

NO. 46153-6-II

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

STATE OF WASHINGTON, Respondent

v.

PEDRO GODINEZ JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-02162-7

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. The Trial Court did not err in admitting the victim's hearsay statement.
- II. The Trial Court did not err in allowing Joanna Speaks to testify in her inmate clothing.
- III. The Trial Court did not err in calculating the offender score.
- IV. The Trial Court did not err in its determination of separate criminal conduct.

B. STATEMENT OF THE CASE

I. Introduction

Pedro Godinez and Joanna Speaks set Freddy Landstrom up to be robbed and kidnapped. Godinez forced Landstrom at gunpoint to drive to Vancouver Lake where he attempted to murder Landstrom by shooting him several times and leaving him to die.

II. Facts

Freddy Landstrom was born in Bogota, Columbia. RP 408. When he was seven years old, his parents were killed. RP 409. At the age of ten, he came to the United States and was adopted. RP 409. Mr. Landstrom was working at a Ford dealership in Milwaukie, Oregon, when he met Joanna Speaks. RP 408, 412. One night after getting off work he went to a convenience store to get some water. RP 412. When he emerged from the

store, he saw a woman with two small children and the woman was crying. RP 412-13. The woman was Joanna Speaks. RP 412. He had never met Speaks before. RP 412. No one was helping Speaks, so Landstrom approached her and asked if she was okay. RP 414. Speaks began telling him that she lost her job and was trying to get to her parents' house, but she didn't have bus fare. RP 414. Landstrom thought the situation was very sad and offered her a ride to her destination. RP 414. Landstrom related to Speaks because of his past, when he needed help as a child and his American parents helped him before even knowing him. RP 415. Landstrom offered to hire Speaks to clean his apartment, figuring that he needed the help because he was very busy and she needed the work. RP 417-18. Landstrom had a girlfriend and a daughter but he lived alone. RP 418. Speaks contacted him a few days later about cleaning his apartment. RP 419. She spent several hours cleaning his apartment and he paid her for it. RP 419. Landstrom also offered to pay Speaks to help him move. RP 420. However, Landstrom did not see Speaks again until the date of this incident. RP 420. Speaks told Landstrom during this time she had gotten a job. RP 421.

On November 27, 2012, at around 11:00 p.m., Landstrom had just finished a phone conversation with his girlfriend and was preparing to go to bed. RP 422. He couldn't sleep, however, and decided to go to La

Center to play poker, as he occasionally did. RP 410, 422-23. He never made it to La Center. RP 423. He received a call from Speaks, and she was crying. RP 424. She told him she'd lost her job and that her electricity was going to be shut off the next morning. RP 424. He told her to calm down and that he would pay the bill. RP 424-25. He planned to drop off the money at her apartment and continue on to La Center. RP 425. She asked him to stop and get her some beer on the way. RP 425-26. He stopped at a gas station on Mill Plain Boulevard in Vancouver and purchased some Corona beer. RP 426-27, 432. He drove his new black Nissan Sentra that night. RP 432.

When Speaks let Landstrom into the apartment it was dark, and she said "follow me." RP 434. He could see by the light on in her bedroom, and as he followed her further in to the apartment she told him where to put the beer. RP 435. She gave him a stoic look and he asked her if she was okay. RP 435. At that point he heard the door to the apartment open and shut, and a man came in with a gun. RP 435-36. The man was the defendant, Pedro Godinez. RP 436. Landstrom assumed at that point that he and Speaks were about to be robbed. RP 437. Godinez said something in Spanish, and Speaks went over to Godinez and whispered in his ear. RP 437. At that point Landstrom realized he'd been set up by Speaks. RP 437. Speaks went to the back of the apartment and Godinez told Landstrom to

take off his jacket and take everything out of his pockets. RP 438.

Landstrom took out his wallet, keys and phone. RP 438.

Godinez began giving Landstrom instructions. RP 441. He led Landstrom down to the Nissan at gunpoint, threatening that he would shoot Landstrom if he didn't comply. RP 441. At the car, Landstrom got into the driver's seat and Godinez got into the middle of the backseat with the gun pointed at Landstrom. RP 443. Godinez forced Landstrom to drive for a long time, and it felt like hours to Landstrom. RP 445. Eventually Godinez directed Landstrom to a "paved wilderness place." RP 447.

Godinez asked Landstrom who were the most important people in his life. RP 447. Before he could answer, Godinez said "It isn't your daughter, I know that." RP 447. Up to that point, Landstrom had not mentioned having a daughter. Landstrom said it was his brother and his daughter. RP 447. Godinez said "don't do anything stupid because I know everything about you." RP 447. Godinez then revealed that Speaks had told him (Godinez) everything about Landstrom. RP 448. Godinez told Landstrom "I've done this before," and threatened that he would get to Landstrom's family. RP 450. Landstrom hoped that he could talk Godinez out of killing him. RP 450-51.

Eventually Godinez told Landstrom to stop the car on a gravel road. RP 451-52. He told Landstrom to get out of the car and hand him the

keys. RP 452. At that point, Landstrom thought he was going to die. RP 453. Godinez instructed Landstrom to walk down the gravel road, and told him not to turn around, and “just keep walking.” RP 456. Godinez told him to stop, and told him to get on his knees. RP 457. Landstrom began pleading for his life, reminding Godinez that he already had Landstrom’s car and credit cards, telling him he didn’t have to do this. RP 457. Godinez began asking Landstrom how much money was available on each of his credit cards, and told Landstrom not to “cry like a bitch.” RP 457. They began walking again, and Landstrom thought Godinez was considering not killing him. RP 458. But they eventually stopped again and Godinez told Landstrom to take his shoes off. RP 459. He also told Landstrom he could report his car stolen the following Saturday, and asked Landstrom for his PIN numbers, which Landstrom gave him. RP 459. They began walking again and Landstrom begged Godinez to allow him to run away. RP 460. Godinez told Landstrom to get on his knees. RP 460. Godinez then said “Sorry, I lied. This is your last night.” RP 461. Godinez then made the sign of the cross and began shooting Landstrom. RP 461.

The first shot hit Landstrom in the head, but it turned out to be a grazing wound. RP 461. Godinez exclaimed “What? You’re not dead?” RP 461. Godinez shot him again in the chest area, and said “die.” RP 462. Landstrom put his hand up to defend himself and a bullet shattered his

hand. RP 462. Godinez shot Landstrom again, saying “Why won’t you die?” RP 462. Despite extreme pain and continued shots, Landstrom got up and ran away. RP 462-63. Landstrom ran to a nearby swamp, with Godinez yelling “You’re dead!” RP 463. As Landstrom fled he tried to cover himself in mud and stayed low in the swamp. RP 464. Landstrom stayed in the swamp for a period of time, thinking Godinez was still after him. RP 466. He eventually got up and searched for help. Id. He was cold and tired. RP 466-67. He eventually made it to Kadow’s Marina, where Sharon Baisden, a resident at the marina, called 911. RP 165. Officer Janisch and Sgt. Alie of the Vancouver Police Department were the first officers to arrive at the scene. RP 113. They were dispatched at 4:30 a.m. RP 112. Sgt. Alie observed that Landstrom was afraid that the shooter was going to go after his family, and feared he would die. RP 114, 116.

Exhibit 313 was admitted into evidence, and it was a surveillance video from the ATM machine at People’s Community Federal Credit Union at Fisher’s Landing from November 28, 2012 at approximately 3:49 a.m. There was also a receipt for a balance inquiry on the victim’s bank account at the same bank during that time frame. RP 217-2-18, Exhibit 116. Cassandra Neal, Godinez’s girlfriend and mother of his two children, checked into a Motel 6 in Vancouver on November 29, 2012. RP 222, 341, Exhibit 448. Surveillance video from the Motel 6 showed a male

getting out of a Nissan Sentra and going to room 229, which was registered to Neal. RP 912-13. At approximately 4:20 a.m. on November 28, 2012, Landstrom's debit card was used at an AM/PM market. RP 284. The surveillance video from the AM/PM showed a Hispanic male using the ATM. RP 285, Exhibit 310. Exhibit 310 also shows the person arriving in a Nissan. RP 292-93, Exhibit 310. The Nissan had a temporary license plate affixed to the rear window, just as Landstrom described. RP 303. There were four transactions on Landstrom's debit card from November 28, 2012. RP 902-04. They were each for \$500, and each within a few minutes of each other, beginning at 4:19 a.m. RP 904.

Landstrom's black Nissan was found at the Motel 6. RP 764. DNA was recovered from the Nissan Sentra after it was recovered. There was blood on the headrest that belonged to Mr. Landstrom. RP 723. There was DNA on the gear shift knob belonging to Godinez. RP 728.

Joanna Speaks was interviewed by law enforcement and initially denied any involvement in this crime. RP 779-81. During a second interview, she implicated Godinez. *Id.* Speaks testified at trial. She testified that she robbed Mr. Landstrom. RP 589. She also testified she pled guilty to robbing Landstrom and went to prison for it. RP 591. After robbing him, Speaks claimed she told Landstrom to leave. RP 595. She testified Godinez was with the mother of his children that night, but

ultimately came and stayed with her. RP 603. She did not implicate Godinez in the crime during her testimony. Based on her repeated inconsistent statements, Speaks was impeached numerous times during her testimony.

Godinez was convicted of attempted murder in the first degree, kidnapping in the first degree, and robbery in the first degree. CP 123-135. This timely appeal followed.

C. ARGUMENT

I. The Trial Court did not err in admitting the victim's hearsay statement.

Godinez argues that the trial court erred in admitting the victim's out-of-court statement made during his ambulance ride to the hospital following his attempted murder, during which he was terrified and believed he was going to die. The trial court did not err.

Following the 911 call that brought the police to Kadow's Marina, Officer Janisch of the Vancouver Police Department found the victim, Freddy Landstrom. RP 329, 359, 361. Landstrom was panicked and terrified, and thought he was going to die. RP 330, 361. Janisch could see Landstrom had apparently been shot in the head, and his hand was mangled. RP 330, 361. Janisch tried to remove Landstrom's jacket and Landstrom screamed in agony. RP 361. Janisch testified "there was a lot

of screaming and crying.” RP 362. Within minutes, the paramedics arrived. RP 362. Janisch rode with Landstrom in the ambulance. RP 330, 362. Fearing that Landstrom would die before arriving at the hospital, Janisch wanted to talk to Landstrom before he died. RP 362. Janisch recorded Landstrom’s utterances. RP 330-31. It appeared to Janisch that Landstrom wanted to get all of his information before he died, and wanted to help the police catch the suspect. RP 331. The recorded statement was admitted as exhibit 303, and played for the jury. RP 363. Godinez objected to the admission of the utterance, conceding that while Landstrom’s statements would qualify as excited utterances and present sense impressions, they could not be admitted if they were made in response to questions. RP 367. Following an offer of proof and argument by counsel, the trial court admitted the statement, finding the statement admissible under the exceptions for excited utterances, statements of then existing mental, emotional, or physical condition, statements made for medical diagnosis or treatment, and present sense impressions. RP 356-57. The court also found that Godinez would not be prejudiced by the admission of the statement where no statements were made in the recording identifying Godinez. *Id.* Godinez conceded at the outset of the trial that he would not dispute that someone robbed, kidnapped, and attempted to kill Landstrom.

He merely took the position that it was not him. Thus, the court correctly reasoned, nothing said on the recording could prejudice Godinez.

The recording begins with Janisch asking Landstrom questions about where he had been walking and where the suspect parked the car. RP 365. Janisch asked Landstrom what the suspect looked like and was wearing. RP 366-67. Landstrom told Janisch that he lost his shoes in the swamp, and told Janisch that the suspect began shooting at him as Landstrom ran away. RP 368. Landstrom was breathing rapidly as he spoke. RP 368. Janisch asked how many times the suspect shot at him and Landstrom told him six or seven times. RP 368. There was more back and forth between the two about which way Landstrom ran and whether he saw which direction the suspect drove in the car. RP 369. Landstrom also said he “just wanted to survive.” RP 369. Landstrom then told Janisch about when he had met the woman (Joanna Speaks) that night, and about buying beer before going to her apartment. RP 370. There was a good deal of inaudible conversation on the recording. RP 370. Landstrom told Janisch about the suspect instructing him not to report his credit cards stolen, and telling him “I’m not going to shoot you, okay?” RP 371. The suspect also told him “You’re going to live...I’m not going to shoot you.” RP 371. The suspect told Landstrom that he (the suspect) knew that Landstrom had a girlfriend and a daughter. RP 371. The suspect told

Landstrom that he couldn't report his car stolen until Friday. RP 371.

Landstrom relayed that he had told the suspect that he had \$2000 available on his credit card, and the suspect told Landstrom that he would take \$1000 each day, and after that Landstrom could report the card stolen. RP 371. Then the suspect threatened him, saying "I know where you live. I can come back. I'll kill you and your family...I know everything about you." RP 371. Landstrom then tried to relay the address of the apartment he'd been at before the abduction. RP 370. He also told Janisch that the suspect was wearing blue jeans and a black jacket. RP 366-67. Throughout the statement, Landstrom would interpose questions to the medical personnel about his vital signs and whether he was going to die. RP 364-396. Landstrom told Janisch about the suspect's threats against his family. Id. The suspect told Landstrom that Speaks was in on it. RP 389. The suspect told Landstrom that he'd been set up. RP. 389. Landstrom gave Janisch a description of his car. RP 387. The suspect told Landstrom he knew where his family lived, and Landstrom was terrified that the suspect would find his family and carry out his threats. RP 387. Landstrom told Janisch things about his life, and Janisch reassured him that he would see his daughter again. RP 391-92. Janisch instructed Landstrom to keep talking and keep his eyes wide open, obviously fearing that Landstrom would die. RP 398. Landstrom spoke constantly, almost as though he

could ward off dying by talking. RP 332. The conversation in the ambulance lasted approximately twenty-three minutes. RP 334.

On cross examination of Officer Janisch, Godinez elicited even more of Landstrom's statements to Janisch, despite having objected earlier to the admission of Landstrom's statements as hearsay. RP 401-03.

The decision to admit evidence, including hearsay, lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997).

An abuse of discretion exists “[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law. *State v. Williamson*, 100 Wn.App. 248, 257, 996 P.2d 1097 (2000).

State v. Neal, 144 Wn.2d 600, 608-09, 30 P.3d 1255, 1260 (2001).

As an initial matter, Godinez does not identify any particular part of the recorded statement which he feels should not have been not been admitted. It is difficult to craft a response and a harmless error argument where Godinez doesn't identify which of Landstrom's declarations do not fall within *any* hearsay exception. He merely complains that the trial court, having found the entire statement to fall within the excited utterance

exception, as well as some other overlapping exceptions at various points, did not parse the statement line by line on the record and identify a hearsay exception for each word uttered. He cites no on-point authority which says a trial court must employ this procedure as a precondition to exercising its discretion in admitting a hearsay statement. Since Godinez is challenging the admission of Landstrom's remarks, and complaining that the trial court didn't parse the statement word by word, it should follow that he should be required to parse it word by word to advise this court which statements, specifically, should not have been admitted. There are remarks made on the recording that inarguably satisfy one or more of the hearsay exceptions, but we are left to guess which ones Godinez thinks were out of bounds. Godinez fails in his burden at the outset.

Additionally, Godinez crafts his challenge based on the words as they appear in the transcript, ignoring that the trial court actually listened to the recording. The recording was admitted as exhibit 303. The determination of whether a statement qualifies as an excited utterance is aided significantly by hearing the actual tone of voice of the declarant. The trial court heard Landstrom's actual words, intonation, and inflection.

The entire statement qualified as an excited utterance. Landstrom had been repeatedly shot, had run for miles in search of help, believed he was going to die, and believed the perpetrator was going to murder his

family. It is difficult to imagine a more stressful event, and Officer Janisch testified that Landstrom was panicked and terrified when he made his statements.

Excited utterances are a recognized exception to the hearsay rule under ER 803 (a) (2). *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

This exception is based on the idea that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control”. 6 J. Wigmore, *Evidence* § 1747, at 195. The utterance of a person in such a state is believed to be “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock”, rather than an expression based on reflection or self-interest. 6 J. Wigmore, at 195.

Chapin at 686.

There are three requirements for a statement to be deemed an excited utterance. “First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition.” *Chapin* at 686. Notably, the startling event which triggers the exception “need not be the ‘principal act’ underlying the case.” *Id.* A startling event may be triggered by an act which draws associations with an earlier traumatic event. *Chapin*

at 687, citing *United States v. Napier*, 518 F.2d 316 (9th Cir.), *cert. denied*, 423 U.S. 895, 96 S.Ct. 196, 46 L.Ed.2d 128 (1975).

Godinez argues that the trial court abused its discretion when it concluded that Landstrom's statements could be admitted as excited utterances. He argues that while the attempted murder was certainly a startling or stressful event, that the passage of time (perhaps two hours) meant that Landstrom could not have been under the stress of the startling event at the time of the utterances. First, Godinez misunderstands the nature of the startling event. The startling event was not merely having Godinez shoot at Landstrom six or seven times and being shot with at least four of those rounds. Rather, the startling event continued through this entire episode. Landstrom's desperate flee for safety as Godinez continued shooting at him, his lengthy trek through mud in the November cold with no shoes on searching for help, his fear that Godinez was hunting down his family to kill them, and his fear that he was going to die, were all part of the startling event upon which the admission of the statements was premised. It is silly to suggest that the startling event was confined to the bullets flying out of Godinez's gun. Landstrom made the statements in question to Janisch very close in time the conclusion of his desperate search for help, and Landstrom continued to fear that his family was being hunted throughout his contact with Janisch. Landstrom was clearly under

the stress of the startling event throughout his statement to Janisch.

Godinez's argument is meritless. Second, the mere passage of time is not dispositive in determining whether a statement is admissible as an excited utterance. *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004). The passage of time in this case between Landstrom's rescue and his recorded statement was short, not long. Godinez's argument fails.

Godinez also complains that not every word uttered by Landstrom directly related to the shooting. He points out that the emotional and terrified Landstrom talked about his family and his life with Janisch. But Godinez's argument misses the mark. "...[A]n utterance may relate to a startling event even though it does not explain, elucidate, or in any way characterize the event. Any utterance that may reasonably be viewed as having been about, connected with, or elicited by the startling event meets this requirement." *Chapin*, supra, at 688. Landstrom was talking about his family because he was terrified he was going to die, and because he knew it was important that he keep talking. His statements related to the startling event, and in any event they were neutral remarks that in no way prejudiced the assailant who later turned out to be Godinez.

Finally, Godinez complains that the statements could not be deemed excited utterances because many of the statements were made in response to questions from Janisch. But statements can qualify as excited

utterances even when made in response to a question. *State v. Hieb*, 39 Wn.App. 273, 278, 693 P.2d 145 (1984), *judgment reversed on other grounds* 107 Wn.2d 97, 727 P.2d 239 (1986). Here, it was obvious why many of Landstrom's statements were in response to questions. First, Janisch wanted to keep Landstrom talking and awake because he feared Landstrom would go into shock and die, and Landstrom appeared to share that fear. Second, the perpetrator of the crime was armed and at large, and the questions were directed at identifying and locating the suspect. In other words, the questions were directed at addressing an ongoing emergency. Landstrom had no motive to fabricate the physical description of the suspect, and Godinez has made no suggestion otherwise.

The entirety of the statement being an excited utterance notwithstanding, Godinez complains that not every statement made by Landstrom falls within each exception identified by the trial court. For example, he acknowledges that while some remarks would qualify under as statements of then existing mental, emotional, or physical condition, they did not *all* qualify under this exception. But this is immaterial. Godinez cites no authority for the proposition that a statement which, at various times, falls within several different hearsay exceptions must fit under *all* identified hearsay exceptions, at all times, to qualify for admission. Additionally, his complaint about statements made for the

purpose of medical diagnosis or treatment ignores the fact that Landstrom's statements about his condition were not declarations. They were questions. With minor exception, whenever Landstrom spoke about his physical condition it was in the form of asking the medical personnel what they were doing, what his vitals were, and whether he was going to die. Questions are not declarations. On other occasions, he would express that he was in pain. Those statements fell under the then existing mental, emotional, or physical condition exception.

The trial court did not abuse its considerable discretion in admitting Landstrom's statements, and any error in admitting the statements was harmless. An evidentiary ruling in violation of the hearsay rule is not a constitutional error. *State v. Ashurst*, 45 Wn.App. 48, 54, 723 P.2d 1189 (1986). Thus, the error will be deemed harmless unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Kelly*, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). It is difficult to imagine how the result of this trial would have been different absent admission of the recorded statement. As noted above, Godinez went on to elicit even more of Landstrom's statements to Janisch during cross-statements that were arguably far more damaging to Godinez than anything said in the ambulance. Godinez's statement "I lied," which Godinez elicited during

cross examination of Janisch, suggested premeditation. RP 403. Moreover, as the trial court noted, Godinez was not named at any point during the statement. Finally, nothing came out of the recorded statement that Landstrom did not ultimately testify to before the jury at trial. Any error in admitting the recorded statement was harmless.

II. The Trial Court did not err in allowing Joanna Speaks to testify in her inmate clothing.

Speaks arrived from DOC without layman's clothes to change into for her testimony. Godinez argues that the trial court committed non-harmless constitutional error when it allowed Joanna Speaks to testify in inmate clothing. Godinez is wrong.

Godinez relies entirely on *State v. Rodriguez*, 146 Wn.2d 260, 45 P.3d 541 (2002) for his argument. But in *Rodriguez*, the witness in question appeared in shackles and handcuffs as well as inmate clothing. The *Rodriguez* Court began by noting the well settled rule that "absent some compelling reason for physical restraint, defendants may appear in court free of prison garb and shackles." *Rodriguez* at 263-64. The Court then noted that this rule has been extended to inmate witnesses for the defendant. *Id.* at 264. As the Supreme Court noted in *State v. Hartzog*, 96 Wn.2d 383, 399, 635 P.2d 694 (1981), the jury may suspect a lack of credibility on the part of a witness who appears wearing shackles, and the

defendant might be prejudiced as a result. The *Rodriguez* Court acknowledged that while a diminution of the credibility of a State's witness would not ordinarily harm a defendant, a defendant can nevertheless be harmed when a State's witness, appearing in inmate clothing, testifies to a criminal association with the defendant. *Rodriguez* at 267.

There are two notable differences in this case: First, Speaks did not testify in shackles, as the inmate witness did in *Rodriguez*. Second, Speaks did not testify to a criminal association with Godinez. She did not implicate Godinez at all in this crime. She took sole responsibility for planning and carrying out the robbery, and she simply didn't address the shooting. It would have been bizarre for the State not to call Speaks to testify. She was a witness to at least part of the crime, and the prosecutor had a duty to put forth her testimony to be evaluated by the jury. The jury would have expected to hear from her. Prosecutors should not simply cherry pick favorable witnesses. They should call all witnesses who possess material information and allow the jury to assess the witnesses' respective credibility. Speaks was repeatedly impeached because she unfortunately elected to say things that were entirely contrary to statements she'd made prior to trial. Her overall lack of credibility rendered her testimony essentially neutral. She neither helped nor hurt

either side. This situation is markedly different than what occurred in *Rodriguez*, where the inmate witness was testifying *against* the defendant, and was testifying to a criminal association with the defendant. The court did not abuse its discretion in allowing Speaks to testify in inmate clothing.

Even if the court erred by allowing Speaks to testify in inmate clothing, that error was harmless. Godinez argues, without citation to Washington authority, that this error is constitutional. The State disagrees. This error did not affect Godinez's right to due process or his right of confrontation. The State submits that this error should be reviewed under the non-constitutional harmless error test. But under either test, the error was harmless. The untainted evidence against Godinez was overwhelming. Mr. Landstrom's testimony, standing alone, was sufficient to convict Godinez in spite of the alleged error. But the jury heard far more than Landstrom's testimony. The jury saw extensive security video footage showing Godinez using both Landstrom's car and his debit card. The jury saw bank receipts which corroborated this evidence. Godinez was at a Motel 6 with his other girlfriend, Cassandra Neal, the day after this crime *with Landstrom's car*. Godinez's DNA was found on the gear shift of Landstrom's car. Any error in allowing Speaks to testify in inmate attire was harmless beyond a reasonable doubt.

III. The Trial Court did not err in calculating the offender score.

Godinez argues, in a one paragraph argument without any citation to case law, that adding a point to an offender score where a defendant committed the crime while on community custody is only allowable where the community custody is based on a felony conviction. He argues that an offender on community custody for a misdemeanor or gross misdemeanor is not actually on community custody. See Brief of Appellant at 28.

Godinez is incorrect.

A sentencing court's interpretation of the Sentencing Reform Act (SRA) is reviewed de novo. *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). Sentences under the SRA "are determined in accordance with the law in effect when" the current offense "was committed, absent clear legislative intent to the contrary." *State v. Parmelee*, 172 Wn.App. 899, 909, 292 P.3d 799 (2013); RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the *current* offense was committed.") (emphasis added); RCW 10.01.040. At sentencing, "[i]f the present conviction is for an offense committed while the offender was under community custody" then the court shall add one point to the defendant's offender score. RCW 9.94A.525(19).

IV. The Trial Court did not err in its determination of separate criminal conduct.

Godinez challenges the court's finding of same criminal conduct as to the attempted murder in the first degree and kidnapping in the first degree. As an initial matter, Godinez's rank misrepresentation of the record must be addressed. Godinez tells this Court that the trial court found that his intent for attempted murder in the first degree was the same as his intent for kidnapping in the first degree. See Brief of Appellant at 15, 29, 30. This is a plain and, apparently, intentional misrepresentation of the record. Here is what the court said:

As to Counts 1 and 2, the kidnapping in the first degree, again, there is some overlap as to criminal intent. Kidnapping in the first degree, in this instance, was charged and the jury found that the charge became kidnapping in the first degree based upon the intent to commit bodily injury. So there is some overlap with attempted murder, although bodily injury and attempted murder are quite different. In fact, attempted murder may actually not involve bodily injury, but in this case certainly did. So analyzing it, I find some overlap in criminal intent, *but find that they are not the same criminal intent*, as argued by the State, the attempted murder is quite a different intent than that of kidnapping.

[The court went on to discuss its view that the crimes happened at a different time and place.]

...

The third factor, same victim, is found in both cases. But based upon not consisting of the same time and place, *and also differing in the criminal intent*, I find that Counts 1 and 2 are to be separately sentenced according to the provisions of the law.

RP 1238-1240.

Thus, the trial court found that based on the actual facts of this case and the manner in which these crimes were committed, the crimes had separate intent and were committed at a separate time and place. When the court discussed overlap of intent, it was referring generally to the fact that kidnapping, as charged in this case, contemplated that Godinez abducted the victim with the intent to inflict bodily harm, and Godinez ultimately did inflict bodily harm during the course of attempting to murder the victim. The court went on to clarify that the statutory intent between the two crimes is different (indeed, attempted murder does not even require the infliction of harm), and that as proved in this case, the intent between the two crimes is different. This was not an abuse of discretion, and the sentence must be upheld even if only one of these bases is found to be proper.

When a defendant is convicted of two or more crimes the sentencing court “may enter[] a finding that some or all of the current offenses encompass the same criminal conduct.” RCW 9.94A.589(1)(a). A finding that the offenses did not encompass the “same criminal conduct” will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013); *State v. French*, 157 Wn.2d 593,

613, 141 P.3d 54 (2006). The burden of proving that offenses constitute same criminal conduct lies with the defendant. *Graciano* at 539.

A court will consider two or more crimes the “same criminal conduct” if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. *Graciano* at 540. The absence of any one of the prongs prevents a finding of “same criminal conduct.” *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts “must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct.” *State v. Price*, 103 Wn.App 845, 855, 14 P.3d 841 (2000); *State v. Wilson*, 136 Wn.App 596, 613, 150 P.3d 144 (2007). If the sentencing court finds that the crimes encompass the same criminal conduct, however, “then those . . . offenses shall be counted as one crime.” RCW 9.94A.589(1)(a).

V. Objective Criminal Intent

“The relevant inquiry for the [criminal] intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.” *State v. Tili*, 139 Wash.2d 107, 123, 985 P.2d 365 (1999) (citations omitted). This inquiry is a two-step process. *Price*, 103 Wn.App. at 857. “First, we must objectively view each underlying statute and determine whether the required intents are the same or different for

each count. If they are the same, we next objectively view the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each count.” *Id.*

The objective intent of a defendant can be determined by whether one crime furthered the other. *Vike*, 125 Wn.2d at 411; *Graciano* at 540. Where crimes are “sequential, not simultaneous or continuous”, a defendant is generally deemed to have sufficient time to form a new criminal intent. *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1999); *In re Rangel*, 99 Wn.App. 596, 600, 996 P.2d 620 (2000) (“Like the defendant in *Grantham*, Mr. Rangel was able to form a new criminal intent before his second criminal act because his crimes were sequential, not simultaneous or continuous.”). On the other hand, a defendant’s criminal intent may not have changed when he or she engages in an “unchanging pattern of conduct, coupled with an extremely close time frame” *Tili*, 139 Wash.2d at 125.

Here, the crime of kidnapping did not further the crime of attempted murder, and they were sequential and separated by a substantial period of time. Godinez could have murdered the victim in Joanna Speaks’ apartment, or he could have done it at any number of points along the way before he actually pulled the trigger. He did not need to kill the victim to obtain or retain any of his property – he had already accomplished those

things by threatening the victim with a gun. Godinez may have decided to abduct and asportate the victim simply to scare him, and thus deter him from reporting the crime, before changing his mind and deciding to kill him to eliminate a witness. Indeed, there was discussion between Godinez and the victim about how long the victim would have to wait before reporting the theft of his car. He could have also merely intended to assault him at the time he abducted him, and later changed his mind and decided to simply kill him. Godinez's actions and words as he led the victim at gun point down the gravel road indicate that he formed his premeditated intent to kill the victim rather late in the game – after the abduction had occurred. These crimes had independent intent. Godinez does not show that under an objective view of the facts usable to the court at sentencing, the trial court abused its discretion in finding that he had distinct and separate criminal intent when he kidnapped and then attempted to kill the victim. Indeed, he behaves as though the trial court did not make this explicit finding.

VI. Same Time and Place

The same time and place prong does not require that crimes happen simultaneously in order for them to be considered to have happened at the same time. *Price*, 103 Wn.App. at 855 *citing State v. Porter*, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997). That prong

does require, however, crimes to be part of “a continuing, uninterrupted sequence of conduct” over a very short period of time. *Id.*; *Porter*, 133 Wn.2d at 183 (holding “that immediately sequential drug sales satisfy the ‘same time’ element of the statute”). Moreover, multiple crimes occurring at one address does not necessarily mean the crimes occurred in the same place. *State v. Stockmeyer*, 136 Wn.App. 212, 220, 148 P.3d 1077 (2006) (holding that “guns found in different rooms in the same house are found in different ‘places’ for purposes of the same criminal conduct test under RCW 9.94A.589(1)(a)”); *State v. Garnier*, 52 Wn.App. 657, 661, 763 P.2d 209 (1988) (holding that each burglary of a suite inside one building “was a complete and final act” and did not constitute the same criminal conduct).

The trial court, relying in part on the testimony of the victim, found that the kidnapping and the attempted murder were separated in time by at least an hour or more, and that they were “quite distant in terms of the same time and the same place.” RP 1239-40. In fact, the abduction occurred in east Vancouver while the attempted murder occurred in the area of Vancouver Lake, substantially west of Speaks’ apartment on 160th Street. Because the trial court was required to “narrowly construe the

'same place' requirement,"² it did not abuse its discretion in finding that these crimes were not committed at the same place. Moreover, Godinez barely makes an argument to the contrary, despite it being his burden to demonstrate same criminal conduct. He devotes one paragraph (beginning at the bottom of page 30) and merely alerts us that the Supreme Court has held that two offenses can be deemed to have occurred at the same time even if they weren't committed simultaneously (citing *State v. Price*, 133 Wn.2d 177, 942 P.2d 974 (1997)), and that *Price* cited *State v. Calvert*, 79 Wn.App. 569, 903 P.2d 1003 (1995), with approval, wherein the Court of Appeals held that two check forgeries occurring at the same bank on the same day were same criminal conduct. Thus, he says, "the trial court erred by treating Mr. Godinez's offenses as separate and distinct criminal conduct." See Brief of Appellant at 30-31. That is the entirety of his argument in this assignment of error. Godinez has failed in his burden of demonstrating that the trial court abused its discretion.

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² See *State v. Stockmeyer*, supra, at 219.

D. CONCLUSION

The conviction and sentence should be affirmed in all respects.

DATED this 16th day of April, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
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By:



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