70054-5

70054-5

NO. 70054-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW SMITH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The trial court instructed the jury using immaterial and prejudicial nomenclature. Where "domestic violence" is not an element of the crime, it should not be included in the to-convict instruction, or throughout the jury instructions. Because the instructions in Matthew Smith's criminal trial were peppered with the "domestic violence" accusation, the resulting conviction should be reversed.

Additional trial errors, standing alone or cumulatively, also require reversal. In the alternative, the judgment and sentence should be returned to the trial court for correction.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury on prejudicial factors that were not elements of the charged crimes.

2. Instructional error denied Mr. Smith a constitutionally fair trial.

3. The trial court abused its discretion in admitting photographs from an alleged prior bad act where the State failed to prove the prior act occurred by a preponderance of the evidence.

4. The trial court abused its discretion in admitting photographs from an alleged prior bad act where the evidence was not relevant to the purported purpose advanced by the State.

5. The trial court abused its discretion in admitting photographs from an alleged prior bad act where any slight probative value was outweighed by the risk of substantial prejudice.

6. The trial court erred in instructing the jury that the reasonable doubt standard equates to an abiding belief in the truth of the charge.

7. Mr. Smith was denied a fair trial where the court's instructions and the prosecutor's argument diluted the State's burden of proof.

8. Cumulative trial errors denied Mr. Smith his constitutional right to a fair trial.

9. The continuing presence of the vacated assault conviction on the amended judgment and sentence violates the prohibition against double jeopardy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Any fact that increases the potential punishment for an offense is an element that must be found by the jury beyond a reasonable doubt. But the fact that the charged offense constitutes a

crime of domestic violence did not alter Mr. Smith's potential punishment. Substantial prejudice inheres in the term "domestic violence." Was Mr. Smith denied a fair trial where the prejudicial term was unnecessarily inserted throughout the jury instructions and listed as an element of the charged offenses?

2. Before admitting evidence of prior misconduct, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. Where the trial court admitted photographs taken subsequent to an alleged prior assault without finding the assault occurred by a preponderance of the evidence, and where the evidence was not relevant but highly prejudicial, did the court commit prejudicial error?

3. The jury's role is to decide whether the prosecution met its burden of proof, not to search for the truth. The court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." The prosecutor emphasized this standard in closing argument. When it is not the jury's job to

determine the truth, did the court misstate the law and was the burden diluted by the court's instruction and the prosecutor's argument in violation of due process?

4. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the cumulative effect of the errors assigned above, was Mr. Smith denied a fundamentally fair trial?

5. The double jeopardy clause prohibits multiple punishments for the same offense. The concept of punishment includes collateral consequences resulting from the public presence of a conviction. Where a conviction was vacated to comply with the prohibition against double jeopardy but the conviction remains on the amended judgment and sentence, should the judgment and sentence be remanded to exclude reference to the conviction?

D. STATEMENT OF THE CASE

Matthew Smith and his girlfriend, Cassandra Mitchell, were living separately due to a pretrial protective order that was entered on July 30, 2012. RP 26-28, 31-32. Because Ms. Mitchell was pregnant with Mr. Smith's child and had no other place to live, she stayed at his

home and he lived with his mother. Exhibit 1 at 05:00-05:30; RP 26-27.[1]

On the night of October 3, Ms. Mitchell was drinking and giving her friend, Tashena Martin, a tattoo. RP 34-35, 140-41. Late in the evening, Ms. Martin fell asleep on a couch in Ms. Mitchell's living room. RP 145. Just after midnight, Ms. Mitchell called 9-1-1 and claimed Mr. Smith had come over and punched her twice. RP 32-33. Ms. Mitchell was transported to the hospital where an emergency room doctor examined her and found no physical manifestations of the purported assault. RP 41-42, 70-75; *see* RP 134 (responding police officer saw no redness or bruising). While at the hospital, Ms. Mitchell signed a written statement that Mr. Smith had assaulted her. Exhibit 3; RP 43, 130-32.

The State charged Mr. Smith with violation of a court order under RCW 26.50.110(4), premised on the assault, and assault in the fourth degree (a gross misdemeanor) under RCW 9A.36.041(1). CP 4-5, 9-10. The information designated each offense as a domestic violence crime under RCW 9.94A.030, RCW 10.99.020 and RCW

[1] The verbatim report of trial proceedings are contained in two consecutively-paginated volumes, referred to herein as "RP" followed by the page number. The separately-paginated transcript from the December 20, 2012 motion hearing is not referenced.

26.50.110. CP 9-10; *see* RCW 9.94A.535(21) (additional points added to offender score for prior offenses where domestic violence designation had been pled and proved).

At and prior to trial, Ms. Mitchell denied that Mr. Smith had any contact with her and denied that he assaulted her. RP 33, 46-49, 53-54, 84. She testified she had fabricated the allegations because she was upset with Mr. Smith for not returning her calls or providing her with money. RP 33-37, 81-82, 84. The State impeached Ms. Mitchell with her written statement and a recording of the 9-1-1 call, both of which also came in as substantive evidence. RP 38-40, 43-44, 53-54; Exhibits 1, 3. The State also admitted, over objection, photographs from an alleged prior assault by Mr. Smith, purportedly also to diminish Ms. Mitchell's credibility. RP 57-62, 76-79. Tashena Martin testified Mr. Smith was at Ms. Mitchell's home that night and she overheard a fight between Mr. Smith and Ms. Mitchell. RP 141, 145-46. She conceded she did not witness an assault. RP 148-52, 161.

The jury instructions included an additional "element" in the to-convict instructions: that this was a domestic violence crime. CP 25, 34. The term "domestic violence" was also peppered throughout the jury instructions and verdict form to describe the offenses. CP 25, 26,

28, 32, 34, 42. Mr. Smith was convicted as charged. CP 42, 49-59, 74-81.

After trial, the misdemeanor assault conviction was vacated to comply with the prohibition against double jeopardy; yet the fact of the jury verdict on that count remains on the amended judgment and sentence. CP 74, 76; RP 260-65, 290-97, 306-11. Mr. Smith appeals. CP 60.

E. ARGUMENT

1. Mr. Smith was denied a fair trial because the to-convict instruction required the jury to find domestic violence, which is not an element of the charged crimes, and this prejudicial descriptor was peppered throughout the instructions.

The term "domestic violence" carries pejorative, prejudicial overtones. Although not an element of the crimes charged, the term was inserted in the to-convict instruction and the crimes were labeled as "domestic violence" offenses throughout the instructions. The court's repeated use of this pejorative language denied Mr. Smith a fair trial.

a. Domestic violence is not an element of either of the charged crimes.

The State charged Mr. Smith with violation of a court order and assault in the fourth degree. RCW 26.50.110(4); RCW 9A.36.041(1); CP 4-5, 9-10. To secure a conviction for felony violation of a court

order, the State must prove beyond a reasonable doubt only that (1) there was a court order protecting the victim from the accused, (2) the accused knew of the existence of the order, (3) the accused knowingly violated the order, (4) the accused's conduct was an assault, and (5) the act occurred in Washington. RCW 26.50.110(4); WPIC 36.51.02. Notably, domestic violence is not an element. *See id.* The elements of fourth degree assault are simply that (1) the accused assaulted the victim (2) in Washington. RCW 9A.36.041(1); WPIC 35.26. Like violation of a court order, domestic violence is not an element of assault. *See id.*

The information designated each offense as a domestic violence crime because of recent changes to the Sentencing Reform Act. RCW 9.94A.535(21) (additional points added to offender score for prior offenses where domestic violence designation had been pled and proved); *see State v. Hagler*, 150 Wn. App. 196, 201, 208 P.3d 32 (2009) ("prosecutor designates domestic violence crimes on charging documents, presumably in part to assist the court in meeting these responsibilities" to issue pretrial no-contact orders, identify such actions on docket sheets, and provide priority scheduling); RP 89-93. Under RCW 9.94A.535(21), domestic violence may be an element of a

hypothetical future charge against Mr. Smith. That statute provides that additional points could be added to Mr. Smith's future offender score for the instant offenses if the State pled and proved the instant offenses as "domestic violence" crimes and the then-pending charge is a crime of domestic violence. RCW 9.94A.535(21). This provision relates to sentencing only of future crimes, and only if Mr. Smith is subsequently charged and convicted of a domestic violence offense.[2] The amendment to section 535 of chapter 9.94A RCW did not alter the elements of the underlying crimes. Specifically, in adopting this provision, the Legislature did not add any elements to violation of a court order or assault.

An element is "[a]ny fact that, by law, increases the penalty for a crime." *Alleyne v. United States*, __ U.S.__, 133 S. Ct. 2151, 2155,

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[2] Mr. Smith recognizes that the statute requires the state to "prove" the domestic violence designation in order to use it to increase punishment in a hypothetical future case. If the State seeks a jury finding on whether the offenses constitute a domestic violence crime for purposes of RCW 9.94A.535(21), that question can be posed in bifurcated instructions, decided after a verdict is returned on the underlying offense. *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002) (trial court did not abuse discretion by bifurcating instructions to require separate consideration of a prejudicial element); *State v. Monschke*, 133 Wn. App. 313, 334–35, 135 P.3d 966 (2006) (bifurcation necessary if unitary trial would significantly prejudice the defendant). Alternatively, although less desirable, the court could sanitize the designation by replacing the pejorative term "domestic violence" crime with a statutorily accurate term such as "crime against family or household member." *Cf. Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (requiring acceptance of stipulation if defendant desires to sanitize evidence of prior conviction, which is an element of the offense).

186 L. Ed. 2d 314 (2013). In *Hagler*, this Court made clear that the domestic violence "designation 'does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced.'" 150 Wn. App. at 201 (quoting *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000)). The domestic violence designation does not alter the punishment for the charged offenses. It does not need to be proven to a jury. *Alleyne*, 133 S. Ct. at 2155, 2158; *see Hagler*, 150 Wn. App. at 201-02.

The "domestic violence" pleading and finding may increase punishment for a future crime, but it does not alter the punishment for the instant offense. In short, the "domestic violence" designation "is neither an element nor evidence relevant to an element" of either violation of a court order or fourth degree assault. *Hagler*, 150 Wn. App. at 202.

b. Although not an element, the pejorative term was included in the to-convict instructions and throughout the court's instructions to the jury.

Providing the jury with a domestic violence designation does not assist it in its task of deciding whether the State has proved the elements of the charges beyond a reasonable doubt. *Hagler*, 150 Wn. App. at 202. There is "no reason to inform the jury of such a

designation." *Id.* Nonetheless, the instructions here not only repeatedly informed the jury of the designation, but required the jury to evaluate and find whether these offenses were indeed crimes of domestic violence. The court explicitly asked the jury to consider whether Mr. Smith is a perpetrator of domestic violence, calling it an "element" of the offenses. The to-convict instruction on violation of a court order provided:

> To-convict the defendant of the crime of Felony Violation of a Court Order (domestic violence), each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> . . .
>
> (5) That this was a domestic violence crime; and .
> . . .

CP 25. The to-convict instruction for assault similarly provided:

> To convict the defendant of the crime of assault in the fourth degree, (domestic violence) . . .
>
> (2) That his was a domestic violence crime . . . .

CP 34. These instructions not only required the jury to deliberate on domestic violence, but also included the term as a qualifier of the offense. That qualifier was included throughout the instructions and on the verdict form. CP 25, 26, 28, 32, 34, 42. The term "domestic violence crime" was defined for the jury in instruction 14:

> For purposes of this case, a "Domestic Violence Crime" includes any of the following crimes when committed by one family or household member against another:
>
> a) Assault in the Fourth Degree
>
> b) Violation of a Court Order

CP 32.[3]

Thus, although "domestic violence" was irrelevant to the jury's determination whether the State proved violation of a court order and assault beyond a reasonable doubt, the pejorative term was referenced in the instructions and verdict form at least ten times and the jury was commanded to deliberate on it as if it were an element.

c. Because the unnecessary, inflammatory language prejudiced Mr. Smith's right to a fair trial, he can raise this manifest constitutional error for the first time on appeal.

The Legislature calls domestic violence a "serious crime against society." RCW 10.99.010. As our Legislature notes, societal attitudes towards domestic violence have shifted from acceptance, in the mid-1900's, to outrage. *Id.* This Court has previously recognized its potential for prejudice. *Hagler*, 150 Wn. App. at 202. The Legislature likewise recognizes the prejudicial imprimatur associated with domestic violence by authorizing independent proceedings when such a

[3] Instruction 15 defined "family or household members" and "dating relationship." CP 33.

designation must be found. RCW 9.94A.537(4) (including domestic violence among limited number of aggravators for which court may conduct separate proceeding). In fact, our Legislature has noted the "public perception of the serious consequences of domestic violence to society and to the victims." RCW 10.99.010. In 2006, our Supreme Court recognized the public "is losing its tolerance for domestic violence." *State v. Cross*, 156 Wn.2d 580, 632, 132 P.3d 80 (2006). The term domestic violence is not neutral; it is incendiary, inflammatory and pejorative.

The repeated use of this provocative, and entirely unnecessary, term prejudiced Mr. Smith and denied him a fair trial. Const. art. I, § 3; U.S. Const. amend. XIV; *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009) (instructional errors may deny fair trial). Moreover, the court misstated the law by including it as an "element" of the offenses. In *Hagler*, the designation appeared several times in the instructions and was included in the verdict forms. 150 Wn. App. at 200. But unlike here, "domestic violence" was not listed as an element the *Hagler* jury was forced to consider and confront. As noted, Mr. Smith's jury was not only told that these crimes were designated as "domestic violence," the jury itself was asked to find Mr. Smith a

perpetrator beyond a reasonable doubt. Unlike *Hagler*, the jury was not provided a passive reference to the designation; Mr. Smith's jury was required to actively consider it. The resulting convictions should be reversed.

2. Mr. Smith was prejudiced by the admission of prior act evidence that was not established by a preponderance of the evidence, was irrelevant, and was highly prejudicial.

During trial, the State sought to admit four photographs from a prior assault that Mr. Smith allegedly perpetrated on Ms. Mitchell on July 30, 2012. RP 57-62, 76. Ms. Mitchell denied she had been assaulted on July 30. RP 49-50, 76. The State argued the evidence should be admitted to show Ms. Mitchell's lack of credibility—she reported an assault on July 30 that she later recanted, despite police photographs taken that night indicating bruising, lacerations and a messy room. The State further argued Ms. Mitchell reported the incident forming the basis of the current charges, and she later recanted that assault as well. RP 28, 37, 45, 57-62. There were no photographs or physical manifestations from the instant assault. Nonetheless, the

court admitted the photographs from July 30 under ER 404(b). RP 62, 76, 80; Exhibit 6.[4]

Washington courts have developed a four-part test for ruling on the admissibility of prior acts evidence: before admitting ER 404(b) evidence, a trial court "must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

"This analysis must be conducted on the record." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). "We cannot overemphasize the importance of making such a record. . . . [T]he absence of a record precludes effective appellate review." *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). "Moreover, a judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue." *Id.*

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[4] A copy of Exhibit 6 is attached as an appendix.

A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Failure to adhere to the requirements of an evidentiary rule is an abuse of discretion. *Id.*; *Foxhoven*, 161 Wn.2d at 174.

"The party seeking to introduce evidence has the burden of establishing the first, second, and third elements." *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). Thus, a trial court should resolve doubts as to admissibility of prior bad acts character evidence under ER 404(b) in favor of exclusion. *Thang*, 145 Wn.2d at 642.

The trial court here abused its discretion in three regards. First, the trial court failed to find the State had established the prior misconduct—the alleged July 30 assault—by a preponderance of the evidence. RP 57-62, 76 (trial court does not analyze or find that the July 30 assault occurred; State presents no offer of proof). As discussed, for evidence of prior bad acts to be admitted under ER 404(b), the trial court must find by a preponderance that the prior misconduct occurred. A trial court's failure to comply with the rule is an abuse of discretion.

In *State v. Asaeli*, this Court held the trial court erred in admitting gang association evidence where the State attempted but failed to prove by a preponderance of the evidence that Kushmen Block was a gang. 150 Wn. App. 543, 576, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001, 220 P.3d 207 (2009). On the other hand, in *State v. Mee*, this Court affirmed the trial court's admission of evidence where "The trial court noted that the State's offer of proof, if supported by the evidence at trial, would establish Mee's gang status and other gang evidence by a preponderance of the evidence, thus supporting its admission." *State v. Mee*, 168 Wn. App. 144, 152-54, 275 P.3d 1192 (2012).

Unlike either *Asaeli* or *Mee*, here the State made no offer of proof to support its admission under ER 404(b). If the court had searched for the necessary evidence to establish a July 30 assault by a preponderance, it would have found it lacking. The State produced a no-contact order entered on July 30, 2012. Exhibit 2. But this was a pretrial order. *Id.* The State did not proffer a probable cause statement or conviction. Ms. Mitchell denied any prior assault occurred. RP 49-50, 76. No other witness testified to a July 30 assault; and the pictures at Exhibit 6 that the State sought to admit at most show that Ms.

Mitchell had injuries on July 30 and her home was messy. Exhibit 6; RP 76-80. Thus, like in *Asaeli*, the trial court erred in admitting Exhibit 6 where the prior misconduct was not established by a preponderance of the evidence and the court made no related finding. *Cf. State v. Venegas*, 155 Wn. App. 507, 525-26, 228 P.3d 813 (2010) (error to admit ER 404(b) evidence without conducting fourth part of test, balancing under ER 403).

Second, the court abused its discretion in admitting Exhibit 6 because it was not relevant. The State argued the photographs were relevant to Ms. Mitchell's credibility. Ms. Mitchell denied that she was assaulted either on July 30 or on October 4. The State argued that the photographs negated Ms. Mitchell's recantation of the July 30 assault and thereby diminished the credibility of her recantation of the October 4 assault. But the photographs at Exhibit 6 do not prove (a) an assault occurred on July 30 and (b) that Mr. Smith was the perpetrator, as the prosecutor argued during trial. Moreover, the State did not produce similar photographs from October 4. In fact, the State could not prove Ms. Mitchell was injured on October 4 in any fashion. The emergency room doctor who attended to Ms. Mitchell testified he did not find any

physical manifestations of Ms. Mitchell's reported pain and allegation. RP 70, 72-75.

Third, the trial court abused its discretion because any slight probative value of Exhibit 6 was outweighed by its prejudicial effect. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986) (ER 404(b) must be read in conjunction with ER 403). As discussed, Exhibit 6 was not relevant. Even if it bore some relevance, its probative value was minimal. Exhibit 6 related to a separate, prior alleged assault—not the October 4 incident that formed the basis of the instant offense. Further, the State introduced other evidence to impeach Ms. Mitchell's credibility, including the recorded 9-1-1 call and Ms. Martin's testimony that Mr. Smith was in the apartment on October 4 and she heard a commotion upstairs. RP 138-39, 142, 145-46. 148-49, 151-52. While the probative value was minimal, the prejudicial effect of admitting three photographs of Ms. Mitchell's bloodied and bruised shoulder was great. The admission of gruesome, inflammatory photographs is "look[ed upon] unfavorably" because of the photographs' overly prejudicial nature. *State v. Crenshaw*, 98 Wn.2d 789, 807, 659 P.2d 488 (1983). Our Supreme Court particularly cautions against the repetitive use of such photographs. *Id.* Here, the

State's exhibit included multiple pictures of Ms. Mitchell's wounded body.

"An [ER 404(b)] error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting *Smith*, 106 Wn.2d at 780). Ms. Mitchell's credibility was a key issue for the jury in determining Mr. Smith's guilt. RP 58, 80, 214-16. The prosecutor recognized this much in emphasizing Ms. Mitchell's lack of credibility in closing argument. RP 214-16, 225-26. Likewise, defense counsel noted Ms. Mitchell's lynchpin role in that she "is the sole source of all this information about the assault." RP 240-41. It cannot be said that the admission of repetitive photographs of Ms. Mitchell's alleged injuries from a prior alleged assault did not materially affect the verdict within reasonable probabilities.

3. The court's instruction equating the reasonable doubt standard with an abiding belief diluted the State's burden in violation of Mr. Smith's due process right to a fair trial.

"The jury's job is <u>not</u> to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added)

(quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793, 807-08 (2012). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 21 (Instruction # 4). By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an

impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741. The error was amplified when the State emphasized this diluted burden on several occasions in closing argument. RP 214 ("This is a test, really, of your ability to determine what actually happened. . . . You need to go through the process of figuring out when they're telling the truth and what the truth actually is. . . . The truth is always there."), 250 (discussing "abiding belief in the truth" concept); *State v. Cronin*, 142 Wn.2d 568, 580-81, 14 P.3d 752 (2000) (incorrect instruction not harmless where prosecutor discussed during closing argument). Because the error is of constitutional dimension and affected Mr. Smith's rights at trial by lowering the State's burden of proof, it may be raised for the first time on appeal. RAP 2.5(a)(3).

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets.

The pattern instruction reads:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [*If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*]

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly

held these remarks misstated the jury's role. *Id.* at 764. However, the error was harmless because the "belief in the truth" theme was not part of the court's instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the "belief in the truth" language almost twenty years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle* the issue before the court was whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the court did not consider the issue raised here: whether the "belief in the truth" phrase minimizes the State's burden and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt. Without addressing this issue, the court found the "[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error." *Id.* at 658.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should

find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

4. Cumulative trial errors denied Mr. Smith a fair trial.

Each of the above trial errors requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Smith a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of

fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *Venegas*, 155 Wn. App. at 530. The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. As previously discussed, the evidence against Mr. Smith was contested. The alleged victim, Cassandra Mitchell, denied the allegations. There was no other witness to the allegations. But the jury was repeatedly instructed to consider these allegations as "domestic violence," the jury received highly prejudicial evidence of prior abuse, and the State's burden of proof was diluted by the court's instructions and the prosecutor's argument. Working together, these trial errors denied Mr. Smith the fair trial constitutional due process guarantees. In light of the cumulative effect of the trial errors, Mr. Smith's convictions should be reversed.

5. The judgment and sentence should be cleansed of all reference to the vacated assault conviction.

The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V; *see* U.S. Const. amend. XIV.[5] Similarly, article I, section 9 of our state constitution states, "No person shall be ... twice put in jeopardy for the same offense." Const. art. I, § 9. Washington gives its constitutional provision against double jeopardy the same interpretation that the United States Supreme Court gives to the Fifth Amendment. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

The double jeopardy clause protects against multiple punishments for the same offense. *E.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). "The term 'punishment' encompasses more than just a defendant's sentence for purposes of double jeopardy." *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). Even without an

[5] The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

accompanying sentence, a conviction alone can constitute punishment. *Id.* at 454-55. Adverse collateral consequences can arise from a mere conviction including delaying eligibility for parole, enhancing a sentence for a future conviction under a recidivist statute, or use as impeachment of the defendant's credibility. *Id.* at 454-55, 465 (citing *Ball v. United States*, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)); *see, e.g.*, RCW 9.94A.525(21) (adding two points to offender score where domestic violence was pled and proved in prior). A conviction also carries a social stigma regardless of any punishment imposed. *Turner*, 169 Wn.2d at 454-55, 465. Accordingly, reducing a lesser conviction to judgment or referencing that conviction in the judgment constitutes punishment and violates double jeopardy. *See id.*

"To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing." *Turner*, 169 Wn.2d at 464-65. Here, the State conceded at sentencing that the assault conviction violated double jeopardy and should be vacated. RP 260-61, 290-95, 306-10. The court agreed and vacated the conviction. RP 310; CP 76. Yet, the

front page of the amended judgment and sentence still reflects the jury's guilty verdict on the assault with a domestic violence designation. CP 74. As described above, the continuing presence of this conviction on the judgment and sentence could have lingering effects, such as delaying eligibility for parole, enhancing a sentence for a future conviction under a recidivist statute, or use as impeachment.

If this Court otherwise affirms Mr. Smith's conviction for violation of a no-contact order, the judgment and sentence should be remanded with directions to enter a corrected judgment and sentence that removes all reference to the vacated assault conviction. *See Turner*, 169 Wn.2d at 466.

F. CONCLUSION

Matthew Smith's convictions should be reversed because he was denied a fair trial when the court instructed the jury that "domestic violence" is an element of the offenses and included the inflammatory term throughout the instructions. Reversal is also required because prejudicial photographs were erroneously admitted and the court's instruction on the reasonable doubt standard misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Smith his right to a fair trial. In the alternative, the judgment and

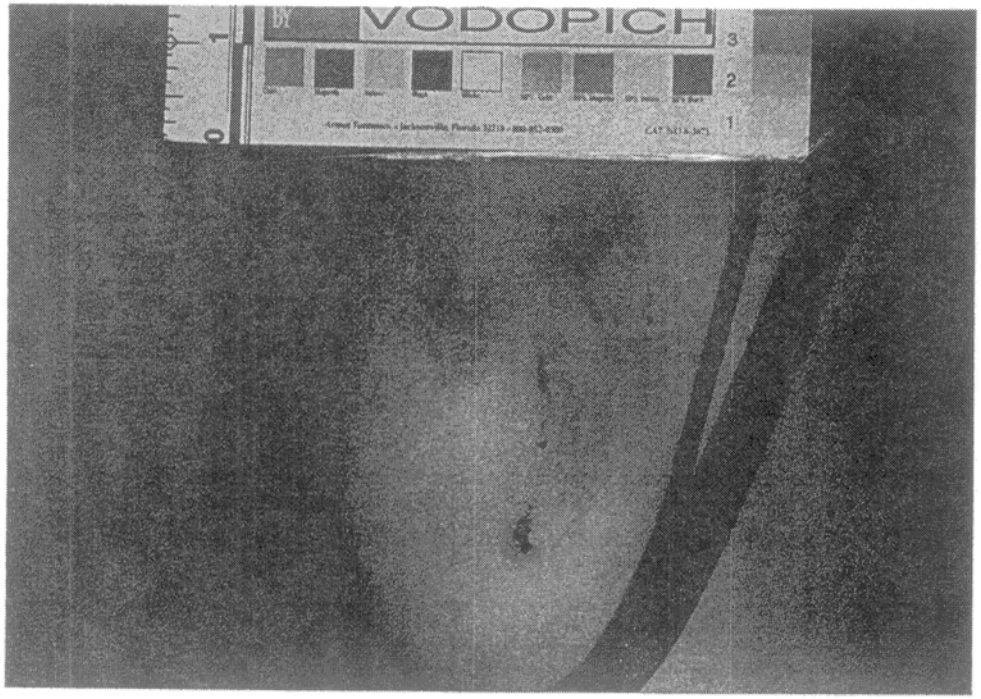
sentence should be cleansed of all reference to the vacated assault conviction.

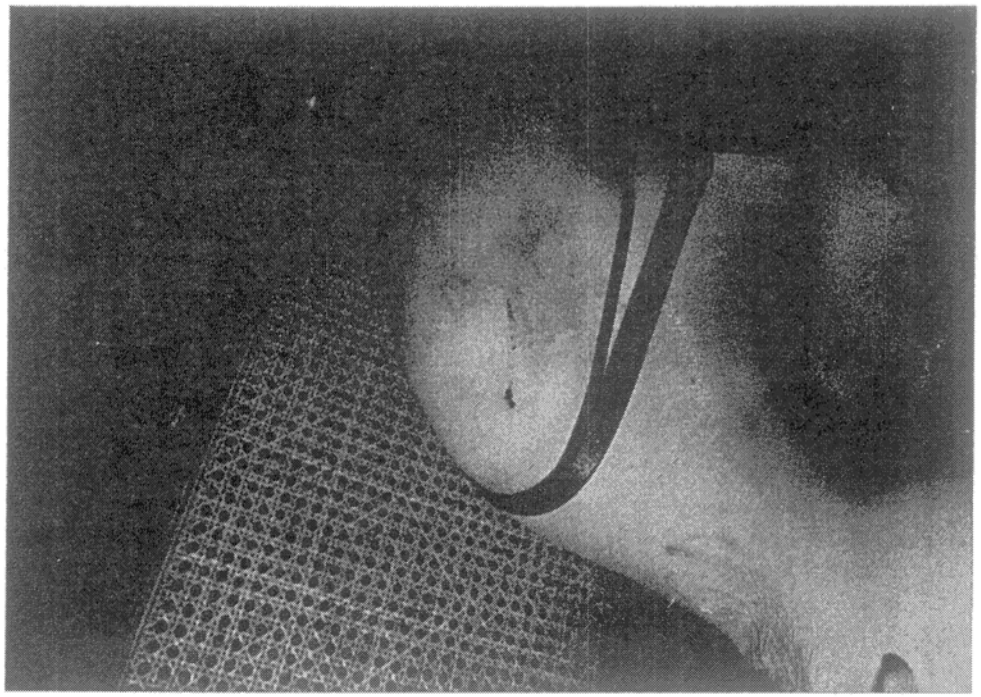
DATED this 12th day of September, 2013.

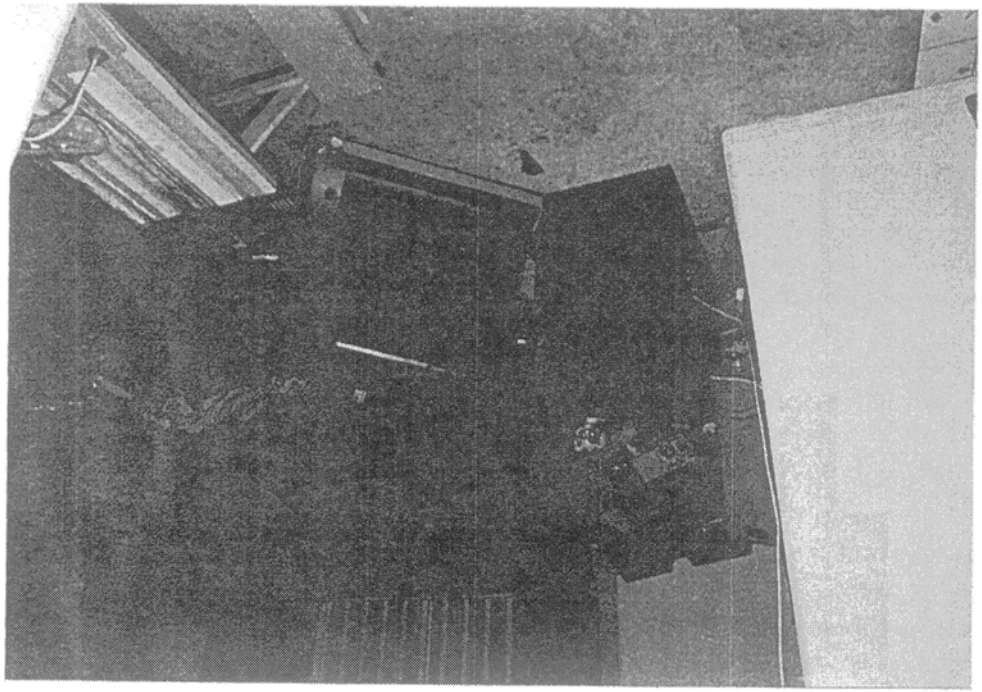
Respectfully submitted,

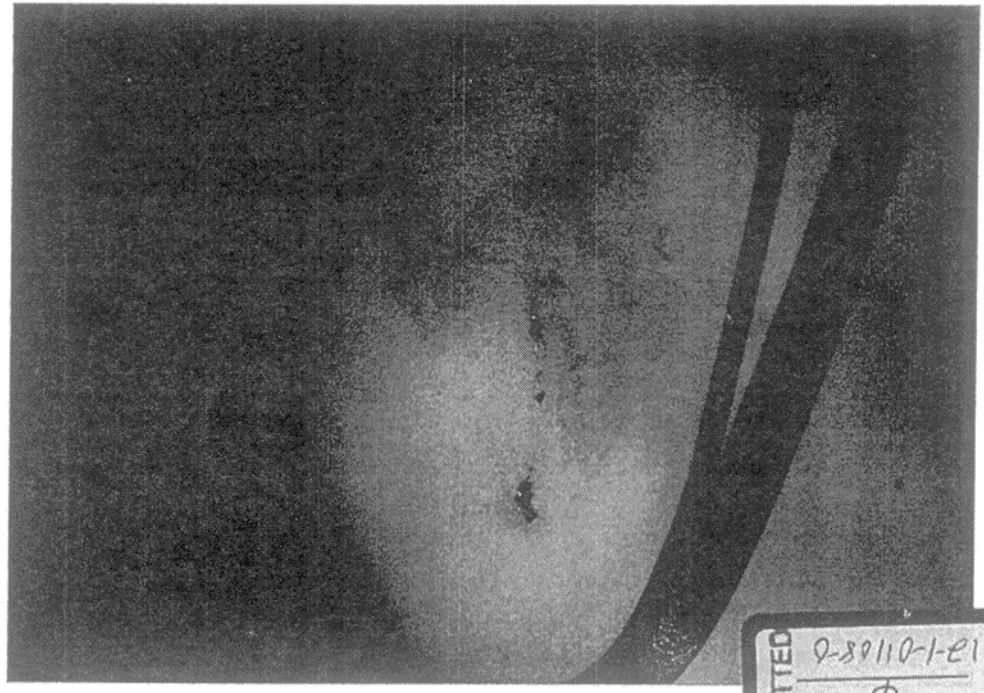
Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDIX









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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 70054-5-I
	)	
MATTHEW SMITH,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	WHATCOM COUNTY PROSECUTOR'S OFFICE 311 GRAND AVENUE BELLINGHAM, WA 98225	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	MATTHEW SMITH 1442 SWEETBAY CT BELLINGHAM, WA 98229	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF SEPTEMBER, 2013.

X_____

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