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MAY 31 2013

King County Prosecutor  
Appellate Unit

69538-0

NO. 69538-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

SERGIO DONATO,

Appellant.

COURT OF APPEALS  
STATE OF WASHINGTON  
2013 MAY 31 PM 3:58

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

The Honorable Mariane Spearman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error for failing to give jurors a definition of "true threat."

2. Trial counsel was ineffective for failing to propose a jury instruction defining "true threat."

3. The trial court erred by concluding the third degree assault and felony harassment convictions did not involve the same criminal conduct.

Issues Pertaining to Assignments of Error

1. Did the trial court commit reversible error by failing to provide the jury with a definition of "true threat," thereby allowing the jury to convict Sergio Donato of felony harassment based on speech protected by the First Amendment?

2. Did trial counsel deprive Donato of his constitutional right to the effective assistance of counsel by failing to propose a jury instruction defining "true threat?"

3. Did the trial court sentence Donato based on incorrect offender scores by concluding the third degree assault and felony harassment convictions did not involve the same criminal conduct?

B. STATEMENT OF THE CASE

Renton Police officers Scott and Phipps responded to a residence shared by Viviana Gonzales, her young son, and Sergio Donato. 6RP 37, 52-53, 70-71, 78.<sup>1</sup> Gonzales and Donato had lived together for about six months and were engaged to be married. 6RP 78-79.

As the officers arrived, Gonzales ran out of the house carrying her son. 6RP 38, 45-46, 72. Gonzales was upset, crying hysterically, and appeared fearful. 6RP 47, 54-55, 72-73. She was holding her ribs and yelled, "Help." 6RP 46, 54. She spoke very little English. 6RP 81-82, 97. Scott asked Gonzales what happened, and Gonzales responded she "hurt." 6RP 47. She pointed to her head, where Scott observed a bump. 6RP 47.

By then, Donato had appeared in the doorway of the house. 6RP 48-49, 73-74. He was holding a leather belt in his hand. 6RP 74-75. Gonzales pointed to her foot, then pointed at Donato, and said, "Kicked head." 6RP 48-49. Meanwhile, Phipps engaged Donato and told him to stop. 6RP 73-75. Donato draped the belt around his neck. 6RP 92. Phipps approached and took the belt away. 6RP 75-77. Donato did not appear to be under the influence of alcohol or drugs. 6RP 91. He

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<sup>1</sup> The verbatim report of proceedings is referred to as follows: 1RP – 9/19/12; 2RP – 9/20/12; 3RP – 9/24/12; 4RP – 10/4/12; 5RP – 10/8/12; 6RP – 10/9/12; 7RP – 10/10/12; 8RP – 10/11/12; 9RP – 10/26/12.

explained he and Gonzales had gotten into an argument and Gonzales called 911. The argument was not physical and he did not assault Gonzales. He had the belt because he was getting dressed. 6RP 78-79, 81.

Scott joined Phipps, shared the information she had learned, and arrested Donato. 6RP 49-50. She asked him what happened, and Donato said he and Gonzales had a verbal argument, that Gonzales was standing on the bed, and that she fell off the bed and hit her head during the argument. 6RP 51, 64. Donato said there was some pushing, but he did not strike Gonzales. 6RP 51, 64. Gonzales was calm and did not appear to be angry during his conversation with Scott. 6RP 63.

Phipps called for medical assistance and fire fighter Jared Olin responded. 6RP 111-12. He spoke a bit of Spanish with Gonzales. 6RP 113-16. Olin observed lumps on Gonzales' head, a welt-like trauma on her trunk and marks on her shins. 6RP 118, 122. Gonzales pointed at Olin's belt, then at her trunk. 6RP 121-22 She also pointed to his boots, then at her head and shins. 6RP 118-20. Gonzales was transported to the hospital. 6RP 120.

Based on this evidence, the State charged Donato with third degree assault with the belt, felony harassment, and interfering with domestic violence reporting. The State alleged each offense involved domestic

violence, and that the assault and harassment occurred within the sight or sound of Gonzales' son. CP 32-34.

Gonzales did not testify, which made the 911 recording an important part of the State's case. The trial court granted the State's motion to admit the recording. CP 30; 3RP 33-37. Because Gonzales spoke Spanish during the 911 call, the contents were translated. CP 27-28; Ex. 2 (defense transcription); Ex. 3 (State transcription). The translations differed in detail, with the State's transcript more detailed than the defense version. 1RP 64-65. Most importantly, the State's translation included the following statement by Donato to Gonzales: "If I kill you, I will kill you, I won't do anything to the child." Ex. 3. The trial court admitted both transcripts so the jury could compare them. Supp. CP \_\_ (sub. no. 30, Order on Additional Motions in Limine, filed October 4, 2012); 4RP 29-31; 5RP 6.

Each transcriber also testified. Claudia A'Zar prepared the State's transcript using software called Transcription Gear. 6RP 13. The software allows her to speed up, slow down, or pause the sound. 6RP 15. Alecia Beatey, the defense translator, prepared her version without using software because she was not asked to do a "forensic" transcription. 5RP 13-15, 23. She explained there are different types of software that

generally help to get more detail out of the audio file at issue. 5RP 24-25. She would have used software had she been asked to do a "forensic" transcription. 5RP 24, 27. She reviewed A'Zar's translations and found them to be accurate. 5RP 30-31.

Donato did not testify. He presented evidence that nearly three weeks after the incident, Gonzales successfully requested the court to lift a no-contact order issued against him. 5RP 154-57. Defense counsel used the evidence to challenge the felony harassment requirement that Gonzales was placed in reasonable fear of being killed. 7RP 41-42. More generally, counsel criticized the police for failing to investigate further. 7RP 41-46.

After hearing the evidence, the jury found Donato guilty as charged. CP 107-08, 115; 8RP 2-3. The jury also answered "yes" to the questions whether the offenses were of the aggravated domestic violence kind and whether they occurred in the presence of Gonzales' young son. CP 109-14.

Donato filed a motion to dismiss the felony harassment conviction, contending it was based on the same evidence relied on to prove assault. CP 116-19. Alternatively, he argued the assault and harassment convictions involved the same criminal conduct. CP 119-21; 9RP 2-3. The trial court rejected each argument, finding assault and felony

harassment had different elements and different intents, and finding one crime did not necessarily further the other. 9RP 7-8.

Despite the presence of an aggravating factor, the trial judge imposed concurrent, standard range sentences of six months for the felonies and a concurrent six-month term and 12 months probation for interfering with domestic violence reporting. CP 129-38.

C. ARGUMENT

1. THE FAILURE TO DEFINE "TRUE THREAT" REQUIRES REVERSAL OF THE HARASSMENT CONVICTION.

The trial court failed to define "true threat" for the jury. This is error because it permitted a conviction based on speech protected by the First Amendment. This Court may address the trial court's failure for the first time on appeal because it constitutes manifest constitutional error. Alternatively, Donato's counsel was ineffective for failing to propose a "true threat" definition. In either event, reversal of Donato's harassment conviction is warranted.

a. Failing to define "true threat" is manifest constitutional error.

Although laws may prohibit all manner of conduct, they may not criminalize speech protected by the First Amendment. State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). RCW 9A.46.020, the statute

defining the crime of harassment, criminalizes pure speech if read literally. Kilburn, 151 Wn.2d at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must thus be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287. Because the instructions in Schaler did not require a mens rea of at least negligence as to result, there was manifest error affecting a constitutional right. Id., 169 Wn.2d at 287-88. As such, the Court addressed the instructional error for the first time on appeal. Id. at 288. See State v. Allen, 176 Wn.2d 611, 628-29, 294 P.3d 679 (2013) (summarizing Schaler).

Schaler predicted the problem was "unlikely to arise in future cases" because the pattern instruction defining "threat" was amended to

mirror the definition of "true threat." 169 Wn.2d at 287-88 n.5 (citing WPIC 2.24).<sup>2</sup> Courts using WPIC 2.24, the Schaler Court advised, will properly incorporate the constitutional mens rea as to the result. Id. Indeed, the Allen Court held the failure to include the "true threat" requirement in the information and "to-convict" instruction was not error because the trial court gave the jury WPIC 2.24. Allen, 176 Wn.2d at 629-30.

The error here is the failure to give WPIC 2.24 or some equivalent. Based on Schaler and Allen, the trial court committed manifest constitutional error. RAP 2.5(a)(3).

b. The error is not harmless.

Manifest constitutional errors may be harmless. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The error is not harmless when the evidence and other instructions "leave it ambiguous as to whether the jury could have convicted on improper grounds." Schaler, 169 Wn.2d at

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<sup>2</sup> WPIC 2.24 provides in pertinent part as follows:

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in [jest or idle talk][jest, idle talk, or political argument].

288. The error was found not harmless in Schaler even though Schaler said he wanted to kill his neighbors, described planning to do so, and dreamt about the incident. The Court noted Schaler did not explicitly say he would kill his neighbors, behaved erratically at the time, and said contradictory things. Schaler, 169 Wn.2d at 289.

For similar reasons, the error is not harmless in Donato's case. His statement was conditional: "If I kill you, I will kill you, I won't do anything to the child." 2RP 47-88; Ex. 3. Most of Donato's statements were demands to see the telephone. There was no evidence Donato had attempted to kill or injure Gonzales in the past, had a reputation for violence, or had forced her to absent herself from trial. He voluntarily spoke with the police before and after receiving Miranda<sup>3</sup> warnings, was calm, made no attempt to resist, did not appear to be under the influence of alcohol or drugs, and did not seem angry. 6RP 62-65, 77-81, 89-92. Considering the context of the vague threat, it is very possible a reasonable juror could have found Donato guilty without concluding he had made a "true threat." This Court should therefore reverse his conviction for felony harassment and remand for retrial.

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

- c. Trial counsel was ineffective for failing to propose a "true threat" instruction.

If this Court decides Donato may not raise the challenge for the first time on appeal under RAP 2.5(a)(3), trial counsel was ineffective for failing to propose the "true threat" instruction. See State v. Gerdtz, 136 Wn. App. 720, 726, 150 P.3d 627 (2007) (court addresses instructional error, despite waiver under RAP 2.5, in context of ineffective assistance of counsel).

A criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). To prevail on a claim of ineffective assistance, the defendant must establish counsel's performance was objectively deficient and caused prejudice. State v. Emery, 174 Wn.2d 741, 754-55, 278 P.3d 653 (2012). This Court reviews an ineffective assistance of counsel claim de novo. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006).

Deficient performance is that which falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Only legitimate

trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

There can be no legitimate reason for failing to propose an instruction that protects First Amendment rights. In addition, counsel lessened the State's burden of proving guilt by failing to propose the "true threat" instruction. Furthermore, the Supreme Court in Schaler made the importance of the "true threat" instruction clear to all practitioners. Reasonable attorney conduct includes an obligation to investigate pertinent law. State v. Woods 138 Wn. App. 191, 197-98, 156 P.3d 309 (2007). Counsel's failure in light of Schaler's dictate is deficient performance.

Counsel's failure prejudiced Donato's right to a fair trial. Prejudice is established where it is reasonably probable that, but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A reasonable probability is one that is sufficient to undermine confidence in the jury's verdict. Strickland, 466 U.S. at 694.

State v. Thomas is instructive. Despite presenting evidence demonstrating Thomas was extremely intoxicated, trial counsel failed to propose an instruction that would have directed the jury to consider both the objective and subjective components of the crime of attempting to elude a police vehicle. Thomas, 109 Wn.2d at 229. The Supreme Court held that without the proper instruction, the jury may have believed the objective sign of wanton or willful disregard created by Thomas' erratic driving established her guilt without first considering the subjective component of attempting to elude. Id. Counsel's failure to propose the instruction was therefore prejudicial. Id.

Counsel's failure to propose a "true threat" definition was similarly prejudicial. It allowed jurors to find Donato guilty of felony harassment even if they did not unanimously find he, in the words of Schaler, "would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283. Donato has therefore shown counsel was ineffective with respect to felony harassment. That conviction should thus be reversed and remanded for retrial.

2. DONATO'S ASSAULT AND HARASSMENT CONVICTIONS INVOLVED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING PURPOSES.

The chief difference between the 911 call translations is that Ms. A'Zar's transcript includes the following statement attributed to Donato: "If I kill you, I will kill you. I won't do anything to the child, just you." 2RP 87-88; Exs. 2-3. The State relied on that statement for the "threat" element of the felony harassment charge. 3RP 42-43; 7RP 11-12, 21-25.<sup>4</sup>

Another important statement, attributed by Beatey to Gonzales, is the final entry of her translation: "Just . . . Just go away please . . . Go away, leave me alone . . . don't hit me, please, no no, the child!!! Please!!! CP 28; Ex. 2. The prosecutor argued that in response to Gonzales' plea, Donato "came after her" with his belt "and mercilessly whipped her in the back until she got to the ground and he kicked her in the head." 7RP 12-13. The prosecutor later told jurors the instrument, weapon, or other object likely to cause bodily harm as required to prove third degree assault as charged was the belt. 7RP 19.

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<sup>4</sup> The trial court instructed the jury that to convict Donato of felony harassment, it had to find (1) he knowingly threatened to kill Gonzales immediately or in the future; (2) his "words or conduct" placed Gonzales in reasonable fear he would kill her; (3) he acted without lawful authority; and (4) the threat was made or received in Washington. CP 93 (instruction 17).

The prosecutor then maintained Donato's "words and his conduct after the threat placed her in reasonable fear that the threat would be carried out[.]" 7RP 25. Stated somewhat differently, Donato's "conduct after the threat" – the assault – furthered the harassment by supporting a conclusion the State presented sufficient evidence to prove Gonzales' fear was reasonable. The offenses thus constituted the same criminal conduct, and the trial court abused its discretion by rejecting Donato's claim. State v. Graciano, 176 Wn.2d 531, 537, 295 P.3d 219 (2013) (determination whether two or more offenses constitute same criminal conduct reviewed for abuse of discretion)

"[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the same criminal conduct. RCW 9.94A.589(1)(a). "'Same criminal conduct,' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id.

The test is objective, and the court must consider how closely related the crimes are, whether there was a change in the criminal

objective, and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

a. Same victim, time and place

It cannot reasonably be disputed that the assault and harassment occurred against Gonzales and at the residence she shared with Donato. With respect to the same time element, the offenses need not literally occur simultaneously. State v. Porter, 133 Wn.2d 177, 182-83, 942 P.2d 974 (1997). Offenses occur at the same time when they are part of a continuing sequence of criminal activity. State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); see State v. Williams, 135 Wn.2d 365, 368-69, 957 P.2d 216 (1998) (sale of 10 rocks of cocaine to one police informant, followed immediately and without interruption by same transaction with second informant, were same criminal conduct); Porter, 133 Wn.2d 177, 183, 186 (immediate, uninterrupted, sequential sales of methamphetamine and marijuana to same undercover officer occurred at same time); State v. Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) (noting that "separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted episode over a short period of time.").

The 911 recording in Donato's case lasted just three minutes and forty-three seconds. 6RP 23. Donato and Gonzales struggled with the telephone throughout the recording, with the threat being uttered during the struggle. CP 27; Using the State's theory, Donato assaulted Gonzales with the belt immediately after the call ended. Police arrived only four minutes after being dispatched. 6RP 70-71. Donato was still holding the belt in his hand as he became visible to the officers within a second or two after Gonzales ran out the door. 6RP 73-74.

It is evident the threat to kill and the assault with the belt were "part of a continuous transaction or in a single, uninterrupted episode over a short period of time." See State v. Tili, 139 Wn.2d 107, 123-24, 985 P.2d 365 (1999) (separate forcible digital penetration of anus and vagina, followed by unsuccessful attempt to penetrate anus with penis, followed by vaginal penetration with penis, all of which occurred during a two-minute, continuous episode "were nearly simultaneous in time," and constituted same criminal conduct rather than three distinct rapes); State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999) ("The few minutes between the rapes is sufficiently close so that it satisfies the RCW 9.94A.400(1)(a) time prong, because in this time Palmer's activity exclusively involved threats and use of force in preparation for the

penile/vaginal rape which immediately followed the oral rape."); cf., State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (finding crimes were "sequential, not simultaneous or continuous," when defendant forcibly penetrated victim's anus, then kicked her, grabbed her face, pulled her hair, and slammed her head into wall until she complied with demand to fellate him).

The harassment and assault in Donato's case were more like the rapes in Tili and Palmer than Grantham; there was no discernable break in the action between the acts constituting the harassment and the assault. The crimes thus occurred at the same time for purposes of this issue.

b. Same objective intent

The assaults and harassment also involved the same intent. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this context, "intent" is not the 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, review denied, 114 Wn.2d 1030 (1990). Factors include whether one crime furthered the other, whether one remained in progress when the other occurred, and whether the offenses were part of the same

scheme or plan. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996); State v. Edwards, 45 Wn. App. 378, 382, 725 P. 2d 442 (1986), overruled in part on other grounds, State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

Several cases demonstrate what is meant by "same intent" in this context. In State v. Taylor, the two defendants assaulted the driver of a car as he stepped out to buy gasoline. The defendants climbed into the car and, with a rifle pointing at the passenger's head ordered the driver to take them to a park. When they arrived at the park, the defendants robbed the passenger, left the car, and crossed the street. 90 Wn. App. 312, 315, 950 P.2d 526 (1998).

At issue was whether the charges of second degree assault and first degree kidnapping against the passenger arose from the same criminal conduct. More specifically, the question was whether Taylor's objective intent was the same when committing the two offenses. Taylor, 90 Wn. App. at 321. The court found it was, holding Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the assault was to persuade Murphy, by the use of fear, to not resist the abduction. The crimes began at the same time, when Taylor and Nicholson entered

the car. It ended when the kidnappers exited the car and the abduction was over. Taylor, 90 Wn. App. at 321. Notably, the court found that where two crimes are committed continuously and simultaneously, "it is not possible to find a new intent to commit a second crime after the completion of the first crime." Id. at 321-322.

The question in State v. Saunders was whether instances of rape and kidnapping involved the same criminal conduct. 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004). Saunders and his friend, Williams, were drinking in Saunders' living room with a third woman when Saunders requested the woman to engage in a sexual threesome. Saunders, 120 Wn. App. at 806-07. After the woman refused, Saunders bound the woman with handcuffs and leg shackles. At some point, Saunders tried to force the woman to perform oral sex on him but she refused. Saunders then went into the kitchen for a knife. When he came back into the living room, Williams was raping the woman. Saunders, 120 Wn. App. at 807.

On review, the court found the kidnapping and rape were the same criminal conduct, reasoning the kidnapping was committed in furtherance of the rape. Saunders, 120 Wn. App. at 825. The court also found Williams' main motivation for raping the woman was to dominate her and

to cause pain and humiliation, an intent similar to the motivation for the kidnap. Saunders, 120 Wn. App. at 825.

As charged, the State had to prove Donato negligently struck Gonzales with a belt and caused bodily injury. CP 32 (information); CP 83 ("to-convict" instruction); RCW 9A.36.031(1)(d). To prove felony harassment, the State bore the burden of proving Donato knowingly threatened to kill Gonzales immediately or in the future, that Donato's words or conduct placed Gonzales in reasonable fear Donato would carry out the threat to kill, and that the threat was not legally authorized. CP 33 (information); 93 ("to-convict" instruction); RCW 9A.46.020(1)(a)(i), (b), (2)(b)(ii).

Donato's criminal objective was to cause Gonzales to reasonably fear he would kill her, which he did not only by threatening to kill her, but also by backing up the threat with his physical striking of her with the belt. There was no discernible change in intent between the assault and harassment.

Nor was there a temporal break where Donato paused and had time to form a new criminal intent to commit a second offense. Cf. State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (because defendant had time to complete assault and form a new intent to threaten the victim,

crimes of assault and felony harassment had different objective intents and thus were not the same criminal conduct). For these reasons, this Court should find Donato's actions encompass the same criminal conduct.

This Court should therefore vacate Donato's sentence and remand for a new sentencing hearing

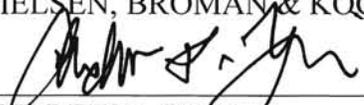
D. CONCLUSION

For the aforesaid reasons, this Court should reverse the felony harassment conviction and remand for retrial. Alternatively, this court should find the harassment and assault convictions involved the same criminal conduct.

DATED this 31 day of May, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KQCH

  
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Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69538-0-I
	)	
SERGIO DONATO,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SERGIO DONATO  
2100 NE 6<sup>TH</sup> PLACE  
RENTON, WA 98058

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF MAY 2013.

X *Patrick Mayovsky*