a perceived violation of CrR 3.3. State v. Carson, 128 Wn.2d 805, 912 P.2d 1016 (1996); State v. Chenoweth, 115 Wn. App. 726, 63 P.3d 834 (2003).

Here, Lopez did not object to a violation under CrR 3.3 until the day his trial began. 4RP 2. By that date, March 26, 2012, more than 10 days had elapsed since his expiration date was reset to a date beyond March 26, 2012.[3] Thus, Lopez waived any objection to his trial being heard on March 26, 2012 under CrR 3.3 by failing to make a timely objection.

[3] The trial court ordered the time-for-trial expiration date to be reset to March 28, 2012 on February 23, 2012. CP 122.

c. The Trial Court Appropriately Exercised Its Discretion.

While a reviewing court generally reviews an alleged violation of the time-for-trial rule *de novo* (State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009)), Lopez's contention here is that his time-for-trial right was violated by the court's granting of numerous continuances when the DPA was in trial on other cases. Accordingly, the proper standard of review here is abuse of discretion rather than *de novo* review.

A speedy trial within the CrR 3.3 time period is not a constitutional mandate and a reviewing court will not disturb a trial court's grant or denial of a motion for a CrR 3.3 continuance absent a showing of a manifest abuse of discretion. State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996); State v. Silva, 72 Wn. App. 80, 863 P.2d 597 (1993). A trial court abuses its discretion only where its decision was "manifestly unreasonable, or was based on untenable grounds or reasons." State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005).

Washington's time-for-trial rule (CrR 3.3) was amended extensively to its present form in 2003. Karl B. Tegland, 4A Washington Practice: Rules Practice 53 (2007 Pocket Part, 6th ed.

2002). One of the stated goals of the task force that proposed changes to the rule was to "provide courts with greater flexibility for getting cases heard, including flexibility with regard to court congestion." Id. at 54. To accomplish this goal, the task force proposed the addition of a limited cure period, as well as the addition of a 30-day buffer period to ensure that "following the end of an excluded period of time there will always be at least 30 days within which to bring the case to trial." Id. Both provisions were included in the amended rule. See CrR 3.3(b)(5) and (g).

In its current form, as amended in 2003, the time-for-trial rule mandates that a defendant who is detained in jail shall be brought to trial "within the longer of (i) 60 days after the commencement date specified in this rule, or (ii) the time specified in subsection (b)(5)." CrR 3.3(b)(1). Subsection (b)(5) specifies that "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). Continuances, defined as "delay granted by the court pursuant to section (f)," are excluded periods. CrR 3.3(e)(3).

Under section (f), a continuance may be granted "on motion of the court or a party" when "such continuance is required in the

administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). When a court grants a continuance, it "must state on the record or in writing the reason for the continuance." Id.

The rule now also dictates that "no case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution." CrR 3.3(h). This section gives effect to the task force's intent "that the courts apply the proposed rule 'as is' instead of adding new requirements not already there." Tegland, 4A Washington Practice: Rules Practice, at 55.

The trial court did not abuse its discretion in granting several continuances based on the unavailability of the prosecutor and/or defense attorney because of involvement in another trial. Washington courts have consistently held that a prosecutor's unavailability due to his or her participation in another trial is good cause to continue trial. State v. Chichester, 141 Wn. App. 446, 170 P.3d 583 (2007); State v. Williams, 104 Wn. App. 516, 17 P.3d 648 (2001). Division One has expressly acknowledged that in urban areas, as is the case here, "deputy prosecutors... are required to try cases back to back, day after day, and month after month, and

year after year." State v. Kelley, 64 Wn. App. 755, 764-65, 828 P.2d 1106 (1992). In Williams, the court found that several continuances that resulted in a month-long delay were warranted in the administration of justice (although the trial court had incorrectly categorized them as "unforeseen circumstances"), due to the DPA being involved in another trial and the need for defense counsel to prepare. Id. at 522-24.

Lopez asserts that none of the many continuances in this case was validly granted, that each continuance was an abuse of the court's discretion, and that his right to a speedy trial was thus violated. To reach this conclusion, Lopez ignores the plain language of CrR 3.3 as well as precedent that establishes that a court does not abuse its discretion by continuing cases when proper grounds exist. The court delayed the start of Lopez's trial multiple times, beginning December 14, 2011, pursuant to CrR 3.3(f)(2), due to the unavailability of the DPA, and once due to the joint unavailability of the DPA and defense counsel. In doing so, the court carefully and correctly applied CrR 3.3.

With respect to the continuances initiated by the court because the DPA was in trial on other cases, Lopez cites State v. Nguyen, State v. Saunders, Kelley, and Chichester, for the

proposition that the court erred in granting these continuances. Nguyen, 131 Wn. App. 815, 129 P.3d 821 (2006); State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009); Kelley, 64 Wn. App. 755; Chichester, 141 Wn. App. 446. Lopez's reliance on these cases is misplaced.

Citing to Saunders and Nguyen, Lopez incorrectly argues that the trial court failed to make an accurate record of the reasons for delay. In Saunders and Nguyen, the courts held that a trial court may not simply declare that a delay is required in the "administration of justice" without providing a legitimate reason for delay. Nguyen, 131 Wn. App. at 820-21; Saunders, 153 Wn. App. at 220. The court rule, similarly, requires that when a court grants a continuance, pursuant to CrR 3.3(f)(2), it "must state on the record or in writing the reason for the continuance."

Contrary to Lopez's argument, the trial court here did not fail to state the reasons for the trial continuances, nor did it simply declare that the continuance was in the "administration of justice." Rather the trial court, at the time *every* continuance was granted, articulated that the continuance was being granted in the "administration of justice" because one or both of the attorneys was in trial. CP 92-93, 95-137; Supp. CP__ (Sub # 78). In his

argument, Lopez ignores the record of this case where the court adequately explained "on the record or in writing" that Lopez's trial was continued because the DPA was in trial. Id.

Seven other trial continuances were initiated by the court based on judicial unavailability. CP 93, 95, 105, 125-26, 131-32. In these instances, however, in contrast to the instances where the DPA or defense counsel was actually in another trial, the court properly recognized that the "administration of justice" did not require the delays, and accordingly did not adjust Lopez's expiration date. Id. Thus, these continuances did not affect Lopez's time-for-trial. Lopez's expiration date was changed only when the court continued the trial in the "administration of justice" due to the unavailability of the DPA or defense counsel when one or both were in trial. See Appendix 1. Lopez fails to acknowledge that his expiration date was not altered based on these continuances. Instead, Lopez relies on several inapposite cases where court congestion caused a trial to be continued beyond the expiration of a defendant's time-for-trial under CrR 3.3. State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009); State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005).

Lopez incorrectly argues that the trial court failed to make an accurate inquiry into the reasons for judicial unavailability. In making this argument, Lopez relies on two cases where the trial courts erred by continuing a case *beyond the expiration of time-for-trial* due to court congestion without making an inquiry on the record of the reasons for such congestion. Kenyon, 167 Wn.2d at 134; Flinn, 154 Wn.2d at 200. Unlike those cases, where the court congestion led to an extension of the time-for-trial beyond the expiration date, here, the unavailability of judges did not alter Lopez's expiration date, let alone extend his trial date beyond the expiration date. Because Lopez's time-for-trial under CrR 3.3 was not extended due to judicial unavailability, the court was not required to make an inquiry into the judicial unavailability to satisfy a good cause continuance.

Lopez also argues that the trial court violated his due process rights by failing to make a sufficient record of the basis for the trial continuances. Due process requires a "record of sufficient completeness" to present errors to the appellate court. Draper v. Washington, 372 U.S. 487, 497, 83 S. Ct. 774, 9 L. Ed.2d 899 (1963). Although Lopez cites to the CrR 3.3(f)(2) requirement for the court to "state the reasons for a continuance on the record *or* in

writing," Lopez again ignores the record, which reflects that the trial court, at the time *every* continuance was granted, articulated the basis for the continuance. Brief of Appellant at 16 (emphasis added); CP 92-93, 95-137; Supp. CP__ (Sub # 78). Here, each order for continuance contains: 1) the identity of the party bringing the motion to continue; 2) any change to the trial date and the previously set date; 3) whether the trial is continued in the administration of justice pursuant to CrR 3.3(f)(2); 4) the basis for the continuance; and 5) the expiration date. Id. The record compiled here not only complies with CrR 3.3, but is a record of sufficient completeness.

In sum, the record of the various continuances and other adjustments of Lopez's trial date establish that the trial court carefully and correctly applied the plain language of CrR 3.3. As a result, Lopez's trial date was never moved beyond the applicable expiration dates, which were appropriately reset pursuant to CrR 3.3(b)(5) each time the court found proper grounds to continue the trial in the administration of justice. Because CrR 3.3(h) allows for dismissal only for an express violation of the time-for-trial rule, and because no such violation occurred here, Lopez's time-for-trial arguments should be rejected.

Nevertheless, despite the fact that the trial court properly applied CrR 3.3, and despite the fact that dismissal under the rule is appropriate only where expressly required by the rule, Lopez asserts that more was required to justify the continuances. In essence, he invites this Court to read into the amended time-for-trial rule requirements that are not expressly set forth in the rule. The legislature specifically precluded this, and Lopez's arguments should be rejected.

2. THE TERM "TRUE THREAT" IS A TERM OF ART DESCRIBING THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF FELONY HARASSMENT.

Lopez argues that it was error not to include the definition of "true threat" in the charging language and "to convict" jury instruction for the crime of Felony Harassment. He contends that the definition of "true threat" is an essential element of every crime involving a verbal threat. This is inconsistent with existing case law and directly contrary to a recent ruling from the Washington State Supreme Court. These cases establish that a "true threat" is not an essential element of a crime involving verbal threats, but is instead

a term of art used to describe the permissible scope of threat statutes for First Amendment purposes.

a. Relevant Facts.

The State alleged by information that Lopez "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; RCW 9A.46.020.

The trial court gave the jury a "to convict" instruction that read in pertinent part:

> To convict the defendant of the crime of felony harassment...each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 4, 2011, the defendant knowingly threatened to kill Sophia Mohnani immediately or in the future;
> (2) That the words or conduct of the defendant placed Sophia Mohnani in reasonable fear that the threat would be carried out;
> (3) That the defendant acted without lawful authority; and
> (4) That the threat was made or received in the State of Washington.

CP 59; see also WPIC 36.07.02.

The court also gave the following definitional instruction in pertinent part:

> Threat means to communicate, directly or indirectly, the intent: To cause bodily injury in the future to the person threatened or to any other person...To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 56; see also WPIC 2.24.

b. Lopez Was Properly Charged And The Jury Was Properly Instructed.

A charging document is sufficient if it sets forth all essential elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). The purpose of the rule is to ensure that defendants are sufficiently apprised of the charges against them so that they may prepare a defense. Id. at 101. Unlike an essential element that must be set forth in a charging document, the term "true threat" is definitional. Thus, the language describing what constitutes a "true threat," is no different from language used to define "intent," "recklessness," or "great bodily harm." This

language need not be included in the charging document or the "to convict" instruction.

In State v. Allen, the Washington State Supreme Court recently held that the "true threat" requirement is not an essential element of a harassment statute.[4] No. 86119-6, 2013 WL 259383 at *7-9 (Wash. Sup. Ct. Jan. 24, 2013). In Allen, the defendant was charged under the same statute as was Lopez and the jurors were instructed using the same "to convict" and "definition of a threat" language as were the jurors in Lopez. Id.

Allen also affirmed the Court of Appeals holdings in State v. Tellez and State v. Atkins. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (the constitutional concept of "true threat" merely defines and limits the scope of the essential threat element and it is error not to give a limiting instruction defining threats to include only true threats); Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010) (the defendant's First Amendment rights were protected so long as the jury was instructed as to the true threat requirement).

The State does not dispute that it was required to prove that Lopez's threat was a "true threat." As instructed here, the jury was required to find beyond a reasonable doubt that Lopez "knowingly

[4] State v. Allen was filed on January 24, 2013, after the Respondent's brief was submitted to the Court of Appeals.

threatened to kill" the mother of his child, and that the threat occurred "in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk." CP 55, 56. Lopez has cited no case holding that the language defining a "true threat" is a separate element that must be included in the charging document for Felony Harassment or for any other crime that contains a threat element. The cases cited by Lopez do not support his argument.

In Virginia v. Black, the Court was asked to rule on the constitutionality of a statute proscribing content-based conduct; specifically, whether Virginia's cross-burning statute violated the First Amendment. 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed.2d 535 (2003). The Court held that a state could proscribe cross-burning done with the intent to intimidate, but that the statute violated the First Amendment because it contained a presumption that any cross-burning was done with the intent to intimidate, even if the cross was burned for political or ideological reasons. 583 U.S. at 363-64. Black did not determine, or even discuss, what must be included in the charging document or jury instructions. In any

event, the Washington harassment statute does not proscribe content-based conduct.

State v. Schaler dealt with jury instructions, which required the jury, in order to convict, to find that Schaler knowingly threatened to cause bodily injury, but defined knowingly as "when the person subjectively intends to communicate a threat." 169 Wn.2d 274, 285, 236 P.3d 858 (2010). In Schaler, the submitted definition of "threat" failed to mention anything about the "fear that typically results from a threat." Id. at 285-86. Thus, the Schaler jury was left with no mens rea requirement attached to the result of the threat, resulting in the faulty instructions. However, the Schaler court clarified, had the "knowingly threaten" language in the jury instructions not been so defined, the mens rea requirement would have been satisfied. Id. at 286.

Additionally, Lopez argues that a reasonable person in Lopez's position would not foresee that a listener would interpret his threat as a serious threat. This argument is wholly unsupported by the record. Lopez threatened to kill Mohnani on two occasions while Lopez was straddled above Mohnani as she lay on the floor. 5RP 79-81, 84-86. During both occasions, Lopez repeatedly threatened to kill Mohnani while he was strangling her with his

hands, restricting her ability to breathe. Id. While being strangled by Lopez, Mohnani squirmed, kicked, and struggled to get Lopez off of her. 5RP 81, 83-84. Mohnani took the second occasion "more seriously because he [strangled her] harder and longer" and there was a longer period of time that she was unable to breathe. 5RP 84-85. While Lopez was on top of her in the bathroom, Mohnani urinated on herself and believed she "was going to die right there." 5RP 86-88.

The jury found beyond a reasonable doubt that Lopez's threat to kill Sophia Mohnani was a "true threat." Because Lopez was properly charged and the jury was properly instructed on all of the elements of the crime of Felony Harassment, this Court should affirm Lopez's conviction for Felony Harassment.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR MISAPPLY THE LAW BY RULING THAT LOPEZ'S CONVICTIONS FOR ASSAULT AND FELONY HARASSMENT DID NOT CONSTITUTE THE "SAME CRIMINAL CONDUCT" FOR SCORING PURPOSES.

Lopez asserts that the trial court abused its discretion in finding that his two convictions did not constitute the "same criminal conduct." Lopez is incorrect. Lopez also, notably, applies the

wrong burden of proof and argues for the application of the incorrect standard of review. Lopez's arguments should be rejected because the trial court properly exercised its discretion in finding, based on the facts of this case, that Lopez's crimes of Assault in the Second Degree and Felony Harassment did not constitute the "same criminal conduct."

A determination of "same criminal conduct" at sentencing affects the standard range sentence by altering the offender score, which is calculated by adding a specified number of points for each prior offense. RCW 9.94A.525; State v. Graciano, No 86530-2, 2013 WL 376076, at *2 (Wash. Sup. Ct. Jan. 31, 2013)[5]. Current offenses are treated as prior convictions for purposes of this calculation. RCW 9.94A.589(1)(a). For the purpose of calculating a defendant's offender score, crimes constitute the "same criminal conduct" only when they are committed at the same time and place, involve the same victim, *and* involve the same objective criminal intent. Id. (emphasis added). The exceptions in RCW 9.94A.589(1)(a) are construed narrowly to disallow most assertions of same criminal conduct. State v. Saunders, 120 Wn. App. 800,

[5] State v. Graciano was filed on January 31, 2013, after the Respondent's brief was submitted to the Court of Appeals.

824, 86 P.3d 1194 (2004); State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).

The burden of proof is on the defendant to prove that crimes constitute the "same criminal conduct." Graciano at *3-4.[6] Each of a defendant's convictions count towards his or her offender score, unless the defendant convinces the court that the crimes constitute the same criminal conduct. Graciano at *2-4. The State bears the burden of proving the existence of prior convictions at sentencing, both because the State is the moving party and because "the existence of a prior conviction favors the State (by increasing the offender score)." Id. at *3-4. However, a finding that two crimes constitute the "same criminal conduct" favors the defendant, and, thus, the defendant bears the "burden of production and persuasion." Id. at *4.

Determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of the law. Id. at *1-2.[7] Deciding whether crimes involve the same time, place, victim, and

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[6] Lopez incorrectly contends that the burden of proof is on the State to prove that each crime *does not* constitute the same criminal conduct.

[7] Lopez argues that the standard of review applied to a finding of same criminal conduct "is subject to debate." Brief of Appellant at 31. Since the filing of Lopez's brief, the Washington Supreme Court has resolved this issue finding that a determination of same criminal conduct is reviewed for abuse of discretion or misapplication of the law. Graciano at *1-2.

criminal intent "often involves determinations of fact." Graciano at *2. Due to this highly fact-specific inquiry, the reviewing court gives great deference to the trial court's ruling and greater deference to the trial court where the record adequately supports either outcome. Id. at *2. When the record supports only one conclusion on whether the crimes constitute the "same criminal conduct," a sentencing court abuses its discretion in arriving at a contrary result. Id. at *3 (citing State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991)). However, "where the record supports either conclusion, the matter lies in the court's discretion." Graciano at *3.

Here, it is undisputed that Lopez committed the crimes in the same place and time, and against the same victim. 8RP 2-5. Thus, the issue is whether the crimes involved the same intent.

To decide whether two crimes involve the same criminal intent for purposes of determining "same criminal conduct," the court must examine and compare each statute underlying each crime to determine whether the required intents are the same or different for each crime. State v. Hernandez, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). Two crimes do not involve the same criminal intent when the defendant's intent objectively changes from

one crime to the other. State v. King, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002), review denied, 149 Wn.2d 1015 (2003). Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan. State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). However, where the second crime is "accompanied by a new objective 'intent,'" one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct. State v. Wilson, 136 Wn. App. 596, 613-14, 150 P.3d 144 (2007) (quoting State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997)).

At sentencing, the trial court evaluated Lopez's assault and harassment of Mohnani. Lopez's defense counsel first argued that Lopez's intent was to "harass *and* to assault." CP 88 (emphasis added). Later, Lopez's defense counsel argued that Lopez's "intent was to perhaps kill her, I don't know the answer to that... but [in] my research, I didn't find the silver bullet that says I'm absolutely right." 8RP 4. Now, without citing any statutory authority or case law, Lopez contends: "An objective perpetrator who assaults a victim while threatening to kill him or her does so to dominate the victim

and instill fear." Brief of Appellant at 34. However, after presiding over this multi-day trial and reviewing Lopez's briefing on same course of criminal conduct, the trial court ruled that "based on what I know, that it is not the same criminal conduct." 8RP 2-3.

The trial court's ruling that Lopez's two crimes do not constitute the same criminal intent is supported by the elements of the crimes themselves and the facts of this case demonstrating Lopez's objective intent. The criminal intent for Assault in the Second Degree requires that the defendant *intentionally assaults by strangulation*. RCW 9A.36.021(1)(g); see also CP 49. In contrast, Felony Harassment requires that the defendant *knowingly threatens to kill.* RCW 9A.46.020(1),(2); see also CP 55. These crimes have different intents, and therefore do not satisfy the statutory requirements. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994) (all prongs must be met for a finding of same criminal conduct; the absence of any one of them prevents such a finding.); see State v. Brown, 100 Wn. App. 104, 113, 995 P.2d 1278 (2000) (rape and assault fail to satisfy the requirements because they have separate intents). Second Degree Assault, as charged here, requires that an individual intend to assault by strangulation, a different statutory intent than the knowledge

required for Felony Harassment. RCW 9A.36.021(1)(g); RCW 9A.46.020(1),(2).

The record shows that Lopez had separate criminal intents for the two acts: one for the assault (physically assaulted Mohnani when he strangled her using his hands) and one for the harassment (verbally threatened repeatedly to kill Mohnani). The facts here do not establish that Lopez had the same criminal intent when he threatened Mohnani and when he strangled her. Viewed objectively, the facts support an inference that Lopez intended to cause physical harm or death when he strangled Mohnani and that he intended to frighten her when he threatened to kill her.

Construing RCW 9.94A.589(1)(a) narrowly, as required, and because the facts support a finding that Lopez had a different criminal intent with respect to each count, the trial court did not abuse its discretion or misapply the law in finding that Lopez's two crimes did not constitute the same criminal conduct. Accordingly, this Court should reject Lopez's request that his sentence be reversed and remanded.

4. THE JUDGMENT AND SENTENCE MUST BE AMENDED TO REFLECT THE COURT'S RULING THAT THE TERMS OF CONFINEMENT ARE TO RUN CONCURRENTLY.

Lopez argues that the trial court erred in failing to reflect in the Judgment and Sentence its finding that Lopez's two terms of confinement are to be served concurrently. This error stems from failing to circle whether the "terms for the counts" are "consecutive/ concurrent" in the confinement section of the judgment and sentence. CP 80. The State concedes this clerical mistake and joins in Lopez's request that the case be remanded for amendment of the judgment and sentence.

At sentencing, the court ruled that the terms of confinement for both counts would run concurrently. 8RP 14-16. The judgment and sentence omits this ruling. CP 80.

A trial court has the authority to correct a clerical mistake in a judgment at any time. CrR 7.8(a). On appeal, the remedy for such a mistake is remand for the trial court to correct it. State v. Priest, 100 Wn. App. 451, 455-56, 997 P.2d 452 (2000). There is nothing in the record to suggest that the error in the judgment and sentence is anything other than a clerical mistake. Accordingly, this matter should be remanded for the sole purpose of amending the

judgment and sentence to state that the terms for counts I and II are to run concurrently.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Lopez's convictions and sentence. Regarding the clerical error on the Judgment and Sentence, the State respectfully asks this Court to remand this case to the trial court to amend the Judgment and Sentence to reflect the court's oral ruling that the sentences are to be served concurrently.

DATED this 27 day of February, 2013.

Respectfully submitted,

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APPENDIX 1

Table of Continuances Summarizing Clerk's Papers

Date Entered	Hearing/ Basis For Continuance	Trial Date	Expiration Date	CP
10/20/2011	Arraignment	12/14/2011 (set at a later hearing)	12/19/2011	23, 90
12/14/2011	Required in the administration of justice: DPA in trial	12/19/2011	1/18/2012	92
12/20/2011	No judicial availability	12/20/2011	1/18/2012	93
12/21/2011	No judicial availability	12/21/2011	1/18/2012	95
12/22/2011	Required in the administration of justice: DPA in trial	12/27/2011	1/26/2012	96
12/27/2011	Required in the administration of justice: DPA in trial	12/28/2011	1/27/2012	97
12/28/2011	Required in the administration of justice: DPA in trial	12/29/2011	1/28/2012	98
12/29/2011	Required in the administration of justice: DPA in trial	1/3/2012	2/2/2012	99
1/2/2012	Required in the administration of justice: DPA in trial	1/4/2012	2/3/2012	100
1/4/2012	Required in the administration of justice: DPA in trial	1/5/2012	2/4/2012	101
1/5/2012	Required in the administration of justice: DPA in trial	1/9/2012	2/8/2012	102
1/9/2012	Required in the administration of justice: DPA in trial	1/10/2012	2/9/2012	103
1/11/2012	Required in the administration of justice: DPA in trial	1/11/2012	2/10/2012	104
1/12/2012	No judicial availability	1/12/2012	2/10/2012	105
1/13/2012	Required in the administration of justice: DPA in trial	1/17/2012	2/16/2012	106
1/17/2012	Required in the	1/18/2012	2/17/2012	107

	administration of justice: DPA in trial			
1/18/2012	Required in the administration of justice: DPA in trial	1/23/2012	2/22/2012	108
1/23/2012	Required in the administration of justice: DPA in trial	1/24/2012	2/23/2012	109
1/24/2012	Required in the administration of justice: DPA in trial	1/26/2012	2/25/2012	110
1/26/2012	Required in the administration of justice: DPA in trial	1/30/2012	2/29/2012	111
1/30/2012	Required in the administration of justice: DPA in trial	1/31/2012	3/1/2012	112
1/31/2012	Required in the administration of justice: DPA in trial	2/1/2012	3/2/2012	113
2/1/2012	Required in the administration of justice: DPA in trial	2/2/2012	3/3/2012	114
2/2/2012	Required in the administration of justice: DPA in trial	2/6/2012	3/5/2012	115
2/7/2012	Required in the administration of justice: DPA in trial	2/8/2012	3/9/2012	116
2/8/2012	Required in the administration of justice: DPA in trial	2/9/2012	3/10/2012	117
2/9/2012	Required in the administration of justice: DPA in trial	2/13/2012	3/14/2012	118
2/13/2012	Required in the administration of justice: DPA in trial	2/15/2012	3/16/2012	Supp. CP__(Sub# 78)
2/15/2012	Required in the administration of justice: DPA and defense counsel in trial	2/21/2012	3/22/2012	119
2/21/2012	Required in the administration of justice: DPA in trial	2/22/2012	3/23/2012	120
2/22/2012	Required in the	2/23/2012	3/24/2012	121

	administration of justice: DPA in trial			
2/23/2012	Required in the administration of justice: DPA in trial	2/27/2012	3/28/2012	122
2/27/2012	Required in the administration of justice: DPA in trial	2/28/2012	3/29/2012	123
2/28/2012	Required in the administration of justice: DPA in trial	2/29/2012	3/30/2012	124
3/1/2012	No judicial availability	3/1/2012	3/30/2012	125
3/2/2012	No judicial availability	3/5/2012	3/30/2012	126
3/6/2012	Required in the administration of justice: DPA in trial	3/6/2012	4/5/2012	127
3/7/2012	Required in the administration of justice: DPA in trial	3/8/2012	4/7/2012	128
3/9/2012	Required in the administration of justice: DPA in trial	3/12/2012	4/11/2012	129
3/12/2012	Required in the administration of justice: DPA in trial	3/13/2012	4/12/2012	130
3/14/2012	No judicial availability	3/14/2012	4/12/2012	131
3/15/2012	No judicial availability	3/15/2012	4/12/2012	132
3/16/2012	Required in the administration of justice: DPA in trial	3/19/2012	4/18/2012	133
3/19/2012	Required in the administration of justice: DPA in trial	3/20/2012	4/19/2012	134
3/20/2012	Required in the administration of justice: DPA in trial	3/21/2012	4/20/2012	135
3/21/2012	Required in the administration of justice: DPA in trial	3/22/2012	4/21/2012	136
3/22/2012	Required in the administration of justice: DPA in trial	3/26/2012	4/25/2012	137
3/26/2012	Trial begins	3/26/2012	4/25/2012	4RP 2

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent and Appendix 1, in STATE V. ANDREW LOPEZ, Cause No. 68619-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

02-27-13
Date

Done in Seattle, Washington