

FILED
Court of Appeals
Division III
State of Washington
5/23/2018 8:02 AM

NO. 35481-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

MICHAEL ADRIAN HARNESS,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii-iii

I. ASSIGNMENTS OF ERROR 1

 A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR..... 1

 B. ANSWERS TO ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE..... 1-7

III. ARGUMENT 7-16

 RESPONSE TO ALLEGATIONS ONE AND TWO:

 1. ASSAULT SECOND DEGREE AND HIT AND RUN – INJURY
 DO NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.

 2. HARNESS’ TRIAL COUNSEL WAS NOT INEFFECTIVE
 WHEN HE DID NOT RAISE IN THE TRAIL COURT THAT
 WHICH HARNESS NOW DEEMS TO BE ERROR

IV. CONCLUSION 16-17

TABLE OF AUTHORITIES

PAGE

Cases

Graciano, 540-41, *infra* 9

In re Pers. Restraint of Shale, 160 Wash.2d 489, 496, 158 P.3d 588 (2007)
..... 10

Lessley, 118 Wn.2d at 778, 827 P.2d 996 8

Lewis, 115 Wn.2d at 302, 797 P.2d 1141 8

Maxfield, 125 Wn.2d at 402, 886 P.2d 123 9

McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31,
846 P.2d 1365 (1993)) 13

McFarland, 127 Wn.2d at 333 (quoting RAP 2.5(a)(3))..... 12

Nichols, 161 Wn.2d at 8 (citing State v. McFarland, 127 Wn.2d 322, 899
P.2d 1251 (1995)) 12

Porter, 133 Wash.2d at 181, 942 P.2d 974..... 9

Scott, 110 Wn.2d at 688..... 10

State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004)..... 13

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987) 9,
14

State v. Flake, 76 Wn.App. 174, 883 P.2d 341 (Div. 1 1994) 8, 14, 16

State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993)..... 9

State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013) 13, 14

State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992) (citing State v.
Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987))15

State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992)..... 13

<u>State v. Maxfield</u> , 125 Wn.2d 378, 886 P.2d 123 (1994)	14
<u>State v. McDougall</u> , 132 Wn.App. 609, 132 P.3d 786 (Div. 3 2006).....	12
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	9, 10
<u>State v. McGrew</u> , 156 Wn.App. 546, 234 P.3d 268 (2010).....	14
<u>State v. Morris</u> , 87 Wn.App. 654, 943 P.2d 329 (1997)	8
<u>State v. Munoz-Rivera</u> , 190 Wn. App. 870, 361 P.2d 182 (2015).....	17
<u>State v. Nguyen</u> , 165 Wn.2d 428, 197 P.3d 673 (2008)	10
<u>State v. Nitsch</u> , 100 Wn.App. 512, 997 P.2d 1000 (2000).....	11, 12
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))	12
<u>Strickland</u> , 466 U.S. at 689 (quoting <u>Michel v. Louisiana</u> , 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)).....	13
Rules	
RAP 2.5(a)(3).....	9, 10
RCW 46.52.020	1, 8
RCW 46.61.522	1
RCW 9.94A.400(1)(a)	8
RCW 9.94A.589.....	7
RCW 9.94A.589(1)(a)	9, 14

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises one assignment of error:

1. The trial court's determination that vehicular assault and hit and run – bodily injury does not constitute the “same criminal conduct is err.

He raises the following issues related to this one assignment:

1. Do convictions under RCW 46.61.522 and RCW 46.52.020 constitute “same criminal conduct” for sentencing purposes?
2. Was it ineffective assistance of counsel not to argue a “same criminal conduct” analysis even though the trial court checked the box on the Judgment and Sentence determining that the two (2) offenses were not the “same criminal conduct”?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

The State's response is as follows:

1. This issue was not raised in the trial court therefore; this court need not address it for the first time in this appeal.
2. If this court reviews this allegation it will determine that the trial court properly found that these two crimes were not the same criminal conduct. There was not error.

II. STATEMENT OF THE CASE

The investigation into this crime revealed that on December 6, 2015 the defendant met with three other people, Edvin Coti, Rachelle Pacsuta and Lyndsey Wagley, who all eventually went to Rachelle Pacsuta's

parent's residence, where they all hung out, had a few drinks and played various games.

Mr. Coti testified that he had been socializing with the defendant on the day of this accident. RP 87-88. He testified that he rode from the casino to Ms. Pacsuta's residence in the same vehicle that was eventually involved in the accident and that this Ford Explorer was driven at all times by the defendant. . RP 90. Mr. Coti testified that he asked Michael (Harness) for a ride but because Harness was not the owner of the car the owner (Wagley) handed him the keys and they took off. He had arrived with all the others so he needed someone to take him to his car. Lyndsey had Harness take Edwin home because she trusted Harness with her vehicle. RP 291-92, 296,

Mr. Coti stated they got to an intersection then he remembered they hit "that car." RP 91. He testified that the vehicle he was in "T-boned" the other car. He testified that Harness went over to the other car and checked on the lady to make sure she was OK and after other people began to show up he took off from the accident scene. Off. RP 92. Mr. Coti eventually texted Ms. Wagley that her vehicle had been in an accident. He did not have contact with the police until approximately one year after the accident. PR 94.

Ms. Rojas was driving through the area of this wreck and she

observed the accident. She observed the vehicle driven by Harness run right through the stop sign and then into the intersection ramming into the car driven by Mrs. Fisher. She was contacted by a man at the scene, but she had no idea if he was connected to the accident. RP 114-18.

Mrs. Manriquez was the passenger of a vehicle that arrived at the scene of the accident shortly after the wreck. As she came into the area she observed a young man whom she later identified from a photo montage as well as in court as the defendant. She testified, without objection:

So, when I -- I remember telling my husband this guy looks like he's running from something. He looks kind of -- kind of a guilty look. So, when we got up to the accident, I had my husband pull over to the side on 56th, we made a right, and I yelled out to the officer and there was a fire truck, a lot of commotion, that I just witnessed someone going south on 56th that looked like he was scared and -- or startled and if there was a suspect if -- wasn't -- if there was not a suspect in custody, this could probably be someone of interest. RP 127.

...

He just looked startled, like he was surprised, or I don't know. He just kind of had a look of -- having raised three sons, I know what guilty looks like; so, kind of like you're running from something. But at the moment, like I say, I told my husband that guy looks like he's got guilt all over his face. He's -- looks like he's in a hurry to get away from something; but at that point I didn't know what was going on up ahead. RP 130-31.

Ms. Wagley testified that Michael (Harness) gave Edwin a ride

from the residence where they had all been socializing. The vehicle that Harness used was her Ford Explorer, the vehicle involved in the accident. RP 191. Ms. Wagley began receiving calls on her cellphone shortly after the defendant and Mr. Coti had left the residence. She was not able to speak initially with anyone, but she assumed that Harness had been pulled over or something and that she was needed to come retrieve her truck. RP 192. Ms. Pacsuta and Lyndsey Wagley eventually found the scene of the accident, contacted the police and she was allowed to take some of her belongings from the vehicle. At the scene she spoke to an officer who told her that her car had been involved in a wreck. RP 193-4.

Ms. Wagley eventually went back to the residence all of them had been hanging out at and when they got there the defendant was sitting in the backyard. Harness stated to Ms. Wagley “he was like I’m sorry that I crashed your car kind of thing.” RP 201.

Mr. Stadler an expert for the State testified regarding data he was able to retrieve from the airbags that were taken from the two cars involved in the accident. He testified that the Explorer driven by Harness was driving at forty-four miles per hour, five seconds before the wreck and forty-seven miles per hour two seconds before the wreck and just at the time of impact it was slowing to forty-three miles per hour. PR 223-24. At this same time the data indicated the accelerator was been pressed

down more, indicating that Harness was accelerating. Then one second prior to the crash his foot was off the accelerator. At about the time of impact Harness finally applied the brakes. RP 223-26.

Kristen Drury, the Yakima Police Department laboratory supervisor, located a latent fingerprint belonging to Mr. Harness on the reverse side of the driver's interior door handle RP 252, 259, 262, 264

Harness testified that he drove the Ford Explorer from the casino to Rachelle's house. RP 303. He stated that the four people were at this home all night and that in the morning Edvin wanted a ride home. He testified that he was given the keys to the Explorer once again but Edvin convinced Harness to let Edvin drive the vehicle. Harness "reluctantly" agreed to allow Edvin to drive. He testified that he "honestly" couldn't recall the accident, he remembered the impact but did not see the victim's car until after the wreck. RP 304. He stated that after the crash he did not see Edvin. He testified that he jumped out and immediately ran to the aid of the victim, trying to get Ms. Fisher to respond. He testified, without stating why, that he took off his sweater and laid it on the ground. He then ran to another vehicle and had the occupants call 911. RP 305. Soon after, he and others were pushed back by the responding emergency personnel and that he stayed and watched from there. RP 305

On cross examination he admitted that he did not approach any of

the emergency responders to tell him that he was a witness to the accident. RP 309. He stated the reason that he left the scene was that he was scared and because Edvin had left the scene and “I do have a past, and I believe obviously it happened like I’m the best bet for the – charges.” RP 310. He agreed when asked if he made an intentional decision to leave the scene even though he could have told the police who the driver of the striking vehicle was. This decision was done with full knowledge that Mrs. Fisher had been seriously injured in this accident. RP 311.

He testified that he did not really discuss the accident that had seriously injured Mrs. Fisher and totaled Lyndsey’s Explorer. The only thing discussed was where Edvin was and was Harness OK. RP 306-7.

When asked about the statements of the two female witnesses Harness stated initially that he didn’t know why they were lying, then changed that to he believed that they were “a little mistaken...things get confused.” RP 308.

Harness was sentenced on July 14, 2017. At the sentencing hearing there was discussion that counts two and three would need to be merged so that there was no issue on appeal regarding double jeopardy. An order was entered to this effect. RP 391-3, CP 103. The State specifically addressed that the counts that remained would be used as point “...his criminal history brought his score to eight and a half points and then

scoring the hit and run and the vehicular assault against each other, that brings his score as to each of those counts as - from nine point five, so it's nine plus. And then the range is sixty-three to eighty-four." The court's determination that counts 1 and 2 are not the same criminal conduct is found when it states;

The -- the most I can give him is the eighty-four months, the top end of the range. The Legislature and -- has not chosen to -- to untie my hands in that regard and so, I am compelled to impose that sentence of eighty-four months as to Count I and eighty-four months as to Count II to run concurrently for a total of eighty-four months. RP 404

And then section 2.2 of the judgment and sentence which is a checked box indicating "Counts 1 and 2 do not encompass the same criminal conduct and do not count as one crime in determining offender score, pursuant to RCW 9.94A.589." CP 105.

III. ARGUMENT

1. Response to allegations one and two – Assault Second degree and Hit and Run – injury do not constitute the same criminal conduct. Harness' trial counsel was not ineffective when he did not raise in the trial court that which Harness now deems to be error.

The State would disagree with Harness that this issue, vehicular assault and "hit and run accident" have not been raised and decided before. This exact issue was address and the court determined that they were not the same criminal conduct.

State v. Flake, 76 Wn.App. 174, 883 P.2d 341 (Div. 1 1994)

“Darin Wilson Flake appeals the judgment and sentence entered against him on June 1, 1993, for one count of vehicular assault and one count of "hit and run injury accident". He argues that the trial court abused its discretion by concluding that the crimes were not the same criminal conduct. We Affirm.”

Here, as the trial court concluded, Flake's objective purposes for the two crimes were different. When he committed the hit and run, Flake objectively intended to avoid responsibility for the collision by leaving the scene. That intention has no relation to the crime of vehicular assault or any criminal purpose that might be ascribed to it. In addition, Flake's commission of the hit and run did not further the vehicular assault because the assault was already completed when Flake fled the scene. Also, the two crimes were not part of a scheme or plan (see Lewis, 115 Wn.2d at 302, 797 P.2d 1141). Finally, Flake violated RCW 46.52.020 after the vehicular assault occurred, not simultaneously with it, and thus, the two crimes occurred at different times. Because two of the three necessary elements are missing, the two crimes are not the same criminal conduct under RCW 9.94A.400(1)(a). Lessley, 118 Wn.2d at 778, 827 P.2d 996. The trial court therefore did not abuse its discretion or misapply the law by counting the two crimes separately for Flake's offender score. Flake, 76 Wn. App at 180-81.

See also, State v. Morris, 87 Wn.App. 654, 943 P.2d 329 (1997)

“Two crimes manifest the "same criminal conduct" only if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. As part of this analysis, courts

also look to whether one crime furthered another. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); see also State v. Garza-Villarreal, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993).

If the defendant fails to prove any element under the statute, the crimes are not the "same criminal conduct." Maxfield, 125 Wn.2d at 402, 886 P.2d 123. "[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." Porter, 133 Wash.2d at 181, 942 P.2d 974.

...
Because Graciano bore the burden to establish each element of same criminal conduct under RCW 9.94A.589(1)(a) and failed to do so as to same time and place, the trial court's refusal to enter a finding of same criminal conduct was not an abuse of discretion."

Graciano, 540-41, *infra*.

Harness for the first time on appeal, alleges that the Court improperly determined that counts one and two were not the same criminal conduct. As stated in State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995) "As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be

"manifest" - i.e., it must be "truly of constitutional magnitude". Scott, 110 Wn.2d at 688."

McFarland goes on to state "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review." State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008) "In general, an error raised for the first time on appeal will not be reviewed. An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "narrow" exception. A "manifest" error is an error that is "unmistakable, evident or indisputable." An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" "that the asserted error had practical and identifiable consequences in the trial of the case." (Citations omitted.)

There is literally nothing before this court to indicate this alleged error, claimed to have occurred at the time of sentencing, is of constitutional magnitude. This is not a double jeopardy challenge to these two counts, it is simply a challenge as to whether the trial court properly exercised its discretion. He did not raise this issue at the sentencing court and has waived the right to appeal it. In re Pers. Restraint of Shale, 160 Wash.2d 489, 496, 158 P.3d 588 (2007) (holding that issue waived when

the defendant " failed to ask the court to make a discretionary call of any factual dispute regarding the issue of 'same criminal conduct' and he did not contest the issue at the trial level"), State v. Nitsch, 100 Wn.App. 512, 519-21, 997 P.2d 1000 (2000);

Generally, issues not raised in the trial court may not be raised for the first time on appeal. This rule is not an absolute bar to review. In the context of sentencing, the general rule is that "[a] sentence within the standard range for the offense shall not be appealed." Illegal or erroneous sentences, however, may be challenged for the first time on appeal.

...

He does not challenge the evidentiary sufficiency of the record nor the correct calculation of prior convictions. Rather, he argues that the court should have, *sua sponte*, found his two crimes to be the same criminal conduct.

This is not an allegation of pure calculation error, as in *Ford* and *McCorkle*. Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion. A defendant's current offenses must be counted separately in calculating the offender score unless the trial court enters a finding that they "encompass the same criminal conduct." Offenses encompass the same criminal conduct when they are committed against the same victim, in the same time and place, and involve the same objective criminal intent. The trial court's determination on the issue is reviewed for abuse of discretion.

While discussing a defendant's failure to address the same issue and the fact that this type of action is a discretionary action on the part of

the trial court, this court stated in State v. McDougall, 132 Wn.App. 609, 132 P.3d 786 (Div. 3 2006), “And the court need not, indeed cannot, exercise that discretion unless it is given the chance to do so. State v. Nitsch, 100 Wn.App. 512, 524-25, 997 P.2d 1000 (2000). And here it was denied that chance.”

This court is more than well versed in claims of ineffective assistance. In order to establish that counsel was ineffective, Appellant must show that counsel’s conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (adopting test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show deficient representation, Harness must present this court with facts that show his counsel's performance fell below an objective standard of reasonableness based on all the circumstances. Nichols, 161 Wn.2d at 8 (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Prejudice is established if there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. Nichols, 161 Wn.2d at 8.

This claimed error is not a "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333 (quoting RAP 2.5(a)(3)). In order to be "manifest," an alleged error must have "practical

and identifiable consequences in the trial." State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown, and the error is not manifest. McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

"Judicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)).

Counsel was effective. This allegation was not raised in the trial court because there was no factual or legal basis for it to be raised.

State v. Graciano, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013) "...a "same criminal conduct" finding favors the defendant by lowering the offender score below the presumed score. "In determining a defendant's offender score ... two or more current offenses ... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct." "[A] 'same criminal conduct'

finding is an exception to the default rule that all convictions must count separately. Such a finding can operate only to decrease the otherwise applicable sentencing range." **Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.** (Citations omitted. Emphasis added.)

Review of this type of allegation is for abuse of discretion or misapplication of the law. Graciano, 176 Wn.2d at 536

State v. McGrew, 156 Wn.App. 546, 552, 234 P.3d 268 (2010) "...the definition of " same criminal conduct" is narrowly construed to disallow most assertions of same criminal conduct and that we review a defendant's criminal intent objectively rather than subjectively. State v. Flake, 76 Wn.App. 174, 180, 883 P.2d 341 (1994); Dunaway, 109 Wash.2d at 215, 743 P.2d 1237, 749 P.2d 160."

The trial court has the discretion to determine whether current convictions encompass the same criminal conduct for the purposes of calculating the defendant's offender score. RCW 9.94A.589(1)(a). This court will review the trial court's finding that offenses did not constitute the same criminal conduct for abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Here the trial court sat through all the testimony presented at trial. It knew the time line of the actions of this defendant from the night before

this tragedy even to the time that he all but ran from the scene of his crime. The trial court was more than apprised of the facts necessary to determine that these two acts were not the same criminal conduct.

Current offenses can be considered the same criminal conduct if they involved the same intent, were committed at the same time and place, and involved the same victim. "[C]rimes affecting more than one victim cannot encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992) (citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987)).

The vehicular assault was a completed crime at the time the defendant's reckless driving through the city occurred, this includes that excessive speed and failure to stop at the stop sign in this controlled intersection and/or (counts 2 and 3 merged) when the disregard for the safety of others occurred both these acts being accompanied by this driving being the proximate cause of Mrs. Fisher's clearly substantial bodily harm.

Then after the scene was frozen, the assault committed and by his own testimony the defendant got out and initially made contact with the victim to make sure she was OK. He testified that he spent some appreciable period of time at the scene and then without contacting the police or other emergency responders at the scene he fled from the scene

and was subsequently arrested back at the home he had been hanging out at the entire morning. There is literally no indication that Harness ever attempted contact the authorities.

His testimony as that he and others were basically pushed back from the scene, a physical and time separation from the vehicular assault that he had committed. It was at this time that he formed the new intent to flee the scene and not report his actions or if someone had believed Harness' testimony, the actions of Mr. Coti.

Harness waited and asked others for assistance helping Mrs. Fisher. He determined that he would not take responsibility for his actions and let the law take its course and he ran, physically from the scene. The intent in the assault was the act of driving in a reckless manner disregarding the safety of others that resulted in injury.

The intent in the hit and run was to avoid the law. The inclusion of "injury" was done to elevate the severity of the crime from hit and run attended and which carries a much lighter sentence.

Flake supra controls and even if Flake did not exist these two criminal acts clearly are not the same criminal conduct.

IV. CONCLUSION

These two crimes were not one continuing, uninterrupted sequence of conduct as Harness claims citing State v. Munoz-Rivera, 190 Wn. App.

870, 361 P.2d 182 (2015).

This case is nearly identical to Flake. This was a reckless act involving speed and a disregard of the lives and safety of Mrs. Fisher that resulted in injuries that nearly killed her. Harness then started to do the right thing, that which the law dictates, stay at the scene. But, after consideration and time he just turned and hurriedly walked off. Done in a manner that was so clear that a witness with several sons recognized the mannerisms of a person who is running away from his responsibility. The trial court properly sentenced Harness. He should not be allowed to raise this issue for the first time on appeal. This court mandates that issues like this be addressed in the trial court so that there is record from which review may be taken. Harness' actions waive this argument. However, even if this court does review the action of the trial court it will find that there was no violation of the judicial standards in this discretionary action on the part of the trial court.

Respectfully submitted this 23rd day of May 2018,

By: s/ David B. Trefry

DAVID B. TREFRY WSBA# 16050

Senior Deputy Prosecuting Attorney

P.O. Box 4846 Spokane, WA 99220

Telephone: 1-509-534-3505

E-mail: David.Trefry@co.yakima.wa.us

DECLARATION OF SERVICE

I, David B. Trefry state that on May 23, 2018 emailed a copy, by agreement of the parties, of the Respondent's Brief, to: Mr. Dennis Morgan at nodblspk@rcabletv.com

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

DATED this 23rd day of May, 2018 at Spokane, Washington.

By: s/David B. Trefry
DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
Yakima County
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us

YAKIMA COUNTY PROSECUTORS OFFICE

May 23, 2018 - 8:02 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35481-4
Appellate Court Case Title: State of Washington v. Michael Adrian Harness
Superior Court Case Number: 15-1-01855-3

The following documents have been uploaded:

- 354814_Briefs_20180523075942D3631333_7347.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Harness 354814 Brief 2.pdf

A copy of the uploaded files will be sent to:

- joseph.brusic@co.yakima.wa.us
- nodblspk@rcabletv.com

Comments:

Sender Name: David Trefry - Email: David.Trefry@co.yakima.wa.us
Address:
PO BOX 4846
SPOKANE, WA, 99220-0846
Phone: 509-534-3505

Note: The Filing Id is 20180523075942D3631333