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

STATE OF WASHINGTON, Respondent

v.

ANDRE ROBERT SARGENT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00898-2

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly applied the domestic violence designation to Sargent’s felony harassment conviction.**
- II. **The trial court did not violate Sargent’s right to a unanimous verdict by giving jury instruction 12.**
- III. **The trial court properly instructed the jury on proof beyond a reasonable doubt by giving the pattern instruction.**
- IV. **The trial court did not abuse its discretion under ER 404(b) when it allowed testimony by the victim that at the beginning of the incident Sargent told her that he heard “voices in his head.”**
- V. **The trial court did not abuse its discretion under ER 403 when it allowed testimony by the victim that at the beginning of the incident Sargent told her that he heard “voices in his head.”**
- VI. **Sargent received the effective assistance of counsel.**
- VII. **Because there were no errors of any kind the cumulative error doctrine does not require reversal of Sargent’s convictions.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Andre Robert Sargent was charged by information with Harassment – Death Threats, Unlawful Imprisonment, and Assault in the Fourth Degree for an incident on or about March 5, 2017 against Brandi Crippen. CP 6-7. Each count also contained a special allegation of

domestic violence. CP 6-7. The parties proceeded to a jury trial in front of the Honorable Robert Lewis beginning on August 7, 2017 and concluding with the jury's verdicts on August 8, 2017. RP 5-290. The jury found Sargent guilty of the Harassment and Unlawful Imprisonment, both felonies, found the domestic violence special allegation, and acquitted Sargent of the Assault. RP 289-90; CP 36-39. The trial court, based in part on the domestic violence designation and the parties' agreement, calculated Sargent's offender score as 7 for each offense and sentenced him to a standard range sentence of 40 months confinement. RP 301, 307, 309; CP 46-47, 55-56. Sargent filed a timely notice of appeal. CP 59.

B. STATEMENT OF FACTS

Brandi Crippen and Andre Sargent had known each other for about 11 years, but only began dating in October of 2016. RP 87. Crippen found Sargent to be too controlling and jealous so she broke up with him on the evening of March 2, 2017. RP 88. Sargent did not take the news well. RP 88-89.

The two talked to each other over the next couple of days, but ultimately Crippen decided that a continuing relationship was not going to work. RP 90-91. Instead, she sought the return of her stuff, in particular a pillow and a blanket that had special significance to her. RP 90-91.

Crippen's attempts to get her blanket back and to arrange an exchange of property was initially met with reluctance from Sargent. RP 91-92.

Eventually the two agreed to meet on the evening of March 5, 2017 on the street outside of the Share House. RP 93.

Crippen drove to the meeting location. RP 93. When she arrived Sargent was already out on the street. RP 94. He placed Crippen's pillow and blanket in the back seat of her car and then got into the passenger seat. RP 94. Crippen informed Sargent that she just wanted this to be a quick drop-off, but Sargent told Crippen that he needed to talk and get some things off his chest, and he asked her to drive around the corner. RP 94. Sargent was persistent. RP 94. Sargent told her to, and Crippen did, drive two blocks away to a spot that was dark and secluded. RP 95, 97.

Once they were parked at that location, Sargent started talking to Crippen "about hearing voices in his head." RP 98. The two began conversing about other issues, including whether Sargent had been faithful, before Sargent got angry, Crippen asked him to get out of the car, and Sargent:

took the keys out of my ignition and slammed my car in park and told me that I wasn't going anywhere, he started threatening me that he would just punch me and knock me out if I tried to escape the car.

RP 103-04. Sargent began degrading and demeaning Crippen and kept on saying “I’m in control and you’re going to listen to what I have to say.”

RP 104. Sargent began screaming and yelling at Crippen to include telling her that he was going to ruin her life, that he was going to attack her at work, and that he was going to show up at her apartment with her abusive ex-husband. RP 105-07. Sargent’s threats continued to escalate. RP 105-07. Crippen testified that:

He threatened to send my naked pictures that he had of me to all of my coworkers and my boss to shame me from working at my current job. He told me that he would beat me. He told me that he would kill me. He told me that I was now in the same boat as his baby’s mother, and that as long as he is out of jail, my life will never be safe, and that I better hope he goes to prison because that’s the only time my life will ever be safe.

RP 106-07. Crippen further testified that Sargent sounded serious and that she believed he would carry out these threats. RP 107.

In particular, Crippen testified that Sargent said that “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, and that [she] would get everything that [she] deserved. RP 110. Part of the reason Crippen feared Sargent’s threats is because he had told her about physical abuse he had perpetrated against an ex-girlfriend of his and he had made comments about killing his ex-girlfriend if he saw her. RP 108-110. Crippen then, despite Sargent’s

warnings that he would hurt her if she tried to leave, made multiple attempts to escape the car. RP 110-13. Sargent immediately reached over, slammed the door shut, grabbed Crippen's arm and "yanked" her back, and told her that he would kill her if she tried that again. RP 111-13. After Crippen's second escape attempt Sargent was able to lock the door. RP 111.

Sargent's threats continued and he began demanding that Crippen drive them over to the Vancouver waterfront, which is an even more secluded area. RP 113. Crippen pleaded with him and told him that she did not want to drive over there. RP 113. Sargent responded by telling Crippen that "he was going to just knock [her] out and drive there himself if [she] didn't comply." RP 113-14.

Soon thereafter, Crippen saw another car, started honking her horn, which appeared to startle Sargent, and made her escape from the car. RP 113-14. Crippen then ran away and to the other side of the street. RP 114-15. Sargent also exited the car. RP 114-17. Crippen explained that what followed seemed like a game of "cat and mouse" on the street where eventually she was able to run back into her car and lock the doors just before Sargent could get there, which left him yanking at the handle of the door. RP 117-18. Finally, Crippen was able to drive away. RP 119.

That night, Crippen had police contact and spoke with her best friend. RP 113-122, 190-99. Crippen gave the responding officer an oral statement but declined to provide a written statement. RP 122. In the days following the incident, Sargent continued to try to contact Crippen—she saw him as she was being released from work and she received multiple phone calls from him. RP 123, 125-39, 131-32. As result, Crippen decided to recontact the police and provide a detailed, written statement and additional evidence. RP 123, 125-29, 131-32. Crippen explained that she made the decision to recontact the police because she did not feel safe. RP 131-32. Crippen’s full written statement was completed by April 24, 2017. RP 142-44.

ARGUMENT

I. The trial court properly applied the domestic violence designation to Sargent’s felony harassment conviction.

RCW 9.94A.525 governs the computation of a defendant’s offender score. In particular, RCW 9.94A.525(21) instructs the trial court how to score a defendant’s prior domestic violence convictions when the present conviction is for felony domestic violence offense. The relevant part of that subsection states:

If the present conviction is for a felony domestic violence offense where domestic violence as defined in *RCW 9.94A.030* was pleaded and proven, count priors as in

subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after August 1, 2011, for any of the following offenses:

A felony violation of a no-contact or protection order RCW 26.50.110, *felony Harassment* (RCW 9A.46.020(2)(b)) . . .

RCW 9.94A.525(21)(a) (emphasis added). In turn, RCW 9.94A.030's definition of "[d]omestic violence has the same meaning as defined in RCW 10.99.020 and 26.50.010."

RCW 10.99.020(5) "sets out a *nonexclusive list* of specific crimes the legislature has deemed to be domestic violence when committed by one family or household member against another." *State v. Kozey*, 183 Wn.App. 692, 334 P.3d 1170 (2014) (emphasis added). In fact, the statutory language explicitly states that domestic violence "includes but *is not limited to* any of the following crimes" before listing "violent crimes, such as assault, kidnapping, and rape; property crimes, such as criminal trespass and malicious mischief; and other miscellaneous crimes. . . ." RCW 10.99.020(5) (emphasis added); *Kozey*, 183 Wn.App. at 697.

RCW 26.50.010, on the other hand, states that domestic violence means:

[p]hysical harm, bodily injury, assault, *or the infliction of fear of imminent physical harm*, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(3) (emphasis added). Thus, RCW 26.50.010 “eschews a specific list of crimes and instead sets out the types of acts the legislature has determined generally constitute domestic violence when perpetrated by one family member against another.” *Kozey*, 183 Wn.App. at 698.

Ultimately, if a crime against a family or household member falls under the definition of domestic violence contained in either RCW 10.99.020(5) *or* RCW 26.50.010(3) then the crime is one of domestic violence for the purposes of a defendant’s offender score calculation pursuant to RCW 9.94A.525(21)(a) and RCW 9.94A.030. *Kozey*, 183 Wn.App. at 695, 705; *State v. Hodgins*, 190 Wn.App. 437, 360 P.3d 850 (2015); *State v. McDonald*, 183 Wn.App. 272, 333 P.3d 451 (2014).

Sargent, without citing to any authority or employing any tools of statutory interpretation, argues that harassment “cannot be a domestic violence offense” because harassment is not among the listed crimes in RCW 10.99.020 and that this absence is dispositive since “[t]he 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.” Brief of Appellant at 15-16. This argument is without merit for multiple reasons.

As a preliminary matter, “[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Long*, 102 Wn.App. 907, FN 1, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 372 P.2d 193 (1962)). Thus, this Court may presume that no authority supports Sargent’s argument.

Next, multiple cases have already rejected Sargent’s argument and held that RCW 10.99.020, just like the statute’s plain language says, contains a “nonexclusive list of specific crimes the legislature has deemed to be domestic violence when committed by one family or household member against another.” *Kozey*, 183 Wn.App. at 697-98; *State v. Lindahl*, 114 Wn.App. 1, 56 P.3d 589 (2002); *Hodgins*, 190 Wn.App at 445 FN 3 (noting that RCW 10.99.020 is “a non-exclusive list of crimes”); *McDonald*, 183 Wn.App. at 277 (explaining that “RCW 10.99.020(5) defines ‘domestic violence’ through a non-exclusive list of crimes . . .”). Accordingly, courts have found, for example, that murder, tampering with a witness, and identity theft in the second degree can be considered domestic violence offenses when the crimes are committed against a family or household member even though none of them is listed in RCW

10.99.020(5). *Lindahl*, 114 Wn.App. at 17-18; *McDonald*, 183 Wn.App. at 278-79; *State v. Walls*, 185 Wn.App. 1045, 2015 WL 460353, 1-2 (2015).¹

Sargent’s argument is also inconsistent with a proper statutory interpretation of RCW 10.99.020. Statutory interpretation, the aim of which is to determine the legislature’s intent, begins with the statute’s plain meaning. *State v. James-Buhl*, --- Wn.2d ----, 415 P.3d 234, 237, (2018) (citation omitted). “Plain meaning is ‘discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’” *Id.* (quoting *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009)). Importantly, when ascertaining the plain meaning of the statute, courts “must not add words where the legislature has chosen not to include them,” and must “construe statutes such that all of the language is given effect.” *Id.* (internal quotation omitted). In other words, courts must interpret a statute to “give effect to all language, so as to render no portion meaningless or superfluous.” *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010) (citation omitted). If the plain language is unambiguous, courts must give it effect. *Id.* (citing *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007)).

¹ *Walls* is an unpublished decision. Pursuant to GR 14.1 the decision is not binding but it “may be accorded such persuasive value as the court deems appropriate.”

One cannot follow the above rules and conclude that RCW 10.99.020 “despite any prefatory language, it is, in fact, meant to be an exhaustive list of all domestic violence offenses” and that the “legislature intended that **Harassment is not a domestic violence offense.**” Br. of App. at 15-16 (emphasis in original). First, this conclusion ignores the plain language of the statute. Second, this construction does not give effect to all the language of the statute and would thus render the prefatory language meaningless. Third, this construction does not accurately ascertain the intent of legislature since it fails to examine “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *James-Buhl*, 415 P.3d at 237 (internal quotation omitted). For example, the offender score statute, RCW 9.94A.525(21)(a), explicitly contemplates the existence of convictions for felony harassment that were domestic violence offenses as it states:

Count two points for each adult prior conviction *where domestic violence as defined in RCW 9.94A.030 was pleaded and proven* after August 1, 2011, for any of the following offenses:

A felony violation of a no-contact or protection order RCW 26.50.110, *felony Harassment* (RCW 9A.46.020(2)(b)) . . .

RCW 9.94A.525(21)(a) (emphasis added). Furthermore, RCW 10.99.010 indicates that “[t]he purpose of this chapter is to recognize the importance

of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.” Consequently, the plain meaning of RCW 10.99.020(5) as evidenced by language used in the statute, the related provisions, and the statutory scheme as a whole supports the trial court’s decision, based on the jury’s special verdict finding Sargent and Crippen were family or household members, that Sargent’s harassment conviction was a domestic violence offense for the purpose of determining his offender score.

Alternatively,² under the facts of this case, Sargent’s harassment conviction could properly be designated a crime of domestic violence under RCW 26.50.010(3) since that statute states that domestic violence means “[p]hysical harm, bodily injury, assault, *or the infliction of fear of imminent physical harm*, bodily injury or assault, between family or household members.” RCW 26.50.010(3) (emphasis added). Here, during the incident in question, Sargent threatened Crippen by telling her that he would punch her and knock her out if she tried to leave the car amongst other threats to physically harm and kill her, and Crippen feared Sargent would carry out his threats. RP 103-111. Thus, Sargent’s actions against Crippen—his harassment of her—constituted “the infliction of fear of

² Sargent does not address RCW 26.50.010. Br. of App. at 13-16.

imminent physical harm,” and, accordingly, domestic violence. RCW 26.50.010(3); *Kozey*, 183 Wn.App. at 700 (noting that “RCW 26.50.010 defines ‘domestic violence’ through a list of qualifying behaviors”).

Therefore, when employing and properly interpreting the relevant statutes, RCW 9.94A.525(21)(a), RCW 9.94A.030, RCW 10.99.020(5), and RCW 26.50.010(3), applying the jury’s special verdict, and considering the actions that Sargent engaged in that constituted his crime, the trial court did not err when it concluded that Sargent’s felony harassment conviction was a domestic violence offense for determining his offender score.

II. The trial court did not violate Sargent’s right to a unanimous verdict by giving jury instruction 12.

Sargent argues that 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).” Br. of App. at 17, 19-20. Sargent also properly acknowledges that our Supreme Court’s recent decision in *State v. Armstrong* rejected this unanimity argument. Br. of App. at 21-22; 188 Wn.2d 333, 394 P.3d 373 (2017).

In *Armstrong*, the defendant was charged with felony violation of a domestic violence no-contact order. *Id.* The order violation was charged as

felony because the defendant committed an assault during the violation of the order and because the defendant had two prior convictions for violation of a no-contact order. *Id.*; RCW 26.50.110(4), (5). At trial, “the trial court instructed the jury that it need not be unanimous as to which of the two means it relied on, so long as it was unanimous as to the conviction.” *Id.* at 336, 338. Despite the defendant’s contention that this instruction violated his right to a unanimous verdict, *Armstrong* held that the instruction was “a correct statement of the law.” *Id.*

As *Armstrong* explained, the affirmation of the jury instruction in question was a “straightforward application of th[e] principle[]” that is well-settled when dealing with jury unanimity, that is; “in alternative means cases, where substantial evidence supports both alternative means submitted to the jury, unanimity as to the means is not required.” 188 Wn.2d at 340 (citing cases); *see also State v. Woodlyn*, 188 Wn.2d 157, 392 P.3d 1062 (2017); *State v. Owens*, 180 Wn.2d 90, 323 P.3d 1020 (2014). In summing up the state of the law, *Armstrong* noted that “[f]or more than 75 years, we have upheld unanimous jury verdicts based on alternative means where the jury did not specify which alternative provided the basis for the verdict.” *Id.* (citing cases).

Here, jury instruction 12, the to-convict for unlawful imprisonment, is substantively indistinguishable from the challenged

instruction in *Armstrong*. CP 12; 188 Wn.2d at 338. Instruction 12, like the instruction in *Armstrong*, contained the language that “[t]o 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.” Alternatives (2)(a) and (2)(b) are alternative means for unlawfully restraining a person, without consent and by physical force or intimidation, respectively. CP 12; RCW 9A.40.040(1); RCW 9A.40.010(6). Sargent does not claim that insufficient evidence supported either means. *See* Br. of App. at 17-22. Consequently, his unanimity argument fails under the reasoning and holding in *Armstrong*.

III. The trial court properly instructed the jury on proof beyond a reasonable doubt by giving the pattern instruction.

The last sentence of WPIC 4.01, the pattern instruction that explains to the jury the concepts of the burden of proof, the presumption of innocence, and reasonable doubt, says “[i]f, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” WPIC 4.01; CP 21. Sargent argues that this last sentence “misleads the jury,” and “misstates the burden and allows conviction without proof of every element beyond a reasonable doubt.” Br. of App. at 22-27. Sargent acknowledges that our Supreme Court in

State v. Bennett instructed trial courts to use WPIC 4.01, but claims that *Bennett* “did not comment on” the “abiding belief” sentence and otherwise seems to treat this issue as one of first impression even though it is not one. 161 Wn.2d 303, 165 P.3d 1241 (2007); Br. of App. at 22-27. Sargent’s argument regarding WPIC 4.01 and the “abiding belief” sentence is without merit.

Our courts have repeatedly held that the “abiding belief” sentence, when construed with the whole pattern instruction, accurately instructs the jury on the State’s burden of proof. *State v. Fedorov*, 181 Wn.App. 187, 324 P.3d 784 (2014); *State v. Kinzle*, 181 Wn.App. 774, 326 P.3d 870 (2014); *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Mabry*, 51 Wn.App. 24, 751 P.2d 882 (1988) (citing *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959); *State v. Walker*, 19 Wn.App. 881, 578 P.2d 83 (1978)); *State v. Price*, 33 Wn.App. 472, 655 P.2d 1191 (1982); *State v. Oleson*, 193 Wn.App. 1018, 2016 WL 1459672, 8 (2016).³ In fact, in *Bennett* itself the Supreme Court in approving of WPIC 4.01 in

³ *Oleson* is an unpublished decision. Pursuant to GR 14.1 the decision is not binding but it “may be accorded such persuasive value as the court deems appropriate.”

full⁴ noted that “WPIC 4.01 is sometimes referred to as the ‘abiding belief’ instruction.” 161 Wn.2d at 308.

Moreover, Sargent’s argument that *State v. Emery*—a case regarding prosecutorial misconduct wherein the prosecutor in closing argument encouraged the jury to “speak the truth” through its verdict—shows that the “abiding belief” sentence is improper has also been rejected on numerous occasions. Br. of App. at 25-26; *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012); *Fedorov*, 181 Wn.App. at 200; see e.g., *State v. Whisler*, 195 Wn.App. 1009, 2016 WL 3965097, 2-3 (2016) (concluding that the “last sentence of WPIC 4.01 does not instruct the jury to ‘solve the case’ or ‘find the truth’); *State v. Hitt*, 185 Wn.App. 1006, 2014 WL 7339602, 5-6 (2014).⁵ This Court should reject Sanger’s argument and conclude that the jury was properly instructed.

⁴ In context *Bennett* unmistakably approves of the full instruction not just those sentences or words that are not bracketed as it spells out the entire instruction, including the “abiding belief” sentence. *Bennett* than notes its approval of the instruction without any disclaimers and by exercising its “inherent supervisory power to instruct Washington trial courts to use only the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt.” 161 Wn.2d at 308-09, 318.

⁵ *Whisler* and *Hitt* are unpublished decisions. Pursuant to GR 14.1 these decisions are not binding but “may be accorded such persuasive value as the court deems appropriate.”

IV. The trial court did not abuse its discretion when it allowed testimony by the victim that at the beginning of the incident Sargent told her that he heard “voices in his head.”

During motions in limine the State moved to preclude Sargent from bringing up the fact that Crippen was in mental health counseling. RP 32; CP 12. Sargent did not object but instead mentioned that the ruling should go “both ways.” RP 32. The State agreed that it would not mention Sargent was receiving mental health treatment. RP 33. Based on the parties’ representations the court granted the State’s motion. RP 33.

Next, during Crippen’s testimony she began to discuss the incident, including being in a dark and secluded area with Sargent in the car. RP 97-98. The State asked Crippen what happened once they arrived at that location and Crippen stated that “[h]e [(Sargent)] started talking about hearing voices in his head.” RP 98. Sargent objected and the jury was called out. RP 98. Sargent then argued that the “State’s motion in limine where we weren’t to talk about mental health issues . . . [w]e’re not going to bring up his mental health. We agreed to that as their motion in limine.” RP 98-99. The trial court responded that the “motion in limine that I granted indicated that neither side could bring up that the other person was in mental health counseling or that they were prescribed antidepressant medication. That was the motion I granted.” RP 99; CP 12.

The trial court continued by explaining that “the witness is testifying about things that the defendant said to her in the moments immediately prior to the incident, which is the subject of the charges. I didn’t rule . . . in any motion that that was impermissible.” RP 99. After some additional discussion by the attorneys the court responded:

But just to be clear, so I don’t have to troop the jury in and out, I don’t sanitize incidents. If a person in the course of having an incident that leads to criminal charges says and does things which aren’t very pleasant, the mere fact that they aren’t very pleasant doesn’t mean that they’re inadmissible.

A person is entitled to describe what happened to them in the period of time immediately preceding an assault, and that’s apparently what she [(Crippen)] is doing.

RP 100. The State’s questioning of Crippen continued and no further mention was made of Sargent telling Crippen about the voices he was hearing in his head.

Sargent makes two arguments on appeal as to how the trial court abused its discretion in admitting the above testimony: (1) “[t]he parties had discussed in motions in limine that any discussion of mental health would be unfairly prejudicial” and (2) “[t]he testimony about Mr. Sargent hearing voices was also improper character evidence under ER 404.” Br of App. at 27-28. These arguments are not supported by the record or the law.

The first argument, that the testimony violated a motion in limine, mischaracterizes both the motion and the testimony. As shown above, and explained by the trial court, the motion in limine that the trial court granted prohibited testimony that the parties were receiving mental health treatment. RP 32-33, 98-100; CP 12. Moreover, the testimony concerned what Sargent was telling Crippen during the incident that was leading to—or was a part of—the crimes he committed and was not a “discussion of mental health.” Br. of App. at 27. Instead, the testimony was relevant to explain Crippen’s reasonable fear and as *res gestae* evidence.⁶ See *State v. Grier*, 168 Wn.App. 635, 278 P.3d 225 (2012) (describing *res gestae* evidence as relevant, admissible evidence because it “complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place and it depicted a complete picture for the jury”) (citation and internal quotations omitted). Thus, the testimony did not violate the court’s order regarding the motion in limine nor was the testimony impermissible character evidence.

Additionally, even assuming error, Sargent properly concedes the admission of the evidence *itself* “may not be harmful.” Br. of App. 28. This concession is proper since the testimony was fleeting, not raised again, not particularly noteworthy given the facts of the case, and not

⁶ The trial court’s commentary as to why Crippen’s testimony was admissible comports with the *res gestae* concept though the court did not use the term. RP 100.

discussed by either party in closing argument. Sargent argues, on the other hand, that the admission of the evidence is relevant to his cumulative error claim.

V. Sargent received the effective assistance of counsel.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 211 P.3d 441 (2009) (stating that

“[j]udicial scrutiny of counsel’s performance must be highly deferential”) (quotation and citation omitted). When counsel’s actions or decisions can be characterized as “legitimate trial strategy or tactics, performance is not deficient.” *Grier*, 171 Wn.2d at 33 (citing *Kyllo*, 166 Wn.2d at 863). Thus, “given the deference afforded to decisions of defense counsel in the course of representation” the “threshold for the deficient performance prong is high.” *Id.* In order to prove that deficient performance prejudiced the defense, “the defendant must establish that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862).

A. SARGENT’S TRIAL COUNSEL MADE A LEGITIMATE TACTICAL CHOICE WHEN HE DECLINED A LIMITING INSTRUCTION FOR THE ADMITTED ER 404(B) EVIDENCE.

The State admitted ER 404(b) evidence showing that Sargent had threatened and physical abused a prior girlfriend. RP 108-110. This evidence was admissible to show Crippen’s reasonable fear that Sargent’s threats would be carried out. RP 17, 19-20, 29-31. The State prepared a limiting instruction for the ER 404(b) evidence but Sargent’s trial counsel decided against using it in a discussion with the trial court:

[DEFENSE COUNSEL]: You know, Your Honor, I was looking at this. The State was kind enough to prepare the limiting instruction. Last night I thought about it, and

limiting instructions can be helpful or hurtful. I'm not convinced I want a limiting instruction, the one the State did, although I do appreciate them doing it, but I think it would be more hurtful. So I --

THE COURT: So just to be clear, you're affirmatively asking that I not give a limiting instruction so that the jury can consider the information for any purpose?

[DEFENSE COUNSEL]: That is correct, because I don't want to continue to raise flags about prior abuse of prior girlfriend.

RP 231-32.⁷ Sargent argues that “[n]o reasonable attorney would allow the evidence to stand without a limiting instruction” and that “[c]ounsel’s statement that it was a tactical decision to avoid raising red flags should not be given any weight.” Br. of App. at 30. But Sargent fails to grapple with, or cite, well established authority to the contrary.

Our courts have consistently held that declining “a limiting instruction can be a legitimate tactic to avoid reemphasizing damaging evidence.” *State v. Embry*, 171 Wn.App. 714, 287 P.3d 648 (2012); *State v. Humphries*, 181 Wn.2d 708, 336 P.3d 1121 (2014); *State v. Yarbrough*, 151 Wn.App. 66, 210 P.3d 1029 (2009) (citing cases). In fact, even where the trial counsel does not articulate a tactical or strategic reason for not requesting a limiting instruction reviewing courts must “presume the action *is* a reasonable tactical decision.” *Humphries*, 181 Wn.2d at 720-21 (emphasis added); *State v. Price*, 126 Wn.App 617, 109 P.3d 27 (2005)

⁷ Defense counsel reiterated his position on the limiting instruction later stating “[t]here is just no point in it. It’s like a red flag.” RP 235.

abrogated on other grounds by State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015). And “a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim.” *Yarbrough*, 151 Wn.App. at 91 (citing *State v. McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002)).

Here, Sargent’s trial counsel straightforwardly articulated his tactical reason for declining the limiting instruction and his tactical reason is one that has been consistently described as “legitimate” and “reasonable.” *Id.*; *Embry*, 171 Wn.App. at 762; *Humphries*, 181 Wn.2d at 721; RP 231-32, 235. Furthermore, the State only discussed the ER 404(b) evidence briefly in its initial closing and properly limited its argument to the reason the evidence was admitted. RP 259-260 (after discussing the ER 404(b) evidence the State commented “that’s what’s going through Ms. Crippen’s mind”). Accordingly, Sargent has failed to show that his trial counsel’s performance was deficient and that there is a reasonable probability that, assuming counsel’s deficient performance, the outcome of the proceedings would have been different.

B. SARGENT’S TRIAL COUNSEL’S CROSS-EXAMINATION OF CRIPPEN DOES NOT CONSTITUTE DEFICIENT PERFORMANCE.

Sargent complains that his trial counsel’s cross-examination of Crippen “highlight[ed] and reinforce[ed] the most damaging facts in the

case” and “was not a tactical decision.” Br. of App. at 30-31. Once again, however, Sargent fails to discuss any relevant legal authority.

Cross-examination is an area of trial strategy or trial tactics that reviewing courts are loath to second guess because “[t]he extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict.” *In re Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004) (quoting *State v. Stockman*, 70 Wn.2d 941, 425 P.2d 898 (1967)). Unsurprisingly then, our Supreme Court has held that “even a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation.” *In re Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998) (citation omitted). Thus, courts generally “entrust cross-examination techniques . . . to the professional discretion of counsel.” *Davis*, 152 Wn.2d at 720.

Here, Sargent’s trial counsel did cross-examine Crippen by way of utilizing her written statement. RP 144-47. The portions of the written statement that Sargent’s trial counsel discussed, while consistent with Crippen’s trial testimony, highlighted Crippen’s fear of Sargent. *Compare* 101-118 *with* RP 144-47. But Sargent’s counsel’s reason for utilizing Crippen’s written statement was obvious, reasonable, and ascertained by Sargent on appeal; “to raise a doubt as to why she would wait so long to report the crime if she really felt such intense for her life the night of the incident.” Br. of App. 31.

Before introducing excerpts from Crippen's written statement Sargent's counsel established that part of the statement was signed on April 10, 2017, while the rest was signed on April 24, 2017—the date of the crime was March 5, 2017—and that it took Crippen ten days to write it out. RP 142-44. After reviewing excerpts of the statement with Crippen, Sargent's counsel questioned Crippen as to why it took so long and why she waited to write the statement. RP 148-150, 161. Finally, Sargent's counsel used the information he elicited during cross-examination multiple times in his closing argument to impugn Crippen's credibility and to cast doubt on the veracity of the statements within the written statement. RP 272-73, 276-77, 279-280.

Given the strength of the evidence, Sargent's trial counsel had to attack Crippen's credibility in some way and the way he chose through cross-examination of Crippen was a reasonable tactical choice and a strategy he carried through to his closing argument. Consequently, Sargent has failed to show that his trial counsel's performance was deficient and that there is a reasonable probability that, assuming counsel's deficient performance, the outcome of the proceedings would have been different had trial counsel not asked the contested questions.

C. SARGENT'S TRIAL COUNSEL DID NOT PERFORM DEFICIENTLY WHEN HE OBJECTED TO REMOVAL OF JUROR 12.

At the conclusion of the first day of trial, Juror 12 informed the bailiff that he might have outside knowledge about the case. RP 175. The trial court and counsel questioned the juror the next morning. RP 175-184. The juror remembered overhearing portions of a conversation between friends about a woman who he believed, based on the first day's testimony, may have been Crippen. RP 176. The friends had discussed the abusive situations this woman had experienced. RP 177. The discussion, however, appears to have centered on one of the friends attempting to dissuade the other from perusing a relationship with this woman. RP 177-79. As a result, the tenor of the conversation was negative as it pertained to the woman. RP 179-180. Overall, the information the juror relayed was unclear and nonspecific though the juror was able to say for certain that he did not hear anything about the incident in question. RP 180.

While the juror expressed reservations about the additional knowledge he may or may not have, he thought that he could "separate it out" and that he could fairly and impartially judge the case. RP 178, 182-84. The State requested the juror be excused. RP 181-82. Sargent's counsel opposed, arguing the juror did not say he could not be fair and

impartial. RP 182. The trial court denied the motion to excuse the juror.
RP 184.

Sargent now claims that the “only reasonable position for defense counsel to take in order to protect Mr. Sargent’s interest was to join with the State in seeking the juror’s removal.” Br. of App. at 32. Sargent argues that information conveyed by the juror “raised a serious danger that the juror would be partial to Crippen and likely side with her against Mr. Sargent.” Br. of App. at 32. As a preliminary matter, even assuming that Sargent’s trial counsel joined the State’s motion to excuse the juror there is no reason to assume the trial Court would have granted the motion. Thus, even assuming the conclusions that Sargent advocates there is little room to argue that Sargent was prejudiced by his trial counsel’s decision.

Furthermore, Sargent does not discuss any relevant legal authority regarding the propriety of removing a seated juror. Br. of App. at 31-32. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *Long*, 102 Wn.App. at 911 FN 1 (quoting *Seattle Post-Intelligencer*, 60 Wn.2d at 126) Thus, this Court can presume the relevant legal authority does not support Sargent’s position.

RCW 2.36.100 and CrR 6.5 govern the excusal of a juror. The statute provides that “[i]t shall be the duty of a judge to excuse from

further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, [or] inattention. . . .” RCW 2.36.100. The court rule provides that “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror’s place on the jury.” CrR 6.5. Moreover, a trial court’s decision to keep or excuse a juror is reviewed for abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005). For example, a trial court does not abuse its discretion when it denies a motion to remove a juror who “had once been acquainted” with the victim and her family where the juror expressed an ability to be a fair and impartial juror. *State v. Kloepper*, 179 Wn.App. 343, 317 P.3d 1088 (2014).

Here, Sargent cannot establish under the relevant rules that Juror 12 was unfit to serve, and even a colorable argument that Juror 12 was unfit would not mean that the trial court abused its discretion in keeping the juror. Besides, Sargent’s trial counsel likely was making a tactical decision that Juror 12—not hearing anything about Sargent and potentially hearing negative information about Crippen—would be more favorably

disposed to Sargent's argument that Crippen was not a credible witness.⁸ That would also explain the State's decision to seek the juror's removal. RP 181. In total, Sargent fails to show that his trial counsel performed deficiently or that his trial counsel's decision prejudiced him.⁹

D. SARGENT'S TRIAL COUNSEL PROPERLY DID NOT OBJECT TO JURY INSTRUCTIONS 4 AND 12, AND THE CALCULATION OF HIS OFFENDER SCORE.

As discussed, *supra*, in sections I, II, and III, the jury was properly instructed and Sargent's offender score was properly calculated. As a result, Sargent's trial counsel did not perform deficiently when he properly did not object to the instructions or his offender score calculation.

Furthermore, whether as part of his ineffective assistance claims or his cumulative error claim, Sargent has failed to establish prejudice or that any and all errors, assuming their existence, were not harmless. Regardless of the standard employed, however, the State presented a strong case and any error that occurred was harmless.

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⁸ Of course, whether any of the information the juror heard was *actually* about Crippen is far from certain given the juror's vague and somewhat confusing testimony. RP 174-185.

⁹ In this case a reasonable probability that the result would have been different but for trial counsel's performance means that the trial court would have dismissed the juror and that by replacing the juror Sargent would have been acquitted of an additional crime.

CONCLUSION

For the reasons argued above, this Court should affirm Sargent's convictions and his sentence.

DATED this 18th day of June, 2018.

Respectfully submitted:

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