FILED
Court of Appeals
Division II
State of Washington
3/7/2018 3:07 PM

No. 50834-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Andre Sargent,
Appellant.

Clark County Superior Court Cause No. 17-1-00898-2

The Honorable Judge Robert A. Lewis

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by applying the domestic violence designation to the harassment count at sentencing.
2. The trial court miscalculated Mr. Sargent's offender score.
3. The 40-month sentence exceeded Mr. Sargent's standard range for each offense.

> **ISSUE 1:** The definition of domestic violence in RCW 10.88.020 does not include Harassment in the list of possible domestic violence offenses. The trial court applied the domestic violence designation to the charge of harassment count, resulting in inflated offender scores and standard ranges for both counts. Did the trial court err by applying the domestic violence designation to the harassment count?

4. The trial court erred by giving jury Instruction 12.
5. The trial court erred by instructing jurors they need not be unanimous in reaching a verdict.

> **ISSUE 2:** The Washington Constitution guarantees a criminal defendant's right to a unanimous jury verdict. Instruction 12 expressly states that unanimity is not required. Did the trial court violate Mr. Sargent's state constitutional right to a unanimous verdict by giving Instruction 12?

6. The trial court erred by giving jury Instruction 4.
7. The trial court erred by instructing jurors they could return a guilty verdict if they had "an abiding belief in the truth of the charge."

> **ISSUE 3:** Instructions on the reasonable doubt standard may not lessen the State's burden of proof. Instruction 4 allows the jury to convict on the basis of a nebulous "belief in the truth of the charge," rather than on proof beyond a reasonable doubt. Did the trial court err by giving Instruction 4?

8. The trial court abused its discretion by overruling Mr. Sargent's objection to testimony that Sargent "started talking about hearing voices in his head." 1 RP 98-101.

ISSUE 4: Due process and ER 404 prohibit the use of propensity evidence to establish guilt in a criminal case. Here the trial court allowed testimony that Mr. Sargent heard "voices in his head," despite an order in limine prohibiting such testimony. Did the trial court abuse its discretion by admitting the testimony?

ISSUE 5: ER 403 prohibits the introduction of evidence that is unfairly prejudicial. Should the trial court have excluded evidence that Mr. Sargent heard "voices in his head" under ER 403?

9. Mr. Sargent was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
10. Defense counsel provided ineffective assistance by reading verbatim portions of the victim's sworn statement to police, with the effect of highlighting and reinforcing in the minds of jurors the most damaging facts in the case.
11. Defense counsel provided ineffective assistance by affirmatively rejecting a limiting instruction regarding prior acts of domestic violence by Mr. Sargent against a different victim.
12. Defense counsel provided ineffective assistance by failing to object to jury Instructions 4 and 12.
13. Defense counsel provided ineffective assistance by failing to object to the categorization of the harassment charge as a Domestic Violence offense.
14. Defense counsel provided ineffective assistance by failing to object to the State's calculation of Mr. Sargent's offender score and standard range.
15. Defense counsel provided ineffective assistance by opposing the removal of Juror 12.

ISSUE 6: Ineffective assistance of counsel requires reversal when counsel's performance is deficient, and the deficiency prejudices the defendant. Mr. Sargent's counsel committed numerous deficient acts that prejudiced Mr. Sargent. Do any of these acts, alone or in combination, require reversal for a new trial?

ISSUE 7: Cumulative error requires reversal when multiple errors combine to produce a trial that is fundamentally unfair. Do the errors and ineffective assistance of counsel set forth above require reversal for a new trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. Prior to trial, the trial court limited testimony of character evidence and prior bad acts.

Andre Sargent was charged with Harassment, Unlawful Imprisonment, and Assault in the Fourth Degree, all arising from an incident involving Brandi Crippen on March 5, 2017. CP 6-7. The Information alleged that all three counts were domestic violence offenses as defined in RCW 10.99.020. *Id.*

Prior to trial, the court addressed motions in limine. The State sought to exclude any mention of Crippen's mental health and treatment, on the grounds it would be irrelevant, prejudicial, and impermissible character evidence. CP 12. Mr. Sargent responded that any exclusion must apply equally to both sides as to both Crippen and Sargent—that is, if Mr. Sargent cannot mention Crippen's mental health, the State also cannot mention Mr. Sargent's mental health. 1 RP 32. The trial court granted the motion with the mutual condition. 1 RP 33.

The State also sought to admit testimony from Crippen regarding prior bad acts of Mr. Sargent for the limited purpose of proving the reasonableness of Crippen's fear as an element of the Harassment charge. CP 11-12. After an offer of proof, the trial court held that testimony regarding Mr. Sargent's statements to Crippen that he had threatened,

chased, or physically assaulted a prior girlfriend would be admissible "for the sole purpose of bearing on her – the reasonableness of her fear that the threat to kill would be carried out." 1 RP 29-30. The trial court specifically noted that a limiting instruction would be necessary. 1 RP 30.

2. The alleged victim, Brandi Crippen, testified that Mr. Sargent held her in her car and threatened to beat and kill her.

Crippen was the State's key witness at trial. She testified that she had known Mr. Sargent for 11 years and started dating him in October 2016. 1 RP 87. They were physically intimate but did not live together. 1 RP 151; *see* 1 RP 90.

Crippen broke up with Mr. Sargent on March 2, 2017. 1 RP 88. She testified that he was controlling and jealous, and she realized she needed to break up with him. *Id.* She continued to communicate with him over the next few days, and the two decided to meet on March 5 in order to recover some personal property from each other. 1 RP 91.

Crippen testified that she drove to the house where Mr. Sargent was staying. 1 RP 93. According to Crippen, Mr. Sargent put Crippen's property into the back seat and then got into the car himself, in the front passenger seat. 1 RP 94. Crippen drove a block or two away and parked to allow Mr. Sargent to talk and "get whatever it was off of his chest." 1 RP 97.

During her direct examination, the State asked Crippen, "Once you are at that location, what happens?" to which Crippen answered, "He started talking about hearing voices in his head…" 1 RP 98. Mr. Sargent objected on the basis of the motion in limine regarding mental health. 1 RP 98-99. The trial court overruled the objection, noting that the motion in limine applied narrowly to evidence of mental health counseling or treatment with antidepressant medication. 1 RP 99.

Mr. Sargent argued that the testimony would become propensity evidence. 1 RP 99 ("the reason he gets angry and does these things is because he is hearing voices"). In the presence of the jury, Mr. Sargent asked the trial court to instruct the jury to disregard the testimony. 1 RP 101. The trial court told the jury, "I have overruled the objection. The answer will stand as is so far." *Id.*

Crippen testified that Mr. Sargent told her that she had to listen to what he had to say. 1 RP 101. At some point in the conversation, Crippen asked Mr. Sargent to leave the car. 1 RP 101-02. She testified that when she put the car in drive, Mr. Sargent "slammed" it into park, took the keys out of the ignition, and told her that she was going to listen to everything he had to say. 1 RP 102.

Crippen testified that Mr. Sargent started to threaten her, saying he would punch her and knock her out if she tried to leave the car. 1 RP 103.

She testified that he berated and insulted her, (1 RP 104), threatened to ruin her life, (1 RP 106), to physically attack her at work, (1 RP 106), to show up at her apartment with her abusive ex-husband, (1 RP 106), and to send naked pictures of her to all her coworkers and her boss, (1 RP 106-07). She testified that Mr. Sargent told her that he would beat her, that he would kill her, and that her life would never be safe unless he was in prison. 1 RP 107. She testified that he told her he had no problem going to prison for killing her—that he would take the 10 or 20 years and it would be worth it. 1 RP 110.

Crippen testified that she believed Mr. Sargent would carry out his threats because he had told Crippen about physical abuse and death threats he had made to a prior girlfriend, the mother of his child. 1 RP 108-09.

Crippen testified that she tried multiple times to escape from the car, but Mr. Sargent would reach over, pull her back and slam the car door shut. 1 RP 110-11. She testified that he threatened to kill her if she tried to escape again. 1 RP 111.

Crippen testified she finally escaped from the car by honking the horn and surprising Mr. Sargent just long enough to enable her to get out and run. 1 RP 113. Crippen testified that after some “cat and mouse” maneuvering outside the car, he started walking away as though he was headed back to his house. 1 RP 117-18. Crippen testified that she ran to

the car and was able to get in and drive away before he could catch her. 1 RP 118.

Crippen spoke with police later that evening but did not make a written report of the incident until weeks later. 1 RP 122-23, 131-32.

3. On cross-examination, Mr. Sargent's counsel read verbatim portions of the Crippen's sworn statement to police, highlighting the most damaging facts in the case.

On cross-examination, Mr. Sargent's counsel highlighted the lengthy delay between the incident and Crippen's written statement. 1 RP 143-44.

Then, without any other lead-in, counsel began reading verbatim quotes from the written statement. He asked Crippen to confirm what she wrote, and what Mr. Sargent actually said the night of the incident. 1 RP 144-47.

> "He told me I was going to listen to everything he has to say, and if I don't, he was going to knock me out with one punch to my face." 1 RP 144.
>
> "I was extremely terrified." 1 RP 144.
>
> "He would beat me up if I tried anything." 1 RP 145.
>
> "So I was in a pure terror mode." 1 RP 145.
>
> "He told me he was going to come to my work and assault me physically." 1 RP 145.
>
> "That he was going to send my naked pictures to everyone I work with to humiliate me and force me to quit my job." 1 RP 145.

“That he was going to team up with my ex-husband to ruin my life and said he would tell my ex all of my personal information and locations.” 1 RP 145.

“He said now you have two enemies coming after you. You were -- you will never be safe. In fact, I will tell you the same thing I told my baby’s mom. As long I'm out of jail, your life is in danger. The only time you will ever be safe is if I’m locked up.” 1 RP 145-46.

“That he will just kill me and take the 10 or 20 years in prison happily.” 1 RP 146.

“I was crying, begging, pleading for him not to kill me, that I need to be here for my daughter, I’m all she has. He said he doesn’t give a F and that I deserve what's coming to me.” 1 RP 146.

“He would bring his fist and face right next to me and say he was going to beat me and kill me if I didn't stay in the car and listen to him berate me.” 1 RP 146.

“He bragged that he would only to have punch me once to knock me out. All I could do was cry and beg him not to.” 1 RP 146.

“All I could think was that I wasn’t going to make it out of this alive. While he screamed and threatened me, I cried for my daughter. I said my goodbye to her in my head. By this point, I was resigned to my fate. That’s my life -- that my life was in his hands, that he would kill me, and I couldn’t think of anymore ways to stop it other than what I had tried. I was scared, defeated, and angry that I hadn’t brought anything to defend myself with.” 1 RP 146.

“I remember thinking that … this was the reason I would lose my life.” 1 RP 147.

“I was wishing I could say goodbye to my mom and daughter. Andre was so angry by this point that I didn’t think there was any chance that I would make it out with anything less than a severe injury.” 1 RP 147.

"Every part of me was convinced that if I drove to the waterfront, I wouldn't survive." 1 RP 147.

4. Defense counsel opposed removal of a juror who may have had outside knowledge of the case that would have prejudiced him against the defendant.

At the conclusion of the first day of trial, Juror No. 12 informed the bailiff that he might have outside knowledge about the case. 2 RP 175. The trial court and counsel questioned the juror the next morning. 2 RP 175-84. The juror remembered overhearing a conversation between friends about a woman who he believed, based on the first day's testimony, may have been Crippen. 2 RP 176. The friends had discussed the abusive situations this woman had experienced. 2 RP 177. The juror expressed reservations that if more information came out that would confirm that the friends had been talking about Crippen, he might be unable to block out the outside information. 2 RP 178. The State requested the juror be excused. 2 RP 181-82. Sargent's counsel opposed, arguing the juror did not say he could not be fair and impartial. 2 RP 182. The trial court denied the motion to excuse the juror. 2 RP 184.

After calling two more witnesses, the State rested. 2 RP 231. Mr. Sargent's counsel had reserved making an opening statement and declined to make a statement to open the defense's case. 1 RP 51; 2 RP 232-33, 238. Mr. Sargent stipulated to having been present with Crippen in her vehicle on the night of March 5 for approximately 45 minutes. 2 RP 230-

31. Mr. Sargent chose not to testify. 2 RP 232-33. The defense rested its case without presenting any evidence or testimony. 2 RP 238.

5. Defense counsel did not object to any jury instructions and affirmatively rejected a limiting instruction on prior bad acts testimony.

Mr. Sargent's counsel did not object to any of the jury instructions. 2 RP 235-36. The State prepared a limiting instruction for Crippen's testimony about Mr. Sargent's prior bad acts, in accordance with the trial court's ruling on the motion in limine. 2 RP 231. Mr. Sargent's counsel asked the trial court not give the limiting instruction, leaving the jury free to consider the testimony for any purpose. 2 RP 231-32. The trial court did not give the limiting instruction.

The trial court's instruction on reasonable doubt (Instruction 4) included the bracketed final sentence of WPIC 4.01: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 21; 2 RP 243.

The trial court's to-convict instruction on the charge of Unlawful Imprisonment expressly permitted the jury to reach a guilty verdict without being unanimous on the alternative elements of a) without consent or b) accomplished by physical force or intimidation:

> If you find from the evidence that elements 1, 3, 4, and 5 and any of the alternative elements 2(a) or 2(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of

> guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 2(a) or 2(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.
> CP 29; 2 RP 246.

6. Defense counsel did not object to the improper application of a domestic violence designation to the Harassment count, which resulted in an inflated offender score and standard range for each charge.

The jury returned a verdict of guilty on the charges of Harassment and Unlawful Imprisonment and not guilty on the charge of Assault. CP 36-38; 2 RP 289. On a special verdict form, the jury found that Mr. Sargent and Crippen were members of the same family or household. CP 39.

At sentencing, the State argued for offender scores of seven for both counts, based on one point for juvenile offenses (half point each for three offenses, rounded down to one), two points for a prior domestic violence felony assault, one point for a violation of a domestic violence protective order, one point for offending while on community placement, and two points for the other current offense. CP 40-41; 3 RP 298-99. This calculation was based on both counts being scored as domestic violence offenses pursuant to RCW 9.9A.525(21) and RCW 10.99.020. *See* CP 44 (applying the domestic violence aggravator to both counts).

Mr. Sargent's counsel did not object to application of the domestic violence aggravator to the Harassment count and conceded that the

offender scores should both be seven. 3 RP 301. The trial court imposed a mid-range sentence of 40 months for each count, to be served concurrently. CP 47; 3 RP 309.

ARGUMENT

I. THE TRIAL COURT ERRED BY APPLYING THE DOMESTIC VIOLENCE DESIGNATION TO THE HARASSMENT CHARGE AT SENTENCING, RESULTING IN INFLATED OFFENDER SCORES AND STANDARD RANGES ON BOTH COUNTS.

A sentencing court acts without authority when it imposes a sentence based upon a miscalculated offender score. *State v. Johnson*, 180 Wn. App. 92, 99-100, 320 P.3d 197 (2014). This Court reviews an offender score calculation de novo. *Id.* at 100.

A domestic violence designation does not alter the elements of the underlying offense. *State v. Hagler*, 150 Wn. App. 196, 201-02, 208 P.3d 32 (2009). However, when an offense is alleged and proven to fall under the definition of domestic violence in RCW 10.99.020, special rules apply to the calculation of the offender score. This includes scoring extra points for prior or current offenses for which domestic violence was alleged and proven. RCW 9.9A.525(21). Instead of the normal scoring, prior domestic violence felonies listed in the statute count as two points each; juvenile domestic violence convictions count as one point each; and "repetitive domestic violence offenses" (including non-felony violation of a domestic

violence protective order) count as one point each. *Id.*; RCW 9.94A.030(42) (definition of repetitive domestic violence offenses).

In the present case, the State alleged that all three counts were domestic violence offenses under RCW 10.99.020. Through the special verdict form, the jury found the key triggering fact that Mr. Sargent and Crippen were members of the same family or household as defined in the statute. But, as defined in the statute, **Harassment is not a domestic violence offense.** Application of the domestic violence designation to the Harassment count was error.

Domestic violence offenses are defined in RCW 10.99.020(5):

> "Domestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:
> (a) Assault in the first degree (RCW 9A.36.011);
> (b) Assault in the second degree (RCW 9A.36.021);
> (c) Assault in the third degree (RCW 9A.36.031);
> (d) Assault in the fourth degree (RCW 9A.36.041);
> (e) Drive-by shooting (RCW 9A.36.045);
> (f) Reckless endangerment (RCW 9A.36.050);
> (g) Coercion (RCW 9A.36.070);
> (h) Burglary in the first degree (RCW 9A.52.020);
> (i) Burglary in the second degree (RCW 9A.52.030);
> (j) Criminal trespass in the first degree (RCW 9A.52.070);
> (k) Criminal trespass in the second degree (RCW 9A.52.080);
> (l) Malicious mischief in the first degree (RCW 9A.48.070);
> (m) Malicious mischief in the second degree (RCW 9A.48.080);
> (n) Malicious mischief in the third degree (RCW 9A.48.090);
> (o) Kidnapping in the first degree (RCW 9A.40.020);
> (p) Kidnapping in the second degree (RCW 9A.40.030);
> (q) Unlawful imprisonment (RCW 9A.40.040);

> (r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);
> (s) Rape in the first degree (RCW 9A.44.040);
> (t) Rape in the second degree (RCW 9A.44.050);
> (u) Residential burglary (RCW 9A.52.025);
> (v) Stalking (RCW 9A.46.110); and
> (w) Interference with the reporting of domestic violence (RCW 9A.36.150).

RCW 10.99.020(5). Harassment is nowhere to be found on the statutory list of domestic violence offenses. Even though the list is prefaced by the words "includes but is not limited to," the comprehensive list that follows does not provide any pattern or general terms that would allow a person to discern what other crimes should or should not be included in the definition.

The detailed, explicit, and expansive nature of the list strongly suggests that, despite any prefatory language, it is, in fact, meant to be an exhaustive list of all domestic violence offenses. The list expressly includes multiple degrees of many crimes, such as assault, burglary, kidnapping, or rape, identifying each with a specific statutory reference. It includes stalking, an offense defined in the same chapter as Harassment (RCW 9A.46), and yet Harassment itself is conspicuously missing. The

legislature would not have been so careful to include all of the degrees or variations of other crimes and then not include harassment, unless the legislature intended that **Harassment is not a domestic violence offense.**

Because Harassment is not a domestic violence offense defined in RCW 10.99.020, it does not qualify for the special scoring provided in RCW 9.9A.525(21). The enhanced scoring applies only to an offense for which "domestic violence as defined in RCW 9.94A.030"—which refers to the definition in RCW 10.99.020—"was pleaded **and proven.**" RCW 9.9A.525(21) (emphasis added). Domestic violence cannot have been proven for the Harassment count because Harassment, by definition, cannot be a domestic violence offense.

Instead of the enhanced scoring under RCW 9.9A.515(21), the offender score for the Harassment count should have been calculated under RCW 9.9A.525(7) as a nonviolent felony. Under that section, the offender score should have been **four,** not seven.[1] The standard sentencing range should have been 12+ to 16 months. *See* RCW 9.94A.510.

The offender score for the Unlawful Imprisonment count is calculated under RCW 9.9A.525(21), but because Harassment is not a

[1] Mr. Sargent should have received **one** point for juvenile felonies (half point each for three offenses, rounded down to one); **one** for prior Assault 2; **zero** for the prior, non-felony domestic violence court order violation; **one** for committing the current offenses while on community placement; and **one** for the other current offense (Unlawful Imprisonment). *See* CP 41.

domestic violence offense defined in RCW 10.99.020, it does not count for two points under RCW 9.9A.525(21)(a). Instead, it is scored under RCW 9.9A.525(7) as one point for a felony conviction. Thus, the offender score for the Unlawful Imprisonment count should have been **six,** not seven.[2] The standard sentencing range should have been 22 to 29 months.

This Court should reverse the erroneous offender score calculations, the excessive sentences (40 months), and the application of the domestic violence designation to the Harassment count, and remand for resentencing within the proper standard ranges. *See* RCW 9.94A.510.

II. THE TRIAL COURT ERRED BY GIVING JURY INSTRUCTION 12, WHICH ERRONEOUSLY ALLOWED THE JURY TO CONVICT ON THE UNLAWFUL IMPRISONMENT CHARGE WITHOUT A UNANIMOUS VERDICT ON THE ALTERNATIVE ELEMENTS (2)(A) AND (2)(B).

Mr. Sargent's right to a unanimous verdict was violated by Jury Instruction 12, which expressly instructed the jury that unanimity was not required on alternative means of committing Unlawful Imprisonment. Although Mr. Sargent did not object to the instruction below, this Court will consider for the first time an error in an instruction that invades a fundamental constitutional right of the accused. *State v. Armstrong*, 188

[2] Mr. Sargent should have received **one** point for juvenile felonies (half point each for three offenses, rounded down to one); **two** for prior domestic violence Assault 2; **one** for the prior non-felony domestic violence court order violation (a "repetitive domestic violence offense"); **one** for committing the current offenses while on community placement; and **one** for the other current offense (Harassment, not a domestic violence felony). *See* CP 41.

Wn.2d 333, 339, 394 P.3d 373 (2017). Constitutional issues are reviewed de novo. *Id.*

A. The trial court violated Mr. Sargent's state constitutional right to a unanimous verdict by expressly instructing jurors they need not be unanimous as to means.

Criminal defendants in Washington have a state constitutional right to a unanimous jury verdict. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); Const. art. I, § 21. The constitutional right to jury unanimity applies to alternative means of committing the crime. *Owens*, 180 Wn.2d at 95; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). This constitutional right is protected by requiring unanimous verdicts in all criminal cases. *Ortega-Martinez*, 124 Wn.2d at 707 ("by allowing verdicts of nine or more only in civil cases, the final clause [of Const. art. I, § 21] implicitly recognizes unanimous verdicts are required in criminal cases").

The Washington Supreme Court has recognized only one exception to the rule of unanimity: In cases where sufficient evidence exists to support each of the alternative means presented to the jury beyond a reasonable doubt, a reviewing court can **infer** that the jury was unanimous. *Ortega-Martinez*, 124 Wn.2d at 707-08. Although the inference itself is questionable, it is a well-established and long-standing exception to Washington's requirement of unanimity. It must be noted,

however, that our Supreme Court has expressly rejected the notion that unanimity is not required at all for alternative means crimes. *Id.* at 708 (rejecting the federal standard expressed in *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)); *accord Owens*, 180 Wn.2d at 95, n. 2.

Unanimity is **always** required under Const. art. I, § 21. The inference of unanimity is only for use by a reviewing court. If the reviewing court finds that the alternative means are all supported by sufficient evidence, the conviction can be affirmed. If, on the other hand, the reviewing court finds that one or more of the alternative means was not supported by sufficient evidence, the inference does not apply. Then the reviewing court must reverse the conviction unless the jury expressed unanimity on a means that was supported by sufficient evidence, such as through a special verdict form. *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08.

However, this exception is not an invitation to the trial court to instruct the jury that it need not be unanimous. To do so is a direct violation of the defendant's constitutional right to a unanimous verdict. Instruction 12 in this case is just such a direct violation. The trial court instructed the jury, **"To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 2(a) or 2(b) has been proved**

beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." CP 29; 2 RP 246 (emphasis added). This instruction flies in the face of the constitutional right to a unanimous verdict by specifically instructing the jurors **that they do not need to be unanimous.**

The preceding sentence in the instruction, if left alone, would have met constitutional muster: "If you find from the evidence that elements 1, 3, 4, and 5 and any of the alternative elements 2(a) or 2(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." CP 29; 2 RP 246. This instruction does not modify the general instruction on unanimity. It does not tell the jurors that they do not have to be unanimous. Even if the jurors conclude on their own that "any of the alternative elements 2(a) or 2(b)" means that they do not need to be unanimous as to those alternatives, their general verdict could be upheld so long as both alternatives were supported by sufficient evidence. In this situation, the jurors would be properly instructed that they must be unanimous, and a reviewing court could appropriately infer that they followed that instruction.

But the express instruction that unanimity is not required directly contradicts the constitutional requirement of unanimity. The defendant has a right to a unanimous jury verdict. That right is directly attacked when a

jury is expressly instructed that unanimity is unimportant. When the jury is expressly instructed not to concern itself with unanimity on the alternative means, a reviewing court can no longer reasonably infer that the jury was unanimous. In fact, the opposite inference would be more appropriate—that the jury followed the instruction and was not unanimous. An instruction expressly allowing the jury to ignore the unanimity requirement is constitutionally infirm and requires reversal of the conviction.

Because the trial court expressly allowed the jury to return a non-unanimous verdict, Mr. Sargent's conviction must be reversed.

B. The Supreme Court should revisit *Armstrong*, because it is both incorrect and harmful (included for preservation of error).

In *Armstrong*, the Supreme Court revised its conception of the alternative means exception. This change is incorrect and harmful. In previous cases, such as *Ortega-Martinez*, the exception was only a matter of judicial review. Juries were required to be unanimous, but if only a general verdict was returned, a reviewing court could affirm a conviction as long as the alternative means were all supported by sufficient evidence. *Armstrong* instead gives license to trial courts to tell juries that unanimity is not really required after all.

Such an instruction attacks the very heart of the defendant's constitutional right. It is incorrect and harmful. There is no knowing how far a jury might go with such an instruction: If unanimity is not important on one issue, perhaps it is not important on another.

A trial court's instructions to the jury should require unanimity. As shown above, a jury can be instructed on alternate means in a way that does not expressly contradict the unanimity requirement but still allows the jury to find that either (a) or (b) was proven beyond a reasonable doubt. On appeal, the reviewing court can still uphold a general verdict where the evidence is sufficient to support all of the alternate means, without knowing whether the jury was actually unanimous or not. Whether it is called an inference or not is unimportant. The importance lies in the defendant's constitutional right. The jury should not be told that unanimity is unimportant. Instruction 12 violated Mr. Sargent's constitutional rights. This Court should reverse the conviction.

III. THE TRIAL COURT ERRED BY GIVING JURY INSTRUCTION 4, WHICH ERRONEOUSLY ALLOWED THE JURY TO CONVICT ON THE BASIS OF A NEBULOUS BELIEF "IN THE TRUTH OF THE CHARGE" RATHER THAN ON PROOF BEYOND A REASONABLE DOUBT.

Errors of law in jury instructions are reviewed de novo. *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). A jury instruction is improper if it misleads the jury or misstates the applicable law. *Id.* The

"abiding belief" instruction is improper because it misleads the jury regarding the State's burden of proof. This is an issue of constitutional magnitude that can be reviewed for the first time on appeal. RAP 2.5(a)(3).

"The presumption of innocence is the bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Courts must be vigilant to protect the presumption of innocence. *Id.* at 316. The presumption can be diluted or washed away if reasonable doubt is not properly defined in the jury instructions. *Id.*

"Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *Bennett*, 161 Wn.2d at 307. The instructions must define reasonable doubt in such a way that does not relieve the State of its burden. *Id.*

The *Bennett* court further declared, "the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction." *Bennett*, 161 Wn.2d at 317-18. The *Bennett* court instructed trial courts to use the pattern instruction, WPIC 4.01. *Id.* at 318. The pattern instruction reads as follows:

> [The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01. The *Bennett* court did not comment on the final, bracketed sentence.

The final sentence, which was included by the trial court in this case over Mr. Sargent's objection, misleads the jury. It allows the jury to convict based on a nebulous and subjective "belief in the truth of the charge," rather than requiring the State to prove every element of the crime beyond a reasonable doubt. A juror may "belie[ve] in the truth of the charge" for any number of impermissible reasons, such as race, religion, age, or gender. A juror may have an abiding belief that the prosecutor would only charge a person who was actually guilty. Any of these "abiding belief[s]" would allow the jury to convict the defendant even if the State had failed to prove one or more elements beyond a

reasonable doubt. The bracketed sentence would improperly allow a jury to convict based on feelings instead of evidence.

Our Supreme Court returned to this issue of "belief in the truth" in *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012). In *Emery*, the prosecutor, in closing argument, encouraged the jury to "speak the truth" through its verdict. *Id.* at 751. The *Emery* court found the prosecutor's statements improper. *Id.* at 760. The court stated emphatically, "The jury's job is not to determine the truth of what happened … Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Id.*

Division I of this court agreed in *Berube*:

> A criminal trial may in some ways be a search for truth. But truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden. The question for any jury is whether the burden of proof has been carried by the party who bears it. In a criminal case, the State must prove its case beyond a reasonable doubt. The jury cannot discern whether that has occurred without examining the evidence for reasonable doubt.

State v. Berube, 171 Wn. App. 103, 120-21, 286 P.3d 402 (2012). In other words, the jury's role is to test the substance of the prosecutor's evidence—to ensure every element of the crime has been proved beyond a reasonable doubt. The jury is not to search for the truth or seek for an

"abiding belief in the truth of the charge." The jury must ensure that the charge has been proven, not simply believed.

Just as the prosecutor's arguments in *Emery* were improper, so is the last sentence of the jury instruction. The last sentence of the instruction improperly misleads the jury by inviting them to search for a "belief in the truth of the charge" as a shortcut for determining if the State has met its burden. This invitation misstates the burden and allows conviction without proof of every element beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan v. Louisiana*, 508 U.S. 274, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan*, 508 U.S. at 281-82). This Court should find that instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the State's burden of proof, confuses the jury's role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. Amend. VI; Wash. Const. art. I, §§ 21, 22.

The trial court erred by including the final sentence of the instruction. This Court should reverse Mr. Sargent's convictions and remand for a new trial.

IV. OTHER ERRORS CUMULATIVELY RESULTED IN AN UNFAIR TRIAL, REQUIRING REVERSAL.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. *Emery*, 174 Wn.2d at 766. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). In addition to the errors above, the trial court improperly admitted testimony that Mr. Sargent heard "voices in his head" and defense counsel committed numerous acts of ineffective assistance.

A. The trial court abused its discretion in overruling Mr. Sargent's objection to testimony that he "started talking about hearing voices in his head."

Mr. Sargent objected to testimony that the incident came about after he "started talking about hearing voices in his head." The trial court overruled the objection and allowed the testimony to stand. The parties had discussed in motions in limine that any discussion of mental health would be unfairly prejudicial. *See* ER 403.

The testimony about Mr. Sargent hearing voices was also improper character evidence under ER 404. The testimony tended to put into the minds of the jury that Mr. Sargent was schizophrenic or otherwise mentally ill in a way that would pose a threat of harm to others. The only purpose of this testimony was to prove that Mr. Sargent acted in conformity with this dangerous aspect of his character.

This is precisely the kind of evidence forbidden by ER 404: "Evidence of a person's character or a trait of character **is not admissible** for the purpose of proving action in conformity therewith on a particular occasion" (emphasis added). The trial court abused its discretion in admitting and not striking this testimony. Although it may not be harmful error in itself, the cumulative effect of this and other errors resulted in an unfair trial.

B. Defense counsel provided ineffective assistance.

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. 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; *Thomas*, 109 Wn.2d at 225-26. Deficient

performance is that which falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 225-26. Prejudice is a reasonable probability that the result would have been different but for counsel's deficient performance. *Id.* at 226.

1. Defense counsel declined a limiting instruction on evidence of prior acts of domestic violence by Mr. Sargent against a different victim, allowing the evidence to be considered for any purpose, including as propensity evidence.

The State introduced extensive testimony regarding threats and acts of violence by Mr. Sargent against a prior ex-girlfriend. The trial court originally correctly determined that all of this testimony was prohibited "prior bad acts" evidence under ER 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, the rule allows such evidence to be admitted for a limited purpose.

Here, the trial court admitted the testimony for the limited purpose of showing the reasonableness of Crippen's fear that Mr. Sargent would carry out his threats, because Mr. Sargent had told Crippen before that he had done so with his prior ex-girlfriend. The trial court correctly indicated that a limiting instruction would be necessary, to instruct the jury that it could consider the testimony only for the purpose of showing the reasonableness of Crippen's fear, but not for the forbidden purpose of

proving that Mr. Sargent committed the alleged acts against Crippen because he had done the same in the past.

After the defense rested, defense counsel affirmatively declined a limiting instruction. Without a limiting instruction, the jury had no way of knowing that it was improper to consider the "prior bad acts" evidence as proof that Mr. Sargent committed the acts alleged on this occasion. If the jury improperly considered the testimony as proof of Mr. Sargent's propensity, it may have convicted based on the "prior bad acts" evidence alone. No reasonable attorney would allow the evidence to stand without a limiting instruction.

Counsel's statement that it was a tactical decision to avoid raising red flags should not be given any weight. Not only is the decision so unreasonable that it cannot be protected as merely "tactical," but counsel's own cross-examination of Crippen demonstrates that counsel was not actually sensitive to raising red flags in the minds of the jurors.

2. During cross-examination of the victim, defense counsel read verbatim portions of the victim's sworn statement to police, with the effect of highlighting and reinforcing the most damaging facts in the case.

Counsel's cross-examination of Crippen consisted mainly of a recitation of the most damaging portions of Crippen's written statement to law enforcement. Although it appears counsel was attempting to impeach

Crippen—to raise a doubt as to why she would wait so long to report the crime if she really felt such intense fear for her life the night of the incident—counsel was apparently blind to the effect that his cross-examination would have on the jury.

Counsel failed to frame his cross-examination for the jury. The jurors could not have had any idea what counsel was trying to accomplish with his questioning. All they heard was a repeat—in even more damning form—of all of Crippen's testimony against Sargent. Her written statement, read at length and verbatim by defense counsel, expressed Mr. Sargent's threats and Crippen's resulting fear more eloquently and memorably than Crippen's live testimony. Far from casting doubt on Crippen, counsel's cross-examination could only have had the effect of highlighting and reinforcing in the minds of the jury all of the most damaging facts in the case. This was not a tactical decision. It was unreasonable, deficient, and prejudicial.

3. Defense counsel opposed the removal of a juror whose impartiality had been compromised by information obtained outside of the courtroom.

Juror No. 12 indicated that he had outside knowledge of a woman who may have been Crippen and some of the abusive situations she had experienced. The juror noted that if further testimony confirmed that it was Crippen, he might not be able to separate out the outside information.

The juror's confession raised a serious danger that the juror would be partial to Crippen and likely to side with her against Mr. Sargent during deliberations. The only reasonable position for defense counsel to take in order to protect Mr. Sargent's interests was to join with the State in seeking the juror's removal. Instead, counsel took the opposite position, arguing for the juror to remain. There is a reasonable probability that the juror did, in fact, go into deliberations with a bias in favor of Crippen, to Mr. Sargent's prejudice.

4. Defense counsel failed to object to jury instructions 4 and 12, discussed above.

Even though this Court may review the errors in jury instructions 4 and 12 for the first time on appeal, trial counsel should have objected at trial. The reasonable probability of prejudice to Mr. Sargent has been demonstrated above.

5. Defense counsel failed to object to application of the domestic violence designation to the Harassment charge and to the State's calculation of the offender scores for both counts.

As shown above, the error in applying the domestic violence designation to the Harassment charge resulting in elevated offender scores and standard ranges. Mr. Sargent was sentenced to 40 months when the standard range sentences should have been only 12+ to 16 months for Harassment and 22 to 29 months for Unlawful Imprisonment.

The prejudice is obvious. Counsel's performance was deficient because RCW 10.99.020, the statute that defines what offenses can receive the domestic violence designation, does not list Harassment among those offenses. There is no reasonable explanation for conceding the offender scores when such a simple argument is available that would have such a significant impact on the liberty of the defendant. Trial counsel's performance was deficient and resulted in significant prejudice to Sargent.

Even if the Court concludes that some or all of these errors were harmless in and of themselves, in combination they resulted in an unfair trial. This Court should reverse and remand for a new trial.

CONCLUSION

Harassment is not a domestic violence offense. The trial court erred by applying the domestic violence designation, resulting in inflated offender scores and standard ranges for both counts. This Court should reverse and remand for resentencing.

The trial court erred by instructing the jury that unanimity was not required on the alternative means for Unlawful Imprisonment. The instruction itself violated Sargent's constitutional right, regardless of whether sufficient evidence supported both alternatives. This Court should reverse the Unlawful Imprisonment conviction.

The trial court erred by instructing the jury on proof beyond a reasonable doubt. The instruction on "abiding belief in the truth of the charge" improperly lessens the State's burden of proof. This Court should reverse the convictions.

Other errors by the trial court and ineffective assistance of trial counsel either independently or in combination resulted in an unfair trial. This Court should reverse the convictions and remand for a new trial.

Respectfully submitted on March 7, 2018,

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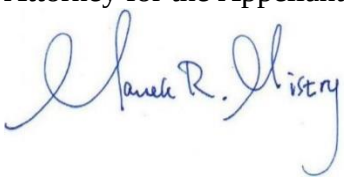

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 7, 2018.

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March 07, 2018 - 3:07 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Andre R. Sargent, Appellant
Superior Court Case Number:	17-1-00898-2

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