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No. 67778-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DERRICK A. VALENTINE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT

Derrick Valentine was convicted of one count of felony harassment, one count of second degree assault, and one count of fourth degree assault. The two assault convictions were based on a single uninterrupted incident in which Mr. Valentine allegedly hit Mary Cason on the head, grabbed her by the neck, and knocked her to the ground. Because the two convictions are the same in law and fact, Mr. Valentine was convicted twice for the same offense in violation of his constitutional right to be free from double jeopardy.

Also, Mr. Valentine's Fifth Amendment right not to incriminate himself was violated when a witness recounted his incriminating custodial statement at trial, despite the trial court's pretrial ruling that the statement was inadmissible because it was not preceded by Miranda warnings.

Finally, the second degree assault and the felony harassment were committed simultaneously against the same person, and Mr. Valentine had no time or opportunity between them to form a separate criminal intent. Therefore, the offenses were the "same criminal conduct" and should have counted as a single crime in the offender score.

B. ASSIGNMENTS OF ERROR

1. Mr. Valentine's two convictions for assault violate his constitutional right to be free from double jeopardy.

2. Admission at trial of Mr. Valentine's unwarned custodial statement violated his Fifth Amendment right not to incriminate himself.

3. Mr. Valentine's offender score was miscalculated when his convictions for felony harassment and second degree assault were treated as separate offenses.

4. Mr. Valentine's Sixth Amendment right to the effective assistance of counsel was violated when his attorney failed to argue that his convictions for felony harassment and second degree assault were the same criminal conduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Double Jeopardy Clause prohibits multiple convictions for offenses that are the same in law and fact. Two offenses are the same in law if one is a lesser offense of the other. For the crime of assault, two offenses are the same in fact if they are committed against the same person during a single uninterrupted episode. Was Mr. Valentine convicted twice for the same offense, where his convictions for second degree assault and fourth degree assault were based on acts committed against the same person during a single uninterrupted episode?

2. Admission at trial of a defendant's incriminating custodial statement, made in response to police interrogation, violates the Fifth Amendment unless the defendant was first informed of his Miranda rights

and waived them. Was Mr. Valentine's Fifth Amendment right violated, where his custodial statement was admitted at trial, but police did not first inform him of his Miranda rights?

3. If two crimes are committed simultaneously against the same person, and one crime furthers the other, they are the "same criminal conduct" and shall be counted as only one offense in the offender score. Was Mr. Valentine's offender score miscalculated, where the felony harassment and second degree assault were committed simultaneously against the same person and one crime furthered the other, but the two crimes were counted separately in the offender score?

4. If the record is sufficient for a fact-finder to find that two offenses are the same criminal conduct for sentencing purposes, a defendant receives ineffective assistance of counsel if his attorney does not raise the issue. Did Mr. Valentine receive ineffective assistance of counsel where a fact-finder could have found his convictions for second degree assault and felony harassment were the same criminal conduct, but his attorney did not raise the issue?

D. STATEMENT OF THE CASE

Derrick Valentine and Mary Cason had an intimate romantic relationship that lasted for about 17 months. 8/30/11RP 15. On May 15, 2011, they were living together in an apartment in Auburn. 8/30/11RP 14-

16. On that day, at around 1 p.m., Mr. Valentine became angry with Ms. Cason and began arguing with her loudly. 8/30/11RP 45. She picked up her cellular telephone and dialed 911. 8/30/11RP 45-46. She did not speak to the operator but held the phone so that the operator could hear Mr. Valentine yelling. 8/30/11RP 46-48. Mr. Valentine cursed and left the apartment to walk to the nearby 7-11 store. 8/30/11RP 48.

Two police officers responded to the 911 call. 8/29/11RP 6. Ms. Cason let them in the front door of the apartment building and the three conversed in the hallway. 8/29/11RP 7-8. Ms. Cason told the officers she and Mr. Valentine had an argument and he hit her on the head and pushed her, causing marks on her face and arm. 8/29/11RP 7.

As Ms. Cason was talking to the officers, Mr. Valentine entered the back door of the building and stopped in front of the door to his apartment. 8/29/11RP 8, 11, 20. The officers approached him, positioning themselves to block his access to the apartment. 8/29/11RP 22, 26, 29-30. One of the officers asked him what happened and he said that he and Ms. Cason had argued the night before and pushed each other, but he denied raising his hand to strike her and denied any physical contact that day. 8/29/11RP 10-11, 32. When the officer began asking more pointed questions about the pushing, and whether Mr. Valentine had threatened Ms. Cason, Mr. Valentine “appeared very agitated, turned his

back towards [the officer] and put his hands together behind his back in a cuffing position, and he said you might as well arrest me then.”

8/29/11RP 34-35; CP 91-92. The officer then put handcuffs on Mr. Valentine and told him he was under arrest. 8/29/11RP 35.

Ms. Cason was standing nearby while the officers questioned Mr. Valentine and overheard him say “oh, you come to arrest me.” 8/30/11RP 57.

After Mr. Valentine was placed in handcuffs, the officer read him Miranda warnings. 8/29/11RP 12. Mr. Valentine said he understood and agreed to talk to the officers. 8/29/11RP 13. He again denied striking Ms. Cason but repeated they had pushed each other the night before. 8/29/11RP 13. Later that day, Mr. Valentine again waived his Miranda rights and spoke with a police detective at the county jail. 8/29/11RP 38-39. Once more, he said he and Ms. Cason pushed each other but he denied striking Ms. Cason. Exhibit 16.

Mr. Valentine was charged with one count of second degree assault by strangulation, RCW 9A.36.021(1)(g) (count I); one count of felony harassment, RCW 9A.46.020(1), (2) (count II); and one count of fourth degree assault, RCW 9A.36.041 (count III). CP 25-27. All three offenses allegedly occurred on May 14, 2011. CP 25-27. For the two felony counts, the State alleged the offenses were part of an ongoing

pattern of psychological, physical or sexual abuse manifested by multiple incidents over a prolonged period of time, and that an exceptional sentence was therefore warranted. CP 25-27; see RCW 9.94A.535(3)(h)(i).

Prior to trial, the defense moved to suppress Mr. Valentine's statements and a CrR 3.5 hearing was held. The court found that, from the moment the police officers approached Mr. Valentine in the hallway of the apartment building, he was a suspect in a crime and was not free to leave.¹ 8/29/11RP 48-49. Therefore, all of his statements made before receiving Miranda warnings, including his statement "why don't you just arrest me," were inadmissible in the State's case-in-chief. 8/29/11RP 48-49. But the statements made *after* Mr. Valentine was informed of his Miranda rights and waived them were admissible. 8/29/11RP 48-49; CP 92-93.

At the jury trial, Ms. Cason testified that on May 14, 2011, Mr. Valentine came home at around 5:30 or 6 p.m. smelling of alcohol. 8/30/11RP 18-19. He was angry at her for not being home earlier and for not helping him with his resume. 8/30/11RP 16. She was sitting in a large stuffed chair in the living room. 8/30/11RP 16. According to Ms. Cason, Mr. Valentine approached her, swore at her, and hit her on both sides of her head with his two hands. 8/30/11RP 16. He hit her hard enough to

¹ A copy of the trial court's written findings of fact and conclusions of law following the CrR 3.5 hearing is attached as an appendix.

loosen two of her teeth and cause her glasses to cut into her eye, leaving a temporary mark on her face. 8/30/11RP 16; 8/31/11RP 12.

Ms. Cason said she hit Mr. Valentine in return so that she could get up out of her chair. 8/30/11RP 19. She tried to reach the front door but he stood in her way. 8/30/11RP 19-21. He then grabbed her by the throat and pushed her to the floor. 8/30/11RP 19-21. She landed on a glass cookie jar that had fallen to the floor and cut her arm. 8/30/11RP 22-23. Mr. Valentine held her by the throat long enough for her to run out of breath. 8/30/11RP 23. Right before releasing her, he told her he would kill her if she called the police. 8/30/11RP 27. Ms. Cason believed him. 8/30/11RP 28. Mr. Valentine then released his hold and Ms. Cason got up and ran outside to her car, where she spent the night. 8/30/11RP 27.

Ms. Cason testified that all of the above actions “happen[ed] together.” 8/30/11RP 21.

Ms. Cason returned to the apartment the next morning. 8/30/11RP 44. At some point, Mr. Valentine’s son called and asked to speak to him. 8/30/11RP 45. Ms. Cason had called the son the night before, from her car. 8/30/11RP 42. After speaking to his son, Mr. Valentine was angry and said she should not have called him. 8/30/11RP 45. He began arguing with her loudly. 8/30/11RP 45. That is when Ms. Cason picked up her cell phone and dialed 911. 8/30/11RP 45-48.

Ms. Cason also testified about what she overheard when the officers responded to the 911 call and questioned Mr. Valentine in the hallway of the apartment building. 8/30/11RP 53-58. Contrary to the trial court's pretrial ruling, Ms. Cason testified that when Mr. Valentine arrived at the building and saw the officers, he said, "oh, you come to arrest me." 8/30/11RP 57. He then "put his hands on the wall, turned to put his hands on the back [sic]" and made a gesture of "arrest me." 8/30/11RP 57-58.

Finally, Ms. Cason testified that Mr. Valentine had assaulted and threatened her several times in the past. 8/30/11RP 29-41.

In closing argument, the deputy prosecutor told the jury that Mr. Valentine was charged with fourth degree assault "for the . . . pattern of conduct he engaged in on May 14th when he pushed Ms. Cason, when he hit her on the head . . . [and] [w]hen he knocked her to the ground where she hit the shards from the cookie jar that had been broken and cut her arm." 9/01/11RP 35. The second degree assault charge was based on his allegedly putting his hand on her throat and squeezing it. 9/01/11RP 35. Finally, the felony harassment charge was based on Mr. Valentine's alleged threat to kill Ms. Cason while choking her. 9/01/11RP 35-36.

The jury found Mr. Valentine guilty of all three counts and the aggravating factor as charged. CP 28-34.

At sentencing, the court counted the felony harassment and second degree assault convictions separately in the offender score. CP 81.

Defense counsel did not argue the two offenses were the same criminal conduct. The court also imposed an exceptional sentence of 12 months above the top of the standard range for count I and 10 months above the top of the standard range for count II. CP 81.

E. ARGUMENT

1. MR. VALENTINE'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED BECAUSE HE WAS CONVICTED TWICE FOR A SINGLE ASSAULT

Mr. Valentine was convicted of both second degree assault and fourth degree assault for allegedly hitting Ms. Cason on the head, grabbing her by the neck, and knocking her to the ground during a single uninterrupted incident. But the legislature did not intend to impose separate punishments for each act committed against the same person during a single assaultive episode. Mr. Valentine's actions were continuous and arose from a single impulse, with no time between them to form a separate intent. Therefore, the two offenses were the same for purposes of the Double Jeopardy Clause.

- a. The Double Jeopardy Clause prohibits multiple convictions for offenses that are the same in law and fact.

The Double Jeopardy Clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. amend. V; Const. art. I, § 9.² The Double Jeopardy Clause protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); Gocken, 127 Wn.2d at 100.

To analyze a double jeopardy claim, the Court first examines the statutory language to see if the applicable statutes expressly permit multiple punishment for the same act or transaction. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). If the statutes do not speak to multiple punishments for the same act, the Court then applies the “same evidence” analysis, which is also known as the “Blockburger test.” Id. at 681-82, 682 n.6 (citing Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Under that test, two offenses are the same

² The Fifth Amendment’s double jeopardy protection applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707, (1969). Washington gives its constitutional provision against

for double jeopardy purposes if they are identical in law and fact. Hughes, 166 Wn.2d at 682.

Here, Mr. Valentine was convicted of second degree assault under RCW 9A.36.021(1)(g) and fourth degree assault under RCW 9A.36.041. The statutes do not expressly authorize multiple punishment for the same act or transaction. Therefore, the “same evidence” test applies. Hughes, 166 Wn.2d at 681-82.

- b. Second degree assault and fourth degree assault are the same in law because one is a lesser offense of the other.

To determine whether two offenses are the same in law under the Blockburger test, the question is whether each statutory provision contains an element not included in the other, and each requires proof of a fact the other does not. Hughes, 166 Wn.2d at 682; Blockburger, 284 U.S. at 304. “Where lesser and greater offenses are concerned, they are the same offense for purposes of double jeopardy, as the lesser offense requires no proof beyond that required to prove the greater.” Brown v. Ohio, 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

Fourth degree assault is a lesser offense of second degree assault as charged in this case. To prove second degree assault under RCW 9A.36.021(1)(g), the State was required to prove Mr. Valentine

double jeopardy the same interpretation that the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

“intentionally assaulted Mary Cason by strangulation.” CP 45 (jury instruction); RCW 9A.36.021(1)(g). To prove fourth degree assault, the State was required to prove Mr. Valentine “assaulted Mary Cason.” CP 50 (jury instruction); RCW 9A.36.041(1). Because proof of fourth degree assault required no proof beyond what was required to prove second degree assault, they are the same in law for double jeopardy purposes. Brown, 432 U.S. at 168; Hughes, 166 Wn.2d at 682.

- c. The two offenses are the same in fact because they occurred during a single uninterrupted episode.

In determining whether two offenses that are the same in law for double jeopardy purposes are also the same in fact, the question is whether the legislature intended to prohibit each individual act ““or the course of action which they constitute. If the former, then each act is punishable separately. . . . If the latter, there can be but one penalty.”” Blockburger, 284 U.S. at 302 (quoting Wharton's Criminal Law § 34 (11th ed.)).

As stated, both the second degree assault statute and the fourth degree assault statute required proof that Mr. Valentine “assault[ed] another.” RCW 9A.36.021(1)(g), .041(1). “Assault” is further defined by the common law as: (1) an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive; (2) an act, with unlawful force, done with intent to inflict bodily

injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented; or (3) an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. State v. Smith, 159 Wn.2d 778, 781-82, 154 P.3d 873 (2007). The common law definitions of assault are not essential elements of the crime but are merely descriptive of the term “assault.” Id. at 788.

In State. Tili, the Washington Supreme Court noted that, unlike the rape statute, which proscribes each act of “sexual intercourse,” the assault statute does not proscribe each physical act against a victim. 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999). Instead, “the Legislature only defined ‘assault’ as that occurring when an individual ‘assaults’ another.” Id. (citing RCW 9A.36.041). As noted, the term “assault” is further defined by the common law, “which sets out many different acts as constituting ‘assault,’ some of which do not even require touching.” Id. at 117. “Consequently, the Legislature clearly has not defined ‘assault’ as occurring upon *any* physical act.” Id. Thus, a person cannot be charged and convicted “for every punch thrown in a fistfight without violating double jeopardy.” Id. at 116.

When a crime is defined as a course of action rather than by each individual act, a single crime occurs “when the impulse is single, . . . no matter how long the action may continue,” but “[i]f successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.” Blockburger, 284 U.S. at 302 (quoting Wharton's Criminal Law § 34 (11th ed.)).

When a crime—such as assault—is defined as a course of action, to determine whether one or more crimes occurred, courts look to whether there are multiple victims, whether the acts occurred in multiple locations, whether there was a temporal break or an intervening act between them, and/or whether a new criminal intent was formed. See, e.g., Lucero v. Kirby, 133 F.3d 1299, 1317 (10th Cir. 1998) (holding convictions for aggravated burglary and attempted sexual penetration violated double jeopardy where acts occurred in same place, against same victim, and during short period of time with no intervening acts); United States v. Chipps, 410 F.3d 438, 447-49 (8th Cir. 2005) (applying Blockburger “impulse test” and holding two convictions for assault violated double jeopardy where first conviction related to conduct occurring inside offender's house and second related to conduct occurring after victim stumbled out front door of house, with no more than a few seconds elapsing between the two instances of assaultive conduct); Partch v. State,

43 So.3d 758, 760-62 (Fla. Dist. Ct. App. 2010) (holding convictions for sexual battery and attempted sexual battery violated double jeopardy where conduct giving rise to charges occurred against same victim, within span of minutes, with no discernable temporal break).

Washington courts have had little occasion to address the circumstances under which the State may convict a person of multiple assaults for a series of acts committed against the same person.³ But in State v. Byrd, 25 Wn. App. 282, 607 P.2d 321 (1980), the Court's decision to uphold separate convictions for assault is consistent with the analysis applied in the cases cited above. In Byrd, the defendant was convicted of first degree burglary based on assault and second degree assault of the same victim. Id. at 283-84. The facts showed Byrd knocked on the victim's door one night, and when she answered, he forced his way in, grabbed her around the waist, and attempted to pull her back into the apartment. Id. at 284. She retreated into the apartment and locked the door. Id. Minutes later Byrd tried to force his way in again, the victim ran out the back door, and Byrd caught her just as she reached her manager's apartment and grabbed her breasts and between her legs. Id. at 284-85. The Court held no double jeopardy violation occurred because the assault

³ It is well-settled that a person may be convicted multiple times for committing the same assaultive act against multiple victims. See, e.g., State v. Smith, 124 Wn. App. 417, 432, 102 P.3d 158 (2004) (citing State v. Wilson, 125 Wn.2d 212, 220, 883 P.2d 320 (1994)), aff'd on other grounds, 159 Wn.2d 778, 154 P.3d 873 (2007).

elevating the crime to first degree burglary was the struggle in the doorway, and the second degree assault was based on the second attack outside the manager's door. Id. at 290.

In Byrd, the two assaults occurred in separate locations, with both a temporal break and intervening acts occurring between them. Id. at 284-85. After the first assault, the victim locked the door but Byrd forced his way in and chased her out the back door to the manager's apartment before the second assault occurred. Id. As discussed, for crimes defined as a course of action, multiple crimes occur if the acts are committed in multiple locations, with a temporal break or an intervening act between them. Lucero, 133 F.3d at 1317; Chipps, 410 F.3d at 447-49; Partch, 43 So.3d at 760-62. Thus, the facts in Byrd supported separate convictions for assault.

In contrast, when a person commits a series of assaultive acts against the same person in a single uninterrupted episode, only one crime occurs. In United States v. Chipps, for instance, the Eighth Circuit held only one assault occurred when the victim was attacked inside the house and then again after he stumbled out the front door, where no more than a few seconds elapsed between the two instances. 410 F.3d at 447-49. In United States v. McLaughlin, the D.C. Circuit held only one assault

occurred when the victim received multiple gunshot wounds while being chased down a street. 164 F.3d 1, 16-17 (D.C. Cir. 1998).

In this case, Mr. Valentine was convicted of both second degree assault and the lesser crime of fourth degree assault for acts occurring during a single, uninterrupted episode against the same person. Ms. Cason testified Mr. Valentine hit her on both sides of her head and then grabbed her by the throat and pushed her to the floor. 8/30/11RP 16-21. All of those actions “happen[ed] together.” 8/30/11RP 21. The acts occurred in the same place, within a short time frame, with no intervening acts between them. They arose from a single “impulse” and Mr. Valentine had no occasion to form a separate intent between them. Blockburger, 284 U.S. at 302. Therefore, the facts support only one conviction for assault. Byrd, 25 Wn. App. at 290; Chipps, 410 F.3d at 447-49; McLaughlin, 164 F.3d at 16-17.

The deputy prosecutor told the jury during closing argument that the fourth degree assault count was based on a “pattern of conduct” in which Mr. Valentine allegedly pushed Ms. Cason, hit her on the head, and knocked her to the ground. 9/01/11RP 35. The prosecutor said the second degree assault charge was based on Mr. Valentine’s allegedly putting his hand on Ms. Cason’s throat and squeezing it. 9/01/11RP 35. But when a crime is defined as a course of action, the State may not avoid the

requirements of the Double Jeopardy Clause by attempting to divide the crime into a series of separate acts. See Brown, 432 U.S. at 169 (“The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.”). The legislature did not define the crime of assault as occurring upon every act committed during an assaultive episode. Tili, 139 Wn.2d at 116-17. The separate acts of pushing Ms. Cason, hitting her on the head, and knocking her to the ground on the one hand, and grabbing her by the throat on the other, occurred during a single uninterrupted episode. Therefore, they do not amount to separate crimes of assault.

- d. The fourth degree assault conviction must be vacated.

When two convictions violate the Double Jeopardy Clause, the remedy is to vacate the conviction for the lesser offense. In re Pers. Restraint of Strandy, 171 Wn.2d 817, 820, 256 P.3d 1159 (2011). Therefore, the conviction for fourth degree assault must be vacated.

2. MR. VALENTINE'S FIFTH AMENDMENT
RIGHT NOT TO INCRIMINATE HIMSELF WAS
VIOLATED WHEN MS. CASON TESTIFIED AT
TRIAL ABOUT HIS INCRIMINATING
CUSTODIAL STATEMENT

- a. Ms. Cason's testimony violated Mr. Valentine's Fifth Amendment right not to incriminate himself.

Ms. Cason testified that when the responding police officers questioned Mr. Valentine in the hallway of the apartment building, he said to the officers, "oh, you come to arrest me." 8/30/11RP 57-58. He then made a gesture of "arrest me" and "put his hands on the wall, turned to put his hands on the back [sic]." Id.

But, after the pretrial CrR 3.5 hearing, the trial court had ruled Mr. Valentine's statement to the officers, "why don't you just arrest me," was not admissible in the State's case-in-chief. 8/29/11RP 48-49. The court found Mr. Valentine was not free to leave at the time he made the statement and therefore he was in police "custody" for Fifth Amendment purposes. Id. Because Mr. Valentine made the statement before he was advised of his Miranda rights, admission of the statement would violate the Fifth Amendment. Id.

As the trial court recognized, a criminal defendant's statement obtained during custodial interrogation cannot be used in the State's case-in-chief at trial unless the State establishes the defendant was advised of,

understood, and waived his right to remain silent and to speak with an attorney. Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); U.S. Const. amend. V (no person “shall be compelled in any criminal case to be a witness against himself”); Const. art. I, § 9 (“No person shall be compelled in any criminal case to give evidence against himself.”). The Miranda warnings are a bright-line constitutional requirement independent of the requirement that custodial statements be voluntary in a due-process sense. Dickerson v. United States, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

A suspect’s Fifth Amendment right not to incriminate himself, and the corresponding right to be read the Miranda warnings, attaches when “custodial interrogation” begins. Miranda, 384 U.S. at 444. “Custodial interrogation” is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Id. “In-custody interrogation[s],” the Court recognized in Miranda, place “inherently compelling pressures” on persons interrogated and trade on the weakness of individuals. Id. at 455, 467. The Miranda warnings are designed to counteract those pressures and safeguard the Fifth Amendment privilege against self-incrimination. Miranda, 384 U.S. 436.

A person is in “custody” for Miranda purposes if his “freedom of action is curtailed to a ‘degree associated with formal arrest.’” Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)); State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986) (adopting Berkemer test). A person is “in custody” if a reasonable person under the circumstances would have felt he or she was not at liberty to terminate the interrogation and leave. Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). That is the sole inquiry. State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989).

Here, when Mr. Valentine made the statement at issue, he was confronted by two police officers who were in full uniform and armed with firearms, and who were investigating a crime. 8/29/11RP 8-10, 21, 23. The officers stood in his way and prevented him from entering his apartment. 8/29/11RP 22, 26, 29-30. They recounted Ms. Cason’s allegations, made clear that he was a suspect in a crime, and asked him to provide his side of the story. 8/29/11RP 8, 10, 48-49. As the trial court found, a reasonable person in Mr. Valentine’s position would not have felt free to terminate the interview and leave. 8/29/11RP 48-49. Therefore, Mr. Valentine was in “custody” for Miranda purposes and his statements

made in response to police questioning before he received Miranda warnings were not admissible in the State's case-in-chief. Miranda, 384 U.S. at 479; Thompson, 516 U.S. at 112.

Ms. Cason testified Mr. Valentine said to the officers, "oh, you come to arrest me." 8/30/11RP 57. Mr. Valentine made that statement while he was in "custody" but before he received Miranda warnings, and the statement was therefore inadmissible. 8/29/11RP 48-49. Ms. Cason's testimony violated Mr. Valentine's Fifth Amendment right not to incriminate himself. Miranda, 384 U.S. 436.

b. The convictions must be reversed.

Error in admitting evidence in violation of the Fifth Amendment is subject to a constitutional harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Constitutional error is presumed prejudicial and the State bears the burden of proving it was harmless beyond a reasonable doubt. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). If the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt, the error is harmless. Id. at 426. But a conviction should

be reversed “where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.” *Id.*

Here, the untainted evidence of guilt was not overwhelming. The State’s principal evidence consisted of Ms. Cason’s testimony and the case therefore turned upon her credibility. Mr. Valentine consistently denied striking Ms. Cason although he did acknowledge pushing her. 8/29/11RP 13; Exhibit 16. There is a reasonable possibility the jury relied on Mr. Valentine’s inadmissible statement, in which he implied he thought the evidence was sufficient to arrest him, to find him guilty of the crimes. Therefore, the convictions must be reversed. *Guloy*, 104 Wn.2d at 426.

3. MR. VALENTINE’S CONVICTIONS FOR FELONY HARASSMENT AND SECOND DEGREE ASSAULT WERE THE “SAME CRIMINAL CONDUCT” AND SHOULD HAVE COUNTED AS A SINGLE OFFENSE IN THE OFFENDER SCORE

- a. 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). “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.” *Id.* All three

prongs of the same criminal conduct test must be met to support a finding of “same criminal conduct.” State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The State bears the burden of proving by a preponderance of the evidence that two or more offenses amount to separate criminal conduct. RCW 9.94A.500(1); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996).

- b. The second degree assault and the felony harassment amounted to the “same criminal conduct” as a matter of law.

If the defendant did not argue same criminal conduct at sentencing and the court did not make a finding but instead counted the convictions separately, the Court of Appeals will treat the court’s calculation of the offender score as an implicit finding that the offenses were not the same criminal conduct. 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 affirm the sentence if the facts in the record are sufficient to support a finding either way on the determination of same criminal conduct. Id. at 62. But if the facts show the two offenses amounted to the same criminal conduct as a matter of law, the Court will reverse the sentence. Id.

Here, the evidence showed that the second degree assault and the felony harassment were the same criminal conduct as a matter of law. First, the two offenses occurred at the same time and place against the same person. Ms. Cason testified Mr. Valentine grabbed her by the throat and pushed her to the floor. 8/30/11RP 19-21. Before releasing his hold on her neck, he threatened to kill her if she called the police. 8/30/11RP 27. Thus, the two crimes occurred simultaneously against the same person.

In addition, the two crimes involved the same criminal intent for purposes of the sentencing statute. Whether two crimes involved the same criminal intent for purposes of RCW 9.94A.589(1)(a) is measured by determining whether the defendant's criminal intent, viewed objectively, changed from one crime to another. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); State v. Israel, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). Intent, as used in this analysis, "is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

Objective intent may be determined by examining whether the second crime was "accompanied by a new objective intent"; if so, the two crimes are not the same criminal conduct. State v. Wilson, 136 Wn.

App. 596, 613-14, 150 P.3d 144 (2007) (quoting State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997)). At issue is whether the two crimes occurred sequentially or simultaneously. Tili, 139 Wn.2d at 123-25 (citing Grantham, 84 Wn. App. at 860-61); Wilson, 136 Wn. App. at 615. 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 separate conduct. Tili, 139 Wn.2d at 123 (quoting Grantham, 84 Wn. App. at 859). On the other hand, if the offenses ““were continuous, uninterrupted, and committed within”” a close time frame, and if the defendant engaged in an ““unchanging pattern of conduct,”” the evidence ““supports the conclusion that his criminal intent, objectively viewed, did not change”” from one crime to the next. Tili, 139 Wn.2d at 123-25.

Here, the felony harassment and the second degree assault occurred simultaneously and Mr. Valentine had no time or opportunity between them to pause, reflect, and form a new criminal intent. Ms. Cason said he grabbed her by the throat and pushed her to the ground, and before releasing her, threatened to kill her. 8/30/11RP 19-21, 27. Thus, Mr. Valentine was still engaged in the first crime when he committed the second; he had no time or opportunity to form a separate intent.

In addition, objective intent may be determined by examining whether one crime furthered the other or whether both crimes were part of a recognizable scheme or plan. Israel, 113 Wn. App. at 295. One crime furthers another if the first crime facilitates commission of the second. 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); State v. Collins, 110 Wn.2d 253, 263, 751 P.2d 837 (1988). In Saunders, for example, a kidnap furthered a rape where the perpetrators restrained the victim as retribution for her past noncompliance with Saunders's sexual demands or to allow Saunders to accomplish his sexual agenda or both. Saunders, 120 Wn. App. at 824-25. Similarly, in Collins, a burglary furthered a rape and assault, where the defendant committed the burglary in order to accomplish the attacks. Collins, 110 Wn.2d at 263.

Here, the assault furthered the felony harassment. To prove felony harassment, the State was required to prove Mr. Valentine threatened to kill Ms. Cason and his words or conduct placed her in reasonable fear that the threat to kill would be carried out. RCW 9A.46.020(1), (2); CP 55 (jury instruction). Mr. Valentine's assaultive conduct must have contributed to Ms. Cason's fear that he would actually kill her. See State v. Mandanas, 168 Wn.2d 84, 87, 228 P.3d 13 (2010) (Court of Appeals determined assault and felony harassment constituted same criminal

conduct for sentencing purposes) (citing State v. Mandanas, No. 57738-7-I, 2007 WL 1739702 (Div. I, June 18, 2007)).

In addition, the two offenses were part of a single recognizable scheme or plan. In Saunders, a rape and kidnap were part of the same scheme or plan where the defendant's primary motivation for both crimes was to dominate the victim and cause her pain and humiliation. Saunders, 120 Wn. App. at 825. Here, the evidence shows Mr. Valentine had the same primary motivation for assaulting Ms. Cason and threatening to kill her—to cause her pain and fear.

In sum, the second degree assault and the felony harassment were committed at the same time and place, against the same person, and with the same objective criminal intent. Thus, they should have counted as only a single offense in the offender score. RCW 9.94A.589(1)(a).

- c. Mr. Valentine may challenge the erroneous calculation of his offender score for the first time on appeal.

If two offenses comprise the same criminal conduct as a matter of law, leaving no room for judicial discretion, a defendant may raise the issue for the first time on appeal. In State v. Longuskie, for example, the Court held kidnapping and child molestation of the same victim amounted to the same criminal conduct as a matter of law, where the purpose of the kidnapping was to further the child molestation. 59 Wn. App. 838, 847,

801 P.2d 1004 (1990). Thus, although the issue was not raised below, and no error was even assigned on appeal, the Court "address[ed] the issue sua sponte because of error." *Id.*; see also Anderson, 92 Wn. App. at 61 (defendant may argue same criminal conduct for first time on appeal).

Allowing defendants to argue for the first time on appeal that two or more offenses comprise the same criminal conduct as a matter of law is consistent with the general rule that a party may challenge a sentence for the first time on appeal on the basis of legal error. It is well established that a defendant cannot waive the right to challenge "a *legal error* leading to an excessive sentence," although waiver may 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). The purpose of allowing belated challenges to legal errors in the calculation of the offender score is "to preserve the sentencing laws and to bring sentences in conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court." State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

The purpose of ensuring sentences are consistent and conform to the law is served by allowing defendants to argue for the first time on

appeal that two or more current offenses comprised the same criminal conduct as a matter of law. Had Mr. Valentine raised the issue below, the trial court would have been compelled to treat his second degree assault and felony harassment convictions as the same criminal conduct. Mr. Valentine should not be denied the benefit of the law simply because his attorney failed to raise the issue.

A defendant may waive the right to argue same criminal conduct on appeal if the record supports a finding either way on the same criminal conduct determination, and if the defendant stipulated to the State's calculation of the offender score. State v. Nitsch, 100 Wn. App. 512, 519, 525, 997 P.2d 1000 (2000). In Nitsch, the defendant stipulated in writing, as part of his plea agreement with the State, to the State's assertion of the standard sentencing range, which could only be arrived at by counting the offenses separately in the offender score. Id. at 522. In addition, the record supported a determination of separate conduct. Id. at 525. Under those circumstances, this Court held Nitsch waived his right to argue same criminal conduct on appeal. Id. at 520-21, 525.

But Nitsch does not preclude review in this case because Mr. Valentine did not stipulate in writing to the State's calculation of the offender score as part of a guilty plea agreement. Mr. Valentine made no assertions at all in writing about the offender score calculation, although

his attorney's oral assertions at the sentencing hearing about the standard range were consistent with the State's. 10/07/11RP 9. In addition, as discussed, the record supports only one determination: that the felony harassment and the second degree assault were the same criminal conduct as a matter of law.

Finally, Nitsch's holding that a defendant's agreement with the State's asserted standard sentence range is also an implicit agreement that his crimes did not constitute the same criminal conduct can no longer be considered good law in light of the Supreme Court's more recent opinion in Mendoza, 165 Wn.2d 913. In Mendoza, the court reaffirmed "the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing" in order to constitute a waiver of the right to challenge the offender score on appeal. Mendoza, 165 Wn.2d at 928 (citing State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999)). The mere failure to object to the prosecutor's factual assertions underlying the offender score calculation does not constitute an acknowledgement of those facts. Mendoza, 165 Wn.2d at 928. "Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation." Id. In other words, a defendant who agrees with the State's asserted sentence range does not thereby

“affirmatively agree” with the implicit factual assertions underlying that range.

Here, Mr. Valentine did not *explicitly agree* his convictions for second degree assault and felony harassment comprised separate conduct. Therefore, under Mendoza, he did not waive his right to argue same criminal conduct on appeal.

- d. To the extent Mr. Valentine waived his right to challenge his offender score due to his attorney’s failure to raise the issue, Mr. Valentine received ineffective assistance of counsel.

If defense counsel did not argue same criminal conduct at sentencing, the Court of Appeals will reach the issue if the defendant can show his attorney's failure to argue same criminal conduct amounts 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 counsel's representation was deficient and 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. Counsel'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 would have differed. 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, Mr. Valentine received ineffective assistance of counsel because the evidence is sufficient for a fact-finder to find the second degree assault and the felony harassment were the same criminal conduct. The two crimes unquestionably occurred at the same time and place against the same victim. In addition, as discussed, a fact-finder could find Mr. Valentine had the same objective intent for each crime.

e. Mr. Valentine must be resentenced.

If a sentence is erroneous due to the miscalculation of the offender score, the defendant must be resentenced. Ford, 137 Wn.2d at 485. Therefore, because Mr. Valentine's offender score was miscalculated, he must be resentenced based on an offender score of "zero."

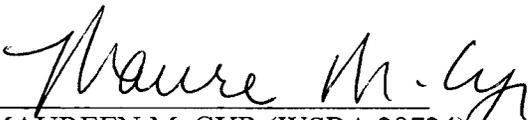
In the alternative, if a defendant received ineffective assistance of counsel for his attorney's failure to argue same criminal conduct at sentencing, the defendant is entitled to a new hearing at which counsel can make the argument. Saunders, 120 Wn. App. at 825. Therefore, Mr.

Valentine is entitled to a new sentencing hearing at which his attorney may argue same criminal conduct.

F. CONCLUSION

Mr. Valentine's convictions for second degree assault and fourth degree assault are the "same offense" for double jeopardy purposes and therefore the fourth degree assault conviction must be vacated. In addition, Mr. Valentine's Fifth Amendment right not to incriminate himself was violated and his convictions must be reversed and remanded for a new trial. In the alternative, because Mr. Valentine's offender score was miscalculated when the trial court counted his felony harassment and second degree assault convictions separately, he must be resentenced.

Respectfully submitted this 7th day of March 2012.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

FILED
KING COUNTY, WASHINGTON

OCT - 7 2011

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DERRICK VALENTINE,

Defendant.

No. 11-1-05759-0 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5
MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on August 30, 2011 before the Honorable Judge Bruce Hilyer.

The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

47A

1 After considering the testimony of Auburn Police Officer Derek Anderson and Auburn
2 Police Detective Michelle Vojir, and the parties' legal briefing and argument, the court enters the
3 following findings of fact and conclusions of law as required by CrR 3.5.

4 1. FINDINGS OF FACT:

5 a. On May 15th, 2011, Auburn Police Officer Derek Anderson was dispatched to a
6 domestic dispute in the area of 22nd St NE and I St NE in Auburn, WA.

7 b. Upon arrival in the area, Officer Anderson saw Mary Cason in the hallway of an
8 apartment building; she was trying to get his attention, so Officer Anderson made contact with
9 Ms. Cason.

10 c. Ms. Cason was very excited and out of breath, and her speech was hard to understand,
11 but she relayed to Officer Anderson that she had been assaulted by her boyfriend, Derrick
12 Valentine. She also showed Officer Anderson a scratch on her forearm and a small red mark
13 above her eye. She told Officer Anderson that Mr. Valentine had hit her.

14 d. While Officer Anderson was talking to Ms. Cason in the hallway of the apartment
15 building, Derrick Valentine entered the building through a door at the opposite end of the
16 hallway. Officer Anderson then approached Mr. Valentine and asked if he was Derrick. Mr.
17 Valentine said yes.

18 e. Officer Anderson spoke with Mr. Valentine just outside the apartment he shared with
19 Ms. Cason. Mr. Valentine did not ask if he could leave, nor did he make any effort to do so.
20 Officer Anderson asked Mr. Valentine to tell him what happened.

21 f. Mr. Valentine explained that he had not put his hands on Ms. Cason "today," and
22 admitted that the two had been in argument the night before. He said they had pushed each other
23

24 WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 2

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 and that a bookcase was pushed over during their argument that day. Mr. Valentine then said
2 "you might as well arrest me then."

3 g. Officer Anderson then handcuffed Mr. Valentine and explained to him that he was
4 being detained. He read Mr. Valentine his constitutional rights, Mr. Valentine acknowledged
5 understanding his rights, and Officer Anderson then asked Mr. Valentine if he had struck Ms.
6 Cason. Mr. Valentine said that other than pushing her the night before, he had not hit her, and
7 denied making any motion or threaten to hit her.

8 h. Later that day, Det. Vojir visited Mr. Valentine while he was in custody and asked
9 him if he would talk to her. He said yes and they spoke in an interview room, where Mr.
10 Valentine was not in restraints.

11 i. Det. Vojir advised Mr. Valentine of his rights, and informed him that the
12 interview was being recorded. Mr. Valentine gave his consent to be recorded and acknowledged
13 his rights. The interview is contained in State's Exhibit 4, which was offered and admitted
14 during trial.

15 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S
16 STATEMENT(S):

17 a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

18 The following statement(s) of the defendant is/are admissible in the State's case-
19 in-chief:

20 1.) Statements made to Officer Anderson after Valentine was handcuffed.

21 This/These statement(s) is/are admissible because Miranda was applicable and the
22 defendant's statement(s) was/were made after a knowing, intelligent and voluntary
23 waiver of his/her Miranda rights.

24 2.) Statements made to Det. Vojir as contained in Exhibit 4.

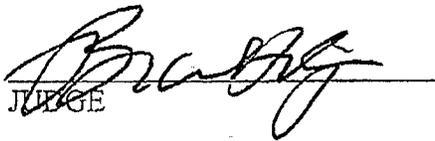
WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 3

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 This/These statement(s) is/are admissible because Miranda was applicable and the
2 defendant's statement(s) was/were made after a knowing, intelligent and voluntary
3 waiver of his/her Miranda rights. Defendant gave his consent to be recorded.

4 In addition to the above written findings and conclusions, the court incorporates by
5 reference its oral findings and conclusions.

6 Signed this 7 day of ~~September~~ ^{October}, 2011.

7
8 
9 JUDGE

10 Presented by:

11 _____
12 Deputy Prosecuting Attorney

13 _____
14 Attorney for Defendant

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24 WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 4

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67778-1-I
v.)	
)	
DERRICK VALENTINE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DERRICK VALENTINE 353704 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

FILED IN DIVISION ONE
 COURT OF APPEALS
 STATE OF WASHINGTON
 2012 MAR - 7 PM 4: 54

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF MARCH, 2012.

X _____ 

Washington Appellate Project
 701 Melbourne Tower
 1511 Third Avenue
 Seattle, WA 98101
 Phone (206) 587-2711
 Fax (206) 587-2710