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NO. 67778-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DERRICK VALENTINE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE BRUCE HILYER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Valentine has waived his challenge to testimony of the victim that when Valentine saw police talking to the victim, Valentine said, "oh, you come to arrest me," when Valentine did not object to this testimony at trial and has failed to establish that the passing reference to this exclamation was a constitutional error that caused actual prejudice to his rights.

2. Whether, if that exclamation is reviewable constitutional error, it is harmless error because in light of Valentine's attitude toward the police, his knowledge that the victim had summoned the police, and his admissions of violence, the statement expresses only cynicism, does not suggest an inference of guilt as to the charged crimes, and could not have affected the outcome of the trial.

3. Whether Valentine has waived his claim that the two felony convictions constituted the same criminal conduct, where he did not raise the issue in the trial court, and he affirmatively stated that his standard range was the range produced when each conviction was counted in the score of the other.

After a trial before Judge Bruce Hilyer, a jury found Valentine guilty as charged, including the aggravating circumstances. 1RP 1;¹ CP 29-34.

The standard sentencing range on the assault in the second degree was six to twelve months of confinement; the standard range on the felony harassment was three to eight months of confinement. CP 81. The State requested an exceptional sentence upward of 65 months as to these felony convictions. 5RP 4. The court concluded that an exceptional sentence upward was appropriate based on the aggravating factors found by the jury, and sentenced Valentine to 24 months of confinement, along with other conditions. CP 80-87. The court sentenced Valentine to a consecutive suspended term of 364 days on the assault in the fourth degree, with additional conditions. CP 88-89.

2. Substantive facts

On May 14, 2011, defendant Derrick Valentine assaulted his girlfriend, Mary Cason. 2RP 15-22. He hit her in the head, then strangled her until she struggled to breathe. 2RP 16, 19-23.

Valentine told Cason that if she reported this assault to the police,

¹ The Verbatim Record of Proceedings is cited as follows: 1RP – 8/29/11; 2RP – 8/30/11; 3RP – 8/31/11; 4RP – 9/1/11; 5RP – 10/7/2011.

he would kill her; Cason believed it. 2RP 27-28. These events form the basis of the charges in this case.

Valentine had previously assaulted Cason on many occasions during their 17-month relationship. 2RP 15, 29, 40-41. The violence began before they moved in together, and became worse afterward. 2RP 40-41.

On one occasion, Valentine could not find his driver's license and threatened to cut Cason's throat with a box cutter. 2RP 29. When Valentine found the license, he apologized, but when Cason asked if Valentine really had intended to cut her throat, Valentine pulled up his shirt and showed her the box cutter. 2RP 29-30.

Valentine choked Cason "a lot of times," including two earlier occasions that Cason specifically remembered because the choking interfered with her breathing. 2RP 31-33, 35. On another occasion, Valentine slapped Cason in the face (giving her a black eye) because she did not want to look at ads and make a grocery list late one night, when he wanted her to do that. 2RP 32-33. He punched her in the face on at least two other occasions. 2RP 33.

Valentine became angry one day when Cason bought expensive cookies as a treat for Valentine. 2RP 34-35. He claimed

that Cason was hiding something, refused to eat the cookies and "beat" Cason for it. 2RP 34-35.

Valentine also told Cason that he had tried to kill his ex-wife because she "cheated on him." 2RP 50-51. Valentine told Cason that he had choked his ex-wife until she turned blue, but changed his mind and stopped because he did not want their children to be without parents. 2RP 50-51. Valentine told Cason over and over again about trying to kill his ex-wife and accused Cason of "cheating" on him. 2RP 52.

On more than one occasion, Valentine told Cason that he would beat her at a specific time in the future; he always followed through on these promises. 2RP 27-28, 46.

Cason had not reported Valentine's assaults to the police prior to May 15, 2011, because she was afraid. 2RP 36. She was told that if she called the police, she was going to be in the morgue. 2RP 37. She stayed with Valentine because she loved him, wanted to help him, and hoped that he would change. 2RP 37, 40.

On May 15, 2011, in a recorded statement, Valentine told Auburn Police Detective Vojir that his relationship with Cason had been violent for some time. Ex. 16 at 8:35. Valentine said that he and Cason were physically violent with each other every two

months, on average. Id. Valentine said that the night before this interview, they had argued and that each had pushed the other, and that he had intentionally pushed a cookie jar onto the floor, breaking it. Ex. 16 at 3:47. He said that Cason left their apartment after the fight and he believed she spent the night in her car. Ex. 16 at 4:12, 10:37. Valentine angrily said that since Cason had gotten a better job than his, Cason was no longer willing to help him. Ex. 16 at 6:15.

Cason described the assault that occurred on the evening of May 14th in more detail. She explained that Valentine yelled at her, then leaned over her while she was seated and hit her on both sides of her head, leaving a small cut by her eye. 2RP 16, 19, 25. When Cason then tried to leave the apartment, Valentine blocked her way. 2RP 19-23. Valentine knocked Cason's crystal cookie jar to the floor and it broke. 2RP 21-22, 54. Then Valentine grabbed Cason hard around the throat with one hand; he applied pressure, making it very hard for Cason to breathe. 2RP 21-23; 3RP 40. He choked her long enough that Cason ran out of breath. 2RP 23. When he released the hold, Cason fell, getting a cut on her arm from the broken glass. 2RP 21, 23, 25-26. Valentine told Cason that if she contacted the police, he would kill her. 2RP 27-28; 3RP

40. Because of Valentine's history of following through on his threats, Cason believed him. 2RP 28. When Cason got up from the floor, she struck Valentine with a broom and fled. 2RP 27; 3RP 10-11.

Cason spent the night in her car. 2RP 42. She went back in the morning, hoping that Valentine would awaken in a better mood. 2RP 43-44. Valentine was not in a better mood the next morning, however. 2RP 44-45.

Cason called 911 on May 15th because Valentine was yelling at her and said he would shove her through the window; she was afraid that he would assault her again. 2RP 45-46; 3RP 4. She did not talk to the operator, but left the phone line open until the phone ran out of account credit and it disconnected. Ex. 10; 2RP 46-48; 3RP 3-5. The 911 recording, admitted at trial, includes shouting and profanity by Valentine; most of the conversation is comprised of Cason denying that she had called 911 and Valentine adamantly insisting that he knew that she had done so. Ex. 10; 2RP 46-48; 3RP 5. When Valentine declared that he knew that people were listening, Cason asked what he wanted to say, and Valentine yelled, "Suck my dick." Ex. 10.

Valentine told Cason to take her books out of a bookcase, but thought Cason was moving too slowly, so Valentine threw some of the books from the bookcase. Ex. 16; 2RP 53-54. Cason then pushed over the bookcase. 2RP 55. Valentine then said, "F you, F the police," and left. 2RP 48.

By the time Valentine returned from getting a beer, the police had arrived at the apartment building in response to the 911 call. 3RP 16-21. Cason met the police at the front door of the apartment building. 2RP 48, 56; 3RP 17. Cason described the assault the previous night and showed the officers the minor injuries that resulted. 3RP 17-20.

As Cason was speaking to the police, Valentine entered the building at the opposite end of the hallway, through the back door of the building. CP 91; 2RP 57-58; 3RP 20. Officer Anderson spoke with Valentine and then arrested him. 3RP 21-23. The details of this encounter are included in the relevant argument section of this brief.

C. ARGUMENT

1. DOUBLE JEOPARDY AS TO CONVICTION OF ASSAULT IN THE FOURTH DEGREE.

The State concedes that Valentine's conviction of assault in the fourth degree constitutes a violation of double jeopardy. The acts supporting that conviction were part of a continuing course of assault over a very brief period of time, which included the act of strangulation that is the basis of the conviction of assault in the second degree.

The conviction and sentence on the assault in the fourth degree should be vacated. Remand for resentencing on the felony counts is unnecessary because this gross misdemeanor conviction had no effect on the offender score of the felony crimes or the sentence on those crimes. However, there is a reference to the term on the felony convictions running consecutive to "count 3" on page four of the felony Judgment and Sentence, and that reference should be stricken.

2. THE UNSOLICITED, PASSING REFERENCE TO VALENTINE'S BELIEF THAT HE WOULD BE ARRESTED WAS NOT REVERSIBLE ERROR.

Valentine claims that reversible constitutional error occurred when Mary Cason testified that Valentine exclaimed that the police had come to arrest him. This claim is without merit. Valentine has not established that this exclamation was addressed at the CrR 3.5 hearing, or that this exclamation was the product of a constitutional violation. Because Valentine never objected to this testimony in the trial court, neither of these issues was presented to the trial court, and Valentine has not preserved this alleged error for review.

This unsolicited testimony described a statement made immediately after Valentine entered the apartment building, while the similar statement that was suppressed at a pretrial hearing was described by a police officer as occurring after questioning by police. The challenged testimony was a passing reference that raised no objection. It conveyed only Valentine's cynicism about the police and does not rise to the level of constitutional error in the trial. If this Court concludes that the reference was manifest constitutional error, the error was harmless.

a. Relevant Facts.

When police responded to Cason's 911 call, she met them at the front door of the apartment building. 2RP 48, 56; 3RP 17. As she was speaking to the police, Valentine entered the building at the opposite end of the hallway, through the back door of the building. CP 91; 2RP 57-58; 3RP 20. The apartment where Valentine and Cason lived was near the back door. 2RP 58.

Officer Anderson testified in the pretrial hearing that the two officers walked down the hall and asked Valentine if he was Derrick; Valentine confirmed that. CP 91; 1RP 8. Then Officer Anderson asked what happened. CP 91; 1RP 10. Valentine said that he and Cason had argued that day, that he had not touched Cason that day, and that they had argued and pushed each other the night before. CP 91-92; 1RP 10-11. Valentine became more and more agitated, until he turned and put his hands together behind his back, and said, "You might as well arrest me." 1RP 11. Anderson then handcuffed Valentine and advised him of his constitutional rights. CP 92; 1RP 12. Valentine repeated that he and Cason had pushed each other the night before, but that he had not hit or pushed Cason that day. CP 92; 1RP 13; 3RP 23.

In a recorded statement to Detective Vijor the same afternoon, Valentine said that he and Cason had argued the night before and had pushed each other, and that he had pushed a cookie jar off a table and broke it. Ex. 16 at 3:47. He said that he and Cason had a history of physical violence, saying that they both were violent, that he had had scratches on his neck like Cason had scratches on her neck. Ex. 16 at 8:35. Valentine said that Cason left the apartment after the violence the previous night, and he thought she slept in her car. Ex. 16 at 4:12, 10:37.

Valentine said that after Cason returned that morning, they argued again. Ex. 16 at 7:11, 11:27. Valentine went out and got a beer. Ex. 16 at 7:11. After he got back, Valentine said that he asked Cason a question and she got a "funky," "smart ass" attitude. Ex. 16 at 11:27. Valentine said that when Cason began taking books off of a bookcase, Valentine threw some of the books, and Cason threw the bookcase on the floor, breaking it. Ex. 16 at 7:24. Valentine left and got another beer; when he got back to the apartment building, he saw the police. Ex. 16 at 7:24, 7:41.

Valentine told Detective Vojir that he knew that in Washington, "they believe what a woman says anyway," so what Valentine said would not make any difference. Ex. 16 at 9:17.

When Vojir said that was not necessarily true, Valentine said that he knew it was true because he had heard it from many people: a man's word "ain't jack." Ex. 16 at 9:17.

After the CrR 3.5 hearing, the trial court ruled that the statements made by Valentine to Officer Anderson before Valentine was advised of his rights were obtained in violation of Miranda v. Arizona² and were not admissible in the State's case-in-chief. 1RP 49. The court ruled that Valentine's statements to Anderson after advice of his rights, and his statements to Vojir, would be admissible.³ CP 92-93; 1RP 49.

At trial, Cason testified that when she called 911 on the morning after the assault, Valentine did not see her dial, but he knew she had called the police. 2RP 46-48. Valentine's own statements during that 911 recording establish his belief that Cason had called the police and that the police were listening to their argument. Ex. 10. During the call, Valentine made one statement directly to the law enforcement officer who he believed was

² Miranda v. Arizona, 384 U.S. 436, 467-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

³ Valentine did not challenge the admissibility of these statements. 1RP 48.

listening: "Suck my dick." Ex. 10. Right before he left the apartment, Valentine said, "F you, F the police."⁴ 2RP 48.

Cason testified that when the police arrived, she told them that Valentine had assaulted her and showed them her injuries.

2RP 56-57. The direct examination continued:

Q: While you were talking to [the police], did Mr. Valentine show up at any point?

Cason: Yes, he did.

Q: Tell us about that.

Cason: As soon as he came through the door he said, oh, you come to arrest me. He put his hands on the wall, turned to put his hands on the back.

Q: Where were you standing when Mr. Valentine -- when you first saw Mr. Valentine?

Cason: I was still standing in the front at the glass door with the police officers where they first came in at.

Q: Where did Mr. Valentine come in?

Cason: He came in through the back door.

....

Q: Did you see the police officers approach Mr. Valentine then?

Cason: Valentine approached them.

⁴ In relating this statement, Cason appears to have been sanitizing the profanity actually used by Valentine. She referred to the "nasty things" Valentine was saying that morning, and Valentine's language during the 911 call and in his statement was laced with actual profanity, not simply the letter "F." Ex. 10, 16; 2RP 46.

Q: Yes or no, did you see them talking to Mr. Valentine?

Cason: Yes.

Q: And you said you saw him make a gesture of, arrest me?

Cason: Yes.

Q: Did you see them cuff him?

Cason: That I did not see. I seen after.

Q: Did you ever yell anything to the police officer when you were seeing all this happening with Mr. Valentine?

Cason: I asked them -- I begged them not to arrest him.

2RP 57-59.

There was no objection to any of this testimony, except a hearsay objection to the last statement ("I begged them not to arrest him"), which was overruled. 2RP 59. There was no objection to the statement now identified as error, either at this point or at any time. There was no request to strike the testimony. The next day, outside the presence of the jury, the prosecutor brought up Cason's testimony that Valentine said "oh, you come to arrest me," requesting permission to elicit similar testimony from Officer Anderson. 4RP 2. The trial court denied that request. 4RP

2. Again, Valentine did not object to Cason's testimony or move to strike it. 4RP 2.

Officer Anderson testified at trial that he approached Valentine in the apartment building hallway and talked to him, and ended up detaining and handcuffing him. 3RP 21-23. Anderson testified that when he handcuffed Valentine, Cason came toward them and pleaded with Anderson not to arrest Valentine, because he would kill her. 3RP 27. Anderson testified to the statement Valentine made to Anderson after advice of his rights. 3RP 23.

Detective Vojir testified and Valentine's recorded statement to her was played for the jury in its entirety. Ex. 16; 4RP 19-21.

b. Valentine Waived Any Error In This Testimony When He Chose Not To Object Or Request A Curative Instruction.

Valentine did not object to the testimony that he now claims constituted a violation of his constitutional rights. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Supreme court opinions have emphasized the importance of a complete RAP 2.5(a) analysis

before review of an error first raised on appeal is granted. State v. Kirkman, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007); State v. O'Hara, 167 Wn. 2d 91, 97-104, 217 P.3d 756 (2009).

Even if testimony challenged on appeal was excluded by a pretrial order, a party ordinarily must object when the evidence is admitted in the trial court to preserve the objection. State v. Weber, 159 Wn.2d 252, 272, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137 (2007). The supreme court describes this rule as a common sense approach, noting that when then there is no objection, the trial court does not have the opportunity "to determine whether the evidence would even have been covered by the pretrial motions." Id. Even if the challenged evidence was covered by the pretrial order, the lack of an objection deprives the trial court of the opportunity to cure any potential prejudice through an instruction. Id.

Valentine has not established either premise of this claim: that Cason related a statement that had been suppressed or that the statement was the fruit of a Miranda violation. It is not clear that the statement had been suppressed: it appears that the statement related was a different statement than the similar statement Officer Anderson described at the pretrial hearing. Further, the limitations

of Miranda would not apply if the statement occurred at the time Cason described, immediately after Valentine walked in the door.

As to Valentine's first premise, it does not appear that Cason was referring to any statement that was suppressed. Cason said, "as soon as he came through the door, he said, oh, you come to arrest me" and put his hands on the wall and then on his back. 2RP 57. In contrast, the statement that Anderson described at the pretrial hearing was that Valentine said "you might as well arrest me" and put his hands behind his back only after he had described the details of the events of the night before and that day.⁵ 1RP 8-11. Because Cason referred to a statement made immediately after entry and the statement suppressed was one Anderson testified was made after discussing events with the police, it does not appear that the two are the same statement.

As to Valentine's second premise, the challenged statement does not appear to be the result of custodial interrogation. Miranda warnings are required only when a suspect endures custodial interrogation by a State agent. State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). The statement Cason described, "oh,

⁵ At trial, Anderson testified that after Valentine came into the building, Anderson talked to Valentine and eventually detained and handcuffed him. 3RP 21-23. Anderson did not describe the statement or gesture related by Cason.

you come to arrest me," would be made at first sight, not after a conversation. If that exclamation was made as soon as Valentine came in, as Cason testified, the statement was made before Valentine was in custody and was not the product of any interrogation, as police were still at the opposite end of the hallway. 2RP 57. Thus, it would not have been subject to the requirements of Miranda.

The case at bar illustrates clearly the necessity of an objection in the trial court to determine whether the testimony fell within the pretrial order and, if not, its admissibility at trial. Further, there was nothing inherently prejudicial about the remark; it could have been stricken and any prejudice cured by an instruction of the court. See State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995) (jury is presumed to follow a court's instruction to disregard stricken testimony); cf. State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968) (testimony that the defendant was implicated in another robbery similar to the charged crime was so inherently prejudicial that a fair trial was impossible).

Even if the reference here is treated as a constitutional error, not every constitutional error falls within the exception that allows review for the first time on appeal; the defendant must show that

the error caused actual prejudice to his rights. McFarland, 127 Wn.2d at 333. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. Kirkman, 159 Wn.2d at 926-27. "To demonstrate actual prejudice, there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" O'Hara, 167 Wn.2d at 99 (quoting Kirkman, 159 Wn.2d at 935).

Valentine has not made a showing of actual prejudice that would be caused by the challenged testimony in the circumstances of this case. The only identified consequence that Valentine claims is that they jury would believe that the exclamation "implied he thought the evidence was sufficient to arrest him." App. Br. at 23.

But other testimony informed the jury that Valentine admitted pushing Cason the night before, and admitted intentionally breaking Cason's property (a cookie jar). Ex. 16 at 3:47; 3RP 23. Other testimony also informed the jury that Valentine believed that Cason had called 911 while he was yelling at her before he left the apartment, and yelled profanities directly at the law enforcement person he believed was listening. Ex. 10; 2RP 46-48; 3RP 5. Under these circumstances, Valentine's conclusion, that the police who were there on his return to the apartment were there to arrest

him, did not suggest that he believed he was guilty of the crimes charged.

Cason's testimony conveyed no more than Valentine's mistrust of the police, which he described at length in his recorded statement to Detective Vojir. Ex. 16 at 9:17. Valentine told Vojir that he believed that police always believe the woman and that it did not matter what he said had happened. Id. Given that belief, Valentine's reaction upon seeing the police, expecting arrest, conveys only that cynicism, not consciousness of guilt. "Juries are not leaves swayed by every breath." United States v. Garsson, 291 F. 646, 649 (D.N.Y.1923), quoted in Kirkman, 159 Wn.2d. at 938.

The reference to Valentine's statement about impending arrest and his cooperative gesture were not emphasized at the time, or referred to again by either party. Valentine's words and gesture were not confirmed by the officer who testified about his contact with Valentine, so this testimony actually may have damaged Cason's credibility, which was the core of this case. The attorneys never referred to the testimony again or used it as a basis for any argument.

Valentine has not established either constitutional error or actual prejudice to his rights. Because he failed to object to this testimony below, he has not preserved his challenge.

c. If The Reference to Valentine's Exclamation Was Constitutional Error, It Was Harmless.

Even if Cason's reference to Valentine's exclamation was constitutional error, it was harmless in light of the context and in light of the nature of the defense. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that it was harmless. State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980). A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the error did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). There is no doubt that the passing reference to Valentine's exclamation did not affect the outcome of this trial.

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), cert. denied, 393 U.S. 869 (1968) (quoting Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

Valentine did not object at trial to the testimony now challenged, and later, when the prosecutor referred to the testimony outside the presence of the jury,⁶ Valentine did not ask that it be stricken or request a curative instruction. 4RP 10-11. Valentine's failure to object to Cason's statement indicates that he did not believe that it was unduly prejudicial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990); State v. Miller, 66 Wn.2d 535, 537-38, 403 P.2d 884 (1965).

The only identified consequence that Valentine claims on appeal is that the jury would believe that the exclamation "implied he thought the evidence was sufficient to arrest him." App. Br. at 23. Such a conclusion would not be inconsistent with Valentine's own statements that he had pushed Cason and had intentionally damaged her property the night before. 3RP 23; Ex. 16 at 3:47, 6:59. In closing argument, Valentine again conceded that he had pushed Cason the night before. 4RP 57.

Particularly in light of Valentine's forcefully stated belief that the police always believe a woman's version of events, and his knowledge that Cason had called 911 after the violence of the

⁶ The prosecutor asked permission to elicit testimony of the officer about the statement, based on Cason's testimony. 4RP 10-11.

previous night and the argument that morning, Valentine's belief that the responding police would arrest him could not be considered relevant to whether the crimes charged either had occurred, or were proven at trial. Neither party mentioned the statement during subsequent testimony or during closing arguments. There was no suggestion that any inference as to guilt as to assault by strangulation or a threat to kill Cason could be drawn from the statement.

The defense theory at trial was that Cason was not a credible witness, so the assaults and strangulation had not been proven. 4RP 47-59. Valentine's own admissions and his beliefs about police bias would warrant his exclamation that police were there to arrest him, so the challenged exclamation did not corroborate the claims of Cason that Valentine did dispute.

This Court can and should conclude beyond a reasonable doubt that the absence of the fleeting reference to Valentine's exclamation when he saw the police would not have tipped the balance in Valentine's favor.

3. VALENTINE'S OFFENDER SCORE WAS PROPERLY CALCULATED.

For the first time on appeal, Valentine claims that his convictions for assault in the second degree and felony harassment constitute the same criminal conduct, so for each crime the trial court incorrectly counted the other conviction in his offender score. Valentine's claim is without merit. By affirmatively agreeing to his offender score, Valentine waived his right to raise a same criminal conduct claim for the first time on appeal. Valentine's claim of ineffective assistance of counsel fails because he has not shown that his counsel's performance was deficient in failure to raise the issue, or that there is a reasonable probability that the court would have found that the convictions constituted the same criminal conduct if the issue had been raised.

For purposes of calculating a defendant's offender score, current offenses are counted as prior convictions unless two or more of the offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Crimes are considered the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. Courts construe the same criminal conduct provision narrowly, as the legislature

intended. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999); State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994).

The standard for determining whether two offenses require the same criminal intent is "the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Intent, in this context, does not mean the *mens rea* element of the crime, but rather the defendant's "objective criminal purpose" in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, rev. denied, 114 Wn.2d 1030 (1990).

a. Valentine Waived His Right To Raise A Same Criminal Conduct Claim.

Valentine is barred from raising a same criminal conduct claim for the first time on appeal because he affirmatively agreed to the calculation of his offender score, and failed to raise the issue at sentencing. A defendant waives a same criminal conduct claim by failing to raise the issue at the trial level and affirmatively assenting to his offender score. In re Pers. Restraint of Shale, 160 Wn.2d 489, 495-96, 158 P.3d 588 (2007); State v. Nitsch, 100 Wn. App. 512, 520-22, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000).

Valentine did not file a sentencing memorandum. However, at the sentencing hearing, he affirmatively acknowledged that he standard sentencing range was three to eight months of confinement on the felony harassment conviction. 5RP 9. This range was the standard sentencing range stated on the Judgment and Sentence, arrived at by counting the convictions separately. CP 80-81, 94; see RCW 9.94A.510 (sentencing grid establishing standard ranges); RCW 9.94A.515 (listing seriousness level of current offenses). Valentine recommended that sentences at the low end of the standard sentencing ranges be imposed, and identified those low end sentences as six months on Count 1 and three months on Count 2. 5RP 8-9. These statements by Valentine also are consistent with the ranges stated in the Judgment and Sentence. CP 80-81.

Valentine never asked the court to exercise its discretion to consider the offenses the same criminal conduct. 5RP 5-10. Having failed to alert the court to the factual issue and request that the court exercise its discretion at sentencing, Valentine has waived his right to raise the issue of same criminal conduct on appeal. Shale, 160 Wn.2d at 495-96.

Valentine misplaces his reliance on State v. Anderson, 92 Wn. App. 54, 960 P.2d 975 (1998), rev. denied, 137 Wn.2d 1016 (1999). The court of appeals there addressed an argument regarding same criminal conduct for the first time on review. However, as this court observed in Nitsch, supra, Anderson did not affirmatively acknowledge his standard range. Nitsch, 100 Wn. App. at 521. Further, the analysis of Anderson was questioned by this Court in its opinion in Nitsch, and the analysis of Nitsch has been adopted and reaffirmed by the Washington Supreme Court.

In Nitsch, the Court observed that it had "grave reservations" about permitting review when the issue of same criminal conduct was not raised in the trial court. Id. at 523. The Court noted that the issue involves both factual determinations and the exercise of discretion, so it is not a merely a calculation or a review of the sufficiency of proof. Id. The Court stated that in some cases it may not be to the defendant's advantage to raise the issue in the trial court, and to allow the issue to be raised for the first time on appeal is a windfall to the defendant. Id. at 523-24.

The supreme court has approved the analysis of Nitsch and its holding that a claim of same criminal conduct can be waived. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).

It recently reaffirmed that holding. Shale, 160 Wn.2d at 494-95. State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009), is distinguishable, as its holding related to the proof of prior convictions, not the discretionary decision about whether current offenses constitute the same criminal conduct.

Having failed to alert the court to the factual issue, and request that the court exercise its discretion at sentencing, Valentine has waived his right to raise the issue of same criminal conduct on appeal.

b. Valentine Received Effective Assistance of Counsel.

Valentine argues that his trial counsel was ineffective for failing to raise the issue of same criminal conduct. However, Valentine has not overcome the presumption of effective assistance and the presumption that counsel was relying on a reasonable strategy; he has not sustained his burden of establishing deficient performance and resulting prejudice.

To establish ineffective assistance of counsel, Valentine must show both that defense counsel's representation was deficient, i.e., that it "fell below an objective standard of reasonableness based on consideration of all the circumstances,"

and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

In judging the performance of trial counsel, courts begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable strategy. Strickland, 466 U.S. at 689-90.

There is a wide range of reasonable performance. Strickland, 466 U.S. at 689. Courts recognize that there are countless ways to provide effective representation, and that even the best criminal defense attorneys might take different approaches to defending the same client. Id. If counsel's conduct can be characterized as legitimate strategy or tactics, then it cannot be the

basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992)). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. McFarland, 127 Wn.2d at 336.

The Strickland standard must be applied with "scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity" of the adversary process. Harrington v. Richter, 562 U.S. ___, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 689-90). Counsel's representation is not required to conform to the best practices or even the most common custom, as long as it is competent representation. Richter, 131 S. Ct. at 788.

In addition to overcoming the strong presumption of competence and showing deficient performance, Valentine must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the [proceeding] would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); Strickland, 466 U.S. at 694. "The likelihood of a

different result must be substantial, not just conceivable." Richter, 131 S. Ct. at 792.

Valentine's counsel was not constitutionally ineffective for failing to raise this single, discretionary issue at sentencing. Although the Constitution guarantees criminal defendants a competent attorney, it does not insure that counsel will raise every conceivable claim. Engle v. Isaac, 456 U.S. 107, 134, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982).

In this case, an argument about the issue of same criminal conduct would not have been to Valentine's benefit. It would have emphasized Valentine's continuing course of violence against Cason, and that he was able to assault her repeatedly because of his repeated threats to kill her if she reported the violence to the police. E.g., 2RP 27-28, 36-37; 3RP 40. Because an exceptional sentence was warranted by the jury's finding of the aggravating factor that the offenses involved domestic violence and were part of an ongoing pattern of psychological, physical or sexual abuse manifested by multiple incidents over a prolonged period of time, the trial court had wide discretion to set the term of confinement, from six months to ten years.

It would not have been to Valentine's benefit to emphasize his efforts to prevent Cason from getting help by threatening to kill her, especially when the defense strategy at sentencing was to claim that this assaultive behavior was totally out of character for Valentine, who was a nice, considerate man. 5RP 5-10. That raising the issue was not worth the risk was especially true because Valentine was in custody between his arrest on May 15 and his sentencing on October 7, 2011. 5RP 7. Because Valentine already had served almost five months in jail, if he received the low end of the range as it was scored, and expected to receive the standard thirty percent good-time credit, he could expect to have already satisfied the jail term and to be immediately released. See RCW 9.92.151 (mandating opportunity to earn good time in jail). Lowering the bottom of the standard range would have no practical effect, and raising the issue would emphasize the pattern of violence, risking a longer term of confinement.

Deciding not to raise the issue was a legitimate strategy and cannot be the basis of a claim of ineffective assistance of counsel. Hutchinson, 147 Wn.2d at 206. In any given case, effective assistance of counsel could be provided in countless ways, with

many different tactics and strategic choices. Strickland, 466 U.S. at 689. The strategy here was reasonable.

For the reasons explained in the next subsection of this brief, the trial court would not have concluded that these crimes constituted the same criminal conduct, so Valentine also has not established prejudice. In addition, given that the trial court imposed an exceptional sentence, it is clear that he considered Valentine's crimes serious, and the court specifically indicated its belief that Valentine had engaged in a lengthy pattern of acts of violence against Cason. 5RP 11-24. Valentine fails to cite any evidence in the record demonstrating a likelihood that the court would have exercised its discretion in his favor.

c The Convictions Of Assault In The Second Degree And Felony Harassment Did Not Constitute The Same Criminal Conduct.

Two crimes constitute the same criminal conduct only if they share the same (1) criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a). If any one of these elements is missing, the crimes cannot be considered the same criminal conduct and must be counted separately in calculating the offender score. Vike, 124 Wn.2d at 410.

Courts construe the same criminal conduct provision "narrowly to disallow most claims that multiple offenses constitute the same criminal act." State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). A reviewing court will reverse a sentencing court's determination of "same criminal conduct" only upon a showing of a "clear abuse of discretion or misapplication of the law." State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). When the issue was not raised below but is nevertheless considered on appeal, the appellate court will treat the calculation of the offender score as an implicit determination that the offenses do not constitute the same criminal conduct. Anderson, 92 Wn. App. at 62; Nitsch, 100 Wn. App. at 525-26.

Although both of Valentine's crimes involved the same victim, and occurred at the same time or place, they did not involve the same criminal intent.

Assault in the second degree, as charged in this case, occurs when a person intentionally assaults another by strangulation. CP 25-27, 45; RCW 9A.36.021. "Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW

9A.04.110(26); CP 49. Viewed objectively, Valentine's intent in assaulting Cason was to harm Cason.

Harassment, as charged in this case, occurs when a person (a) without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to the person threatened and (b) the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. CP 25-27, 54-55; RCW 9A.46.020(1). Harassment rises to a felony when such a threat to cause bodily injury is a threat to kill the person threatened. CP 54-55; RCW 9A.46.020(2). Viewed objectively, Valentine's intent in threatening to kill Cason was to prevent her from reporting Valentine's violence to the police, and thus, to protect himself from prosecution and punishment. Valentine's intent, objectively viewed, was distinctly different for purposes of these two crimes.

Valentine's argument that the intent of the assault was to create fear, so that Cason would take the threat to kill her seriously, defies common sense. He has not established that any trial court would be legally required to accept that characterization of events.

The objective intent of the assault by strangulation and the objective intent of the threat to kill Cason if she reported Valentine's violence to the police were distinctly different. Valentine has not

established that the implied determination to that effect by the trial court was an abuse of discretion. Further, a finding that these crimes were the same criminal conduct would not be justified in this case.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this Court to affirm Valentine's convictions of assault in the second degree and felony harassment and his sentence on those counts. The State has conceded that Valentine's conviction for assault in the fourth degree should be vacated.

DATED this 30th day of May, 2012.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting Attorney

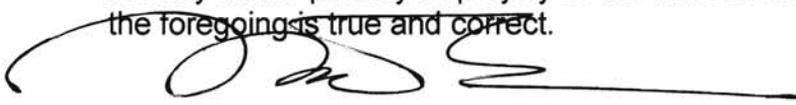
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen M. Cyr, 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, in STATE V. DERRICK VALENTINE, Cause No. 67778-1-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
Done in Seattle, Washington

05/30/12

Date