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COA No. 65735-6-1

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

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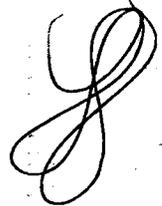
STATE OF WASHINGTON,

Respondent,

v.

JAMES O'CAIN,

Appellant.



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ON APPEAL FROM THE SUPERIOR COURT  
OF KING COUNTY

The Honorable Jim Rogers

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. In Mr. O’Cain’s trial on charges of multiple assaults and a charge of felony harassment, the evidence was insufficient to prove felony harassment.

2. Double Jeopardy was violated by entry of judgment on the conviction for felony harassment, where there was no expressly or implicitly communicated threat to kill and the State solely proffered, as evidence of such alleged threat, the same acts which supported the defendant’s fourth and second degree assault convictions.

3. Defense counsel provided ineffective assistance of counsel in failing to argue that the assault offenses and the harassment conviction were the “same criminal conduct.”

4. Absent the manifest constitutional error of admitting ER 803(a)(4) medical hearsay in a case where the complainant did not testify at trial, reversal of the second degree assault conviction is required, where it cannot be said that the jury would have reached the same verdict absent the error, and where the evidence – absent the error -- was in fact wholly insufficient to prove second degree assault of Ms. Robinson by intentional assault recklessly causing substantial bodily harm.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the evidence insufficient to prove felony harassment (threat to kill) where the evidence at trial included no communication of a threat to kill, but showed only that the non-testifying complainant, Ms. Robinson, called 911 and stated that her boyfriend had assaulted her, and reported to the operator that “he [the defendant O’Cain] tried to kill me”?

2. Was the defendant’s right to be free from Double Jeopardy violated by imposing judgment on the felony harassment conviction, where that offense was proved solely by the same evidence used to prove the multiple assault charges?

3. Did defense counsel provide ineffective assistance of counsel by failing to request that the assault and felony harassment counts be scored as the “same criminal conduct”?

4. Must the second degree assault conviction be reversed where medical hearsay, admitted in violation of Mr. O’Cain’s confrontation rights, was the crucial and/or only evidence that the complainant’s injury of broken glass in her back was caused by the defendant’s assaultive actions?

## C. STATEMENT OF THE CASE

1. **Procedural history.** Based upon a 911 call to police by Sheila Robinson reporting a physical altercation at her home, and upon Ms. Robinson's police statement given to law enforcement at Highline Hospital, James O'Cain was arrested and charged with the following offenses: second degree assault by strangulation, second degree assault by intentional assault recklessly causing substantial bodily harm, felony harassment by threatening to kill Ms. Robinson, and tampering with a witness.<sup>1</sup> CP 1-6, 19-22.

According to the affidavit of probable cause, which was based on the incident report of Deputy Scott Thomas (which in turn referenced his interview of and written statement from Ms. Robinson taken at Highline Hospital), Ms. Robinson claimed that Mr. O'Cain had pushed her onto a couch, causing her to land on a glass vase. Additionally, the police report indicated that Mr. O'Cain allegedly verbally threatened to kill Ms. Robinson. CP 1-6.

However, Sheila Robinson did not testify at trial. As a result, various of her out-of-court statements were assessed for admissibility at trial under Crawford v. Washington, 541 U.S. 36,

51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Neither Robinson's written statement describing how she cut her back, nor any testimony by Deputy Thomas regarding the alleged verbal threat by the defendant, were admitted.

Nonetheless, the prosecutor pursued the harassment charge at trial, and argued in closing that Mr. O'Cain was guilty of felony harassment, not by a stated threat, but by virtue of his claimed physically assaultive conduct that constituted the evening's incidents, buttressed (the State contended) by Robinson's hearsay statement from the 911 call in which she reports, "he [the defendant] tried to kill me." See 7/1/10RP at 320 (prosecutor arguing in closing that "she thought his actions would lead to her death" and "the defendant's behavior in this case constituted the threat to Ms. Robinson") (Emphasis added.).

The jury apparently rejected the contention that Mr. O'Cain had strangled Ms. Robinson when he put his hand on her throat during the episode, and thus found him guilty on the lesser-included offense of fourth degree assault, as to that count. The jury convicted Mr. O'Cain on the second count of second degree

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<sup>1</sup> Charges involving violation of a court order were dismissed. 7/1/10RP

assault, which had alleged that the defendant intentionally assaulted Ms. Robinson and recklessly inflicted substantial bodily harm by virtue of the glass that lacerated her back. Mr. O'Cain was also convicted on the felony harassment count and the tampering count. See CP 102-07.

Standard range sentences were imposed, CP 115-23, CP 112-13, and Mr. O'Cain timely appealed. CP 114.

**2. Trial testimony.** Ms. Robinson's 911 call was admitted as non-testimonial, since the purpose of the call -- according to the caller's claims to the operator -- was to seek help at a time when the defendant was allegedly still present in the area of the home. 6/23/10 at 48-52; Supp. CP \_\_\_\_, Sub # \_\_\_\_ (State's transcript of 911 call, filed \_\_\_\_, at p. 2).

In the 911 recording, Ms. Robinson replies to the operator that she had been in a fight with her boyfriend Mr. O'Cain, and that he was trying to get back into the home. Then the caller states that she had cuts, because she "fell on some glass:"

**OPERATOR:** Has it been physical by hitting or?

**ROBINSON:** Yes . . . (unintel) . . . I have cuts. I fell on some glass. I got cuts all over my back. . . . (unintel) . . . he tried to kill me.

Supp. CP \_\_\_\_, Sub # \_\_\_\_ (State's transcript of 911 call, filed \_\_\_\_, at p. 2); Supp. CP \_\_\_\_, Sub # 95D (Exhibit list, State's exhibit 23 (CD-KCSO 911 Tape Recording)). The operator next asks questions about whether the home's door is locked, and regarding Ms. Robinson's location in the home. Then, Ms. Robinson states that there was "glass stuck in my back:"

**ROBINSON:** . . . (unintel) . . . glass stuck in my back.

**OPERATOR:** You have glass stuck in your back?

**ROBINSON:** Yes.

**OPERATOR:** Okay. What did he – what did he cut it on? Where did the glass from – come from?

**ROBINSON:** . . . (unintel) . . . a little decorative thing on the table.

Supp. CP \_\_\_\_, Sub # \_\_\_\_ (State's transcript of 911 call, filed \_\_\_\_, at p. 6).

Deputy Scott Thomas noted to the jury that he took a written statement from Ms. Robinson while she was at Highline Hospital. 6/29/10RP at 97-99; State's Exhibit 34. However, the statement was identified as an exhibit, but was not read to the jury and did not

go back to the jury room during deliberations. 6/29/10RP at 99-100; Supp. CP \_\_\_\_, Sub # 98D (Exhibit list).<sup>2</sup>

Medical hearsay was admitted under the ER 803(a)(4) exception to the hearsay bar. As a consequence, Highline Hospital physician's assistant David Island, who removed glass, including a large fragment, from Ms. Robinson's back, stated that Ms. Robinson told him she was "thrown onto a [glass] table," which broke. 6/30/10RP at 175. Robinson also had a "tenderness along her facial features." 6/30/10RP at 172. Robinson told Island she had been "knocked out," which the witness testified meant she "lost consciousness." 6/30/10RP at 178. There was no diagnosis or detection of head injury by Island beyond Robinson's own "statement [to Island that] she was struck in the head." 6/30/10RP at 178-79. Robinson also stated that she was "choked" but no further details were provided. 6/29/10RP at 180-81. Mr. Island's

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<sup>2</sup> In the non-admitted written police statement taken at Highline, which was the basis of Deputy Thomas's incident report and in turn the affidavit of probable cause and the criminal case, Ms. Robinson claimed that she was pushed onto a couch by the defendant and landed on a glass vase, and claimed that the defendant verbally threatened to kill her. State's Exhibits 33 (incident report), 34 (written statement). However, this, and everything Robinson communicated to the Deputy orally and in this written statement, beyond her general statement at the scene that she had "injuries," and the fact that she was crying, was properly excluded under Crawford. 9/29/10RP at 88, 94.

medical report, State's Exhibit 41, was used to refresh his recollection, but was not admitted as an exhibit for jury review.

6/30/10RP at 171.

State's witness Nicholas Sutherland, an EMT who responded to the scene, stated that Ms. Robinson told him that she had been "struck with a glass object, which had broke, if I remember correctly, and that's how she received the cuts."

6/30/10RP at 220-21. State's exhibit 42 – the EMT's written report – was apparently used by the prosecutor for questioning of Sutherland during his *voir dire* testimony taken for purposes of the hearsay ruling, but was not admitted at trial for jury review.

6/30/10RP at 204, Exhibit 42, Supp. CP \_\_\_\_, Sub # 98D (Exhibit list).

Nurse Aliana Morris stated that Ms. Robinson had some lacerations on her right shoulder when she checked in at Highline Hospital. 6/30/10RP at 225. Robinson told the Nurse that she had been pushed, kicked, and choked by her boyfriend, and "thrown [sic] some objects at her." 6/30/10RP at 226. Robinson stated that she lost consciousness. 6/30/10RP at 226. A piece of glass was

removed from the back of her right shoulder by physician's assistant Island. 6/30/10RP at 227.

**3. Closing argument.** In closing argument, the State proffered the following theories of guilt, *inter alia*:

- The defendant committed second degree assault as to count 1 by strangling and choking Ms. Robinson, 7/1/10RP at 317;

- The defendant committed second degree assault as to count 2 by intentionally assaulting Ms. Robinson and recklessly inflicting the resulting substantial bodily harm of glass pieces lacerating her back. 7/1/10RP at 318-20;

- The defendant committed the crime of felony harassment (threat to kill) as shown by his physical assaults that night, and Ms. Robinson's statement to 911 that "he tried to kill me," 7/1/10RP at 320.

Defense counsel noted in closing that there was no evidence adduced, including on the 911 recording, of any "threatening" communication to Ms. Robinson by the defendant; 7/1/10RP at 327-28; that none of the physical evidence observed in the apartment provided any evidence of the specific facts required for the charge of an intentional assault with reckless infliction of

harm, 7/1/10RP at 329-30, 333 (“we don’t know how she fell”), 337 (“maybe that [glass item] was just there, and it broke when she was pushed onto a couch”). 7/1/10RP at 330-33. Counsel further argued that Robinson had claimed loss of consciousness, but never stated that she was strangled or choked and that her airway or breathing was thereby impeded, requiring the first count of second degree assault to be rejected. 7/1/10RP at 330-33, 335-36.

## **E. ARGUMENT**

### **1. MR. NYSTA’S CONVICTION FOR FELONY HARASSMENT WAS UNSUPPORTED BY SUFFICIENT EVIDENCE OF A KNOWING THREAT TO KILL.**

Mr. O’Cain’s conviction for felony harassment – threat to kill- must be reversed for insufficiency of the evidence.

Pursuant to RCW 9A.46.020, a person is guilty of Felony

Harassment -- threat to kill, when:

[w]ithout lawful authority, the person knowingly threatens: to cause bodily injury immediately or in the future to the person threatened or to any other person [and] the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out [and] the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened[.]

See RCW 9A.46.020(1)(b)(i). Thus, harassment consists of (1) a

knowing threat, (2) to cause bodily injury immediately or in the future, and (3) words or conduct placing the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1). A threat is a direct or indirect communication of the intent to cause bodily injury – here, to kill Ms. Robinson. WPIC 2.24; RCW 9A.04.110(26)(a).

The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. amend. 14.

Any challenge to the sufficiency of the evidence admits all inferences that reasonably can be drawn therefrom. State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980). However, the above statutory and constitutional standards are not met in this case, wherein the State proffered evidence, and contended in framing the case in closing argument, pursuant to a theory that Mr. O’Cain’s assaultive conduct during the evening constituted the threat to kill. For guilt, there must be an actual, knowing threat to

kill, and this “true threat” must be communicated to the victim. See, e.g., State v. Mills, 154 Wn.2d 1, 12, 109 P.3d 415 (2005); State v. Kilburn, 151 Wn.2d 36, 48-49, 84 P.3d 1215 (2004). A “threat” as charged in this case is defined as a direct or indirect communication of the intent to cause bodily injury in the future to the person threatened or to any other person. RCW 9A.04.110(25)(a).

Thus 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 person.” State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001).

The harassment statute thus plainly requires proof of a communicated threat. Pursuant to the statutory language, conduct by the threatenor may contribute to the victim’s fear that the threat will be acted upon – “the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” See RCW 9A.46.020(1)(b)(i). But there is no authority for any contention that violent conduct alone, unaccompanied by

words or other knowing communication of an expression of an intent to kill a person, amounts to felony harassment – threat to kill.

It is true that there is general case law allowing evidence of the accused's prior bad physical acts of violence in felony harassment cases, including as relevant to the offense's element of whether the victim reasonably feared that the threat would be carried out. 9/29/09RP at 35. See, e.g., State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000). See also State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (prior acts admissible as to victim's credibility); State v. Fisher, 1654 Wn.2d 727, 746, 202 P.3d 937 (2009) (similar holding).

However, this reasoning allowing admission of prior acts into evidence does support a proposition that a defendant's current alleged violent acts (here, charged as various assaults) can amount in and of themselves to the "threat to kill" required for felony harassment, in the absence of a knowing threat communicated in some manner. This is true irrespective of evidence that the complainant told 911 in an excited utterance that she believed the defendant had "tried to kill" her – which was a mere description of a past physical act.

When a threat is an element and the State fails to identify any evidence of a threat, the conviction must fail. State v. Weisberg, 65 Wn. App. 721, 725, 829 P.2d 252 (1992) (reversing conviction for rape in the second degree by forcible compulsion under RCW 9A.44.010(6) when the State failed to “identify any evidence of a threat of harm, either express or implied” and forcible compulsion alleged was a threat).

The case of State v. Hanson, 126 Wn. App. 276, 280, 108 P.3d 177 (2005), does not support an argument that the harassment count in this case was supported by sufficient evidence based on physical conduct alone. In that case, involving essentially misdemeanor harassment (a threat to injure that is not a threat to kill<sup>3</sup>), the complainant stated that she was caused, by the defendant’s actions, to be afraid that her husband was going to kill her, and the defendant’s actions were specifically that he threatened the complainant several times, during the course of physical violence toward her. Hanson, 126 Wn. App. at 277-80. The decision recites abundant evidence that the defendant in that

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<sup>3</sup> The defendant in Hanson was charged with felony harassment because of a prior conviction for harassment of the same victim, see Hanson, at 280 n. 3,

case did threaten the complainant. Id. Additionally, Mr. Hanson repeatedly attempted to call the complainant as she tried to report the physical abuse, and when he reached her, his yelling words caused her to become more afraid of the continuing threat.

Hanson, 126 Wn. App. at 280.

In comparison, in the present case, there was no evidence of any communicated threat. There was no evidence that past actions by the defendant somehow rendered his alleged current acts of violence a reasonably understood threat to kill. There was no evidence that the defendant's physical violence – assaultive battery -- came in a form that expressed a threatened mortal assault. The felony harassment conviction cannot be based solely on the victim's subjective reaction to the conduct of another.

Weisberg, 65 Wn. App. at 725. Here, furthermore, that reaction by Ms. Robinson was solely her 911 statement describing past physical conduct by the defendant – “he tried to kill me.” The evidence does not support a conviction for threat to kill under RCW 9A.46.020(1)(b)(i).

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as opposed to an allegation that he made a threat to kill (the complainant only feared that she would be killed).

Furthermore, if the defendant's assaultive conduct did also constitute felony harassment, then the two convictions violate Double Jeopardy.

**2. MR. NYSTA'S CONVICTION FOR FELONY HARASSMENT MUST BE VACATED WHERE IT WAS PROVED BY THE SAME FACTS ESTABLISHING THE MULTIPLE ASSAULT CONVICTIONS.**

**a. The double jeopardy clauses preclude multiple punishments for the same offense.**<sup>4</sup> The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. The Washington courts interpret Article 1, § 9's provision coextensively with the United States Supreme Court's reading of the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Without offending these constitutional rules barring

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<sup>4</sup> Double jeopardy violations are, in general, manifest constitutional errors that may be raised for the first time on appeal under RAP 2.5. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

duplicative punishment, the State may bring multiple charges arising from the same criminal conduct, in a single proceeding. State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). Courts may not, however, enter multiple convictions or impose punishment for conduct that amounts to a constitutional same offense; doing so *violates* the defendant's double jeopardy protections. State v. Freeman, 153 Wn.2d 765, 770-72, 108 P.3d 753 (2005).

Thus where a defendant's conduct can support charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the "same" constitutional offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 808, 100 P.3d 291 (2004). This focus on legislative intent is required because the legislature has the power to define criminal offenses and set punishments. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995); see William S. McAninch, Unfolding the Law of Double Jeopardy, 44 S. C. L. Rev. 411, 483-84 (1993).

In the case of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the United States Supreme

Court enunciated a rule to define whether two distinct statutory provisions constituted multiple punishments for the same offense: when each provision requires proof of an additional fact which the other does not, double jeopardy has not been offended by duplicative punishment. Blockburger, 284 U.S. at 304. The courts inquire whether the evidence proving one crime also proved the second crime. Orange, 152 Wn.2d at 820-821.

This is examined by looking to the charging theories and proof of the case rather than merely examining the statutory elements. Orange, at 819-820; State v. Freeman, 153 Wn.2d at 779. Here, the prosecutor's sole proof of felony harassment was the very same acts that also constituted the multiple assaults as to which the defendant was also convicted. This was the state of the proof, and the prosecutor's theory of guilt, as shown by the State's closing argument. 7/1/10RP at 320.

Under these circumstances, Mr. O'Cain's additional conviction for felony harassment violates Double Jeopardy. For example, the Supreme Court in Orange cited with approval State v. Potter, 31 Wn. App. 883, 645 P.2d 60 (1982), and In re Personal Restraint of Burchfield, 111 Wn. App. 892, 46 P.3d 840 (2002).

Orange, at 820. In Potter, the Court of Appeals held that convictions for reckless driving and reckless endangerment based on the defendant's excessive speed violated double jeopardy because "proof of reckless endangerment through use of an automobile will always establish reckless driving." Potter, 31 Wn. App. at 888. Similarly, in Burchfield, the Court held that convictions for first degree manslaughter and first degree assault arising out of the same gunshot violated double jeopardy even though the crimes contained different statutory elements. Burchfield, 111 Wn. App. at 845. See State v. Fuentes, 150 Wn. App. 444, 451 n. 20, 208 P.3d 1196 (2009) (citing Orange, Potter, and Burchfield).

In Mr. O'Cain's case, the State's theory of guilt would transform every physical assault (which causes the victim to believe, or fear, that the actor did or may try to kill her) into a separate, additional conviction for felony harassment. This cannot be correct under established Double Jeopardy analysis. For further example, in United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), double jeopardy was violated where the defendant was convicted of contempt, for violating conditions of release by possessing drugs, and also of the substantive offense of

drug possession. Dixon, 509 U.S. at 698. The importance of Dixon lies in its instruction on the application of Blockburger. There, while there were in fact a myriad of ways of violating the contempt provision of the defendant's release, in Dixon, proving contempt by showing the defendant's arrest for possession of narcotics also necessarily proved the crime of drug possession. Double Jeopardy was therefore violated.

Under the Blockburger inquiry as informed by the cited cases, the proof of multiple assaults, also necessarily proved felony harassment under RCW 9A.46.020. Given the state of the evidence, Mr. O'Cain's multiple assaults constituted the totality of the State's evidentiary proffer on the felony harassment count. As charged and proved in this case, the two offenses were the same for Double Jeopardy purposes.

Finally, this is not a case in which one offense -- here, the threat to kill -- is statutorily defined as a series of offenses -- here, assaults -- which may also, and each, be charged as independent offenses without violating double jeopardy. See State v. Haines, 151 Wn. App. 428, 441-43, 213 P.3d 602 (2009); State v. Parmelee, 108 Wn. App. 702,

709, 32 P.3d 1029 (2001); see RCW 9A.46.110. Double Jeopardy was violated.

**b. The felony harassment conviction must be vacated.**

The appropriate remedy in Mr. O’Cain’s case is vacation of the harassment conviction. State v. Weber, 127 Wn. App. 879, 885, 112 P.3d 1287 (2005) (“The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense”), affirmed, 159 Wn.2d 252, 149 P.3d 646 (2006); cert. denied, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

**3. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HE DID NOT ARGUE THAT THE ASSAULTS AND THE HARASSMENT CONVICTIONS WERE THE “SAME CRIMINAL CONDUCT.”**

Mr. O’Cain’s counsel was ineffective for failing to have the assault and felony harassment convictions scored as the “same criminal conduct,” where they involved the same victim, and were committed at the same time and place.

To sustain an ineffective assistance claim under the Sixth Amendment, a defendant must establish that his counsel’s performance was objectively unreasonable and that there is a

reasonable probability that the result of the proceeding would have been different absent the unprofessional errors. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. amend. 6.

***Same criminal conduct generally.*** Under the governing sentencing law, crimes constitute the same criminal conduct for sentencing purposes only if they involve each of three elements: “(1) the same criminal intent, (2) the same time and place, and (3) the same victim.” State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994); 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).”

***Same victim.*** The victim of a crime of unwanted assault is the person that the defendant assaulted touched or battered in committing a crime against that person. See, e.g., State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The victim of felony harassment is the person to whom the threat to kill is

communicated and who is placed in fear that the threat will be carried out. State v. Leming, 133 Wn. App. 875, 889, 138 P.3d 1095 (2006).

**Same place.** The offenses were committed in the same place, i.e., the home where the crimes were carried out. The place is the same.

**Same time.** The “same time” element does not require that the two crimes occur simultaneously. State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996). Individual crimes may be considered the same criminal conduct if they occur during an uninterrupted incident. Porter, 133 Wn.2d at 185-86; Dolen, 83 Wn. App. at 365.

Here, however, the State’s own manner of proof, which proof was minimal in terms of its factual specificity, establishes that the assaults, and the threat to kill, were committed at the precise same “time,” or at the very least in one single uninterrupted incident, and the offenses meet that requirement of RCW 9.94A.589(1)(a) absent some other showing in the record to the contrary.

**Same intent.** The “same criminal intent” element is determined by looking at whether the defendant's objective intent changed from one crime to the next. Dolen, 83 Wn. App. at 364-65; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997); see State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (standard for determining the same intent prong is the extent to which the criminal intent, viewed objectively, changed from one crime to the next). In this case, there was no proof of a change in criminal intent during the undifferentiated episode of striking, which the State of course argued also constituted harassment. If there were multiple separately punishable offenses, the fact that one crime furthered commission of the other may, and in this case would, indicate the presence of an unchanging intent. Vike, 125 Wn.2d at 411; State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Where the State's proof was that the defendant's threat to kill Ms. Robinson was the uninterrupted assaultive episode, this was manifestly not a case where some passage of time establishes that the defendant had the opportunity, after completing an offense, to reflect and form a new intent to commit an additional crime. Cf. State v. Wilson, 136 Wn. App. 596, 615,

150 P.3d 144 (2007) (where defendant had time to complete assault and then form new intent to threaten victim, crimes of assault and harassment had different objective intents and were not same criminal conduct).

The counts of assault and felony harassment of which Mr. O’Cain was convicted in this case all involved the same intent, and involved the same victim. The time and place were also the same. Thus the two crimes constituted the “same criminal conduct.” Counsel should have requested that these counts be scored accordingly, and was deficient for not doing so; because the legal issue could only be decided in the defendant’s favor, counsel’s error was prejudicial. Strickland v. Washington, 466 U.S. at 694. Mr. O’Cain asks that this Court remand the case for resentencing.

**4. ADMISSION OF MS. ROBINSON’S MEDICAL  
HEARSAY STATEMENTS VIOLATED MR. O’CAIN’S  
STATE AND FEDERAL CONSTITUTIONAL RIGHTS  
TO CONFRONTATION.**

Confrontation Clause challenges may be manifest constitutional error that can be raised for the first time on appeal, where, as here, admission of the evidence was crucial to conviction or had observable consequences with regard to the jury's determination of verdict. RAP 2.5(a)(3); State v. Kronich, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007).

**a. Admission of the complainant's statements to various medical providers violated article 1, section 22 of the Washington Constitution.** The Washington Constitution provides criminal defendants the right to confront and cross-examine the witnesses against him. Wash. Const. art. 1, § 22. Article 1, section 22 states, "in criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face." This constitutional provision provides greater protection for the right to confrontation than does the Sixth Amendment. State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009); State v. Foster, 135 Wn.2d 441, 473-74, 481, 957 P.2d 712 (1998) (Alexander, J., concurring in part, dissenting in part).

In interpreting Washington's Confrontation Clause, the appellate courts look at the history of the constitutional provision

and Washington law at the time of the adoption of the constitution.

The Pugh Court, for example, determined that statements to a 911 operator did not violate the Washington Constitution because similar statements would have been admitted in court at the time of the constitution's adoption. Pugh, 167 Wn.2d at 837-40. The law at the time of the passage of our state's constitution similarly demonstrates that Washington's Confrontation Clause does not permit a prosecution based primarily upon statements made by a nontestifying witness for purposes of medical treatment.

Ms. Robinson's statements to EMT Sutherland, physician's assistant Island, and Nurse Aliana Morris were admitted under the hearsay exception for statements for medical diagnosis and treatment, ER 803(a)(4). See 6/30/10RP at 212-14. This modern hearsay exception became part of Washington's evidence law in 1978, when the Rules of Evidence were adopted by the Washington Supreme Court. Judicial Council Task Force on Evidence Comment, ER 803(a)(4) (found in Robert H. Aronson, The Law of Evidence in Washington § 803.02, at 803-6.1 (4th ed. 2008)).

Prior to 1978, a patient's description of past symptoms and medical history to a medical provider was not admissible in Washington courts as substantive evidence, although a physician could testify as to his medical conclusion based in part upon the patient's description. Petersen v. Dept. of Labor & Industries, 36 Wn.2d 266, 269, 217 P.2d 607 (1950); Kraettli v. North Coast Transp. Co., 166 Wash. 186, 189-94, 6 P.2d 609 (1932); Task Force Comment (Aronson, The Law of Evidence, *supra*, at §803.02).

Thus, prior to the adoption of ER 803(a)(4), a treating physician could relate a patient's description of symptoms only to show the basis for his expert opinion. The patient's statements were not admissible as substantive evidence, nor would a medical treatment provider relate a patient's description of a crime or identification of the perpetrator of a crime. FRE Advisory Committee Note to Fed.R.Evid. 803(a)(4) (found in Aronson, The Law of Evidence in Washington, *supra*, § 803.09, at 803-13).

This rule was consistent with the common law at the time of the adoption of Washington's Constitution. A hearsay exception existed for a person's exclamation of pain and terror at the time of

an injury, similar to the current exception for excited utterances. Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 271, at 202-03 (9th ed. 1884). This exception did not extend to the patient's hearsay statements as to the cause of her injury. Id. at 202 n.4.

The Washington Supreme Court has long held that article 1, section 22's guarantee of due process includes the right to meet the witnesses in open court and cross-examine them. State v. Stentz, 30 Wash. 135, 142, 70 P. 241 (1902) ("This means that the examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him"). As demonstrated above, Washington courts in 1889 would not have permitted a medical provider to repeat to the jury, as three providers did here, Ms. Robinson's statements describing the alleged assault, as substantive evidence. Instead, her description of her symptoms would be admissible at most only to explain the EMT's, physician's assistant's, or nurse's expert opinion as to the nature of her injuries.

Mr. O’Cain’s jury was never able to evaluate Ms. Robinson’s demeanor and credibility, and Mr. O’Cain never had the opportunity to cross-examine her. This Court should find hearsay statements to a medical provider were not admissible at the time of the writing of Washington’s Constitution, and article 1, section 22 forbids their admission absent an opportunity for cross-examination.

**b. Admission of Ms. Robinson’s hearsay statements to the medical providers violated Mr. O’Cain’s Sixth Amendment right to confrontation.** The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The essence of the Sixth Amendment’s right to confrontation is the right to meaningful cross-examination of anyone who bears testimony against him. Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); United States v. Owens, 484 U.S. 554, 557, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

"A witness's testimony against a defendant is thus inadmissible against a defendant unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); Crawford, 541 U.S. 53-54.

"[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused . . . ." Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (Stewart, J., concurring). In Crawford, the United States Supreme Court announced the Confrontation Clause forbids the introduction of "testimonial" hearsay against the accused unless the declarant is unavailable and the defendant had the prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54.

The United States Supreme Court has not addressed under what circumstances statements to medical personnel are testimonial for purposes of Confrontation Clause analysis. However, lower courts have reached divergent results when deciding whether statements to medical personnel describing

criminal activity are testimonial. Jeffrey L. Fisher, What Happened—And What is Happening—to the Confrontation Clause, 15 J.L. Pol'y 587, 619 (2007).

The Court of Appeals has previously found a domestic assault victim's statements to a physician were not testimonial because (1) they were made for diagnosis and treatment, (2) the speaker did not expect the statements would be used at trial, and (3) the doctor was not working with the State. State v. Sandoval, 137 Wn. App. 532, 537, 154 P.3d 271 (2007) (citing State v. Moses, 129 Wn. App. 718, 729-30, 119 P.3d 906 (2005)). This analysis, however, did not take into account Crawford's return to the original principles of Sixth Amendment jurisprudence in addressing the Confrontation Clause, which was designed as a break from prior English practices. Crawford, 541 U.S. at 50, 60-61. Looking at the history of the medical exception to the hearsay rule demonstrates that Ms. Robinson's statements to the three medical providers would not have been considered admissible against Mr. O'Cain by the Framers of the Constitution.

At the time of the drafting of the United States Constitution, doctors were permitted to give their opinions as to medical

conditions, but hearsay statements to physicians were not generally admissible. David J. Carey, Reliability Discarded: The Irrelevance of the Medical Exception to Hearsay in Post-Crawford Confrontation Jurisprudence, 64 N.Y.U. Ann. Surv. Am. L. 653, 679-80 (2009).

The Confrontation Clause was intended to strengthen the right of confrontation as it existed at the time of the writing of the Constitution, not replicate common law. Id. at 682-83 (citing inter alia Crawford, 541 U.S. at 47-50). Ms. Robinson's statements describing the assaultive episode would not have been admitted in a criminal trial in colonial America, and they are the kind of testimonial statements forbidden by the Sixth Amendment.

Indeed, use of the factors that were utilized to review hearsay statements made to *police* in Davis also demonstrate that Ms. Robinson's description of assaults by Mr. O'Cain were testimonial. In Davis, the Court provided a generalized test for statements made to government agents such as the police or 911 operators who are responding to a call for help:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the

interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicated that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.

Davis, 547 U.S. at 822. Thus, by utilizing the Davis analysis to review a woman's statements to her doctor that she was "tied and raped," the Illinois appellate court found they *were* testimonial.

People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 (2008).

There, the victim was unavailable to testify and her statements to her doctor fit within the medical diagnosis exception to the hearsay rule. Spicer, 884 N.E.2d at 685. The appellate court turned to the four Davis factors and found they all supported the conclusion the statement was made to prove past events since the victim was relating past events, was safe in the hospital and not trying to address a current emergency, and was upset but not frantic.

Spicer, at 687. Since the victim had been transported to the hospital by the police, the court could find no reason to distinguish between "a note-taking policeman" and "a note-taking doctor." Id. at 688.

Similarly, here, Ms. Robinson spoke to an EMT, Sutherland, at the scene after speaking to police and after police called the aid car for her. 6/29/20RP at 90-91. The police accompanied Ms. Robinson to the hospital in order to take a statement from her at that location, and the same analysis applies. Mr. O'Cain had been detained some distance from the home. 6/29/10RP at 74. Thus, the statements to medical providers, including Island and Morris, were made when Ms. Robinson was not under an immediate threat but was safely in the care of medical personnel after police had intervened. In addition, as noted above, the three medical providers questioned Ms. Robinson about past events in part to determine how the alleged incident occurred.

The information Ms. Robinson related to these medical providers was like that of criminal testimony, as it described events that happened in the past. If Ms. Robinson's statements to the medical providers had been made to a police officer, they clearly would be considered testimonial. See Spicer, 884 N.E.2d at 688; Carey, Reliability Discarded, supra, at 690 (declarant's identification of her assailant should not be treated differently merely because given to doctor and not police officer).

Commentators on the Confrontation Clause agree, and view statements such as those admitted here, to medical personnel describing past crimes, as testimonial. Professor Friedman, for example, posits a crime victim's description of the crime, whether made to authorities or to a private party, is normally testimonial. Richard Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1101, 1042-43 (1998). Professor Fisher agrees that description of past events as part of an interview with medical personnel is testimonial. Fisher, What Happened, *supra*, at 622 (quoting Davis, 547 U.S. at 829-30).

**c. The admission of Ms. Robinson's hearsay statements to medical providers without an opportunity for cross-examination by Mr. O'Cain was not harmless beyond a reasonable doubt as to the second degree assault conviction.**

Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). However,

a constitutional error may be "so unimportant and insignificant" in the setting of a particular case that the error is harmless beyond a reasonable doubt. State v. Wells, 72 Wn.2d 492, 500, 433 P.2d 869 (1967) (emphasis omitted) (quoting Chapman, 386 U.S. at 21-22).

Here, there is more than a reasonable possibility that admission of Ms. Robinson's repeated hearsay statements to three medical providers influenced the jury's verdict. Indeed, the medical hearsay was crucial to any finding by the jury that Mr. O'Cain intentionally assaulted Ms. Robinson, and recklessly caused harm.

Physician's assistant David Island stated that Ms. Robinson told him she was "thrown onto a [glass] table," which broke. 6/30/10RP at 175. The EMT stated that Ms. Robinson told him that she had been "struck with a glass object, which had broke . . . and that's how she received the cuts." 6/30/10RP at 220-21. And finally, Robinson told the Nurse that she had been pushed, kicked, and choked by her boyfriend, and he had "thrown [sic] some objects at her." 6/30/10RP at 226. All of this should have been excluded.

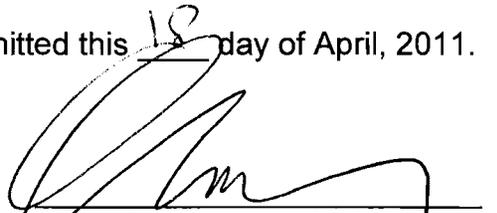
The remaining untainted evidence that the defendant intentionally assaulted Ms. Robinson and recklessly caused harm

was far from overwhelming, if not insufficient entirely. Absent the medical hearsay, the jury would have been provided solely with the 911 claim that there had been a fight or an assault, and that Ms. Robinson – in her own words on the call – had “fell on some glass” or that she had been cut by a decorative item that was on a table. Supp. CP \_\_\_\_, Sub # \_\_\_\_ (State’s transcript of 911 call, filed \_\_\_\_, at p. 6). Without Ms. Robinson’s statements to the three medical providers, the jury would likely have concluded Ms. Robinson’s 911 statements did not rise to the level of proof beyond a reasonable doubt of second degree assault as charged, which required an intentional assault that recklessly caused substantial bodily harm. Therefore, the conviction for second degree assault must be reversed.

**F. CONCLUSION**

Based on the foregoing, Mr. O'Cain respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this <sup>18</sup> day of April, 2011.



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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 65735-6-I
	)	
JAMES O'CAIN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, JOSEPH ALVARADO, STATE THAT ON THE 19<sup>th</sup> DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **APPELLANT'S OPENING BRIEF** 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:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
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[X] JAMES O'CAIN	(X)	U.S. MAIL
764239	( )	HAND DELIVERY
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**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>th</sup> DAY OF APRIL, 2011.

X \_\_\_\_\_ *JA*

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