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NO. 67394-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

VICTOR GOMEZ-RAMIREZ,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE KIMBERLEY PROCHNAU

---

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. During trial, a police officer testified that he made a call to the telephone number that he was given for Gomez-Ramirez and that the person who answered the phone hung up. Gomez-Ramirez testified at trial about the circumstances surrounding the crime; he was not questioned regarding the phone call. During closing argument, the State referred to the phone call, commenting that Gomez-Ramirez “doesn’t want to talk to the police but he’s not afraid to tell his rendition of the events up here.” Gomez-Ramirez failed to object to the testimony on the grounds that it violated his right to remain silent, and he failed to object to the prosecutor’s closing argument. Has he demonstrated the existence of a manifest constitutional error so as to present the issue for the first time on appeal?

2. Victim Bolanos testified that Gomez-Ramirez swung a boxcutter at him, chased him, and threatened to kill him if he called the police. An eyewitness testified that he heard Bolanos and Gomez-Ramirez arguing, and that he saw Bolanos “running for his life” because Gomez-Ramirez was chasing him with a boxcutter. Another witness initially testified that he heard the two men argue but that was all that had happened between them. Upon cross-

examination, that witness admitted that Gomez-Ramirez told Bolanos he was "going to do something to him" and moved toward him. Gomez-Ramirez himself initially testified that there was no argument and that he was not angry. He later admitted that he was angry, that there had been an argument, that he approached Bolanos, and that "they were about to hit each other." Gomez-Ramirez later contradicted himself and denied that he had earlier testified that the two men were "about to hit each other." Was the prosecutor's improper comment regarding Gomez-Ramirez's right to remain silent harmless beyond a reasonable doubt?

3. Gomez-Ramirez was convicted of both second degree assault and felony harassment. At sentencing, he affirmatively agreed with the State's calculation of his standard sentencing range as including the two crimes as separate conduct. Has Gomez-Ramirez waived a challenge to the sentencing court's scoring the convictions as separate criminal conduct?

4. To establish that his counsel was ineffective for not raising the issue of same criminal conduct, Gomez-Ramirez must show that it was objectively unreasonable for his trial counsel to not raise the issue and that he would likely have prevailed on the argument. Gomez-Ramirez assaulted victim Bolanos by swinging a

boxcutter at him. When Bolanos pulled out his phone to call 911, Gomez-Ramirez told him that he would kill him if he called the police. As objectively viewed, did Gomez-Ramirez's criminal intent change from the time he committed the assault to the time he committed the felony harassment, such that his counsel was not ineffective for failing to raise the issue of same criminal conduct?

**B. STATEMENT OF THE CASE**

Victor Gomez-Ramirez was charged in King County Superior Court with second degree assault and felony harassment, both with deadly weapon enhancements. CP 6-7. The charges stemmed from Gomez-Ramirez's acts of assaulting and threatening Jerson Bolanos.

Bolanos testified that he was Gomez-Ramirez's supervisor at a painting company. 1RP 42, 45.<sup>1</sup> On August 8, 2009, Bolanos heard Gomez-Ramirez using foul language on the job. 1RP 45. He told Gomez-Ramirez to stop cursing and get back to work. 1RP 47, 49. In response, Gomez-Ramirez threw a punch at

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<sup>1</sup> The Verbatim Report of Proceedings consists of three volumes. The first volume includes the proceedings that occurred on May 31, 2011 and June 1, 2011, and will be referred to as "1RP." The second volume contains the proceedings from June 2, 2011 and June 3, 2011, and will be referred to as "2RP." The third volume contains the sentencing hearing on June 24, 2011, and will be referred to as "3RP."

Bolanos. 1RP 50. When his punch missed Bolanos, he pulled a boxcutter from his pocket and swung it at Bolanos, missing him by six to eight inches. 1RP 50-52. Bolanos attempted to flee from Gomez-Ramirez by running away; Gomez-Ramirez chased after him, threatening him. 1RP 54-55.

Gomez-Ramirez eventually stopped chasing Bolanos, who pulled out his phone to call the police. 1RP 55. Gomez-Ramirez told Bolanos that if he called the police, he would kill him. 1RP 55-56. Gomez-Ramirez fled in his car. 1RP 56. When Issaquah Police Officer Christian Munoz arrived a few minutes later, Bolanos seemed very upset. 1RP 83.

At trial, Jesse Salinas testified. Salinas, who had also been working at the jobsite, heard Bolanos and Gomez-Ramirez arguing. 1RP 108. He could not hear what they were saying. 1RP 113. However, he saw Bolanos "running for his life" because Gomez-Ramirez was chasing him with a boxcutter in his hand. 1RP 108-09. He saw Gomez-Ramirez try to cut Bolanos with the boxcutter, swinging the blade within one foot of him. 1RP 117. Salinas testified that Gomez-Ramirez left in his truck. 1RP 112. Salinas saw that Bolanos was nervous, shaking, and "almost going

to faint.” 1RP 114-15. Salinas spoke to the police when they arrived. 1RP 115.

Jose Hernandez-Moreno testified on Gomez-Ramirez's behalf. He testified that he heard Bolanos lay Gomez-Ramirez off from the job. 2RP 162. He then heard the men arguing, claiming that Bolanos was “discriminating against Central American folks.”<sup>2</sup> 2RP 164.

Hernandez-Moreno claimed that Gomez-Ramirez left after “strong words were exchanged but that was that. . . . I didn't see that anything was done.” 2RP 165. However, Hernandez-Moreno later admitted that Gomez-Ramirez had chased after Bolanos, saying that he was “going to do something to [Bolanos].” 2RP 166. He denied seeing anything in Gomez-Ramirez's hands. Id.

Although Hernandez-Moreno had testified on direct examination that he knew Gomez-Ramirez from work,<sup>3</sup> during cross-examination it became clear that the two of them had known each other since they were children together in Central America. 2RP 177.

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<sup>2</sup> Hernandez-Moreno's claim that Bolanos did not like Central Americans was odd, as Bolanos testified that Bolanos himself was from El Salvador. 1RP 68.

<sup>3</sup> 2RP 160.

During questioning by the State, Hernandez-Moreno changed his story in other ways as well. Although he initially testified that there had not been “any sort of aggression,”<sup>4</sup> when pressed repeatedly about his earlier statements to the defense investigator, he admitted that Gomez-Ramirez “swung” at Bolanos, that “they launched a fist at each other,” that Gomez-Ramirez “threw the punch at [Bolanos] and [Bolanos] defended himself and then he went running out.” 2RP 173, 179. Hernandez-Moreno also testified that Gomez-Ramirez had asked him to testify, as a favor, because he “was the only one who had seen” what had happened. 2RP 181.

Officer Christian Munoz testified that when he arrived at the location of the assault in response to Bolanos’s 911-call, Hernandez-Moreno had told him that there was only an argument between two people and that he had not seen a foot chase or a knife. 1RP 97.

Gomez-Ramirez testified on his own behalf. He told the jury that he had been muttering to himself (but would not repeat the exact words for the jury) when Bolanos came over and told him to take his things and leave. 1RP 130; 2RP 197-98. Gomez-Ramirez

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<sup>4</sup> 2RP 170.

testified during direct examination that there “wasn’t really an argument,” and that although he asked Bolanos why he was being fired, he agreed to take his things and leave. 1RP 131.

However, on cross-examination, Gomez-Ramirez admitted that the interaction with Bolanos had made him angry. 2RP 200, 211. He admitted that the two men argued back and forth. Id. He admitted that he had physically approached Bolanos as Bolanos backed away from him, but he continued to deny that anything more than a verbal argument had occurred. 2RP 200-02. Upon further questioning about whether anything other than arguing happened, Gomez-Ramirez stated, “No. Just the argument, just the argument. Hey, and, yeah, we’re going to hit each other but, yeah, that was all.” 2RP 203. However, Gomez-Ramirez later denied that he had testified they “were just about to hit each other.” 2RP 204.

Gomez-Ramirez denied that he threatened to kill Bolanos or that he had even had a utility knife in his possession that day. 2RP 205.

The jury convicted Gomez-Ramirez as charged. CP 47-50. The State calculated Gomez-Ramirez’s offender score on each count to be a “1.” Supp. CP \_\_ (Sub. No. 113, Statement of

Prosecuting Attorney, filed June 22, 2011). Because Gomez-Ramirez had no prior scorable felony convictions, his offender score was calculated by counting each of the offenses as an “other current offense.” Id. His standard range on the second degree assault was six to 12 months, plus an additional 12 months for the deadly weapon enhancement. Id. His standard range for the felony harassment charge was three to eight months, with an additional six months for the deadly weapon enhancement. Id.

At sentencing, Gomez-Ramirez affirmatively agreed with the State’s calculation of his standard range: “We agree that the range is six to 12, and we also agree with the state [sic] that it’s three to eight on the felony harassment.” 3RP 3. Gomez-Ramirez was sentenced within the standard range to a total of 27 months in custody. CP 54. He appealed. CP 60.

**C. ARGUMENT**

**1. REVERSAL IS NOT WARRANTED DESPITE THE PROSECUTOR’S IMPROPER ARGUMENT.**

Gomez-Ramirez argues that the State improperly elicited testimony from Officer Munoz that he hung up the telephone when Munoz called his number and identified himself as a police officer.

He further argues that his conviction must be reversed due to the prosecutor's inappropriate closing argument regarding such testimony.

However, Gomez-Ramirez did not object to the testimony on the basis that it commented on his pre-arrest silence, nor did he object to the prosecutor's inappropriate closing argument. Because he cannot demonstrate manifest constitutional error, he is precluded from raising the issue for the first time on appeal. Alternatively, the error was harmless beyond a reasonable doubt and Gomez-Ramirez's conviction should be affirmed.

a. Relevant Facts.

During trial, the State questioned Officer Munoz about his efforts to locate and speak to Gomez-Ramirez after the incident:

Q: Did you try to call Victor Gomez-Hernandez [sic] on the phone – on the cell phone number that you obtained from your investigation?

A: Yes.

Q: When you called that, did somebody pick up the phone?

A: The first time, yes.

Q: Did you introduce who you were?

A: Yes.

Q: Was there a response?

A: None.

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

[Defense]: Objection. Asked and answered.

The Court: Overruled.

Q: Let me ask it again. You said - -

[Defense]: Also - - also leading.

The Court: Overruled.

Q: There's a reason I'm leading, your Honor.

[Defense]: Well, it's still leading and it's still asked and answered.

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.

Q: Did you have any other involvement in this particular case?

A: I called once more, a few days later, and it was disconnected and that was the end of my investigation.

1RP 90-91.

Gomez-Ramirez testified at trial. The first question that he was asked on direct examination was, "You've waited a long time to tell what happened, is that fair?"<sup>5</sup> 1RP 125. Gomez-Ramirez was not questioned by anyone about the phone call from Officer Munoz. Later, during closing argument, the State told the jury:

And then a phone call, made by, I believe, Officer Munoz. Two times he calls his 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.<sup>6</sup>

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<sup>5</sup> Gomez-Ramirez misunderstood the question and gave a non-responsive answer that indicated he had "never been involved in anything like this before." 1RP 125. The prosecutor immediately requested a sidebar. *Id.* Gomez-Ramirez successfully moved to strike his own answer as non-responsive. 1RP 126. Later, it was revealed that at sidebar, the parties had discussed whether Gomez-Ramirez's claim that he had "never been involved in anything like this" opened the door to impeachment with his prior assault conviction. 1RP 134. The parties did not address any issues involving pre-arrest silence or Gomez-Ramirez's desire to "tell what happened."

<sup>6</sup> The prosecutor at trial appears to have labored under the same misunderstanding of Officer Munoz's testimony as Gomez-Ramirez does on appeal. Munoz testified that someone answered the telephone the first time that he called. 1RP 90. Munoz testified that several days later, when he called a second time, the phone had been disconnected. 1RP 91.

2RP 238. Gomez-Ramirez did not object to the prosecutor's argument.

b. The State's Argument Was Improper.

The Fifth Amendment affords that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, our state constitution provides that, "No person shall be compelled in any criminal case to give evidence against himself." Wash. Const. art. I, § 9. These rights are coextensive. State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

The constitutional right to silence extends to situations prior to arrest. State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996). A defendant who testifies at trial may be impeached with his pre-Miranda<sup>7</sup> silence, but the State may not permissibly use the fact of the defendant's pre-arrest silence as substantive evidence of guilt, or to argue that such silence implies guilt. State v. Burke, 163 Wn.2d 204, 217-18, 181 P.3d 1 (2008); Easter, 130 Wn.2d at 237-38; State v. Lewis, 130 Wn.2d 700, 705, 707, 927 P.2d 235 (1996).

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<sup>7</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

When determining whether the State's argument improperly commented on the defendant's pre-arrest silence, this Court must consider "whether the prosecutor manifestly intended the remarks to be a comment on that right." Burke, 163 Wn.2d at 216 (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Subtle and brief remarks that do not "naturally and necessarily" emphasize the accused's pre-arrest silence are permissible. Id.

The State elicited testimony from Officer Munoz regarding his attempts to speak to Gomez-Ramirez during its case-in-chief. 1RP 90-91. It is unclear whether Gomez-Ramirez was even the person who answered the telephone when Officer Munoz called. However, the testimony (that the telephone number belonged to Gomez-Ramirez) implied as much. Even if the testimony itself is considered merely a "passing reference" to the defendant's silence, the State's later closing argument was improper. However, as outlined infra, reversal is not warranted.

- c. By Not Objecting Below, Gomez-Ramirez Has Waived His Right To Raise The Issue On Appeal.

An appellant must preserve an issue for appeal by objecting at trial. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Failure to object at trial prevents the trial court from correcting an error (by striking testimony and providing a curative instruction) and leads to needless appeals and additional trials.

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

A defendant's decision not to object at trial may well be tactical, and a retrial after an appeal would come at significant cost. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Thus, appellate courts may refuse to address claims raised for the first time on appeal unless the claim involves a "manifest constitutional error." RAP 2.5(a)(3); McFarland, 127 Wn.2d at 332-33. To meet this exception to the general rule requiring objections to be lodged at trial, the appellant must identify a constitutional error and show how the alleged error actually affected his rights at trial. Kirkman, 159 Wn.2d at 926-27.

Not all constitutional errors are "manifest." Scott, 110 Wn.2d at 687. The exception is a narrow one. Kirkman, 159 Wn.2d at 934-35. To demonstrate "manifest" error, an appellant must show

actual prejudice. Id. at 935 (citing State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001)). This requires a plausible showing that the claimed constitutional violation had “practical and identifiable consequences.” State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Here, the comment on Gomez-Ramirez’s pre-arrest silence is constitutional in nature. State v. Holmes, 122 Wn. App. 438, 445, 93 P.3d 212 (2004) (citing State v. Romero, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002)). However, Gomez-Ramirez did not object to the State’s improper closing argument.<sup>8</sup> Thus, the trial court was deprived of the opportunity to address and correct the error.

Nonetheless, the evidence against Gomez-Ramirez was overwhelming. The testimony of an independent eyewitness, Jesse Salinas, was consistent with, and corroborated victim Bolanos’s testimony in full; Salinas heard arguing and observed Gomez-Ramirez chasing Bolanos with a boxcutter in his hand. 1RP

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<sup>8</sup> Gomez-Ramirez did not preserve a proper objection to Officer Munoz’s testimony either. See State v. Powell, 166 Wn.2d 73, 82-83, 206 P.3d 321 (2009) (issue not properly preserved where objection at trial was different than that raised on appeal). Gomez-Ramirez’s objection to the testimony at trial was based on his assertion that the questions were leading and already answered. 1RP 90.

108-09. He saw Gomez-Ramirez swing the blade within one foot of Bolanos. 1RP 117. Salinas saw Gomez-Ramirez leave in his truck, and testified that Bolanos's demeanor was nervous and shaking immediately after the incident. 1RP 112, 114-15.

Hernandez-Moreno's testimony, although intended to help Gomez-Ramirez, had the opposite effect. Immediately after the assault, Hernandez-Moreno told the Issaquah Police that he had only observed an argument; that he had not seen a foot chase or a knife. 1RP 97. At trial, he initially testified that Gomez-Ramirez simply left after "strong words were exchanged but that was that. . . . I didn't see that anything was done." 2RP 165. However, Hernandez-Moreno later admitted that he had seen Gomez-Ramirez chase after Bolanos, yelling that he was "going to do something to [Bolanos]." 2RP 166. Moreover, during cross-examination, Hernandez-Moreno changed his story further. When pressed repeatedly about his earlier statements to the defense investigator, he admitted that he had observed Gomez-Ramirez swing at Bolanos, that "they launched a fist at each other," that Gomez-Ramirez "threw the punch at [Bolanos] and [Bolanos] defended himself and then he went running out." 2RP 173, 179.

Finally, Gomez-Ramirez's own testimony was incredible and unbelievable in light of all of the other evidence. He contradicted himself extensively. First, he claimed that he had not been angry, and that there had been no real argument between him and Bolanos; he simply agreed to take his things and leave after Bolanos fired him. 1RP 131. However, on cross-examination, Gomez-Ramirez admitted that the interaction with Bolanos had made him angry. 2RP 200, 211. He admitted that the two men argued back and forth. Id. He admitted that he had physically approached Bolanos as Bolanos backed away from him, but he continued to deny that anything more than a verbal argument had occurred. 2RP 200-02. Finally, upon further questioning about whether anything other than an argument happened, Gomez-Ramirez admitted "we're going to hit each other but, yeah, that was all." 2RP 203. And if that was not enough, Gomez-Ramirez later denied that he had just testified that he and Bolanos were about to hit each other. 2RP 204.

Because the evidence was overwhelming, Gomez-Ramirez cannot show that the prosecutor's improper argument had any practical and identifiable consequences. This Court should decline to review his claim of error pursuant to RAP 2.5(a).

d. The Prosecutor's Improper Comment Was Harmless Beyond A Reasonable Doubt.

Even if a constitutional error is "manifest," it may still be harmless. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A prosecutor's improper comment on the defendant's right to silence is harmless when the reviewing court "is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Easter, 130 Wn.2d at 242.

For all of the same reasons the error is not manifest, it is also harmless beyond a reasonable doubt. There was no physical proof of the crime; the only evidence presented was the testimony of the witnesses about what occurred. Both Hernandez-Moreno's and Gomez-Ramirez's testimony was intentionally minimizing, internally inconsistent, and incredible in light of Salinas's and Bolanos's testimony. This Court should be convinced beyond a reasonable doubt that any reasonable jury would have found the defendant guilty absent the improper comment on the defendant's pre-arrest silence. Gomez-Ramirez's conviction should be affirmed.

**2. GOMEZ-RAMIREZ'S ASSAULT AND FELONY HARASSMENT CONVICTIONS WERE PROPERLY SCORED AS SEPARATE CRIMINAL CONDUCT.**

Despite agreeing at sentencing that his convictions for assault and felony harassment should score separately, Gomez-Ramirez now argues on appeal that the trial court erred by not finding that the crimes constituted the same criminal conduct. He claims that the appropriate standard of review is a *de novo* one, and argues that because his offenses constitute the same criminal conduct "as a matter of law," he has not waived the issue by not raising it below. Finally, he argues in the alternative that his trial counsel was ineffective for not arguing that the crimes constituted the same criminal conduct.

Gomez-Ramirez's arguments must be rejected. He has waived the issue by affirmatively agreeing with the State's calculation of his standard range to include the crimes as separate criminal conduct. Because the sentencing court could properly find that the crimes were separate criminal conduct, he has not established that there was an error in his sentence as a matter of law, or that his trial counsel was ineffective for failing to raise the issue.

Offenses that are considered the same criminal conduct are scored as one offense. RCW 9.94A.589(1)(a). "Same criminal conduct" refers to two or more crimes requiring the same criminal intent, committed at the same time and place, and involving the same victim. Id.; State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The definition of "same criminal conduct" is to be construed narrowly so that most crimes are not considered the same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If any one of the three elements is missing, the offenses are not the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

To determine whether two or more criminal offenses involve the same criminal intent, courts are required to focus on "the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next." State v. Dunaway, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); Lessley, 118 Wn.2d at 777-78. Whether the defendant's intent changed is determined "in part by whether one crime furthered the other." State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (quoting Vike,

125 Wn.2d at 411). Other factors to consider include whether the crimes were part of the same scheme or plan or whether the defendant's criminal objectives changed. State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995).

a. Gomez-Ramirez Has Waived His Right To Present This Claim On Appeal.

Gomez-Ramirez never raised the issue of same criminal conduct in the sentencing court. Instead, he affirmatively agreed with the State's calculation of his standard range, which was based on the two crimes as separate criminal conduct. Because the crimes are not the same criminal conduct as a matter of law, he has waived the right to present this claim on appeal.

Generally speaking, a criminal defendant does not waive a challenge to the miscalculation of an offender score by failing to object in the sentencing court. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). However, because the issue of "same criminal conduct" involves an analysis of the facts surrounding the crimes, and requires an exercise of the sentencing court's discretion, the "failure to identify a factual dispute for the court's resolution" results in a waiver of the issue by the defendant.

Goodwin, 146 Wn.2d at 874 (quoting State v. Nitsch, 100 Wn. App. 512, 520, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000)). See also In re Pers. Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007) overruled on other grounds by State v. Knight, 162 Wn.2d 806, 174 P.3d 1167 (2008) (defendant waived the right to argue that his crimes were the same criminal conduct when he did not raise the issue below).

Therefore, unless there is an obvious legal error (i.e., the crimes are the same criminal conduct as a matter of law), a defendant can agree to count the crimes separately. State v. McDougall, 132 Wn. App. 609, 613, 132 P.3d 786 (2006) (citing Goodwin, 146 Wn.2d at 874-76 and Nitsch, 100 Wn. App. at 524-25). If the defendant does agree, he cannot later claim that it was error for the trial court to rely on his agreement. McDougall, 132 Wn. App. at 612-13.

Here, Gomez-Ramirez affirmatively agreed with the State's calculation of his standard sentencing range, which necessarily included a factual agreement that the two crimes constituted separate criminal conduct. 3RP 3. He did not raise the issue of same criminal conduct at sentencing when the trial court, who had heard the evidence in the case and was in the best position to

make such a determination, could decide it. See 3RP 1-5. Instead, he affirmatively agreed that the crimes should score separately. Id.

Because Gomez-Ramirez did not raise the issue or allow the trial court the opportunity to address any potential factual disagreement, he is precluded from raising the claim on appeal unless he can show that scoring the crimes separately was wrong as a matter of law. For the reasons outlined below, he cannot make such a showing and his claim is not reviewable.

b. Gomez-Ramirez's Crimes Were Properly Scored As Separate Criminal Conduct.

Ample evidence in the record supports a finding that Gomez-Ramirez's convictions for assault and felony harassment were separate criminal conduct. As a result, he has not established that scoring his crimes separately was erroneous as a matter of law, or that his trial counsel was ineffective for failing to raise the issue below. He is not entitled to resentencing.

i. Standard of review.

Citing to State v. Torngren, 147 Wn. App. 556, 196 P.3d 742 (2008), Gomez-Ramirez argues that a *de novo* standard is applied

when reviewing a sentencing court's determination regarding same criminal conduct. Brf. of Appellant at 25-26. However, the correct standard of review has long been abuse of discretion or misapplication of the law.

Torngren reasoned that because the question of same criminal intent is determined under an objective standard, an appellate court is on equal footing with the trial court when making such a determination. 147 Wn. App. at 562-63. But the court in Torngren was not asked the question of whether the defendant's *current* crimes constituted the same criminal conduct. Id. at 560. Rather, the question presented was whether the defendant's *prior* convictions involved the same criminal intent. Id. Unlike a defendant's current offenses, about which the trial court heard evidence of first-hand, a determination regarding prior offenses must be made from a sterile record of documents such as the information, declaration of probable cause, judgment and sentence, and statement of defendant on plea of guilty. In such a case, the appellate court presumably has access to all of the same information that the sentencing court used to make its decision.

Despite Torngren, the standard of review for a trial court's decision regarding same criminal conduct has long been abuse of

discretion or misapplication of the law. State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006); State v. Haddock, 141 Wn.2d 103, 3 P.2d 733 (2000); State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d 80 (1990); State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999). See also Flake, 76 Wn. App. at 180; State v. Stockmyer, 136 Wn. App. 212, 218, 148 P.3d 1077 (2006); State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998).

Gomez-Ramirez correctly notes that the reasoning in Torngren is currently pending before our state supreme court in its review of Division III's unpublished decision in State v. Graciano, 173 Wn.2d 1012, 266 P.3d 221 (No. 86530-2). However, unless and until the court decides to reverse itself, this Court is bound by clear precedent.<sup>9</sup> In the absence of a misapplication of the law, a trial court's decision on same criminal conduct will not be reversed unless the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

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<sup>9</sup> The State does not concede that the trial court's decision here would be reversed even if a *de novo* standard of review were applied.

When the facts in the record support a finding either way regarding the issue of same criminal intent, the trial court's determination is entitled to deference. State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868 (1991) (citing State v. Burns, 114 Wn.2d 314, 317, 788 P.3d 531 (1990)). See also State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003), affirmed on other grounds, 153 Wn.2d 765 (2005) (trial court's finding of separate criminal conduct was upheld because the evidence supported both the defendant's argument of same intent and the trial court's finding of different intent).

Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

- ii. Gomez-Ramirez's crimes are not the same criminal conduct "as a matter of law."

The evidence at trial supports a finding that Gomez-Ramirez's convictions for second degree assault and felony harassment were separate criminal conduct. Gomez-Ramirez

cannot establish that scoring the crimes separately was erroneous as a matter of law.

Here, Gomez-Ramirez's crimes were committed at the same time and place, and were against the same victim. However, his criminal intent was different. As outlined supra, when determining criminal intent, the trial court's analysis is an objective one, and asks whether the defendant's intent changed from one crime to the next. Dunaway, 109 Wn.2d at 214-15. When crimes occur simultaneously, the question of whether one crime "furthered the other" is not particularly useful. Haddock, 141 Wn.2d at 114. Instead, whether or not Gomez-Ramirez's criminal objectives changed is the key inquiry. See Calvert, 79 Wn. App. at 577-78.

The evidence at trial amply supports a conclusion that Gomez-Ramirez's criminal intent, as objectively viewed, changed from the time he assaulted Bolanos to when he threatened to kill him. During a dispute, Gomez-Ramirez tried to punch Bolanos, and then swung a boxcutter at him. 1RP 50-52. He threatened Bolanos and chased after him with the boxcutter. 1RP 53-54. Then, after Gomez-Ramirez assaulted him and chased him with the boxcutter, Bolanos got out his cell phone to call the police for help. 1RP 55. Upon seeing Bolanos go to make a phone call, Gomez-

Ramirez stopped chasing Bolanos and told him that if he called the police, he would kill him. 1RP 55.

As objectively viewed, Gomez-Ramirez's initial criminal intent was to assault Bolanos with the boxcutter. He lunged at Bolanos, the boxcutter coming within six to eight inches of him. 1RP 52. He chased after him with the knife. 1RP 53. However, when he told Bolanos that he would kill him if he called the police, Gomez-Ramirez's objective criminal intent had shifted from the intent to assault Bolanos to the intent to intimidate and threaten Bolanos to prevent him from calling the police.

In State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), multiple counts of rape occurring during a relatively short time frame (the same evening) were found to be separate criminal conduct based on the fact that the defendant, upon completing one rape, "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." 84 Wn. App. at 859. That same opportunity for reflection existed for Gomez-Ramirez. When he observed Bolanos attempting to use his telephone, he could have ceased his criminal activity at that point. Instead, however, he chose to commit the

additional criminal act of threatening to kill Bolanos to intimidate him out of calling the authorities.

Because the facts in the record support a finding that Gomez-Ramirez's objective criminal intent was not the same for the assault and the felony harassment, the two crimes are not the same criminal conduct as a matter of law. Had Gomez-Ramirez raised the issue below, the trial court, who heard the evidence, could have exercised its discretion to resolve any factual dispute between the parties. He did not allow the trial court such an opportunity. Thus, he is precluded from raising the issue on appeal.

- iii. Gomez-Ramirez's counsel was not ineffective when he agreed that the two crimes scored separately.

To establish a claim of ineffective assistance of counsel, a defendant must prove that the trial attorney's representation was deficient and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Thus, Gomez-Ramirez must show not only that it was objectively unreasonable for his trial counsel to not raise the issue

of same criminal conduct, but he must also show that he likely would have prevailed on such an argument. See State v. Brown, 159 Wn. App. 1, 17, 248 P.3d 518 (2010) (defendant could not show unreasonableness or prejudice where it was unlikely that his argument as to same criminal conduct would have succeeded).

A reviewing court must give a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Moreover, this Court need not address both prongs of the Strickland test if Gomez-Ramirez fails to make a sufficient showing on either prong. State v. Thompson, 69 Wn. App. 436, 440, 848 P.2d 1317 (1993).

As argued supra, Gomez-Ramirez had different criminal intents when he committed the two crimes at issue. His intent to threaten and intimidate Bolanos so as to keep him from calling the police was objectively different from his intent to assault him. As such, any argument that his counsel might have raised was not likely to succeed, and his counsel was not objectively unreasonable for failing to present it. Gomez-Ramirez's sentence should be affirmed.

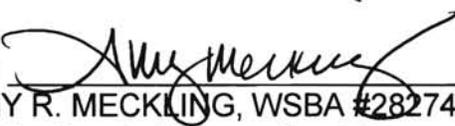
D. CONCLUSION

For all the reasons stated above, the State respectfully asks this Court to affirm Gomez-Ramirez's conviction and sentence.

DATED this 29 day of June, 2012.

Respectfully submitted,

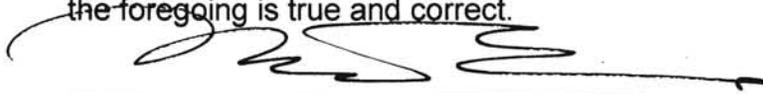
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. VICTOR GOMEZ-RAMIREZ, Cause No. 67394-7-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

06/29/12  
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Date