Supreme Court No. ____
(COA No. 386872-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MITCHELL CRANE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mitchell Crane, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review pursuant to RAP 13.3 and RAP 13.4.

B. ISSUES PRESENTED FOR REVIEW

1. In *State v. Hatt*, Division I of the Court of Appeals found that when a person is convicted for both being a felon in possession of a firearm and for possession of the same unlawful firearm, these offenses were the same criminal conduct because the objective criminal intent in committing the two crimes was the same: to possess the firearm. 11 Wn. App. 2d 113, 141, 452 P.3d 577 (2020). In Mr. Crane's case, Division III reached the opposite conclusion after this Court's decision in *State v. Westwood,* 2 Wn.3d 157, 534 P.3d 1162 (2023), even though *Westwood* upholds *State v.*

Dunaway's objective intent analysis upon which Division I based its decision in *Hatt*. 11 Wn. App. 2d at 142 (citing *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987)). This Court should accept review to guide courts in the application of *Westwood* and resolve this division split. RAP 13.4(b)(1),(2).

2. The offense of witness intimidation is committed if a person attempted to influence a current or prospective witness's testimony by threatening them. Testimony is defined as any statement offered by a witness in an "official proceeding." The evidence at trial was that Mr. Crane told his neighbor he would kill the person who reported him to Fish and Wildlife, but not that he tried to influence any person's "testimony." This Court should accept review to ensure people are not convicted of witness tampering for generalized

threats unrelated to any official proceeding. RAP 13.4(b)(3).

3. The court instructed the jury that to convict Mr. Crane of unlawful possession of a firearm, the State had to prove he knowingly possessed each particular gun identified by its make, model, and/or serial number in the to-convict instruction. The trial evidence did not show Mr. Crane knowingly possessed these specific firearms. This Court should accept review because the Court of Appeals erred in finding the evidence was sufficient to establish the element of knowing possession of specifically identified firearms. RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Mitchell Crane lived next to his mother, Trudy Crane, in rural Finley, Washington. RP 285.[1] Like many people in this part of rural Washington, Mr. Crane's family's pastime was hunting, and he raised his now-adult son, Andrew, to hunt as well. RP 325.

Fish and Wildlife began an investigation of Mr. Crane for deer poaching. RP 275–76, 268. The Department obtained a search warrant for Mr. Crane's home where he had lived with his girlfriend, Nadine Lacotti. RP 275–76. Officers arrived on the Crane property in three to four trucks with emergency lights flashing. RP 199. Mr. Crane was not home, but Ms. Lacotti was. RP 198.

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[1] "RP" citations reference the consecutively paginated VRP from the trial. Reference to any other hearings will include the date of the hearing followed by the page number.

The officers raided Mr. Crane's home and shop. RP 194, 201, 226. They found 27 firearms in the primary bedroom of the house. RP 271. There was a gun safe, but it was open, and firearms were lying outside of it. RP 244. The officers also searched Mr. Crane's workshop on the property and found two firearms in a toolbox, one of which had a barrel under 18 inches long, which was below the legal length for a shotgun. RP 244–45.

Mr. Crane arrived home about 45 minutes to an hour after Fish and Wildlife officers had arrived. RP 200. Mr. Crane said the residence and shop were his. RP 202–03. When the officer first asked Mr. Crane about the firearms, Mr. Crane said, "most . . . belonged to him," some belonged to his son, and some to Ms. Lacotti. RP 203. He said the firearms were stored in a gun safe for which only Ms. Lacotti had a key. RP 203.

Mr. Crane did not specify which firearms were his and which belonged to other people. RP 205–06. The officer never asked Mr. Crane which guns had been brought to his house, and the officer never took Mr. Crane into the bedroom to show him the specific guns they had found. RP 209.

Mr. Crane told the officer the two guns found in the shop were "replicas" he had gotten from an acquaintance. RP 207. He was refurbishing them. RP 207. There were paper shells located in the shop intended for older firearms. RP 230.

Fish and Wildlife seized all the guns they found in the bedroom and the shop. RP 220. The State charged Mr. Crane with 29 counts of unlawful possession of a firearm for each of them, in addition to

charging him with possession of an unlawful firearm for the short-barreled shotgun. CP 10–18.[2]

The officers took photographs of each gun. RP 220. Another officer prepared a PowerPoint slide with photographs taken that day. RP 278. The officer added wording on the slide that included each gun's make, model, and/or serial number. RP 278–79; Ex. 1–54. The State showed these PowerPoint slides to the jury at trial. *Id.*

Trudy Crane, Mr. Crane's mother, testified that because Mr. Crane could not lawfully possess firearms, they were to be passed on to his son, Andrew. RP 291. She believed that Ms. Lacotti was holding them for Andrew until he had a place to store them. RP 291.

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[2] Mr. Crane stipulated to a prior offense that made him ineligible to possess firearms. CP 19.

Andrew testified that, indeed, because his dad could not lawfully possess firearms, he stored these guns that he considered his, with his stepmother, Ms. Lacotti. RP 299. He also said the toolbox in his dad's shop belonged to him, along with the guns found there. RP 303.

Andrew Kienholz lived with his dad and family about five or six miles from where Mr. Crane lived. RP 183. Andrew Kienholz had anonymously spoken to Fish and Wildlife about Mr. Crane and was aware of their investigation. RP 183–84.

After the Fish and Wildlife raid of his house, Mr. Crane drove to Andrew Kienholz's house at about 7–7:30 p.m. RP 184. Mr. Kienholz's dad answered the door and told his son, "Mitch was outside, and he wanted to talk in his car." RP 185. Mr. Kienholz's father noted that Mr. Crane "appeared to be normal."

RP 192. Mr. Kienholz was nervous but got into the car to speak with Mr. Crane. RP 185.

Andrew Kienholz is 6'5" tall and weighs about 250 pounds. RP 189. He said Mitch was very demanding. RP 187. Mr. Kienholz said Mitch asked him if he had reported him to Fish and Wildlife and "that if we had any problems we could go out in the front yard and duke it out right now." RP 185. Mitch again asked Mr. Kienholz if he was the one that turned him into Fish and Wildlife, which Mr. Kienholz again denied. RP 185. Mr. Kienholz then said Mitch "told me that when he found out who turned him in, that he was gonna kill them." RP 185.

The State charged Mr. Crane with intimidating a witness based on Mr. Kienholz's claim about the threat, in addition to the firearm offenses. CP 12.

The to-convict instruction for the numerous unlawful possession of firearm charges included the make, model, and serial number information the officer had added onto the PowerPoint slides that were entered as exhibits at trial. Ex. 1–54; CP 38–66. The jury found Mr. Crane guilty of each count and the witness intimidation charge. CP 73–103.

At sentencing, the parties agreed that all of the convictions for unlawful possession of the firearms found respectively in the bedroom and shop were the same criminal conduct that counted as a single offense in Mr. Crane's offender score. 1/05/22 RP 5–6; CP 106.

But the State argued that Mr. Crane should receive an additional point in his offender score because one of his convictions for unlawfully possessing firearms was for a short-barreled shotgun which he

was also convicted of possessing as an unlawful firearm. 1/05/22 RP 6–8.

Mr. Crane argued that his conviction for unlawful possession of the short-barreled shotgun for which he was also convicted of unlawful possession, was the same criminal conduct because it was the same gun, the same victim (the general public) in the same location, with the same objective intent—to possess the firearm. CP 106. The court disagreed and counted this single act of possession as two separate points in Mr. Crane's offender score. 1/05/22 RP 23.

The Court of Appeals affirmed. Slip Op. at 1.

D. ARGUMENT

1. This Court should accept review to clarify the application of *Westwood* and resolve a division split about whether two convictions for possession of the same firearm are the same criminal conduct.

This Court should accept review to guide lower courts on the application of its decision in *Westwood*, 2 Wn.3d 157, and to resolve a division split as to whether possession of a single firearm is the same criminal conduct.

When a person is sentenced for two or more current offenses, the sentence range for each is determined by counting all other current and prior convictions "unless the crimes involve" the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" means crimes that involved the same victim, were committed at the same time and place,

and involved the same criminal intent. RCW 9.94A.589(1)(a).

To determine if two offenses had the same criminal intent, courts look to "the objective intent and whether the crimes were closely related enough to justify a finding of same criminal conduct." *Westwood*, 2 Wn.3d at 168.

Division I found that when a person is convicted of both unlawful possession of a firearm (under the statute prohibiting firearms possession for those with prior felony convictions) and possession of an unlawful firearm (of a type that is generally unlawful for anyone to possess), based on the same gun, the two offenses are the same criminal conduct. *Hatt*, 11 Wn. App. 2d at 143.

Hatt was convicted of unlawful possession of a firearm in the second degree and possession of an

unlawful firearm. *Id.* at 121. The court determined that the charges both stemmed from possessing the same firearm at the same time and place. *Id.* at 142. The court concluded that for each offense the victim was the same: the general public. *Id.* Regarding intent, the court reasoned, "Although Hatt's possession of the weapon was unlawful for two separate reasons, his objective criminal intent in committing the two crimes was the same: to possess the firearm." *Id.* at 143.

The same facts exist in Mr. Crane's case. He was convicted of knowingly possessing a short-barreled shotgun. CP 34; 73. He was convicted of unlawful possession of this same firearm. CP 38; CP 75. As he argued to the sentencing court, these were the same criminal conduct because the victim, the same objective intent, and the location were the same. 1/05/22 RP 11–12, 19-23.

But Division III of the Court of Appeals relied on this Court's decision in *State v. Westwood* to reach a different result than in *Hatt*. Slip op. at 17. Division III agreed "with the holding in *Hatt* that the overarching intent of both crimes" is "to possess the firearm." *Id.* at 18 (citing 11 Wn. App. 2d at 143). Division III also considered "whether the crimes furthered each other and were part of the same scheme or plan." *Id.* (citing *Westwood*, 2 Wn.3d at 168). This consideration led the court to reach the opposite conclusion as Division I finding, the "objective intent" of the two crimes was different and they were not the same criminal conduct. *Id.*

This Court should accept review to clarify application of the objective intent analysis in *Westwood* and resolve this division split. RAP 13.4(b)(2).

2. This Court should accept review and ensure a person is not convicted of witness intimidation for making a threat unrelated to an "official proceeding."

Mr. Crane's threat to kill the person who reported him to Fish and Wildlife was a threat, but it was not an attempt to influence Mr. Kienholz's testimony in an official proceeding as required for conviction for intimidating a witness. This Court should accept review because the mere words Mr. Crane was accused of uttering did not constitute witness intimidation.

Mr. Kienholz's claim about what Mr. Crane said to him after his home was raided and before any criminal charges were brought was insufficient to establish Mr. Crane attempted to influence Mr. Kienholz's *testimony* as required for conviction for witness intimidation.

A person commits the offense of intimidating a witness when "by use of a threat against a current or prospective witness," the person "attempts to:"

> (a) Influence the testimony of that person;
>
> (b) Induce that person to elude legal process summoning him or her to testify;
>
> (c) Induce that person to absent himself or herself from such proceedings; or
>
> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

RCW 9A.72.110.

Section (d) was added in 1994. Laws of 1994, ch. 271 § 204(d). By adding section 1(d), the legislature intended to eliminate the requirement that there be a pending official proceeding as required by section 1(a)–(c), which addresses witness "testimony" or "such

proceedings" where testimony is offered. Laws of 1994, ch. 271 § 204(d); *State v. James,* 88 Wn. App. 812, 816, 946 P.2d 1205 (1997).

Where the added section 1(d) addresses the attempt to influence a person's participation in a criminal investigation, section 1(a)–(c) addresses an attempt to influence a person's "testimony" which by definition involves an official proceeding. RCW 9A.72.010(6) defines "testimony" to include "oral or written statements, documents, or any other material that may be offered by a witness *in an official proceeding*" (emphasis added).

In *State v. Brown,* the evidence was insufficient to support a conviction for witness intimidation under section (1)(a) of RCW 9A.72.110, where the State's evidence established only that the defendant threatened the witness in an attempt to prevent her

from providing any information to the police, but not to influence the witness's *testimony*. *State v. Brown*, 162 Wn.2d 422, 429–30, 173 P.3d 245 (2007(emphasis in original).

State v. Savaria, 82 Wn. App. 832, 919 P.2d 1263 (1996) further elucidates that prong 1(a) requires evidence of an intent to influence a person's testimony in an official proceeding and does not apply to attempts to influence a criminal investigation. In *Savaria*, the defendant was charged with assault and violating a protection order against a woman with whom he had a relationship. *Id.* at 835. During a telephone conversation the night before the trial, the witness informed the defendant that she was going to appear in court the next day. *Id.* The defendant became very angry, said he wanted the charge dropped, would get revenge, and threatened to kill her with a gun. *Id.*

The next day both appeared at the courthouse. *Id.* The witness was sitting in the prosecutor's office talking to a police officer when the defendant appeared at the office window, exhibited his middle finger, and glared at the witness. *Id.*

The defendant was charged with harassment for the threat to kill on the phone and charged with intimidating a witness for his conduct at the courthouse. *Savaria,* 82 Wn. App. at 835, 40. The State alleged the defendant intended to influence the defendant's testimony by menacingly glaring at the witness and "flipping her off." *Id*. at 840–41.

The Court of Appeals found "the defendant's actions at the courthouse certainly evidenced his unhappiness that [the witness] was at the courthouse apparently willing to testify against him," but did not

support the finding that he "was thereby attempting to influence the content of [her] testimony." *Id*. at 841.

As in *Brown* and *Savaria,* there was no evidence Mr. Crane intended to influence the content of Mr. Kienholz's "testimony." The State charged Mr. Crane with each alternative means of committing the offense under subsections RCW 9A.72.110(1)(a)–(d). CP 12. But the jury was instructed on only one means of committing the offense in section 1(a): "the defendant by the use of a threat against a current or prospective witness attempted to influence the testimony of that person." CP 36.

Mr. Kienholz claimed around 7–7:30 p.m., his dad "came and got me and told me Mitch was outside, and he wanted to talk in his car." RP 185. Mr. Kienholz said Mr. Crane "was waiting by the driver's door" and "[t]old me to get in. So, I sat down. He was very, very

aggressive. He put a piece of paper in my lap with a bunch of highlights." RP 185.

Mr. Kienholz claimed Mr. Crane

> Asked me if I was the one that reported him, and I told him that I was not. He told me that if we had any problems we could go out in the front yard and duke it out right now. Then he asked me again if I was the one that turned him in. I told him that I was not, and then he told me that when he found out who turned him in, that he was gonna kill them.

RP 185.

Mr. Kienholz stated that Mr. Crane did nothing physical, "[i]t was just his demeanor." RP 186.

This threat to kill based on Mr. Crane's belief that Mr. Kienholz reported him to Fish and Wildlife may have been a threat, but it was not evidence Mr. Crane intended to influence Mr. Kienholz's *testimony* in an "official proceeding" because it made no reference to any such proceeding. RCW 9A.72.010(6); *Brown*, 162 Wn.2d at 429–30; *Savaria,* 82 Wn. App. at 839–40.

Though it could have been construed as inducing Mr. Kienholz to "not report the information relevant to a criminal investigation" under prong 1(d), the jury was not instructed on this means of committing the offense. RCW 9A.72.110(1)(d); CP 36.

Absent evidence of a threat made in an attempt to influence Mr. Kienholz's *testimony*, the evidence is insufficient to support his conviction and his conviction must be reversed. *Brown,* 162 Wn.2d at 430. This Court should accept review. RAP 13.4(b)(3).

3. The evidence was insufficient to establish Mr. Crane knowingly possessed the particular firearms identified by their make, model, and serial number in the to-convict instruction.

The State proposed, and the court gave, "to-convict" instructions that required the jury to find Mr. Crane knowingly possessed a specific firearm identified by make, model, and serial number. Under the law of

the case doctrine, Mr. Crane's knowledge of the particular make, caliber, and serial number became an element of the crime the State was required to prove. The Court of Appeals erred in finding the evidence was sufficient to establish the requisite knowledge of these particular firearms. This Court should accept review. RAP 13.4(b)(3).

Under the federal and state constitutions, due process requires that the State prove every element of a crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017).

Under Washington's law of the case doctrine, the State must prove the elements included in the to-convict instruction, even when those elements may be "otherwise unnecessary." *State v. Dillon*, 12 Wn. App. 2d 133, 142, 456 P.3d (2020) (citing *Johnson,* 188

Wn.2d at 760). On appeal, a person may assign error to elements added under the law of the case doctrine. *Johnson*, 188 Wn.2d at 756. When the sufficiency of the evidence is challenged, the reviewing court considers the sufficiency in light of the instructions. *State v. Jussila*, 197 Wn. App. 908, 921, 392 P.3d 1108 (2017).

Washington's law of the case doctrine derives from common law and is "an established doctrine with roots reaching back to the earliest days of statehood." *Johnson*, 188 Wn.2d at 755 (citing *State v. Hickman,* 135 Wn.2d 97, 101, 954 P.2d 900 (1998)). The law of the case doctrine "benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given." *Hickman,* 135 Wn.2d at 105. It also promotes "finality and efficiency in the judicial process" and encourages "general notions of fairness" by ensuring that "the

appellate courts review a case under the same law considered by the jury." *Johnson*, 188 Wn.2d at 757 (internal citations omitted).

In *Hickman*, the Washington Supreme Court held that by adding the county of the crime in the jury instruction, the State bore the burden of proving the offense's location beyond a reasonable doubt because it was the law of the case. *Hickman*, 135 Wn.2d at 99. The court reversed Hickman's conviction due to the lack of evidence about the county. *Id.* at 106.

The law of the case was reaffirmed in *Johnson*. There, a person was charged with one count of second-degree theft of an access device. *Johnson*, 188 Wn.2d at 749–51. Specific intent to steal an access device was not a statutory element of the crime. *Id.* 749–51. But because that element was included without objection in

the to-convict instruction, the State assumed the burden of proving it. *Id*. at 762.

Here, the essential elements of unlawful possession of a firearm are "[k]nowing possession" of a firearm. *State v. Hartzell*, 156 Wn. App. 918, 944, 237 P.3d 928 (2010) (citing *State v. Anderson,* 141 Wn.2d 357, 366, 5 P.3d 1247 (2000)); RCW 9.41.040(1)(a)[3]. The firearm's identifying characteristics are not a statutory element of the crime. *See Id.* However, when the make, model, and serial number for a firearm are included in

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[3] RCW 9.41.040(1)(a) provides:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

the to-convict instruction, they become the law of the case.[4] *Jussila*, 197 Wn. App. at 932.

In Mr. Crane's case, the State proposed the to-convict instruction. RP 344–53; Supp. CP ___ (State's Proposed Instructions). The to-convict instructions for unlawful possession of a firearm required the jury to find, for each count of unlawful possession of a firearm, that Mr. Crane "knowingly owned a firearm" or "knowingly had a firearm in his possession or control, to wit:" the particular make, and/or caliber and the serial number of 29 different firearms. CP 38–66.

The requirement of knowledge refers to each element listed in the clause: "[a]s 'a matter of ordinary

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[4] In *Jussila,* the State did not present evidence about the serial numbers, and evidence about the model of the firearms was extremely limited, and so the court reversed for insufficient evidence on this basis and did not address whether the defendant had knowledge of these elements. 197 Wn.2d at 932.

English grammar,' we normally read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime." *Rehaif v. United States*, 588 U.S. 275, 204 L. Ed. 2d 594, 139 S. Ct. 2191, 2196 (2019) (citing *Flores-Figueroa v. United States,* 556 U.S. 646, 650, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009)). Therefore, Mr. Crane's knowledge of the make, caliber, and the serial number of each firearm he allegedly possessed was an element of the crime that the State had to prove beyond a reasonable doubt. But the State failed to prove Mr. Crane had knowledge of any particular gun identified in the to-convict instruction.

Viewed in the light most favorable to the prosecution, no "rational trier of fact" could have found the essential element of knowing possession of the particular firearms identified in the to-convict

instruction beyond a reasonable doubt. *Johnson*, 188 Wn.2d at 751 (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

The State introduced evidence that Mr. Crane admitted to general possession of some firearms in his home but not the 29 firearms specifically identified in the to-convict instruction. The evidence was insufficient to support his convictions, and dismissal is required.

Officer Horn questioned Mr. Crane about the guns they had found in the house in the broadest of terms: "After I had talked to him about the -- the deer hunting stuff, then I brought up the firearms to him." RP 203. Mr. Crane told Officer Horne "that most of the firearms belonged to him. He said some belonged to his son, Andrew, and some belonged to Mrs. Lacotti." RP 203.

The extent of Mr. Crane's knowledge was "that they were being stored inside of a -- of a gun safe in the primary bedroom. He told me that the safe was locked and that the only person that had the key for the safe was Mrs. Lacotti." RP 203.

As the officer continued to question Mr. Crane, his account of how the guns were stored changed slightly, but he never identified any specific firearms. The Fish and Wildlife Officer testified that Mr. Crane "admitted the safe was open." RP 205. Mr. Crane also "told me that his uncle had dropped the firearms off the previous day or two. That he was not home when the firearms had been dropped off." RP 205.

This was the extent of the officer's questioning of Mr. Crane about the guns found in the bedroom. RP 209. The officer did not take Mr. Crane into the bedroom to show him the guns they had found and did

not ask him specifically which guns were brought to his house. RP 209. This general admission to possession of some firearms in the bedroom did not establish knowledge of the particular make, model, and serial numbers included in the to-convict instructions for the firearms police seized. CP 38–66.

As for the two guns officers located in Mr. Crane's shop, Mr. Crane stated only that they were "replicas that he had gotten from an acquaintance. One of the guns was a -- was just a metal part left over from like a 30-30 lever-action rifle. It looked like it had been burned at one point, and he told me that he was trying to refurbish that gun." RP 207.

Though arguably this established more specific knowledge of a particular gun, unlike for any gun located in the house, it by no means established knowledge of a "Meridian 12 GA short Shotgun Serial

#15509," or an "H&R .38 Special revolver" as the to-convict instruction required the State prove he knowingly possessed. CP 38–39.

Mr. Crane's admission to generally possessing some guns in no way established he knowingly possessed any of the particularly identified guns as the State alleged in the information and to-convict instruction. Even when viewed in the light most favorable to the State, this evidence is insufficient to prove beyond a reasonable doubt that Mr. Crane knew each firearm's make, caliber, and serial number.

The State failed to prove Mr. Crane knowingly possessed the firearms bearing the specific make, model, and serial number contained in the to-convict instructions. Because the evidence was insufficient to prove the elements of the crimes, the convictions for

unlawful possession of a firearm must be reversed and the charges dismissed. *Hickman,* 135 Wn.2d at 103.

E. CONCLUSION

Based on the foregoing, petitioner Mitchell Crane respectfully requests this that review be granted pursuant to RAP 13.4(b).

In compliance with RAP 18.17, this petition contains 4,657 words.

DATED this 16th day of May, 2024.

Respectfully submitted,

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APPENDIX

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FILED
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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MITCHELL EUGENE CRANE, Appellant.	))))))))))	No. 38687-2-III UNPUBLISHED OPINION

COONEY, J. — Following a jury trial, Mitchell Crane was convicted of 29 counts of unlawful possession of a firearm, one count of possession of an unlawful firearm, and one count of intimidating a witness. He appeals arguing there was insufficient evidence to convict him of the 29 counts of unlawful possession of a firearm because the State added elements to the "to convict" instructions that it failed to prove. He also posits there was insufficient evidence to convict him of intimidation of a witness. Finally, Mr. Crane contends his offender was incorrectly calculated.

We affirm the convictions and remand for resentencing based on a corrected offender score.

BACKGROUND

Mr. Crane lived in rural Finley, Washington. He had previously been convicted of a "serious offense" in the state of Washington and was therefore prohibited from owning

firearms. Rep. of Proc. (RP)[1] at 180; RCW 9.41.040(1)(a). In 2020, the Department of Fish and Wildlife (Department) began investigating Mr. Crane for poaching deer. In February 2020, officers with the Department executed a search warrant at Mr. Crane's residence. During the search, officers found 27 firearms in Mr. Crane's residence and 2 firearms in a shop on the property. One of the firearms found in Mr. Crane's shop was a short-barrel shotgun.

After the search warrant was executed, Mr. Crane drove to Andrew Kienholz's, and his father's, James Kienholz's,[2] residence. James and Andrew had earlier spoken to the Department regarding Mr. Crane's alleged poaching, but Andrew had asked that his name not be used in the search warrant affidavit. Mr. Crane told James that he wanted to speak with Andrew in his car. Andrew met Mr. Crane in his car and testified that Mr. Crane was "very, very aggressive." RP at 185. Andrew stated that Mr. Crane

> asked me if I was the one that reported him, and I told him that I was not. He told me that if we had any problems we could go out in the front yard and duke it out right now. Then he asked me again if I was the one that turned him in. I told him that I was not, and then he told me that when he found out who turned him in, that he was gonna kill them.

RP at 185.

[1] Unless otherwise noted, "RP" refers to the consecutively paginated verbatim report of proceedings beginning August 3, 2020.

[2] Andrew and James Kienholz are referred to by their first names for clarity.

Mr. Crane was charged with 29 counts of unlawful possession of a firearm in the first degree, one count of possession of an unlawful firearm for possessing the short-barrel shotgun, and one count of intimidating a witness. A jury trial ensued. At trial, the court granted the State's motion to admit exhibits 1-54. Exhibits 4-6 and 23-49 were photos of each of the firearms Mr. Crane was alleged to have unlawfully possessed, along with a description consisting of the make, model, and serial number of each, positioned above each picture.

Following submission of the evidence, the court instructed the jury on each count of unlawful possession of a firearm similar to instruction 36:

> To convict the defendant of the crime of unlawful possession of a firearm in the first degree as charged in count 24, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about February 4, 2020, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control, to wit: *CVA Hunter Bolt .50 cal. black muzzleloader Serial #61-13-208623-02*;
>
> (2) That the defendant had previously been convicted of a serious offense; and
>
> (3) That the ownership or possession or control of the firearm occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 59 (emphasis added). With the exception of the make, model, and serial number of each firearm differing, the instructions for each count were the same.

The jury found Mr. Crane guilty of all counts.

Mr. Crane was sentenced for these offenses and two additional convictions for unlawful possession of a firearm from a different case at the same time. At sentencing, the parties agreed that all of Mr. Crane's convictions for unlawful possession of a firearm for the guns found in his home were the same criminal conduct and therefore counted as a single point in Mr. Crane's offender score. Likewise, the parties agreed the guns found in the shop were the same criminal conduct and counted as 1 point.

The parties disagreed about whether Mr. Crane's conviction for possession of an unlawful firearm and his conviction for unlawful possession of a firearm, both relating to his possession of the short-barrel shotgun, were the same criminal conduct. The State argued that the two offenses had different criminal intent and were therefore not the same criminal conduct.

The court accepted the parties' agreement that the convictions for unlawful possession of a firearm for the guns found in the home were the same criminal conduct and that the firearms found in the shop were the same criminal conduct. However, the court found the convictions for unlawful possession of a firearm and possession of an unlawful firearm were not the same criminal conduct and counted the convictions separately in Mr. Crane's offender score.

The State did not submit the judgment and sentences for Mr. Crane's two previous convictions from 2015, for second degree assault and felony harassment, but the court counted them as 2 additional points in Mr. Crane's offender score. The court sentenced Mr. Crane pursuant to an offender score of 7. Mr. Crane appealed.

After Mr. Crane's initial opening brief was filed with this court, we granted the State's motion to supplement the record pursuant to RAP 9.11. Comm'r's Ruling (Apr. 6, 2023). The superior court was ordered to take additional evidence regarding Mr. Crane's 2015 convictions and whether they constituted the same criminal conduct. Comm'r's Ruling at 8 (Apr. 6, 2023).

The State submitted Mr. Crane's 2015 statement on plea of guilty and judgment and sentence for his assault and harassment convictions. The State conceded that "it would be a mistake to say that [Mr. Crane's 2015 convictions are] not . . . the same criminal conduct." RP (July 18, 2023) at 18. However, the State contended Mr. Crane's argument that the two convictions constituted the same criminal conduct was untimely as his convictions for those crimes were over a year old.

The court agreed that Mr. Crane's 2015 convictions were the same criminal conduct that would lower his offender score from 7 to 6. However, the court elected to "defer to the Court of Appeals" on whether Mr. Crane should be allowed to raise the same criminal conduct issue at this stage. CP at 163. Thus, the court declined to alter Mr. Crane's offender score.

ANALYSIS

On appeal, Mr. Crane argues there was insufficient evidence to convict him of the 29 counts of unlawful possession of a firearm because the State added elements to the "to convict" instructions that it failed to prove. He also posits there was insufficient evidence to convict him of intimidation of a witness. Finally, Mr. Crane contends his offender score was incorrectly calculated.

SUFFICIENCY OF EVIDENCE – UNLAWFUL POSSESSION OF A FIREARM

Mr. Crane argues there was insufficient evidence to prove that he knowingly possessed the particular firearms identified by their make, model, and serial number in the to convict instructions. We disagree.

The sufficiency of the evidence is a question of law this court reviews de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt 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 can reasonably be drawn from it." *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

The due process clause of the Fourteenth Amendment to the United States Constitution requires the State prove every element of an alleged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). If, at trial, the State fails to present sufficient evidence to support the elements of the crime, double jeopardy prohibits a retrial. *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). The double jeopardy clause of the Fifth Amendment to the United States Constitution does not afford the State a second opportunity to supply evidence in a second trial that it failed to muster in the first. *Id.*

"A to-convict instruction must contain all of the essential elements of the crime because it serves as a 'yardstick' for the jury to measure innocence or guilt." *State v. Nielsen*, 14 Wn. App. 2d 446, 450, 471 P.3d 257 (2020). The State "must prove the elements included in the to-convict instructions, even when those elements [are] 'otherwise unnecessary.'" *State v. Dillon*, 12 Wn. App. 2d 133, 142, 456 P.3d 1199 (2020) (quoting *State v. Johnson*, 188 Wn.2d 742, 760, 399 P.3d 507 (2017)).

RCW 9.41.040(1)(a) reads:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, accesses, has in the person's custody, control, or possession, or receives any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense.

The make, model, and serial number of the particular firearm is not an element of the crime of unlawful possession of a firearm. However, here, the "to convict"

instructions read, in relevant part: "(1) That on or about February 4, 2020, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control, to wit: CVA Hunter Bolt .50 cal. black muzzleloader Serial #61-13-208623-02." CP at 59. The to convict instructions for each count were the same, save for the make, model, and serial number of each distinct firearm.

In support of his argument, Mr. Crane directs us to *State v. Jussila*, 197 Wn. App. 908, 932, 392 P.3d 1108 (2017). In *Jussila*, we reversed Mr. Jussila's convictions for unlawful possession of a firearm. *Id*. There, the to convict instructions included each firearm's make, model, and serial number. At trial, the State presented little, if any, evidence of the make, model, and serial numbers of the firearms Mr. Jussila was charged with possessing. In *Jussila*, we held the law-of-the-case doctrine applies to jury instructions that add an element to a crime. *Id*. at 920.

Conversely, in *State v. Munoz-Rivera*, we held that the victim's birthdate did not become an added element of the crime when the to convict instruction read, in part, "(1) That on or about November 3, 2013, the defendant assaulted *K.T. DOB: (11/27/03)* with a deadly weapon." 190 Wn. App. 870, 878, 361 P.3d 182 (2015) (emphasis added). The court in *Munoz-Rivera* reasoned:

> By placing K.T.'s date of birth in parentheticals, the State did not add her date of birth as an additional and otherwise unnecessary element. Rather, the parenthetical date of birth information was given to identify K.T. and thus distinguish her from any other person whose name might have been mentioned during the trial. To hold otherwise would place form over

> substance and manufacture an ambiguity on appeal that certainly never entered the jurors' minds.

Id. at 883.

The *Jussila* court distinguished Mr. Jussila's "to convict" instructions from those in *Munoz-Rivera* stating, "We consider the use of parenthesis in *State v. Munoz-Rivera* dispositive." *Jussila*, 197 Wn. App. at 924. The court reasoned that "[e]mployment of parenthesis informed the jury that the information in parenthesis is different, if not insignificant, from other language explaining the elements of the crimes." *Id.* The court pointed to the dictionary definition of parenthesis to support its reasoning: "The *English Oxford Dictionary* [sic] defines 'parenthesis' as '[a] word or phrase inserted as an explanation or afterthought into a passage which is grammatically complete without it, in writing usually marked off by brackets, dashes, or commas.'" *Id.* (second alteration in original) (quoting OXFORD DICTIONARY ONLINE, https://en.oxforddictionaries.com /definition/parenthesis (last visited Feb. 15, 2017).

Here, because the State added the make, model, and serial number of each firearm to the to convict instructions, to secure a conviction, proof of such was necessary. However, we disagree with Mr. Crane's argument that the State had to prove he *knew* the specific make, model, and serial number of each firearm.

In jury instruction 36, the to convict instruction, the noun "firearm" was set apart by the adverb "to-wit." CP at 59. "To wit" means "that is to say **:** NAMELY . . . often

used to call attention to particular matters embraced in more general preceding language." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2418 (1993). Further, contrary to Mr. Crane's argument, the term "knowingly" only modified the portion of the instruction that stated Mr. Crane "had a firearm in his possession or control." CP at 59.

To secure a conviction, the jury instructions required the State to prove Mr. Crane knowingly owned a firearm or knowingly had a firearm in his possession or control and, by way of the adverb "to wit," that the firearm he knowingly owned or possessed was the same make and model and bore the same serial number as the firearm introduced into evidence. In other words, the State had to prove only that Mr. Crane knowingly possessed each firearm, not that he knew the specific make, model, and serial number of each.

The State provided evidence that Mr. Crane knowingly possessed each firearm by identifying the firearms by their make, model, and serial number via exhibits 4-6 and 23-49. Each exhibit corresponded to a jury instruction that also included the make, model, and serial number of each firearm. In viewing the evidence in the light most favorable to the State, any rational trier of fact could have found Mr. Crane's guilt beyond a reasonable doubt.

We affirm Mr. Crane's convictions for 29 counts of unlawful possession of a firearm as the State presented evidence sufficient to show that Mr. Crane knowingly

possessed each firearm identified in the information and prescribed in the jury instructions.

SUFFICIENCY OF THE EVIDENCE – INTIMIDATION OF A WITNESS

Mr. Crane contends his general threat was insufficient to prove he attempted to influence Andrew's testimony. We disagree.

RCW 9A.72.110 reads, in relevant part:

> (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
>
> (a) Influence the testimony of that person;
>
> (b) Induce that person to elude legal process summoning him or her to testify;
>
> (c) Induce that person to absent himself or herself from such proceedings; or
>
> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

Mr. Crane's to convict instruction for intimidating a witness stated:

> To convict the defendant of the crime of intimidating a witness, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about February 4th, 2020, the defendant by use of a threat against a current or prospective witness attempted to influence the testimony of that person; and
>
> (2) That this act occurred in the State of Washington.

CP at 36.

Mr. Crane argues his threat to Andrew, that he "was gonna kill" whoever turned him into the authorities, was not made in an attempt to influence Andrew's testimony in an "official proceeding" because Mr. Crane referenced no such proceeding. Am. Br. of Appellant at 36. Mr. Crane points to RCW 9A.72.010(6) that defines "testimony" as including "oral or written statements, documents, or any other material that may be offered by a witness in an *official proceeding*." (Emphasis added.) However, Mr. Crane does not offer any authority to support his proposition that an attempt to influence a prospective witness's testimony must directly reference an official proceeding.

Mr. Crane cites *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007), and *State v. Savaria*, 82 Wn. App. 832, 919 P.2d 1263 (1996), to support his claim that the evidence was insufficient. In *Brown*, our Supreme Court held the evidence was insufficient to support a conviction for witness intimidation because the State's evidence established only that Mr. Brown attempted to prevent the witness from providing information to the police, not that he attempted to influence her testimony. *Brown*, 162 Wn.2d at 430.

In *Savaria*, we held that there was insufficient evidence to support the "attempt to influence" means of intimidating a witness. 82 Wn. App. at 841. Mr. Savaria, during a telephone call with the witness the day before trial, threatened to kill her after being informed she would appear in court as a witness against him. The next day, Mr. Savaria and the witness appeared at the courthouse and Mr. Savaria glared at her and showed his

middle finger to the witness upon seeing her in the prosecutor's office talking to a police officer.

Mr. Savaria was subsequently charged with two alternative means of witness intimidation: attempting to influence the testimony of the witness and attempting to induce the witness to absent herself from his trial. The prosecutor argued that Mr. Savaria attempted to influence the witness's testimony by glaring at her and "'flipping her off'" at the courthouse. *Id.* at 841. Mr. Savaria argued on appeal that there was insufficient evidence to support the "attempt to influence" means of intimidating a witness. *Id.* The court held that Mr. Savaria's actions at the courthouse evidenced his unhappiness that the witness was going to testify against him, but were not enough to prove he intended to influence her testimony.

On the other hand, the State cites *State v. Scherck*, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973). There, Mr. Scherck's witnesses testified that he asked the victim to "'just, you know, drop the charges. That's all we ever asked him to do.'" *Id.* Mr. Scherck contended on appeal that this was not enough to demonstrate an attempt to prevent the witness from "'appearing'" at his trial. *Id.* Contrary to Mr. Scherck's evidence, the victim testified that Mr. Scherck said, "'If you will refuse to appear as a witness in a trial against [Scherck's friend], the State will have no course but to drop the case.'" *Id.* (alteration in original). And that "[w]hen the victim responded that he could not refuse to appear, Scherck observed that he (the victim) had a nice house in a nice neighborhood

and that '[i]t would be a shame if anything happened to it.'" *Id.* (second alteration in original). The witness testified that Mr. Scherck also stated "that if the case came to trial it 'would be very embarrassing for [the victim].'" *Id.* (alteration in original). Based on this evidence, this court held there was substantial evidence supporting the court's conclusion that a factual question remained for the jury.

Here, Mr. Crane's threat and "aggressive" demeanor toward Andrew demonstrated his anger about being reported to the Department. RP at 185. Further, his statement that "when he found out who turned him in, that he was gonna kill them," was intended to dissuade Andrew from testifying against him at trial because doing so would surely reveal that he was the informant. *Id*. "A jury may infer intent 'where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability.'" *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995) (quoting *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991). After viewing the evidence in the light most favorable to the State, any rational trier of fact could have found Mr. Crane's threat to Andrew was meant to prevent him from revealing himself as the informant by testifying against him at trial. Thus, there was sufficient evidence to convict Mr. Crane of intimidation of a witness.

SAME CRIMINAL CONDUCT (POSSESSION OF AN UNLAWFUL FIREARM AND UNLAWFUL POSSESSION OF A FIREARM)

Mr. Crane argues his convictions for unlawful possession of a firearm and possession of an unlawful firearm encompassed the same criminal conduct and should have been counted as 1 point. We disagree.

Determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of the law. *State v. Aldana Graciano*, 176 Wn.2d 531, 536-37, 295 P.3d 219 (2013). Because a finding of "same criminal conduct" favors Mr. Crane, he has the burden to prove the possession of the unlawful firearm and the unlawful possession of a firearm were the same criminal conduct. *Id.* at 539.

A determination of "same criminal conduct" at sentencing alters the offender score that is calculated by adding up the number of points for each prior offense. RCW 9.94A.525(5)(a)(i). For purposes of an offender score calculation, current offenses are treated as prior convictions. RCW 9.94A.589(1)(a).

For sentencing purposes, if a court finds that "some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *Id*. For multiple crimes to be treated as the "same criminal conduct," the crimes must have (1) been committed at the same time and place, (2) involved the same victim, and (3) involved the same objective criminal intent. *Id*.

Here, the trial court found that Mr. Crane's convictions for unlawful possession of a firearm and possession of an unlawful firearm were not the same criminal conduct. Consequently, the trial court added 2 points to Mr. Crane's offender score, 1 point for each of the two convictions.

In *State v. Hatt*, Division One of this court held that Mr. Hatt's convictions for unlawful possession of a firearm and possession of an unlawful firearm had the same objective intent—"to possess the firearm." 11 Wn. App. 2d 113, 143, 452 P.3d 577 (2019). Thus, the two offenses encompassed the same criminal conduct. *Id.* In doing so, the court analyzed *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1988), which "directed courts to 'focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next'" for purposes of analyzing the third factor of the same criminal conduct analysis. *Hatt*, 11 Wn. App. 2d at 142. The *Hatt* court recognized that the Supreme Court in *Dunaway* "did not interpret objective criminal intent to be equivalent to statutory intent, stating that 'counts with identical mental elements, if committed for different purposes, would not be considered the same criminal conduct.'" *Id.* at 143 (internal quotation marks omitted) (quoting *Dunaway*, 109 Wn.2d at 215).

However, the court in *Hatt* viewed *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016), as departing from *Dunaway*'s analysis. 11 Wn. App. 2d at 143. The *Hatt* court recognized that in *Chenoweth* "the court compared the statutory criminal intent

requirements of [rape of a child and incest] to determine that '[t]he intent to have sex with someone related to you differs from the intent to have sex with a child.'" *Id.* (second alteration in original) (quoting *Chenoweth*, 185 Wn.2d at 223). The court in *Hatt* nevertheless believed the *Dunaway* framework was applicable. *Id.*

More recently, in *State v. Westwood*, the Supreme Court explained that *Chenoweth* and *Dunaway* are "not inconsistent and neither overrules the other." 2 Wn.3d 157, 166, 534 P.3d 1162 (2023). The court reiterated that "[t]he statutory intent is relevant in determining whether the objective intent prong is satisfied. Looking to any other source of intent has the potential to lean too closely to the subjective analysis that we have always rejected." *Id.* at 167. The court further clarified that "when same criminal intent is satisfied, in cases where we determined the crimes did encompass the same criminal conduct, there was a connection in the statutory definitions, with the statutory intent element of the crimes being either identical or very similar." *Id.*

Here, to convict Mr. Crane of possession of an unlawful firearm, the State had to prove Mr. Crane "knowingly possessed a short-barreled shotgun" and that Mr. Crane "had knowledge of the characteristics that make the gun unlawful." CP at 34; RCW 9.41.190(1). On the other hand, to prove Mr. Crane unlawfully possessed the short-barrel shotgun, the State only had to prove Mr. Crane "knowingly owned a firearm or knowingly had a firearm in his possession" having been previously "convicted of a serious offense." CP at 38; RCW 9.91.040(1)(a).

We agree with the holding in *Hatt* that the overarching intent of both crimes is "to possess the firearm." 11 Wn. App. 2d at 143. However, that does not conclude our analysis. "If the objective intent for the offenses were the same or similar, courts can then look at whether the crimes furthered each other and were part of the same scheme or plan." *Westwood*, 2 Wn.3d at 168.

The objective intent of the crime of unlawful possession of a firearm is simply to possess a firearm. Possession of an unlawful firearm has a different criminal intent—to possess a firearm more dangerous and easier to conceal than a legal firearm. Consequently, the two crimes do not have the same objective criminal intent and are not the same criminal conduct.

The trial court did not abuse its discretion or misapply the law in finding that the unlawful possession of a firearm and possession of an unlawful firearm were not the same criminal conduct.

SAME CRIMINAL CONDUCT (2015 ASSAULT AND HARASSMENT)

Mr. Crane argues, and the State concedes, that his 2015 convictions for assault and harassment constituted the same criminal conduct. We accept the agreement and remand for resentencing with a corrected offender score.

Below, the State recognized that "it would be a mistake to say that [Mr. Crane's 2015 convictions are] not . . . the same criminal conduct." RP (July 18, 2023) at 18.

However, the State contended Mr. Crane's argument that the two convictions constituted the same criminal conduct was untimely as his convictions were over a year old.

The trial court made "a finding that I'm held to the standard of the statement on a plea of guilty on Case Number 15-1-00192-06" and attributed 1 point for each conviction toward Mr. Crane's offender score rather than counting both as a single point. *Id*. at 33. The trial court, in its findings, recognized that the crimes had the same victim, occurred at the same time and place, and had the same objective criminal intent. The court concluded the crimes involved the same criminal conduct. However, the trial court declined to count them as 1 point and instead elected to "defer to the Court of Appeals the issue of whether the defendant should be allowed to raise a collateral attack on cause number 15-1-00192-6 at this point." CP at 70. The two offenses should have been counted as 1 point.

RCW 9.94A.525 reads:

> (5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:
>
> (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. *The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used.* The current sentencing court may presume that such other prior offenses were not the same criminal conduct

> from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.

(Emphasis added.) Thus, the current sentencing court must make its own determination of whether prior offenses constitute the same criminal conduct. *State v. Johnson*, 180 Wn. App. 92, 101, 320 P.3d 197 (2014). The fact that Mr. Crane's prior 2015 convictions were over a year old has no bearing on the analysis.

The court correctly concluded that Mr. Crane's two 2015 convictions were the same criminal conduct and it should have therefore counted them as 1 point. Remand for resentencing is necessary.

CONCLUSION

We affirm Mr. Crane's convictions and remand for the trial court to resentence Mr. Crane with a corrected offender score.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 38687-2-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: May 16, 2024
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