Supreme Court No. 96108-5
(COA No. 76308-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOE JOSEPH,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joe Joseph, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Joseph seeks review of a portion of the published decision by the Court of Appeals dated April 30, 2018, for which reconsideration was denied on June 13, 2018, copies of which are attached as Appendix A and B.

C. ISSUES PRESENTED FOR REVIEW

1. By statute, harassment is elevated to a felony when the State proves the accused person has a prior conviction for a "crime of harassment" against the same person. In a novel published ruling, the Court of Appeals deemed any assault in the third degree, even when predicated on acting with criminal negligence, to be a "crime of harassment."

RCW 9A.46.060 lists the offenses that are "crimes of harassment." This list includes first, second, and fourth degree assault but omits third degree assault. When the legislature

purposefully omitted this offense from the list of crimes of harassment, should this Court review the Court of Appeals' unprecedented, published determination that third degree assault is a crime of harassment requiring increased punishment?

2. As the United States Supreme Court has recently emphasized,[1] a law increasing punishment for a conviction is unconstitutionally vague if it does not define what conduct is subject to increased sanction by setting forth predictable, non-arbitrary standards.

Here, RCW 9A.46.060 lists offenses that are deemed a "crime of harassment." It also states the list "is not limited to" the named offenses but gives no criteria for a court or individual to determine whether an unlisted crime is subject to increased punishment under RCW 9A.46.020(2)(b)(i).

Does it violate due process under the Fourteenth Amendment and article I, section 3, and the Sixth Amendment to give a judge ad hoc authority to assess whether a non-listed

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[1] *See Johnson v. United States*, _ U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015); *Sessions v. Dimaya*, _ U.S. __, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).

crime constitutes a crime of harassment as a matter of law, and should this Court review the arbitrary statutory construction employed by the Court of Appeals?

D. STATEMENT OF THE CASE

Joe Joseph was angry with his partner Nita Katlong and threatened her with harm. 5RP 475. Both Mr. Joseph and Ms. Katlong were from the Marshall Islands and had limited English-language skills, making it difficult to parse exactly what happened between them. 4RP 460. But due to this incident, Mr. Joseph was charged with felony harassment, premised on claim he committed harassment and had a prior conviction for third degree assault against Ms. Katlong. CP 13. [2]

A prior conviction for a "crime of harassment" elevates a gross misdemeanor of harassment to a Class C felony. CP 13.

Mr. Joseph argued to the court that his prior conviction for third degree assault did not qualify as a crime of harassment elevating his punishment to a felony. 4RP 337-41; 7RP 703-05,

[2] Because the Court of Appeals reversed Mr. Joseph's other convictions, the facts underlying those convictions and the appellate issues pertaining to them are not presented here, as they are not pertinent to this petition for review.

708-10. The court ruled that third degree assault was categorically a crime of harassment. It instructed the jury as a matter of law that it needed to find only that Mr. Joseph was previously convicted of third degree assault. CP 102. It did not ask the jury to separately decide that his prior conviction for third degree assault constituted a crime of harassment. *Id.*

The Court of Appeals affirmed, ruling that even though the list of crimes of harassment includes other assault offenses yet conspicuously omits third degree assault, it would not treat third degree assault's absence from this list as a purposeful act by the Legislature.

E. ARGUMENT

The published Court of Appeals decision uses circular and arbitrary analysis to elevate harassment to a felony based on a prior conviction that is not authorized by statute.

1. *The Court of Appeals opinion violates due process and risks invading the jury's province by creating an unpredictable, individual assessment for when a prior conviction is a crime of harassment.*

A law increasing punishment for a crime violates due process if it does not give ordinary people fair notice of the conduct it punishes or its lack of standards invites arbitrary

enforcement. *Johnson v. United States*, _ U.S. __, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015); U.S. Const. amends. 5, 14; Const. art. I, § 3. It is the legislature, not "the executive or judicial branch" that must "define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, _ U.S. __, 138 S. Ct. 1204, 1212, 200 L. Ed. 2d 549 (2018).

In *Johnson*, the Supreme Court addressed a sentencing statute that increased punishment for a prior "violent felony." 135 S. Ct. at 2555-56 quoting 18 U.S.C. §924(e)(2)(B). The statue defined certain qualifying prior convictions, such as "burglary, arson, or extortion" and then provided that the list was not exclusive. *Id.* For unlisted offenses, the statute explained increased punishment would also apply if a prior conviction "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.*

This "otherwise involves" phrase is called the residual clause. *Id.* at 2556.

After struggling with whether certain prior convictions met the criteria of this residual clause, the Supreme Court eventually concluded this exercise was too unpredictable and

arbitrary to satisfy due process. The statute's listed offenses, such as burglary and extortion, did not sufficiently guide whether an unlisted felony satisfied the residual clause. *Id.* at 2557. Comparing an unlisted offense to the listed offenses was not reliable. *Id.* at 2557-58. The statutory criteria of involving serious risk of injury to another also did not give predictable, non-arbitrary standards of what this meant. *Id.* at 2558.

Consequently, the Supreme Court declared the residual clause violated due process. This statutory provision is "unconstitutionally vague" because assessing whether an unlisted offense is a violent felony requires "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* "[T]he indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557.

The *Johnson* Court ruled the court cannot simply assess whether a prior crime is similar in kind and degree of risk to the listed offenses. 135 S. Ct. at 2559. This type of comparison leaves too much uncertainty, particularly when the listed

offenses are not particularly similar to each other and the statute does not give precise guidance. *Id.*

RCW 9A.46.020 contains the penalties for a person who commits the offense of harassment. Section (2)(b)(i) elevates the offense from a gross misdemeanor to a felony if the person previously been convicted of a "crime of harassment, as defined in RCW 9A.46.060, of the same victim . . . ."

RCW 9A.46.060 lists offenses that are deemed a "crime of harassment" but adds that the list is not exclusive. Yet it gives no criteria for a court or individual to decide whether another offense is a crime of harassment subject to increased punishment under RCW 9A.46.020(2)(b)(i).

The Court of Appeals did not construe this list narrowly. It refused to interpret whether an offense that appears purposefully omitted should be deemed ineligible to be a crime of harassment. Instead, it broadly declared that any offense similar in nature to any listed offense would constitute a crime of harassment. Slip op. at 7.

The Court of Appeals engaged in the type of wide-ranging inquiry deemed impermissible in *Johnson*. Even though the jury

did not consider the individual facts of Mr. Joseph's prior conviction and whether an offense is a crime of harassment is a categorical determination for any offense of that type, it relied on the individual circumstances underlying Mr. Joseph's prior conviction. Slip op. at 8 n.3.

If whether a third degree assault is a crime of harassment rests on the individual circumstances of the prior conviction, as the Court of Appeals opinion states, this approach violates the Sixth Amendment. The jury was not asked to decide whether Mr. Joseph's third degree assault constituted a crime of harassment – it only decided whether he was convicted of third degree assault.

RCW 9A.46.060 uses a categorical approach, and *Johnson* and *Dimaya* affirm this approach, to avoid the Sixth Amendment implications of having a judge assess the individual facts underlying a prior conviction. *See Johnson*, 135 S. Ct. at 2557; *Dimaya,* 138 S. Ct. at 1217. But the Court of Appeals disregarded the Sixth Amendment implications of having a reviewing court assess whether a prior conviction was "harassing" enough to be a crime of harassment.

The Court of Appeals admitted the 38 listed offenses in RCW 9A.46.060 cover a broad gamut of conduct lacking any "uniform expression of mens rea." Slip op. at 8. Based on the breadth of the list, the Court found o exclude third degree assault. Slip op. at 9.

This analysis runs afoul of the Due Process Clause's requirements. Assessing whether Mr. Joseph's conviction for third degree assault is "of a similar nature" to a broad list of crimes that have an array of different elements invites the same indeterminate and wide-ranging inquiry deemed unacceptable by the United States Supreme Court. The Court's decision is not predicated on reliable guidelines or predictable, non-arbitrary standards to define what non-listed offenses constitute a crime of harassment. *See Johnson*, 135 S. Ct. at 2558. RCW 9A.46.060 gives no guidance to what constitutes a crime of harassment other than the listed offenses. Deeming third degree assault similar enough is too speculative to give fair notice and guard against arbitrary enforcement.

This Court should grant review based on the due process implications of the Court of Appeals opinion, which is contrary

to the predictable standards necessary for increased punishment as the United States Supreme Court has clearly ruled.

2. This Court should grant review because the Court of Appeals misapplied controlling principles by broadly construing an illustrative list and disregarding clear evidence of Legislative intent.

No case law construes whether the list of offenses deemed crimes of harassment applies to third degree assault. This published decision is the first occasion in which the Court of Appeals has expanded the list of crimes of harassment to this offense and the only occasion in which the Court of Appeals has construed the statute for any offense in a published decision. The Court of Appeals' expansive view of the statute establishes an impermissibly broad view of when a prior conviction may be deemed a crime of harassment. Substantial public interest favors review.

The Court of Appeals refused to give any weight to the statute's construction, which expressly includes greater and lesser degrees of assault yet omits third degree assault from the list of crimes of harassment. Had the Legislature intended to include any assault, or any offense of domestic violence, it would

have said so, as the Legislature knows how to do that. *See State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) ("to express one thing in a statute implies the exclusion of the other").

The "fundamental purpose in construing statutes is to ascertain and carry out the legislature's intent." *State v. Bigsby*, 189 Wn.2d 210, 216, 399 P.3d 540 (2017). The sequence of the statute's enactments must be considered when construing a statute. *Little v. Little*, 96 Wn.2d 183, 189, 634 P.2d 498 (1981).

Sequentially, the Legislature initially defined a crime of harassment in RCW 9A.46.060 to include first, second, and the then-equivalent of fourth degree assault. *Laws* of 1985, ch. 288 § 6. Shortly thereafter, the Legislature created assault of a child in the first, second, and third degrees. *Laws* of 1992, ch. 145, §§ 1-3, 12.

Simultaneously with enacting three degrees of assault of a child, the Legislature amended the list of crimes of harassment to add first and second degree assault of a child. *Id.* at § 12. But it again omitted third degree assault of a child, which has an identical negligence prong as third degree assault. *Id.* at § 12.

The Legislature has amended the list of crimes of harassment many times. *See* Appellant's Reply Brief at 5 (listing dates of additions to list). Despite repeatedly drawing its attention to this list, specifically in the context of assault offenses, and even though it added other crimes of assault, it never made third degree assault as a crime of harassment. No case law has ever otherwise deemed third degree assault to be a crime of harassment.

The Court of Appeals summarily dismissed the Legislature's construction of this list as wholly irrelevant. It refused to give any weight whatsoever to the plain evidence that the Legislature purposefully left third degree assault off this list. But sequence, context, and content of enactments and amendments matter in statutory construction. *Little*, 96 Wn.2d at 189.

The Legislature is also deemed to be aware of judicial interpretations of a statute and relevant case law. *See Hazel v. Van Beek*, 135 Wn.2d 45, 51, 954 P.2d 1301 (1998). This Court has construed the term "assault," when used in a statute without referring to any degree, to mean the Legislature

intended to refer to all degrees of assault. *State v. Lee*, 96 Wn. App. 336, 342, 979 P.2d 458 (1999). Conversely, by listing specific degrees of assault in RCW 9A.46.060, the Legislature shows its intent to limit the statute's embrace to those listed degrees of assault. *Id.*

A further principle of statutory construction is that criminal statutes are not read expansively. *King County v. Graf*, 39 Wn. App. 433, 436, 693 P.2d 738 (1985) ("Penal statutes must be strictly construed"). "Strict construction of a statute means that, given a choice between a narrow, restrictive construction and a broader, more liberal construction, the first option *must* be chosen." *Id.* (emphasis added).

Contrary to the mandate of strict construction for penal statutes, the Court of Appeals opinion liberally construes what constitutes a "crime of harassment." *Graf*, 39 Wn. App. at 436. It refuses to weigh the sequence in which the particular enumerated offenses were placed on this list by the Legislature, despite the importance of such sequence and context in construing legislative intent. *Little*, 96 Wn.2d at 189. It ignores the common sense and common law precedent that the

Legislature understands when that specifying certain degrees of assault means it is excluding other degrees of assault. *See Lee*, 96 Wn. App. at 342.

This Court should grant review. The Court of Appeals decided a novel issue in a published decision based on an approach that is contrary to the basic premise of statutory construction, which is to ascertain the Legislature's intent. Omissions from a list of like terms, when the Legislature's attention was directed to the very same offenses of greater and lesser seriousness, demonstrates its intent to exclude third degree assault from the list of what constitutes a crime of harassment. The result of the opinion is to mandate substantially increased punishment and substantial heightened collateral consequences attached to a felony conviction. *See Dimaya*, 138 S. Ct. at 1213 (noting due process protections bar amorphous standards for "aggravated felony" offense leading to deportation). Mr. Joseph was a recent immigrant from the Marshall Islands and this heightened conviction for a felony harassment offense would expose him to the particularly harsh

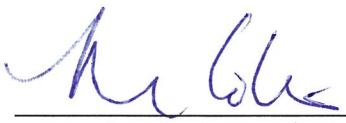
sanction of potential deportation and isolation from his children. RP 415-19. Substantial public interest further favors review.

F. CONCLUSION

Based on the foregoing, Petitioner Joe Joseph respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 13th day of July 2018.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOE JOSEPH, Appellant.	)	No. 76308-3-I DIVISION ONE PUBLISHED OPINION FILED: April 30, 2018

MANN, A.C.J. — Joe Joseph appeals his conviction for one count of felony violation of a court order and one count of felony harassment for assaulting his partner Nita Katlong.[1] Joseph contends that (1) his conviction for felony violation of court order should be reversed because there was insufficient evidence of one of the charged alternative means of committing the crime, (2) his prior conviction for third degree assault was not a crime of harassment, and thus does not qualify as a predicate offense supporting a conviction for felony harassment, and (3) the trial court erred by failing to instruct the jury that the domestic violence

[1] There is some discrepancy in the record regarding Nita Katlong's name. In the transcript, her name is spelled Katalong. Whereas in the Clerk's Papers her name is spelled Katlong. To avoid confusion, we rely on the spelling in the Clerk's Papers.

aggravator for both offenses required proof beyond a reasonable doubt and a unanimous verdict.

Because assault in the third degree is a qualifying predicate crime, we affirm Joseph's conviction for felony harassment. We agree, however, that there was insufficient evidence to support the alternative means and reverse Joseph's conviction for felony violation of a court order. We also agree that the trial court erred by failing to instruct the jury that the domestic violence aggravator required proof beyond a reasonable doubt and unanimity.

We affirm Joseph's conviction for felony harassment, but reverse for resentencing with a lesser offender score.

FACTS

Joseph and Katlong temporarily lived together at a friend's home despite a no-contact order prohibiting Joseph from contact with Katlong. On August 30, 2016, Joseph accused Katlong of infidelity and threatened to kill her. Joseph pushed Katlong to the couch, picked up a hammer, waived it around, and tapped Katlong's forehead with the flat end. Joseph's niece, Nekky, was present and watching. Nekky asked Joseph to stop because he was scaring her and then left the room.

Joseph was charged by amended information with domestic violence felony violation of a court order (count one), felony harassment (count two), and misdemeanor harassment (count three). All charges stemmed from the August 30, 2016, incident.

Joseph had previously pleaded guilty to a charge of assault in the third degree, domestic violence, for a separate assault of Katlong. The parties stipulated at trial that this charge had been proven beyond a reasonable doubt. The State relied on this prior conviction of assaulting Katlong to elevate the harassment allegation to a class C felony under RCW 9A.46.020(2)(b)(i).

The jury found Joseph guilty on all charges. The jury was then reconvened to consider special verdict forms that asked whether Joseph and Katlong were members of the same household for purposes of elevating Joseph's offender score. The special verdict form was answered "yes."

Based on a joint motion by Joseph and the State, the trial court agreed that the convictions for misdemeanor harassment (count 3) and felony harassment (count 2) violated double jeopardy. The court vacated the conviction on count 3.

For the purposes of sentencing, the parties and court agreed to treat the convictions for felony violation of a no-contact order (count one) and felony harassment (count two) as the same criminal conduct.

Joseph appeals.

ANALYSIS

Alternative Means for Conviction of Felony Violation of a Court Order

Joseph argues first that his conviction for felony violation of court order (count 1) should be reversed because there was insufficient evidence of one of the charged alternative means of committing the crime. The State concedes this issue and we agree.

Article I, section 21 of the Washington State Constitution guarantees criminal defendants the right to a unanimous jury verdict. See State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). In alternative means cases, where the criminal offense can be committed in more than one way, an expression of jury unanimity is not required if each alternative means is supported by sufficient evidence. State v. Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87 (2015) (citing Ortega-Martinez, 124 Wn.2d at 707-08). "But when insufficient evidence supports one or more of the alternative means presented to the jury, the conviction will not be affirmed." Sandholm, 184 Wn.2d at 732 (citing Ortega-Martinez, 124 Wn.2d at 707-08).

The to-convict jury instruction for felony violation of a no-contact order stated the prosecution must prove:

> (4) That
> (a) the defendant's conduct was an assault or
> (b) the defendant's conduct was reckless and created a substantial risk of death or serious physical injury to another.

The jury was instructed that the State must prove "either of the alternative elements (4)(a) or (4)(b)" beyond a reasonable doubt. The instruction further explained "the jury need not be unanimous as to which alternatives (4)(a) or (4)(b) has been proved beyond a reasonable doubt as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt."

The State concedes that the jury instruction sets forth alternative means for committing the same crime, and that the evidence that Joseph had a hammer and tapped Katlong on the head was insufficient to demonstrate that he

recklessly "created a substantial risk of death or serious physical injury" under 4(b). If there is insufficient evidence to support an alternative means, "a 'particularized expression' of jury unanimity is required." State v. Woodlyn, 188 Wn.2d 157, 165, 392 P.3d 1062 (2017). "Absent some form of colloquy or explicit instruction, we cannot assume that every member of the jury relied solely on the supported alternative." Woodlyn, 188 Wn.2d at 166. No "particularized expression" of the jury's decision exists here. Joseph's conviction for felony violation of a no-contact order (count 1) is reversed.

Felony Harassment Based on a Predicate Offense of Third Degree Assault

Joseph next contends that his prior conviction for third degree assault was not a crime of harassment under RCW 9A.46.060, and thus does not qualify as a predicate offense supporting the elevation of harassment from a gross misdemeanor to a felony. We disagree and hold a previous conviction for third degree assault of the same victim is a qualifying crime of harassment under RCW 94.46.020(2)(b)(i). See also RCW 9A.36.031(f); RCW 9A.46.060.

"The meaning of a statute is a question of law we review de novo." State v. Mitchell, 169 Wn.2d 437, 442, 237 P.3d 282 (2010). "The court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). If the meaning of the statute is plain on its face, then we must give effect to the plain meaning as an expression of legislative intent. State v. Larson, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). A statute's plain meaning can be discerned by looking at the text of the statutory provision in question, the context

of the statute, related provisions, and the statutory scheme as a whole. Larson, 184 Wn.2d at 848.

The State charged Joseph with harassment under RCW 9A.46.020(1), alleging that Joseph knowingly threatened to cause bodily injury to Katlong. While the crime of harassment is ordinarily a gross misdemeanor, when the "person who harasses another" has "previously been convicted . . . of any crime of harassment, as defined in RCW 9A.46.060, of the same victim" the crime is elevated to a class C felony. RCW 9A.46.020(2)(b)(i) (emphasis added). The State elevated Joseph's charge to a class C felony under RCW 9A.46.020(2)(b) based on Joseph's prior conviction of assault in the third degree against Katlong. The question before us is whether Joseph's prior conviction for third degree assault is a "crime of harassment" under RCW 9A.46.060.

RCW 9A.46.060 sets out a list of crimes included in harassment, stating that "'harassment' may include but is not limited to" any one of the 38 crimes enumerated.[2] Listed offenses include: reckless endangerment, extortion, coercion, burglary, criminal trespass, malicious mischief, kidnaping, unlawful imprisonment, rape, rape of a child, indecent liberties, child molestation, stalking, residential burglary, and violation of a protective order. The list includes, in relevant part,

> (4) Assault in the first degree (RCW 9A.36.011);
> (5) Assault of a child in the first degree (RCW 9A.36.120);
> (6) Assault in the second degree (RCW 9A.36.021);
> (7) Assault of a child in the second degree (RCW 9A.36.130);
> (8) Assault in the fourth degree (RCW 9A.36.041);

[2] (Emphasis added.)

RCW 9A.46.060(4)-(8). The statute does not list assault in the third degree.

While Joseph acknowledges that the list of predicate crimes in RCW 9A.46.060 is not exclusive, he nonetheless argues that legislature's decision to omit assault in the third degree demonstrates the legislature's intent to omit the crime. We reject this contention.

Washington courts have consistently interpreted the statutory language, "including but not limited to," to indicate the legislative intent to create an illustrative, not exhaustive, list. See Larson, 184 Wn.2d at 849. When a statute is plain and unambiguous on its face, our analysis stops there, we do not resort to interpretive tools such as legislative history. Larson, 184 Wn.2d at 854. Joseph provides no authority to support a claim that the mere inclusion of a nonexhaustive list renders a statute ambiguous. And we do not so find. Here, the plain language of this statute unambiguously creates an illustrative and nonexhaustive list that does not specifically exclude any crimes.

Washington courts have a recognized method for interpreting such lists within a statute. Where a general term, here harassment, is modified by a nonexclusive list, the general term will be deemed to "incorporate those things similar in nature or 'comparable to' the specific terms." Larson, 184 Wn.2d at 849 (quoting Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 151, 3 P.3d 741 (2000)). Accordingly, the question is whether Joseph's conviction of assault

in the third degree is "of a similar nature" or "comparable" to the crimes specifically listed in the statute.

In determining whether assault in the third degree is "of a similar nature" to those included in harassment, we look to the clearly stated legislative intent behind the anti-harassment act, chapter 9A.46 RCW:

> The legislature finds that the prevention of serious, personal harassment is an important government objective. Toward that end, this chapter is aimed at making unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim.

RCW 9A.46.010. A person is guilty of assault in the third degree where, among other alternatives, the person, "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(f). A crime where the defendant has caused "substantial pain" and "considerable suffering" to the same victim, falls squarely within the stated legislative intent.[3]

Joseph argues assault in the third degree is not comparable to the other crimes of "harassment" under RCW 9A.46.060, because the other crimes require intent, or at least a higher mens rea than the criminal negligence mens rea required for assault in the third degree. This argument also fails.

There is no uniform expression of mens rea within the other crimes listed in RCW 9A.46.060. The listed crimes included in the statute rely on different

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[3] As part of the stipulation admitting the prior assault conviction, Joseph entered the following statement:

> On or about May 15, 2016, with criminal negligence, I did cause bodily harm accompanied by substantial pain that did extend for a period of time sufficient to cause considerable suffering to Nita Katlong. She is the mother of my children.

levels of intent. Some require intentional conduct, others require recklessness, and a few include no mens rea at all. For example, rape in the first degree (RCW 9A.44.040),[4] rape in the second degree (RCW 9A.44.050), rape in the third degree (RCW 9A.44.060),[5] rape of a child in the first degree (RCW 9A.44.073), rape of a child in the second degree (RCW 9A.44.050), and rape of a child in the third degree (RCW 9A.44.079) do not have a mens rea element. Because there is no indication within the plain language of the statute that the legislature intended to differentiate crimes based on criminal intent, we will not assume such an exclusion exists.

We hold that assault in the third degree, where the defendant has caused "substantial pain" and "considerable suffering" to the same victim, is "of a similar nature" to the other crimes listed in RCW 9A.44.060, and falls within the legislature's intent to punish "harassment." Accordingly, although the crime was not specifically listed in RCW 9A.44.060, the crime is a qualifying predicate crime under RCW 9A.46.020(2)(b)(i).

Domestic Violence Aggravator

Joseph argues finally that the trial court erred by failing to instruct the jury that a finding that Joseph's crimes were domestic violence offenses required proof beyond a reasonable doubt and a unanimous verdict. "The Sixth Amendment to the United States Constitution requires that a jury must unanimously find beyond a reasonable doubt any aggravating circumstances that

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[4] See State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003) ("First degree rape contains no mens rea element.").

[5] See State v. Chhom, 128 Wn.2d 739, 741-42 n.4, 911 P.2d 1014 (1996) (noting that all rape crimes lack a mens rea element).

increase a defendant's sentence. In Washington, a jury uses special verdict forms to find these aggravating circumstances." State v. Nunez, 174 Wn.2d 707, 709, 285 P.3d 21 (2012).

Because the jury's special verdict findings of domestic violence increased Joseph's punishment, it was a violation of the Sixth Amendment that the jury was not instructed that their verdicts must be unanimous and beyond a reasonable doubt. The State agrees that the failure to instruct the jury was error and concedes that the matter must be remanded for resentencing with a lesser offender score.

We affirm Joseph's conviction for felony harassment. We reverse Joseph's conviction for felony violation of a no-contact order based on insufficient evidence to support the alternative means. We remand for resentencing with a lesser offender score.

Mann, ACJ

WE CONCUR:

Cox, J.

Becker, J.

APPENDIX B

FILED
6/13/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. JOE JOSEPH, Appellant.	No. 76308-3-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Joe Joseph has filed a motion for reconsideration of the court's opinion filed on April 30, 2018. The panel has determined that the motion should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE PANEL:

Mann, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76308-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Amy Meckling, DPA
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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: July 13, 2018
Washington Appellate Project

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Filed with Court:	Court of Appeals Division I
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Appellate Court Case Title:	State of Washington, Respondent vs. Joe Joseph, Appellant
Superior Court Case Number:	16-1-05927-5

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