

65774-7

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COA No. 65774-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVEN NYSTA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Richard McDermott

APPELLANT'S OPENING BRIEF

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LAW REVIEW ARTICLES

William S. McAninch, Unfolding the Law of Double Jeopardy, 44 S.
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting the defendant's statements made during interrogation in violation of Miranda.¹
2. The jury questionnaires were sealed without conducting a Bone-Club² analysis.
3. The defendant's Double Jeopardy rights were violated.
4. Defense counsel provided ineffective assistance.
5. The defendant's exceptional sentence was not supported by a proper special verdict.
6. The court erred in entering CrR 3.5 finding of fact 6.
7. The court erred in entering CrR 3.5 conclusion of law 1.
8. The court erred in entering CrR 3.5 conclusion of law 2.
9. A scrivener's error appears in the judgment and sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by admitting the defendant's statements during custodial interrogation, where requested to speak with his lawyer that was unequivocal, and required cessation of questioning, regardless of the reason he made the request?

¹ See Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2. Where the jury questionnaires were sealed without conducting a Bone-Club analysis, was this a violation of the defendant's right to a public trial requiring reversal of his convictions, where the sealing order was contemporaneous with the filing of the questionnaires in the clerk's office?

3. Was the defendant's right to be free from Double Jeopardy violated by imposing judgment and sentence on the felony harassment conviction, where that offense was proved solely by the same evidence used to prove "forcible compulsion" for purpose of the second degree rape conviction?

4. Did defense counsel provide ineffective assistance of counsel by failing to request that the second degree rape and felony harassment counts be scored as the "same criminal conduct"?

5. Was the defendant's exceptional sentence supported by a properly obtained verdict, where the instructions failed to inform the jury that disagreement as to the answer to the special allegation required issuance of a "no" answer, in violation of Bashaw?

6. Must the scrivener's error in the judgment be corrected?

² State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

C. STATEMENT OF THE CASE

1. **Procedural history.** The King County Prosecuting Attorney charged Daven Nysta with Rape in the First Degree; Rape in the Second Degree, with a special allegation that the crime was an aggravated domestic violence offense; Felony Harassment, two counts Violation of a Court Order, and Tampering with a Witness. CP 1-8, 12, 117. All the counts involved Mr. Nysta's girlfriend Sara Franz as complainant. CP 1-8, 12, 117.

According to the State's allegations, Kent police were dispatched to the apartment of John Huntley on 61st Place South, and encountered Ms. Franz, who had knocked on the door of her neighbor's unit and stated to Huntley that she had been beaten by the defendant. Police proceeded to Ms. Franz's unit and arrested Mr. Nysta, who was found sleeping on the bed. CP 5-8. Ms. Franz told EMT personnel she was raped. CP 6-8.

At a jury trial, Mr. Nysta was found guilty of the substantive offenses as charged, and the jury also answered in the affirmative on the special allegation that Ms. Franz's two-year-old daughter was in the room when the rape occurred. CP 164-70. The trial court imposed an exceptional sentence in the form of consecutive terms

on the rape counts, based on the jury-found aggravating factor and additional reasons premised on the defendant's criminal history, for a total indeterminate minimum sentence of incarceration of 450 months to life. CP 303, 320. Mr. Nysta appeals. CP 181-82.

2. Trial testimony. On the night of the incident, Ms. Franz told Mr. Nysta that she had been on a date with another man earlier that evening, when Mr. Nysta was gone from the apartment. Mr. Nysta allegedly became agitated, and took Ms. Franz upstairs and threw her on the bed. 6/9/10/RP at 41-43. He placed his fingers inside her vagina and/or anus, and allegedly struck her and kicked her. 6/9/10/RP at 43-47. When Ms. Franz's two-year-old daughter was heard crying in the other room, Mr. Nysta followed Ms. Franz to that room. At some point the defendant allegedly urinated on the complainant. 6/9/10/RP at 47-49. He then struck Ms. Franz while she was in the bathroom showering. Id.

After putting the complainant's daughter down near a wall of the room where the first alleged rape took place, Mr. Nysta forced Ms. Franz to engage in oral sex, and then penile-vaginal intercourse. 6/9/10/RP at 48-51. During the intercourse, Mr. Nysta hit Ms. Franz

and forced her to engage in the sexual act by threatening that he would kill her and her children, if she did not. 6/9/10/RP at 52.

The jury learned that in police interrogation, Mr. Nysta had confessed to striking Ms. Franz, and he also claimed he was inebriated and had no memory of what else occurred. CP 79-92; 6/10/10RP at 55-60.

E. ARGUMENT

1. THE DEFENDANT'S STATEMENTS WERE IMPROPERLY ADMITTED BECAUSE THE POLICE FAILED TO CEASE QUESTIONING WHEN MR. NYSTA UNEQUIVOCALLY STATED THAT HE HAD TO TALK TO HIS ATTORNEY.

a. **Facts at Mr. Nysta's CrR 3.5 hearing.** Following his arrest at Ms. Franz's apartment, Mr. Nysta was taken to an interrogation room at the jail by Detective Jones of the Auburn Police Department, who was investigating the defendant on an unrelated recent Auburn burglary incident. Detective Jones was accompanied by Kent Detective Focht, who had been assigned to the rape case involving Ms. Franz. 5/4/10RP at 78-80; 5/5/10RP at 29-30. The detectives agreed that Jones would take the lead in the interrogation. 5/4/10RP at 80; 5/5/10RP at 31; see CP 87-90 (CrR 3.5 findings of fact). After advisement of Miranda rights, the

defendant was asked if he was willing to answer questions.

5/5/10RP at 33-34; State's pre-trial exhibit 1 (transcript of CD recording of interrogation).

Detective Jones then questioned Mr. Nysta regarding the Auburn burglary and the fact that persons had identified him as being involved in it. 5/5/10RP at 39. At some point, the detective inquired of Mr. Nysta if he would be willing to take a polygraph test, telling him it would be voluntary. 5/5/10RP at 40; Pre-trial 1 (at p. 16); CP 87-90 (finding no. 6). Detective Jones also informed Mr. Nysta that these tests were valid, that a polygraph would be "very very accurate" and would "tell me if you are being truthful or not." 5/5/10RP at 40-41. He stated that he would set up the test if the defendant wanted to do it. 5/5/10RP at 41. Mr. Nysta then stated,

"Shit man I got to talk to my lawyer, someone."

5/5/10RP at 41; Pre-trial 1 (at p. 17). Detective Jones testified that he interpreted this statement by Mr. Nysta as not being a request to speak with his attorney, because the detective questioned the defendant again about whether he wanted to take a voluntary polygraph, and Mr. Nysta said, "Well I really need to talk to my lawyer first." 5/5/10RP at 41-42; Pre-trial 1 (at p. 17). The

detective continued questioning Mr. Nysta, and the detectives subsequently elicited the damaging statements from him regarding the rape allegations, that were held admissible and used at trial. Pre-trial 1 (at pp. 18-23); CP 87-90 (finding no. 6); 5/5/10RP at 43, 5/6/10RP at 3-6 (oral ruling); 6/10/10RP at 55-60 (Detective's trial testimony). At the conclusion of the CrR 3.5 hearing the court found

that when the defendant requested to speak with an attorney he was indicating his desire to speak with an attorney before taking a polygraph examination and that his request was not intended to indicate a desire to speak with an attorney prior to continuing the interview.

CP 87-90 (CrR 3.5 finding no. 6); 5/6/10RP at 3-6 (oral ruling). The CrR 3.5 findings do not quote the defendant's statements that he had to talk to his lawyer. CP 87-90.³

³ The State-drafted findings of fact, specifically finding of fact no. 6, present a somewhat disingenuous record of the defendant's interrogation and the CrR 3.5 litigation. The issue whether a defendant's invocation of his right to counsel during interrogation was equivocal or unequivocal, and whether subsequent "clarifying" questioning by the police was permissible, depends on the words used by the defendant in invoking the rights he was warned of per Miranda. See, e.g., State v. Quillin, 49 Wn. App. 155, 159, 741 P.2d 589 (1987). Yet, just at the juncture when the CrR 3.5 findings purport to address this specific, critical portion of the interrogation and the central matter at issue in the CrR 3.5 litigation – i.e., when it would be most helpful for purposes of appellate review to have findings with at least some degree of specificity – finding of fact no. 6 instead offers merely a broadly worded narrative which completely leaves out the language of the defendant's actual requests to speak with his lawyer. See CrR 3.5(c); State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), review denied, 137 Wn.2d 1023 (1999) (purpose of requirement of clear and specific findings is to facilitate appellate review); State v. Harris, 114 Wn.2d 419, 440-41, 789 P.2d 60 (1990)

b. The defendant's statements made in response to custodial interrogation may not be admitted at trial if obtained in violation of *Miranda / Edwards*.⁴ The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. 5. The Washington Constitution, Article I, section 9, is equivalent to the Fifth Amendment and "should receive the same definition and interpretation as that which has been given to" the Fifth Amendment by the United States Supreme Court. City of Tacoma v. Heater, 67 Wn.2d 733, 736, 409 P.2d 867 (1966); Wash. Const. Art. 1, § 9.

In Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966), the United States Supreme Court

(noting, including by citation to CrR 3.5 and CrR 3.6, the importance of detailed written findings where an important issue turns on precise distinctions of fact).

⁴ Mr Nysta placed this contention before the trial court, although also raising other arguments at the CrR 3.5 hearing:

His statement is what the Court should focus on. His statement is clear. His statement is, I got to talk to a lawyer. I think we can go back in hindsight and try to interpret what is going on here, but I think the Court should focus on what Mr. Nysta said, and it's a question of law that once a suspect says, I want to speak with a lawyer, if it's a clear request, what has to happen at that point. And what has to happen is the interview must stop.

fashioned a practical rule to ensure the integrity of the privilege against self-incrimination under the Fifth Amendment. The Miranda Court held that a suspect interrogated while in police custody must be told that: he has a right to remain silent; anything he says may be used against him in court; he is entitled to the presence of an attorney; and if he cannot afford an attorney one will be appointed for him prior to the interrogation if he desires. Miranda v. Arizona, 384 U.S. at 479.

The inherently coercive nature of custodial interrogation imposes a heavy burden on the State to show an accused person's statements were obtained in accord with these protections. State v. Jones, 19 Wn. App. 850, 853, 578 P.2d 71 (1978) (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)); Miranda v. Arizona, 384 U.S. at 444, 455, 467.

The right to counsel warned in Miranda is not the same right to counsel guaranteed under the Sixth Amendment; rather, the rule is a procedural protection safeguarding the Fifth Amendment privilege against compulsory self-incrimination. State v. Stewart,

113 Wn.2d 462, 780 P.2d 844 (1989); Edwards v. Arizona, 451 U.S. 477, 483, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

In addition to requiring the set of Miranda warnings and waiver of the rights outlined therein, the Miranda Court also held that if the accused, following waiver and during his subsequent interrogation, indicates a desire for an attorney "in any manner," officers must immediately stop asking questions -- interrogation must cease. (Emphasis added.) Miranda, 384 U.S. at 444-45.

c. A suspect's unequivocal invocation of the *Miranda* right to counsel during interrogation requires that questioning by law enforcement must immediately cease. When the defendant unequivocally requests counsel, but questioning does not cease as required, any statements subsequently obtained must be suppressed. Edwards, 451 U.S. at 485. Importantly, an accused's responses to further interrogation following an initial request for counsel may not be used to cast retrospective doubt on the unequivocality of the initial request itself. Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984).

A suspect being interrogated invokes his right to counsel, thus requiring police to cease interrogation, when his request for an

attorney is unequivocal in nature. Edwards, 451 U.S. at 485. In contrast, an “equivocal” request for an attorney, which is one that expresses both a desire for counsel and a desire to continue the interview without counsel, does not require cessation of questioning. State v. Quillin, 49 Wn. App. at 159; State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008).

In the present case, Mr. Nysta’s request to speak with his attorney was not equivocal. For example, in State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), overruled on other grounds by State v. Radcliffe, supra, 164 Wn.2d at 906, the Supreme Court characterized the suspect’s statement, “Maybe I should call my attorney, as “equivocal.” Robtoy, 98 Wn.2d at 32, 41. But in State v. Grieb, 52 Wn. App. 573, 574, 761 P.2d 970 (1988), the defendant stated that “he did not want to waive his rights;” and this statement was deemed an unequivocal invocation of the rights he was warned of per Miranda.

There was no “maybe” or any other words of equivocality, in Mr. Nysta’s request to talk with an attorney. The relevant case law shows that the request for a lawyer made by this defendant contained no “equivocality” because his words did not express both

a desire for counsel, and at the same time a desire to continue the interview with Detective Jones without the presence of counsel. Quillin, 49 Wn. App. at 159; Robtoy, 98 Wn.2d at 38-39; see also United States v. Weston, 519 F. Supp. 565, 572 (W.D.N.Y.1981); Jurek v. Estelle, 623 F.2d 929, 939 (5th Cir.1980). The only tenable finding is that Mr. Nysta unequivocally stated that he desired to speak with his lawyer, requiring cessation of questioning. There was no ambiguity, expressed by alternating wishes, or use of the word "maybe," or any contingency stated by use of the word "if," or otherwise, and only unequivocality is present in these words.

The trial court's factual findings following a CrR 3.5 hearing are reviewed for substantial evidence, State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), but the Court of Appeals reviews de novo questions whether the facts demonstrate statements taken in violation of Miranda and its protections. State v. Johnson, 94 Wn. App. 882, 897-98, 974 P.2d 855 (1999). Here, Mr. Nysta unequivocally stated he wanted to talk with his attorney, and interrogation was required to cease.

d. The reason the defendant was requesting to speak with his lawyer is not pertinent to law enforcement's obligation to cease questioning. The prosecutor contended, and the trial court found, that Mr. Nysta requested to speak with his lawyer to consult with the attorney regarding the proposed polygraph examination. The record supports a more accurate conclusion that the reason the defendant asked for his lawyer was because he realized what serious trouble he was in when the police started talking about polygraphs. Notably, the defendant's invocation was not qualified or limited -- he did not say, "I got to talk to my lawyer [about that]." Especially given the detective's ominous warning that the truth would come out in the case if Mr. Nysta took a polygraph, the record indicates that the defendant, at that juncture, decided it was in his interest to invoke the right to an attorney which he had just been told, per the requirements of Miranda, that he was entitled to do.

More importantly, however, none of this matters. Having advised the defendant that he had the right to request an attorney, and given the rule that such a request -- if clear and unequivocal -- requires interrogation to cease, it was improper for the detectives to

either speculate about or analyze the reason for, or the scope of, the request. Such dissection of the “motivation” for the defendant’s attorney request, intended to whittle away at the invocation and determine if the reason for the demand might be something narrow enough in scope so as to allow the police to continue interrogating the suspect about topics they desired, conflicts with the central principles applicable to this area of Miranda / Edwards protections.

Before commencing custodial interrogation, police must inform a suspect that he has the right to remain silent, that anything he says can be used against him in court, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him before questioning if he wishes.

Duckworth v. Eagan, 492 U.S. 195, 202, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989); Miranda, 384 U.S. at 479. In requesting the presence of an attorney, it is well-accepted that the interrogee need not speak with the precision or clarity of an “Oxford professor.” The Supreme Court stated in Davis v. United States:

Although a suspect need not “speak with the discrimination of an Oxford don,” [citing concurring opinion] at 2364 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable

police officer in the circumstances would understand the statement to be a request for an attorney.

Davis v. United States, 512 U.S. 452, 458-59, 129 L.Ed.2d 362, 114 S.Ct. 2350 (1994). Here, the defendant was advised that if he requested an attorney he would be given one. 5/5/10RP at 33-34. The defendant unequivocally requested to talk with his lawyer. He was not given means to do so, and questioning did not cease. Nothing further need be shown. The law in this highly factually diverse context requires a “bright line” rule that asks whether the language used to request to speak with a lawyer was explicit. Because of the numerous factual contexts in which the need for this assessment arises, courts have turned to this bright line rule that an explicit request for an attorney requires cessation of questioning State v. Radcliffe, 164 Wn.2d at 908 (citing Davis v. United States, 512 U.S. at 456-59).

The analysis focuses on the words used by the defendant, and there is no authority for law enforcement to ignore the unequivocality of the interrogee’s invocation of his rights by asking questions in order to parse down the request as limited to only whatever sub-topic officers were asking the defendant about at the

moment he asked for a lawyer. Indeed, in Anderson v. Terhune, 516 F.3d 781, 788 (9th Cir. 2008), the federal Court of Appeals criticized a trial court's analysis that strayed beyond this strict rule:

The state court accurately recognized that under Miranda, "if [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease," 384 U.S. at 473-74, 86 S.Ct. 1602, but then went on to eviscerate that conclusion by stating that the comments were "ambiguous in context," [holding]: "*In the present case, the defendant's comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying question.*" Using "context" to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law.

Anderson v. Terhune, 516 F.3d at 788 (quoting trial court's ruling).

Thus interrogating officers may not "use the guise of clarification as a subterfuge for eliciting a waiver of the previously asserted right to counsel." Robtoy, 98 Wn.2d at 39-40; Smith v. Illinois, 469 U.S. at 91 (an interrogatee's responses to further interrogation following an initial request for counsel may not be used to cast retrospective

doubt on the clarity of the initial request itself). The trial court erred in its CrR 3.5 ruling.

e. The conviction must be reversed. “A confession is like no other evidence. Indeed, “ ‘the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.’ ” Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting)). Here, although Mr. Nysta did not confess expansively regarding the allegations, the statements he made admitted physical violence, corroborated the complainant's claims of alcohol use, and effectively admitted to the accusations, claiming no memory of events. Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that the erroneous admission of Mr. Nysta's improperly obtained statements did not contribute to the guilty verdicts. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Reversal is required.

**2. SEALING THE JUROR QUESTIONNAIRES
“CLOSED” VOIR DIRE TO PUBLIC SCRUTINY,
VIOLATED THE DEFENDANT’S PUBLIC TRIAL
RIGHT GUARANTEED BY ARTICLE 1, SECTION
22, AND CAUSED STRUCTURAL ERROR THAT
REQUIRES REVERSAL OF MR. NYSTA’S
CONVICTIONS.**

This Court should find error in the trial court’s order sealing the juror questionnaires in this case, and order reversal of Mr. Nysta’s convictions for violation of the public trial guarantees of the Sixth Amendment, and Article 1, section 22 of the state constitution. Confidential juror questionnaires, when used in a criminal trial, are an important part of the *voir dire* process of questioning and selecting jurors who are unbiased and can sit fairly in judgment on the case. The examination of the venire members by means of such questionnaires differs substantively from “live” courtroom *voir dire* only by the fact that this means of questioning potential jurors is conducted on paper. However, unlike *voir dire* in open court, since they are court documents, juror questionnaires are subject to state law, General Rule 31 and the Superior Court’s local rules for public access to court records. Those rules manifestly do not allow any member of the public to inspect the juror questionnaires by obtaining them from the court or counsel while they are in use in court during

jury selection, prior to their filing.

Therefore, where, as here, juror questionnaires are ordered sealed at the same time that they are filed with the Clerk's Office -- the only location where public access to copies of case records, by any person for any reason, can legally occur -- the public is entirely barred from inspecting this portion of the *voir dire* process. Supp. CP ____, Sub # 73 and 74 (juror questionnaires and order sealing). This is a violation of the defendant's Article 1, section 22 right to a public trial, just as surely as is a closure of the courtroom doors to the public during jury selection. The order to seal deprived Mr. Nysta of the benefit of that public scrutiny of his prosecution at a meaningful time, before verdict, when an opportunity existed for such scrutiny to make a difference. This sealing also violated the public's Section 10 right to open court proceedings, but that does not render the error non-cognizable under Section 22.

That opportunity for public scrutiny has now forever passed. The inadequate remedy of remand for an after-the-fact Bone-Club hearing would therefore be no remedy at all. The sealing order in this case cannot be harmless and requires reversal of Mr. Nysta's convictions.

a. The right to a public trial is violated where the trial court, without a proper *Bone-Club* analysis, seals juror questionnaires and thus prevents public scrutiny of the *voir dire* process of jury selection. Mr. Nysta's right to a public trial is protected by both the state and federal constitutions. The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." And article I, section 22, of the Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury."

Additionally, separate from Section 22's guarantee of a public trial, section 10 of article I provides that "[j]ustice in all cases shall be administered openly." This section protects the public's right to open court proceedings, similar to the public's right under the First Amendment, because open proceedings "assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny." State v. Coleman, 151 Wn. App. 614, 620, 214 P.3d 158 (2009); see U.S. Const. amend. 1.

The constitutional guarantees of a public trial and open criminal proceedings extend to the process of *jury selection*, which

process is a critical component of the jury trial right “ ‘not simply to the adversaries but to the criminal justice system’ “ as a whole.

State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), cert. denied, ___ U.S. ___, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010).

In State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), the Supreme Court set out the standards that must be met before the rare incident of a trial judge closing all, or any portion, of a criminal trial, can come to pass. Bone-Club, 128 Wn.2d at 258-59. Because the two rights under article I, section 22 and article I, section 10 are interrelated, the same requirements, set out below, apply to any plan to impinge either or both of these rights:

1. The proponent of [courtroom] closure or sealing [of case documents] must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.
2. Anyone present when the motion is made must be given an opportunity to object to the action.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of curtailment and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, at 258 (quoting Allied Daily Newspapers v. Eikenberry,

121 Wn.2d 205,210-11, 848 P.2d 1258 (1993)); see also Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982).

When the defendant's right to a public trial is deemed violated, which occurs by closure of the process from public scrutiny accompanied by the absence of a proper Bone-Club analysis, as appellant contends occurred here, the appellate court will devise a remedy appropriate to the violation. If the error is structural in nature, the conviction must be reversed and a new trial is required. Momah, 167 Wn.2d at 149. An error is considered structural when it " 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' " (Emphasis added.) Momah, at 149 (quoting Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

Thus, for example, where holding potential juror questioning in the trial court's chambers violated the right to a public trial, the error could not be harmless, and reversal of the convictions was required. State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).

b. Juror questionnaires constitute voir dire questioning on paper. Here, the King County Superior Court's act of sealing the juror questionnaires in Mr. Nysta's prosecution without a

Bone-Club analysis violated article I, section 22, in addition to article I, section 10. Jury questionnaires are a standard tool for juror selection, and thus they constitute a fundamental component part of the *voir dire* process. *Voir dire* questioning of the venire is normally conducted in open court by questioning of the potential jurors. When part of that questioning and answer process is conducted by means of a written questionnaire, it is wholly uncontroversial, or should be, to note that this is the very same question-and-answer process as occurs during traditional *voir dire* in the courtroom.

Therefore, jury questionnaires are *voir dire*, just conducted in writing on paper, and are not merely a “screening tool” for the collection of administrative information regarding jurors. This Court of Appeals has addressed the question whether sealing juror questionnaires violated one or both of the aforementioned constitutional provisions. In State v. Coleman, supra, a jury questionnaire was employed for *voir dire*, and several days after the jury was accepted by the parties and sworn, the trial court ordered the juror questionnaires sealed, following findings deemed inadequate under Bone-Club’s multi-factor analysis. Coleman, 151 Wn. App. at 618-19.

However, Mr. Nysta respectfully argues that the Court misapprehended the mechanics of the public trial right with regard to the *voir dire* process of jury selection. Mr. Nysta urges this Court to reconsider the Coleman reasoning that sealing of the jury questionnaires was non-structural error. In Coleman, the Court concluded that the failure to do a Bone-Club analysis prior to sealing the questionnaires offended only the public's right to open and accessible court proceedings under section 10. Coleman, 151 Wn. App. at 618. As remedy, therefore, the Court ordered merely “remand for reconsideration of the order.” Coleman, 151 Wn. App. at 219. The Court reasoned that there was no violation of the public trial right that amounted to presumed prejudice and structural error requiring reversal of Coleman’s convictions, because the juror questionnaires were not sealed until several days after the jury was selected, a fact which this Court deemed significant:

[First], the questionnaires were used only for selection of the jury, which proceeded in open court.

[Second], the questionnaires were not sealed until several days after the jury was seated and sworn.

[Third], unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public

inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right and did not "create 'defect[s] affecting the framework within which the trial proceeds.'" "

Coleman, at 623-24. Mr. Nysta respectfully argues that this analysis was in error. By definition, a trial court's order to seal juror questionnaires prevents public access to a portion of the *voir dire* jury selection process. Numerous cases recognize as an unremarkable matter of fact that jury questionnaires are utilized as a part of this *voir dire* jury selection process. See, e.g., State v. Young, 158 Wn. App. 707, 243 P.3d 172 (2010); State v. Erickson, 146 Wn. App. 200, 203, 207-08, 189 P.3d 245 (2008); State v. Duckett, 141 Wn. App. 797, 807, 173 P.3d 948 (2007).

Even mundane preliminary questions posed to the venire by this method will constitute *voir dire* questioning. See, e.g., Erickson, 146 Wn. App. at 204-05 ("On January 21, 2009, jury *voir dire* began [with] jury questionnaires, general questioning, and open interviews with individual jurors "). But these cases also demonstrate that the inquiries made of potential jurors in such questionnaires often delve into more material matters that are central to the selection (or rejection) of jurors for a particular case. See, e.g., State v. Castro,

141 Wn. App. 485, 488, 170 P.3d 78 (2007) (in child molestation trial, "[d]uring jury *voir dire*, the jurors responded to questionnaires about any past history of sexual abuse and sexual offenses").

Juror questionnaires cannot be dismissed as something less or different than *voir dire* for purposes of selecting a fair and impartial jury. The sealing of such questionnaires therefore hides the jury selection process from public inspection just as effectively as does an order closing the entire courtroom during traditional *voir dire*, or questioning of individual potential jurors *in camera*.

Importantly, the public has no right or ability to inspect sealed, or unsealed, documents that are not yet filed and are then in the possession of the parties and the judge and are being employed by the court and counsel during the trial process. Mr. Nysta believes that the Coleman Court was wrong in asserting to the contrary. See Coleman, at 624.

GR 31(d)(1) provides that "[t]he public shall have access to all court records except as restricted by federal law, state law, court rule, court order, or case law." GR 31(a). When a member of the public or the press desires to scrutinize the contents of documents filed as part of the trial process that exist as court records, she or he

makes a request to view and/or copy the documents, and the request is granted by the Clerk. See GR 31(c)(1) (“ ‘Access’ means the ability to view or obtain a copy of a court record”).

Critically, the Washington Courts provide public access to documents and other case records only where they have been filed in the Clerk’s Office by the parties, by the court itself, or by the administrative office of the courts. JIS-Link, the electronic portal that provides public access to see the titles of the documents have been filed in the Clerk’s Office in a case, repeatedly emphasizes that it is through the court of record by which members of the public obtain access to court records in a case.⁵

However, where documents of the case are filed in the court record “under seal,” a request by a member of the public to view or

⁵ The Washington Courts website makes clear that the case filings accessible to the public are those filed with the court of record, and are available only at the court of record:

Case Docket. JIS-Link provides access to case information including the case docket. The case docket may list documents filed in the case. JIS-Link does not display case documents. To view case documents, contact the court in which the case is filed.

(Emphasis added.) <http://www.courts.wa.gov/jislink/>.

copy such document(s) must be and will be denied by the Clerk.⁶ Such sealing prevents all access for public inspection of the document(s) in question. In Mr. Nysta's prosecution, because the trial court's order to seal the juror questionnaires was issued contemporaneous with the filing of those documents in the Clerk's Office, the questionnaires were never present in the Clerk's record of the case in a non-sealed state. There was no public access, either actual or potential.

Contrary reasoning in the recent case of State v. Lee, ___ P.3d ___, 2011 WL 383930 at pp. 4-5 (Wn. App. Div. 1, February 07, 2011), demonstrates how the Coleman decision was based on an erroneous assessment of the public availability of the juror questionnaires. This Court affirmed Coleman, holding that where the questionnaires were sealed three days after jury selection, the appellants had failed to show any violation of the right to a public trial because "the questionnaires were . . . used in open court during jury selection" and nothing indicated that "the questionnaires were [not] available to the public during *voir dire*." (Emphasis added.) State v.

⁶ The court records electronic access portal referred to by GR 31 states

Lee, 2011 WL 383930 at pp. 4-5.

Mr. Nysta respectfully argues that this Court in Coleman and later in Lee failed to consider the actual means by which the public does, and more importantly does not, have access to court documents under GR 31, when it stated that it would “not speculate about how the court would have ruled had a member of the public asked for access to these questionnaires” during jury selection, and further stated that the record was “silent on where these questionnaires were located during jury selection, which unquestionably proceeded in open court.” State v. Lee, 2011 WL 383930 at pp. 5. These assertions, Mr. Nysta respectfully submits, are immaterial.⁷

Instead, the timing that is relevant to the public trial right is the timing of the filing of the questionnaires in the Clerk’s Office compared to the order to seal, which may be either contemporaneous or subsequent thereto. There is no avoidance of

that the “[th]e public cannot view or copy sealed documents or sealed case records.” <http://www.courts.wa.gov/jislink/>.

⁷ To begin with, GR 15 indicates that a document cannot be sealed unless it is filed as a court record and that record is filed in the file of a case or a consolidated case. GR 15(a), (b), (c)(1). Thus, by definition, no document is sealed until it is filed.

constitutional error by the fact that that in a given case, the jury questionnaires were not sealed until after jury selection, or by virtue of the fact that the questionnaires were in the possession of the court and the attorneys for the parties in open court during the jury selection process. Where, as here, the order to seal is entered at the same time as the filing of the questionnaires in the Clerk's Office, there is, and has been, no public access to the documents.

There is no state law or court rule that provides for, or even contemplates the suggestion that the public somehow has open access to documents such as confidential juror questionnaires, during the time they are being utilized in the courtroom by the court and counsel prior to being filed of record in the Superior Court file as sealed documents, at which point they are affirmatively inaccessible by the public.

The public only has access to documents in a criminal case at the Clerk's Office, when those documents are made a part of the court file, and then only if the document resides in that court file in an unsealed state. Under state law the Clerk's Office only has available for viewing, or for copying, those documents that are "on file of record." Title 36 RCW confirms that the documents that are

available are only those that have been filed in "the official public records." See RCW 36.18.005(1) to (3). The specific means by which the public can view the documents that have been filed in the record of criminal cases is by request made at the Superior Court Clerk's Office. Nowhere in RCW 36.18 *et seq.*, on the Clerk's Office website, or in the Local Rules, is there any provision for the viewing, copying, or removal of documents in cases where such documents are not "on file of record."

c. Reversal of the convictions is required. Because juror questionnaires constitute part of the *voir dire* process, and because this written portion of *voir dire* in Mr. Nysta's trial was always under seal when filed and thus never accessible to the public at the Clerk's Office under GR 31, the order to seal rendered "closed" this portion of the *voir dire* process of jury selection from the public in violation of Section 22, just as fully and effectively as does banishing the public from the physical courtroom, in addition of course to preventing access to the court records under Section 10.

Therefore, a trial in which this portion of the documentary record of the case is filed under seal is a trial that is not entirely public, irrespective of when the documents are filed and sealed.

This Court should reconsider the reasoning of cases that rely on assumptions to the contrary, and rule that the sealing of juror questionnaires, in the absence of a Bone-Club analysis, results in the public having no ability to scrutinize the critical trial process of jury selection, to assess whether the trial is proceeding as a fair and reliable vehicle for determining a particular defendant's guilt or innocence. Open jury selection is a critical component of a public trial. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Jury selection in Mr. Nysta's criminal trial was not open.

In any event, the recent post-Coleman cases of State v. Strode and State v. Momah, particularly considered in light of GR 31 and state laws and court rules cited above, make clear that the sealing of juror questionnaires is a violation of the right to a public trial and cannot be deemed non-structural upon appellate review by means of the reasoning in Coleman and Lee. State v. Strode, 167 Wn.2d at 228, 231; State v. Momah, 167 Wn.2d at 139-40.

These opinions decided that the trial courts below either expressly or implicitly closed the courtrooms by preventing public access to a portion of *voir dire*. Because the closure in Strode was not preceded by the Bone-Club analysis; the closure in that case

resulted in violation of the defendant's public trial rights. Strode, 167 Wn.2d at 228, 231. Addressing the appropriate remedy in Strode, the Court held that "denial of the public trial right [absent the required analysis] is deemed to be a structural error and prejudice is presumed." Strode, 167 Wn.2d at 231. In Momah, the Court concluded that there was no structural error because the trial court actually weighed the appropriate factors on the record prior to closing the courtroom, effectively engaging in the required Bone-Club analysis. Momah, 167 Wn.2d at 139-40.

This is the correct remedy analysis here – ordering reversal for the structural error of denial of a public trial. The lesser remedy of remand for a Bone-Club analysis based on Section 10 denial of access to court records is inadequate, because it fails to cure the fact that Mr. Nysta was deprived of the benefit of public scrutiny of his trial at a time when irregularities would be noticed by the public, before the non-public trial process led to guilty verdicts. The Bone-Club requirements ensure that such denial of public scrutiny of the trial is permitted only "under the most unusual circumstances," which were not identified in Mr. Nysta's case. Bone-Club, 128 Wn.2d at 259; see also In re Pers. Restraint of Orange, 152 Wn.2d

795, 808, 100 P.3d 291 (2004); see Supp. CP ____, Sub # 73 (order sealing juror questionnaires based upon “good cause”).

Because the trial court did not conduct the Bone-Club analysis required by our State Supreme Court to be conducted before the public is precluded from scrutinizing any and all phases of the jury trial process, Mr. Nysta asks this Court of Appeals to reverse his convictions in favor of a new trial.

3. MR. NYSTA’S CONVICTION FOR FELONY HARASSMENT MUST BE VACATED WHERE IT WAS PROVED SOLELY BY FACTS ESTABLISHING THE “FORCIBLE COMPULSION” ELEMENT OF RAPE IN THE SECOND DEGREE, IN VIOLATION OF HIS DOUBLE JEOPARDY PROTECTIONS.

a. Evidence and State’s argument at trial. Mr. Nysta was convicted of rape in the second degree in count 2, and felony harassment (threat to kill) in count 3. CP 164-70. The second degree rape count was predicated on the defendant’s sexual intercourse by forcible compulsion, occurring in the bedroom after a prior act of digital intercourse that constituted the first degree rape count. 6/9/10RP at 49-52; 6/15/10RP at 18-20.

During this second act of intercourse, Mr. Nysta allegedly threatened Ms. Franz by saying that he would kill her and her

children. 6/9/10/RP at 52. The prosecutor in closing argument told the jury that this threat satisfied the “forcible compulsion” element of the crime of rape. 6/15/10RP at 20. That element was defined correctly as follows in the jury instructions, which stated that “forcible compulsion” means:

physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

CP 129-63 (instruction no. 9, defining forcible compulsion); see RCW 9A.44.010(6). The prosecutor also argued in closing that the defendant’s hitting of Ms. Franz during the incident showed forcible compulsion under the force language in the element. 6/15/10RP at 19-20. The jury was not asked to specify by any special verdict, or otherwise instructed regarding which part of the definition of forcible compulsion constituted proof of the rape offense.

Regarding the charge of Felony Harassment, the prosecutor also argued in closing that Mr. Nysta’s threat to the complainant and her children proved the offense of felony harassment because it was a threat to kill. 6/15/10RP at 34-35; see CP 129-63 (instruction no.

18 defining felony harassment). There was no other evidence introduced by the prosecutor as proof of the harassment count.

b. The double jeopardy clauses preclude multiple punishments for the same offense.⁸ The double jeopardy clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. The Fifth Amendment’s double jeopardy protection is applicable to the States via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); U.S. Const. Amend. 14. The Washington courts interpret Article 1, § 9’s provision coextensively with the United States Supreme Court’s reading of the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Without offending these constitutional rules barring duplicative punishment, the State may bring multiple charges arising from the same criminal conduct, in a single proceeding. State v.

⁸ Double jeopardy violations are, in general, manifest constitutional errors that may be raised for the first time on appeal under RAP 2.5. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). Courts may not, however, enter multiple convictions or impose punishment for conduct that amounts to a constitutional same offense; doing so *violates* the defendant's double jeopardy protections. State v. Freeman, 153 Wn.2d 765, 770-72, 108 P.3d 753 (2005).

Thus where a defendant's conduct can support charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the "same" constitutional offense. In re Pers. Restraint of Orange, 152 Wn.2d at 815. This focus on legislative intent is required because the legislature has the power to define criminal offenses and set punishments. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995); see William S. McAninch, Unfolding the Law of Double Jeopardy, 44 S. C. L. Rev. 411, 483-84 (1993).⁹

⁹ There is significant overlap in the types of "evils" the Legislature was aiming to prevent in enacting the crimes and constituent elements of these criminal offenses. The Legislature employs its statutory definition of "forcible compulsion" as necessary to proof of rape in the second or first degree. RCW 9A.44.040, 050. Harassment is conduct that expressly or impliedly threatens physical injury, and where that threat is to kill, the greater punishment reserved for felony harassment is imposed. RCW 9A.46.020(2)(b)(ii). RCW 9A.46.010 indicates that the Legislature's intent in enacting the harassment statute was to aim the government's objective of prevention of unlawful conduct at threats that "intimidate" and "coerce,"

In the case of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the United States Supreme Court enunciated a rule to define whether two distinct statutory provisions constituted multiple punishments for the same offense: when each provision requires proof of an additional fact which the other does not, double jeopardy has not been offended by duplicative punishment. Blockburger, 284 U.S. at 304. The courts inquire whether the evidence proving one crime also proved the second crime. Orange, 152 Wn.2d at 820-821. This is examined by looking to the charging theories and proof of the case rather than merely examining the statutory elements. Orange, at 819-820; State v. Freeman, 153 Wn.2d at 779.

Thus the Supreme Court in Orange cited with approval State v. Potter, 31 Wn. App. 883, 645 P.2d 60 (1982), and In re Personal Restraint of Burchfield, 111 Wn. App. 892, 46 P.3d 840 (2002). Orange, at 820. In Potter, the Court of Appeals held that convictions for reckless driving and reckless endangerment based

because these acts of harassment involve serious invasions of personal privacy. Likewise, the statutory offense of rape protects against the same invasion of personal privacy and reserves its highest punishment for the offense in the first and second degrees, which are committed if there was "forcible compulsion" – including "a threat, express or implied, that places a person in fear of death or physical

on the defendant's excessive speed violated double jeopardy because "proof of reckless endangerment through use of an automobile will always establish reckless driving." Potter, 31 Wn. App. at 888. In Burchfield, the Court held that convictions for first degree manslaughter and first degree assault arising out of the same gunshot violated double jeopardy even though the crimes contained different statutory elements. Burchfield, 111 Wn. App. at 845. See State v. Fuentes, 150 Wn. App. 444, 451 n. 20, 208 P.3d 1196 (2009) (citing Orange, Potter, and Burchfield).

For further example, in United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), double jeopardy was violated where the defendant was convicted of contempt, for violating conditions of release by possessing drugs, and also of the substantive offense of drug possession. Dixon, 509 U.S. at 698. The importance of Dixon lies in its instruction on the application of Blockburger. While there were a myriad of ways of violating the contempt provision of the defendant's release, in Dixon, proving contempt by showing the defendant's arrest for possession of narcotics also necessarily proved the crime of drug possession.

injury" – used to coerce unwanted sexual intercourse. RCW 9A.44.010(6).

Double Jeopardy was therefore violated.

Under the Blockburger inquiry as informed by these cases, the proof of rape, by forcible compulsion per RCW 9A.44.010(6), also proved felony harassment under RCW 9A.46.020. Mr. Nysta's threat to kill, which was cited by the prosecutor as proof of the forcible compulsion element of the second degree rape charge in count 2, necessarily proved the felony harassment count. Importantly, that threat constituted the totality of the State's evidentiary proffer on the felony harassment. As charged and proved in this case, the two offenses were the same for Double Jeopardy purposes. This is the proper result despite the fact there was also evidence of physical force by Mr. Nysta which satisfied the "forcible compulsion" element of rape, because the entire statutory definition of forcible compulsion was given to the jury without objection. The jury was permitted to consider the threat to kill, in addition to the physical force used by Mr. Nysta, in determining whether forcible compulsion was proved beyond a reasonable doubt. Indeed, as noted, the prosecutor urged the jury to do exactly that.¹⁰

¹⁰ Certainly, no special verdict or interrogatory affirmatively indicates that the jury relied on the hitting evidence, and did not rely on the evidence of the threat to kill, to find proof beyond a reasonable doubt on the forcible compulsion element

Double Jeopardy was violated.

c. The felony harassment conviction must be vacated.

The appropriate remedy in Mr. Nysta's case is remand for resentencing and vacation of the harassment conviction. State v. Weber, 127 Wn. App. 879, 885, 112 P.3d 1287 (2005) ("The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense"), affirmed, 159 Wn.2d 252, 149 P.3d 646 (2006); cert. denied, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

4. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HE DID NOT ARGUE THAT THE SECOND DEGREE RAPE AND THE HARASSMENT CONVICTIONS WERE THE "SAME CRIMINAL CONDUCT."

Mr. Nysta's counsel was ineffective for failing to have the second degree rape and the harassment convictions scored as the

of count 2. The multi-definitional nature of the "forcible compulsion" statute fails to protect against a Double Jeopardy violation. Analogously, in the doctrinal area of cases involving unanimity in alternative means offenses, the Washington Courts reason that the law requires reversal of a conviction obtained by general verdict where one of the alternative means of committing an offense was not supported by trial evidence. See, e.g., State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

“same criminal conduct,” where they involved the same victim, and were committed at the same time and place.

To sustain an ineffective assistance claim under the Sixth Amendment, a defendant must establish that his counsel's performance was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the unprofessional errors. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. amend. 6.

Same criminal conduct generally. Under the governing sentencing law, crimes constitute the same criminal conduct for sentencing purposes only if they involve each of three elements: “(1) the same criminal intent, (2) the same time and place, and (3) the same victim.” State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994); RCW 9.94A.589(1)(a) (“same criminal conduct” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim).”

Same victim. The victim of rape is the person with whom

the defendant had unwanted sexual intercourse. See State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The victim of felony harassment is the person to whom the threat to kill is communicated and who is placed in fear that the threat will be carried out. State v. Leming, 133 Wn. App. 875, 889, 138 P.3d 1095 (2006).

Same place. The offenses were committed in the same place, i.e., the bedroom of Ms. Franz's apartment where the crimes were carried out. The place is the same.

Same time. The "same time" element does not require that the two crimes occur simultaneously. State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996). Individual crimes may be considered the same criminal conduct if they occur during an uninterrupted incident. Porter, 133 Wn.2d at 185-86; Dolen, 83 Wn. App. at 365.

Here, however, the testimony of Ms. Franz recounted supra does establish that the rape and the threat to kill were committed at the precise same "time," and the offenses meet that requirement of RCW 9.94A.589(1)(a) absent some other showing in the record to the contrary.

Same intent. The “same criminal intent” element is determined by looking at whether the defendant's objective intent changed from one crime to the next. Dolen, 83 Wn. App. at 364-65; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997); see State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (standard for determining the same intent prong is the extent to which the criminal intent, viewed objectively, changed from one crime to the next). In this case, as the State argued in closing, the defendant’s purpose in using threat language, evidence of which was also proffered as the proof of the harassment count, was to overcome Ms. Franz’s resistance and intimidate or coerce her to submit to unwanted sexual intercourse. The fact that one crime furthered commission of the other may, and in this case does, indicate the presence of the same intent. Vike, 125 Wn.2d at 411; State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Where the State’s proof was that the defendant’s threat to kill Ms. Franz was uttered during the time he was engaging in the act of sexual intercourse with her, and for the purpose of coercing the sexual act, this was manifestly not a case where some passage of time establishes that the defendant had the opportunity, after completing

an offense, to reflect and form a new intent to commit an additional crime. Cf. State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (where defendant had time to complete assault and then form new intent to threaten victim, crimes of assault and harassment had different objective intents and were not same criminal conduct).

The counts of second degree rape and felony harassment of which Mr. Nysta was convicted in this case involved the same intent, and involved the same victim. The time and place were also the same. Thus the two crimes constituted the “same criminal conduct.” Counsel should have requested that these counts be scored accordingly, and was deficient for not doing so; because the legal issue could only be decided in the defendant’s favor, counsel’s error was prejudicial. Strickland v. Washington, 466 U.S. at 694. Mr. Nysta asks that this Court remand the case for resentencing and re-scoring of the multiple current offenses.

5. THE SPECIAL VERDICT WAS OBTAINED IN VIOLATION OF GOLDBERG AND BASHAW AND MUST BE VACATED ON APPEAL.

The exceptional sentence that was imposed on Mr. Nysta based in part on a special verdict, in which the jury found an offense of domestic violence committed in front of the defendant’s or the

victim's minor child, must be reversed because the jury was erroneously informed that it had to be unanimous as to a "no" answer on the special verdict form. CP 129-63.

a. The instructions misinformed the jury that agreement was required to reject the special allegation. By telling the jurors generally that "each of you must agree to return a verdict" and failing to correct that instruction with regard to the special allegation, Mr. Nysta's jury was instructed that whether it answered "yes" or "no" on the special verdict, it had to be unanimous. CP 54-83 (jury instructions nos. 16, 28), CP 95 (special verdict form A). Thus the special verdict was improperly obtained under State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

Although unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a finding. Furthermore, in Bashaw and Goldberg the Court makes clear that a non-unanimous negative jury decision on a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt, and re-trial is barred. See, e.g., Goldberg, 149 Wn.2d at 891.

Notably, this is no radical rule. Certainly the Supreme Court has inherent power both to fashion remedies, and to enforce its supervisory authority. The remedy the Court is imposing for violation of the Goldberg rule promotes the very conservative doctrine of judicial economy. Re-trial on an aggravator or enhancement requires the entire case be re-tried because aggravating factors are inextricably linked factually with the crime charged. Substantive offenses upon which there is already a guilty verdict, should not be re-tried all over again, simply to support a second prosecution on facts that merely enhance sentence.

b. The error can be raised for the first time on appeal.

Mr. Nysta did not object to the trial court's instructions with regard to the aggravated domestic violence finding in this respect, but neither did the defendant in Bashaw. Nevertheless, the Supreme Court addressed the issue and vacated the special finding and the enhanced sentence based upon the improper instruction. Bashaw, 169 Wn.2d at 146-47. Mr. Nysta may raise this issue for the first time on appeal.

More to the point, the error in Mr. Nysta's case occurred not in the use of the invalid instruction but when the trial court imposed

sentence based upon an invalid special verdict. An increase in the maximum penalty must be authorized by a valid jury special verdict. State v. Williams-Walker, 167 Wn.2d 889, 900, 225 P.3d 913 (2010). Error occurs when the trial court imposes a sentence enhancement not authorized by a valid jury verdict. See State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (error in imposing enhancement where the jury found only a deadly weapon occurred during sentencing, not in the jury's determination of guilt).

As a consequence, because "illegal or erroneous sentences may be challenged for the first time on appeal" regardless of whether defense counsel registered a proper objection before the trial court, see State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), Mr. Nysta may raise this issue for the first time on appeal because it involves the imposition of an invalid sentence.

c. Under *Bashaw*, the error can never be harmless. In Bashaw, the jury instructions suffered from the same error as those used in the present case. The Supreme Court refused to apply harmless error analysis, stating of the Respondent's contentions:

This argument misses the point. The error here was

the procedure by which unanimity would be inappropriately achieved. . . . The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Bashaw, at 147-48. The same analysis applies here. This error is not subject to harmless error analysis. It is simply impossible to speculate what a jury in an aggravating factor case might have done or not done if each juror knew that he or she had it in his or her power to require the special allegation be answered in the negative.

State v. Bashaw, at pp. 15-17.

Finally, the Bashaw rule clearly applies to special verdicts regarding statutory aggravating factors. Goldberg was a case involving a special verdict issued on the aggravating factors enhancing first degree murder. Goldberg, 149 Wn.2d at 891; see RCW 10.95.020 ("A person is guilty of aggravated first degree murder [if] one or more of the following aggravating circumstances exist . . ."). The occurrence of re-trials in exceptional sentence cases affected by Blakely v. Washington under Legislative authority is not a demonstration that the Bashaw Court's rule barring re-trial

does not apply in Mr. Nysta's case. See State v. Berrier, 143 Wn. App. 547, 551, 178 P.3d 1064 (2008) ("In 2007, the statute [RCW 9.94A.535] was amended to respond to the Washington Supreme Court's decision in State v. Pillatos, 159 Wn.2d 459, 480, 150 P.3d 1130 (2007) ("We hold that [former RCW 9.94A.537], by its terms, applies only to cases where trials have not begun or guilty pleas accepted, and that Washington courts lack inherent power to empanel sentencing juries outside of that new act.")).

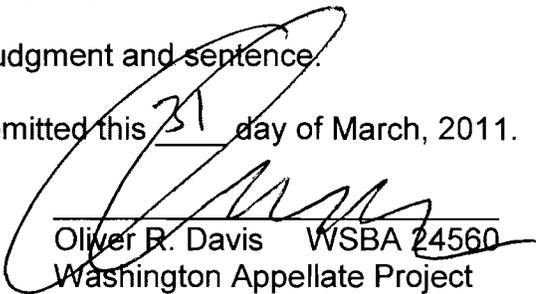
6. THE JUDGMENT MUST BE CORRECTED

This Court should remand for the trial court to exercise its authority to correct the clerical error in the judgment and sentence, which lists count 2 as rape of a child. CP 303; In re PRP of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005); see CrR 7.8(a).

F. CONCLUSION

Based on the foregoing, Mr. Nysta respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 31 day of March, 2011.



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65774-7-I
v.)	
)	
DSAVEN NYSTA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MARCH, 2011.

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