

COA No. 67394-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VICTOR GOMEZ-RAMIREZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Kimberly Prochnau

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Gomez-Ramirez's convictions for assault and harassment must be reversed because the trial prosecutor, by his emphatic questioning of a police witness and yet again during closing argument, improperly, purposefully, and disparagingly commented on Mr. Gomez-Ramirez's pre-arrest silence.

2. The defendant's convictions for assault and harassment were improperly scored against each other as if they were "prior convictions," rather than being scored as the "same criminal conduct" under RCW 9.94A.589(1)(a).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. There is rarely any reason to tell the jury that a criminal suspect was silent in response to police questioning, and therefore, simply bringing up the matter is usually an improper "comment" on the accused's exercise of that right. When the fact of silence is not only noted, but is done so disparagingly, the prejudice that results is at its most grievous. At trial below, the prosecutor purposefully elicited from the investigating officer that the defendant twice refused to speak with him when telephoned. Then, in closing argument, the prosecutor stated that this showed Mr. Gomez-Ramirez was "afraid" to speak with the police, or give his account of events at that time. The defendant's silence was not proffered for

any purpose of impeaching his testimony, but instead, was remarked upon in order to persuade the jury that he was guilty.

Should this Court reverse the convictions, where the untainted evidence of guilt was highly controverted, and not overwhelming, and the constitutional error was harmful beyond a reasonable doubt?

2. May the defendant appeal the manifest constitutional error under RAP 2.5(a)(3)?

3. Did the sentencing court commit an error of law in its scoring of the defendant's convictions for assault and harassment, where the two counts were the "same criminal conduct" under any iteration of the test under RCW 9.94A.589(1)(a)?

4. Alternatively, was defense counsel ineffective for failing to argue that the convictions constituted the same criminal conduct?

5. Is the standard of review de novo on a "same criminal conduct" issue under RCW 9.94A.589(1)(a), where the facts are undisputed, and the application of law is clear?

C. STATEMENT OF THE CASE

1. Procedural history. Victor Gomez-Ramirez was charged with second degree assault per RCW 9A.36.021(1)(c) (assault with a deadly weapon), and felony harassment per RCW 9A.46.020(1),(2). The charges were based on a claim by Jerson

Bolanos, the defendant's supervisor, that Mr. Gomez-Ramirez chased after him swinging a box cutter and threatening to kill him. CP 1-5 (information and affidavit of probable cause), CP 6-7 (amended information).

In his defense, Mr. Gomez-Ramirez readily admitted that he and Bolanos had an angry verbal argument after Bolanos fired him without reason, but Gomez-Ramirez never had a knife, wielded a knife, nor did he ever threaten Bolanos. CP 17-18 (defense trial brief). At trial, a defense eyewitness confirmed that Mr. Gomez did not have a knife. 6/2/11RP at 166-67, 172.

The jury found Mr. Gomez-Ramirez guilty as charged, rejecting a lesser degree offense instruction of fourth degree assault that the prosecutor did not oppose. Both guilty verdicts were accompanied by deadly weapon findings per RCW 9.94A.825 and RCW 9.94A.533(4). 6/3/11RP at 260-61; CP 47-51. Mr. Gomez-Ramirez, who had no prior crimes, was sentenced to concurrent standard range terms of 9 months and 6 months, with 12 and 6 month deadly weapon enhancements running consecutively, for a total prison term of 27 months, along with 18 months community custody for a violent offense. 6/24/11RP at 5-6; CP 52-59.

Mr. Gomez-Ramirez appeals. CP 60.

2. Trial evidence. Jerson Bolanos, the defendant's supervisor at the "Lower 48" painting company, was overseeing a condominium painting job in Seattle on August 28, 2010. He claimed that he overheard Mr. Gomez-Ramirez, one of the painters, using offensive language about other employees. 6/1/11RP at 41, 48-49. Mr. Bolanos testified that he approached the ladder that Mr. Gomez-Ramirez was standing on, and told him to get back to work. 6/1/11RP at 47.

According to Bolanos, Mr. Gomez-Ramirez reacted by saying "I'm gonna punch you," and said that he was going to "kick [Mr. Bolanos'] ass. 6/1/11RP at 49. Mr. Gomez-Ramirez came down the ladder, tried to punch Mr. Bolanos, and allegedly chased after him with a painter's utility knife he pulled from his pocket, all the while saying he was going to kill Mr. Bolanos, including if he called the police. 6/1/11RP at 50-54. Mr. Bolanos stated he was "scared." 6/1/11RP at 71. A

A co-worker of Mr. Bolanos, Jesse Salinas, stated that Mr. Bolanos later seemed to be shaking and looked as if he was going to faint. 6/1/11RP at 114. Salinas said he had seen Mr. Gomez-Ramirez chasing Mr. Bolanos, and supported the supervisor's claim that Mr. Gomez-Ramirez had a knife. 6/1/11RP at 108-09, 111. He had not overheard anything being said. 6/1/11RP at 113.

Taking the stand, Mr. Gomez-Ramirez denied that most of this happened, and in particular adamantly denied ever wielding any knife or even having a painter's knife on him during that particular time at work. 6/1/11RP at 130; 6/2/11RP at 201-02. He told the jury that he was working the painting job when his supervisor, Bolanos, approached the ladder he was standing on and abruptly told him he was laid off. 6/1/11RP at 129-30. Mr. Gomez-Ramirez definitely became angry, because Bolanos gave him no reason why he was being let go. 6/1/11RP at 130. The two men briefly had angry words, during which time Mr. Gomez-Ramirez demanded to know why he was being fired. 6/1/11RP at 130-31. Mr. Gomez-Ramirez did then leave the job site, certainly angry at Mr. Bolanos, but intending to call the boss of both of them. 6/2/11RP at 210.

Mr. Gomez-Ramirez never wielded a knife, box-cutter or other painting knife at any time, and in fact, he was not carrying one at that moment because he had just come from a paint-spraying job, and at the new site, he was working with a putty gun and new paint. 6/1/11RP at 130. He also did not chase after Mr. Bolanos – he briefly walked after him because Bolanos, when he fired him, pulled a can of paint out of his hands that Mr. Gomez-Ramirez had advanced payment for with his own money. 6/2/11RP at 201-02.

Mr. Gomez-Ramirez repeated that did not ever wield, brandish, or swing any knife at Mr. Bolanos. 6/2/11RP at 204-05.

The defendant's account was supported by another painter, Jose Moreno Hernandez, who was working in a different corner of the room being painted. 6/2/11RP at 160-61. He confirmed that he saw Mr. Bolanos approach the defendant's ladder and heard him tell Mr. Gomez-Ramirez that he was fired. 6/2/11RP at 164. The two men had also been arguing previously, because Mr. Bolanos was someone who "discriminat[ed] against Central American folks." 6/2/11RP at 164. Hernandez testified that Mr. Gomez-Ramirez did not try to assault Bolanos:

He did leave after the strong words were exchanged but that was that. I didn't see that anything was done.

6/2/11RP at 165. Mr. Hernandez did see Mr. Gomez-Ramirez head briefly, maybe about 8 feet, toward Mr. Bolanos, and say that he was going to do "something" to him, such as hit him, but Mr. Gomez-Ramirez was not holding anything, including any knife. 6/2/11RP at 166-67, 172.

D. ARGUMENT

1. **THE PROSECUTOR OPENLY URGED THE JURY TO CONCLUDE THAT THE DEFENDANT'S PRE-ARREST REFUSAL TO SPEAK WITH OFFICER MUNOZ DEMONSTRATED HE WAS GUILTY AS CHARGED.**

- a. **"Manifest constitutional error" under RAP**

2.5(a)(3). Where the State elicits testimony or engages in argument interjecting the fact of a defendant's silence in response to police inquiry, the violation may, upon further showing, constitute "manifest constitutional error." Such error can be raised for the first time on appeal under RAP 2.5(a)(3).

See, e.g., State v. Holmes, 122 Wn. App. 438, 445-46, 93 P.3d 212 (2004) (stating rule); State v. Curtis, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002).

To be entitled to review under this rationale, Mr. Gomez-Ramirez must

show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error manifest, allowing appellate review.

(Emphasis added.) (Citation omitted.) State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Here, as the State knew before trial by virtue of discovery,¹ this relatively simple case would involve competing batteries of witnesses, supporting each party. Seeking to tip the balance in favor of the State, the prosecutor presented not just the fact of Mr. Gomez-Ramirez's silence, but also openly contended that his unwillingness to talk to Officer Munoz demonstrated his guilt. 6/1/11RP at 90-91; 6/2/11RP at 238. These comments in trial and argument were error, without question. State v. Easter, 130 Wn.2d 228, 235-340, 922 P.2d 1285 (1996) (defendant's "right to silence was violated by testimony he did not answer and looked away without speaking" to testifying officer); Holmes, 122 Wn. App. at 445 (merely eliciting fact of silence is normally error).²

These comments were certainly capable of persuading the lay jury of the accused's guilt. See also State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518, review denied, 154 Wn.2d 1009 (2004) (juries find police authoritative in their impermissible assessment of defendant's culpability). The prosecutor's comments carried identifiable, indeed potent consequences for

¹ See CP 3-4; CP 17-18 (Defendant's trial memorandum); Supp. CP ____, Sub # 22 (omnibus hearing); Supp. CP ____, Sub # 103C (State's trial memorandum).

² Compare State v. Gregory, 158 Wn.2d 759, 839-40, 147 P.3d 1201 (2006) (prosecutor's reference to fact that defendant was silent was "so subtle and so brief" that it did not "naturally and necessarily emphasize" the defendant's silence).

the jury's decision on the central issue of which witness to credit, and therefore for the defendant's rights. RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 926-27. Finally, the State would face the burden of proving that this class of error was harmless beyond a reasonable doubt. Easter, at 242; Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The totality of these circumstances satisfy the required "plausible showing" for manifest error that the error alleged had practical and identifiable consequences in Mr. Gomez-Ramirez's trial. Kirkman, 159 Wn.2d at 935 (explicating RAP 2.5(a)(3)). This Court should review the prosecutor's disparagement of Mr. Gomez-Ramirez's silence under RAP 2.5(a)(3).

b. The prosecutor may not, by questioning of witnesses or in argument, reveal that the defendant was silent in the face of police inquiry. The constitutional right to remain silent in the face of a police officer's inquisitiveness, protected by the Fifth Amendment and the Washington Constitution,³ exists even prior to a person's arrest and his receipt

³ The Fifth Amendment states that no person "shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Washington Constitution, article 1, § 9, contains almost identical language, and the Washington Supreme Court has determined that the two provisions are to be interpreted equivalently. State v. Earls, 116 Wn.2d 364, 375, 805 P.2d 211 (1991).

of the Miranda⁴ advisement of the right. This constitutional guarantee is intended to prohibit the inquisitorial method of investigation, in which the accused is forced to speak to his guilt or innocence regarding an incident. State v. Easter, 130 Wn.2d at 235 (citing Doe v. United States, 487 U.S. 201, 210-12, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)). A defendant possesses this right to remain silent, “both before and after arrest,” because the Fifth Amendment and the state constitution protect him from *ever* being required to state his self-incriminatory knowledge, if any, of the offense. State v. Thomas, 142 Wn. App. 589, 595, 174 P.3d 1264 (2008).

Enforcement of these rights takes the form of the prohibition that the State, at trial, may not use a defendant’s silence against him to show guilt. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240 (1976); Griffin v. California, 380 U.S. 609, 619, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

Notably, the right to silence in pre-arrest encounters with police officers may perhaps be more amenable to violation in the form of prosecutorial comment, since the fact of a Miranda advisement serves as a reminder of the post-arrest right, in pre-trial

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

hearings and in trial testimony regarding interrogation. See, e.g., State v. Burke, 163 Wn.2d 204, 206, 223, 181 P.3d 1 (2008); Easter, 130 Wn.2d at 243; Doe, 487 U.S. at 213. This generalization holds true in the present case, considering that the trial prosecutor's open, emphatic use of the "silence equals guilt" contention appeared more like a strategic deployment than an accidental overreach.

In this case, specifically regarding pre-arrest situations such as Officer Munoz's attempts to question Mr. Gomez-Ramirez, the defendant's silence may not be used by the State as "substantive evidence of defendant's guilt." State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

The Court of Appeals, in a survey of Washington cases, has made clear that improper prosecutorial comment occurs simply where the defendant's silence is *elicited* by the State, which occurs in three possible ways: (1) if a police witness testifies that (the defendant) refused to speak with him or her, (2) if the State purposefully elicits testimony as to the defendant's silence, or (3) if the State comments on the defendant's silence in closing argument. State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002).

The critical point here is that the fact of silence is so rarely a proper matter to be revealed to the jury, and yet so laden with

implications of guilt in the mind of lay jurors, that it need only be mentioned in a more than passing manner for the constitutional rule to be violated. Thus in State v. Romero, supra, the Court noted that even where the testimony about the defendant's silence during trial was limited, and despite the fact that the prosecutor did not "harp" in closing argument on the officer's testimony, the State's presentation of its case included an improper comment on silence because – as here – it "injected [the matter] into the trial for no discernible purpose other than to inform the jury that the defendant refused to talk to police." (Emphasis added.) Romero, 113 Wn. App. at 793.

Importantly, however, Mr. Gomez-Ramirez need not and does not rely on the rule's "floor" to make out error. In the present case, beginning with the prosecutor's questioning of Officer Munoz, the State's purpose was clear, and the point was then driven home in improper closing argument.

(i). *Police testimony that Mr. Gomez-Ramirez refused to speak with him, purposefully elicited by the State.*

During the State's case-in-chief,⁵ Officer Christian Munoz of the Issaquah Police Department testified that he responded to the

⁵ Officer Munoz was the State's second witness. 6/1/11RP at 79. This fact, along with the presence, and absence of other circumstances, forestalls any contention by the Respondent that the wrongful comments

condominium where the painting company was working, investigated the alleged assault, and took witness statements. 6/1/11RP at 86-88. The officer was asked if he had been able to locate contact information for the alleged assailant. Officer Munoz stated that he obtained an address, and an employee telephone number, for Mr. Gomez-Ramirez. 6/1/11RP at 89.

The prosecutor then began questioning Officer Munoz regarding his efforts to speak with the defendant, eliciting answers, and then repeating, confirming, and re-asking what the witness had just testified to, to be sure his testimony was understood by the jury.⁶

Officer Munoz responded that he telephoned the defendant's phone number, and someone answered. 6/1/11RP at 90. However, when Officer Munoz identified himself as the police, there was silence, nothing more was spoken, and then the person on the other end of the line apparently hung up. 6/1/11RP at 90-91. The prosecutor's pointed questioning of the officer demonstrated an

by the prosecutor are amenable to after-the-fact justification as "impeachment" of Mr. Gomez-Ramirez's trial testimony. See Part D.1.c, infra.

⁶ The defense objection to these colloquies was that the prosecutor's narrative questions were leading and had been repeatedly asked and answered. 6/1/11RP at 90.

effort to highlight the fact of Mr. Gomez-Ramirez's change from speaking, to silence:

Q: So, they answered your call and are you saying they answered it but once you introduced yourself, there was nobody on the phone?

6/1/11RP at 90. The prosecutor then asked:

Q: So, let me straighten this out. You called the phone number associated to Victor Gomez-Ramirez through your investigation, somebody answers the phone; and once you introduce who you are, assuming it's Police Officer Munoz --

A: Right.

Q: -- no one on the phone talks and the phone call ends?

A: That's correct.

6/1/11RP at 90-91. The prosecutor next asked Officer Munoz what he had done after that, and the witness indicated he made a second attempt to speak with Mr. Gomez-Ramirez on the telephone several days later. However, the same thing happened – someone answered but then the call was “disconnected.” 6/1/11RP at 91.

Officer Munoz stated that this was therefore “the end of [his] investigation.” 6/1/11RP at 91.

This was plainly improper. “A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions.” Romero, 113 Wn. App. at 790; State v. Lewis, 130 Wn.2d at 705. Accordingly, a prosecutor may not solicit such testimony from a law enforcement witness. Romero, at 790.

"A direct comment on silence - such as a statement that a defendant refused to speak to an officer when contacted - is always a constitutional error." Holmes, 122 Wn. App. at 445 (citing Romero, 113 Wn. App. at 790).

(ii). *Re-emphasis of the officer's testimony that the defendant did not want to speak with police, and comment on silence, in closing argument.*

In closing argument, the prosecutor first recounted Officer Munoz's testimony that the defendant hung up the telephone when the officer wanted to speak with him, and then expressly urged the jury to conclude Mr. Gomez-Ramirez was afraid to give his version of events after the incident:

And then a phone call made by, I believe, Officer Munoz. Two times he calls his [Mr. Gomez-Ramirez's] phone number, he picks up, Hey this is Issaquah PD Officer Munoz. Click. Second time, Hey this is Officer Munoz with Issaquah PD. Someone answers, click. Interesting how he doesn't want to talk to the police but he's not afraid to tell his rendition of the events up here.

6/2/11RP at 238. This reminder to the jury about the defendant not wanting to talk to the police, and the State's argument disparaging Mr. Gomez-Ramirez for refusing to do so, were again improper.

Romero, 113 Wn. App. at 790; State v. Lewis, 130 Wn.2d at 705.

The constitutional right was violated by virtue of the fact that the prosecutor *elicited* that the defendant, sought out by law

enforcement, was silent. Then, the prosecutor offered express *argument*, which openly disparaged Mr. Gomez-Ramirez for being unwilling to talk to the officer – despite the fact that he was under no obligation to do so. The State's closing argument exploited and magnified the prejudicial effect of the improper emphasis on silence at trial. Romero, at 790-91 (citing Easter, at 236).

For example, in Burke, a statutory rape case, the defendant was answering questions during a pre-arrest interview, but then ended the interview because he wanted to consult with a lawyer. Burke, 163 Wn.2d at 206. In cross-examination of Burke, and then again in closing argument, the State emphasized that the defendant terminated the interview when the topic turned to the victim's age. Burke, 163 Wn.2d at 209. The Supreme Court held that this questioning, and then argument, were improper. Burke, 163 Wn.2d 222. In Burke, and here, there was no other purpose for the trial testimony or the closing argument but to emphasize that the defendant invoked his right to silence, inviting the jury to infer that he was avoiding police inquiry because he was guilty. Id.

Similarly, in State v. Keene, an officer testified that the defendant missed an appointment, and did not return any of her telephone calls, and the prosecutor then argued in closing that these actions were not those of an innocent person. State v. Keene, 86

Wn. App. 589, 592-94, 938 P.2d 839 (1997). The facts of the present case are similar -- the prosecutor exploited the testimony elicited at trial, emphasizing Mr. Gomez-Ramirez's silence in argument as showing that the defendant was afraid to talk to police or was unable to make any claims in defense of himself.

In useful contrast is State v. Lewis, supra, a case which discusses the right to silence, but found no error. In Lewis, an officer testified that he told the defendant he could come to the police station if he had anything more to say to show his innocence. But critically, the officer did not thereafter testify that the defendant did not come to the station, and the prosecutor did not note the failure in closing argument or imply that it showed guilt. State v. Lewis, 130 Wn.2d at 704.

Here, the prosecutor pointedly elicited from Officer Munoz the fact that he wanted to speak with the defendant about the assault report, and called him on the telephone, but Mr. Gomez-Ramirez – who at first answered vocally – then fell silent and hung up the telephone. Unlike Lewis, the prosecutor in this case elicited police testimony in a way that both revealed, and emphasized, that the defendant's reaction was silence, when Officer Munoz identified himself. In closing argument, the prosecutor told the jury that all of this showed Mr. Gomez-Ramirez was “afraid” to speak with the

officer about the incident. As in Easter, 130 Wn.2d at 238-39, and Keene, 86 Wn. App. at 592-94, the prosecutor directly cast the defendant in an inculpatory light on the basis of his being unwilling to speak with the officer

By no measure was this testimony and argument a mere “passing reference” to the defendant’s silence that can escape classification as constitutional error. See State v. Gregory, *supra*, 158 Wn.2d at 839-40. The prosecutor purposefully elicited, highlighted, and harped on the defendant’s silence in a disparaging manner, offering it to the jury as indicative of guilt at several different junctures of trial. The topic was exploited even more fully here, compared to the brief treatment of the defendant’s silence in Romero, which also required reversal. Romero, at 793.

c. Not impeachment. The prosecutor did not question Officer Munoz, or offer his argument in closing about Mr. Gomez-Ramirez’s silence, or question Mr. Gomez-Ramirez in cross-examination, in any way that would permit the State’s repeated comments on the defendant’s silence to be dismissed as allowable “impeachment” of his trial testimony.

Of course, any such efforts would still be scrutinized under the rule prohibiting use of silence to imply guilt. In certain circumstances, the State may “use” a testifying defendant’s pre-

arrest conduct -- by mode of questioning of witnesses, or by argument in closing -- to *impeach* his trial testimony. State v. Burke, 163 Wn.2d at 217. For example, if the defendant waives his right to remain silent and makes a statement, the prosecution may properly use that earlier statement to impeach any inconsistent trial statements. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988) (post-arrest silence case); see also State v. Seeley, 43 Wn. App. 711, 713-15, 719 P.2d 168, review denied, 107 Wn.2d 1005 (1986) (prosecutor entitled to present evidence about and comment on inconsistency of defendant's statement to officer compared to defendant's version of events at trial). That is not what happened here.

In any event, the cases that have permitted testimony about the defendant's silence as to a particular matter have done so only for the limited purpose of impeachment after the defendant has taken the stand, and not as substantive evidence of guilt. State v. Easter, 130 Wn.2d at 237; Burke, 163 Wn.2d at 218. That is also not the procedural posture of the present case.

Finally, nothing in the record supports any argument by the Respondent that the State elicited the testimony of Officer Munoz as an attempt at "anticipatory" impeachment. See Burke, 163 Wn.2d at 218 n. 8 (anticipatory impeachment may be admissible

with a proper foundation and with the court's permission). There was no effort to lay any foundation for impeachment in this case because the prosecutor's purpose in emphasizing Mr. Gomez-Ramirez's silence was not impeachment. The State never asked the defendant a *single question* about being telephoned by the police, or about any events after he left the scene, much less inquired of him in any way that suggested his testimony should be doubted because he had not offered it earlier. See 6/1/11RP at 132-37; 6/2/11RP at 193-212, 213-15 (cross-examination of defendant). The State's questions and argument were simply not focused topically on showing that Mr. Gomez-Ramirez's defense contentions should not be believed because he failed to make these factual claims previously, even if that were proper in a case where the defendant gave no prior statement at all.

The constitutional right to pre-arrest silence precludes the prosecution from implying to the jury that exercising it shows that the defendant is guilty, but this is what happened in Mr. Gomez-Ramirez's trial. Easter, 130 Wn.2d at 238-39 (improper officer testimony and closing argument under rule); Keene, 86 Wn. App. at 592-94 (same).

d. Reversal is required. This Court should reverse for the constitutional errors. In State v. Keene, 86 Wn. App. 589,

supra, the Court reversed where a police detective testified that the defendant failed to return telephone calls, and the prosecutor told the jury it was their "decision if those are the actions of a person who did not commit these acts," State v. Keene, at 592. The Court stated that the untainted evidence, consisting of a child's claims of abuse and a report of the abuse a year later, was not overwhelming. Keene, at 595-96.

And in Romero, 113 Wn. App. at 795, the error of a police officer commenting on the defendant's silence was not harmless where the case was a credibility contest. The Romero Court reversed because the jury "could have been swayed by Sergeant Rehfeild's testimony, which insinuated Mr. Romero was hiding his guilt." Romero, 113 Wn. App. at 795.

Here, the case was a sharply litigated credibility contest. The important factual dispute at issue was whether the defendant wielded a knife and threatened Mr. Bolanos; the victim claimed that Mr. Gomez-Ramirez did so, Mr. Gomez-Ramirez testified that he had no knife and did not threaten anyone. One eyewitness supported his supervisor's claim, another eyewitness confirmed that Mr. Gomez-Ramirez did not wield or display a knife.

The evidence below is not susceptible to a contention that the constitutional error was rendered harmless by "overwhelming"

evidence. See State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The defendant's and the complainant's accounts were equally credible, and there was no slough of supporting witnesses for the State that tilted the credibility contest into a case of overwhelming evidence for the prosecution. Rather, both parties presented their own competing witness and eyewitness accounts. See also State v. Holmes, 122 Wn. App. at 443-47 (reversal for comment on post-arrest silence despite compelling testimony of sexual offense victims, where case hinged on their credibility versus that of the defendant).

Lest there be any doubt as to the closeness of the case, the State's attempts to discredit the defense eyewitness, Mr. Hernandez, were also not reflective of a prosecution case confidently supported by "overwhelming" evidence.⁷

⁷ The prosecutor spent an inordinate amount of time trying to get Mr. Hernandez to testify whether he was a "friend" or "enemy" of the defendant's. 6/2/11RP at 181-84 (Hernandez calmly stated that he was simply the defendant's co-worker). Then in closing, the prosecutor argued that Mr. Hernandez was doing a "favor" for Mr. Gomez-Ramirez, and that his testimony was therefore "brokered" and non-credible. 6/2/11RP at 240 (initial argument), 6/2/11RP at 251 (rebuttal). There was no ground for this accusation. At trial, Mr. Hernandez had stated simply:

Well, he said that I was the only one who had seen, and he was asking me if I could, as a favor, come and say what it was that I had seen.

6/2/11RP at 181. The prosecutor also expended great dredges of court time trying to show that Mr. Hernandez never told the investigating

The prosecutor's multi-pronged effort to break the jury toward its competing factual account versus the defendant's, by insinuating to the jury that Mr. Gomez-Ramirez was guilty because he refused to talk when contacted by police, was likely emotionally persuasive to the jury, surely successful in procuring the verdicts, and constitutionally prohibited. The State cannot show that it is "beyond a reasonable doubt" that the verdicts on the assault, harassment, or the deadly weapon allegations were not affected by these constitutional errors, and reversal is required. State v. Keene, 86 Wn. App. at 592; Easter, at 242; Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

2. THE DEFENDANT'S CONVICTIONS FOR ASSAULT AND HARASSMENT WERE THE SAME CRIMINAL CONDUCT BUT WERE INCORRECTLY SCORED AGAINST EACH OTHER.

a. Sentencing facts. At sentencing, Mr. Gomez-Ramirez was ordered to serve terms of incarceration for second degree assault based on a score of 1, and for felony harassment based on a score of 1; he did not have a prior criminal history. CP 47-51, 52-54.

officer that Mr. Gomez-Ramirez did not go after Mr. Bolanos with a knife. But Mr. Hernandez responded that he did tell the officer what he had seen – that no one had assaulted or hurt anyone. 6/2/11RP at 167.

These scores and the crimes' seriousness levels permitted his base sentences of 9 months and 6 months. 6/24/11RP at 5-6; CP 52-59.

Mr. Gomez-Ramirez's counsel agreed at the sentencing hearing that the defendant's standard ranges as stated by the prosecutor were correct, 6/24/11RP at 3, but did not address the facts of the crimes or discuss the same criminal conduct issue.

b. Two offenses that occur at the same time and place, involve the same victim, and result from the same objective criminal intent amount to the "same criminal conduct" for sentencing purposes. When a person is convicted of two or more offenses, they count as one crime in the offender score if they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). The "same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a); see, e.g., *State v. Vike*, 125 Wn.2d 407, 409-10, 885 P.2d 824 (1994).

Thus, when the jury has issued verdicts in a case where the defendant faced multiple charges arising out of an incident, the multiple offenses "shall be counted as one crime" where the three requirements of the statutory definition are established. RCW 9.94A.589(1)(a).

The State bears the burden of proving by a preponderance of the evidence that two or more offenses amount to separate criminal conduct. See State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996); RCW 9.94A.500(1) (“If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist”); but see State v. Lopez, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012, 195 P.3d 87 (2008) (statute presumes separate offenses).

This burden of proof as stated in Dolen is in accord with the general rule that the State at criminal sentencing must prove the defendant’s criminal history and that much is required before a defendant will be deemed to have affirmatively acknowledged facts necessary to his sentence. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); see also State v. Hunley, 161 Wn. App. 919, 927, 253 P.3d 448, review granted, 172 Wn.2d 1014 (2011).

c. A non-deferential *de novo* standard is appropriate on appellate review of a same criminal conduct issue. As a general rule, where the relevant facts are undisputed and the only issue is the correct application of a legal analysis to those facts, the proper standard of review is de novo. See, e.g., State v. Ustimenko, 137 Wn. App. 109, 115, 151 P.3d 256 (2007) (applying de novo

standard to objective custodial interrogation issue). Accordingly, in State v. Torngren, 147 Wn. App. 556, 196 P.3d 742 (2008), the Court of Appeals applied this non-deferential standard in an appeal involving the question whether certain prior offenses were the same criminal conduct, carefully reasoning as follows:

The statutory elements for “same criminal conduct,” however, are clear. And the test is described as “objective.” [citing State v. Dunaway, 109 Wn.2d 207, 216–17, 749 P.2d 160 (1987) (referring to intent prong of same conduct analysis)]. It seems to us, then, that we are in as good a position as the sentencing court to apply these objective standards to uncontroverted facts. A de novo standard of review of the question of “same criminal conduct” would, then, seem more appropriate.”

Torngren, 147 Wn. App. at 562–63. The Supreme Court is presently reviewing an unpublished Court of Appeals decision that applied the de novo standard to a same criminal conduct question. See State v. Graciano, 173 Wn.2d 1012, 266 P.3d 221 (Wash. Jan 05, 2012) (NO. 86530-2).

d. The second degree assault and the felony harassment amounted to the “same criminal conduct” as a matter of law. Under RCW 9.94A.589(1)(a), the trial court in imposing judgment below could either treat the two counts in this case as “prior convictions” under that statute and assign each a score of “1,” or the court could calculate the offender scores by

treating the counts as “one crime” under the statute. The court did the former.⁸ CP 52-59.

If the defendant did not argue same criminal conduct at sentencing and the trial court counted the convictions separately, the Court of Appeals considers the court’s calculation of the offender score as a finding that the offenses were deemed to be separate conduct under the statute. State v. Anderson, 92 Wn. App. 54, 61-62, 960 P.2d 975 (1998), review denied, 137 Wn.2d 1016, 978 P.2d 1099 (1999). The Court will therefore affirm the sentence based on that scoring if the facts in the record are sufficient to support such a finding on the determination of same criminal conduct. Anderson. 92 Wn. App. at 62.

However, if the facts show that the two offenses should have been categorized as the same criminal conduct, as a matter of law, the Court will reverse the scoring and sentence. Anderson. 92 Wn.

⁸ RCW 9.94A.589(1)(a) provides in pertinent part:

(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.

(Emphasis added.) RCW 9.94A.589(1)(a).

App. at 62. Here, the evidence showed that the second degree assault and the felony harassment were the same criminal conduct as a matter of law. No tenable application of the law to the facts permitted the convictions to be categorized otherwise.

First, here, the two offenses certainly occurred at the same time and place, and were committed against the same victim. According to the State's evidence, Mr. Bolanos said something to Mr. Gomez-Ramirez. The defendant reacted angrily, saying that he was going to kill Bolanos, which he uttered several times as he descended the ladder and pulled a knife from his pocket, and swung it at the victim as he advanced toward him.

This attack was charged as two statutory offenses under RCW 9A.36 and RCW 9A.46, and the jury found that the conduct satisfied both counts. CP 1-5, CP 47-51. However, the offenses were the same conduct because Mr. Gomez-Ramirez's criminal intent, objectively viewed, remained substantially the same for both offenses. In re Pers. Restraint of Connick, 144 Wn.2d 442, 459, 28 P.3d 729 (2001) (citing State v. Dunaway, 109 Wn.2d at 215); see State v. Mandanas, 168 Wn.2d 84, 87, 228 P.3d 13 (2010) (noting Court of Appeals decision that Mandanas's assault and felony harassment convictions constituted the same criminal conduct for sentencing purposes).

Intent, as used in the “same conduct” analysis, is not the specific statutory *mens rea* listed in the Legislature’s definition of the offense, but rather it is the offender's “objective criminal purpose in committing the crime.” State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). In general, where this objective purpose does not substantially change for one crime or the other, the “same intent” requirement of the statute is met, the crimes must be categorized as the same conduct, and counted as one offense. Connick, 144 Wn.2d at 459; Dunaway, 109 Wn.2d at 215; RCW 9.94A.589(1)(a).

In categorizing the objective purpose of the defendant’s conduct, the court will look at the following factors: how intimately related the crimes are, whether the criminal objective changed substantially between the crimes, and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Here, there was no substantial change or difference in Mr. Gomez-Ramirez’s criminal objective. Significantly, the facts in evidence do not support that this was an attempt to kill or even to stab Mr. Bolanos, and the prosecutor expressly did not prove Mr. Gomez-Ramirez guilty by those means. See 6/2/11RP at 236. Rather, in closing argument the prosecutor argued that the defendant committed assault by intentionally placing the victim in

immediate apprehension or fear or harm. 6/2/11RP at 235; CP 28 (jury instruction 6); see State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (noting three means of committing assault). Similarly, the prosecutor argued that Mr. Gomez-Ramirez was also guilty of harassment, because he threatened to kill Mr. Bolanos and placed him in fear that the threat would be carried out. 6/2/11RP at 236.

This proof established a single incident in which the defendant had an objective, continuing purpose to cause Mr. Bolanos fear and apprehension of being stabbed and killed. His conduct of swinging a knife at the victim in a manner capable of killing, at the same time as uttering threats to do so, was a manifestation of one objective criminal intent, despite simultaneously satisfying two criminal statutes.

The defendant's conduct was "intimately related;" indeed, the very same verbal and physical conduct proved both convictions. As the prosecutor argued in closing, Mr. Gomez-Ramirez was guilty of harassment placed Bolanos in actual, reasonably warranted fear that his threats to kill would be carried out. 6/2/11RP at 236. Mr. Gomez-Ramirez's brandishing of the knife embodied, and furthered, the single objective intent, continuing during the confrontation, to make Mr. Bolanos believe this was going to happen.

Additionally, each crime furthered the other. For example, in State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004), review denied, 156 Wn.2d 1034, 137 P.3d 864 (2006), a rape and kidnap were the same conduct, where the defendant's primary motivation for both crimes was to dominate the victim and cause her pain and humiliation. See also State v. Collins, 110 Wn.2d 253, 263, 751 P.2d 837 (1988) (burglary furthered rape and assault, where defendant committed burglary to accomplish attacks). Here, each crime furthered the other's purpose of placing Mr. Bolanos in fear and apprehension.

It is also significant for same criminal conduct purposes whether the two offenses, which occurred at the same time under the statute, specifically occurred "sequentially," or "simultaneously." State v. Tili, 139 Wn.2d 107, 123-25, 985 P.2d 365 (1999) (citing State v. Grantham, 84 Wn. App. 854, 860, 932 P.2d 657 (1997)).

However, whichever analysis the trial court below would have deemed applicable, the result is the same, and the offenses are therefore the same, as a matter of law. If the crimes occurred sequentially, and the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," then the record supports a finding

of a new intent, and thus separate criminal conduct. Tili, 139 Wn.2d at 123 (quoting Grantham, 84 Wn. App. at 859).

Here, if the counts of conviction were committed sequentially, it is nonetheless impossible to conclude there was any time, however brief, where Mr. Gomez-Ramirez had an opportunity to decide either to commit another crime or to cease his conduct. Where the conduct and purpose are continuing, there must be some moment of transition to the other offense, in order to identify a substantial change in objective intent. Compare State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (defendant momentarily left room and had time between assault and threat to either desist or continue criminal conduct, thus had opportunity to form new intent).

On the other hand, as seems more tenable, if the assault and harassment were committed by continuous and uninterrupted conduct, within the same time frame so as to be *simultaneous*, the court below was certainly also required as a matter of law to score the counts as one crime.

When the offenses were commenced with a single objective intent and are committed simultaneously, there can be no change or difference in the objective criminal purpose, because the defendant's crimes were committed as a single, "unchanging,

pattern of conduct.” Tili, 139 Wn.2d at 123-25. If both crimes share the same objective purpose and occur at the same time, they constitute the same criminal conduct. State v. Grantham, 84 Wn. App. at 859.

Here, Mr. Gomez-Ramirez's conduct was a single, threatening attack on the victim which simultaneously violated both the assault and harassment statutes. When Mr. Gomez-Ramirez lunged at Mr. Bolanos, saying he would kill him as he swung a knife at him, both RCW 9A.36 and RCW 9A.46 were being violated. The convictions could only be scored as the same criminal conduct.

Additionally, in the case of simultaneous crimes, the “furtherance” requirement for proving “same intent” is not a necessary showing. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). If the assault and harassment in this case were committed simultaneously, a sentencing court would find the same objective intent even absent a showing that one crime furthered the other. Haddock, 141 Wn.2d at 113-14. Logically, simultaneous crimes each further their shared objective intent, as opposed to one crime furthering the other crime.

Nonetheless, the requirement of furtherance, even if unnecessary for simultaneous crimes, is also satisfied here. Each crime furthered and reinforced the other in a pattern of unchanging

conduct. The assault furthered the harassment, because Mr. Gomez-Ramirez, angered by the confrontation, wanted to instill fear in Mr. Bolanos. He threatened to kill Bolanos, instilling fear and belief of harm, and he proved his ability to carry out the threat by wielding a weapon commonly understood (and statutorily defined) as capable of causing death. Assaulting Bolanos by swinging the knife at him, created actual, and "reasonable" fear of death in the victim. See State v. Mills, 154 Wn.2d 1, 2-4, 109 P.3d 415 (2005); State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

Similarly, the harassment furthered and reinforced the second degree assault. The objective purpose of Mr. Gomez-Ramirez's assault, consistent with the theory argued to the jury, was intentionally causing the victim to apprehend and fear being bodily injured. Mr. Gomez-Ramirez' simultaneous conduct of repeatedly telling Bolanos that he was going to kill him fundamentally pursued and furthered that same objective.

Ultimately, there is no reasonable basis for separating certain swings of the knife as intended by Mr. Gomez-Ramirez to place Mr. Bolanos in apprehension of assaultive contact by stabbing, as distinguishable other swings that were intended to place him in reasonable fear that the threat was to be carried out.

The overall goal of the defendant's criminal conduct was objectively the same, and did not substantially change among the multiple crimes. State v. Burns, 114 Wn.2d at 318. As a matter of law, the convictions should have counted as a single crime in the defendant's offender score. RCW 9.94A.589(1)(a). This Court should reverse the sentences and remand for resentencing.

e. Mr. Gomez-Ramirez may challenge the erroneous calculation of his offender score for the first time on appeal. If as argued above, the two offenses comprised the same criminal conduct as a matter of law, leaving no room for judicial discretion, the defendant may raise this issue for the first time on appeal. In State v. Longuskie, 59 Wn. App. 838, 847, 801 P.2d 1004 (1990), although the issue was not raised below, the Court addressed same conduct determination as a legal matter. See also Anderson, 92 Wn. App. at 61 (defendant may challenge offender score and argue same criminal conduct for first time on appeal).

This is in accord with the well-established rule that a defendant cannot waive the right to challenge "a legal error leading to an excessive sentence," while waiver may, however, be found "where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court

discretion.” In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

Here, Mr. Gomez-Ramirez’s counsel did not waive the error by agreeing to the State’s representation of the standard range. In State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009), the Supreme Court reaffirmed that waiver results only by “an affirmative acknowledgment by the defendant of facts and information introduced for the purposes of sentencing” under an offender score. (Emphasis added.) Mendoza, 165 Wn.2d at 928. Defense counsel in this case never acknowledged any state of the facts at sentencing and there was no affirmative waiver of the issue.

f. If the right to challenge the offender score was waived, Mr. Gomez-Ramirez received ineffective assistance of counsel. If defense counsel did not argue same criminal conduct at sentencing, the Court of Appeals will also reach the issue if the defendant can show his attorney's failure to argue the matter amounted to ineffective assistance of counsel. Saunders, 120 Wn. App. at 825; State v. Allen, 150 Wn. App. 300, 316, 207 P.3d 483 (2009).

To establish ineffective assistance of counsel, the defendant must show his lawyer's representation was deficient, and that he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668,

687, 104 S. Ct. 2052, 80 L. Ed .2d 674 (1984); U.S. Const. amend. VI. A lawyer's performance is deficient if it falls below an objective standard of performance. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice results where there is a reasonable probability that, but for counsel's deficient performance, the outcome of trial would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

An attorney's failure to argue same criminal conduct at sentencing amounts to ineffective assistance of counsel if the evidence is sufficient to allow a fact-finder to find that multiple offenses are the same criminal conduct. Saunders, 120 Wn. App. at 825. Here, as argued, the two crimes unquestionably occurred simultaneously, and shared the same objective intent. Had the issue been argued, the two convictions would have been counted as "one crime" under RCW 9.94A.589(1)(a).

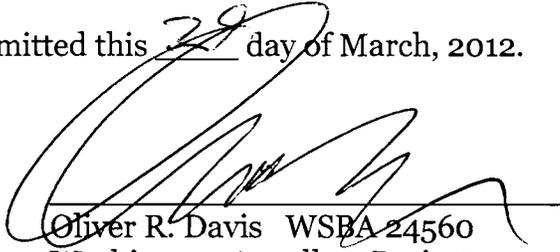
g. Mr. Gomez-Ramirez's case should be remanded to the sentencing court. If a sentence is erroneous due to miscalculation of the offender score amounting to legal error, the defendant must be resentenced to the correct score. State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). In the alternative, if a defendant received ineffective assistance of counsel by his attorney's failure to argue same criminal conduct, the defendant is

entitled to a new sentencing hearing where counsel can properly raise the argument. Saunders, 120 Wn. App. at 825. This Court should remand Mr. Gomez-Ramirez's case to the Superior Court, consistent with its opinion.

E. CONCLUSION

Based on the foregoing, Mr. Gomez-Ramirez respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 29 day of March, 2012.



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67394-7-I
v.)	
)	
VICTOR GOMEZ-RAMIREZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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