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COURT OF APPEALS
DIVISION ONE

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COURT OF APPEALS NO. 66554-5-I

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

STATE OF WASHINGTON

V.

MARLOW TODD EGGUM,

Appellant.

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

The Honorable Ira J. Uhrig, Judge

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION[1]

Marlow Todd Eggum was convicted of two counts of intimidating a public servant, two counts of felony harassment and one count of stalking for alleged offenses involving his community corrections officer (CCO) Melissa Hallmark, Whatcom county deputy prosecuting attorney Eric Richey, and Eggum's ex-wife Janice Gray. CP 6-18. Eggum was sentenced to exceptional sentences totaling twenty years in prison, although the statutory maximum for the most serious offense is only ten years. CP 6-18; RCW §§ 9A.76.180(4), 9A.20.020(1)(b).

Significantly, the case did not include any "allegations that Eggum caused any physical harm to anyone." CP 39. Moreover, "it cannot be disputed that Eggum was convicted [primarily] on the basis of letters written to his mother." CP 39.[2] Eggum's mother was not a complainant in this case. CP 100-105. However, there were statements in Eggum's letters to her – which were copied by the department of corrections (DOC) and sent to the Whatcom county sheriff's office – concerning Hallmark, Richey and Gray. RP

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[1] The transcripts are referred to as follows: "1RP" – pretrial hearing October 14, 2010; and "RP" – trial and sentencing in 4 bound volumes, consecutively paginated, of December 6-9, 13-14, 2010, and January 14, 2011.

[2] See also Supp. CP __ (sub. no. 149, State's Sentencing Memorandum, 1/11/11) (acknowledging letters written "primarily to his mother.").

64, 66-69. It was a Whatcom county sheriff's detective, not Eggum, who subsequently revealed the contents of these letters to the named individuals. RP 64, 66-69, 188, 288, 409, 567, 573, 596.

Although counts (3) and (4) for intimidating a public servant and felony harassment involved the same complainant – Eric Richey – and the harassment was done in furtherance of the intimidation, the court ruled they did not constitute the same criminal conduct. CP 8; RP 678.

And although counts (5) and (6) for felony harassment and stalking involved the same complainant – Janice Gray – and the harassment was committed with the same intent as the stalking – to induce Gray to "sit down and talk" – the court ruled these also did not encompass the same criminal conduct. CP 8; RP 678. The court accordingly scored Eggum's offender score as 8 points, instead of 6, as urged by defense counsel. CP 8; RP 678.

Not only was there a miscalculation of Eggum's offender score (as Eggum will argue), but the court unlawfully imposed exceptional sentences that were both beyond the standard range for the offense and ordered to run consecutively for counts (1), (4) and (6), where the state proved only one aggravator for each.

Moreover, the court improperly enhanced Eggum's sentences based on a factor inherent in the stalking offense and thus, already contemplated by the Legislature in establishing the standard range.

Additionally, the special verdicts were found in violation of Eggum's due process rights, as jurors were improperly instructed they must be unanimous to find the state did not prove the aggravators beyond a reasonable doubt. Eggum will argue that for all these reasons, this Court should reverse his sentences and remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The court erred in finding counts (3) and (4) allegedly committed against deputy prosecuting attorney Eric Richey did not encompass the same criminal conduct.

2. The court erred in ruling that counts (5) and (6) allegedly committed against Eggum's ex-wife Janice Gray did not encompass the same criminal conduct.

3. The court erred in imposing exceptional sentences that were both beyond the standard range for the offense and ordered to run consecutively for counts (1), (4) and (6).

4. Because the crime of stalking necessarily involves an ongoing pattern of abuse, the court erred in enhancing Eggum's sentence for count (6) based on this alleged aggravating circumstance.

5. Appellant's constitutional due process rights were violated by instructions requiring the jury to be unanimous in order to find the state had not sufficiently proven the aggravating circumstances charged.

6. To the extent defense counsel contributed to the error asserted in No. 6, appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Where the intimidation and harassment of Richey were based on two letters Eggum wrote in one week and with the same intent – to influence Richey to drop the charge against Eggum – did the court err in finding the offenses were not committed at the same time and with the same intent?

2. Where the harassment and stalking of Gray were based on the same batch of letters and committed with the same intent – to induce Gray to sit down and talk – did the court err in

finding the offenses were not committed with the same intent and therefore not same criminal conduct?

3. The court imposed an exceptional sentence of 120 months on count (1); the top of the standard range on count (3); an exceptional sentence of 60 months on count (4); the top of the standard range on count (5); and an exceptional sentence of 60 months on count (6). CP 6-18. The court also ordered counts (1), (4) and (6) to run consecutively.

Did the trial court err in imposing exceptional sentences beyond the standard range, as well as ordering the sentences to run consecutively, for counts (1), (4) and (6), where only one aggravator was alleged for each?

4. The stalking charge was based on the repeated harassment of Gray through Eggum's letter-writing campaign between January 24, 2007, and August 6, 2009. CP 100-105; RP 598. Did the court err in enhancing Eggum's sentence based on a finding that the stalking involved an ongoing pattern of psychological abuse manifested by multiple instances over a prolonged period of time, in that such was already contemplated by the legislature in setting the standard range?

5. The jury in appellant's case was instructed it must be

unanimous in order to answer "no" to the Special Verdicts asking whether the state proved the aggravators beyond a reasonable doubt. This is an incorrect statement of the law under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and amounts to an error of constitutional magnitude under the due process clause, as held by this Court in State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011). Did the instructional error violate appellant's constitutional due process rights?

6. To the extent defense counsel contributed to the error by proposing the faulty instruction, did appellant receive ineffective assistance of counsel?

C. STATEMENT OF THE CASE

1. Charges

Following a jury trial in Whatcom County Superior Court, Marlow Todd Eggum was convicted of the following five counts: (1) intimidating a public servant (IPS), allegedly committed against Eggum's community corrections officer Melissa Hallmark on April 22, 2009;[3] (3) IPS, allegedly committed against deputy prosecuting attorney Eric Richey between June 1 and June 30, 2009; (4) felony harassment of Richey, allegedly occurring between June 18, 2007,

and July 28, 2009; (5) felony harassment, allegedly committed against Eggum's ex-wife, Janice Gray, between January 24, 2007, and August 6, 2009; and (6) felony stalking of Gray during that same time period. CP 42, 45, 48, 50, 55, 100-105, 191-196; RCW §§ 9A.76.180(1), 9A.04.110(25), 9A.46.020(2)(b)(ii), 9A.46.110(1), 9A.46.110(5)(b).

For counts 1, 3 and 4, the jury also found the special aggravating circumstance that the offense was committed against a public official in retaliation of the official's performance of his or her duty to the criminal justice system. CP 46, 49, 54, 191-196; RCW 9.94A.535(3)(x). For counts 5 and 6, the jury found the aggravating circumstance that the offense involved domestic violence and was part of an ongoing pattern of abuse. CP 40, 43, 194-196; RCW 9.94A.535(3)(h)(i).

2. Historical Backdrop

In 1992, Eggum and Gray married. RP 74. They had one daughter, Krystal, before separating in 2001. RP 73, 76, 108. As part of their eventual divorce, the court imposed a lifetime no contact order prohibiting Eggum from contacting Gray. RP 77-78.

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[3] Eggum was acquitted of allegedly harassing Hallmark – count (2) of the Information. CP 53.

During the course of their marriage, Eggum and Gray made a number of videotapes, mostly featuring Gray involved in sexually explicit activity with other individuals. 1RP 122-130; RP 75-76, 215-216. Throughout the dissolution proceeding and over the years, Eggum and Gray have fought over who should own the videos. RP 76, 201, 206, 328-329.

Under a 2004 cause number, Eggum pled guilty in 2005 to felony stalking of Gray. RP 264. One of the state's allegations was that Eggum left video jackets – with sexually explicit pictures of Gray – at places in Lynden, where Gray had been. RP 206, 208, 282-83, 317-318. While the case was pending, deputy prosecuting attorney Eric Richey obtained a search warrant for Eggum's home and police confiscated a number of sexually explicit videos featuring Gray. RP 207, 294-295, 303-304, 319.

These videos were awarded Gray in 2005 in the dissolution proceeding. RP 245-46. However, the judge ruled any imagery still retained by Eggum remained his property, although the judge prohibited him from disseminating it. RP 246, 255, 671.

Eggum was sentenced to community custody on the 2004 case. RP 266, 449. Following Eggum's release, Gray complained to his community corrections officer – Melissa Hallmark – that

Eggum was stalking her. RP 212, 449. Deputy prosecuting attorney Eric Richey – who prosecuted Eggum in the 2004 case – instructed Gray to keep a "stalking log" documenting each time she felt Eggum was following her. RP 210-211, 263, 337.

Based on Gray's "stalking log," together with evidence Hallmark obtained during a DOC search of Eggum's car, Richey charged Eggum in 2005 with 15 counts of stalking and harassment of Gray and her friend, Jerry Hemple. RP 212-213, 342-344, 430, 450. Eggum eventually pled to three charges in 2007: stalking of Gray and Hemple and harassment of Gray. RP 90, 209-210, 268. As part of the plea, Eggum agreed to an exceptional sentence of 72 months. RP 268.

During the pendency of the case, however, Eggum sold his house. The new homeowner turned over to police a number of sexually explicit videos of Gray, which he found in the house. RP 143. The property was held under the 2005 cause number, for some reason. RP 668. Accordingly, at sentencing in 2007, Eggum asked for the return of his property. RP 330-332. The judge ruled the property would remain under the control of the Whatcom county

sheriff's office until a civil suit was filed and everyone with a proprietary interest had an opportunity to be heard.[4]

Eggum was nearing the end of his prison sentence when the current case was filed. As part of his release plan, Eggum had proposed to move back in with his mother, Lorraine Eggum, in Everson. RP 390-91. DOC authorities – Hallmark, in particular – denied that proposal. RP 391-392. As DOC later realized, however, Eggum was not required to provide an approved release address to get out of prison. RP 456-457.

3. Letter to Hallmark, Count (1)

The first count of this case is based on the letter Eggum wrote to Hallmark after she denied his proposed residence location. RP 393. In relevant part, the letter stated:

> My unit supervisor recently informed me that you had personally turned down any release address, and denied my ORP [offender release plan] because of what you loosely termed "victim concerns," which amount to nothing less than you trying to delay my adult business website from starting up again. The Department of Corrections has no lawful business meddling in my business affairs, when they are legal. And as such, you are taking it upon yourself to step outside of what the State has authorized you to do. Denying my address in an attempt to delay my business from going online is an unlawful action, an

[4] Eggum appealed this ruling in a prior appeal. See COA No. 63261-2-I. This Court may take judicial notice of its own files. See ER 201; K. Tegland, 5 Wash. Pract. Evidence, §§ 46-47 (3d ed. 1989).

> action which entitles me to be able to file a lawsuit against you, personally. I can assure you, upon my release, you will be served a summons.
>
> There are always circumstances to one's actions, and that will certainly apply to you attempting to delay my business from restarting, just because my wife doesn't want it to restart. As a result of your actions, taken on behalf of my wife, I have decided to release 1,000 free promotional movies in my birthplace, which is St. Johns Newfoundland. St. Johns also happens to be where my wife was born and raised, too. Because of what you have done, that is is [sic] going to be a non-negotiable consequence of your actions. So that is going to happen and you cannot mitigate it.
>
> Now, if my release date is delayed for any reason, there are going to be additional consequences, because I can continue to up the ante for you. For every month my release is delayed past my ERD [earliest release date] I'm going to release an additional thousand free promotional movies in St. Johns' over an eight-month period of time.
>
> Additionally, you should take care to see that my mother does not die while you are trying to delay my release. Last year my mother almost died, and she was given a year or less to live, and that was over a year ago. If she died alone, without me there at her bedside, because of your meddling, I'll hold you personally responsible.

RP 396-97 (interjections of Hallmark while testifying/reading letter omitted); see also Ex 25.[5]

Hallmark testified she believed Eggum was referencing the sexually explicit videos of Gray and was concerned about the

[5] Ironically, Eggum showed the letter he wrote Hallmark to his classification counselor and sought his approval to send it. RP 393, 458. The classification

potentially harmful social repercussions that could befall Gray if Eggum did in fact disseminate the videos. RP 399-400. Hallmark felt Eggum was trying to pressure her into changing her decision about his residence location by threatening to disseminate the videos. RP 401.

The day Hallmark received the emailed letter, April 22, 2009,[6] Richey charged Eggum with intimidating a public servant. RP 268-69, 409. Richey also obtained an arrest warrant so that upon completion of sentence, Eggum would not be released but transferred to the Whatcom county jail. RP 270.

4. Letter to Richey, Count (3)

Eggum thereafter mailed Richey a letter, attempting to negotiate a settlement of the case. This letter was the basis for count (3) – intimidating a public servant, allegedly committed against Richey. RP 272, 585.

In the letter dated June 7, 2009, Eggum first explained that DOC had ruled Hallmark did not have authority to delay his release, as he was not required to have an approved release address. RP 273. According to Eggum, Hallmark therefore did not have any

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counselor emailed the letter to Hallmark and merely returned it to Eggum to mail. RP 458.

[6] Hallmark received the original in the mail a little later. RP 409.

decision-making authority to influence. Moreover, as Eggum pointed out, Hallmark's decision had already been made. RP 273.

In Eggum's opinion, Richey was more concerned about Eggum "selling and marketing" his movies in St. John's, Newfoundland. RP 274. Eggum asserted Canada had ruled his business was legal. RP 275. Eggum further wrote:

> It would seem to me that you would be more concerned about mixing Todd's adult pornography with the inmates at McNeil Island. I would be more concerned about having 1,200 inmates by [sic] Todd's porno, than the entirety of Newfoundland owning one. This island is more than 50% sexual offenders, and not a day goes by where an inmate doesn't come up to me and ask for the website address where my movies are sold at today. I even had offenders approach me and ask if that's my wife on the photos that they had printed off. I think that would be bother [sic] you more than Newfoundlanders buying them. And here you are filing charges against me, keeping me in prison where I tell everyone my story. Doesn't make sense.

RP 275-276.

Eggum therefore proposed:

> I will agree to relocate to Snohomish County as long as there is an agreement in place whereas I can travel freely to Everson to take care of my dying mother. And as part of that agreement, I'll agree to stay out of Lynden, and if I violate that, you can arrest me.
>
> So here is the offer: Cancel the warrant, allow me to depart McNeil Island without being arrested, and if you hear of me in Lynden, or I'm seen there,

> you can issue the warrant for my arrest on these charges. . . .
>
> In addition, I'll agree to return to the Lisa Fasano[7] fuck tape that I own, and drop the Washington State Bar Association Complaint, if you agree to return the movies that you have illegally seized. Then we part ways. Bear in mind (FYI), that this small handful of movies is nothing more than that, and doesn't even touch the full of amount of what I own. Therefore, you have nothing to lose here, either. So all in all, that's a damn good offer from where I stand. The alternative would be to try prosecuting this case – which I guess you would not win – and the best you could hope for would be to return me to prison where I would continue to tell every inmate who asked, where they could find my movies being marketed. That's not a good scenario for you, one which I would think would you like to avoid.

RP 276-77.

In closing, the assistant attorney general (AAG)[8] argued Eggum essentially was making the same threat as the one he purportedly made to Hallmark: change your decision or I'll continue to harass Gray by distributing these movies; and also, I'll pursue this bar complaint I filed against you if you don't change your mind. RP 585; see also RP 281-285 (Richey's testimony to that effect).

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[7] Elizabeth Fasano represented Gray during the dissolution proceeding. RP 200.

[8] To avoid the appearance of unfairness, the Whatcom County Prosecutor's Office transferred the case to the Attorney General. RP 286.

5. Letters to Lorraine Eggum and Pastor Grant Fishbook, Counts (4), (5) and (6)

George Gilbert is the department of corrections' chief investigator at McNeil Island Correctional facility, where Eggum was incarcerated following his 2007 convictions. RP 29, 32-34. On June 19, 2007, Gilbert received a request from the Whatcom county sheriff's office to monitor Eggum's mail. RP 38. The sheriff's office made the request after Gray complained Eggum was still bothering her. RP 59.

Prison staff copied the letters and provided them to the sheriff's office, while the originals were mailed in the normal course. RP 39-43, 60.

Whatcom county sheriff's detective John Allgire did not begin reviewing the letters until January 2009. RP 65, 487. In addition to the letters Eggum wrote his mother, Lorraine Eggum (Ex 4-11), the sheriff's office also received letters Eggum wrote Grant Fishbook (Ex 21-23), a pastor at Christ the King Church, where Gray and Hemple previously attended. RP 40-43, 61-64, 91-93. Upon reading the letters, Allgire became concerned and shared their contents with Gray, Hallmark and Richey. RP 64, 66-69.

(i) Gray Counts (5) and (6)

Exhibits 21-23 were letters written to Fishbook in 2008. RP 91-92, 98. In the first letter, Eggum referenced Gray and Hemple, his (Eggum's) ability to access firearms and his belief in the invalidity of his and Gray's divorce. RP 95. Regarding his belief in the invalidity of their divorce, Eggum wrote that he better not catch Gray with anyone else and that to serve as a warning to anyone who might consider dating Gray, he had gotten a tattoo with her name on his arm. RP 96.

In the second letter, Eggum referenced a woman named "Krystal Way" who was killed by her husband at Bellingham's community college. RP 99. Way had worked with Eggum at a real estate office. RP 99-100. In the letter, Eggum recounted a conversation he reportedly had with Way wherein she said her husband might try to kill her. RP 100. When Eggum asked why, Way reportedly replied: "the court system has me playing games with Mark, through using NCO's, hiding his children from him, not letting him see his kids, the divorce, and I know he is going to kill me one day." RP 101.

Eggum lamented that Way had not heeded his advice to apologize to her husband and make amends. RP 102. Eggum

opined that "No Contact Orders can be dangerous, getting people killed every day." RP 102. Eggum then recounted another instance in which a man killed his estranged wife after she obtained a no contact order. RP 103. Eggum wrote:

> Grant, listen, it was the NCO that got Krystal Way killed. It was the NCO that got this woman killed. In fact, it's usually an NCO that serves as the catalyst to these needless killings. And you have got one here, too. Not only do you have a nasty situation, you have my wife Janice somehow convincing this guy (co-worker) [Hemple] to purchase a gun.[9] Does she even know that gun getting pulled out could have gotten her killed? Do you see that? Or do you always see your congregation packing around weapons?

RP 104.

Eggum further wrote, "I'm hoping you will see a pattern developing here, one which you will recognize from one of the other numerous NCO stories, that ends poorly." RP 106. Eggum concluded, stating: "I think my wife has her finger jammed into the system socket so far that she doesn't have the common sense to pull her finger out." RP 106. Eggum suggested church counseling might help. RP 106.

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[9] At the time of the 2005 charges involving Gray and Hemple, Hemple was in fact carrying a gun (with a concealed weapons permit) while walking with Gray on her walking route. RP 227. Hallmark was the one who told Eggum of this fact. RP 451, 473-474.

In the third letter to Fishbook, Eggum wrote about "the prophecy and prophecy fulfillment." RP 108. After describing how an angel's prior prophecies had come true (RP 108-110), Eggum described a third prophecy:

> Now, that doesn't alarm me, but the angel also foretold that national media attention would be brought onto my case, after a tragic occurrence, and my case would appear on the national news, and that as a part of that, I would end up shot dead by the police.
>
> That part of the prophecy bothers me, of course, not to mention the tragedy occurrence that precedes it, which is the reason why the police are chasing me in the first place.

RP 110.

Eggum ended the letter stating his "plans for the future are simple." RP 112. He intended "to give away 10,000 free promotional movies within Lynden and Bellingham to bring this matter to a head." RP 112.

Exhibit 4 was a letter addressed to Eggum's mother (RP 113-19), wherein Eggum made a number of points:

> Number one, as long as Krystal is alive, Krystal will always know where her mom is at. Number two, as long as Krystal is alive, I'll always be able to find out where Krystal is living at. Number three, if I can locate Krystal, then I will be able to locate J, as Krystal will be contacting her. Number four, so finding J won't be hard at all. In fact, it will be easy. Number five, Janice has no divorce. I consider her still

> married to me. Number six, and I love saying this one (now), as, if I can't have her, then I'll mix [sic] sure no one else can. That always scares the shit out of them (the system) when they hear a guy say that. Number seven, and so, regardless of where J tries to run to, with my stolen money, as long as she has got my stolen money and/or trying to date anyone, I'll be right down the street with Jim Polanski selling my movies, number one, earning back any stolen quarter million, and (two) ensuring no one dates my wife. And who would? With 500 moves being sold in her neighborhood, who would want to date her? And bring back that porno into their family's life? That's where we are headed. Number eight, as I don't care if I'm 80 fucking years old, I'm going to go after her and my money until I have got both. Big period on end of sentence.

RP 121.

In Exhibit 5, dated April 11, 2008, Eggum wrote that his daughter's concern for her mother's safety "if I catch her (J) with someone else" was "a viable concern." RP 122-124. Eggum reasoned, "Janice will have no divorce, until after she has sat down with me and talked." RP 125. Eggum warned that if he even suspected Gray was dating someone, he would "market each and every one of his friends and family." RP 125. Eggum concluded, "And in the end, if that happens a few times, sooner other [than] later J will come to the table to talk." RP 125.

In exhibit 6, Eggum described the unsavory people he had befriended in prison. RP 127-30. Reportedly, three had killed their

wives and a fourth had stated his intent to do so upon his release. RP 129-30. Eggum also referenced a supposedly recent incident in which a man had killed his wife after she obtained a no contact order. RP 131.

According to Eggum, his attorney once told him, "you haven't [snapped] because you have something that those other people didn't, and that's your movies." RP 132. In this vein, Eggum continued:

> When pushed my attorney predicted, when you get out you will do one of two things, you will either (number one) go sell your movies, or (two) if I don't do that for any reason, say you lose them, you will end up in prison for having killed someone. Pretty strong statement to be making, don't you think? But also very, very wise, very well thought out. You should listen. Pay attention.
>
> So, I got to ask you, mom, given that astute observation, how smart is it that Richey's trying to steel [sic] my movies? Richey takes a movie out of my hand and puts a gun in there instead? Pretty fucking shortsighted, don't you think? I am not a gambling man, but if doing that creates a 95 percent chance that someone is going to end up getting killed, then I don't want to be the person who stands to get killed.

RP 134. Eggum ended the letter with a reference to the "prophecy," which he proposed would be fulfilled if Gray started dating. RP 137-38.

Exhibit 7 was an earlier letter Eggum wrote his mother, dated November 2007. It's content was similar to exhibit 6, but also made reference to Nicole and O.J. Simpson. RP 145.

Exhibit 8 contained a Lynden newspaper clipping dated June 25, 2008, announcing local weddings and engagements. RP 154. On the clipping, Eggum wrote, "another lucky week gone by." RP 155. Eggum also described a letter he had written Lisa Fasano, Gray's divorce attorney:

> Fasano's letter, which was written to be forwarded to Janice, for Janice's consideration, was nothing more than another offer to settle this. But this time the offer being tender with Janice being informed that (number one) the supreme court had ruled that I could legally sell my movies or give them away in Lynden or Bellingham or St. John's, Newfoundland, or anywhere else I wanted to,[10] and to inform that Janice that (two) I have started giving away my sex movies to rapists and child molesters who are being released from prison. And that I'm giving them maps to the Lynden Manor[11] so they can see for themselves that Janice – the porno actress – is a real person. I guess you could say, giving away maps to the Lynden Manor promotes future sales.

RP 156. Eggum explained to his mother that his actions were motivated to "force Janice's hand and force your hand and force L's

[10] Gray testified she was not aware of any court document declaring Eggum's rights regarding the movies. RP 158.
[11] Gray works at Lynden Manor. RP 198.

hand and force family to say enough is enough, we are stepping in and taking back the situation from the state." RP 158.

In Exhibit 11, Eggum wrote to his mother about a book that addresses compatibility among persons of different astrological signs. RP 176. According to Eggum, there was an odd warning pertaining to Gray: "beware self-fulfilling prophecies do come true." RP 177. The letter also addressed Eggum's intent to sell movies in Gray's sister's neighborhood, reasoning: "if nothing else it should put a fire under Linda's ass to at least let J know that her street in Newfoundland is to be marketed soon, and visiting her won't be too good of an idea from here on out." RP 179.

Gray testified that these letters – taken as a whole – caused her to fear for her life and also to fear that Eggum would disseminate the sexually explicit videos, which she did not want, for fear of isolation and embarrassment. RP 97, 107, 112-113, 121, 156, 158-161, 164, 179.

In closing, the AAG argued Gray had reasonable fear Eggum would try to kill her based on: exhibit 22, wherein Eggum reportedly made a comparison between him and Gray and Mark and Krystal Way; exhibit 23, the "prophecy letter; exhibit 5, wherein Eggum referenced his daughter's concern for Gray's safety as

"viable;" exhibit 7, wherein he reportedly made a comparison between him and Gray and O.J. and Nicole Simpson; and exhibit 12, wherein he chastised his father for visiting Gray and giving the false impression that everything would be okay. RP 594-595; see also RP 151 (describing contents of letter to Martin Eggum).

As for the stalking count, the AAG argued it was based on all the letters, which were intended to frighten and harass Gray. RP 598. As an aggravating circumstance of the stalking, the AAG argued it involved an ongoing pattern of psychological abuse manifested by multiple instances over a prolonged period of time. RP 600.

(ii) Richey, Count (4)

Regarding exhibit 6, Richey testified he believed Eggum was threatening to kill him when he wrote that his attorney had made an "astute observation," i.e. that Eggum had not snapped because he still had his movies, and questioned how smart it was for Richey to steal his movies, further remarking that Richey was taking a movie out of Eggum's hand and placing a gun there instead. RP 292.

Richey also felt threatened by statements Eggum made in exhibit 8. RP 292. In addition to Eggum's discussion of the "Fasano letter," Eggum wrote of "a bill that's coming due," and

described how his attorney had said the only reason he hadn't "grabbed a gun and killed someone is because you have always had the ability to hit back using your movies, but if for any reason you were to loss [sic] your movies, someone would end up dead[.]" RP 293. Richey believed these comments were directed at him, as he was involved in confiscating Eggum's movies in 2004. RP 294-295.

In Exhibit 9, Eggum wrote that he empathized with Timothy McVeigh and his anger toward the government:

> Kind of like the prosecutor's office breaking into my house, two times, without search warrants, and letting Lisa Fasano falsify charges against me. Why did they do that? Answer is: Because they could, and because no one has ever tried stopping them. Had Whatcom County done to Tim McVeigh what they have done to me, the Whatcom County courthouse would be blown up and leveled, instead of the Murray building.
>
> Whatcom County has continually violated the Constitution's protections against unreasonable warrantless seizures against me (4th amendment), and as Tim McVeigh quoted as saying, "those who betray or subvert the Constitution are guilty of sedition and/or treason, are domestic enemies and should, and will, be punished accordingly."

RP 300-301. Again, Richey felt Eggum was threatening him, as he was the one who prepared the warrant that led to the seizure of Eggum's property. RP 303.

Finally, the state introduced Exhibit 10, a letter from Eggum to his mother, dated June 14, 2009. RP 174, 304. In the letter, Eggum stated he understood why an "inmate who was fucked with by DOC would pick up a gun and kill a cop[.]" RP 306. He suggested more inmates should take up arms "until enough cops were dead so that one would open their eyes to the problem." RP 306.

Eggum also expressed concern that his mother might die during his incarceration and suggested she contact Richey about his prior offer to relocate to Snohomish. RP 306-307. The letter ended with this message:

> Janice lobbies Richey, so does shit-head. So you have got to do the same and tell him how sick you really it [sic] are. Let him know you are dying. Tell you what, if you die while I'm in here, Richey will have bigger problems than he has ever imagined. An eye for an eye, a tooth for a tooth, and here he is escalating things to the extremely dangerous zone. Tell him to the knock [sic] it off now, before more damage gets done.

RP 307-308.

In closing, the AAG argued Richey had a reasonable fear Eggum would try to kill him kill him based on: exhibit 6, wherein Eggum stated Richey took a movie out of his hand and put a gun there instead; exhibit 10, wherein he stated Richey would have

bigger problems if Eggum's mother dies while he is in prison, i.e. an eye for an eye, a tooth for a tooth; exhibit 9, wherein Eggum made the Timothy McVeigh comparison; and exhibit 10, wherein he advocated cop killing. RP 588-90.

6. Special Verdict Forms and Sentencing

For brevity, the facts pertaining to these issues will be set forth in their respective argument sections.

C. ARGUMENT

1. THE COURT ERRED IN SCORING THE RICHEY OFFENSES AND THE GRAY OFFENSES SEPARATELY AS EACH SET OF OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT.

Under RCW 9.94A.589, other current offenses are treated as prior offenses and scored separately unless the court enters a finding that some or all encompass the same criminal conduct. RCW 9.94A.589.[12] Same criminal conduct means two or more

[12] Under the statute:

> (1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more

crimes that require the same intent, are committed at the same time and place, and involve the same victim. Id.

As indicated in the introduction, the defense argued that counts (3) and (4) involving Richey constituted the same criminal conduct, as did counts (5) and (6) involving Gray. CP 34-39. Regarding the Richey counts, the defense argued:

> The crimes require the same criminal intent: to threaten to kill Eric Richey. Although the intimidating a public servant charge requires additional proof that the threat was made in an attempt to get the public servant to change an official decision, this additional element does not change the required intent for the crime: an intent to threaten. The two crimes have the same intent. Additionally the two offenses were committed at the same time and place: the same batch of letters introduced by the state supported the jury's verdict of guilty on both counts. Finally, the two offense involve the same victim: Eric Richey.

CP 35.

As for the Gray counts, the defense argued:

> These crimes require the same criminal intent: to threaten and harass to [sic] Janice Gray. "Stalking," in the context under which Eggum was convicted, is defined as a series of harassments. One of these incidents of harassment forms the basis for count V while the series of harassments (including the facts underlying count V) for the basis for the jury's conviction on Count VI. The two offenses had the

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crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

> same criminal intent: to threaten and harass Janice Gray. Additionally, the two offenses were committed at the same time and place. The same batch of letters introduced by the state supported the jury's verdict of guilty on both counts; the charging documents alleged one long period during which both offenses were committed. Finally, the two offenses involved the same victim: Janice Gray.

RP 36.

The state disagreed the Richey and Gray counts constituted the same criminal conduct, however. Regarding the Richey counts, the state argued they did not occur at the same time or involve the same intent:

> Counts III and IV did not occur at the same time. Count III, intimidating a public servant, occurred during June 2009. Count III occurred from June 2007-July 2009, a two-year period.
>
> Counts III and IV did not require the same criminal intent. "The relevant inquiry for the intent prong is to what extent the criminal intent, when viewed objectively, changed from one crime to the next." State v. Lessly, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Here, the objective criminal intent required for Count IV, felony harassment, was to knowingly utter a threat to kill Eric Richey at some unspecified future date. The objective criminal intent required for Count III, intimidating a public servant, was an intent to immediately influence the decision of a public servant. These are two entirely different objective criminal intents.

Supp. CP __ (sub. no. 149, State's Sentencing Memorandum, 1/11/2011); see also RP 675-676.

Regarding the Gray counts, the state did not dispute they involved the same complainant and were committed at the same time and place. Supp. CP __ (sub. no. 149). However, the state disputed the offenses were committed with the same intent:

> The crime of felony harassment required that the defendant knowingly utter a threat to kill Janice at an unspecified time in the future. The crime of felony stalking required that the defendant intentionally and repeatedly "harass" Janice Gray. There was no requirement for stalking that the defendant knowingly threaten to kill Janice Gray. Similarly, despite the name of the offense, there is no requirement of an intent to "harass" for the crime of harassment; rather, the intent is to "knowingly threaten" to cause bodily harm or death. The two offenses do not require the same objective criminal intent.

Id; RP 676-677.

For the reasons set forth by the state, the court found counts (3) and (4) did not occur at the same time and did not require the same intent and counts (5) and (6) similarly did not require the same intent. RP 678. It therefore calculated Eggum's offender score as 8 points. CP 8; RP 678.

The court imposed an exceptional sentence of 120 months on count (1); the top of the standard range on count (3); an exceptional sentence of 60 months on count (4); the top of the standard range on count (5); and an exceptional sentence of 60

months on count (6). CP 6-18. The court also ordered counts (1), (4) and (6) to run consecutively, for a total of 240 months of confinement. CP 9.

(i) The Richey Counts Occurred at the Same Time and Involved the Same Intent.

The trial court erred in concluding Eggum's offenses did not encompass the same criminal conduct. Contrary to the state's arguments, Eggum committed the offenses against Richey at the same time and place[13] and with the same intent.

The intimidating a public servant offense was based on a letter Eggum wrote Richey on June 7, 2009. RP 272, 585. The AAG argued Eggum essentially was threatening to harm Gray and pursue his bar complaint against Richey, if Richey did not drop the warrant and charge involving Hallmark. RP 585; see also RP 281-285.

The harassment count, however, was based on any number of potential acts. CP 79. One of which relied upon by the state was a letter Eggum wrote to his mother on June 14, 2009, in which Eggum asked his mother to "lobby" Richey, and threatened that if she died while he was still incarcerated, Richey would "have bigger

[13] The state conceded the offenses were committed at the same place. Supp. CP __ (sub. no. 149).

problems than he has ever managed[,]" specifically, "[a]n eye for an eye, a tooth for a tooth[.]" RP 588-90.

The jury did not indicate which act it relied upon to convict. However, an ambiguous verdict must be interpreted in favor of the accused. State v. Deryke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002).

Accordingly, the two offenses – IPS and harassment of Richey – occurred within one week of one another. It is well settled that separate incidents giving rise to separate convictions may have been committed at the same time, as will allow finding that they encompass the same criminal conduct and are a single offense for sentencing purposes, when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. State v. Young 97 Wn. App. 235, 984 P.2d 1050 (1999). That is the case here. The letters qualify as a single, uninterrupted criminal episode (campaign) in which Eggum was trying to intimidate Richey into dropping the warrant and concomitant charge involving Hallmark.

The offenses were also committed with the same intent. Contrary to the state's reasoning, "intent," as used for same criminal conduct purposes "is not the particular mens rea element

of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." In re Holmes, 69 Wn. App. 282, 290, 848 P.2d 754 (1993); see also State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990) (a single intent includes "numerous offenses committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective."). Stated differently, "if one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." Lessley, 118 Wn.2d at 777.

The harassment plainly furthered Eggum's intent to influence Richey to drop the charge. The court abused its discretion in adopting the state's interpretation of time and intent, as both were contrary to law.

(ii) The Gray Counts Were Committed with the Same Intent.

The harassment and stalking of Gray were based on the same batch of letters. RP 594-95, 598. The AAG argued in closing that Eggum's intent in stalking Gray was to frighten and harass her. Yet, the AAG argued at sentencing that Eggum's intent in harassing Gray was somehow different, because "there is no requirement of

an intent to 'harass' for the crime of harassment." Supp. CP __ (sub. no. 49). This argument is nonsensical. Harassment is part and parcel of stalking. Stalking is but a series of harassment.

The required intent for stalking is intent to frighten, intimidate or harass the person. CP 83. "To harass" means to carry out a knowing and wilfull course of conduct directed at a specific person which seriously alarms, annoys, or harasses or is detrimental to such person. CP 86. Clearly, knowingly threatening to kill a person could be – as it was in this case – part of a wilfull course of conduct designed to seriously alarm someone.

In any event, the state and court again misapprehended the intent required for same criminal conduct as being the statutory mens rea required for the offense. As indicated in the preceding section, the correct test is the offender's objective criminal purpose in committing the offense. Under that test, it is clear Eggum's intent did not change from one offense to the other. His main objective – as he stated repeatedly in the letters – was to get Gray to sit down and talk. See e.g. RP 106, 111, 112, 125, 132, RP 151, 155, 160, 162, 179. In other words, the harassment and stalking were both committed with the intent to intimidate Gray into talking with Eggum, as opposed to relinquishing control to the system.

The court therefore erred in finding that the offenses did not encompass the same criminal conduct. Although the court imposed exceptional sentences, remand for resentencing is required because the court must first determine the correct standard range before imposing an exceptional sentence. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

2. THE COURT WAS WITHOUT AUTHORITY TO IMPOSE NON-STANDARD RANGE, CONSECUTIVE SENTENCES FOR COUNTS (1), (4) AND (6) WHERE ONLY ONE AGGRAVATOR WAS ALLEGED FOR EACH.

As indicated in the "charges" section, for counts 1, and 4, the jury found the special aggravating circumstance that each offense was committed against a public official in retaliation of the official's performance of his or her duty to the criminal justice system. CP 46, 49, 54, 191-196; RCW 9.94A.535(3)(x). For count 6, the jury found the aggravating circumstance that the offense involved domestic violence and was part of an ongoing pattern of abuse. CP 40, 43, 194-196; RCW 9.94A.535(3)(h)(i).

Although the jury found only one aggravator for each charge, the court enhanced the sentences for counts (1), (4) and (6), not only by an increase in beyond the standard range, but by running these increased sentences consecutively, where ordinarily they

would run concurrently. The court acted without lawful authority in doing so.

Where concurrent sentences are normally presumed, running sentences consecutively amounts to an exceptional sentence. RCW 9.94A.589(1). Thus, consecutive sentences must be supported by a jury's finding of aggravating factors. RCW 9.94A.535, 9.94A.537, and 9.94A.589.

In a series of cases, Division III has interpreted the Sentencing Reform Act (SRA) to require there be more than one aggravator for a single count before a trial court may impose multiple types of exceptional sentences. State v. Quigg, 72 Wn. App. 828, 845, 866 P.2d 655 (1994); In re Holmes, 69 Wn. App. 282, 292-93, 848 P.2d 754 (1993), overruled on other grounds, State v. Calle, 125 Wn.2d 769, 778, 888 P.2d 155 (1995); State v. McClure, 64 Wn. App. 528, 534, 827 P.2d 290 (1992). In other words, the finding of a single aggravating factor will not support both a nonstandard range sentence and an exceptional consecutive sentence for any one count. Id.

The cases cited above rely on the Supreme Court's decision in State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991). Specifically, those holdings hinge on the following passage: "If a

presumptive sentence is clearly too lenient, this problem could be remedied either by lengthening concurrent sentences, or by imposing consecutive sentences." McClure, 64 Wn. App. at 534, (citing Batista, 116 Wn.2d at 785-86). From this, Division III reasoned that when there is only one aggravating factor, the trial court may impose only one type of exceptional sentence. Id.

Under this line of cases, the court acted without authority in imposing multiple exceptional sentences on counts (1), (4) and (6), where only one aggravator was alleged for each.

In response, the state may argue the Division III cases cited above are no longer good law, based on the Supreme Court's decision in State v. Smith, 123 Wn.2d 51, 864 P.2d 1371(1993), reversed on other grounds, State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). In Smith, the court stated:

> Other sections of that opinion make it clear that "[w]here multiple current offenses are concerned, in addition to lengthening of sentences, an exceptional sentence may also consist of imposition of consecutive sentences where concurrent sentencing is otherwise the standard." (Italics ours.) Batista, at 784, 808 P.2d 1141. Indeed, in State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986), we upheld an exceptional sentence which was both beyond the standard range and consecutive. The SRA itself supports no other result. Thus, we hold that is permissible to impose an exceptional sentence which includes both sentencing components.

Smith, Wn.2d at 57-58.

The state's reliance on Smith would be misplaced, however, because both Smith and Oxborrow involved multiple aggravating factors supporting the multiple exceptional sentences. Neither Oxborrow nor Smith addressed the issue presented here and in the Division III decisions relied on by Eggum. Smith's analysis of Batista pertained to a different set of circumstances and, therefore, cannot be read as undermining the proposition that a single aggravating factor on each count is insufficient to support two exceptional sentences for each of those counts. As such, Division III's cases remain good law.

Indeed, former panels of this Court appear to have recognized McClure's reasoning as sound even after Smith. State v. Stewart, 72 Wn. App. 885, 901, 866 P.2d 677 (1994), aff'd, 125 Wn. 2d 893, 890 P.2d 457 (1995), superseded by statute on other grounds. In Stewart, the defendant argued the trial court wrongly imposed both a non-standard range sentence and consecutive sentences where there was only one aggravating factor. Id. Although this Court rejected Stewart's argument because the

record showed there were actually two aggravating factors, it offered the following assessment of the SRA provisions:

> While Stewart is correct that two exceptional sentences were imposed (statutory maximums and consecutive sentences), he ignores the trial court's use of the clearly too lenient factor as well as the future dangerousness factor to impose two exceptional sentences. Where numerous aggravating factors are present, more than one exceptional sentence may be imposed. State v. McClure, 64 Wn. App. 528, 534, 827 P.2d 290 (1992).

Id.

Accordingly, under Division III's line of cases and this Court's decision in Stewart, the court was without authority to impose consecutive, non-standard range sentences on counts (1), (4) and (6). This Court should reverse and remand for resentencing. sfied that McClure's interpretation of the SRA was still viable even after Smith.

3. THE AGGRAVATOR RELIED UPON TO IMPOSE EXCEPTIONAL SENTENCES ON COUNT 6 WAS INVALID AS A MATTER OF LAW.

The court imposed a non-standard range, consecutive sentence on count (6), based on the aggravating circumstance that the stalking involved an ongoing pattern of psychological abuse manifested by multiple instances over a prolonged period of time. RP 600. Such is the very definition of stalking, however. Because

the court enhanced Eggum's sentence for count (6) based on circumstances inherent in the offense and thus, already contemplated by the legislature, the court acted without lawful authority. See e.g. State v. Ferguson, 142 Wash.2d 631, 648, 15 P.3d 1271, 1279 (2001) (the trial court may not base an exceptional sentence on factors the Legislature necessarily considered in establishing the standard sentencing range).

Under RCW 9A.46.110,

> (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
>
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either:
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

Emphasis added. The offense amounts to a class C felony if, as in Eggum's case, the accused has previously been convicted of any crime of harassment of the same victim. See CP 41; RCW 9A.46.110(1)(b).

The stalking charge in this case was based on the repeated harassment of Gray through Eggum's letter-writing campaign between January 24, 2007, and August 6, 2009. CP 100-105; RP 598. Accordingly, that the stalking involved an ongoing pattern of psychological abuse manifested by multiple instances over a prolonged period of time was a factor already contemplated by the legislature in setting the standard range and therefore, could not serve as a lawful basis for the court to enhance Eggum's sentence on count (6). This Court should reverse and remand for resentencing.

4. EGGUM'S DUE PROCESS RIGHTS WERE VIOLATED WHEN JURORS WERE INSTRUCTED THEY MUST BE UNANIMOUS TO ANSWER "NO" TO THE SPECIAL VERDICT.

Eggum received a number of exceptional sentences, as already set forth in detail. Each one must be reversed because the special verdict form instructions were unconstitutional. Regarding

the verdict forms, the jury was given the following instructions, in relevant part:

INSTRUCTION NO. 30

> You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.
>
> Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP 88-89.

INSTRUCTION NO. 32

> You will also be given special verdict forms for the crimes charged in counts I-VI. If you find the defendant not guilty of a crime, do not use the special verdict form(s) for that count.
>
> If you find the defendant guilty on the verdict forms for either of Counts I and/or III,[14] you will then use the special verdict form for that count and fill in the blank with the answer "yes" or "no" according to the decision you reach.
>
> If you find the defendant guilty on the verdict forms for any of Counts II, IV, V, or VI,[15] you will then use the "First Special Verdict Form" for that count[16]

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[14] Verdict Forms I and II concerned the intimidation charges allegedly committed against Hallmark and Richey. CP 55, 50.

[15] Verdict Forms II, IV, and V concerned misdemeanor harassment of Hallmark, Richey and Gray, respectively. CP 53, 48, 45. Verdict From VI concerned misdemeanor stalking of Gray. CP 42.

[16] The "First Special Verdict Form" for counts II, IV and V concerned whether the threat alleged was a threat to kill and whether Hallmark, Richey and Gray, respectively feared the threat to kill would be carried out. CP 52, 47, 44. The "First Special Verdict Form" for count VI concerned whether Eggum had a prior

> and fill in the blank with the answer "yes" or "no" according to the decision you reach. If you answer "no" on any "First Special Verdict Form" for any of Counts II, IV, V, or VI, or you cannot unanimously agree on an answer, do not use the "Second Special Verdict Form" for any of Counts II, IV, and V and VI.
>
> If you answer "yes" to any First Special Verdict Form for Counts II, IV, V, or VI, you will then consider the Second Special Verdict Form[17] for that count and fill in the blank with the answer "yes" or "no" according to the decision you reach.
>
> Because this is a criminal case, all twelve of you must agree in order to answer a special verdict form. In order to answer a question on a special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a doubt as to a question on a special verdict form, you must answer "no".

CP 91. It appears this instruction was proposed by defense counsel. RP 507.

The special verdict form instruction was incorrect, because a unanimous jury decision is not required to find the state has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the state has not proved the

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conviction for a crime of harassment against Gray. CP 41. In short, these First Special Verdict Forms concerned the aggravating circumstances that elevate the underlying offenses from misdemeanors to felonies.

[17] These "Second Special Verdict Forms" concerned the aggravating circumstance for counts (1)-(4) that the offenses were committed against a public servant in retaliation of the servant's performance of his or her duty to the criminal justice system, and for counts (5) and (6) that the offenses involved

special verdict finding beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In keeping with this rule, it is manifest constitutional error to instruct the jury it must be unanimous in order to find the *absence* of such a special finding. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2001).

In Bashaw, Bertha Bashaw was convicted of three drug deliveries. Because the jury determined that each delivery took place within 1,000 feet of a school bus route stop, her maximum sentence was doubled by statute. Bashaw, 169 Wn.2d at 137. In the jury instruction explaining the special verdict forms, the jury was instructed: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Bashaw, 169 Wn.2d at 139 (citation to record omitted). On appeal, Bashaw argued that the jury instruction incorrectly required unanimity for finding that her actions did not take place within 1,000 feet of the school bus route stop. Bashaw, at 137.

The Supreme Court agreed:

> Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, 72 P.3d

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domestic violence and were part of an ongoing pattern of abuse. CP 40, 43, 46, 49, 54.

> 1083, it is not required to find the *absence* of such a special verdict finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis in original).

The state argued the error was harmless, but the court disagreed:

> In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999)). The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court's instruction to a nonunaminous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.
>
> 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. Goldberg is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." Id. at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise

> additional questions that would lead to a different result. 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. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147-48.

In Ryan, this Court held the nature of the error addressed in Bashaw was a constitutional due process violation. As this Court explained:

> The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as "the procedure by which unanimity would be inappropriately achieved," and referred to "the flawed deliberative process" resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

Ryan, 252 P.3d at 897 (footnotes omitted).[18]

Accordingly, where Ryan's jury was instructed it must unanimously have a reasonable doubt to answer "no" to the special

[18] Cf. State v. Nunez, 160 Wn. App. 150, 163, 248 P.3d 103 (2011); see also State v. Morgan, __ Wn. App. __, __ P.3d __ 2011 WL 3802782.

verdict, it was an error Ryan could raise for the first time on appeal and entitled him to vacation of the deadly weapon enhancement. Ryan, 252 P.3d at 897-898.

The error here is no different than that in Bashaw and Ryan. It was an error of constitutional magnitude that may be raised for the first time on appeal and is not harmless, as it resulted in a flawed deliberative process.

In response, the state may argue that since defense counsel proposed the flawed instruction should be given, any error was invited. Eggum had the right to effective assistance of counsel at trial. U. S. Const. amend. 6; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Gentry, 125 Wn.2d 570, 646-47, 888 P.2d 1105 (1995); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Doogan, 82 Wn. App. at 188 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Strickland, 466 U.S. at 690-91. Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel. See State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct).

Defense counsel provided ineffective assistance to Eggum by agreeing to the special verdict form instruction. It improperly told jurors it must be unanimous in order to find Eggum did not commit the offenses in retaliation (counts (1), (3) and (4)) or as part of an ongoing pattern of abuse (counts (5) and (6)), respectively, which is an incorrect statement of the law under Golberg, which has been on the books since 2003, and made it more difficult for jurors to find Eggum not guilty of the aggravating circumstances. Eggum was prejudiced because it resulted in a flawed deliberative process that tells us little about what result the jury would have reached had it been given a correct instruction. This Court should therefore reverse all the exceptional sentences.

D. CONCLUSION

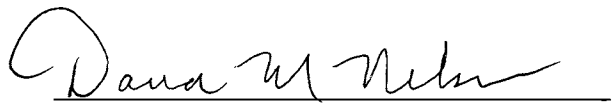
Because the jury was incorrectly instructed regarding the verdict forms for each of the aggravating factors, this Court should reverse each of the special verdicts and remand for resentencing within the standard range. On remand, Eggum should be resentenced based on a corrected offender score of 6, because the Richey and Gray counts constitute the same criminal conduct.

Should this Court disagree that the Bashaw issue can be raised for the first time on appeal, see note 18, this Court should nevertheless reverse Eggum's sentence, because the court incorrectly calculated his offender score, improperly imposed non-standard range, consecutive sentences on counts (1), (4) and (6) – where only one aggravator was alleged – and the court improperly enhanced Eggum's sentence for count (6) based on factors already contemplated by the legislature in setting the standard range.

Dated this 31st day of August, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66554-5-I
	)	
MARLOW EGGUM,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, DANA NELSON, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 AUG 31 PM 4:44

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

x Dana M Nelson