No. 44119-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DALE JACKSON PURSER,

Appellant.

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

The Honorable George L. Wood

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. RCW 9.94A.535(3)(h), as applied to Mr. Purser, is unconstitutionally vague and violates the Fourteenth Amendment's Due Process Clause.

2. The trial court violated Mr. Purser's fundamental right to parent in imposing a lifetime no-contact order barring contact with his son, D.P., Jr.

3. The imposition of convictions for felony harassment and intimidating a witness both as a result of the same act violated double jeopardy.

4. The trial court violated Mr. Purser's right to a unanimous verdict on felony harassment when it failed to instruct the jury on unanimity.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth Amendment's Due Process Clause. RCW 9.94A.535(3)(a) and (h)(iii), setting forth the aggravating factors of deliberate cruelty, do not provide any standards to govern the determination of what degree of violence is normally associated with a given offense. By leaving it to

the jury in Mr. Purser's case to define this element, was Mr. Purser deprived of due process?

2. The trial court's power at sentencing is statutory. By statute, the court may impose "crime-related" prohibitions as a condition of the sentence. Sentencing prohibitions that inhibit or infringe on a fundamental constitutional right, such as the right to parent, may be imposed but only where the prohibition is reasonably necessary to accomplish the essential needs of the State and public order. Less restrictive alternatives must be considered. Here, the trial court imposed a lifetime prohibition on contact between Mr. Purser and his son, D.P., without making any finding the prohibition was reasonably necessary and without considering less restrictive alternatives. In light of the trial court's failures, is this Court required to strike the prohibition as impermissibly infringing on Mr. Purser's fundamental constitutional right?

3. A defendant has the constitutional right to be free from being placed twice in jeopardy. Multiple punishments for the same act where the Legislature has not authorized such multiple punishment violates double jeopardy. Imposition of multiple convictions that rely upon the same evidence violates double jeopardy. Where Mr. Purser's threat to

kill provided the only evidence supporting the offense of felony harassment (Count II) and the offense of intimidating a witness (Count III), did the trial court violate double jeopardy when it entered convictions for both offenses?

4. A defendant has a constitutionally protected right to a unanimous jury. In order to insure jury unanimity where the State alleges several acts, each of which may constitute the charged offense, the prosecutor must either elect the act upon which it relied, or the court must instruct on jury unanimity. Here, the State proved several threats to kill, each of which could have constituted a count of felony harassment, but the prosecutor did not elect which act constituted the act upon which he relied, nor did the court instruct on jury unanimity. Was Mr. Purser's right to jury unanimity violated requiring reversal of his felony harassment conviction?

C. STATEMENT OF THE CASE

Jennifer Purser and appellant, Dale Purser, were married on February 20, 2009. 8/29/2012RP 31. At the time they were married, Ms. Purser had a son from a previous relationship, who was born in 2005. 8/29/2012RP 31. Ms. Purser and Mr. Purser had a son, D.P. who was born in 2010. 8/29/2012RP 31. Ms. Purser described Mr.

Purser as initially calm and shy, who in her terms, turned violent and controlling with mood swings. 8/29/2012RP 31. Ms. Purser claimed several months of domestic violence, culminating in two instances where he assaulted her. 8/29/2012RP 32-38.

On September 22, 2011, following another argument between the two, Ms. Purser left the house and stayed with a friend. 8/29/2012RP 46. When she returned, Ms. Purser demanded Mr. Purser leave the house. 8/29/2012RP 46. Mr. Purser refused and demanded Ms. Purser leave the house. 8/29/2012RP 46. Instead, Ms. Purser claimed she slept in the couple's car. 8/29/2012RP 47.

In the morning, Ms. Purser came into the house to get her oldest son ready for school. 8/29/2012RP 48. According to Ms. Purser, Mr. Purser attacked her, hitting her repeatedly. 8/29/2012RP 49. Ms. Purser claimed Mr. Purser repeatedly threatened to kill her while assaulting her. 8/29/2012RP 49-54. When she went to leave, Mr. Purser allegedly told Ms. Purser that if she called the police he would kill her and her family. 8/29/2012RP 54-55, 59.

The State charged Mr. Purser with one count of assault in the first degree, one count of assault in the second degree, two counts of intimidation of a witness, and one count of felony harassment. CP 93-

96. Each of the counts contained a sentence enhancement allegation for committing aggravated domestic violence. CP 93-96.

The court's to-convict instruction for felony harassment stated:

> To-convict the Defendant of the crime of HARASSMENT as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 23rd day of September 2011, the Defendant knowingly threatened to kill J.P. immediately or in the future;
> (2) That words or conduct of the Defendant placed J.P. in reasonable fear that the threat to kill would be carried out;
> (3) That the Defendant acted without lawful authority; and
> (4) That the threat was made or received 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 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.

CP 62.

During closing argument, the prosecutor did not elect the threat to kill the State was relying on for Count II, instead relying on all of them:

> Jennifer Purser testified that while the defendant was beating her he told her he was going to kill her. He told her to say goodbye to her children because he was going to kill her. The repeated threats that had been made over the course of the past couple of years placed her in reasonable fear that he would be capable of carrying it out.

8/30/2012RP 49.

Following a jury trial, Mr. Purser was convicted as charged. CP 27-32.

At sentencing, the court found the harassment, first degree assault, and one count of intimidation of a witness constituted the same criminal conduct, and the second degree assault count and the remaining intimidation count also constitute the same criminal conduct. CP 9. The court imposed exceptional sentences on the remaining counts. CP 10-11. Finally, the court imposed a lifetime no-contact order between Mr. Purser and his son, D.P. CP 16.

D. ARGUMENT

1. THE AGGRAVATING FACTOR IN RCW 9.94A.535(3)(h)(iii) IS IMPERMISSIBILY VAGUE.

a. The vagueness doctrine of the Fourteenth Amendment's Due Process Clause applies to aggravating factors. In *Apprendi v. New Jersey*, the Court recognized that sentencing enhancements which increase the maximum sentence to which a person is exposed trigger the Fourteenth Amendment's Due Process Clause because those enhancements affect the person's liberty interest in being free of confinement. 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Thus, *Apprendi* held the Fourteenth Amendment's Due Process Clause required proof beyond a reasonable doubt of those enhancements. Additionally, the Sixth Amendment right to a jury trial incorporated by the Fourteenth Amendment's Due Process Clause required those facts be proved to a jury. In *Blakely v. Washington*, the Court expressly applied that holding to aggravating factors in the Sentencing Reform Act (SRA). 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Because aggravating factors trigger the protection of the Fourteenth Amendment's Due Process Clause, those factors are

subject to challenge under the vagueness doctrine of the Due Process Clause.

The vagueness doctrine of the Due Process Clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. A statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 566, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of guidelines to govern enforcement. *Kolender v. Lawson*, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

Prior to *Blakely*, in *State v. Baldwin*, the Washington Supreme Court overturned its prior decision in *State v. Rhodes*, 92 Wn.2d 755, 600 P.2d 1264 (1979), and concluded that aggravating factors were not subject to a vagueness challenge. 150 Wn.2d 448, 78 P.3d 1005 (2003). *Baldwin* offered several justifications for its conclusion. First, *Baldwin* held "the void for vagueness doctrine should have application only to laws that 'proscribe or prescribe conduct'" and . . . it was " 'analytically unsound' to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences." 150 Wn.2d at 459, *quoting State v. Jacobsen*, 92 Wn. App. 958, 966, 965 P.2d 1140, *review denied*, 137 Wn.2d 1033 (1999) (internal quotation omitted). *Baldwin* concluded that because sentencing guidelines "do not define conduct . . . nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature[,]" the void-for-vagueness doctrine "[has] no application in the context of sentencing guidelines." *Baldwin*, 150 Wn.2d at 459. Second, *Baldwin* concluded there was no liberty interest at stake in the determination of an aggravating factor, stating "before a state law can create a liberty interest, it must contain "'substantive predicates'" to the exercise of discretion and "'specific directives to the decision maker that if the

regulations' substantive predicates are present, a particular outcome must follow.'" *Baldwin*, 150 Wn.2d at 460, *quoting In re Personal Restraint of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994). It is clear that each of these conclusions is incorrect in light of *Apprendi* and *Blakely*.

First, *Baldwin*'s conclusion that aggravating factors "do not . . . vary the statutory maximum and minimum penalties" is indisputably incorrect following *Blakely*. There the Court held aggravating factors *do* alter the statutory maximum of the offense. *Blakely*, 542 U.S. at 306-07. Moreover, aggravating factors no longer "merely provide directives that judges should consider when imposing sentences." The vast majority of aggravating factors may no longer be considered by a sentencing court at all, unless they are first found by the jury beyond a reasonable doubt. RCW 9.94A.537. Thus, unlike the pre-*Blakely* scheme, the aggravating factors are not matters that merely direct judicial discretion at all.

Further, the conclusion that aggravating factors do not impact a liberty interest is also contrary to the conclusions reached in *Apprendi* and *Blakely*. Those cases concluded the Due Process Clause does apply to aggravating factors. First, it is by virtue of the Fourteenth

Amendment Due Process Clause that the Sixth Amendment is incorporated against the states. *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491(1968). In determining whether to incorporate a specific right within the Due Process Clause the Court asked the following:

> whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, whether it is basic in our system of jurisprudence, and whether it is a fundamental right, essential to a fair trial.

Id. 148-49 (Internal citations and quotations omitted). The Court reasoned the right a jury trial "in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power-a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.* 156. Thus, the Sixth Amendment right to a jury applies to state court proceedings as a component of the Due Process Clause because of the liberty interest at stake. And, because it applies equally to aggravating factors, the same liberty interests must necessarily be at stake.

Second, in *Apprendi*, the Court said:

> [a]s we made clear in [*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)], the "reasonable doubt" requirement "has [a] vital role in our criminal procedure for cogent reasons." 397 U.S., at 363, 90

> S.Ct. 1068. Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and ... the certainty that he would be stigmatized by the conviction." *Id.* We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. *Id.*

Apprendi, 530 U.S. at 484. Thus, *Apprendi*, specifically applied to Washington's SRA by *Blakely*, applied the Due Process Clause's protections to sentence enhancements because of the loss of liberty associated with the finding. *Apprendi* also noted "we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Id.* (Brackets in original, internal quotations omitted.) Thus, liberty interests arise from facts which establish the length of the sentence.

Apprendi and *Blakely* clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause. Indeed, as *Apprendi* expressly noted, aggravating factors impact the most basic of liberty interests - the right to be free of confinement. And it is because they affect the most basic liberty interest that enhancements and aggravating factors, just as traditional elements, must be proved beyond

a reasonable doubt. With the recognition that this most basic liberty interest is implicated any time a statute permits an increase in the prescribed range of punishment based upon a jury finding, the second of *Baldwin's* underpinnings is lost.

In reaching its conclusion that no liberty interest was affected, *Baldwin* relied principally on *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* merely held that, in death penalty cases, a legislature could not restrict juries' ability to consider the full array of potential mitigating evidence in determining whether to return a verdict to impose the death penalty. The Court found such restrictions in the Ohio statue violated both the Eighth and Fourteenth Amendments. 438 U.S. at 605. *Lockett* recognized that in noncapital cases "legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Id.* at 603-04. But *Lockett* says nothing about whether an individual has a liberty interest in guidelines, indeed it never mentions the term "guidelines." And even if it did, because the issue in that case was whether the legislature could restrict juries' consideration of mitigation in a capital case, any discussion of liberty interest in a standard range is dicta and not the holding of the Court. In fact the Court said:

> . . . . We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes.

438 U.S. at 605, n.13(Emphasis added). Thus, *Lockett* did not dictate the outcome of *Baldwin* nor was it even relevant.

And while *Lockett* offered the general recognition that legislatures may establish the amount of discretion afforded sentencing judges, the SRA has largely eliminated judicial discretion at sentencing. And, with the elimination of discretion, the SRA has specifically removed a judge's ability to find aggravating factors. RCW 9.94A.537. This was done in recognition that the Due Process Clause requires more of that finding. That jury finding leads to a specific result: an increase in the prescribed range of punishment.

Further, the relevant question is not whether a person has a right to be sentenced to the standard range. Instead, a court must ask whether his maximum sentence may be increased beyond that range without the protections of the Due Process Clause. *Apprendi* and *Blakely* have recognized that a defendant plainly does have the right, his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process, to be sentenced below the maximum sentence but

for the jury's finding of an aggravating fact. Because it is that jury finding which triggers the increase in punishment, that finding is subject to the vagueness doctrine.

Following *Apprendi* and *Blakely*, it is clear that the Due Process Clause applies to the determination of whether an aggravating factor exists. The vagueness doctrine of the Due Process Clause must also apply.

b. The aggravating factor at issue in this case is impermissibly vague as applied to Mr. Purser. In this case, the jury had no objective standard by which to measure what inheres in the crime or is normally associated with it. Here, RCW 9.94A.535(h)(iii) requires that the "current offense involved domestic violence, . . . and one or more of the following was present: (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim."

Unlike a judge, who may have years of experience with similar cases, jurors called to sit on a single case lack any framework by which to assess the normalcy of a given set of facts. And even assuming an individual juror possessed such a framework, it is inherently subjective, as it exists as a product of a single juror's experience. That inherent subjectiveness renders these aggravators impermissibly vague.

Importantly, Mr. Purser does not contend that the statute is vague because a different jury might reach a different result. Instead, he contends the doctrine is violated because there is no assurance that a subsequent jury would even apply the same standard regarding what inheres in or is normally associated with the crime. Because RCW RCW 9.94A.535(3)(h) does not guard against this arbitrary and inherently subjective application, and in fact requires it, it is void for vagueness. Mr. Purser's sentence, which is predicated on this unconstitutionally vague aggravator, must be reversed for imposition of a standard range sentence.

2. THE IMPOSITION OF THE NO-CONTACT ORDER WITH D.P. VIOLATED MR. PURSER'S FUNDAMENTAL RIGHT TO PARENT

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the trial court to impose "crime-related prohibitions" as a condition of a sentence. RCW 9.94A.505(8). A "crime-related prohibition" prohibits "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "[B]ecause the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender, the appropriate standard of review [is] abuse of discretion." *In re Personal Restraint of Rainey*, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010).

If the sentencing condition infringes a constitutional right (such as the right to the care, custody, and companionship of one's children), that condition can only be upheld if the condition is reasonably necessary to accomplish the essential needs of the State and public order. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007 (2009) ("More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.").

The right to the care, custody, and companionship of one's children constitutes such a fundamental constitutional right. *Rainey*, 168 Wn.2d at 374. Thus, sentencing conditions burdening this right "must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" *Rainey*, 168 Wn.2d at 373, *quoting Warren*, 165 Wn.2d at 32.

This Court has held that a no-contact order prohibiting a defendant from all contact with his children was "extreme and unreasonable given the fundamental rights involved," where less stringent limitations on contact would successfully realize the State's interest in protecting the children. *State v. Ancira*, 107 Wn.App. 650, 655, 27 P.3d 1246 (2001). In *Ancira*, the trial court imposed the no-contact order prohibiting Mr. Ancira from all contact with his wife and children as a condition of his sentence for felony violation of a domestic no-contact order. *Id.* at 652-53. Although this Court recognized the State's interest in preventing the children from having to witness instances of domestic violence, this Court determined that the State had "failed to demonstrate that this severe condition was reasonably necessary" to prevent that harm. *Id.* at 654. Rather, this Court concluded indirect contact, such as mail, or supervised contact

without the mother's presence might successfully satisfy the State's interest in protecting the children. *Ancira*, 107 Wn.App. at 655.

Similarly, in *Rainey*, the Supreme Court struck a lifetime no-contact order prohibiting Mr. Rainey from all contact with his child, because the sentencing court did not articulate any reasonable necessity for the lifetime duration of that order. 168 Wn.2d at 381-82. In reaching its decision, the Court noted that the fact that the child was a victim of Mr. Rainey's crime was not in itself determinative as to whether the no-contact order was proper: "It would be inappropriate to conclude that, simply because [the child] was a victim of Rainey's crime, prohibiting all contact with her was reasonably necessary to serve the State's interest in her safety." *Rainey*, 168 Wn.2d at 378. Recognizing the "fact-specific nature of the inquiry," the Court remanded to the trial court for resentencing so that the court could "address the parameters of the no-contact order under the 'reasonably necessary' standard." *Id.* at 382.

The decision in *Rainey* did not set forth a bright-line rule requiring trial courts to expressly justify the conditions and duration of no-contact orders under the reasonably necessary standard. Rather, the decision required reviewing courts to analyze the scope and duration of

no-contact orders independently in light of the facts in the record. Remand is required when a reviewing court fails to determine whether a specific provision or term is reasonably necessary. In *Rainey*, the Court was unable to determine whether, in the absence of any express justification by the trial court, a lifetime no-contact order was reasonably necessary to achieve the State's interest in protecting a child from her father. *Rainey,* 168 Wn.2d at 381-82. In addition, the Court concluded that the trial court should have addressed Mr. Rainey's argument that a no-contact order would be detrimental to his daughter's interests before pronouncing sentence. *Id.* at 382. Thus, the Court remanded for resentencing.

Here, the trial court ordered that Mr. Purser have no contact with his son, D.P., for life. CP 285, 290, 293. Because the no-contact order implicated Mr. Purser's fundamental right to the care, custody, and companionship of his child, for the sentencing condition to be constitutionally valid, "[t]here must be no reasonable alternative way to achieve the State's interest." *Rainey*, 168 Wn.2d at 379; *Warren*, 165 Wn.2d at 34-35.

In imposing the challenged sentencing condition, the trial court failed to address whether the no-contact order was reasonably

necessary to realize a compelling state interest. Moreover, although the State has a compelling interest in protecting children from harm, the State failed to demonstrate how prohibiting all contact between Mr. Purser and his son for life was reasonably necessary to effectuate that interest. Because the sentencing condition implicated Mr. Purser's fundamental constitutional right to parent D.P., the State was required to show that no less restrictive alternative would prevent harm to D.P.

Because whether a particular crime-related prohibition satisfies the "reasonably necessary" standard is a fact-specific inquiry, this Court must strike the sentencing condition prohibiting Mr. Purser's contact with D.P. and remand for further proceedings.

3. IMPOSITION OF CONVICTIONS FOR INTIMIDATING A WITNESS AND FELONY HARASSMENT VIOLATED DOUBLE JEOPARDY

a. Multiple convictions for the same act violate double jeopardy. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall ... be twice put in jeopardy for the same offense." The two clauses provide the same protection. *In re Personal Restraint*

of Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber,* 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intended to impose multiple punishments, their imposition does not violate the Double Jeopardy Clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.; see Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* If application of the

Blockburger test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that the Legislature ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent. Hunter,* 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the Legislature intended that multiple punishments be imposed. *Id.; State v. Kier,* 164 Wn.2d 798, 804, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* "same evidence" test to determine whether the crimes are the same in fact and law. *State v. Calle,* 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

In addition, double jeopardy is implicated by multiple convictions arising from the same act, even if the court finds the offenses to be the same criminal conduct. This recognizes the

collateral consequences of conviction, such as the mere fact of conviction, separate and apart from the sentence imposed. *Ball v. United States*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). *See also State v. Gohl*, 109 Wn.App. 817, 822, 37 P.3d 293 (2001), *review denied* 146 Wn.2d 1012 (2002) ("The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses.").

Double jeopardy challenges are reviewed *de novo. State v. Freeman,* 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

b. Imposition of convictions for harassment and witness intimidation violated double jeopardy. Under RCW 9A.46.020(1), (2)(b)(1)(a)(i), to be found guilty of felony harassment, the defendant must knowingly threaten to kill the victim of the harassment - the "person threatened" - and that person be placed in reasonable fear that the threat will be carried out. Under West's RCW 9A.72.110(1), a person is guilty of intimidating a witness by using a threat against a current or prospective witness, and attempting to induce the person not to provide information regarding a criminal investigation, induce the

person not to have the offense prosecuted, and/or induce the person not to give true or complete information regarding the criminal investigation. Thus, both offenses involve the use of threats. But neither the harassment nor the intimidating a witness statute contains an express provision or statement of intent that the offenses should be punished separately.

Both offenses require a "threat" to be uttered. Here, the same threats to kill were used to establish that Mr. Purser was guilty of felony harassment in Count II, *and* guilty of intimidating a witness in Count III, thus imposition of convictions for the two offenses violated double jeopardy since the same evidence establishes both offenses.

In assessing whether two offenses violate double jeopardy, this Court does not consider the elements of the offenses on an abstract level. "'[W]here *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact* which the other does not.'" *In re Personal Restraint of Orange,* 152 Wn.2d 795, 817, 100 P.3d 291 (2004), *quoting Blockburger,* 284 U.S. at 304 (emphasis added). In this

analysis, the elements of the crime are considered *as charged and proven. Freeman,* 153 Wn.2d at 777.

Here, the precise same acts by Mr. Purser were the basis for felony harassment and intimidating a witness. Counts II and III arose from the events on September 23, 2011. CP 94-95. In that assault, Mr. Purser told his wife that if she called the police he would kill her and her family. RP 54. This single statement had both the threat to kill and the threat of harm if Ms. Purser called the police, thus constituting the evidence supporting Counts II and III. As a result, imposition of convictions for both offenses violated double jeopardy.

c. The remedy for a double jeopardy violation where the two offenses arose from the same conduct is to vacate the lesser conviction. In *State v. Womac,* the Washington Supreme Court ruled that the proper remedy for a violation of double jeopardy based upon imposition of two or more convictions founded upon the same evidence is to vacate the lesser conviction. 160 Wn.2d 643, 659-60, 160 P.3d 40 (2007); a*ccord State v. League*, 167 Wn.2d 671, 223 P.3d 493 (2009) ("When two convictions violate double jeopardy principles, the proper remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction.").

Intimidating a witness is a Class B felony and felony harassment is a Class C felony, thus harassment is the lesser offense. RCW 9A.46.020; RCW 9A.72.110. The felony harassment should have been stricken. As a result, this Court should strike the felony harassment conviction in Count II.

4. THE TRIAL COURT FAILED TO ENSURE THE JURY VERDICT WAS UNANIMOUS THUS REQUIRING REVERSAL OF MR. PURSER'S HARASSMENT CONVICTION

a. A criminal defendant has a right to a unanimous verdict. A criminal conviction requires that a unanimous jury conclude that the defendant committed the criminal act charged in the information. Const. art. I, § 21; *State v. Ortega–Martinez,* 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the State alleges multiple acts resulting in a single charge, either the prosecutor must elect which act she is relying on as the basis for the charge, or the trial court must instruct the jurors that they must unanimously agree that the State proved a single act beyond a reasonable doubt. *State v. Petrich,* 101 Wn.2d 566, 572, 683 P.2d 173 (1984). *See also State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) ("[w]hen the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, *either the State must elect*

which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.") (emphasis added). If the State fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error stemming from the possibility that some jurors may have relied on one act or incident while other jurors may have relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *State v. Kitchen,* 110 Wn.2d 403, 411, 756 P.2d 105 (1988).[1] Whether the trial court was required to instruct the jury on unanimity is reviewed by this Court *de novo*. *State v. Bradshaw,* 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

The failure to elect an act or give a unanimity instruction is presumed prejudicial and subject to harmless error analysis. *Coleman,* 159 Wn.2d at 512; *Kitchen,* 110 Wn.2d at 403. This harmless error test turns on whether a rational trier of fact could have a reasonable doubt as to whether each incident established the charged offense beyond a reasonable doubt. *Kitchen,* 110 Wn.2d at 405-06.

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[1] Mr. Purser did not propose a unanimity instruction at trial. But appellate courts may review for the first time on appeal a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott,* 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The right to a unanimous verdict is part of the fundamental constitutional right to a jury trial which may be raised for the first time on appeal. *State v. Bobenhouse,* 166 Wn.2d 881, 912, 214 P.3d 907 (2009).

b. The multiple acts proven here were multiple separate acts, not a continuing offense. Here, Ms. Purser testified about several threats to kill Mr. Purser allegedly uttered on September 23, 2011. 8/26/2012RP 49-60.

A unanimity instruction is required only in a multiple acts case. *State v. Furseth,* 156 Wn.App. 516, 520, 233 P.3d 902 (2010). A case is a multiple acts case when "'several acts are alleged and any one of them could constitute the crime charged.'" *Furseth,* 156 Wn.App. at 520, *quoting Kitchen,* 110 Wn.2d at 411. Each of the multiple acts alleged must be "capable of satisfying the material facts required to prove" the charged crime. *Bobenhouse,* 166 Wn.2d at 894. Here, each threat by Mr. Purser arguably was sufficient to support the charged offenses. Thus, the multiple threats to kill constituted multiple acts.

It may be argued that Mr. Purser's threats were part of continuing offense against Ms. Purser, thus negating the requirement of a unanimity instruction. Courts distinguish between multiple acts and continuing offenses. Facts indicating "conduct at different times and places, or different victims . . . tends to show" a multiple acts case. *State v. Love,* 80 Wn.App. 357, 361, 908 P.2d 395, *review denied,* 129 Wn.2d 1016 (1996). But, facts analyzed in a common sense manner

that indicate "an ongoing enterprise with a single objective" qualify as a continuing offense. *Id.* at 361.

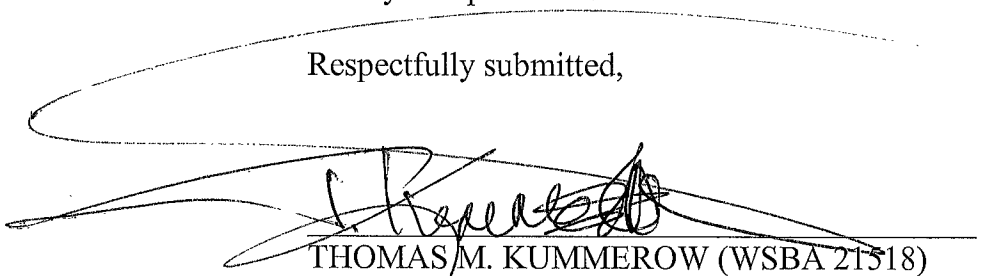
The unit of prosecution for harassment is each individual threat. *State v. Alvarez,* 128 Wn.2d 1, 13, 904 P.2d 754 (1995); *State v. Morales,* ___ Wn.App. ___, 2013 WL 1456393 at 8 (April 9, 2013) ("[W]here, . . . (1) a perpetrator threatens to cause bodily harm to a single identified person at a particular time and place and (2) places a single victim of the harassment in reasonable fear that the threat will be carried out, the conduct constitutes a single offense"). Here, each threat was a separate offense, and each act alone was sufficient to independently constitute a count of harassment, thus requiring a unanimity instruction. The court erred in failing to instruct the jury on unanimity. Mr. Purser is entitled to reversal of his conviction.

E. CONCLUSION

For the reasons stated, Mr. Purser requests this Court reverse the enhancements for aggravated domestic violence and remand for resentencing to a standard range sentence without the enhancements. Alternatively, Mr. Purser asks this Court to strike the no-contact order barring contact with his son, D.P., and/or strike the conviction for felony harassment in County II. Finally, Mr. Purser asks this Court to reverse the harassment conviction and remand for a new trial.

DATED this 29th day of April 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 44119-5-II
	)	
DALE PURSER,	)	
	)	
Appellant.	)	

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