Supreme Court No.: 89516-3
Court of Appeals No.: 68619-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDREW LOPEZ,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Andrew Lopez requests this Court grant review pursuant to RAP 13.4(b)(3) of the decision of the Court of Appeals, Division One, in *State v. Lopez*, No. 68619-4-I, filed September 16, 2013. A copy of the opinion is attached as an Appendix.

B. ISSUE PRESENTED FOR REVIEW

An accused has a constitutional and statutory right to a speedy trial. Although the statutory speedy trial period may be extended due to unforeseen and unavoidable circumstances as well as continuances required in the administration of justice, the court must find support for such continuances on the record. Moreover, due process entitles a criminal defendant to an adequate record of proceedings. While Mr. Lopez remained in custody, the trial court extended his trial on 49 different occasions without explanation beyond that the prosecutor was in another trial (42 continuances) or "lack of judicial availability" (7 continuances). Should this Court grant review to determine whether the trial court's failure to inquire into the need for or explain the justification for the 49 continuances violates Mr. Lopez's right to due process? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

The State charged Mr. Lopez with assault in the second degree and felony harassment. CP 1, 24. He was held in custody with an initial trial expiration date of December 19, 2011. CP 90 (initial arraignment); 10/20/11RP 1-5.[1] The matter was continued once "in the administration of justice" because the prosecutor was in another trial. CP 92 (order for continuance). There is no further record of the basis for the extension; nonetheless the speedy trial date was reset to January 18, 2012. *Id.* Beginning on December 20, 2011, the court entered 49 additional continuances. Seven of these were based on lack of judicial availability but entered without any record other than merely an indication of "court congestion." The remaining 42 continuances were entered due to the prosecutor being engaged in other trials. Mr. Lopez moved to have the case dismissed, which the trial court denied. CP 21; 2/8/12RP 3-7; 3/26/12RP 2-6, 13-15.

When the case eventually was tried, a jury convicted Mr. Lopez as charged. CP 67-70.

[1] Each volume of the verbatim reports of proceeding is referred to by the first hearing date transcribed.

D. ARGUMENT

The Court should grant review to determine whether the failure to create a record of the bases for 49 trial continuances violated the in-custody Andrew Lopez's constitutional right to due process.

Due process entitles a criminal defendant to a "record of sufficient completeness" to present errors to the appellate court. *E.g.*, *Draper v. Washington*, 372 U.S. 487, 497, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963); *State v. Saunders*, 153 Wn. App. 209, 219-21, 220 P.3d 1238 (2009) (continuances granted without adequate explanation were abuse of discretion); Const. art. I, § 3; U.S. Const. amend. XIV.

Further, CrR 3.3(f)(2) requires the court state the reasons for a continuance on the record or in writing. Criminal Rule 3.3 sets a definite time line in which a trial must occur; it requires that a defendant who is in custody be brought to trial within 60 days, or the trial court must dismiss the charge. The right to a speedy trial derives from this speedy trial rule as well as the federal and state constitutions. U.S. Const. amend. VI; Const. art. I, § 22; *Barker v. Wingo*, 407 U.S. 514, 531-32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); *State v. Ross*, 98 Wn. App. 1, 4, 981 P.2d 88 (1999).

The trial court bears the burden of ensuring that the accused receives a timely trial under CrR 3.3. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009); CrR 3.3(a)(1) ("It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."). Certain periods may be excluded in computing the time for trial, including valid continuances granted by the court pursuant to CrR 3.3(f) and unavoidable or unforeseen circumstances. CrR 3.3(e)(3), (8). However, the court is required to state the reasons for the delay on the record. CrR 3.3(f)(2); *Kenyon*, 167 Wn.2d at 139.

The trial court continued Mr. Lopez's trial seven times for lack of judicial availability without once discussing the availability of courtrooms and visiting or pro tempore judges. This Court has held that routine court congestion is not a permissible reason for a continuance. *State v. Mack*, 89 Wn.2d 788, 576 P.2d 44 (1978). Delay based upon court congestion is "contrary to the public interest in prompt resolution of cases, and excusing such delays removes the inducement for the State to remedy congestion." *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005).

Where a continuance is based on docket congestion or courtroom management, the speedy trial rule is violated unless (1) good cause is shown on the record for the finding and (2) the finding is tied to specific, articulable facts, rather than a generalized assertion. *Kenyon*, 167 Wn.2d at 134 (reversing where trial court continued trial because trial judge was in a criminal trial and second county judge was on vacation; the "trial court should have documented the availability of pro tempore judges and unoccupied courtrooms" because, pursuant to CrR 3.3(f), it is "required to 'state on the record or in writing the reasons for the continuance' when made in a motion by the court or by a party"); *State v. Cannon*, 130 Wn.2d 313, 327, 922 P.2d 1293 (1996) (reaffirming that a generalized assertion of docket congestion is not good cause for continuance); *State v. Smith*, 104 Wn. App. 244, 251-52, 15 P.3d 711 (2001) (routine court congestion not good cause for continuance); *State v. Warren*, 96 Wn. App. 306, 309, 979 P.2d 915 (1999) (courtroom unavailability is synonymous with court congestion) (citing *State v. Kokot*, 42 Wn. App. 733, 737, 713 P.2d 1121 (1986)). Specifically, "[w]hen the primary reason for the continuance is court congestion, the court must record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance

and the availability of visiting judges to hear criminal cases in unoccupied courtrooms." *Flinn*, 154 Wn.2d at 200.

However, the written orders in the case at bar provide no evaluation of the circumstances constituting "court congestion" or "no judicial availability." CP 93, 95, 105, 125-26, 131-32. Hearings were held on only three occasions, the transcripts of which provide no further explanation or consideration of availability. 3/1/12RP 3-4.

Moreover, the trial court entered 42 further continuances, each "in the administration of justice" while the prosecutor tried the cases of other accused persons without evaluating alternatives to continuing to delay Mr. Lopez's trial while he remained in custody. Under CrR 3.3(f)(2), the court may continue a trial if it finds "such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." But the court may not simply declare that the delay is required in the "administration of justice." *Saunders*, 153 Wn. App. at 220; *State v. Nguyen*, 131 Wn. App. 815, 820-21, 129 P.3d 821 (2006). The court must also assess on the record the reasons for the delay and the prejudice to the defense. *Saunders*, 153 Wn. App. at 220.

The record is far from sufficient here. First, no hearings were transcribed or recorded when continuances were entered on 23 occasions. The written orders for these continuances provide no specification other than "plaintiff's counsel in trial."[2]

With regard to the continuances which were granted after a hearing on the record, the trial court completely failed to assess the reasons for the delay and the prejudice to the defense. The sum total of the court's inquiry, findings, explanation and evaluation is:

- "Mr. Simmons is in trial in Judge Shaffer's court. Continued to February 13 in the administration of justice." 2/8/12RP 3; CP 118.

- "We'll set that over to 2/15 because the prosecutor is in trial." 2/8/12RP 3; CP 119.

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[2] There is no record for the 2011 hearings on December 14, 21, 22, 27, 28, or 29. *See* CP 92 (December 14 continuance), 93 (minutes from December 21), 95 (December 22 continuance), 96 (December 27 continuance), 97 (December 28 continuance), 98 (December 29 continuance). In 2012, no hearings were held for continuances granted on January 2, 4, 5, 9, 11, 13, 17, 18, 23, 24, 26, 30, 31, February 1, 2, 7, 8, 15, 22, 23, March 5, 6, and 15. CP 99 (January 2 continuance), 100 (January 4 continuance), 101 (January 5 continuance), 102 (January 9 continuance), 103 (January 11 continuance), 105 (January 13 continuance), 106 (January 17 continuance), 107 (January 18 continuance), 109 (January 23 continuance), 110 (January 24 continuance), 111 (January 26 continuance), 112 (January 30 continuance), 113 (January 31 continuance), 111 (February 1 continuance), 114 (February 2 continuance), 116 (February 7 continuance), 117 (February 8 continuance), 119 (February 15 continuance), 121 (February 22 continuance), 122 (February 23 continuance), 127 (March 5 continuance), 128 (March 6 continuance), 133 (March 15 continuance).

- After a non-searching inquiry about the prosecutor's trial schedule, the court stated to Mr. Lopez "I don't blame you for being impatient. I would be, too. It's not fair, what's going on. . . . If you want to know why it's happening this way, it's because there aren't enough lawyers. And I don't have an answer for you. I don't have a simple way – I don't have a way to resolve it. There just aren't enough lawyers on both sides." 2/8/12RP 6-7; CP 120.

- "Mr. Simmons is in trial in Judge Shaffer's court. Continue to February 28th in the administration of justice." 2/8/12RP 10-11.

- "Mr. Simmons is in trial in Judge Shaffer's court. Continue to February 29th in the administration of justice." 2/8/12RP 11; CP 123-24.

- "Mr. Simmons is in trial in Judge Spearman's court. Continued to March 13th in the administration of justice." 3/1/12RP 3; CP 129-30.

- "Mr. Simmons is in trial in Judge Robinson's court. Continued to March 20th in the administration of justice." 3/1/12RP 4-5.

- "Mr. Simmons is in trial in Judge Robinson's court. Continue to March 22nd in the administration of justice." 3/1/12RP 5; CP 135.

- "Mr. Simmons is in trial in Judge Robinson's court. Continue to March 26th in the administration of justice." 3/1/12RP 5; CP 136-37.

The trial court and the State have a responsibility to timely bring an accused person to trial. The State is further required to responsibly manage its prosecutors' caseloads and vacations. *State v. Heredia-Juarez*, 119 Wn. App. 150, 154, 79 P.3d 987 (2003); *see State v.*

Chichester, 141 Wn. App. 446, 455, 170 P.3d 583 (2007) (trial court "is entitled to determine whether reassignment is feasible and necessary in a particular situation"); *State v. Kelley*, 64 Wn. App. 755, 758, 764-67, 828 P.2d 1106 (1992). Although actual reassignment of a case to the next most qualified prosecutor may not be required per se, where the accused is in custody and the trial has been continued repeatedly because of various other trials by the prosecutor, the court must at least inquire on the record to determine when the case might realistically go to trial and whether the prosecutor's office has or should consider reassigning the case to ensure a more speedy trial. *See* CrR 3.3(f)(2); *Saunders*, 153 Wn. App. at 220

In short, the trial court granted 49 continuances of Mr. Lopez's trial—while he remained confined in jail. The vast majority of the continuances were at the request of the State because the prosecutor was in another unspecified trial for an unspecified period of time. The court provided Mr. Lopez no further explanation for the delay or understanding of when his trial might realistically begin. A smaller subset of the continuances was granted due to judicial unavailability. But these continuances are similarly without record as to what the unavailability was and whether it could be resolved. To the extent that

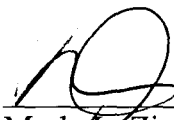
the court failed to make an adequate record of the reasons to continue the case, Mr. Lopez's due process rights were violated. This Court should grant review and hold that such egregious violations of the requirement that a record be made prior to granting continuances amounts to a deprivation of due process.

E. CONCLUSION

This Court should grant review of the substantial constitutional question whether a lack of record for the bases of granting 49 trial continuances over objection and while the accused remained in custody violates an accused's constitutional right to due process.

DATED this 16th day of October, 2013.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANDREW SIMON LOPEZ, Appellant.	)	No. 68619-4-I DIVISION ONE UNPUBLISHED OPINION FILED: September 16, 2013

BECKER, J. — Andrew Lopez appeals his convictions for second degree assault and felony harassment, arguing that the trial court violated his speedy trial right. He also contends that the charging document and jury instructions omitted an essential element of the crime of felony harassment. Lopez challenges his sentence, claiming that the trial court erred in determining his two crimes did not constitute the same criminal conduct. The State concedes that the trial court failed to indicate on the judgment and sentence that the imposed confinement terms were to be served concurrently and joins Lopez in requesting remand to correct the clerical error. Because review of his speedy trial claim is barred and Lopez fails to demonstrate any error other than the conceded clerical error, we affirm his convictions and sentence but remand for correction of the judgment and sentence.

FACTS

In the early morning hours of October 4, 2011, Andrew Lopez and Sophia Mohani got into an argument in the apartment they shared with their child. When Mohani fell to the floor of their bedroom, Lopez got on top of her and squeezed his hands around her neck while threatening to kill her. Mohani got away, but the argument continued in the bathroom, where she again fell to the floor and Lopez choked her and threatened her. Eventually, Mohani escaped his grasp, went to the bedroom for their son, and then locked herself and their son in the bathroom, where she called her mother. Mohani's mother called the police. The police arrived and arrested Lopez.

The State charged Lopez with second degree assault and felony harassment. Lopez appeared for arraignment in custody on October 20, 2011. The trial court entered a 60-day time for trial expiration date of December 19, 2011. On November 1, the court set a trial date of December 14. While Lopez remained in jail, the court both continued the trial date and extended the expiration date many times, about three or four times each week, until beginning trial on March 26, 2012. In the order granting the final continuance under CrR 3.3(f)(2) on March 22, 2012, the trial court noted an expiration date of April 25, 2012. In this manner, the court maintained an expiration date 30 days beyond the date set for trial.

At a hearing on February 21, 2012, defense counsel informed the court that Lopez wanted new counsel, stating:

> He wants a speedy trial. We're not going to continue it. So here we are, some two months after his expiration date and Mr.

> Lopez has asked me on several occasions to do a motion to dismiss for a violation of his speedy trial.
>
> I've tried to explain to him that under the current court rule and the way the speedy trial rule is written, in effect there really is no speedy trial rule. And he says that he needs a new lawyer who understands the speedy trial rule. I said, "You're free to ask Judge Kessler, but I think he'll explain to you that there really is no teeth to our speedy trial rule." So here we are.

Defense counsel did not ask for a ruling on Lopez's request for new counsel, and the trial court pointed out that appointment of new counsel would cause additional delay. The trial court granted Lopez's alternative request to set a bond hearing.

On the first day of trial, March 26, Lopez filed a written motion to dismiss the charges, alleging a violation of the CrR 3.3 speedy trial rule. Lopez claimed that his time for trial expired on December 19, 2011, 60 days after his arraignment, because he did not request a continuance or waive his right to a speedy trial. The trial court denied the motion. Following trial, the jury found Lopez guilty as charged. At sentencing, the trial court rejected Lopez's claim that the two crimes constituted the same criminal conduct for offender score purposes and imposed a standard range sentence with confinement terms of 14 months on the assault and 12 months on the harassment, to be served concurrently.

Lopez appeals.

ANALYSIS

SPEEDY TRIAL

Lopez first contends he was denied his right to a speedy trial under CrR 3.3 when the trial court granted 49 trial continuances, including "7 unexplained continuances for lack of judicial availability or court congestion." Lopez also

generally faults the trial court for entering 42 other continuances based on unavailability of the deputy prosecutor, contending that the court abused its discretion by failing to sufficiently inquire into alternatives to additional delay. He claims that the trial court violated his constitutional right to due process by failing to create a record of the basis for each continuance.

The trial court is responsible for ensuring compliance with the time for trial rule. CrR 3.3(a)(1). The court may grant a continuance where it is required in the administration of justice, provided that the defendant will not be substantially prejudiced in the presentation of his defense. CrR 3.3(f)(2). In granting a continuance, the court must state on the record or in writing the reasons for the continuance. CrR 3.3(f)(2). Furthermore, periods of delay resulting from the grant of a continuance are excluded in computing the time for trial period. CrR 3.3(e). CrR 3.3(b)(5) provides: "If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." Any party objecting to a trial date "upon the ground that it is not within the time limits prescribed by" CrR 3.3 must move, within 10 days, "that the court set a trial within those time limits." CrR 3.3(d)(3). "A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule." CrR 3.3(d)(3).

We agree with Lopez that the number of continuances granted here is troubling. And he may have a valid point that his experience is the result of a systematic problem with understaffing and/or a lack of sufficient inquiry by the

trial court into alternatives. But Lopez failed to file a timely objection and move the court to set a trial before the December 19, 2011, expiration date as required by CrR 3.3(d)(3). Review of this issue is therefore barred. CrR 3.3(d)(3); RAP 2.5(a). And we are not persuaded by Lopez's unsupported attempt to transform this issue into a constitutional due process claim. State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985) ("Violations of CrR 3.3 are not constitutionally based.").

However, we take this opportunity to note that we disagree with trial counsel's characterization of CrR 3.3 as "in effect . . . no speedy trial rule," and a rule with "no teeth." CrR 3.3(d) explicitly provides a procedure by which a party may challenge the trial court's rulings regarding the trial date, and CrR 3.3(h) provides a remedy of dismissal with prejudice if a charge is not brought to trial within the time limit determined under the rule. The fact that CrR 3.3(d) imposes specific obligations on the defendant does not eviscerate the rule as a whole or eliminate the potential for a remedy under the appropriate circumstances.

TRUE THREAT

Lopez next argues that the charging document and the to-convict instruction lacked all essential elements of felony harassment because they did not allege Lopez's threat was a "true threat." The Supreme Court recently held the true threat requirement is not an essential element of the crime of felony harassment. State v. Allen, 176 Wn.2d 611, 626-30, 294 P.3d 679 (2013) (First Amendment protections limiting the criminalization of threatening language to only "true threats," defines, rather than constitutes, an essential element of felony

harassment and need not be included in the information or to-convict instruction). Following Allen, we reject this claim.

SAME CRIMINAL CONDUCT

Lopez next contends that the assault and harassment were the same criminal conduct and the trial court erred in concluding otherwise.

When imposing a sentence for multiple current offenses, the sentencing court determines the offender score by considering all other current and prior convictions as if they were prior convictions. RCW 9.94A.589(1)(a). However, if the sentencing court finds that some or all of the current convictions encompass the same criminal conduct, then those offenses are counted as a single crime. RCW 9.94A.589(1)(a).

Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The offenses must be counted separately unless all three elements are present. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Courts construe RCW 9.94A.589(1)(a) narrowly, disallowing most assertions of same criminal conduct. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). In construing the intent element, the standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Whether one crime furthered the other is relevant. Vike, 125 Wn.2d at 411. The defendant bears the burden of production and persuasion as to same criminal conduct. State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

We review the sentencing court's determination regarding same criminal conduct for abuse of discretion or misapplication of law.[1] Graciano, 176 Wn.2d at 537-38. Where the record supports only one conclusion, the sentencing court abuses its discretion by arriving at a contrary result. Graciano, 176 Wn.2d at 538. Where the record adequately supports either conclusion, the result is within the court's discretion. Graciano, 176 Wn.2d at 538.

There is no dispute that the crimes were committed at the same time and place and involved the same victim. Lopez contends the trial court erred in determining that his crimes differed in criminal intent. He claims that the objective intent in the assault and harassment were the same, that is, to dominate Mohani and instill fear. Lopez contends that case law compels a finding of same criminal conduct.

But the cases on which Lopez relies do not require such a result here because (1) defense counsel raised the issue at sentencing, (2) the charged crimes differed in statutory intent, and (3) the evidence did not indicate that one crime furthered the other. Cf. State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (defendant received ineffective assistance when defense counsel failed to make same criminal conduct argument where evidence and case law provided potential support); State v. Tili, 139 Wn.2d 107, 124-25, 985 P.2d 365 (1999) (trial court abused its discretion by treating three counts of first degree rape committed continuously within a two-minute time frame as separate and distinct conduct without articulating any viable basis for such a finding);

[1] Lopez argues for a different standard, but he filed his brief in this case before the Supreme Court issued its opinion in Graciano. Because that case settles any question as to the applicable standard, we need not address Lopez's arguments.

State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998) (defendant entitled to have assault and kidnapping committed simultaneously treated as the same criminal conduct where there was no evidence of assaultive behavior during the kidnapping with any purpose beyond facilitating and furthering the abduction).

Defense counsel argued at sentencing that Lopez's intent, "to perhaps kill" Mohani, did not change as he simultaneously strangled her and threatened to kill her. Lopez argues on appeal that the objective intent of simultaneously strangling and threatening a victim is to dominate the victim and instill fear. But as the State points out, viewed objectively, the evidence supports an inference that Lopez intended to cause physical harm or death by strangling Mohani and that he intended to frighten her with his verbal threats to kill her. The two crimes have different statutory intents: the intent for second degree assault as charged is to assault by strangulation and the intent for felony harassment is to knowingly threaten to kill. RCW 9A.36.021(1)(g); RCW 9A.46.020(1), (2). Lopez does not argue, and the evidence in the record does not conclusively establish, that he committed either crime to facilitate or further the other. Under these circumstances, Lopez fails to demonstrate any abuse of discretion or misapplication of law in the trial court's decision to count the two crimes separately.

CLERICAL ERROR

Finally, relying on the sentencing court's oral ruling that the term of confinement on the two counts should run concurrently, Lopez contends that remand is required to amend the judgment and sentence to reflect the court's ruling. The State concedes the clerical mistake and joins Lopez in requesting remand for amendment of the judgment and sentence to state that the confinement terms for the two counts are to run concurrently. We accept the State's concession and remand for the requested amendment.

Affirmed in part and remanded.

Becker, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68619-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Lindsey Grieve, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 16, 2013