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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence presented at trial to convince a rational trier of fact that Guzman was guilty of second degree assault against Jesus Zepeda and Jacob Murphy.

2. Whether Count III, second degree assault, and Count IV, felony harassment, both against victim Raymond Reyes, Sr., constitute the same criminal conduct for purposes of calculating Guzman's offender score.

3. Whether Guzman's sentence, including community custody, exceeds the statutory maximum for second degree assault.

4. Whether Guzman's trial counsel was ineffective for failing to raise the offender score and statutory maximum issues at sentencing.

B. STATEMENT OF THE CASE.

The State accepts Guzman's statement of the case.

C. ARGUMENT.

1. The evidence produced at trial was sufficient to convince a rational trier of fact, beyond a reasonable doubt, that Guzman committed second degree assault against Jesus Zepeda and Jacob Murphy.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410,

415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

During the night of March 10-11, 2007, there were two separate incidents involving gunfire at 1313 25th Court NE in Olympia. Guzman does not dispute that during the first incident he fired a bullet into the air. Raymond Reyes, Sr., saw Guzman's girlfriend, Aracelli, take the gun out of her purse and hand it to Guzman. He fired it. [RP 89] Daniel Ramos heard the shot and saw Guzman holding the gun immediately afterward. [RP 113] Afterward, Guzman gave the gun back to Aracelli to put in her purse. [RP 107]

After that incident, Guzman had some sort of disagreement with a person named Joey, and was so angry that the senior Reyes took him into the unfinished addition to the house to try to calm him down. [RP 91] He was spectacularly unsuccessful at that; Guzman attacked Reyes, Sr., striking him in the mouth, kicking him, and causing him to fall against a sink in such a manner that he broke two ribs and collapsed a lung. [RP 92-93, 108-09] Immediately thereafter, Guzman asked Aracelli for "the black bag", but she was

unable to reach him because the wall studs prevented her from doing so. [RP 110] Reyes, Sr., was taken to the hospital by his daughter. [RP 93-94] Daniel Ramos, who didn't realize Reyes, Sr., had left, was distracted by two little girls crying near the door, and he took them to the senior Reyes's bedroom to calm them. Ramos turned the TV up for them and stayed with them "for awhile". Hearing yelling, he went into the hallway, telling the girls to lock the door behind him; he heard gunfire, then heard Guzman enter the house and ask where Reyes was: "Where's Chuco, where's Chuco, he's fucking dead." [RP 110-12] Ramos was frightened enough that he re-entered the bedroom, closed the door, braced it shut with his feet, and called 911. [RP 112]

While Ramos was upstairs with the children, Jesus Zapeda was in the living room with the door locked against Guzman when Jacob Murphy banged on the door. As soon as Murphy entered, telling Zapeda to duck, three or four bullets were fired through the open door. [RP 123-25] As he was opening the door, Zapeda saw Guzman outside. [RP 124]

Officer Robert Krasnican of the Olympia Police Department interviewed Guzman at the scene. Guzman told the officer he was angry because he'd been injured in some kind of fight, that he got

his gun from his girlfriend's purse, and shot it. Guzman walked to the north side of the cul-de-sac, raised his hand into the air, and said "I went bang, bang, bang." When asked what he did with the gun, Guzman answered by asking if the officer had spoken to Aracelli.[RP 29-32] After speaking to Aracelli, the officer located the gun at the southeast edge of the cul-de-sac. [RP 35]

The jury was instructed that direct and circumstantial evidence are equally valuable, [Instruction No. 4, CP 35] and that the State must prove each element of the crime beyond a reasonable doubt. [Instruction No. 3, CP 34]. Guzman is correct that no witness testified to seeing Guzman fire the gun at Zapeda and Murphy. However, the evidence before the jury was that no one other than Guzman and Aracelli was seen with a firearm that evening, and Guzman was attempting to retrieve the gun from Aracelli during the altercation with Reyes, Sr. There was a great deal of testimony that Guzman was extremely angry and aggressive with more than one person. Guzman was outside the door when the gun was fired at Zapeda and Murphy. Guzman admitted to shooting the gun which was found in the cul-de-sac, and which was proven to have fired at least one of the bullets and five cartridge cases recovered from the house. [RP 145] There was

no evidence whatsoever that any other person had fired the gun all evening.

Any jury could have concluded, based upon this evidence, that Guzman fired the shots at Zapeda and Murphy. Contrary to Guzman's argument, there is far more here than a "pyramiding of inferences." That term comes from State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962). In Weaver, there was no evidence other than a tool that could possibly have been used in a burglary in a place Weaver had been. At the time Weaver was decided, the rule was that a conviction could be based solely on circumstantial evidence only where the circumstances were totally and completely inconsistent with innocence. That rule has since been rejected. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). The current rule is that "whether the evidence be direct, circumstantial, or a combination of the two, the jury need be instructed that it need only be convinced of the defendant's guilt beyond a reasonable doubt." Id.

"If the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt, a conviction may be properly based on 'pyramiding inferences.'" . . . [I]t is the province of the trier of fact to determine what conclusions reasonably follow from the particular evidence in a case.

Id., cite omitted.

It is not a stretch for the jury to find that Guzman retrieved the gun from Aracelli a second time and fired it at Zapeda and Murphy.

2. Counts III (second degree assault) and IV (felony harassment), where the victim in both was the same person, do not constitute the same criminal conduct for purposes of calculating Guzman's offender score.

The two convictions for second degree assault and felony harassment, both against Raymond Reyes, Sr., should not count as the same criminal conduct. Whether sentences are consecutive or concurrent is determined by RCW 9.94A.589(1):

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

To constitute the same criminal conduct, the separate crimes must involve all three of the elements listed in the statute--(1) the

same criminal intent; (2) the same time and place; and (3) the same victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). “This court must narrowly construe RCW [9.94A.589(1)] to disallow most assertions of same criminal conduct.” State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999). The trial court’s ruling will be reversed only if it abused its discretion or misapplied the law. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The same criminal conduct analysis involves both factual determinations and trial court discretion. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). Here, the victim was clearly the same for both counts. The place was the same residence. However, the time and intent were not.

“[T]he repeated commission of the same crime against the same victim over a short period of time” can constitute same criminal conduct, 13A SETH AARON FINE, WASHINGTON PRACTICE § 2810, at 112 (Supp 1996). In Vike, *supra*, the defendant was convicted of two counts of possession of a controlled substance after he was arrested with both heroin and clonazepam in his possession at the same time. The court there held that “on the narrow facts before us, simultaneous simple possession of two or more controlled substances encompasses the

same criminal conduct for sentencing purposes.” Vike, *supra*, at 409. In State v. Walden, 69 Wn. App. 183, 847 P.2d 956 (1993), the court found that two acts of sexual intercourse forced upon the same victim in a short period of time constituted the same criminal conduct.

However, in Guzman’s case, the two offenses were separated by some significant amount of time. After the assault on Reyes, Sr., the victim left to go to the hospital, and Ramos had time to take the two children to the victim’s bedroom, turn the TV up for them, and spend “awhile” calming them before he heard the second gunshots and heard Guzman threatening the life of Reyes, Sr. Guzman, who did not have the gun while he was assaulting Reyes, Sr., had time to retrieve it from his girlfriend and fire it at Zepeda and Murphy before entering the house looking for Reyes, Sr. Sequential crimes are not necessarily the same criminal conduct even when committed against the same victim.

State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), is a rape case where two acts of sexual intercourse occurring in a short span of time were found not to be the same criminal conduct. The court found that Grantham, having completed one act of forced intercourse, had “the time and opportunity to pause, reflect, and

either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act.” Id., at 859. Citing to a Wisconsin case, the court quoted this language with approval:

If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment and he must be treated as accepting that risk whether he in fact knew of it or not.

.....
One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim’s integrity and a further danger to the victim.

Id., at 861.

The same reasoning applies to Guzman. The assault on Reyes, Sr., was over and he had ample time to consider before he armed himself and went looking for his victim again, clearly expressing his intent to kill him.

As these cases indicate, the time factor is very much tied up with the “same intent” element. Guzman argues that his intent remained the same for both crimes—the intent to harm Raymond Reyes, Sr. This court, however, has found different intents where

the two offenses at issue were assault in violation of a restraining order and felony harassment. In State v. Wilson, 136 Wn. App. 596, 150 P.2d 144 (2007), Wilson had broken down the door of the residence he shared with his victim, even though she had a restraining order against him. He grabbed her by the hair, pulled her out of bed, and kicked her. After leaving the house briefly, he reentered, picked up a piece of wood, and threatened to kill her with it. In finding that the two offenses were not the same criminal conduct, the court articulated the standard this way:

Two crimes do not contain the same criminal intent when the defendant's intent objectively changes from one crime to the other. . . 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. . . But where the second crime is "accompanied by a new objective 'intent,'" one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct. . .

Id., at 613-14, internal cites omitted.

The Wilson court further examined the intents for the two crimes as defined in the statutes and found them different. In Guzman's case, the second degree assault charge required an intentional assault and a reckless infliction of substantial bodily

harm [Instruction No. 20, CP 41], while felony harassment required that Guzman knowingly threaten to cause bodily injury [Instruction No. 24, CP 42-43]. This language from Wilson applies equally well to Guzman's case:

Not only do these two crimes' respective statutes define different criminal intents, but also the two acts giving rise to the two criminal charges were separated in time, providing opportunity for completion of the assault and ending Wilson's assaultive intent, followed by a period of reflection and formation of a new, objective intent upon reentering the house to threaten Sanders and to harass her. . . Construing RCW 9.94A.589(1)(a) narrowly, as we must, to disallow most assertions of "same criminal conduct," we vacate the trial court's same-criminal-conduct finding. . .

Wilson, *supra*, at 615 (internal cites omitted).

Guzman's crimes were sequential, with different intents. Neither crime furthered the other, and Guzman had ample time to "pause and reflect" before committing the felony harassment. Given the general rule that the crimes count separately, there is no basis here for finding an exception to the rule. The facts here are significantly different than those in Vike, for example, where the court held that "on the narrow facts before us, simultaneous simple possession of two or more controlled substances encompasses the same criminal conduct for sentencing purposes. Given the facts in

Guzman's case, second degree assault and felony harassment do not constitute the same criminal conduct for purposes of calculating his offender score.

a. Waiver.

Even if the two crimes did constitute the same criminal conduct, Guzman waived his right to argue on appeal that his offender score was improperly calculated when he failed to challenge it in the trial court. [01/29/08 RP 4] State v. Wilson, 117 Wn. App. 1, 21, 75 P.3d 573 (2003); see also State v. Beasley, 126 Wn. App. 670, 685-86, 109 P.3d 849 (2005) ("Beasley left the determination to the court and thus, waived his right to object to this issue.")

3. The judgment and sentence incorrectly attaches both firearms enhancements to Count VI. The matter should be remanded for the trial court to correct the judgment and sentence.

Guzman argues that any community custody over 15 months will increase his standard range sentence of 105 months beyond the statutory maximum of 120 months. As the judgment and sentence is written, that appears to be the case. However, the judgment and sentence incorrectly states both the sentence as handed down by the court, and the law.

The jury found that Guzman was armed with a firearm when he committed both second degree assaults, Counts V and VI. [CP 20-21] Second degree assault is a class B felony, and the statutory maximum is ten years. The firearm enhancement for a class B felony is 36 months. RCW 9.94A.533(3)(a). The period of the firearm enhancement is mandatory, to be served in total confinement, and runs consecutively to all other sentences and all other firearm or deadly weapon enhancements. RCW 9.94A.533(3)(e).

RCW 9.94A.533(3)(g) provides:

If the standard range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(Emphasis added.)

Guzman's standard range for each assault was 33-43 months. [CP 74] The weapons enhancement for each was 36 months. At sentencing, the court imposed 33 months for each of the three second degree assaults (the jury did not find the firearm enhancement for the third assault charge [CP 23]), 16 months for

the second degree unlawful possession of a firearm, and 16 months for the harassment count, all to run concurrently. The court further imposed the two firearm enhancements of 36 months to run consecutively to counts V and VI as well as to each other. [01/29/08 RP 11-12] Thus the sentence as imposed for each of counts V and VI was 33 months plus 36 months firearm enhancement for a total of 69 months on each count. The court also imposed a range of 18-36 months of community custody on each count [CP 77], for a maximum total of 105 months (69 months plus 36 months).

However, when the judgment and sentence form was filled out, the sentence was entered to impose no firearm enhancement on Count V but imposed both enhancements on Count VI, making the sentence for that count appear as 105 months. [CP 77] This is clearly incorrect, as the language of RCW 9.94A.533(3)(g), quoted above, shows. "The" enhancement is to be added to "the" offense, not to the total offenses.

The Washington Supreme Court decided a case on almost identical facts in 2003. In State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003), Thomas was convicted of two counts of second degree robbery, which is a class B felony with a statutory maximum of 120 months. He was also convicted of second degree unlawful

possession of a firearm, a class C felony with a statutory maximum of 60 months. A firearm enhancement of 36 months was added to each robbery conviction and one of 18 months to the unlawful possession conviction. His standard range for each robbery count was 99-120 months, including the enhancement, and 51-60 months for the firearms possession. He received top of the standard range on each robbery count, 84 months plus the 36-month enhancement, for a total of 120 months, and a 60-month sentence on the unlawful possession count. The base sentences were to run concurrently, but the enhancements consecutive to the longest base sentence and to one another. The total came to 13 years. Id., at 669. Thomas appealed, arguing that his total enhanced sentence could not exceed ten years. The Court of Appeals, as well as the Supreme Court, rejected his argument and affirmed.

The Thomas court's analysis is based on RCW 9.94A.310(3)(g), which has since been recodified as RCW 9.94A.533(3)(g), but the language has remained consistent. Guzman, like Thomas, is arguing that this statute caps his total period of confinement at the statutory maximum for the most serious of his offenses. The court said, however:

[N]othing in the plain language of former RCW 9.94A.310(3)(g) suggests that an offender's total period of confinement for multiple offenses would be capped at the statutory maximum for the highest level offense. The provision does not refer to multiple offenses but to "*the* offense," and it makes no mention of the highest level offense. Subsection .310(3)(g) concerns only the calculation of the maximum standard sentence range for a single offense.

Id., at 671-72, (emphasis in original). In its conclusion the court held that "[w]hile the statutory maximum for second degree robbery provided a maximum sentence for each of Thomas's firearm-enhanced second degree robbery convictions, former RCW 9.94A.310(3)(g) did not cap at 10 years Thomas's total period of confinement." Id., at 674.

Guzman is in exactly the same position. The maximum he would serve on each count of second degree assault is 33 months for the base sentence, 36 months for the firearm enhancement, and 36 months of community custody, for a total of 105 months, well under the statutory maximum of 120 months. The fact that the two firearm enhancements run consecutively to the base sentences and to each other does not raise the sentence for each count above the statutory maximum for each.

Because the judgment and sentence incorrectly documents this sentence, this matter should be remanded to the trial court so

that it may be amended to conform to the sentence actually imposed by the court, and with the law.

4. Guzman did not receive ineffective assistance of counsel.

Guzman correctly sets forth the standard for review of a claim of ineffective assistance of counsel. Applying that standard, however, it is apparent that his counsel was not ineffective. As argued above, the second degree assault and felony harassment convictions do not constitute the same criminal conduct, and therefore his attorney was not ineffective for failing to object to the calculation of his offender score or for affirmatively agreeing with it. There was no error and thus no invited error. While it may have been error for defense counsel to fail to bring to the attention of the court that the judgment and sentence was incorrectly completed, Guzman can show no prejudice in that his sentence will not change in the slightest. The only difference will be in the manner in which it is memorialized. It is also difficult to find that trial counsel fell below an objective standard of reasonableness when neither the prosecuting attorney nor the trial court noticed that the judgment and sentence was incorrectly filled out.

D. CONCLUSION.

The State produced sufficient evidence at trial to allow a rational trier of fact to find beyond a reasonable doubt that Guzman was guilty of two counts of second degree assault against Zepeda and Murphy. The second degree assault against Raymond Reyes, Sr., and the felony harassment against the same victim did not constitute same criminal conduct for purposes of calculating the offender score. The court did not impose a sentence in excess of the statutory maximum, although the judgment and sentence was incorrectly completed and should be remanded for amendment. Guzman did not receive ineffective assistance of counsel.

The State respectfully requests that this court affirm Guzman's convictions and sentence, and remand for correction of the judgment and sentence.

Respectfully submitted this 3d of October, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief No. 37302-5-II, on all parties or their counsel of record on the date below as follows:

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BY _____
DENVER

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

Dated this 3rd day of October, 2008, at Olympia, Washington.

TONYA MAIAVA