NO. 45971-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRIAN G. COX,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Gary R. Tabor, Judge
Cause No. 13-1-0914-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in taking challenges for cause at sidebar during jury selection.

02. The trial court erred in not taking count III, violation of an order for protection, from the jury where it cannot be determined whether the verdict was unanimous.

03. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Cox of his constitutional due process right to a fair trial on the charge of solicitation of the murder of Lopez-Ortiz.

04. The trial court erred in permitting Cox to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's closing argument vis-à-vis the charge of solicitation of the murder of Lopez-Ortiz that vouched for Parmley's credibility.

05. The trial court erred in miscalculating Cox's offender score.

06. The trial court erred in permitting Cox to be represented by counsel who provided ineffective assistance by failing to object or by inviting error to the miscalculation of his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court violated Cox's right to a public trial in taking challenges for cause at sidebar during jury selection? [Assignment of Error No. 1].

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02. Whether a conviction for violation of an order for protection must be set aside where the prosecutor argued an uncharged means of committing the offense and it cannot be determined whether the jury was unanimous on the proper means of committing the offense. [Assignment of Error No. 2].

03. Whether the prosecutor committed misconduct by vouching for Parmley's credibility, which denied Cox a fair trial on the charge of solicitation of the murder of Lopez-Ortiz? [Assignment of Error No. 3].

04. Whether Cox was prejudiced as a result of his counsel's failure to object to the prosecutor's closing argument vis-à-vis the the charge of solicitation of the murder of Lopez-Ortiz that vouched for Parmley's credibility? [Assignment of Error No. 4].

05. Whether the sentencing court miscalculated Cox's offender score by including his current conviction for the gross misdemeanor of violation of order of protection to add a point to his offender score for his conviction for the solicitation of the murder of Lisa Cox? [Assignment of Error No. 5].

06. Whether Cox was prejudiced as a result of his counsel's failure to object or by inviting error to the miscalculation of his offender score where the court included his current conviction for the gross misdemeanor of violation of order of protection to add a point to his offender score for his conviction for the solicitation of the murder of Lisa Cox? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Brian G. Cox was charged by third amended information filed in Thurston County Superior Court February 7, 2014, with two counts of criminal solicitation of murder in the first degree, counts I-II, and violation of an order for protection, count III, contrary to RCWs 9A.28.030, 9A.32.030(1)(a), 26.50.010, 26.50.060 and 26.50.070. Counts I and III further alleged domestic violence, in violation of RCW 10.99.020. [CP 20-21].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced February 11, the Honorable Gary R. Tabor presiding. Cox was found guilty as charged, sentenced within his standard range, and timely notice of this appeal followed. [CP 74-77, 92, 105-115, 118].

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02. Substantive Facts[1]

02.1 Count III: Violation of Protection Order - Domestic Violence (03/25/13)

On March 21, 2013, an Order for Protection was issued restraining Cox from harassing, following or having any contact whatsoever with his estranged wife Lisa. [RP 193-94; State's Exhibit 3 at 2].[2] Cox was in court and signed the order when it was entered. [RP 669; State's Exhibit 3 at 5]. Four days later, while honking his horn, he closely followed a car driven by his estranged wife for less than a block. [RP 153, 155, 178-79].

> If I had stepped on my brakes at all, he'd have hit my car. That's how close he was.

[RP 152].

> He was flipping me the bird.

[RP 153].

When contacted by the police on the day of the incident, Cox said that his wife was the first to honk and flip him off. [State's Exhibit 10 at 22-23]. He further noted that what he had done was

> in response to frustration with (his estranged wife) because he felt he was provoked because she had slowed down to - - the speed limit on Capitol Boulevard is 35 miles an hour.

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[1] The counts are presented in non-sequential order for the purpose of simplifying the presentation of the case.

[2] All references to the Report of Proceedings are to the transcripts entitled JURY TRIAL – VOLUMES I-V.

> He expressed that she had slowed down to 10 miles an hour prematurely, before he got to her residence, to agitate him, and had - - I mean, basically pumped her brakes and was provoking him, so he responded also by honking and flipping her off.

[State's Exhibit 10 at 12].

At trial, Cox explained that he did not tailgate nor ride his wife's back bumper [RP 674]:

> I wasn't until she brake checked me that I - - what I believe she tried to cause me to crash into the back of her and that was when the vehicles actually came somewhat close.
> ....
> When she brake checked me and I slammed on the brakes, then she flipped me off and I took the lower road and flipped her off back and laid on the horn.

[RP 674]. He was stuck behind her for ten seconds before "she pulled on to her street." [RP 675].

The protection order allowed Cox to come within 500 feet of his wife's residence while driving on the road where the incident occurred if he was driving to or from work. [RP 195, 670; State's Exhibit 3 at 2; State's Exhibit 10 at 21].

02.2 Count I: Solicitation for Murder of Lisa M. Cox – Domestic Violence (05/14 – 06/11/13

Ramon Lopez-Ortiz and Cox worked at the Washington State Department of Financial Institutions (DFI) since 2007 and maintained a professional relationship, though they rarely worked

together. [RP 275, 278, 687]. They hadn't talk to each other for over two years when they found themselves riding in the same elevator at DFI near the end of April 2013. [RP 279-280, 688]. Cox mentioned that he was "going through an ugly divorce." [RP 688]. As they exited the elevator, Cox revealed that he had a $250,000 life insurance policy on his wife and that he would give Lopez-Ortiz half of it if he "would make his wife permanently disappear." [RP 281].

> He just asked me if I wanted to do it or if I knew somebody, and I told him I didn't want to do it but I could probably find someone to do it.

[RP 283]. Troubled by the encounter, Lopez-Ortiz reported it to his program manager who in turn reported it to law enforcement. [RP 197, 261, 270-71, 288].

On June 6, Lopez-Ortiz called Cox at "his state-issued phone." [RP 299]. During the call, which was recorded by the police, Lopez-Ortiz asked Cox if he was serious about their prior conversation concerning his wife. When Cox asked if the call was being recorded, Lopez-Ortiz assured him it was not and that he was calling because he was in need of money. [State's Exhibit 7 at 2]. Cox indicated he had said many things in the past out of anger but suggested they meet in person to make sure they were talking about the same thing. [State's Exhibit 7 at 2]. Lopez-Ortiz reiterated he was in need of money, explaining he was "in debt with the

IRS" for several thousand dollars. [State's Exhibit 7 at 3]. Cox told him he was "willing to borrow money - I am willing to go into debt for you ... if you do this for me." [State's Exhibit 7 at 3]. He then laughed before the two ended the call by agreeing to meet the following week. [State's Exhibit 7 at 3-4]. In the interim, they exchanged several e-mails, and in response to Lopez-Ortiz's inquires as to whether Cox was really serious, Cox answered, saying they needed to talk to make sure they were on the same page. [RP 315; State's Exhibit 4].

Five days later the two met at DFI for about eight minutes. [RP 226-28, 313]. Lopez-Ortiz was wearing a wire and the conversation was audio-video recorded. [RP 322-33; State Exhibits 6 and 8]. It started with Cox admitting he had been pissed off and asking Lopez-Ortiz what he had previously told him. [State's Exhibit 8 at 1]. As the conversation continued, Cox asked Lopez-Ortiz if he was "fucking serious." [State's Exhibit 8 at 1]. Lopez-Ortiz responded with the same question. [State's Exhibit 8 at 1]. After patting Lopez-Ortiz down to see if he was wearing a wire, Cox said he was "totally serious" but no longer had access to the life insurance policy, commenting that he still wanted "that bitch dead" and that it was worth $10,000, reasoning he was going to pay more as a result of the divorce. [State's Exhibit 8 at 1-2]. "Dude, we're talking murder here, man." [State's Exhibit 8 at 2]. They talked about Lopez-Ortiz finding

someone else to do it and that Cox had an "injury settlement" coming "that is worth six figures." [State's Exhibit 8 at 4].

Cox was taken into custody within the hour. [RP 232, 433, 451]. After advisement and waiver of rights [RP 47], he agreed to give a taped statement,[3] wherein he denied trying to hire anyone to kill his estranged wife [RP 550-51, 557, 568], explaining that he didn't have any money and that she was attempting to destroy him [RP 547, 561, 578, 582]:

> He told me (Detective Jennifer Kolb) that she had called the police on him four times, had called the FBI, had called him a terrorist. He told me that she was trying to get all his money and that he had made her some offers and she wouldn't take it.

[RP 549].

Prior to filing for divorce in January 2013, Cox had informed his wife of his intentions and that he would wait until she took care of some medical issues in order to keep her on his insurance. [RP 662-63, 666]. After he filed for divorce, the FBI interviewed him because his wife had said he "was going to fly (his) plane into a building and commit a terrorist act." [RP 667].

When confronted with his recorded conversations with Lopez-Ortiz, Cox said he wasn't serious, that doing such a thing would destroy

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[3] The first 40 minutes of his statement failed to record because the equipment had not been properly activated. [RP 559-560].

his career, and that Lopez-Ortiz was trying to set him up. [RP 557-58, 579-581]. He did admit, however, that he had talked to Lopez-Ortiz about hiring him to "slash tires." [RP 564-65].

At trial, Cox testified that when he met Lopez-Ortiz on the elevator, he could have possibly mentioned a life insurance policy, noting that if he had he wasn't serious. [RP 689].

> We're exiting the elevator, and it was kind of like, hey, I got an insurance policy, I'll split it with you if you make her disappear, you know, ha, ha, wink wink, nudge nudge, walking off, and that's how I would have presented it.

[RP 690].

When Lopez-Ortiz called him on June 6, he started laughing, thinking

> this must be one of his practical jokes trying to get back at me now. And so it sounded like I was on speaker phone so I'm going, are you serious, are you like recording this or something, trying to set me up, frame me? Oh, no uhn-uhn, uhn-unh.
> ....
> And he asked me if I was serious, and so I figured I was going to call his bluff and then I go yeah. I don't recall what I said, but yeah, whatever it was. I'm serious, yeah, what are you going to do.

[RP 691].

Regarding the June 11 meeting, Cox stated:

> We didn't discuss any plan for anything in the future, to discuss anything again in the future. I was still trying to figure out if he was actually serious and do you want to do

this, or if he was trying to set me up and frame me, or if it was just another sick joke and I was expecting people to jump back, gees, Brian, I can't believe you fell for it, that type of thing.

[RP 700]. Cox agreed that he used the word "murder" during this meeting because he "wanted to make sure it was clear that he (Lopez-Ortiz) was the one talking about it." [RP 754-55]. "I didn't say we're talking murder, I said you (Lopez-Ortiz) are." [RP 755].

02.3 Count II: Solicitation for Murder of Ramon Lopez-Ortiz (06/12 – 07/01/13)

While in custody in the Thurston County Jail for the charge of first-degree robbery,[4] 53-year-old Kenneth Parmley, who had five prior convictions for crimes of dishonesty, was a cellmate of Cox "from June 21st into July, towards the end of July." [RP 472-74]. According to Parmley, during this time Cox told him "he thought that he was - - he was going to be convicted unless something was done with (Lopez-Ortiz)." [RP 481]. "That the only chance he had was for Mr. Ortiz to disappear, as he put it." [RP 481].

A. He asked if I knew anybody who or if I could - - if I was out, if I could help him out with that.

Q. Did he get any more specific on what "help him out" meant?

A. To get rid of Mr. Ortiz.

[4] Parmley eventually pleaded guilty to second-degree robbery. [RP 465].

[RP 482].

In "looking to get a break in (his) case(,)" Parmley said he played along, telling Cox "I couldn't do it myself but I knew somebody who could." [RP 482]. I told him this person "had a pig farm." [RP 487].

> Q. Where in the conversation did you first tell Mr. Cox about that?
>
> A. It would have come up when we were talking about disposing of the body.
>
> Q. And in your thought process, what's the importance of the pig farm?
>
> A. That they will pretty well eat everything, I guess.
>
> Q. Did you explain why that was important to Mr. Cox or did you have a discussion with him about that?
>
> A. No, he knew, I mean.
>
> Q. Did he seem surprised when you mentioned the pig farm?
>
> A. He kind of smiled actually.

[RP 487-88].

When Cox asked how much it would cost, Parmley told him it would be "in the neighborhood of $20,000 [RP 485](,)" and Cox said that "was doable." [RP 492]. Once they were both bailed out, Cox was going to give him "some money to operate on to get up there and talk to the person who was going to do it." [RP 486].

> [H]e wanted to try to figure out how to get me out of jail. I told him I needed to be out to really do it. I couldn't really do it over the phones, through the mail and be safe here.

[RP 483].

Parmley was housed in the same jail unit, D Tank, as were Cox and Sonny Borja. [RP 612]. And though he testified he had never talked with any inmates about how Cox was his ticket out of jail [RP 522], Borja testified to the contrary, relating that Parmley told him that Cox was

> "going to be my (Parmley's) golden ticket out of here," and those were his exact words.

[RP 620]. Borja heard Parmley tell Cox that if he bailed him out, he'd take care of his wife for $10,000, to which Cox responded:

> [D]ude, no, I don't want - - Brian said "I don't want to pay anybody," he said, "I don't. I'm not - - that's why I'm in here. No, I don't want to do this," you know.

[RP 618].

Cox admitted that he and Parmley "discussed our cases while playing cards and whatnot [RP 716]," but denied ever asking him to eliminate any witness or offering to bail him or anyone else out of jail. [RP 715, 718-19]. "It was the exact opposite." [RP 713].

> He's the one who was asking me and trying to get me to bail him out and to take care of my witnesses. He would use the term "no face, no case."

[RP 714].

> I talked to him about my case, but it was him the whole time trying to get me to bail him out regarding solicitation.

[RP 786].

D. ARGUMENT

01. THE TRIAL COURT VIOLATED COX'S RIGHT TO A PUBLIC TRIAL BY TAKING CHALLENGES FOR CAUSE AT SIDEBAR DURING JURY SELECTION.

Both the Sixth Amendment to the United States Constitution and art. I, §§ 10 and 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008); Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010). This right is not, however, unconditional, and a trial court may close the courtroom in certain situations. State v. Easterling, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006). Such a closure may occur only after (1) properly conducting a balancing process of five factors and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005). In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62.

Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514; State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

In State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013), this court, discussing State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and Sublett, recognized that our Supreme Court has developed a two-step process for determining whether a particular proceeding implicates a defendant's public trial right:

> First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett's "experience and logic" test? (footnote omitted).

State v. Wilson, 174 Wn. App. at 335.

Given this court's acknowledgement in Wilson, 174 Wn. App. at 335-40, that the Washington Supreme Court has established that the public

trial right applies to jury selection, Cox addresses only whether the trial court violated his right to a public trial by taking challenges for cause at sidebar during jury selection. See State v. Wise, 176 Wn.2d at 11-12.

The record demonstrates that during the jury selection process several prospective jurors were excused for cause at sidebar:

> THE COURT: I'd like to make a record of a sidebar we had before we selected the jury. At that time, there were requests to excuse for cause No. 6, 40 and 43. The State did object to 43. They indicated in my thinking we were not going to reach 43 anyway and we did not, but I granted the challenges for cause for each of those three, 6, 40 and 43.
>
> Does anybody need to put anything else on the record in that regard?[5]
>
> (PROSECUTOR): Your Honor, just to be specific, I think with 6 and 40, it was actually the state that made the request, made the motion, but I think they might have been agreed or stipulated by defense, but I think just for technicality purposes that was –
>
> THE COURT: That's right. It was you that made the objection.
>
> (DEFENSE COUNSEL): And I agree. It was the state that made the strike for cause and I did not object to either one.
>
> THE COURT: All right. And then we discussed excusing jurors for hardship and counsel did not object to our excusing No. 9, who had indicated that he had job responsibilities and that would make it difficult for him to concentrate. There was also the issue about his coworker.

[5] This was put on the record at the conclusion of the jury selection process. [RP 126-27; CP 59-60].

> He was the boss of the boss of the coworker seated next to him, No. 10. But we excused No. 9 for hardship.
>
> We also excused No. 12, the lady whose sister was ill, that she might have to travel to New Mexico if there was a worsening of her condition. So they were stricken for hardship.
>
> Is there anything else I need to memorialize about any sidebars or actions outside the record?

[RP 126-27].

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), where the issue was whether Love's right to a public trial was violated because the trial court entertained peremptory challenges at the clerk's station, Division III of this court held that the public trial right does not attach to the exercises of challenges during jury selection, reasoning that neither "prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in pubic." Id. at 920. This court tracked this analysis when confronted with the same issue in State v. Dunn, ___ Wn. App. ___, 321 P.3d 1283 (2014):

> We agree with Division III that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right.

Id. at 1285.[6]

[6] A petition for review was filed in Love under cause no. 89619-4, which was stayed by our Supreme Court on April 4, 2014. Similarly, a petition for review was filed in Dunn on May 7 and is scheduled to be considered on August 5, 2014 under cause no. 90238-1.

Cox respectfully disagrees with this court's decision in Dunn, which relied on Division III's decision in Love, for it is well established that the right to a public trial extends to jury selection. In re Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Importantly, our Supreme Court's decisions in Wise and State v. Strode, 176 Wn.2d 58, 292 P.3d 715 (2012), in addition to this court's decision in Wilson, support the claim that peremptory challenges—and by extension challenges for cause—must be made in open court. In Strode, where "for-cause" challenges were conducted in chambers, the court held this practice violated public trial rights. Strode, 167 Wn.2d at 224, 227, 231.

In Wilson, by noting that the public trial right has not historically encompassed excusals for hardship prior to the commencement of voir dire, Wilson, 174 Wn. App. at 337-39, this court differentiated between such excusals under CrR 6.3 and those "for-cause" and peremptory challenges under CrR 6.4, the latter of which must occur in open court. Id. at 342.

The trial court erred in taking challenges for cause at sidebar during jury selection, outside the public's purview and in violation of Cox's right to a public trial. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), rev. granted in part, 176 Wn.2d 1031 (2013) (rejecting argument that no public trial violation can occurred where jurors

dismissed at sidebar). The error was structural, prejudice is presumed, and reversal is required.

02. A CONVICTION FOR VIOLATION OF AN ORDER FOR PROTECTION MUST BE SET ASIDE WHERE THE PROSECUTOR ARGUED AN UNCHARGED MEANS OF COMMITTING THE OFFENSE AND IT CANNOT BE DETERMINED WHETHER THE JURY WAS UNANIMOUS ON THE PROPER MEANS OF COMMITTING THE OFFENSE.

Cox was charged by third amended information with violation of an order for protection:

> In that the defendant, BRIAN GLENN COX, in the State of Washington, on or about March 25, 2013, with knowledge that the Thurston County Superior Court had previously issued a protection order pursuant to Chapter 26.50 in Thurston County Superior Court, on March 21, 2013, Cause No. 13-2-30027-1, did violate the order while the order was in effect by knowingly violating (1)(a)(i) the restraint provisions prohibiting contact with Lisa Marie Cox, a family or household member, pursuant to RCW 10.99.020; and/or (ii) provisions excluding the person from a residence, workplace, school, or day care of Lisa Marie Cox. (emphasis added).

[CP 21].

RCW 26.50.110(1)(a)(i) and (ii) provide:

> (1)(a) Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 7.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross

misdemeanor, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party; (emphasis added).

(ii) A provision excluding the person from a residence, workplace, school, or day care;
....

Court's instruction 16, the to-convict instruction for violation of the order for protection, provides in relevant part:

(3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting contact with a protected party or a provision of the order excluding the person from a residence, school, workplace, or daycare.... (emphasis added).

[CP 88].

In pertinent part, the Order for Protection restrained Cox from the following actions relating to his estranged wife and her children:

2. Respondent is Restrained from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, locations, or wire or electronic communication of .... (emphasis added).

3. Respondent is Restrained from coming near and from having any contact whatsoever ... with.... (emphasis added).

[State's Exhibit 3 at 2].

Given there was neither proof nor argument that Cox violated the provision excluding him from his estranged wife's residence, workplace, school or day care (RCW 26.50.110(1)(ii), the State was left to prove that he violated the Order of Protection that prohibited him from contacting her as set forth above in the amended information, RCW 26.50.110(1)(a)(i), court's instruction 16, and subsection 3 of the Order of Protection. This is so because the amended information, statutory provision and instruction are limited in scope to the parameters of subsection 3 of the Order of Protection, which prohibited Cox from having any contact with his estranged wife, compared with subsection 2 that included activity such as harassment.

During closing, while agreeing that Cox "did have permission to go down that road to go to and from work [RP 853](,)" the prosecutor argued that Cox had nevertheless violated the order in two ways:

> I would submit to you there's two parts of this order that were violated and we (have) talked about the contact....

[RP 855].

> The other provision of the order that I would submit to you that was violated is provision - - and you'll see the order right above the one that says no contact, and lists a bunch of other things that the defendant is not allowed to do. And first among those in the list is harass Lisa Cox....

[RP 857].

Referencing subsection 2 of the Order of Protection, which is beyond the scope of the applicable no-contact provision of subsection 3, which required proof that Cox had in fact contacted his estranged wife, the prosecutor went on to argue that Cox

> admittedly was honking, admittedly was yelling at her. Is that harassing behavior? I would submit to you that it is.

[RP 857].

As charged and instructed, the State was required to prove that Cox violated the Order of Protection that prohibited him from contacting his estranged wife, not that he was harassing her. The State admittedly argued both, which is wrong, for harassment and contact are not the same thing. A juror in this case could have reasonably believed there was no impermissible contact since Cox had a right to be where he was, but at the same time believe there was evidence of harassment based on the second part of the prosecutor's argument.

Criminal defendants have a constitutional right to a unanimous jury verdict. WASH. CONST. art. 1, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d. 231 (1994). When alternative means of committing a single offense are presented to the jury, each alternative means must be supported by substantial evidence in order to safeguard a

defendant's right to a unanimous jury determination. State v. Garcia, 179 Wn.2d 828, 836, 318 P.3d 266 (2014).

Here, the prosecutor argued that Cox violated the Order of Protection in two ways, by either contacting his estranged wife or by harassing her. [RP 855, 857]. As argued, the former was permissible; the latter was not. The information and instruction could easily have been written to include harassment as a means of violating the Order of Protection, but no such language appeared. There is no way of knowing whether any of the jurors relied on the impermissible harassment alternative (subsection 2 of the Order for Protection) instead of the no-contact provision (subsection 3 of the Order for Protection), with the result that Cox's conviction for violation of the Order for Protection should be reversed.

03. THE PROSECUTOR COMMITTED MISCONDUCT BY VOUCHING FOR PARMLEY'S CREDIBILITY, WHICH DENIED COX A FAIR TRIAL ON THE CHARGE OF SOLICITATION OF THE MURDER OF LOPEZ-ORTIZ.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty

can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

If it is established that the prosecutor made improper comments, this court reviews whether those improper statements prejudiced the defendant under one of two different standards of review. State v. Emery, 174 Wn. 2d 742, 7761, 278 P.3d 653 (2012).

Where, as here, a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

However, where the State's misconduct violates a defendant's constitutional rights, this court analyzes the prejudice under a different standard: the stringent constitutional harmless error standard. State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996). Under this standard, this court presumes constitutional errors are harmful and must reverse unless the State meets the heavy burden of overcoming the presumption that the error is prejudicial, Id. at 242, which requires proof

that the untainted evidence overwhelmingly supports a finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

A prosecutor's obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

It is misconduct for a prosecutor to vouch for a witness by expressing his or her personal belief as to the truthfulness of a witness. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "'It is misconduct for a prosecutor to state a belief as to the credibility of a witness.'" Id. (quoting State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)).

Unmoored from this restriction, the prosecutor impliedly vouched for Parmley. The gist of his circular argument was that Parmley was

telling the truth because he was willing to endure the provocation of his fellow inmates even though he had nothing to gain, unlike witnesses for the defense, who benefited by "getting credibility in the world that they're in by trying to attack a snitch, by trying to discredit a snitch." [RP 912]. "Again, I would submit to you what do people have to gain by what they say in testimony to you and what their testimony is?" [RP 910].

> What did Kenneth Parmley have to gain? Well, he's already been labeled an informant, a snitch, he's already been verbally and physically assaulted on multiple occasions even outside of jail. He never said to anyone by his own testimony or anyone's testimony that, hey, you know what, I made this up, I don't want to testify. He never said you can't make me testify. He never backed out even after he knew he wasn't getting a deal.
>
> Did he want that initially? Yes. Did he get it? No. And did he know very early on in the process he wasn't getting it? Yes. But he kept going with law enforcement, he kept cooperating and came in and testified even knowing all that.

[RP 910-911].

In Ish, our Supreme Court held that "a witness's testimony that (he was) speaking the truth and living up to the terms of (his) plea agreement may amount to a mild form of vouching." 170 Wn.2d at 197. (emphasis added). Here, in contrast, there is more than a possibility that the prosecutor's argument amounted to vouching. Not only was he impliedly asserting that Parmley was "speaking the truth," he was advancing this

with the argument that it must be so because Parmley had endured jail-house abuse and had nothing to gain, unlike witnesses for the defense. Such an argument surely goes beyond the mere possibility of vouching referenced in Ish.

The State's case on count II was neither clear-cut nor overwhelming. It relied heavily on the testimony of Parmley, and the sole issue was whether he was telling the truth. Other evidence—his prior convictions, current charge—was short of encouraging. In this context, the prosecutor's misconduct of vouching for this jailhouse informant was nothing short of a flagrant attempt to encourage the jury to decide count II on improper grounds, and in the process ensured that Cox did not receive a fair trial on this charge. Reversal is required.

04. COX WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT VIS-Á-VIS THE CHARGE OF SOLICITATION OF THE MURDER OF LOPEZ-ORTIZ THAT VOUCHED FOR PARMLEY'S CREDIBILITY.[7]

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of

[7] While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court determine that counsel waived the issue by failing to object to the prosecutor's closing argument that vouched for

Parmley's credibility, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel would have failed to so object to this argument for the reasons previously argued herein. Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident for the reasons set forth in the preceding section.

Counsel's performance thus was deficient because he failed to object to the argument here at issue for the reasons previously agued, which was highly prejudicial to Cox, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for solicitation of the murder of Lopez-Ortiz.

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05. THE SENTENCING COURT MISCALCULATED COX'S OFFENDER SCORE BY INCLUDING HIS CURRENT CONVICTION FOR THE GROSS MISDEMEANOR OF VIOLATION OF ORDER OF PROTECTION TO ADD A POINT TO HIS OFFENDER SCORE FOR THE CONVICTION FOR THE SOLICITATION OF THE MURDER OF LISA COX.

"'In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). As a matter of law, where a standard range sentence is given, the amount of time imposed may not be appealed. RCW 9.94A.585(1); State v. Friederich-Tibbets, 123 Wn.2d 250, 866 P.2d 1257 (1994); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). An appellant, however, may challenge the procedure by which a sentence within the standard range was imposed. Mail, at 710-11; State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986).

Solicitation to commit murder in the first degree is a serious violent offense. RCW 9.94A.030(45)(a)(i) and (b). Under RCW 9.94A.589(1)(b), multiple current serious violent offenses "shall be served consecutively to each other...." Cox was sentenced to 218.63 months for count I (solicitation/Lisa Cox, offender score 1), 180 months for count II

(solicitation/Lopez-Ortiz), and 364 days suspended for the non-felony violation of order of protection in count III. [CP 107, 109]. Under RCW 9.94A.589(1)(b), counts I and II were run consecutively to each other and count III was run concurrent to count I for a total of 398.63 months. [CP 109-110]. Cox's offender score of 1 for count I was determined by including his gross misdemeanor offense in count III for violation of order of protection (domestic violence) as a "repetitive domestic violence offense" as set forth in RCW 9.94A.030(41)(a)(ii), which defines "repetitive domestic violence offense" to include any "[d]omestc violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense."

> If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through 20 of this section; however, count points as follows:
> ....
> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011. (emphasis added).

RCW 9.94A.525(21) and (c).

Cox's conviction in count III for violation of order of protection (domestic violence), a gross misdemeanor, cannot be construed, as happened here, as a "prior conviction for a repetitive domestic violence

offense." It is not a prior conviction, it is not repetitive, it is not a felony, and it is not subject to the scoring provisions of the Sentencing Reform Act. City of Bremerton v. Bradshaw, 121 Wn. App. 410, 413, 88 P.3d 438 (2004).

> A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

RCW 9.94A.525(1). And the rule of lenity applies here to the interpretation of the above-quoted RCW 9.94A.525(21)(c), thus requiring this court to construe the statute strictly against the State and in Cox's favor. See State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Absent the existence of ambiguity, this court ascertains the meaning of a statute from its language alone. State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). Conversely, under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), review denied, 145 Wn.2d 1013 (2001).

Remand is required to resentence Cox on count I based on an offender score of zero.

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06. COX WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT OR BY INVITING ERROR TO THE MISCALCULATION OF HIS OFFENDER SCORE WHERE THE COURT INCLUDED HIS CURRENT CONVICTION FOR THE GROSS MISDEMEANOR OF VIOLATION OF ORDER OF PROTECTION TO ADD A POINT TO HIS OFFENDER SCORE FOR HIS CONVICTION FOR THE THE SOLICITATION OF THE MURDER OF LISA COX.[8]

Should this court determine that Cox's attorney waived the issue regarding the miscalculation of his offender score by failing to object to the miscalculation or by inviting error by asserting in his sentencing memorandum that his gross misdemeanor should be included in his offender score because "non-felony repetitive domestic violence offense convictions count as a point for scoring purposes [CP 95](,)" then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object or invite error for the reasons argued in the preceding section. The prejudice is self-evident: but for counsel's failure to object or by inviting error, Cox was

[8] For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier herein is hereby incorporated by reference.

sentenced on count I based on an incorrect offender score, which rendered a higher standard range. Remand for resentencing should follow.

E. CONCLUSION

Based on the above, Cox respectfully requests this court to reverse his convictions and/or remand for resentencing consistent with the arguments presented herein.

DATED this 31st day of July 2014.

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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