

69538-0

69538-0

NO. 69538-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SERGIO DONATO,

Appellant.

2013 JUL 25 PM 2:54

COURT OF APPEALS  
STATE OF WASHINGTON

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MARIANE C. SPEARMAN

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. When a defendant is charged with felony harassment, jurors must be instructed that the threat must be a “true threat,” and not mere “jest, idle talk, or political argument.” Failure to give such an instruction is error, but the error is not reversible, manifest constitutional error if it appears beyond a reasonable doubt that the omission did not affect the jury’s verdict. Here, Donato was charged with felony harassment and “true threat” was not defined for the jury. Where Donato’s threat to murder his girlfriend, as recorded in her call to 911, was proved to be a true threat beyond a reasonable doubt and Donato’s victim reasonably believed that Donato’s threat would be carried out, were his constitutional rights preserved?

2. Defense counsel is ineffective where his performance is deficient and it prejudices the defendant. Here, counsel failed to propose a “true threat” definition at trial. Where the error did not create manifest constitutional error, has Donato failed to show prejudice?

3. Two crimes are the same course of criminal conduct when they involve the same victim, place, time and intent. Here, felony harassment and assault in the third degree involved different

intents, and Donato had a different purpose in committing each crime. Was the trial court within its discretion in finding that the crimes were not the same course of criminal conduct?

**B. STATEMENT OF FACTS**

1. PROCEDURAL FACTS.

Defendant Sergio Augustin Donato was charged with felony harassment, assault in the third degree and interfering with a domestic violence 911 call, for crimes against his live-in girlfriend, Vivian Gonzalez. CP 32-34; 6RP 78.<sup>1</sup> He was also charged with an aggravator for committing the crimes in the presence of Gonzalez's two or three-year-old son. CP 32-34; 6RP 121. Gonzalez did not appear at trial, but the State presented other evidence, including the recorded 911 call placed by Gonzalez and testimony from the first responders.

Following the trial, the jury found Donato guilty of all counts, including the aggravating factor for having committed the crimes in the presence of Gonzalez's child. CP 107-15. Donato was

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<sup>1</sup> This brief will refer to the Verbatim Report of Proceedings as follows: 1RP (9/19/2012); 2RP (9/20/2012); 3RP (9/24/2012); 4RP (10/4/2012); 5RP (10/8/2012); 6RP (10/9/12); 7RP (10/10/12); 8RP (10/11/12); 9RP (10/26/12).

sentenced to a standard range sentence of 6 months in custody.  
CP 132.

## 2. SUBSTANTIVE FACTS.

At around 12:10 P.M. on May 2, 2012, Renton Police Officer Scott arrived at the home of Vivian Gonzalez in response to a 911 call. 6RP 37. As Scott walked toward the house, the front door “flew open,” and Gonzalez ran toward her, yelled “help!,” and cowered behind the officer. 6RP 37-38. At trial, Scott testified that Gonzalez appeared “hysterical” as she ran from the home, clutching her son in her arms. 6RP 46, 54. Phipps, an officer who had arrived a few moments earlier, testified that Gonzalez bolted from the home like she was “being chased.” 6RP 72. As Gonzalez hid herself behind Officer Scott, Donato emerged from the house with a belt draped around his neck. 6RP 49, 75.

Although Gonzalez’s English was limited, she was able to show the officers a “goose egg bump” on the top of her head, and pointed to her foot, then to Donato saying, “kicked head.” Through a series of gestures and broken words, Gonzalez was able to communicate through her tears to Scott and Olin (a firefighter who responded to the scene), that Donato had just beaten her and that

she was afraid. 6RP 82-83, 116-22. Gonzalez clutched at her ribs and showed them injuries on her head, back, side and legs. 6RP 117-19. She pointed to Olin's boots and then to some of her injuries, gesturing "that she was struck using boots." 6RP 118. One of the wounds on her back appeared consistent with a belt mark, and Gonzalez pointed to Olin's belt, then to the mark. 6RP 122. Officer Phipps took photographs of her injuries that were admitted at trial. 6RP 81-88. Her son clung to her legs as she received treatment. 6RP 121.

Donato told Officer Scott that he had been in an argument with Gonzalez while she was standing on the bed and that she had fallen off the bed and hit her head. 6RP 51. While he admitted to "some pushing," he denied that he had struck Gonzalez. 6RP 51. Donato said that he and Gonzalez had been together for about six months, and admitted to the officer that she was the 911 caller. 6RP 78. He said that the child belonged to Gonzalez from a previous relationship. 6RP 79.

Gonzalez did not appear at trial, but the jury heard the 911 call and heard testimony from the officers and the firefighter regarding their observations, her excited utterances, and Donato's admissions. They also heard from a defense investigator, who

testified that, on May 21, 2012, Gonzalez appeared in Renton Municipal Court and requested that a no contact order protecting her from Donato be lifted. 6RP 157. This no contact order was issued in a separate case, where a concerned neighbor apparently called 911. 6RP 159.

### 3. FACTS REGARDING THE 911 CALL.

Before police arrived at her home on May 2, 2012, Vivian Gonzalez made a frantic call to 911, saying "Help me" in accented English. Appendix 1.<sup>2</sup> Throughout the call, Donato's voice can be heard aggressively addressing an increasingly hysterical Gonzalez. Exhibit 1,<sup>3</sup> Appendix 1. Because the line is open, Donato can be heard telling Gonzalez, "Nothing will happen to the child... The problem is with you." Donato tells her that he "can't involve the child with anything." Exhibit 1, Appendix 1. Crying and screaming,

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<sup>2</sup> Two separate translated transcriptions of the 911 call were used at trial, one by the State (Exhibit 3) and one by Donato (Exhibit 2). Exhibit 3, the only forensic interpretation, captured more of the audio in the call, including Donato's threat to kill. Exhibit 3. Beatey, the interpreter who made Exhibit 2, testified that, had she used the same forensic equipment as the translator who made Exhibit 3, she could have produced a more detailed transcription. 5RP at 25-27. Beatey testified that, unlike Exhibit 3, hers was not a forensic transcription. 5RP at 27. Appendix 1 refers to Exhibit 3. Both transcripts have been submitted to this Court.

<sup>3</sup> While most of the call itself is in Spanish, the tone and tenor cannot be understood without listening to the audio in conjunction with reading the transcript. Exhibit 1, the actual 911 call, has been submitted to this Court.

Gonzalez pleads with Donato to "Please Stop!" and asks him why he wants the child. Exhibit 1, Appendix 1. Then Donato's threat becomes explicit: "If I kill you, I will kill you, I won't do anything to the child. Uh? Just you." Exhibit 1, Appendix 1.

After Donato's threat, Gonzalez can be heard weeping, and it appears that Donato suddenly realizes that she may have called 911, thereby revealing their interaction to authorities: "[W]ait, where is the phone? Show me." Gonzalez begins screaming, "Please!" as Donato asks her again, and then demands to see the "screen" of her telephone. Exhibit 1, Appendix 1. After asking her four times to see her phone, Gonzalez cries, "Stop... Leave us alone!" Donato replies, saying "Not anymore," before again demanding to see the telephone. Exhibit 1, Appendix 1.

After Gonzales begs him to "please go now," Donato asks her whether she called the police. Exhibit 1, Appendix 1. He repeats this over and over but she continues to respond by asking him to "just leave," until finally Gonzalez screams wildly: "Let go of me! Don't hit me! Please! Noooo! No... the child!..." She screams and cries again before shrieking, "Please" one last time before the phone call is cut off. Exhibit 1, Appendix 1. The dispatcher made

two unsuccessful attempts to call Gonzalez back at the same number. Exhibit 1, Appendix 1.

4. FACTS REGARDING SAME COURSE OF CRIMINAL CONDUCT ARGUMENT.

At Donato's sentencing, his attorney asked the trial court to find that his felony crimes were all part of the same criminal conduct, and should therefore not be scored against each other. 9RP 2. While Donato conceded that the mens rea required for felony harassment and assault in the third degree were different, he argued that the "law on same criminal intent is not the specific mens rea; but, essentially, the criminal enterprise – that is, what was the general intent." 9RP 2-3. He went on to say that the felony harassment and the assault charges "furthered each other in some sort of grand enterprise during the 911 call," and told the court that it "could not distinguish the two" for purposes of scoring. 9RP 3.

The State countered by asking the trial court to focus on the criminal intent requirements for each crime: "For the criminal intent, objectively looking at Felony Harassment is to place a victim in fear that their life is in danger of death. And so, when [Donato] made

the threat to kill, and audibly, you could hear her, basically in fear – she was crying and whimpering – that crime was completed.”

9RP 4. The State argued that Donato's “criminal intent changed substantially” during the struggle over the phone and culminated in Donato “assaulting her with his belt”:

It wasn't to further any crime of threat to kill; but, rather, objectively, to assault her with an instrument. And frankly, to punish her... for her acts of calling the police. And so, there is a shift in the criminal objective, or the criminal intent of the defendant.

...  
[C]learly, the objective – before he even knew that there were police involved, or that there was an open call to 911 – he wanted to put her in fear of death, basically; which had nothing to do, necessarily with the assault.

And so, because the crime was completed upon his threat to kill and the intervening fact [the 911 call] changed the objective, there is no same course of conduct in this case.

9RP 6.

After hearing from both sides, the trial court made its ruling:

As to whether or not they are the same course of conduct, I agree with the State that, certainly, there's not the same intent to negligently cause bodily harm to a person as there is to knowingly threaten to kill someone. And one does not necessarily further the other. So, the motion ... to score [the crimes] as one for purposes of same criminal conduct is denied.

9RP 7.

**C. ARGUMENT**

1. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE DEFINITION OF "TRUE THREAT" WAS NOT MANIFEST CONSTITUTIONAL ERROR.

Donato contends that the court's failure to instruct the jury on the definition of true threat created a manifest constitutional error warranting reversal of count I. But the evidence showed beyond any reasonable doubt that Donato's threat to kill Gonzalez was intended as a threat to kill her, and not a "jest, idle talk, or political argument." The failure to submit the instruction had no practical and identifiable consequences in the case, and therefore was not manifest and review is not warranted.

Innocent threats are protected speech but true threats are not. State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). Because the harassment statute criminalizes speech, the State must prove that a threat was not made merely "in jest, idle talk, or political argument." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Whether a statement is a true threat is determined by applying an objective standard that focuses on the speaker. Id. at 44.

To prove felony harassment, the State "must establish that a reasonable person in the defendant's position would foresee that

his statements or acts would be interpreted as a serious expression of intention to carry out the threat.” State v. Schaler, 169 Wn.2d 274, 290, 236 P.3d 858 (2010). At trial, a jury instruction defining true threat must be given along with the “to convict” instruction for felony harassment charges. State v. Johnston, 156 Wn.2d 355, 366, 127 P.3d 707 (2006).

A showing of manifest constitutional error, as raised in this case, requires a showing of actual prejudice; “essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007).

The felony harassment statute Donato was charged with reads in pertinent part:

- (1) A person is guilty of harassment if:
  - (a) Without lawful authority, the person knowingly threatens:
    - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
  - ....
  - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

....  
[(2) ](b) A person who harasses another is guilty of a class C felony if ... the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened.

The “to convict” instruction submitted to the jury in this case mirrored the statute. CP 93.

The Washington Pattern Jury Instruction (WPIC) for the definition of a true threat reads as follows:

To be a **threat**, a statement or act must occur in a context ... 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 [fill in the blank: jest or idle talk or political argument].”

WPIC 2.24. No party in this case proposed WPIC 2.24, nor did any party object to its absence.

Normally, failure to request or object precludes an appellate review of jury instructions. State v. Hickman, 135 Wn.2d 97, 104-05, 954 P.2d 900 (1998). But an appellant may raise a claimed error for the first time on appeal when it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Because the trial court's failure to provide a definition of true threat had no practical or identifiable consequences at trial, review is not warranted. State v. Kirkman, 159 Wn.2d at 935.

The context of the threat Donato made against Gonzalez in the 911 call and the tone and tenor of its delivery, leave little room for interpretation, and make it apparent that a jury instruction defining true threat would have had no impact upon the verdict. After all, the 911 call begins with a cry for help from Gonzalez, while Donato, who does not appear to know that the phone line is open, tells her that her child's life will be spared: "Nothing will happen to your child. The problem is with you." Exhibit 1, Appendix 1. Donato sounds angry and aggressive and Gonzalez is weeping and hysterical when she asks him why he wants to take her son with him, and Donato replies, "The problem is with you, bitch!" It is in this context that Donato makes his threat: "If I kill you, I will kill you, I won't do anything to the child. Uh, just you." Exhibit 1, Appendix 1.

Donato contends that because his threat to murder Gonzalez and spare her toddler sounds "conditional" (e.g., "If I kill you"), the true threat definition could have potentially made a difference in the verdict. Brief of Appellant at 8. But the true threat definition would have raised the following questions for the jury: *Was Donato's threat made in a context where a reasonable person, in the position of Donato, would foresee that the statement or act*

*would be interpreted as a serious expression of intention to carry out the **threat**? Was there any reasonable possibility that Donato's threat could have been a jest, or idle talk, or political commentary?*

WPIC 2.24. The answers to the questions posed, in light of the evidence, would have added nothing to the assessment of Donato's guilt or innocence, as the only reasonable answer to each question, with or without a "true threat" instruction, is "No."

The jury's guilty verdict, as rendered, reveals that the jury believed beyond a reasonable doubt that Donato threatened to kill Gonzalez and that she reasonably believed that he would carry out his threat. CP 93, 107. The context of the threat – that it was made after she had made a plea for help and during her crying and screaming for him to leave her alone – must have played a decisive role in the jury's verdict. It is this same context that would be evaluated by the jury after reading the true threat instruction to determine what a reasonable person in Donato's place could have foreseen. A reasonable person in Donato's position would have heard Gonzalez's screams for help, her pleas that he leave the house, her concern for her son, and the abject, piercing fear in her voice that transcends language. Exhibit 1, Appendix 1. A reasonable person in Donato's position would have heard the

aggression in his own voice, and would have known that the threat to kill was in no way “conditional” – the threat served to strike a very real fear in Gonzalez, the same fear that made her hide the phone as Donato demanded it, that made her beg for him not to hit her, and that sent her rushing out the front door the moment police arrived.

The effect of Donato’s words would have been obvious to anyone, including Donato, and the presence of Gonzalez’s son in the home as Donato threatened to kill her, but spare him, would only have served to fuel her fear. To argue that, had the jury been instructed on the definition of a true threat, they might have found that Donato was just joking, or did not intend to truly frighten Gonzalez, is to ignore the very context the true threat instruction asks a jury to assess in the first place.

Donato relies upon State v. Schaler to support his contention that the error was not harmless. 169 Wn.2d 274 (2010). In Schaler, the mentally ill defendant called a crisis center in tears, saying that he dreamt he had killed his neighbors and was afraid he might hurt someone. Id. at 278-79. Police arrived and took Schaler to the hospital, where he made threats that he wanted to kill his neighbors. Id. at 280. He was charged with felony harassment and

convicted, but the court failed to provide a definition of a true threat for the jury. Id. at 280-84. Because the jury was not instructed that the defendant actually needed to intend to threaten the listener, the Washington Supreme Court found that the error was not harmless:

Here, we cannot know whether the jury properly determined that Schaler's threats to kill his neighbors were "true threats." Certainly, there was evidence that Schaler said he wanted to kill his neighbors... However, Schaler never explicitly said that he would do so, his behavior at the time was erratic, and he was often contradictory. For example, he said that he wished to kill his neighbor with his bare hands, but in the same breath said that he hoped he did not kill her. Also, when he threatened to fight with the mental health workers who wanted to give him an injection, Schaler said that someone would get hurt but then suggested that, from prior injuries, he himself would be the one hurt.

Id. at 865-66.

Because Schaler's "utterances [did] not unequivocally lead to finding of a true threat," the court found that the absence of the true threat instruction was not harmless. Id. at 66.

Donato's threat, however, carried none of the ambiguity of Schaler's. It was communicated directly to its intended victim, and her response, not just to the threats, but to his whole violent demeanor, manifested a pervasive and real fear. Unlike Schaler, Donato never voiced any reluctance or desire *not* to murder

Gonzalez, but only insisted that he was going to murder her and not her little boy. His tone and hers, coupled with her pleas and her frantic fleeing from the house moments later, provide a very different context than Schaler's psychosis-induced ramblings to doctors and nurses about threats to a third party.

There is no evidence, either direct or by inference, that Donato's threats were jokes or idle threats, and no reasonable juror would have found as such. Given the surrounding context of his threat and its obvious and immediate effect on Gonzalez (which would have been even more obvious to Donato, who was next to her as the call was made), the jury would have rendered the same verdict with or without the "true threat" instruction. The error, therefore, is not manifest constitutional error and Donato's conviction should be affirmed.

2. COUNSEL WAS NOT INEFFECTIVE BECAUSE DONATO CANNOT SHOW PREJUDICE.

Donato argues that he received ineffective assistance of counsel where his trial counsel failed to propose a true threat jury instruction. But because the error had no practical consequences, such a failure did not prejudice him.

In assessing an ineffective assistance of counsel claim, a defendant must show both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice occurs when it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Even if Donato's attorney was deficient in not proposing the jury instruction, Donato cannot show prejudice because, as argued above, the evidence overwhelmingly supports that Donato intended his words to be a true threat against Gonzalez, and knew his threat was being taken seriously by Gonzalez. It is not likely that the jury would have found that Donato meant his threat as anything other than a true threat to kill. There is not a reasonable probability that the outcome would have differed, so any deficiency was not prejudicial. Id. at 694. Because there was no prejudice, Donato cannot show ineffective assistance of counsel, and his conviction should be affirmed.

3. THE TRIAL JUDGE ACTED WITHIN HER DISCRETION WHEN SHE FOUND THAT ALL CRIMES WERE SEPARATE CRIMINAL CONDUCT.

Donato argues that the trial court abused its discretion by finding that his crimes of felony harassment and assault in the third degree were not the same criminal conduct. But each crime involved a different objective intent and purpose, permitting the trial court, in its discretion, to find that they were not the same criminal conduct.

In determining a defendant's offender score under the Sentencing Reform Act, multiple current offenses are presumptively counted separately, unless the trial court finds that the offenses encompassed the "same criminal conduct." RCW 9.94A.589(1)(a). Two crimes constitute the same criminal conduct only if the crimes (1) required the same criminal intent; (2) were committed at the same time and place; and (3) involved the same victim. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a). Failure to meet any one element precludes a finding of same criminal conduct, and the offenses must be counted separately in calculating the offender score. Vike, 125 Wn.2d at 410. Courts

narrowly construe the concept of same criminal conduct to disallow most assertions of it. State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

An appellate court will not disturb a trial court's determination regarding same criminal conduct absent a clear abuse of discretion or a misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

In count I, Donato was charged with assault in the third degree for "with criminal negligence," causing "bodily harm to Vivian Gonzales," by "means of a ... belt." CP 32; RCW 9A.36.031(1)(d). In count II, he was charged with felony harassment for "knowingly and without lawful authority" threatening to "cause bodily injury" to Gonzales "by threatening to kill" her and his "words or conduct did place" her in "reasonable fear that the threat would be carried out." CP 33; RCW 9A.46.020(1),(2)(b).

To determine whether two or more crimes involve the same intent, courts focus "on the extent to which the defendant's criminal intent, as objectively viewed, changed from one crime to the next."

State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

“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. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007) (emphasis added). The Washington Supreme Court has made clear that “the ‘furtherance test’ was never meant to be and never has been the lynchpin of [the Washington Supreme Court’s] analysis of ‘same criminal conduct.’” Haddock, 141 Wn.2d at 114. The focus of the inquiry remains on the extent to which the criminal intent changed from one crime to the next. Wilson, 136 Wn. App. at 613.

To determine criminal intent, for purposes of calculating an offender score, courts first objectively view each underlying statute and determine if the required intents were the same for each count; where the statutory intents were the same, the court next objectively views the facts to determine whether a defendant’s intent was the same with respect to each count. State v. Bickle, 153 Wn. App. 222, 222 P.3d 113 (2009). As such, even crimes with identical mental elements will not be considered the “same criminal conduct,” if they were committed for different purposes. State v. Price, 103 Wn. App. 845, 854, 14 P.3d 841 (2000).

Here, although the victim and place were the same, the objective intents of the crimes charged were different; the assault required only "criminal negligence," while the harassment required knowledge. 9RP 7; 9A.36.031(1)(d), RCW 9A.46.020(2)(b). Even on their face, the statutes themselves require disparate mens rea for the commission of each crime, supporting the trial judge's decision that the two crimes were not the same course of criminal conduct.

A factual analysis of Donato's crimes also serves to counter a same course of conduct argument. After all, Donato threatened to kill Gonzalez first, and it was only after he suspected her of having called the police that he appeared (according to the audio on the 911 call), to begin assaulting her with the belt. Appendix 1, Exhibit 1. With his threat conveyed and Gonzalez's obvious fear voiced in her whimpering voice, the commission of the felony harassment was complete. Once Donato made the decision to begin beating Gonzalez with his belt after he had threatened to kill her, his intent changed and a new crime began. As the trial judge found, these crimes did not necessarily further each other; Donato could have easily made a credible threat to murder Gonzalez without actually striking her with his belt, particularly given the

context of the threat, where it was implicated that he would take her toddler from Gonzalez after he had murdered her. Appendix 1, Exhibit 1.

When Donato realized that Gonzalez had called 911 and was refusing to show him the telephone, he formed a new intent: to punish her for calling for help. In Grantham, 84 Wn. App. at 858-59, the court found that where two crimes against the same victim were separated by a brief moment of time that allowed for a period of reflection and formation of a new, objective intent, the trial court had discretion to find that same criminal conduct did not apply, even if the statutory intent was identical in both crimes. Here, consistent with the finding in Grantham, Donato's motive changed from trying to frighten Gonzalez to assaulting her for calling the authorities; this change manifested the formation of new objective intent, buttressing the trial court's finding that there was no same criminal conduct.

Because felony harassment and assault require different criminal intents and because the facts of the crimes themselves reveal different designs, the trial judge acted well within her discretion in finding that there was no same course of criminal conduct. This Court should affirm the trial court's decision.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Donato's convictions.

DATED this 25 day of July, 2013.

Respectfully submitted,

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\_\_\_\_\_  
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## Appendix 1

**BILINGUAL FORENSIC TRANSCRIPT**

*Transcribed and Translated by Claudia A'Zar, United States Court Certified Interpreter*

**KEY TO TRANSCRIPTIONS AND TRANSLATION**

Italics            Spoken in English

[u]                Unintelligible

[i]                Inaudible

---                Non linguistic audio content

/                  Separates two valid alternatives for the translation

An unintelligible portion may include multiple syllables, words, or other linguistic units. Unintelligible portions starting at 10 seconds in length are timed. (i.e., if an unintelligible portion is not timed, its length is less than 10 seconds.)

Certification    Transcriber/ Translator's certification upon request.

Voice designations were not supplied.

	Voices	Original	Translation
1.	---	[pitido]	[beep]
2.		Nine-one-one.	<i>Nine-one-one.</i>
3.		[A un lado: ¡Sergio! Help me. [A un lado: Sergio...]	[On the side: Sergio! <i>Help me.</i> [On the side: Sergio...]
4.		Hí, nine-one-one, can I help you?	<i>Hi, nine-one-one, can I help you?</i>
5.	---	[voces en el trasfondo]	[voices in the background]
6.	--	Hello?	<i>Hello?</i>
7.		A ti...al niño no le pasa nada. El pedo es contigo.	To you...Nothing will happen to the child. . The problem is with you.
8.		Pero es que...	But it's just that...
9.		Hello.	<i>Hello.</i>
10.	-	Al niño no lo puedo meter con nada. ¿Eh?	I can't involve the child with anything. Uh?
11.		¡Por favor ya! [llorando] [voces se traslapan]	Please stop! [crying] [Voices overlap]
12.		Tú [u] coraje, [u] coraje. El pedo es con usted. ¿Eh?	You [u] anger, [u] anger. The problem is with you, uh?
13.		¿Pero por qué te quieres llevar a mi hijo?	But why do you want to take my son with you?
14.		¡El pedo es con usted cabrona! Vámonos güey.	The problem is with you bitch! Let's go dude.
15.		Ya te dijeron que... [llorando]	You've already been told that... [crying]
16.		Yo si la mato, la voy a matar a usted, al niño no le voy a hacer nada ¿eh? A usted nomás.	If I kill you, I will kill you, I won't do anything to the child. Uh? Just you.
17.		[llorando]	[crying]
18.		Usted [u]se está pasando [u] conmigo, a ver espérate, ¿dónde está el teléfono? Enséñame.	You [u] going over [u] with me. Let's see....wait, where is the phone? Show me.
19.		[u] ¡Por favor!	[u] Please!

20.	Aquí nomás.	Just here.
21.	[llorando]	[crying]
22.	¿Dónde está el teléfono?	Where is the phone?
23.	[llorando]	[crying]
24.	Voltéalo, la pantalla. [u]	Turn it, the screen...
25.	Ya déjalo, ya vete.	Let it go/let him go, just go.
26.	[u] Enséñame el tuyo.	[u] Show me yours.
27.	Ya déjalo éjalo ya...	Just let it go/just let him go...
28.	¿Enseñame el tuyo?	Show me yours?
29.	Yo no he marcado a nadie...	I have not called anybody...
30.	Enseñámelo tú...	You, show it to me...
31.	Tú sabes que nunca le hablo a nadie...	You know that I never call anyone...
32.	Enseñámelo.	Show it to me.
33.	Nunca le hablo a nadie, Sergio...[u]	I never call anyone, Sergio...[u]
34.	¿Por qué teléfono estás hablando?	What phone are you calling from?
35.	Ya...[llorando] ¡Déjanos en paz! Ya no...	Stop... [crying] Leave us alone! Not anymore...
36.	Enseñame el teléfono.	Show me the telephone.
37.	Ya por favor vete.	Please go now.
38.	¿Le marcaste a la policía?	Did you call the police?
39.	Ya vete [llorando]	Just go [crying]
40.	¿Le marcaste a la policía?	Did you call the police?
41.	¡Por favor...ya!	Please...stop!
42.	Dame el teléfono.	Hand me the phone.
43.	¡Ya...vete por favor! ¡Vete!	Please...just go! Go!
44.	Ya...	Already...
45.	¡Déjame! ¡No me pegues! ¡Por favor! ¡Nooooo! ¡No.....! El niño, [gritos] [llanto] Por favor...	Let go of me! Don't hit me! Please! Nooooo! No...the child! [Screams] [crying] Please...

46.	---	[01:28- [Se corta la llamada] 02:25]	[01:28- [the call was cut off] 02:25]
47.		[llamando] We are sorry; your call did not go through...	[dialing] <i>We are sorry; your call did not go through...</i>
48.	---	[2:30-03:14]	[2:30-03:14]
49.		You have reached the voice mailbox of three, two, three, five, one, nine, five, two, sev...	<i>You have reached the voice mailbox of three, two, three, five, one, nine, five, two, sev...</i>
50.	---	[fin de la grabación]	[end of the recording]

## Appendix 2

State vs Sergio Donato, 12-1-02516-5

Transcription and translation of CD "Sergio Donato, CR 56251 911 Audio"

LEGEND

D = 911 Dispatcher

BN= Background noise

U= Unintelligible

VO= Voice Overlap

**Bold face typing: Spanish to English Translation**

*Italics= Original English, not a translation*

Calibri: Original Spanish

1	<i>911</i>	D		1
2	<b>Sergio... Help me... Sergio</b>		Sergio...Help me ... Sergio...	2
3	<i>911. Can I help you?</i>	D		3
4	<i>BN</i>			4
5	<i>Hello??</i>	D		5
6	<b>I'm not gonna do anything to the kid... the problem is with you... I'm not gonna involve the kid in anything, ok?</b>		Al niño no le hago nada, el tema es contigo...Al niño no lo voy a meter con nada..eh?	6
7	<b>Hello?</b>	D		7
8	<b>Please... {VO}</b>		Por favor, ya...{VO}	8
9	<b>{U} My problem is with you, ok? {U} {VO}{U} I'm not gonna do anything to the kid, ok? Just you... {U} {VO}</b>		{U} El pedo es con usted, eh?... { U} {VO} {U}al niño no le voy a hacer nada eh? , a usted nomás ...{U} {VO}	9
10	<b>Let me see the phone, turn the phone, let's see... show me</b>		A ver el teléfono, voltee el teléfono, a ver...enséñeme...	10
	<b>Please</b>		Por favor	
11	<b>Show it to me... turn it, the screen. Turn</b>		Enséñemelo... voltéalo, la pantalla.	11

	it so I can see it..		Volteámelo para verlo	
12	Leave us alone, just go away		Ya déjanos, ,ya vete...	12
13	Show me the phone		Enséñame el teléfono	13
14	Just leave us alone, I haven't dialed anybody		Déjanos, ya... no le he marcado a nadie..	14
15	Let's see... show me		A verte, enséñame lo	15
16	You know I never call anybody		Tú sabes que nunca llamo a nadie	16
17	Show me		Enséñame lo	17
18	I never call anybody, Sergio		Nunca le hablo a nadie, Sergio .	18
19	Turn the phone so I can see it		Voltea el teléfono para verlo	19
20	Just leave us alone!!		Ya! Déjanos en paz	20
21	Show me the phone		Enséñame el teléfono	21
22	Please, please, go away		Ya, por favor vete	22
23	Are you dialing the police?		Le estás marcando a la policía?	23
24	Just go away		Ya vete	24
25	Have you dialed the police?		Marcaste a la policía?	25
26	Just go away... Please...		Ya vete... Por favor... Ya	26
27	Show me the phone		Enséñame el teléfono	27
28	Just... Just go away please... Go away, leave me alone... don't hit me, please, no no, the child!!! Please!!!		Ya....Vete por favor.. vete, déjame, no me pegues, por favor, no, no, el niño! Por favor!!!	28

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 Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. SERGIO DONATO, Cause No. 69538-0 -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.

Dated this 25 day of July, 2013

A handwritten signature in black ink, appearing to be "A. P. Zinner", written over a horizontal line.

Name  
Done in Seattle, Washington