

No. 46153-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

PEDRO GODINEZ JR

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BRIEF OF APPELLANT

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## A. Assignment of Errors

### Assignment of Errors

1. The trial court erred by admitting Mr. Landstrom's hearsay statement, as recorded by Officer Janisch.
2. The trial court erred by permitting Ms. Speaks to testify in a jail uniform after a timely objection from the defense.
3. The trial court erred by adding one point to his offender score for being on community custody.
4. The trial court erred by treating the attempted first degree murder and first degree kidnapping as separate and distinct criminal conduct.

### Issues Pertaining to Assignment of Errors

1. Officer Janisch recorded a 23-minute question and answer statement from Mr. Landstrom while in the ambulance en route to the hospital. Did the trial court err in admitting the statement: (a) as an excited utterance when the statement was taken two to three hours after the exciting event and the witness had the opportunity to, and did in fact, decide to fabricate a portion of his story; (b) as a then existing mental, emotional, or physical condition when the statement is clearly a recitation of past events; (c) as being for medical diagnosis or treatment when the statement was made to a police officer for the purpose of evidence

preservation; or (d) as a present sense impression when the statement was not spontaneous but in response to questions?

2. Did the trial court err in allowing a witness to testify in jail attire after a timely objection without conducting a hearing or making findings that the jail attire was necessary?

3. Did the trial court err in adding one point to Mr. Godinez' offender score, allegedly because he was on community custody, although he was on supervision for a misdemeanor offense?

4. Did the trial court err in concluding the offenses of attempted murder and kidnapping constituted "separate and distinct criminal conduct" when they involved the same criminal intent, occurred at the same time and place, and involved the same victim?

## B. Statement of Facts

### Substantive Facts

On November 27, 2012, Freddy Landstrom couldn't sleep. RP, 422. Sometime after midnight on November 28, 2012, he decided to head to a local casino in La Center to play some cards. RP, 423. While en route, he received a phone call from Joanna Speaks. RP, 424. Joanna Speaks was an acquaintance of his that had he met in Milwaukie, Oregon outside a strip club. RP, 412, 582. The day he met her, Mr. Landstrom had

offered her a job cleaning his apartment in exchange for financial compensation. RP, 417. She agreed to clean his apartment in exchange for financial compensation. RP, 420.

What happened next was the subject of significant debate at trial. The State called two eyewitnesses to testify about the subsequent chain of events, Joanna Speaks and Freddy Landstrom. RP, 577, 407. Ms. Speaks had, prior to trial, pleaded guilty to first degree robbery and tampering with a witness. RP, 615. There was no agreement that she would testify on behalf of either side, although both parties listed her as a witness on their witness lists. RP, 638. Originally, Ms. Speaks was to be a defense witness, but on the eve of trial the State elected to call her in their case in chief. RP, 100. At the time of the trial, Ms. Speaks was residing at the Women's Correction Center in Purdy and was brought to the trial pursuant to an Order of Production. CP, 571. When she arrived at the Clark County Jail, she had no civilian clothes. RP, 571. The defense objected to her testifying in jail clothes because it "diminishes the veracity of a witness when they're in jail garb." RP, 572. The Court overruled the objection and ordered she be brought to court in "whatever attire she's in." RP, 573.

According to Ms Speaks' testimony, she visited Mr Landstrom two or three times at his home to "clean it," but "come to find out" that "wasn't all he wanted." RP, 620. On each occasion, he told her he wanted

to have sex with her and she agreed. RP, 620. On one of the occasions, they stopped at a gas station for gas and she learned the PIN numbers to his credit cards. RP, 596. At trial, Mr. Landstrom testified she only visited his house once to clean it and they never had “sexual activity,” although he admitted telling Detective Stephan they engaged in “intimate relations” on the day she cleaned his apartment. RP, 419, 493. Mr. Landstrom testified he had a girlfriend and did not look at Ms. Speaks in “any other way than somebody that [he] was trying to help.” RP, 500

When Mr. Landstrom received the call from Ms. Speaks on November 27, 2012, she was very upset about an electric bill she could not pay. RP, 424. She needed \$85 to pay the bill. RP, 425. As further incentive for Mr. Landstrom to come over, Ms. Speaks texted a photo of her breasts and “talked dirty” to him, although at trial Mr. Landstrom conveniently could not remember that detail. RP, 502, 625-26. There was a suggestion at trial that Mr. Landstrom was thinking, “Hey, this might be my lucky night,” but he denied making that statement to Detective Stephan as well. RP, 502. Mr. Landstrom agreed to drive to Ms. Speaks’ residence and “calm her down.” RP, 424-25.

At Ms. Speaks’ request, Mr. Landstrom stopped and purchased a six pack of beer. RP, 156, 432, 427, 588. The beer was purchased at 1:56 a.m. from a Chevron gas station at the corner of Olympia and Mill Plain in

Vancouver. RP, 155-56. He also picked up a *Busted* newspaper, which is a periodical that features people who have been recently arrested. RP, 428. Ms. Speaks lives “pretty close” to the gas station. RP, 430.

What happened next was the subject of significant dispute. According to Ms. Speaks, Mr. Landstrom was acting “jumpy” like he had figured out he was walking into a “prostitution sting.” RP, 589, 594. The first thing he did was to “pat her down” and while doing so he saw a photograph of the defendant, Pedro Godinez, Jr., on her nightstand. RP, 588-89. Mr. Godinez, frequently known to his friends and family as Junior, was Mr. Speaks’ boyfriend at the time. RP, 578, 345. Ms. Speaks then walked over to her bed and invited him to join her for a drink. RP, 589. She then pulled a gun on him and ordered him to empty all his pockets. RP, 589. She took his wallet, money, credit cards and keys. RP, 595. After that, Mr. Landstrom left the apartment for an unknown destination. RP, 602. The decision to rob Mr. Landstrom was entirely hers and Mr. Godinez did not contribute to the decision. RP, 621. Later that night, Mr. Godinez came to her apartment and she gave him the credit cards and PIN numbers and asked him to go get some money. RP, 604. She told him to use Mr. Landstrom’s vehicle (which was still parked outside her apartment), saying it belonged to a friend. RP, 604. Mr. Godinez went to the ATM and extracted money, giving \$500 of it to Ms.

Speaks. RP, 605. She later hid the wallet and a gun holster in a garbage can hidden in soiled diapers. RP, 606-08. She gave the gun to a guy on the bus. RP, 627.

Mr. Landstrom provided a markedly different account of what happened. When he arrived at Ms. Speaks' house, he knocked on the door and she answered. RP, 434. She ushered him into the apartment and directed him to put the beer on the counter. RP, 435. He then followed her into the bedroom. RP, 508. At that point the front door opened and closed, and Mr. Landstrom saw a man standing in the apartment armed with a gun. RP, 436-37. At trial, Mr. Landstrom identified Pedro Godinez, Jr. as the assailant. RP, 436. The assailant pointed the gun at him and said something in Spanish. RP, 437. Mr. Landstrom heard the word "set up" and then the assailant said, "Shut the fuck up." RP, 437. The assailant told him to take everything out of his pockets. RP, 438. He then ordered him to go outside to the car. RP, 441. They walked out together to the car with the assailant pointing a gun at him. RP, 442. Mr. Landstrom got into the driver's seat and the assailant got into the back seat, sitting in the middle with the gun pointed at him. RP, 443. While they were driving, the assailant asked him questions about his brother and daughter. RP, 447.

The assailant directed Mr. Landstrom to drive to a gravel road. RP, 452. The assailant directed him to walk down the gravel road. RP, 456.

Eventually, he directed him to get on his knees. RP, 457. He then asked him about his credit cards and PIN numbers. RP, 457-59. He directed him to take off his shoes. RP, 459. The assailant then said, "I lied. This is your last night." He made the sign of the cross and shot him. RP, 461. The two of them struggled for a few moments. RP, 462. Mr. Landstrom was shot in the hand while trying to grab the gun. RP, 462. The assailant then shot him again, saying, "Why won't you die?" RP, 462. Mr. Landstrom was struggling to stand up when the force of the fourth shot propelled him forward and caused him to start running. RP, 463. Nearby there was a swamp and Mr. Landstrom jumped into the swamp. RP, 463. He could hear the assailant yelling at him, "You're dead. You're dead." RP, 463. Mr. Landstrom grabbed mud to try and camouflage himself. RP, 463. Mr. Landstrom lay in the swamp for what "seemed like an eternity," thinking he was going to die. RP, 465-66.

At some point, the cold and pain forced him to start to move again. RP, 466. He saw a red light in the distance and started walking towards it. RP, 467. The distance was no less than a mile and could have been as much as five miles. RP, 373, 467. The walking was slow because he was shoeless and in a great deal of pain. RP, 467. After walking for over an hour, he came to a house. RP, 470, 374. He called out, asking for help. RP, 470. He said, "Just call the police. My name is Freddy Landstrom.

I've been shot. Call 911." A woman's voice called out, "Go away or I'll call the police." Mr. Landstrom continued to ask for help RP, 471.

Sharon Baisden, who lives near Kadow's Marina, was up very late at night brushing her teeth when she heard someone hit her window. RP, 166. She shouted, "What do you want?" The man said, "Help me. Help me." RP, 166. When she looked out her window, the person had moved on to her neighbor's house. RP, 167. She decided to call 911. RP, 168. The man made several comments, including, "I have a daughter," and "They tried to rob me." RP, 169. The man kept repeating himself. RP, 171.

A surveillance video from a nearby business captured Mr. Landstrom walking in the area of the marina. RP, 197. The time stamp on the video showed 3:19 a.m., however the testimony was that the time stamp was at least an hour off 195-96.

At 4:25 a.m., Vancouver Police Corporal William Pardue was dispatched to the scene. RP, 176. Vancouver Police Sergeant Jay Alie was dispatched soon thereafter. RP, 112. Sergeant Alie made contact with Mr. Landstrom who was in a lot of pain and kept saying he was believed he was going to die RP, 114. He was wearing one sock and his feet were wet and muddy. RP, 116.

At 3:49 a.m., someone attempted to access the ATM at the Fisher's Landing People's Credit Union. RP, 208. Although no money was removed from the ATM, a receipt with the available balance was produced at 4:09. RP, 211. In its closing argument, the State argued that the man in the video was Mr. Godinez and that he spent 20 minutes at the ATM because he could not remember accurately the PIN number Mr. Landstrom had given him and he was trying different numbers until he figured out the correct one. RP, 1041.

At 4:17 a.m., a man entered the AM/PM store on 164<sup>th</sup> Avenue. RP, 144-48. Mr. Landstrom's debit card was used at that location. RP, 284

Based upon surveillance footage obtained from the AM/PM store, Detective Darren McShea obtained photographs of two possible suspects. RP, 287. A photo of the first suspect was shown to Mr. Landstrom and he said that was not the man who shot him. RP, 287. A second photo was then showed him and he identified that man as the shooter. RP, 288.

Mr. Godinez has previously been convicted of a serious felony. RP, 946.

#### The Recorded Interview

The morning of the incident, Vancouver Police Officer John Janisch responded to the scene and had contact with Mr. Landstrom. RP,

361. Officer Janisch questioned Mr. Landstrom for ten to fifteen minutes at the scene. RP, 401. At that point, medical personnel made the decision to transport him to the hospital. RP, 362. Officer Janisch made the decision to ride in the ambulance with him. RP, 331. During the ambulance ride, Officer Janisch conducted an interview with him and asked him details about the shooting. RP, 331. The conversation was recorded. RP, 330. The result was a 23-minute recording. RP, 334. The recording was taken at approximately 5:00 in the morning. RP, 369.

The recording is a detailed question-answer interview taking up 35 pages of the trial transcript. RP, 365-400. In the recording, Mr. Landstrom says the assault occurred about two hours earlier. RP, 370. He provides a description of the assailant's clothing. RP, 366. He gives the name of "Joanna Speaks" as well as her phone number and address. RP, 372, 389. The incident started with Ms. Speaks texting him when he was on his way to play poker that she wanted him to come over. RP, 380-81. She told him to bring beer with him. RP, 381. When he got to her house, she invited him in and they discussed having a drink. RP, 381. Then a guy walked in the front door and pulled a gun from his jacket. RP, 381-82. It was then he realized he was being "set up." RP, 382. The assailant demanded he take out his wallet and money. RP, 383. He then ordered him to leave the house and get into his car and drive them. RP, 384.

Mr. Landstrom told Officer Janisch about detailed conversations between himself and the assailant. In the car, the assailant told him he had been “set up” and he shouldn’t be “disrespecting[ing] a girl.” RP, 385. He told him he was not going to kill him but he was going to “teach him a lesson.” RP, 385. Later he told him, “I’m not going to shoot you, okay. You’re going to live.” RP, 371.

He explained how they drove to the end of a deserted road and he was dropped off at the side of the road. RP, 373-74. He described being shot six to seven times. RP, 368. He ran into the swamp, which he described as tall grass. RP, 393-94. He said he lost his shoes in the swamp. RP, 368. He expressed concern that his credit cards had been stolen and were probably being used “right now.” RP, 370.

During the interview, Officer Janisch asked, “So did you go to meet her for a date?” RP, 380. Mr. Landstrom answered, “No, what happened was she cleaned my apartment.” RP, 380. Later, he says, “But I just wanted to help her. She looked so down. I mean, I wasn’t even trying to do anything. I was just going to play (inaudible) La Center. It’s \$500 a hand.” RP, 398-99.

During the recording, Mr. Landstrom would also interject random thoughts. For instance, at one point he said, “I want to tell you a story about me... I was born in Bogota, Columbia [sic]. My parents were killed

when I was seven years old I was adopted when I was ten years old. I grew up on the streets of Bogota, Columbia [sic].” RP, 391 At another point he said, “He wanted to shoot me because I had told her that I wanted to be a police officer” RP, 397. He also recalled that he had a girlfriend named Marilyn Gillian RP, 398.

The State first offered Mr. Landstrom’s recorded statement as a dying declaration RP, 187. The State later clarified it was also offering the statement as an excited utterance, then existing mental, emotional, or physical condition, and statement made for medical diagnosis or treatment. RP, 326. The trial court indicated it wanted to hear an offer of proof before ruling on the admissibility. In the offer of proof, Officer Janisch testified when he first contacted Mr. Landstrom, he was panicked, terrified, and thought he was dying. RP, 330 The purpose of the interview was to reassure him and to preserve evidence. RP, 333. During the interview, Mr. Landstrom was acting like he wanted to get as much information out as possible in case he died. RP, 331. Mr. Landstrom also asked a lot of questions about what the medical personnel were doing and the officer had to redirect him to the topic at hand by asking specific questions. RP, 332. The court ruled the recorded statement was admissible as an excited utterance, then existing mental, emotional, or physical condition, statement made for medical diagnosis or treatment,

and present sense impression. RP, 357 The court ruled the dying declaration rule did not apply because the declarant was available. RP, 357

#### Procedural Facts

Pedro Godinez, Jr. was originally charged with attempted first degree murder, first degree kidnapping, and first degree robbery. CP, 1. Later an amended information was filed alleging attempted first degree murder (with aggravating factors of deliberate cruelty and lack of remorse), first degree kidnapping (with aggravating factors of deliberate cruelty and lack of remorse), first degree robbery (with aggravating factors of deliberate cruelty and lack of remorse), bribing a witness, and unlawful possession of a firearm in the first degree. CP, 10. The bribery charge was dismissed by the trial court. RP, 947. The jury convicted him as charged.

In the jury instruction, the court defined “deliberate cruelty” as “gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain such as an end in itself and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.” RP, 1013.

An “egregious lack of remorse” was defined as “the Defendant’s words or conduct demonstrated extreme indifference to harm resulting from the crime or were alternatively intended to aggravate that harm. In

determining whether the Defendant displayed an egregious lack of remorse, you may consider whether the Defendant's words or conduct: (1) increased the suffering of others beyond that caused by the crime itself, (2) were of a belittling nature with respect to the harm suffered by the victim, or (3) reflected an ongoing indifference to such harm. A defendant does not demonstrate an egregious lack of remorse by denying guilt, remaining silent, asserting a defense to the charge, or failing to take responsibility for the crime." RP, 1013-14.

During the jury deliberations, the jury asked to re-listen to Mr. Landstrom's statement, as recorded by Officer Janisch. RP, 1132. The court permitted the replaying of the statement. RP, 1134.

At sentencing, the State presented evidence that Mr. Godinez had four prior felony convictions: two juvenile counts of assault in the second degree (cause number 08-8-01346-5), second degree unlawful possession of a firearm (cause number 10-1-01105-1), and theft in the first degree (cause number 11-1-00672-7) RP, 1194. Cause number 11-1-00672-7 also included a misdemeanor conviction for assault in the fourth degree. RP, 1194.

The State called Community Corrections Officer Daniel Johnson to testify about his supervision status. CCO Johnson testified that as of November 28, 2012 Mr. Godinez was being supervised on cause number

11-1-00672-7 and was in warrant status. RP, 1198. On cross-examination he conceded he was being supervised only for the fourth degree assault, not the first degree theft. RP, 1199. Mr. Godinez argued he should not receive an offender score point for being on community custody CP, 136. The State conceded the robbery conviction and kidnapping convictions merge for purposes of sentencing. RP, 1200. The State argued, and the Court found, that Mr. Godinez was on community custody at the time of the offense. RP, 1202, 1246; CP, 144.

The biggest dispute at sentencing related to the issue of whether the attempted murder charge was separate and distinct from the kidnapping charge. RP, 1202, CP, 136. The parties repeatedly categorized this issue as one of whether the offenses constituted “same criminal conduct,” which, considering the current state of the case law is not surprising. RP, 1203. The trial court found that there was “some overlap as to criminal intent” between these two offenses and the victim was the same, but that the offenses occurred at a different time and place. RP, 1238-40. Therefore, the offenses did not constitute same criminal conduct and the offenses run consecutive, not concurrent. RP, 1240.

The Court imposed a sentence of 607.75 months. RP, 1250. Mr. Godinez appeals. RP, 161.

## C. ARGUMENT

### 1. The trial court erred by admitting Mr. Landstrom's hearsay statement, as recorded by Officer Janisch.

At trial, the State sought to introduce the 23-minute statement of Mr. Landstrom, recorded in the ambulance by Officer Janisch. The statement, concededly hearsay, was admitted by the trial court under four theories: excited utterance, then existing mental, emotional, or physical condition, statement made for medical diagnosis or treatment, and present sense impression. The trial court erred by admitting the statement.

Prior to reaching the merits of the various hearsay exceptions, it is worth noting that the court treated the 23-minute statement as a single statement. This in itself was error. The Washington Supreme Court has said that when an extended statement is to be admitted, the Court must analyze each sentence, or even portion of a sentence, separately and may not admit an extended narrative. The Court “construed the word ‘statement’ to mean ‘a single declaration or remark,’ as opposed to an extended declaration (narrative).” State v. Roberts, 142 Wash.2d 47114 P.3d 713 (2000), citing Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed 2d 476 (1994).

As will be discussed below, some of the sentences in the 23-minute narrative could arguably have been admitted as hearsay exceptions, such

as a then existing mental, emotional, or physical condition or as a statement for medical diagnosis or treatment. But if the court were to make such a ruling, it was incumbent on the trial court to parse the 23-minute statement into its tiny parts and review each statement for admissibility. The trial court made no effort to do so. In any event, the most relevant portions of the statement were clearly not admissible as a then existing mental, emotional, or physical condition or as a statement for medical diagnosis or treatment. Rather than analyze each sentence individually, the trial court blanketly admitted the entire statement, making it impossible for this Court to do anything but reverse the conviction for erroneous admission of the entire statement.

a. Excited Utterance

Officer Janisch testified when he contacted Mr. Landstrom, he was panicked, terrified, and thought he was dying. RP, 330. On the surface, this testimony would appear to qualify the statements as excited utterances. On closer examination, however, the recorded statement should have been excluded.

There are generally three requirements that must be satisfied for a hearsay statement to qualify as an excited utterance. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the

event or condition. Third, the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681826 P 2d 194 (1992). The declaration may “not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” State v. Brown, 127 Wn. 2d 749, 903 P 2d 459 (1995)

As to the first and third elements of an excited utterance, one can assume that the Mr Landstrom experienced an exciting event. The third element, that the statement relates to the startling event, can go either way. The statement is long, 23-minutes, and while most of the statement involves him answering questions about the startling event, he also throws in random, unrelated thoughts, like the fact that he grew up in Bogota and the La Center poker tables are \$500 per hand.

Most importantly, however, Mr. Langstrom was not under the stress of the exciting event at the time of the statement. While the timeline in this case is difficult to nail down, the exciting event must have occurred between two and three hours before the statements. The evidence showed Mr. Landstrom stopped close to Ms. Speaks’ residence to purchase a six pack of beer, paying for it at 1:26 a.m. The police began responding at 4:25 a.m. Officer Janisch testified he did not turn on the recorder for approximately ten to fifteen minutes.

In Chapin, the Court emphasized that the “key to the second element is spontaneity. Ideally, the utterance should be made contemporaneously with or soon after the startling event giving rise to it. This is because as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases. The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought.” Chapin at 687-88. In this case there was a two to three hour lapse of time between the startling event and the recorded statement. This gave Mr. Landstrom significant time to reflect and contemplate his story.

Not only was there a significant passage of time, but there is evidence of significant activity by Mr. Landstrom’s between the startling event and the recorded statement. First, once Mr. Landstrom escaped from his attacker, he jumped into a swamp and tried to camouflage himself with mud. He stayed in the swamp for a significant period of time waiting for the assailant to leave until the cold and pain compelled him out. Second, he walked barefoot down a dirt empty road for long period of time. He estimated the distance as a mile, but the record does not reflect the actual distance. In any event, given his shoeless state and his injuries, he was undoubtedly walking slowly towards a distant red light. Third, once he did locate a house, the occupant was less than cooperative,

ironically responding to his request that she call the police with, “Go away or I’ll call the police.” RP, 471. In sum, Mr. Landstrom had plenty of time to reflect on what he was going to say to law enforcement.

Finally, not only did a significant period of time elapse giving the witness an opportunity to contemplate, but there is evidence he actually did contemplate his answers. Mr. Landstrom, who had a girlfriend and made a point of mentioning his girlfriend, made the decision after contemplation to downplay the fact that he was contacting Ms. Speaks for a sexual encounter, probably as part of a prostitution deal. There is ample evidence in this record that Ms. Speaks was engaging in prostitution services with Mr. Landstrom. He invited her, a complete stranger, to his apartment to “clean it” and they ended up having sex and he paid her for her work. On November 27, 2012, she called him complaining about her electric bill, sending him a topless photo and “dirty” texts. This caused him to change his plans at 1:30 in the morning, go get a six pack of beer, and show up at her apartment ready to “get lucky.” Ms. Sparks testified he got very nervous when he realized it was “prostitution sting.” But when questioned on the recording about his motive for meeting her, he denied it was for a “date,” and said he was only there to help her, and had no intention of doing “anything” with her. Mr. Landstrom contemplated his

story and decided to deny he was there for prostitution services or “intimate relations.”

In Brown the Supreme Court concluded that the trial court had abused its discretion when it admitted a 911 tape made approximately 15 minutes after an alleged rape. The victim was a prostitute. Prior to calling 911, she reported the rape to a friend. They discussed whether she should reveal that she is a prostitute and decided against it. The Supreme Court held that the statements on the tape were not produced by a spontaneous response to the rape, but were the result of premeditation about how to answer difficult questions. The Court concluded its analysis as follows, “It is thus apparent that [the victim’s] testimony that she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call renders erroneous the trial court’s conclusion that the content of her call was admissible as an excited utterance.” Brown at 759. Likewise, Mr. Landstrom had the opportunity to and did in fact, decide to fabricate a portion of his story prior to talking to Officer Janisch. The trial court erred by admitting the recorded statement.

b. Then Existing Emotion or Physical Condition

The other three hearsay exceptions can be addressed more summarily. The exception for then existing mental, emotional, or physical condition clearly does not apply. While a few of the statements in the

recording arguably do relate to then existing emotional or physical conditions (e.g. “[T]here is pain [in my elbow]”), they are a tiny minority of the statements within the larger 23-minute recording. The relevant statements in the recording all relate to past events that had occurred two to three hours earlier and do not relate to any emotional or physical conditions. Had the trial court made some effort to parse the statement, it may have been within its discretion to admit some statements under this exception, but without any effort by the trial court to parse the recording, the admission of the entire recording under this exception was clearly error.

c. Medical Diagnosis and Treatment

Similarly, none of the relevant statements relating to the assault were made for medical diagnosis or treatment. Generally, the rule requires two things: (1) whether the declarant’s motive in making the statement was to promote treatment; and (2) whether the medical professional reasonably relied on the statement for purposes of treatment. State v. Price, 126 Wn.App. 617109 P 3d 27 (2005). In this case, the lion’s share of the statements were made to the police officer, not the ambulance personnel. Although a few of the statements were made to the ambulance personnel, the statements relevant to the case were all made in response to questions by the officer for the purpose of determining how

and by whom Mr. Landstrom was shot and not for the purpose of medical diagnosis or treatment. Officer Janisch testified the purpose of the interview was to reassure Mr. Landstrom and to preserve evidence. RP, 333. The purpose was not to promote treatment nor would the ambulance personnel reasonably have relied on the statements for treatment purposes.

d. Present Sense Impression

The final exception relied on by the judge, present sense impression, was not argued by the prosecutor. ER 803(a)(1) permits the court to admit present sense impressions from a witness regardless of availability. But this exception has been interpreted very narrowly in Washington because of the underlying Confrontation Clause concerns. State v. Hieb, 39 Wn.App. 273, 693 P.2d 145 (1984), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986). Washington courts noted in a pre-Crawford case that it is not a firmly rooted exception to the hearsay rule. State v. Martinez, 105 Wn.App. 775, 20 P.3d 1062 (2001); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In order to be admissible, a present sense impression must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design. Hieb, citing Beck v. Dye, 200 Wn. 1, 92 P.2d 1113 (1939). The rule requires that the statement be spontaneous, made while

the declarant was perceiving the event, or immediately thereafter. The statements may not be made in response to questions Hieb at 279. In Hieb, the Court of Appeals ruled that statements made several hours after the event did not qualify as a present sense impression.

In this case, the recording occurred two to three hours after the event in question and is made up almost entirely of questions and answers. It does not qualify as a present sense impression.

e. Harmless Error

The final issue related to the statement is whether its admission was harmless. Generally, erroneous admission of hearsay evidence requires reversal unless the “overwhelming untainted evidence supports the jury’s verdict.” Martinez, citing State v. Guloy, 104 Wn.2d 412, 705 P 2d 1182 (1985)

In this case, the jury heard two very different versions of what happened from two eyewitnesses. On the one hand, if Mr. Landstrom was believed, Mr. Godinez robbed him, took him to a remote area of Clark County, shot him repeatedly, and left him in a swamp to die. On the other hand, if Ms. Speaks was believed, she acted alone in robbing Mr. Landstrom at gun point, taking his wallet and keys and Mr. Godinez was only an accessory after the fact to using the stolen credit cards to get money. In determining which version of facts to believe, the most

powerful piece of evidence presented by the prosecutor was the 23-minute narrative taken by Officer Janisch. This statement, which was not subject to cross-examination, was taken just shortly after the event, is largely consistent with Mr. Landstrom's in court testimony, and was likely deemed by the jury as highly corroborative of his version of the events. The fact that the jury found it important is highlighted by the fact the jury asked it to be replayed during deliberations. It cannot be said that but for the erroneous admission of the statement "overwhelming untainted evidence supports the jury's verdict." Reversal is required.

2. The trial court erred by permitting Ms. Speaks to testify in a jail uniform after a timely objection from the defense.

Despite a timely objection, the trial court permitted Ms. Speaks to testify in jail attire. The trial court provided little reasoning for its decision and the decision seems to be primarily motivated by a desire to keep the trial moving and not inconvenience the jail. This decision was error and requires reversal.

It is well established constitutional error under the Due Process clause of the Fourteenth Amendment for a court to allow a defendant to appear in front of a jury dressed in jail attire. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In State v. Rodriguez, 146 Wn.2d 260, 45 P.3d 541, 545 (2002) the Washington Supreme Court

extended this logic to witnesses as well. In Rodriguez, the Court noted that the logic of Estelle had been extended to witnesses by every other Court to consider the issue. Rodriguez at 264. At least one other state has cited Rodriguez approvingly since its decision. People v. Bowman, 93 N.E.2d 970 (Ill. App. 2012)

In Rodriguez the Court also considered whether a government witness appearing in jail attire could be prejudicial error and concluded it could be, particularly when the witness was incarcerated for the same criminal act as the defendant on trial. Rodriguez at 261, citing United States v. Brooks, 125 F.3d 484 (7th Cir.1997)); State v. Charron, 743 S.W.2d 436 (Mo.Ct App.1987). In Washington, the presumption is that any witness, whether for the government or the defense, will appear in civilian clothes unless the trial court determines on the record after a hearing that sufficient security concerns exist to justify different attire Rodriguez at 272.

Whether the appearance of a witness in jail attire is reversible error depends on whether a timely objection is made and whether the error is harmless. Rodriguez at 269-70. In this case, Mr. Godinez made a timely objection, noting that it “diminishes the veracity of a witness when they’re in jail garb.” RP, 572. The trial court did not, as required by Rodriguez, conduct any hearing or make any findings justifying the appearance of Ms.

Speaks in jail attire and there does not appear in this record that any security concerns existed. This was error

The final question is whether the error requires reversal. Because the defendant in Rodriguez did not raise an objection until after the witness testified, the Washington Supreme Court did not determine the proper standard of review. In People v. Bowman, however, the Illinois Court of Appeals held that the standard is whether the error is harmless beyond a reasonable doubt.

In this case, the error of having Ms. Speaks testify in jail attire is not harmless beyond a reasonable doubt. This is true for the exact opposite reasons that the introduction of Ms. Landstrom's recorded interview was not harmless. As argued above, the jury heard two very different versions of what happened on November 27, 2012 from the only two eyewitnesses. Although Ms. Speaks was on both party's witness lists, the understanding of the trial judge was that she was going to appear in the defense case. The State decided on the eve of trial to call her as a government witness. RP, 100. If believed, Ms. Speaks' version of events would have completely exonerated Mr. Godinez of the charged offenses. On the other hand, Mr. Landstrom's version inculpated him of the charged offenses. The State's calculated strategy was to present Ms. Speaks' version as totally incredible and Mr. Landstrom's testimony as completely

credible. Pursuant to the strategy, just as they unfairly bolstered Mr. Landstrom's testimony with his 23-minute recorded interview, they unfairly undermined Ms. Speaks testimony by presenting her in jail attire. The error of requiring Ms. Speaks to testify in jail attire was not harmless beyond a reasonable doubt and reversal is required.

3. The trial court erred by adding one point to his offender score for being on community custody.

The Court gave him an additional offender score point for being on community custody. RCW 9.94A.525(19) This was error. RCW 9.94A.030(5) defines community custody as "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence *under this chapter* and served in the community subject to controls placed on the offender's movement and activities by the department." (Emphasis added.) RCW 9.94A.010 makes clear that sentencing "under this chapter" is limited to "felony offenders." As CCO Johnson's testimony makes clear, Mr. Godinez was being supervised for a misdemeanor assault offense, not a felony first degree theft offense. He was not on community custody and the trial court erred by adding one point to his offender score.

4. The trial court erred by treating the attempted first degree murder and first degree kidnapping as separate and distinct criminal conduct.

Mr. Godinez was sentenced to consecutive sentences for the attempted murder and kidnapping charges pursuant to RCW 9.94A.589(1)(b). At sentencing, defense counsel argued the two offenses constituted the “same criminal conduct” and should not be run consecutive. The trial court concluded the two offenses have the same criminal intent and same victim, but occurred at different times and places. Therefore, the trial court determined they were separate and distinct criminal conduct and ran them consecutive. This was error.

When a person is convicted of two or more serious violent offenses, the Court must run the sentences consecutive unless they constitute “separate and distinct criminal conduct.” RCW 9.94A.589(1)(b). Although there is no statutory definition of “separate and distinct criminal conduct,” it is well established that in determining whether criminal conduct is separate and distinct, Washington courts rely on the definition of “same criminal conduct” in RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); State v. Brown, 100 Wn.App. 104, 113, 995 P.2d 1278 (2000), *rev'd in part on other grounds by* 147 Wn 2d 330, 58 P.3d 889 (2002). If two or more crimes fail

to meet the statutory definition of “same criminal conduct,” they are necessarily “separate and distinct.” Cubias, 155 Wn 2d at 552

In State v. Dunaway, 109 Wash 2d 207743 P.2d 1237 (1987), the Supreme Court held that a defendant who pleaded guilty to robbing and kidnapping his victim should have his two crimes treated as same criminal conduct because the criminal intent of one was to further the criminal intent of the other, they occurred at the same time and place, and involved one victim. (The defendant actually pleaded guilty to two counts each of robbery and kidnapping because there were two victims. The Court analyzed each victim separately.) On the other hand, companion cases in Dunaway held that the criminal intent changed for two defendants convicted of robbery and attempted murder. The Court held that intent of the attempted murders was to escape the consequences of the robberies and did not further the intent of the robberies themselves.

In this case, the trial court concluded the criminal intent was the same and there was obviously only one victim. The issue then is whether they were committed at the same time and place. Courts have not applied a hyper-technical application to whether two or more offenses occurred at the same time and place. In State v. Price, 133 Wash 2d 177942 P.2d 974 (1997), the Supreme Court held that two offenses need not occur simultaneously in order to occur at the same time and place. The Court

cited with approval the case of State v. Calvert, 79 Wash.App. 569, 903 P.2d 1003 (1995), *review denied*, 129 Wash.2d 1005, 914 P.2d 65 (1996) where two check forgeries occurring at the same bank on the same day were treated as same criminal conduct even though it was unknown whether the checks were forged at the same time. In sum, the trial court erred by treating Mr. Godinez' offenses as separate and distinct criminal conduct.

D. Conclusion

This Court should reverse the conviction and remand for a new trial. In the alternative, reversal for a new sentencing hearing is required.

DATED this 9<sup>th</sup> day of December, 2014.

A handwritten signature in black ink that reads "Thomas E. Weaver". The signature is written in a cursive style with a large, sweeping initial "T" that extends over the first few letters of the name.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant

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

|                      |   |                                  |
|----------------------|---|----------------------------------|
| STATE OF WASHINGTON, | ) | Court of Appeals No : 46153-6-II |
|                      | ) |                                  |
| Respondent,          | ) | DECLARATION OF SERVICE           |
|                      | ) |                                  |
| vs                   | ) |                                  |
|                      | ) |                                  |
| PEDRO GODINEZ, Jr ,  | ) |                                  |
|                      | ) |                                  |
| Defendant.           | ) |                                  |

|                     |   |
|---------------------|---|
| STATE OF WASHINGTON | ) |
|                     | ) |
| COUNTY OF KITSAP    | ) |

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action, and:

On December 9, 2014, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and on that same date, a copy of said Brief was emailed to Clark County Prosecuting Attorney Anne Cruser and a copy was emailed to Michele Young at the Office of Public Defense through the Court of Appeals transmittal system.

On December 11, 2014, I e-filed a Motion for Extension and Waiver of Sanctions in the above-captioned case with the Washington State Court of Appeals, Division Two; and on that same date, a copy of said Brief was emailed to the Clark County Prosecuting Attorney's office and to Michelle Young at the Office of Public Defense through the Court of Appeals transmittal system.

On December 11, 2014, I deposited into the U.S. Mail, first class, postage prepaid, copies of the Brief of Appellant and the Motion for Extension and Waiver of Sanctions to the defendant:

////

1 Pedro Godinez, Jr., DOC #341908  
2 Clallam Bay Corrections Center  
3 1830 Eagle Crest Way  
4 Clallam Bay, WA 98326

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

7 DATED: December 11, 2014, at Bremerton, Washington

8   
9 \_\_\_\_\_  
10 Alisha Freeman

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A copy of this document has been emailed to the following addresses:

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