

66632-1

66632-1

NO. 66632-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE M. WHITE,

Appellant.

2011 OCT 31 PM 4:26  
COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Ronald L. Castleberry, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Jesse M. White's two convictions for second degree assault violate double jeopardy.

2. Trial counsel deprived White of his constitutional right to effective assistance by failing to argue the assaults and harassment constituted the same criminal conduct.

3. Trial counsel deprived White of his constitutional right to effective assistance by failing to propose a limiting instruction for evidence related to White's purported drug abuse.

4. Trial counsel deprived White of his constitutional right to effective assistance by failing to object to the aggressor instruction.

5. The information is defective because it omits an element of the harassment offense.

Issues Pertaining to Assignments of Error

1. White was charged with and convicted of two counts of second degree assault for the same act against the same person. Do White's assault convictions violate double jeopardy, requiring vacation of one of the convictions?

2. Was trial counsel ineffective for failing to argue the acts used by the state to obtain convictions for two second degree assaults and

felony harassment, all of which occurred during the same continuing course of events against the same complainant, constituted the same criminal conduct?

3. Was trial counsel ineffective for failing to propose an instruction that could have limited the jury's use of evidence related to his purported drug abuse?

4. Was trial counsel ineffective for failing to object to the trial court's aggressor instruction, which effectively deprived White of his only defense?

5. Is reversal of the harassment conviction required where the state failed to allege the "true threat" element of felony harassment in the information?<sup>1</sup>

B. STATEMENT OF THE CASE

Raina Stevens and Jesse M. White met in April 2005 and began living together in early 2006. They had a daughter, Nyhia, in July 2007. RP 246-47.<sup>2</sup> White's use of prescribed pain medication and medical

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<sup>1</sup> This issue is pending in the Washington Supreme Court in State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784 (2011), review granted, No. 86119-6, (September 26, 2011).

<sup>2</sup> "RP" refers to the five-volume, sequentially paginated report of proceedings beginning August 27, 2010, and ending January 6, 2011.

marijuana had been a sore point throughout the relationship. RP 247-50, 329, 347-49, 547-50, 585. In the next three years he had two additional injuries that required him to use pain medication. RP 546-50. In Stevens' view, White used his medicine inappropriately. RP 405. She described his behavior as "erratic" and "extremely unpredictable" when he used the drugs. RP 308.

According to Stevens, there was "violence in our relationship." RP 308. By that she meant White punched walls, spat on her, threatened her, and was very controlling. RP 404-05. White never hit her, and the only physical contact consisted of a push in June 2009 when she threatened to move out. RP 344-46. She did not move out, but instead obtained a protection order that was later lifted. RP 347. Stevens acknowledged White never struck or attempted to harm the child. RP 384.

When Stevens later found text and email messages on White's telephone indicating he was selling drugs, she decided to take Nyhia and move out. RP 248-50, 499-502. She did just that in April 2010 during a weekend White was in Portland. RP 250-52. Her father, who had come to the house to help her pack and move things, found a revolver and an air pistol in the couple's bedroom. RP 252-53, 435-38. At her father's suggestion, Stevens put the gun, holster, and ammunition in a plastic bag

and buried the bag near an old shed in the corner of the backyard. RP 253-56, 259-60.

The next day Stevens and White spoke on the phone. During the conversation she broke the news to him that she had moved out. RP 262. Later that day, after White got home, they discussed the situation. RP 263-64, 441-42. Stevens then took Nyhia out for dinner and agreed to return later. RP 264-65.

While they were at dinner, White called and asked Stevens where his guns were. She lied and said her father had taken them. RP 265. White called Stevens' father, who said he did not have the guns. RP 443. When Stevens returned to White's house with Nyhia, White persisted in asking where his gun was. Stevens told him she buried it just behind the back of the house. RP 266. White went downstairs, and Stevens took Nyhia and left for her apartment. RP 266-67.

Via text messages, Stevens agreed to come to the house and meet with White the following day. RP 270. She wanted to amicably arrange a visitation plan for Nyhia to avoid going to court. RP 271. Stevens arrived about mid-day. Their conversation did not go well; White wanted Nyhia to live at the house with him. RP 272-74.

He also wanted to know where his gun was, so Stevens relented, went outside with him, and pointed out where she buried the weapon. RP 274-75. They came back inside together and Stevens heard Nyhia had awakened. She went into the bedroom and lay down with the child. The next thing she heard was White slamming doors and swearing in an "aggressive" tone of voice. RP 275-76.

After about five minutes, Stevens picked up Nyhia and carried her into the living room, where White was seated on the end of the couch. RP 278. White angrily declared Nyhia was going to stay with him at the house and Stevens could visit her there. Stevens disagreed and told White they would have to go to court if they could not come to an agreement on their own. RP 277, 297-98.

White immediately stood up, pulled a gun out from behind him, pointed it at her, and said he was going to kill her. RP 278. Stevens rolled Nyhia onto the couch and stood up, at which point White grabbed her by the hair and threw her face-first to the floor. RP 279. He punched her several times in the back of the head and neck while telling her she was going to die. RP 283-84. Stevens managed to roll over when White stopped hitting her. She saw the gun on the floor near her feet and as she began to get up, White put both his hands on her neck and began

squeezing so she couldn't breathe. He stopped after a "couple seconds," then reached behind for the gun. Stevens again started to get up, so White placed his knee on her neck to hold her down while he grabbed for the gun. Somehow both Stevens and White grabbed onto the gun at the same time. They struggled over the weapon until White said he would let go if she did. Stevens let go, grabbed Nyhia, and sat back on the couch. White had the gun in his hand. RP 284-87.

According to Stevens, "it all happened so fast." RP 279. White yelled that the incident was Stevens' fault, slapped her in the face, and said she was "so fucking stupid." RP 287-88. He then said he would kill her, Nyhia, and himself if she called the police, and would kill every member of Stevens' family if any of them called the police. RP 288. After awhile, Stevens told White to put the gun down, so he did. RP 288-89.

White calmed down after a bit of time and eventually said he was hungry and wanted to eat. He also said Stevens needed to go back and get some of Nyhia's things so the child could stay the night. When Stevens proposed taking Nyhia with her, White balked. He told Stevens while she was gone, he and Nyhia would go to the store and buy food to make dinner. RP 301-02. He "ripped" the now-screaming child from Stevens' arms, pushed her out the door, and locked her out. RP 306-07.

Stevens returned to her car and called her mother. RP 307. She did not immediately call the police because she believed White would carry out his threat to kill Nyhia and himself. RP 307-08. She told her mother what happened, that White had a gun and was with Nyhia, and that "if I call the police he's probably going to kill her." RP 309, 462-63. Stevens' mother encouraged her to call the police, which she did. RP 49-50, 310-15, 462-64; Ex. 22 (recorded 911 communication, played for jury).

Police officer Herwick, responding to the resulting dispatch, met Stevens at her apartment. RP 47-52, 319. Stevens told Herwick what happened and permitted her to take photographs of her injuries. RP 52-60, 319-20. Herwick observed "fresh bruises on her neck and her arms." RP 52, Stevens declined an offer of medical aid. RP 52-53. Herwick contacted her supervisor and briefed him on the situation. RP 60-61. Other officers were then contacted and directed to respond to White's house. RP 61, 79-80, 159-62, 181-83, 224-25, 230-32. One officer, who was stationed behind the house, spotted White running through thick woods with Nyhia in his arms. RP 163. That officer and some colleagues gave chase through the woods and apprehended White at gunpoint about 15 minutes later. RP 164-69, 184-95, 227-29, 232-33.

In a search of White incident to the arrest, an officer found a plastic tube with a white residue on it. RP 171-75. The officer called the tube a "tooter pipe used for smoking OxyContin." RP 175-76, 178. He admitted, however, the white residue could have been cocaine and the tube could have been used other than as a smoking device. RP 179-80.

Nyhia was unharmed but for a few superficial scratches from the bushes in the woods. RP 67-70, 323-24. Medics at the scene checked the child and released her to Stevens' care. RP 233-34, 324-25. Stevens went to the emergency room (ER) the following day. RP 203, 325, 420-25. According to an ER nurse and a doctor, Stevens' bruises and swollen forehead were consistent with her version of events. RP 206-09, 221-22, 427-32.

Meanwhile, officers searched White's residence later on the night of the incident. RP 72, 81-82, 234. One of the officers found a loaded revolver hidden under some of White's clothing in a main bedroom closet. RP 107-12, 120-23, 235-36, 252, 583. Stevens identified it as the same gun her father found while helping her move. RP 252. A small container with hypodermic needles, a measuring spoon, and Q-tips, was also recovered. RP 113, 236. According to Officer Herwick, the items were used to prepare substances for injection. RP 114-15. Those items

belonged to White. RP 583. A different officer found a box of ammunition, two ammunition loaders for a revolver, and a holster. RP 72-76, 81-87, 89-94, 117-27. He also found a bag containing suspected marijuana and bong used to smoke marijuana. RP 87-88.

The state ultimately charged White with first degree assault, alleging he assaulted Stevens with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; second degree assault, by strangulation of Stevens, felony harassment, second degree unlawful possession of a firearm, and reckless endangerment, alleging White engaged in conduct that created a substantial risk of death or serious physical injury to Nyhia. The state alleged each offense victimized a family or household member (domestic violence), that the assaults were committed while White was armed with a firearm, and that the assaults and harassment occurred within sight or hearing of Nyhia. CP 110-11.

White asserted a defense of self-defense. He testified the revolver belonged to him and Stevens. They agreed it would help them protect the house, which was in a secluded area. RP 556-57.

He used pain medication because without it, he would be unable to walk or sit for more than about 15 minutes. RP 549-50. Stevens did not

like him using OxyContin, which was the main problem in their relationship. RP 551. He acknowledged selling some of the drugs to earn money toward rent during a time his disability benefits had been cut off. White discussed it first with Stevens and received her permission to sell some. RP 549. The hypodermic needles were used to sell drugs; White neither injected nor smoked them himself. RP 585.

On the morning he left Portland on the train, he called Stevens to let her know he was on his way. During their conversation Stevens told him she moved out. RP 554. He felt "betrayed" by the move, but not mad. RP 585. Upon arrival at home, Stevens and White discussed the reasons for Stevens' decision and how to address the situation with Nyhia. RP 555. White walked around the house a bit to see what Stevens had taken. He noticed the gun was gone, asked her about it, and did not receive a straight answer. RP 555, 557-58. Later Stevens broadly said she buried the gun outside and pointed to the woods behind the house. RP 559. White looked for the revolver but found only the air gun, ammunition, speed loaders, and holster downstairs. RP 568.

White called Stevens later that night to speak with Nyhia. White and Stevens agreed to meet the next day to try to reach a custody arrangement regarding the child. RP 561-63. Stevens and Nyhia came to

White's house about mid-day, and the adults discussed how to share custody. The custody conversation became heated; Stevens finally said she would have the court determine the parenting plan. RP 569-70.

An argument ensued, and White asked for a break and for Stevens to leave for awhile. Stevens responded by saying she was not leaving without Nyhia. RP 572. When he told her to "get the fuck out of my house," Stevens pulled a gun from her purse, pointed it at White, and said, "Fuck you, Jesse." RP 572.

White instinctively ran into the gun, with the barrel pressed into his chest. RP 572, 575. He was trying to protect Nyhia from getting shot. RP 575. He grabbed Stevens' arm and the gun, trying to pull it up and away to avoid getting shot. RP 573. Unsuccessful, he pulled Stevens down to the floor by her hair and straddled her. RP 573. He tried to wrench the gun from Stevens' hand, but when she would not let go of the weapon, he choked her with one hand for a few seconds. RP 574. She finally let go of the gun and he grabbed it, stood up, and placed the weapon on a bar. RP 574.

White was shocked. Stevens grabbed Nyhia and repeatedly said, "I'm sorry." RP 574. White insisted Stevens had to leave for awhile, but she did not want to. She offered to bring back pajamas for Nyhia and left.

RP 576. During the course of the evening White and Stevens exchanged text messages. Stevens wrote that she was sorry and wanted to come back to talk. RP 577-78.

A few hours later, he looked out the window and saw many police officers descending upon his house with assault rifles. Because of "firsthand experience with police brutality," White became frightened. As a result of the June 2009 incident, he had been tased, ran into the woods behind his house, and eventually got severely bitten on both arms by a police dog after he had surrendered. RP 579-80. Scared for both himself and his daughter, White put on a sweatshirt, zipped Nyhia up inside it, and ran out the back door and onto the trails in the same woods. RP 578-82.

He hid under some fern bushes, but the police spotted him. RP 579-81. When the officers and dog approached to within 10 feet away, White surrendered and held Nyhia out so they could see she was there. RP 581-82, 587. He was arrested, escorted up to the street, and placed in a patrol car. RP 582. As the officer drove back in the direction of the house, Stevens drove by, rolled down her window, and yelled, "Fuck you, Jesse White." RP 582.

After considering the evidence, the jury found White guilty of the lesser offense of second degree assault while armed with a deadly weapon,

second degree assault by strangulation, felony harassment, unlawful possession of a firearm (because of a forgery conviction) and reckless endangerment against Nyhia. CP 25, 26, 30, 34, 38. Jurors also found the assaults and felony harassment were aggravated domestic violence offenses. CP 27-28, 31-32, 35-36.<sup>3</sup> Finally, the jury found White committed the assaults while armed with a firearm. CP 33, 37.

At sentencing, the prosecutor conceded the assaults were the same criminal conduct and should be scored as 1. RP 688-89. The trial court agreed. CP 7; RP 706. The offender scores for the felonies were therefore 2. CP 7. The trial court imposed concurrent standard range sentences for the felonies (14 months for the assaults and 12 each for harassment and unlawful possession of a firearm), added 72 months to the sentences for second degree assault (36 months consecutive for the firearm enhancements) and 12 months concurrent to the assault sentences (for the aggravating factor) for a total of 98 months in prison. CP 7-9. The court imposed a maximum 365-day sentence for the reckless endangerment,

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<sup>3</sup> See RCW 9.94A.535(3)(h)(ii) (offense involved domestic violence and "occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years"); CP 92-93 (jury instructions 42-43, setting forth elements of subsection (h)(ii) and informing jurors they must unanimously agree that aggravating circumstance has been proven beyond a reasonable doubt to find the existence of the aggravator).

suspended in lieu of 24 months probation. That misdemeanor sentence was ordered to run consecutively to the felony sentences. CP 1-4.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED DOUBLE JEOPARDY PRINCIPLES BY ENTERING A JUDGMENT AND SENTENCE FOR EACH OF THE TWO COUNTS OF SECOND DEGREE ASSAULT.

"The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). The prosecutor did just that by securing two second degree assault convictions based on a single ongoing assault. This Court should dismiss one of the convictions and remand for resentencing.

Under constitutional double jeopardy provisions, an accused may not be convicted more than once under the same criminal statute if only one "unit" of the crime has been committed. U.S. Const. amend. V; Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). Although unit of prosecution questions are of constitutional magnitude, they are answered by principles of statutory interpretation and determination of legislative intent. In re Personal Restraint of Davis, 142 Wn.2d 165, 172, 12 P.3d

603 (2000). Specifically, the court must determine what unit of prosecution the Legislature intended as the punishable act under the particular statute. State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000). The unit of prosecution may be either an act or a course of conduct. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005).

Identifying the statutory unit of prosecution involves an issue of law reviewed de novo. State v. Ose, 156 Wn.2d 140, 144, 124 P. 3d 635 (2005). The issue of multiple convictions for the same offense in violation of double jeopardy is manifest constitutional error, which may be reviewed for the first time on appeal. See RAP 2.5(a); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). The first step is to analyze the statute in question. State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). Next, courts review the legislative history. Id. Finally, courts analyze the facts to determine whether more than one unit prosecution is present in the case. Id.

Words in a statute are given their plain and ordinary meaning absent evidence of a contrary intent. State v. Lilyblad, 163 Wn.2d 1, 7, 177 P.3d 686 (2008). Courts must read statutes as a whole and give effect to all language used. In re Personal Restraint of Skylstad, 160 Wn.2d 944, 948, 162 P.3d 413 (2007). A statute is ambiguous if a reasonable person

can interpret it in more than one way. State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002). If the statute is ambiguous as to the unit of prosecution, the "rule of lenity" prohibits the court from turning a single transaction into multiple crimes. Ose, 156 Wn.2d at 144.

In White's case, the pertinent statute is RCW 9A.36.021, second degree assault:<sup>4</sup>

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) *Assaults another with a deadly weapon*; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) *Assaults another by strangulation or suffocation*.

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<sup>4</sup> The applicable version of the statute in White's case was identical but for the words "or suffocation" in subsection (1)(g), which was added by amendment in 2011. Laws of 2011 ch. 166, § 1.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

(Italics added). Each of subsections (a) through (g) represents an alternative means of committing the single offense of second degree assault. State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

Additionally, because “assault” is not defined in the statute, the common law definitions govern. State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). As applied in White's case, an assault can consist of an intentional, offensive touching (battery) or an act done with the intent to create apprehension and fear of injury (common law assault). State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (quoting State v. Bland, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993)); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 547 (3d ed. 2008); CP 54 (instruction 8, attached as appendix).

Analysis of the second degree assault statute and common law assault definitions yields no clear answer as to whether the unit of prosecution is the individual act(s) or a continuing series of actions in one assaultive incident.

Nor does the legislative history. The Legislature amended RCW 9A.36.021 in 2007 by adding the strangulation alternative means of committing second degree assault. The lawmakers found that "[s]trangulation is one of the most lethal forms of domestic violence. The particular cruelty of this offense and its potential effects upon a victim both physically and psychologically, merit its categorization as a ranked felony offense under chapter 9A.36 RCW." Laws of 2007, ch. 79, § 2. Therefore, while perceiving a need to penalize those who commit assault by strangulation as class B felons, the Legislature did not indicate whether that act could result in a separate conviction and sentence when it occurs during the course of an assault with a deadly weapon that causes apprehension and fear of bodily injury.

As for an analysis of the facts, counsel for White found no Washington precedent on point. Our Supreme Court included dicta stating all acts occurring during the course of an assault constitute one unit of prosecution. In State v. Tili,<sup>5</sup> the Court held the rape statute explicitly contemplated separate units of prosecution for each act of penetration. In explaining its reasoning, the Court distinguished the rape statute from the assault statute:

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<sup>5</sup> 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999).

Unlike the rape statute, the assault statute does not define the specific unit of prosecution in terms of each physical act against a victim. Rather, the Legislature only defined “assault” as that occurring when an individual “assaults” another. See RCW 9A.36.041. A more extensive definition of “assault” is provided by the common law, which sets out many different acts as constituting “assault,” some of which do not even require touching. *See, e.g.,* 11 *Washington Pattern Jury Instructions: Criminal* 35.50 (2d ed. 1994) (WPIC). Consequently, the Legislature clearly has not defined “assault” as occurring upon *any* physical act.

Tili, 139 Wn.2d at 116-117.

Under this rationale, White committed only one assault, not two, although he may have committed it by alternative means. Importantly, White's assault with a firearm was done with the intent to create in Stevens apprehension and fear of bodily injury regardless of whether infliction of bodily injury was intended. This assault was continuous throughout the incident; the gun remained immediately accessible to White and Stevens' reasonable fear remained. There was no appreciable break that would have given White the time to form a new criminal intent. While this assault continued, White used strangulation, a different form of assault, for the purpose of maintaining possession of the gun. White's overall criminal purpose was to frighten Stevens into agreeing with his proposed child custody plan. Therefore, the two assaults occurred simultaneously and result in one offense.

The unit of prosecution was the assaultive episode, not each alternative method of committing second degree assault. Finding otherwise would violate White's right to be free from double jeopardy. This Court should reverse count 2, which was based on the strangulation alternative, and remand with an order to dismiss count 2 and resentence White.

2. WHITE'S ASSAULT AND HARASSMENT CONVICTIONS INVOLVED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING PURPOSES.

Finding the assaults were based on the same criminal conduct, White was sentenced with an offender score of 2 using his other current felony convictions. CP 5-16; RP 688-89; 706. The felony harassment also should have been part of the same criminal conduct, but defense counsel did not make the argument. Because such an argument would have resulted in a lowered offender score and concomitant standard range, White received ineffective assistance of counsel.

a. Ineffective assistance of counsel

Article I, section 22 and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). Defense

counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

The presumption of competent performance is overcome by demonstrating the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Crawford, 159 Wn. 2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (failing to raise same criminal conduct before sentencing court waives argument challenging offender score), review denied, 167 Wn.2d 1007 (2009); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (reaching ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing), review denied, 170 Wn.2d 1014 (2010); State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) ("counsel's decision not to argue same criminal conduct as to the rape and kidnapping charges constituted ineffective assistance of counsel").

b. Same criminal conduct

“[W]henever 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” unless the crimes involve the “same criminal conduct.” 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.” Id.

The test is objective; a court must consider how closely related the crimes committed are, and whether the criminal goals substantially changed between the crimes charged. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Another question is whether one crime furthered the other. Id. The issue is reviewed for an abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

i. Same victim, time and place<sup>6</sup>

Starting with the time and place element, our Supreme Court has recognized that "the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); see State v. Williams, 135 Wn.2d 365, 368-69, 957 P.2d 216 (1998) (sale of 10 rocks of cocaine to one police informant, followed immediately and without interruption by same transaction with second informant, were same criminal conduct); State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (rejecting "simultaneity" requirement, Court finds immediate, uninterrupted, sequential sales of methamphetamine and marijuana to same undercover officer occurred at same time); State v Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) (noting that "separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted episode over a short period of time.").

With respect to time, Stevens said "it all happened so fast." RP 279. She testified that after telling White they would have to settle the

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<sup>6</sup> The victim of each assault and the harassment was Stevens. And the place of each of the offenses was the same – the living room of White's home.

child custody dispute in court, White stood up, brandished a gun, and said he was "going to fucking kill" her. RP 278-79. In response, she stood up, at which point White grabbed her by the hair and threw her face-first to the ground. RP 279-80. He hit her on the back of the head and neck, and when he stopped, she managed to roll over and saw the gun on the floor near her feet. RP 284-85. As she began to get up, White put his hands on her neck, squeezed for a few seconds, and reached for the gun. Stevens said she tried to get up, causing White to put his knee on her neck to hold her down. She nevertheless was able to grab the gun at the same time as White. They briefly struggled until White said, "[S]top. I'll let go if you let go." RP 284-86. She let go and White grabbed the gun. RP 286-87.

Their daughter, meanwhile, was "right there with us." RP 287. As Stevens tried to console her, she saw a clump of her hair on the floor. White was yelling and blaming her for the entire incident. He slapped her in the face and called her "stupid." RP 287. He also said he would kill all three of them if she called police, and would kill her family if someone called police. RP 288.

Plainly, these events occurred "as part of a continuous transaction or in a single, uninterrupted episode over a short period of time." See Tili, 139 Wn.2d at 123-24 (separate forcible digital penetration of anus and

vagina, followed by unsuccessful attempt to penetrate anus with penis, followed by vaginal penetration with penis, all of which occurred during a two-minute, continuous episode "were nearly simultaneous in time," and constituted same criminal conduct rather than three distinct rapes); State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999) ("The few minutes between the rapes is sufficiently close so that it satisfies the RCW 9.94A.400(1)(a) time prong, because in this time Palmer's activity exclusively involved threats and use of force in preparation for the penile/vaginal rape which immediately followed the oral rape."); cf., State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (finding crimes were "sequential, not simultaneous or continuous," when defendant forcibly penetrated victim's anus, then kicked her, grabbed her face, pulled her hair, and slammed her head into wall until she complied with demand to fellate him).

The assaults and continuing felony harassment(s)<sup>7</sup> in White's case were more like the rapes in Tili and Palmer than Grantham; there was no

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<sup>7</sup> According to Stevens, White threatened to kill her after producing the gun at the outset of the encounter and threatened to kill her, their daughter, and himself at its conclusion. Further, as White was hitting Stevens in the back of the head and neck, she "remember[ed] just hearing that I'm going to fucking die and that's what I remember him mostly saying." RP 284.

discernable break in the action between the acts constituting the assault with a firearm – which occurred throughout, the assault by strangulation, and the harassment(s). The crimes thus occurred at the same time for purposes of this issue.

ii. Same objective intent

The assaults and harassment also involved the same intent. “The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this context, "intent" is not the mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990). Factors include whether one crime furthered the other, whether one remained in progress when the other occurs, and whether the offenses were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996); State v. Edwards, 45 Wn. App. 378, 382, 725 P. 2d 442 (1986), overruled in part on other grounds, State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

Several cases demonstrate what is meant by "same intent" in this context. In State v. Taylor, the two defendants assaulted the driver of a car

as he stepped out to buy gasoline. The defendants climbed into the car and, with a rifle pointing at the passenger's head ordered the driver to take them to a park. When they arrived at the park, the defendants robbed the passenger, left the car, and crossed the street. 90 Wn. App. 312, 315, 950 P.2d 526 (1998).

At issue was whether the charges of second degree assault and first degree kidnapping against the passenger arose from the same criminal conduct. More specifically, the question was whether Taylor's objective intent was the same when committing the two offenses. Taylor, 90 Wn. App. at 321. The court found it was:

The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and Nicholson entered the car. It ended when the kidnappers exited the car and the abduction was over.

Taylor, 90 Wn. App. at 321. Notably, the court found that where two crimes are committed continuously and simultaneously, "it is not possible to find a new intent to commit a second crime after the completion of the first crime." Id. at 321-322.

The question in State v. Saunders was whether instances of rape and kidnapping involved the same criminal conduct. 120 Wn. App. at

824-25. Saunders and his friend, Williams, were drinking in Saunders' living room with a third woman when Saunders requested the woman to engage in a sexual threesome. Saunders, 120 Wn. App. at 806-07. After the woman refused, Saunders bound the woman with handcuffs and leg shackles. At some point, Saunders tried to force the woman to perform oral sex on him but she refused. Saunders then went into the kitchen for a knife. When he came back into the living room, Williams was raping the woman. Saunders, 120 Wn. App. at 807.

On review, the court found the kidnapping and rape were the same criminal conduct, reasoning the kidnapping was committed in furtherance of the rape. Saunders, 120 Wn. App. at 825. The court also found Williams' main motivation for raping the woman was to dominate her and to cause pain and humiliation, an intent similar to the motivation for the kidnap. Saunders, 120 Wn. App. at 825.

In State v. Calvert, the defendant's ex-wife stole a checkbook and forged several checks that the defendant deposited in his account over the course of about one week. 79 Wn. App. at 572. The defendant ultimately pleaded guilty to five counts of forgery. Id. at 572-73. He argued two of the counts, based on checks presented on the same day, involved the same criminal conduct. The trial court agreed. Id. at 574. The state appealed,

and the reviewing court upheld the trial court. The court held that while "possession and presentation of one forged check did not 'further' the possession or presentation of the other, both were deposited . . . on the same day, as part of the same scheme, with the same criminal objective: to defraud." Id. at 578.

As charged in White's case, the State had to prove an assault and the use of a deadly weapon (count 1 lesser) and an assault and strangulation (count 2). CP 110-11; RCW 9A.36.021(1)(c) (deadly weapon; (1)(g) strangulation). The jury was instructed that an "assault" consists of an intentional touching that is harmful or offensive, or an act, with unlawful force, done with the intent to make another person apprehensive and fearful of bodily injury. CP 54 (instruction 8, attached as appendix); see 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 547 (3d ed. 2008); State v. Abuan, 161 Wn. App. 135, 154-55, 257 P.3d 1 (2011) (setting forth common law definitions of assault). Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future to the person threatened and that the person threatened was placed in reasonable fear that the accused would carry out the threat. RCW 9A.46.020(1)(a)(i);

State v. Mandanas, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2011 WL 4489529, \*3 (2011).

Crimes that White objectively intended to commit included an intentional, offensive touching and threatening to commit bodily injury, which created an apprehension of bodily harm. There was no discernible change in intent between the crimes of second degree assault and harassment. Moreover, assault through strangulation and threatening to kill Stevens furthered the crime of creating apprehension of more bodily harm. Those acts also furthered the harassment by ensuring Stevens' reasonable fear.

In addition, there was no temporal break where White paused and had time to form a new criminal intent to commit a second offense. Cf. State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (because defendant had time to complete assault and form a new intent to threaten the victim, crimes of assault and felony harassment had different objective intents and thus were not the same criminal conduct). Finally, as in Taylor, the second degree assault occurred throughout the affray because of Stevens' continuing apprehension of bodily harm and White's possession of the revolver. For these reasons, this Court should find White's actions encompass the same criminal conduct.

Because a same criminal conduct finding results in a lower offender score, White's trial counsel was ineffective for failing to make the above argument. This Court should therefore vacate White's sentence and remand for a new sentencing hearing.

3. TRIAL COUNSEL DEPRIVED WHITE OF HIS RIGHT TO EFFECTIVE REPRESENTATION BY FAILING TO REQUEST AN INSTRUCTION THAT WOULD HAVE LIMITED THE JURY'S USE OF DRUG-RELATED EVIDENCE.

As the result of a trial court ruling in limine, jurors were permitted to hear officers found marijuana, a "tooter" pipe used to smoke OxyContin or snort cocaine, and syringes and a spoon on White's person and in his home. The evidence was admitted for the purposes of explaining the reasonableness of Stevens' fear that White would carry out his threat to kill and why Stevens' believed White has been acting erratically. Defense counsel nevertheless failed to propose a limiting instruction, thereby permitting jurors to use the evidence to question the reasonableness of his belief that he needed to defend himself and his child. Counsel was ineffective for failing to propose the instruction. White may make this claim for the first time on appeal. State v. Keend, 140 Wn. App. 858, 864, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041 (2008).

As set forth above, the Sixth Amendment and article I, section 22 guarantee criminal defendants the effective assistance of counsel. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Nichols, 161 Wn.2d at 8. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Before White's trial, defense counsel moved to exclude evidence of drug use. Counsel contended the evidence, including testimony from Stevens that White sold drugs, was not relevant to whether he committed the charged crimes and would mislead the jury. RP 27-28. The prosecutor countered the evidence was relevant because White's drug use and resulting erratic behavior explained why Stevens moved out and why her fear of White carrying out his threat to kill was reasonable. RP 27-30.

The trial court granted the motion "as to prior drug usage or suspected drug usage." RP 30. The court denied the motion to the extent the evidence explained Stevens' fear of White, "especially the emails" that

indicated White sold drugs, which "substantiate the behavior of the defendant, and that's necessary to independently support her belief" that White acted erratically during the two days leading up to the incident. RP 30-31. White's counsel sought permission to propose a limiting instruction, which the court granted. RP 31.

As a result, the jury heard testimony that officers found marijuana and a bong, a "tooter" pipe with white residue, and a drug-injection "kit" containing syringes and a spoon. At the end of trial, however, counsel proposed no limiting instruction.

There was no legitimate reason not to propose a limiting instructions given the prejudicial nature of the drug-related evidence. Under certain circumstances, courts have held failure to propose a limiting instruction may be legitimate trial strategy because an instruction would have highlighted damaging evidence for jurors. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

That rationale is inapplicable here. The drug-related evidence came up in a variety of ways during trial, and the prosecutor mentioned it

again in closing argument. RP 611. This is not a case where a limiting instruction raised the specter of reminding the jury of briefly referenced evidence. Furthermore, with respect to evidence of other crimes, jurors learned White had prior convictions for forgery, second degree theft, and bribe giving. RP 548, 598. Therefore, the danger of overemphasizing prior bad acts evidence did not exist.

The forgery conviction was the predicate for the unlawful firearm possession charge. Defense counsel requested and received an instruction limiting the use of the theft and bribe giving convictions for impeachment only. CP 49; RP 590-91. But he made no request to limit use of the drug-related evidence. After unsuccessfully attempting to keep the evidence out before trial, it was incumbent upon counsel to prevent the jury from using that evidence for an improper purpose.

Unchecked use of drug abuse evidence is unfairly prejudicial. See Noble v. Lansche, 735 S.W.2d 63, 65 (Mo. Ct. App. 1987) (to conclude forced disclosure of expert witness's past drug abuse was harmless "would be to ignore the poison inherent in the public perception of drug abuse."); People v. Gardner, 78 Misc.2d 744, 750, 359 N.Y.S.2d 196, 202 (N.Y. Sup. Ct. 1974) (in rejecting Eighth Amendment challenge to New York's sentencing scheme for sale of drugs, court observed that "we deal with but

one phase of a large scale, well entrenched criminal activity that springs from human greed and preys on man's weakness-one that turns buyers into sellers, makes addicts out of newborn infants and sets addicts to mugging, thievery, prostitution, robbery and murder to support an insatiable appetite. The punishment fits the crime.").

More specifically, White's defense was self-defense. The jury was given proper self-defense instructions that applied to both assault counts. CP 62-66, 71. Self-defense incorporates both objective and subjective components. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). White's state of mind at the time of the assaults, therefore, was critical to the jury's analysis of his defense. Although the drugs at issue, including the suspected marijuana, were prescribed, admission of the "tooter pipe" and syringes, and accompanying testimony, permitted jurors to conclude White was abusing his medicine for the purpose of altering his mental state and perceptions of reality. Such a conclusion would undermine his defense.

For these reasons, defense counsel's failure to propose a limiting instruction was deficient performance, which in turn resulted in prejudice. This deprivation of the right to counsel requires reversal of White's convictions and a remand for a new trial.

4. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE AGGRESSOR INSTRUCTION.

White testified Stevens produced the revolver and threatened him with it. His defense was self-defense. Despite the absence of evidence showing White acted intentionally to precipitate the affray with Stevens, counsel failed to object to the aggressor instruction. The instruction permitted jurors to disregard White's only defense. Counsel was ineffective for failing to object to the instruction.

Aggressor instructions are not favored. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), review denied, 138 Wn.2d 1008 (1999), overruled on other grounds by In re Personal Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). As this Court has observed, "Few situations come to mind where the necessity for an aggressor instruction is warranted." State v. Arthur, 42 Wn. App. 120, 125, 708 P.2d 1230 (1985). An aggressor instruction vitiates a claim of self-defense, which the State must disprove beyond a reasonable doubt. State v. Stark, 158 Wn. App. 952, 960, 244 P.3d 433 (2010), review denied, 171 Wn.2d 1017 (2011).

Only where there is credible evidence showing the accused provoked the need to act in self-defense is an aggressor instruction appropriate. State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999).

The provoking act must be intentional and one a jury could reasonably believe would cause a belligerent response from the victim. Arthur, 42 Wn. App. at 124. Words alone do not constitute sufficient provocation. Riley, 137 Wn.2d at 911. Whether the state produced sufficient evidence to support an aggressor instruction is a question of law this Court reviews de novo. State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008).

Importantly, the provoking act cannot be the actual assault. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986). This is the problem in White's case. There was no isolated provoking act that precipitated his affray with Stevens other than the assault itself. According to Stevens, the matter began after she told White the court would have to decide the custody issue. White stood up, produced a revolver, pointed it at her, and threatened to kill her. This was the beginning of the continuing second degree assault the jury found as the lesser included offense for count 1. As argued above, the remaining acts were part of the continuing assault with a deadly weapon. See CP 60 (instruction 14, second degree assault instruction setting forth as elements assault, with a deadly weapon, in Washington). Therefore, the evidence

did not support the giving of the aggressor instruction and the court erred in giving it.

Giving an unsupported aggressor instruction is constitutional error and is not harmless unless proven so by the state beyond a reasonable doubt. Stark, 158 Wn. App. at 961. The state cannot prove that here. The instruction required jurors to disregard White's sole defense if they wrongly concluded the evidence proved he was the aggressor. The only witnesses to the incident were Stevens, Nyhia and White, and only the two adults testified. The question was who produced the gun. But as explained, even if the jury believed Stevens' version of events and believed White displayed the gun, the evidence was insufficient to show he was the aggressor. The trial court's error, therefore, was not harmless. The assault convictions should be reversed.

Trial counsel failed to object to the unsupported aggressor instruction. As set forth above, counsel deprives his client of his constitutional right to effective representation where the client shows deficient performance and resulting prejudice. Strickland, 466 U.S. at 687; Nichols, 161 Wn.2d at 8. Counsel was ineffective for failing to object to an instruction that allowed jurors to disregard his only defense. White may make this claim for the first time on appeal. Keend, 140 Wn.

App. at 864. This Court should therefore reverse White's convictions and remand for a new trial.

5. THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED THE "TRUE THREAT" ELEMENT OF THE CRIME OF FELONY HARASSMENT.

White's felony harassment conviction must be reversed because the charging document does not set forth the "true threat" element of the crime. CP 2; U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

A charging document is constitutionally defective under the Sixth Amendment and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime. Vangerpen, 125 Wn.2d at 787. Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary element is neither found nor fairly implied in the charging document, the court

presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must therefore be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have

some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information accused White of committing felony harassment as follows: "That the defendant, on or about the 12th day of April, 2010, without lawful authority, knowingly threatened to kill another, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out[.]" CP 111.

The information fails to allege White made a "true threat." This Court has held the "true threat" allegation need not be included in the charging document because it is definitional rather than an essential element. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9A.46.020(2)(b)); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (felony harassment under RCW 9A.46.020); State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784 (2011), review granted, No. 86119-6, (September 26, 2011).

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court

did reaffirm, however, that the State must prove "a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement is in accord with Kilburn, where the Court held a harassment conviction must be reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)), review denied, 163 Wn.2d 1007 (2008). As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an element of felony harassment. The State's information is deficient because it lacks this element. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of "true threat" is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse. McCarty, 140 Wn.2d at 425.

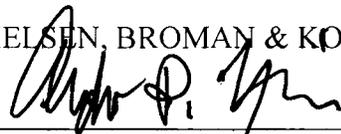
D. CONCLUSION

For the reasons stated above, the trial court should vacate one of White's two second degree assault convictions, reverse the remaining convictions and remand for a new trial, or find the acts underlying the assault and felony harassment convictions constituted the same conduct and remand for resentencing.

DATED this 31 day of October, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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## APPENDIX

INSTRUCTION NO. 8

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 66632-1-II
	)	
JESSE WHITE,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 31<sup>ST</sup> DAY OF OCTOBER, 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.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] JESSE WHITE  
DOC NO. 347132  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 OCT 31 PM 4:26**

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF OCTOBER, 2011.

x *Patrick Mayovsky*