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Court of Appeals
Division III
State of Washington

NO. 29654-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

ANTONIO GARCIA VALLE,

APPELLANT.

BRIEF OF RESPONDENT

D. ANGUS LEE
PROSECUTING ATTORNEY

Edward A. Owens, WSBA #29387
Chief Deputy Prosecuting Attorney
Ryan Ellersick, WSBA #43346
Deputy Prosecuting Attorney
Attorneys for Respondent

PO BOX 37
EPHRATA WA 98823
(509)754-2011

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I. INTRODUCTION

Antonio Garcia Valle is a career criminal. After a two-day crime spree that involved breaking into two occupied homes—one with three children inside—Garcia Valle was apprehended by police. The State charged Garcia Valle with ten counts of felony and misdemeanor offenses. The jury convicted him of all but one count. Based on Garcia Valle's lengthy criminal history and high offender score, the trial court sentenced him to 20 years in prison. Garcia Valle now appeals, raising issues regarding the sufficiency of the evidence and the length of his sentence. This Court should affirm.

II. ISSUES

A. Is there sufficient evidence for any rational trier of fact to have found Garcia Valle guilty of (1) malicious mischief third degree, (2) coercion, (3) intimidating a witness, (4) unlawful imprisonment, and (5) residential burglary?

B. Was the State required to charge Garcia Valle with resisting arrest rather than obstructing a law enforcement officer where Garcia Valle was not under arrest at the time he fled?

C. Did the trial court err by imposing an exceptional sentence based on its finding that (1) Garcia Valle's prior unscored misdemeanor convictions resulted in a presumptive sentence that was clearly too lenient, and (2) Garcia Valle committed multiple current offenses and his high offender score would have resulted in some of the current offenses going unpunished?

III. STATEMENT OF THE CASE

On the morning of July 27, 2010, Tracy O'Shea was at home alone taking shower. 1 RP (Oct. 20, 2010) at 45-46, 49. From the bathroom, she heard some knocking at the front door. *Id.* at 46. Shortly after, she heard what sounded like items falling and being moved around inside the house. *Id.* at 48-49. Curious, she stepped out of the shower, wrapped herself in a towel, and went to open the bathroom door that led out to her master bedroom. *Id.* at 49-50. On opening the door, she discovered a man, later identified as Garcia Valle, standing in her bedroom. *Id.* at 50. She screamed. *Id.* Garcia Valle yelled at her to get back in the bathroom and stay there, and he forced the door closed. *Id.* at 51.

After approximately 10 seconds, Ms. O'Shea heard running sounds, so she decided to come out from the bathroom. *Id.* at 52. Finding that Garcia Valle was no longer in the home, she went to the sliding-glass back door and saw Garcia Valle fleeing towards a van. *Id.* at 52-54. He proceeded to throw several items into the van before climbing in and driving away. *Id.* at 54-55. As he was leaving, Garcia Valle slammed into an antique tractor on the O'Shea's property, causing the tractor to rotate 90 degrees and cracking one of its wheels. *Id.* at 56; 2 RP (Oct. 21, 2010) at 85-87. Ms. O'Shea immediately called the police. *Id.* at 57.

Deputy Hilliard, who was patrolling in the area, arrived at the scene within minutes. 2 RP (Oct. 21, 2010) at 76-77. Ms. O'Shea was shaken and scared. *Id.* at 77-78. Several items were determined missing from the O'Shea residence, including a camcorder and Ms. O'Shea's purse. 1 RP (Oct. 20, 2010) at 69-70. On further contact with the O'Sheas, Deputy Hilliard learned that their residence came equipped with security cameras, and that the cameras had taken photos of Garcia Valle's van and license plate number. 2 RP (Oct. 21, 2010) at 81-83. Deputy Hilliard eventually determined that the van was registered to Misty Gonzalez, who resided at an apartment complex in Quincy, Washington. *Id.* at 83.

The next morning, June 28th, Deputy Hilliard received a call that the suspect van was parked at Misty Gonzalez's residence. *Id.* at 93-94. Deputy Hilliard responded and made contact with Ms. Gonzalez. *Id.* at 94. After explaining that he was investigating an incident involving her van, Ms. Gonzalez told Deputy Hilliard that she had let her boyfriend, Garcia Valle, borrow the van on the morning of June 27th. *Id.* at 102-03. She also advised Deputy Hilliard that she had dropped Garcia Valle off at another residence on Road 10 NW the day before. *Id.* at 105, 111. Hoping to make contact with Garcia Valle, Deputy Hilliard requested that

Officer McMillan and Sergeant Snyder take up surveillance at the Road 10 NW residence until he could arrive. *Id.* at 12, 106

Officer McMillan and Sergeant Snyder responded in separate vehicles. *Id.* While Deputy Hilliard was en route, Sergeant Snyder observed the owner of the Road 10 NW residence drive by with a passenger. *Id.* at 13, 126.[1] Officer McMillan began following the vehicle, with Sergeant Snyder a short distance behind. *Id.* at 13. Before Officer McMillan could initiate a traffic stop, the suspect vehicle suddenly pulled to the side of the road. *Id.* at 126. The passenger, later identified as Garcia Valle, jumped out of the vehicle and took off running. *Id.* at 126, 128.

Sergeant Snyder pursued Garcia Valle on foot, yelling "Stop. Police." *Id.* at 15. Garcia Valle continued to flee, eventually secreting himself in a nearby cornfield. *Id.* at 16. By that time, numerous officers had arrived and began to set up a perimeter around the cornfield. *Id.* at 16-17. While they waited for Garcia Valle to emerge, a crop dusting plane on a routine mission sprayed the field with pesticides. *Id.* at 16. Garcia Valle was soaked with the dangerous chemicals, forcing him to remove his shirt to wipe his face. 3 RP (Oct. 22, 2010) at 46-47. Shortly after, a

[1] It is unclear from the record, but Sergeant Snyder apparently recognized the owner of the home they were surveilling based on prior contacts.

police helicopter arrived to help officers pin down Garcia Valle's location. 2 RP (Oct. 21, 2010) at 17. Just as the helicopter reached the cornfield, Sergeant Snyder spotted Garcia Valle come out from hiding and start running again. *Id.* at 18-19. The officers again gave chase. *Id.* at 18.

Nearby, Leticia White was house sitting for her in-laws along with her three children: an eleven-year-old daughter, nine-year-old daughter, and five-year-old son. *Id.* at 143. As she was sitting in the living room, she heard someone come in the back door. *Id.* at 144. Excited and thinking it was her husband home early from work, Ms. White turned her attention to her five-year old son who was standing nearby facing the back door. *Id.* at 144, 146. She noticed a look of alarm on his face. *Id.* at 146. Garcia Valle then walked into the living room. *Id.* at 147.

Ms. White noticed that Garcia Valle was anxious and thought he might be hurt. *Id.* at 147. But he immediately told her not to tell the cops he was in the home. *Id.* Realizing what was happening, Ms. White became fearful. *Id.* at 147-48. Concerned for the safety of her children, she began thinking of ways to get away. *Id.* at 148. However, her 11-year-old daughter was asleep in one of the bedrooms. *Id.* And she was afraid that if she tried to move it would make Garcia Valle angry. *Id.*

Garcia Valle began pacing back and forth, again commanding Ms. White not to tell the cops he was there. *Id.* at 149. Feeling that Garcia

Valle's presence prevented them from escaping, she thought of ways to protect her children. *Id.* When Garcia Valle went to get a drink of water from the kitchen, Ms. White grabbed her son and nine-year-old daughter and told them to lock themselves in the bedroom with the other daughter. *Id.*

Feeling "a lot more afraid" at that point, Ms. White watched Garcia Valle walk down the hallway and into the master bedroom. *Id.* at 149, 152. He then entered and exited the bedroom several times, pacing back and forth. *Id.* at 153. Ms. White tried to avoid making any eye contact. *Id.*

As she was desperately trying to decide what to do, Ms. White saw a police officer directly outside the home. *Id.* at 152. She motioned to the officer letting him know that Garcia Valle was inside. *Id.* She then opened the door and several officers came inside announcing their presence. *Id.* at 133, 153. After a brief struggle, the officers apprehended Garcia Valle in the master bathroom. *Id.* at 133-34. Ms. White later discovered that the door to the master bedroom had broken hinges and that the master-bedroom closet was in disarray. *Id.* at 154.

The State charged Garcia Valle with multiple offenses stemming from his two-day crime spree: residential burglary of the O'Shea residence (count I); residential burglary of the White residence (count II); malicious

mischief in the third degree for damage to the O'Shea's tractor (count III),[2] or, alternatively, hit and run involving damage to the O'Shea's tractor (count IV)[3]; theft in the second degree from the O'Shea residence (count V); obstructing a law enforcement officer (count VI); malicious mischief in the third degree for damage to the White's door (count VII); unlawful imprisonment (count VIII); coercion (count IX); and intimidating a witness (count X). CP at 108-11.

At the close of the State's case in chief, Garcia Valle moved to dismiss several of the charges for insufficient evidence. Regarding count III for malicious mischief, Garcia Valle argued there had been no evidence of damage. 2 RP (Oct. 21, 2010) at 170. The court denied the motion citing the photographs the State had admitted into evidence. *Id.* at 171; *see also* State's Suppl. Designation of CPs, Ex.'s 27-29. On the obstructing charge under count VI, Garcia Valle argued that the State should have charged resisting arrest, which he asserted was the more specific statute. *Id.* at 173. The court denied that motion because Garcia Valle was not under arrest during the pursuit. 3 RP (Oct. 22, 2010) at 5. Garcia Valle also moved to dismiss the unlawful imprisonment charge under count VIII, the coercion charge under count IX, and the intimidating

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[2] Count III was originally charged as malicious mischief in the second degree, but was amended down to third degree at trial. 2 RP (Oct. 21, 2010) at 170-71.
[3] The hit-and-run charge was later dismissed. CP 388.

a witness charge under count X. 2 RP (Oct. 21, 2010) at 175, 178-79. The court denied the motions, finding that Garcia Valle had failed to meet his burden of showing that no rational trier of fact could find him guilty of the charges. 3 RP (Oct. 22, 2010) at 18.

After a three-day trial, the jury found Garcia Valle guilty on eight of the remaining nine counts. CP 174-83. He was found not guilty of count VII, malicious mischief in the third degree involving damage to the White's door. CP 180.

At sentencing, the trial court found that Garcia Valle had 14 prior felony convictions, in addition to the 5 felony convictions on the current case. CP at 188. The court also found that Garcia Valle's offender score based on prior and current felony convictions was 16 at a minimum, and that he had 30 misdemeanor and gross misdemeanor convictions dating back to 1992. *Id.* Given these findings, the court concluded that an exceptional sentence was appropriate because (1) "[t]he defendant's prior unscored misdemeanor results in a presumptive sentence that is clearly too lenient in light of RCW 9.94A.010," and (2) "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished and would result in a sentence that is clearly too lenient in light of RCW 9.94A.010." CP at 189.

The court imposed the statutory maximum of 120 months, rather than a standard range sentence of 63-84 months, on both counts of residential burglary, and the court ordered that the sentences run consecutive. CP 391-93. The court imposed standard range sentences at the high end on the remaining felony convictions and ran them concurrent with the burglary sentences. CP at 393. Garcia Valle appealed.[4]

IV. ARGUMENT

A. Sufficient Evidence Exists to Support the Jury's Verdict of Guilty

Evidence is sufficient if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* at 201.

[4] In preparing this brief, the State discovered that Count VII (malicious mischief third degree for damage to the White's door) was mistakenly included in Garcia Valle's judgment and sentence as a conviction. *Compare* CP 180 (verdict form indicating Garcia Valle found "not guilty" of count VII), *with* CP 388-89 (judgment and sentence indicating Garcia Valle found "guilty" of count VII). At sentencing, the trial court properly found that Garcia Valle had been acquitted on count VII and did not sentence him on that charge. RP (Jan. 10, 2011) at 19.

1. Sufficient Evidence Exists to Support the Jury's Verdict of Guilty for Malicious Mischief In the Third Degree

Malicious mischief in the third degree requires a showing that the defendant "[k]nowingly and maliciously cause[d] physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree [i.e. not exceeding $750]." RCW 9A.48.090(1)(a); *see also* RCW 9A.48.080(1)(a) (describing malicious mischief in the second degree as damage in excess of $750).

The evidence at trial showed that Garcia Valle slammed into the O'Shea's antique tractor as he was fleeing the scene of the crime in his van. The van rammed the tractor hard enough to rotate the tractor approximately 90 degrees. 1 RP (Oct. 20, 2010) at 56; 2 RP (Oct. 21, 2010) at 85-87. The collision also cracked the tractor's wheel. 2 RP (Oct. 21, 2010) at 85-87. The State introduced several photographs to highlight for the jury the extent of the tractor's damage. *See* State's Suppl. Designation of CPs, Ex.'s 27-29. Given this evidence, a rational trier of fact could find Garcia Valle guilty of malicious mischief in the third degree.

Garcia Valle argues that the evidence is lacking because there was no testimony regarding damage in terms of a dollar amount. But the statute in effect at the time Garcia Valle committed the crime did not

require a showing of a minimum dollar amount of damage. RCW 9A.48.090(1)(a); *see also* Laws of 2009, ch. 431 §§ 6, 20 (removing the requirement for $50 minimum damage and making all malicious mischief third degree offenses gross misdemeanors for crimes committed on or after September 1, 2009).

The confusion here stems from the apparent error in the jury instructions, which instructed the jury that it must find the damage to have exceeded $50 in order to convict on malicious mischief third degree. CP 144-45. This error was harmless. "An erroneous instruction is harmless if, from the record in a given case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). Rather than prejudicing Garcia Valle, the apparent error in the jury instruction actually worked to his benefit by requiring the State to prove something it did not have to prove under the law. Had the jury instruction not included the $50 minimum requirement, the verdict would have been the same. Because the instructional error is harmless and sufficient evidence supports the jury's finding of guilty, the conviction for malicious mischief third degree should be affirmed.

2. Sufficient Evidence Exists to Support the Jury's Verdict of Guilty on the Charge of Coercion

"A person is guilty of coercion if by use of a threat he compels or induces a person . . . to abstain from conduct which [the person] has a legal right to engage in." Former RCW 9A.36.070(1) (1975). The word "threat" means "[t]o communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." Former RCW 9A.36.070(2)(a). "Threat" also means "to communicate directly or indirectly the intent: (a) [t]o cause bodily injury in the future to the person threatened or to any other person; or (b) [t]o cause physical damage to the property of a person other than the actor; or (c) [t]o subject the person threatened or any other person to physical confinement or restraint." Former RCW 9A.04.110(27)(a)-(c) (2007); former RCW 9A.36.070(2)(b).

Given these definitions, a defendant may be found guilty of coercion if he or she (1) compels a person to abstain from conduct the person has a legal right to engage in (2) by communicating "indirectly" the intent to subject the person to physical confinement or restraint.[5]

"Determining what counts as an indirect communication of intent to cause physical harm depends on the totality of the circumstances."

[5] The jury was also given the "true threat" pattern jury instruction. CP 167; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.24 (3d Ed).

State v. Harvill, 169 Wn.2d 254, 260, 234 P.3d 1166 (2010) (construing the definition of "threat" under RCW 9A.04.110(27)(a) in the context of the duress statute). The absence of "or else" language is not dispositive, as it proves only that no *direct* threat occurred. *Id.* Still, the victim's "perception of the implicit threat [must be] reasonable under the circumstances." *Id.* at 262.

In *Harvill*, the police organized a controlled buy of cocaine between Harvill and the police informant Nolte. After Harvill was arrested and charged with supplying cocaine to Nolte, Harvill argued he was entitled to a jury instruction on duress based on Nolte's implied threats. Harvill testified that, in the days leading up to the drug transaction, Nolte called Harvill multiple times saying in an aggressive tone, "'You gotta get me something,' or 'You better get me some cocaine.'" *Id.* at 257. Nolte never said "or else" or words to that effect. On review, the Supreme Court looked at Nolte's statements together with the fact that Harvill was five inches shorter and 60 pounds lighter than Nolte. The Court also took into account the fact that Harvill was aware of Nolte's violent history. Given the totality of the circumstances, the Court held that Harvill was entitled to an instruction on duress based on Nolte's indirect threat. *Id.* at 263.

Here, a rational trier of fact could find that Garcia Valle's actions in the White residence rose to the level of coercion. First, Garcia Valle threatened Ms. White by indirectly communicating the intent to subject her to physical confinement or restraint. After breaking into the home and approaching Ms. White in the living room, Garcia Valle told her not to tell the cops he was there. 2 RP (Oct. 21, 2010) at 147. She was at home alone with her three children. *Id.* at 143. She did not feel free to leave and was afraid to move, thinking it may set Garcia Valle off. *Id.* at 148-49. As Garcia Valle paced back and forth, he continued telling her not to tell the cops he was in the home. *Id.* at 149. Ms. White did not know whether Garcia Valle was violent or armed with a weapon. All she knew was that a man had broken into the home, she was alone with her children, and he was repeatedly telling her not to tell the cops he was there. Under the totality of the circumstances, Garcia Valle's words and conduct could reasonably be perceived by Ms. White as a threat to restrain her and her children.

Second, Garcia Valle's indirect threat compelled Ms. White to abstain from conduct she had a legal right to engage in—namely, calling the police. A reasonable person in Ms. White's position would not have felt free to pick up the phone and dial 911. She could not simply disregard Garcia Valle's command and risk the consequences of potential violence

against her and her children. Because there is sufficient evidence showing that Garcia Valle's indirect threat prevented Ms. White from calling the police, his conviction for coercion should be affirmed.

3. Sufficient Evidence Exists to Support the Jury's Verdict of Guilty for Witness Intimidation

Witness intimidation requires a showing that the defendant, "by use of a threat against a current or prospective witness, attempt[ed] to . . . [i]nduce that person not to report the information relevant to a criminal investigation." Former RCW 9A.72.110(1)(d) (1997). The phrase "current or prospective witness" means "[a] person whom the actor has reason to believe may have information relevant to a criminal investigation." Former RCW 9A.72.110(3)(b)(iii). "Threat" means "[t]o communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." Former RCW 9A.72.110(3)(a)(i). "Threat" may also be defined in accordance with the various definitions under former RCW 9A.04.110(27). *See* former RCW 9A.72.110(3)(a)(ii).

A rational trier of fact could find that Garcia Valle was guilty of witness intimidation. As noted above, Garcia Valle indirectly threatened Ms. White (1) based on his commanding her not to tell the police he was in the home and (2) the surrounding circumstances of the home invasion.

Ms. White qualified as a "current or prospective witness," because Garcia Valle had reason to believe that—having witnessed him break into the home to evade the police—Ms. White would have information relevant to a criminal investigation. Finally, Garcia Valle's statement to Ms. White had the express purpose of discouraging her from reporting information relevant to a criminal investigation.

Importantly, the witness intimidation statute "criminalizes threats made to induce a person not to report a crime and, necessarily, threats made *before an investigation is commenced.*" *State v. James*, 88 Wn. App. 812, 817, 946 P.2d 1205 (1997) (emphasis added). Accordingly, Garcia Valle's indirect threat designed to prevent Ms. White from reporting him to the police constituted witness intimidation. Because sufficient evidence supports this finding by the jury, Garcia Valle's conviction should be affirmed.

4. Sufficient Evidence Exists to Support the Jury's Verdict of Guilty for Unlawful Imprisonment

A person is guilty of unlawful imprisonment if "he knowingly restrains another person." Former RCW 9A.40.040 (1975). "'Restrain' means [1] to restrict a person's movements [2] without consent and [3] without legal authority [4] in a manner which interferes substantially with his liberty." Former RCW 9A.40.010(1) (1975). The statute goes on to

explain that "[r]estraint is 'without consent' if it is accomplished by [] physical force, intimidation, or deception." *Id.* A defendant's actions must be done "knowingly" as to each component of the offense. *State v. Warfield*, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000).

Garcia Valle does not appear to dispute that sufficient evidence exists showing that he restricted Ms. White's movements, that he did so without legal authority, and that he interfered substantially with her liberty. Rather, he argues that there was no evidence that the restriction of Ms. White's movements was "without consent." Appellant's Br. at 10. Specifically, Garcia Valle claims that no evidence shows "intimidation" of Ms. White resulting from his unexpected presence in her living room. This argument fails.

While the word "intimidation" is not defined under the unlawful-imprisonment statute, the witness-intimidation statute does provide some guidance. As noted above, the witness-intimidation statute appears to equate "intimidation" with "threat" and defines the latter term consistent with general definition of threat under former 9A.04.110(27). *See* former RCW 9A.72.110(1)(d). Thus, a person may be "intimidated" as a result of an indirect threat to subject the person to physical confinement or restraint. Former RCW 9A.04.110(27)(c). Such a threat would therefore also render any restraint "without consent" for purposes of unlawful imprisonment.

Here, a rational trier of fact could find that Garcia Valle restrained Ms. White "without consent." Garcia Valle's indirect threat to Ms. White constituted "intimidation." And the jury could infer based on the circumstances that Garcia Valle knew his command not to call the police—combined with his unwanted and unexpected presence in the house—was intimidating and threatening. Sufficient evidence supports the jury's finding that Garcia Valle unlawfully imprisoned Ms. White.

Garcia Valle also argues that the unlawful-imprisonment conviction must be reversed based on the incidental-restraint doctrine as outlined in *State v. Elmore*, 154 Wn. App. 885, 228 P.3d 760 (2010). This argument likewise fails. As *Elmore* points out, "restraint does not inhere in the crime of burglary." *Elmore*, 154 Wn. App. at 902. A residential burglary is accomplished when the defendant enters the residence with intent to commit a crime therein. *See id.* Any restraint of occupants in the home is therefore supplementary to the actual commission of the burglary. Garcia Valle has not shown that his unlawful imprisonment of Ms. White "was so incidental to the burglary that it could not support a separate conviction." *Id.* at 903. The conviction for unlawful imprisonment should therefore be affirmed.

5. Sufficient Evidence Exists to Support the Jury's Verdict of Guilty for Residential Burglary

Residential burglary requires a showing that the defendant (1) "enter[ed] or remain[ed] unlawfully in a dwelling" (2) "with intent to commit a crime against a person or property therein." Former RCW 9A.52.025(1) (1989).

A rational trier of fact could find these elements met based on Garcia Valle's actions in the White residence. As to the first element, the evidence at trial showed that Garcia Valle entered the residence knowing it was occupied. 3 RP (Oct. 22, 2010) at 56. He admitted to doing so without permission. *Id.* After breaking into the home, Garcia Valle remained unlawfully for several minutes, placing Ms. White and her children in a state of shock and fear. Garcia Valle did not leave the residence until he was extracted from the master bathroom by the police.

The evidence also showed that Garcia Valle had the intent to commit a crime against a person in the home. After breaking into the residence, Garcia Valle proceeded to commit several crimes against Ms. White, including coercion, intimidating a witness, and unlawful imprisonment. Each of these offenses involved a threat to restrain Ms. White or otherwise prevent her from calling the police. Whether Garcia Valle formed the intent to commit these crimes before or after he entered

the home is immaterial. *See State v. Frye*, 36 Wn. App. 312, 313-14, 673 P.2d 881 (1983). In either case, he formed the requisite intent to commit a crime in the dwelling.

Garcia Valle argues that evidence of intent to commit a crime was so lacking that a rational juror could not reach a finding of guilt even relying on the inference instruction for burglary. As Garcia Valle points out, the inference instruction "does not relieve the State from meeting its evidentiary burden to prove a defendant's intent to commit a crime therein." *State v. Stinton*, 121 Wn. App. 569, 573, 89 P.3d 717 (2004). Yet while the State must prove the requisite intent, "'the standard of proof regarding a permissive inference is more likely than not.'" *Id.* (quoting *State v. Snedden*, 112 Wn. App. 122, 127, 47 P.3d 184 (2002)). Here, that standard was met, given the evidence of Garcia Valle's additional crimes committed in the White residence.

Garcia Valle also claims that evidence of intent to commit a crime was absent because his actual intent was to hide from the police. But Garcia Valle's intent to evade police did not negate his intent to commit crimes in the White residence. While the evidence shows that Garcia Valle was attempting to hide, the evidence likewise shows that he intended

to, and in fact did, commit several crimes in the house. Garcia Valle's conviction for residential burglary should therefore be affirmed.[6]

B. The State Properly Charged Garcia Valle with Obstructing a Law Enforcement Officer Because Garcia Valle was Not Under Arrest When He Fled

"[W]hen a specific statute punishes the same conduct punished under a general statute, they are concurrent statutes and the State must charge only under the specific statute." *State v. Presba*, 131 Wn. App. 47, 52, 126 P.3d 1280 (2005) (citing *State v. Shriner*, 101 Wn.2d 576, 681 P.2d 237 (1984)). Statutes are concurrent where the general statute is violated every time the specific statute is violated. *Id.* (citing *Shriner*, 101 Wn.2d at 580). Stated differently, "'[a]ll of the elements required to be proved for a conviction of [the general statute] are also elements that must be proved for conviction of [the specific statute].'" *Id.* (quoting *Shriner*, 101 Wn.2d at 579-80).

These rules of statutory construction do not apply in this instance to require the State to have charged Garcia Valle with resisting arrest.

[6] If the court determines that none of the predicate crimes survive because there was no "threat," the residential burglary conviction should still be affirmed. If the court decides there was no threat under on the witness-intimidation charge, for example, the proper remedy would be to remand for entry of a conviction on the lesser-include offense of witness tampering. *See, e.g., State v. Montejano*, 147 Wn. App. 696, 703-04,196 P.3d 1083 (2008); *see also State v. Meneses*, 169 Wn.2d 586, 238 P.3d 495 (2010) (noting that witness tampering is a lesser included of witness intimidation, the only difference being the element of a "threat").

While resisting arrest is a more specific statute than obstructing a law enforcement officer, resisting arrest was not the appropriate charge in this case. Garcia Valle was simply not under arrest at the time he fled from the police.

The crime of resisting arrest requires a showing that the defendant "intentionally prevent[ed] or attempt[ed] to prevent a peace officer from lawfully arresting him." Former RCW 9A.76.040(1) (1975). Absent an arrest, there could be no resisting of the arrest. Here, the evidence shows that police officers did not place Garcia Valle under arrest at the time he began running. There was no evidence that police ever yelled "you're under arrest." 2 RP (Oct. 21, 2010) at 175. Instead, the evidence established that Garcia Valle obstructed a law enforcement officer by hindering and delaying an investigation. *Cf. State v. Devitt*, 152 Wn. App. 907, 911-12, 218 P.3d 647 (2009) (equating running from the police to avoid capture with obstructing a law enforcement officer).[7]

[7] To the extent Garcia Valle challenges the sufficiency of the evidence on the obstruction charge, the evidence of his running from police is enough to allow a rational trier of fact to find him guilty.

C. The Court Properly Imposed an Exceptional Sentence Under RCW 9.94A.535(2)(c) Based on its Finding that Garcia Valle's High Offender Score Would Result in Some of the Current Offenses Going Unpunished

Whether an exceptional sentence violates the Sixth Amendment is a question of law reviewed de novo. *State v. Newlum*, 142 Wn. App. 730, 737, 176 P.3d 529 (2008) (citing *State v. Saltz*, 137 Wn. App. 576, 580, 154 P.3d 282 (2007)).

RCW 9.94A.535(2) authorizes a trial court to impose an exceptional sentence without findings of fact by a jury in four circumstances, including:

> (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is *clearly too lenient* in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
>
> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current *offenses going unpunished.*

Former RCW 9.94A.535(2)(b)-(c) (2010) (emphasis added).

The Washington Supreme Court recently affirmed that "[t]he determination under RCW 9.94A.535(2)(c) that 'some of the current offenses [go] unpunished' rests solely on criminal history and calculation of the offender score, without the need for additional fact finding by the jury." *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). Accordingly, the Court held that an exceptional sentence imposed under

RCW 9.94A.535(2)(c) does "not violate the Sixth Amendment right to a jury trial as defined in *Blakely*." *Id.*

Here, the trial court imposed an exceptional sentence based primarily on a finding under RCW 9.94A.535(2)(c) that some of Garcia Valle's current offenses would go unpunished due to his high offender score. CP at 188-89. As stated in *Alvarado*, this finding rested "solely on criminal history and calculation of the offender score," *Alvarado*, 164 Wn.2d at 569, and therefore did not require any fact finding by the jury. The exceptional sentence imposed on this ground was proper.

Garcia Valle contends that because the trial court also relied on the "clearly too lenient" finding under RCW 9.94A.535(2)(b), the exceptional sentence must be reversed. Unlike the "offenses going unpunished" finding under RCW 9.94A.535(2)(c), the "clearly too lenient" finding under RCW 9.94A.535(2)(b) has been construed to require a jury determination under *Blakely*. *Saltz*, 137 Wn. App. at 583; *see also State v. Hughes*, 154 Wn.2d 118, 137, 110 P.3d 192 (2005) *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In other words, while RCW 9.94A.535(2)(b) authorizes a *trial court* to find that a sentence is "clearly too lenient," courts have interpreted this subsection to run afoul of *Blakely* unless a *jury* makes the finding of "clearly too lenient." *See id.*

While the trial court here made a finding that the presumptive sentence was "clearly too lenient," Garcia Valle's exceptional sentence need not be reversed. The sentence can stand independently on the separate finding of "offenses going unpunished" under RCW 9.94A.535(2)(c).[8]

"Not every aggravating factor cited must be valid to uphold an exceptional sentence." *Hughes*, 154 Wn.2d at 134. Where, for example, "'the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing.'" *Id.* (quoting *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)). Stated differently, "[r]emand is not necessary if the appellate court is confident the court would impose the same sentence upon considering only valid factors." *Saltz*, 137 Wn. App. at 586 (citing *State v. Ross*, 71 Wn. App. 556, 567, 861 P.2d 473 (1993)).

The record of the sentencing hearing shows that the State and the trial court were primarily concerned that, because of Garcia Valle's

[8] The trial court's finding on the "offenses going unpunished" factor under RCW 9.94A.535(2)(c) also incorporated the "clearly too lenient" language from subsection (2)(b) that had already been mentioned in a separate finding. CP at 189. This repetition in the language from subsection (2)(b) was nothing more than surplusage and does not negate the trial court's proper finding under subsection (2)(c).

offender score and multiple offenses, some of the offenses would go unpunished. In making its recommendation to the court, the State commented, "[L]ooking at his criminal history he's going to get, if he has nineteen points right now Judge, nine is the max[,] he's getting ten free walks. Ten free. Okay, I'm going to commit all these crimes, nothings [sic] going to happen to me[,] this is the most I can get." RP (Jan. 10, 2011) at 4-5. In making its findings, the court stated, "I am finding that . . . the multiple defense [sic] policy of the . . . act . . . . supports an exceptional sentence." *Id.* at 14.

This Court can be confident that the trial court would impose the same exceptional sentence taking into account only the finding that some of Garcia Valle's offenses would go unpunished. Accordingly, the exceptional sentence should be affirmed.

V. CONCLUSION

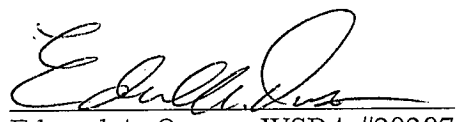
Garcia Valle's convictions for (1) malicious mischief third degree (O'Shea), (2) coercion, (3) witness intimidation, (4) unlawful imprisonment, and (5) residential burglary (White) should be affirmed based on the sufficiency of the evidence. Garcia Valle's conviction for obstructing a law enforcement officer should likewise be affirmed because the State was not required to charge him with resisting arrest. Finally, this Court should affirm Garcia Valle's exceptional sentence as properly

imposed under the "offenses going unpunished" factor in RCW 9.94A.535(2)(c).

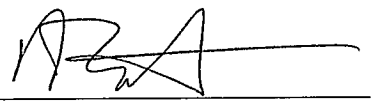
DATED this 20 day of January, 2012

Respectfully submitted:

D. ANGUS LEE
Grant County Prosecuting Attorney



Edward A. Owens, WSBA #29387
Chief Deputy Prosecuting Attorney



Ryan J. Ellersick, WSBA #43346
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. ANTONIO GARCIA VALLE, Appellant.	)	No. 29654-7-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kenneth H. Kato
khkato@comcast.net

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Antonio Garcia Valle
c/o Kenneth H. Kato
1020 N. Washington St.
Spokane WA 99201

Dated: January 20, 2012.

Kaye Burns