

NO. 35146-7-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION THREE

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

SCOTT MATTHEW ELLIS,

Defendant/Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY

The Honorable Linda Tompkins

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR.

1. THE BURGLARY AND VEHICLE PROWLING CONVICTIONS VIOLATED THE DEFENDANT'S RIGHT TO JURY UNANIMITY.
2. THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.
3. THE TRIAL COURT COMMITTED SENTENCING ERRORS WHICH REQUIRE REVERSAL AND REMAND FOR RE-SENTENCING.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Where the charging document alleged the defendant both entered unlawfully and remained unlawfully, but the jury instructions allowed the jury to convict him of either alternative, and the jury was neither instructed on unanimity nor indicated which alternative its convictions were based on, did the convictions violate the defendant's right to jury unanimity? (Assignment of Error #1)
2. Was there sufficient evidence to prove Ellis both entered unlawfully with criminal intent and remained unlawfully with criminal intent? (Assignment of Error #1)
3. Where counsel elicited testimony about the defendant being threatened and pursued into a storage lot, and the defendant testified his entry was motivated by fear, did counsel's failure to request a necessity instruction amount to ineffective assistance of counsel? (Assignment of Error #2)

4. Where defense counsel informed the court there was another witness the defendant wanted her to call, but no other witness was called or mentioned afterwards, and where a witness who spoke at sentencing possessed first-hand knowledge that would have corroborated the defendant's testimony, was the defendant denied effective assistance of counsel by the failure to call the witness?
(Assignment of Error #2)
5. Did defense counsel's failure to investigate diminished capacity or consult with an expert about the defendant's unusual actions fall below an objective standard of reasonableness? (Assignment of Error #2)
6. Where the defendant presented evidence of multiple mitigating factors, including his military service and related PTSD and substance abuse issues, did the court err by not continuing the hearing to allow him to obtain his service records and proceeding with sentencing without ordering a presentence report or chemical dependency screening? (Assignment of Error #3)
7. Did the court actually consider the defendant's request for a mitigated exceptional sentence where it stated it could not consider his military service without official documentation? (Assignment of Error #3)

8. Did the totality of facts and circumstances presented to the sentencing court distinguish the defendant's offense from other burglaries and make his crime less egregious? (Assignment of Error #3)

III. STATEMENT OF THE CASE.

In the late evening hours of August 31, 2016, Brian Chavez, owner of Valleyway Self Storage, received a phone call from someone who lived next door to the lot, who called because he heard a voice coming from inside it. RP 81-82. The caller was apparently the only person who heard anything, as the bookkeeper who was on-site at the time did not hear any strange noises. RP 113.

Chavez, who lived a few minutes away, hopped in his truck and drove over, entering his code into the keypad to open the entrance gate, and drove around the circular path, but didn't see or hear anything suspicious. RP 122. While stopped near the gate, he noticed a flickering light coming from one of the motor homes. Chavez didn't hear any sounds coming from it, and he did not exit his truck or knock on the door; instead, he told the neighbor to call the police. RP 106.

Like Chavez and the bookkeeper, the initial responding officer heard no suspicious sounds like crashes or breaking glass as he approached the motor home. RP 159-60. When Deputy Hunt knocked on

the door, a man stuck his head out an open window and gave the deputy his name and date of birth, then added he had blocked the door and wouldn't come out unless his DOC officer was present. RP 108, 150, 160. Hunt responded by telling him he was under arrest and that he was going to send his dog in to bite him. RP 151.

As additional officers responded to the man in the motor home, Ellis and Hunt continued talking, with Ellis repeating he would come out for his DOC officer and Hunt responding he had a dog that would soon be biting him. Id. After even more officers showed up and began surrounding the motor home, one of them snuck onto the roof and dropped two cans of OC gas inside. RP 151. The situation quickly deteriorated after that.

Now surrounded by close to a dozen officers and a K-9, Ellis began erecting a barricade, stacking what he could find and eventually removing parts of the motor home in order to stack them up and insulate himself. RP 152, 188-89. Around this time, the owners arrived with the keys, but the door wouldn't open because Ellis had tied a seat belt around it to prevent entry before the police arrived. RP 129, 152-53.

Eventually, the police broke a window to gain entry, and three officers entered with the K-9 and located Ellis underneath a bed frame in a rear compartment. RP 187, 197, 208. When he wouldn't release his grip on the frame, the police released the dog, which bit him and drew blood.

RP 123. After releasing the bed frame, he was punched in the back of the head by one officer and pepper sprayed in the face by another before being taken into custody. RP 165, 198-99. At no time during the incident did he make any threats or attempt to harm any of the officers.

Ellis testified and provided context for his presence in the storage lot that night, explaining that, thanks to a recent divorce, he was homeless and had been temporarily staying in a friend's garage. RP 218. Earlier that evening, he had taken a bus to his former home, located near the lot, to retrieve some of his remaining possessions from his ex-wife. Id. When a verbal argument ensued, her boyfriend emerged from inside the house and threatened to shoot him. RP 220. Ellis walked away, heading back to the bus stop, but quickly noticed the boyfriend following in a truck. RP 221. He also saw a second man in the passenger seat, who he assumed was the friend the boyfriend had mentioned during the earlier threat. RP 222.

After he was unable to lose the vehicle by weaving his way through a parking lot and some open areas, Ellis crawled underneath a fence and cut through a backyard adjacent to the storage lot and hid next to a large air conditioning unit. RP 224-25. While there, he heard and then saw the truck stop and park across the street. RP 225-26. When a truck pulling a trailer drove into the storage lot, Ellis followed it through the open gate. RP 227. When asked why he did that, he explained it was "a

safe area” he hoped the boyfriend wouldn’t be able to enter. Id. Once inside, he looked for a good place to hide; he ignored the RV parked closest to the gate because it was in the line of sight of the boyfriend’s truck, checked the next motor home and discovered it was unlocked, then entered. RP 228-29.

Ellis listened to hear if the truck drove away while he made sure the men couldn’t enter by tying the seat belt around the door handle. RP 229. After waiting for some time, he began to watch a movie when the police arrived. RP 230. Ellis identified himself and tried explaining about the boyfriend and why he was there, but the deputy was not interested and repeatedly threatened to have his dog bite him. RP 230-31. Fearing the dog and the increasing number of people surrounding the motor home, Ellis explained multiple times that he had a good relationship with his DOC officer and would come out for him, but to no avail.

When the police dropped OC gas through the ceiling, he began having trouble seeing and breathing, causing him to “freak[] out.” RP 233-34. As the threats multiplied, he stacked more things in front of the entrance and retreated deeper into the motor home. RP 232-33. Eventually, because of the gas and the growing number of officers, he moved to the rear of the motor home, closed the door and hid in a storage area underneath the bed. RP 233-34. When asked why he had entered the

motor home, Ellis explained, “just to feel safe because it was a safe spot,” elaborating that he was scared, and going into the motor home “was my best option rather than continuing to run.” RP 237-38.

The jury convicted Ellis of the burglary, vehicle prowling, malicious mischief, and obstruction charges, but acquitted him of theft. At sentencing, Ellis requested a 29-month mitigated exceptional sentence. CP ____.¹ The court heard from Jessica Johnson, a longtime friend who told the court about his military service, his subsequent struggles with Post-Traumatic Stress Disorder (“PTSD”) and drugs, and her personal knowledge of numerous threats made against him by his ex-wife. RP 403-07.

The court found that chemical dependency likely contributed to the offenses, and also acknowledged a link between his PTSD and his behavior, but did not order a presentence report or a chemical dependency screening. Although the court was sympathetic, it stated it could not consider a downward departure because Ellis did not have official documentation of his military service with him at the hearing. RP 410-11. When counsel asked for more time to obtain the service records, the court declared it was too late and went forward with sentencing, adding that documentation of his service would have resulted in a sentence “tailored”

¹ A Supplemental Designation of Clerk’s Papers including these pleadings was filed on 8/7/17. The page numbers have not yet been assigned.

to his particular situation. RP 413. The court sentenced Ellis to 55 months for the burglary and 29 months for the vehicle prowling. CP 54-67.

IV. ARGUMENT.

A. THE BURGLARY AND VEHICLE PROWLING
CONVICTIONS VIOLATED THE DEFENDANT'S
RIGHT TO JURY UNANIMITY.

The right to a unanimous jury verdict is protected by the Sixth Amendment to the U.S. Constitution and Article I, Section 21 of the Washington Constitution. *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017); *State v. Kinchen*, 92 Wn.App. 442, 451, 963 P.2d 928 (Div. I 1998). An accused may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the prosecution presents evidence of several acts that could form the basis of a single count, the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *Id.* Where multiple counts are involved, the instruction should clearly require unanimity for one particular act for each count charged. See WPIC 4.25 (Note on Use); *State v. Watkins*, 136 Wn.App. 240, 148 P.3d 1112 (Div. I 2006).

The right to jury unanimity also includes the right to unanimity as to the means by which the defendant committed the crime when the

defendant is charged with, and the jury is instructed on, an alternative means crime. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

In the absence of a unanimity instruction, where alternative means are submitted to the jury, the conviction will be reversed if the evidence is insufficient to support any one of the alternatives. *Kinchen* at 451. The Supreme Court recently re-affirmed this principle in *Armstrong*:

When there is insufficient evidence to support one of the alternative means charged and the jury does not specify that it unanimously agreed on the other alternative, we are faced with the danger that the jury rested its verdict on an invalid ground. In those situations, the conviction cannot stand.

Armstrong at 343-44.

The *Armstrong* Court reiterated that “an instruction on jury unanimity as to the alternative method found is preferable” because it eliminates potential problems that may arise when the evidence is insufficient to support one of the means. *Id.* at 344; *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987). Although defense counsel did not request a unanimity instruction, because lack of jury unanimity implicates the fundamental constitutional right to trial by jury, it is an error of constitutional magnitude which may be raised for the first time on appeal. *Armstrong* at 343-44.

1. Burglary and Vehicle Prowling Are Alternative Means Offenses.

Burglary is an alternative means crime; it can be committed by either entering unlawfully with criminal intent or by remaining unlawfully with criminal intent. RCW 9A.52.030(1); *State v. Sony*, 184 Wn.App. 496, 500, 337 P.3d 397 (Div. I 2014); *State v. Allen*, 127 Wn.App. 125, 131, 110 P.3d 849 (Div. I 2005). The same applies to first-degree vehicle prowling, which uses the same “enters or remains unlawfully” language. RCW 9A.52.095. In the case at bar, the charging document accused Ellis of committing both alternatives. CP 4-5 (Ellis “did enter and remain unlawfully. . .”). Thus, under *Armstrong*, the convictions must be reversed unless there was sufficient evidence to prove both alternatives beyond a reasonable doubt.

2. There Was Insufficient Evidence to Support a Unanimous Jury Finding That Ellis Unlawfully Entered the Lot And/or Vehicle Intending to Commit a Crime.

The State must prove every essential element of the charged crime beyond a reasonable doubt for a conviction to be upheld, and it is reversible error to instruct the jury in a manner that would relieve the State of that burden. *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Byrd*, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995). Each element must be supported by sufficient evidence, and dismissal is

required where no rational trier of fact could find that all the elements were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Unlawful entry and criminal intent are separate elements that must be proved independently. *State v. Grimes*, 92 Wn.App. 973, 980, 966 P.2d 394 (1998); *Sony* at 500; RCW 9A.52.025. The State may not prove a defendant's intent to commit a crime merely with evidence that he entered the premises, or vice-versa. *State v. Miller*, 90 Wn.App. 720, 725, 954 P.2d 925 (1998). As the *Allen* court explained, "[a] lawful entry, even one accompanied by nefarious intent, is not by itself a burglary. Unlawful presence and criminal intent must coincide for a burglary to occur." *Allen* at 137. While criminal intent may be inferred from conduct that "plainly indicates such intent as a matter of logical probability," it may not be inferred from conduct that is "patently equivocal." *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985).

The only evidence regarding the defendant's intent when he entered the lot came from his testimony that he was looking for a place to hide and "be safe," a motive which was corroborated by the State's witness. RP 110-111. His conduct after entering was equivocal, and arguably contradicted a finding of criminal intent. According to the undisputed testimony, Ellis did not force the lock or damage the fence or

gate, but entered by walking through the open gate, and immediately looked for a place to hide. RP 227-29. He was not armed with burglary tools, weapons, or anything a criminal would use to break into or pry open locks or vehicles, and there was no suggestion he did anything or walked anywhere else once he was past the gate. His actions were consistent with escaping his pursuers, and an intent to commit a crime was not plainly indicated as a matter of logical probability. Once he entered the Brahams' motor home, the two coinciding elements of second-degree burglary could no longer be legally established.

A similar analysis should apply to the vehicle prowling charge, which utilizes the same "enters or remains unlawfully" language: there was insufficient evidence of criminal intent when he entered it, and criminal intent cannot be inferred merely because he entered in light of his uncontroverted testimony about why he did. *Miller*, supra.

No unanimity instruction was given, and the jury did not specify it unanimously agreed on one or the other alternative. According to Instructions Nos. 8 and 17, the jury could have convicted him for either unlawfully entering or unlawfully remaining and, due to the lack of a unanimity instruction, there is a danger the jury convicted him on an invalid ground. Therefore, pursuant to *Armstrong*, the error is not harmless and the burglary and vehicle prowling convictions should be reversed.

B. THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Effective assistance of counsel is guaranteed by both the Sixth Amendment to the U.S. Constitution and Article I, § 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To prevail on a claim of ineffective assistance of counsel, the defendant must establish that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by that performance. *Strickland*, 466 U.S. at 684-85.

In reviewing the first prong of the *Strickland* test, the appellate courts presume defense counsel was not deficient, and counsel's performance will not be deemed deficient if it qualifies as legitimate trial strategy or tactics. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, not all of counsel's strategies are immune from attack: "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Id.* at 33-34. To show prejudice, a defendant must establish a reasonable possibility that, but for counsel's errors and omissions, the result would have been different. *Strickland* at 694; *State v. McNeil*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

1. Counsel's Failure to Propose Instructions That Presented the Defendant's Theory of the Case.

Defense counsel has a duty to research and know the relevant law. *State v. Kylo*, 166 Wn.2d 856, 862, 866, 215 P.3d 177 (2009). A reasonably competent attorney is presumed to be sufficiently aware of relevant case law to propose a proper instruction applicable to the facts of a given case. *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Failing to request an instruction on a potential defense may constitute ineffective assistance of counsel. *Id.* at 228; *In re Hubert*, 138 Wn.App. 924, 929-30, 158 P.3d 1282 (Div. I 2007). Where a claim of ineffective assistance of counsel is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

a) Unanimity Instruction.

As explained in IV.A., *supra*, because the defendant was charged with alternative means charges, he was entitled to unanimity instructions. There is no strategic reason for counsel's failure to request the instruction, and the defendant was prejudiced because there was insufficient evidence to prove he unlawfully entered intending to commit a crime.

b) Necessity Instruction.

A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support it, and a failure to so instruct is reversible error. *State v. Fisher*, 185 Wn.2d 836, 848-49, 374 P.3d 1185 (2016). When evaluating the sufficiency of such evidence, the court must view it in the light most favorable to the defendant. *Id.* at 849. Evidence supporting an instruction may come from whatever source tends to show entitlement to the instruction, whether that be testimony from defense witnesses or cross-examination of the State's witnesses. *Id.* Because the defendant is entitled to the benefit of all the evidence, his defense may even be supported by facts inconsistent with his own testimony. *Id.* Even if the evidence is "weak, insufficient, inconsistent, or of doubtful credibility," the instruction should be given. *United States v. Zuniga*, 6 F.3d 569, 570 (9th Cir.1993) (cited in *Fisher*).

The necessity defense is available "when circumstances cause the accused to take unlawful action in order to avoid a greater injury." *State v. Jeffrey*, 77 Wn.App. 222, 224-25, 889 P.2d 956 (1995). To avail himself of the defense, the defendant must not have caused the threatened harm, and there must be no reasonable legal alternative to breaking the law. *Id.* at 225. The defendant must establish the defense by a preponderance of the evidence. *Id.* Whether a defendant reasonably believed himself to be in

danger is a jury question. See *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (duress defense directs jury's inquiry to defendant's belief and whether such belief is reasonable).

In *Jeffrey*, a necessity instruction was not required because the defendant was in his own home and faced no serious bodily injury or death from the "silhouette" he claimed prompted him to shoot through his headboard and the side of his house. *Jeffrey* at 227. Here, Ellis testified the boyfriend had threatened to shoot him, and that he and a second person were following him, both of which created a reasonable fear of serious bodily injury or death. RP 220-222. As demonstrated by his unsuccessful attempts to lose his pursuers, the fact that he was on foot, while the others were in a truck, severely limited his alternatives and was sufficient to raise a jury question about whether there was a reasonable alternative to hiding in the storage lot.

A virtually identical issue was presented in *Flowers v. State*, 51 So.3d 911 (Miss. 2010), where the Mississippi Supreme Court held the trial court erred by refusing to instruct on necessity in a burglary case after the defendant testified he broke in and hid inside because he was being pursued by an armed individual. Although the court was skeptical of the defendant's account, it recognized that his credibility was a jury question, as was the question of whether there was an adequate alternative to

breaking into the house. *Flowers* at 913; *Accord*, WPIC 18.02. This Court should follow *Flowers* and hold that Ellis would likewise have been entitled to the instruction.

Applying the above principles, had defense counsel requested a necessity instruction, the court would have been constrained to give it in light of (a) the defendant's undisputed testimony about being pursued into the lot, the same explanation he gave Chavez that night, RP 111, 119, (b) his limited actions upon entering the lot, which were consistent with his reason for entering it (see IV.A.2, *supra*), (c) defense counsel's emphasis on what motivated him to enter the lot and motor home, (d) the case law requiring the court to consider the evidence in the light most favorable to the defendant, and (e) the fact that it was consistent with the defendant's testimony and theory of the case. *Fisher*, *supra*. With the striking similarities to *Flowers*, had counsel researched and cited the case in support of the request, the court would arguably have been compelled to give the instruction.

Given Ellis's testimony, counsel's focus on why he entered the lot and motor home throughout the trial, and the fact that a successful necessity defense could result in an acquittal on at least the burglary charge, an objectively reasonable defense counsel would have requested the instruction if only to create and preserve the appellate issue, but also

because, based on the case law, there was sufficient evidence to warrant giving one, and because it was consistent with Ellis's theory of the case. Defense counsel's failure to request the instruction fell below an objective standard of reasonableness, and prevented the jury from considering the defendant's theory of the case.

The defense elicited testimony from multiple witnesses about the defendant being pursued into the lot, yet failed to request the relevant instruction that would have allowed – if not required – the jury to consider whether that reason made his entry lawful. See *State v. Powell*, 150 Wn.App. 139, 155, 206 P.3d 703 (Div. II 2009) (counsel's performance was deficient where he failed to request instruction on statutory defense when the evidence supported it, defense counsel "in effect, argued the statutory defense," and the defense was consistent with the defendant's theory of the case). The defendant was prejudiced because, without the instruction, the jury had no way to understand the legal significance of his testimony about being threatened and followed, and no way to acquit him of the burglary charge if it believed his testimony about why he entered. *Powell* at 156; *Flowers* at 913.

2. Failure to Investigate and Call a Defense Witness.

A failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis

for an ineffective assistance of counsel claim. *State v. Jones*, 183 Wn.2d 327, 339-40, 352 P.3d 776 (2015). Courts will not give deference to an uninformed or unreasonable failure to interview witnesses. *Id.* at 340. A failure to interview witnesses who may provide corroborating testimony may constitute deficient performance. *State v. Weber*, 137 Wn.App. 852, 858, 155 P.3d 947 (2007), *rev. denied*, 163 Wn.2d 1001 (2008).

At the sentencing hearing, defense counsel advised the court Ellis had served three tours in the Army between 1999-2007, suffered from PTSD, and began using methamphetamines after returning from his last tour in Afghanistan. RP 394. Counsel also presented a witness, Jessica Johnson, who spoke on Mr. Ellis's behalf. RP 403-07. Among other things, she told the court Ellis: (1) had been staying with, and working for, her near the time of the incident; (2) suffered from PTSD; (3) struggled with substance abuse issues related to his military service and PTSD; and (4) believed his ex-wife was having him followed. As to this last point, she reported she had witnessed and heard numerous threats and stalking-type statements made by his ex-wife around the time of the incident. RP 405-06.

Johnson indicated she had not been made aware of the trial. RP 406 ("You know, I would have been here if I had known"). Notably, at the end of the trial's second day, defense counsel had advised the court "my

client has one more witness he's hoping that I can call." RP 262. However, no other witness was called, and defense counsel never mentioned the witness (or any other witness) again. It is reasonable to assume Ms. Johnson was the "one more witness," but there is nothing to explain why she wasn't called to testify.

Her testimony about the threats and stalking-type statements would have corroborated Ellis's testimony about being threatened and followed, thereby making his testimony more credible, and would have provided additional evidence in support of a necessity instruction. Without her testimony, the jury likely concluded Ellis was making everything up about being threatened and followed; with it, the issue of whether his entry was necessary and lawful would have been cast in an entirely different light.

3. Failure to Investigate Diminished Capacity.

Defense counsel must, at a minimum, conduct a reasonable investigation in order to make informed decisions about how to best represent his client, which includes investigating all reasonable lines of defense. *State v. Jury*, 19 Wn.App. 256, 263, 576 P.2d 1302 (Div. II 1978). The presumption of counsel's competence can be overcome by a showing that counsel failed to conduct appropriate investigations, either factual or legal, to determine which defenses were available. *Id.*

A diminished capacity defense requires evidence of a mental condition that prevents the defendant from forming the requisite intent necessary to commit the crime charged, and can negate the intent or knowledge elements of a crime. WPIC 18.20; *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). The failure to present a diminished capacity defense where the facts support one has been held to satisfy both prongs of the *Strickland* test. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (citing *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987)).

The Supreme Court recognized the relevance of PTSD in the criminal context back in 2000, noting the disorder can cause flashbacks, disassociation from reality, and loss of control of one's actions:

One hallmark of PTSD is flashback, a condition “during which components of the [traumatic] event are relived and the person behaves as though experiencing the event at that moment.” . . . When a person has a flashback, he or she undergoes an “alteration in the perception or experience of the self in which the usual sense of one’s own reality is temporarily lost or changed.” . . . While in this state, the person experiences “[v]arious types of sensory anesthesia and a sensation of not being in complete control of one’s actions, including speech.” . . . So, a person who truly suffers from PTSD could experience a flashback and during that flashback might be unable to control his or her actions.

State v. Botrell, 103 Wn. App. 706, 715, 14 P.3d 164 (Div. II 2000) (citations omitted); see also *State v. Janes*, 64 Wn.App. 134, 145, 822 P.2d 1238 (Div. I 1992); *remanded on other grounds*, 121 Wn.2d 220, 850 P.2d

495 (1993) (diminished capacity instruction justified by expert testimony that the defendant suffered from PTSD).

It is now widely known that a significant percentage² of veterans returning from wars in Iraq and Afghanistan suffer from PTSD. According to the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (“*DSM-V*”), the manifestations of PTSD include depression, hypervigilance and a heightened sensitivity to potential threats, an exaggerated startle response, and self-destructive and self-harming behaviors. In recent years, specialized veterans’ courts have been established throughout the country that are better able to address the unique problems they face after returning to civilian life, including substance abuse and mental health issues.

Given the evolving knowledge about the triggers and pervasive effects of PTSD, the emphasis on Ellis’s criminal intent (or lack thereof), and the unusual nature of his actions after being surrounded and then gassed, PTSD was a viable area to investigate. Counsel elicited testimony that his behavior was “not rational,” RP 170, which she emphasized during closing argument, RP 348-49, but there is nothing to indicate counsel ever investigated the defense or contacted an expert to consult

² The U.S. Department of Veterans’ Affairs estimates as many as 20% of Iraq and Afghanistan veterans suffer from PTSD. See <https://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp>

and/or evaluate the defendant. In the absence of a diminished capacity instruction, that testimony was likely disregarded. In addition, Ms. Johnson's knowledge and observations would have informed a mental health professional's evaluation and diagnosis, and her testimony would have helped support a diminished capacity instruction. WPIC 18.20.

Counsel's failure to investigate the defense prejudiced the defendant because, with expert testimony linking the condition to his behavior, a diminished capacity instruction would have compelled the State to address his mental state and PTSD, instead of dismissing it as beside the point, and emphasized the State's obligation to prove his intent beyond a reasonable doubt. In the absence of the instruction and defense, the State was able to argue that defense counsel's statements about the defendant's irrational behavior – which were based on testimony from the State's own witnesses - were irrelevant because the instructions made no mention of it, adding intent “[isn't] about rational or not.” RP 365-66. Had there been a diminished capacity instruction, not only could defense counsel have answered her own question, “what do you do with this information?” (RP 349), the jury would have been obligated to consider that information relative to the issue of intent, the primary contested issue in the case.

4. Failure to Request a Bill of Particulars.

While the general rule is that the State need not specify a burglary's intended crime, where the specific crime may be material to the defendant's case, "for example, where a defendant claims to have entered and/or remained in the premises for some lawful purpose," the proper procedure is for the defense to request a bill of particulars and require the State to specify the crime, then propose jury instructions that will allow the defense to argue its theory of the case. *State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985).

Although counsel elicited testimony about Ellis being pursued into the lot (implicating necessity), and the defense's theory was that he was scared and didn't intend to commit any crime, counsel never requested a bill of particulars specifying what crime the State alleged Ellis intended to commit inside the storage lot. If it was the act of entering the motor home, the same analysis arguably applies: was entering an unlocked motor home in order to escape his armed pursuers a crime? See *Flowers*, supra.

Assuming it was one of the other alleged crimes that occurred on someone else's property 30-60 minutes later – theft or malicious mischief³ – a bill of particulars would have been warranted. Had the bill of particulars specified theft as the intended crime, which is likely given the

³ Obstruction cannot be the basis for a burglary charge. *State v. Devitt*, 152 Wn.App. 907, 218 P.3d 647 (2009).

State's focus on it during the trial, see RP 179-80, 367, there is a reasonable possibility that a different outcome for the burglary charge would have resulted since Ellis was acquitted of theft.

5. Conclusion.

Defendant submits the failure to request a necessity instruction is sufficient by itself to establish ineffective assistance of counsel. When added to the failure to request a unanimity instruction for two alternative means crimes, the failure to investigate diminished capacity or request a bill of particulars, and the witness who was never called, the combination of counsel's actions and omissions deprived him of effective assistance of counsel.

C. THE TRIAL COURT COMMITTED SENTENCING ERRORS WHICH REQUIRE REVERSAL AND REMAND FOR RE-SENTENCING.

1. The Court Failed to Comply with RCW 9.94A.500's Mandatory Presentencing Procedures.

RCW 9.94A.500 lists a number of procedures and actions a court must take prior to sentencing a convicted defendant, including that a chemical dependency screening report be ordered where the court finds the offender has a chemical dependency that contributed to his offense and preparation of a presentence report if the court determines the defendant may be mentally ill. RCW 9.94A.500(1). The statute's language is

“mandatory and unambiguous.” *State v. Brown*, 178 Wn.App. 70, 79, 312 P.3d 1017 (Div. II 2013), *rev. denied*, 180 Wn.2d 1004 (2014). The general prohibition against appealing standard range sentences does not apply when mandatory presentencing procedures are not followed. *Id.* at 79-80, n.3. A trial court’s failure to order a mandatory presentence report is not subject to harmless error analysis. *Id.* at 81. While *Brown* discussed presentence reports, the requirement that a chemical dependency screening report be ordered prior to sentencing utilizes the same mandatory “shall” language. Thus, a failure to do either is contrary to the statute, and harmless error does not apply.

In the present case, the court specifically found “chemical dependency likely contributed to these offenses,” RP 412, yet no screening was ordered. Although the court did not make a similarly explicit finding about mental illness, it was presented with uncontroverted evidence of his PTSD via Ellis and Ms. Johnson, as well as the unusual nature of his actions. In addition, the court specifically acknowledged “it is well understood that PTSD and this type of erratic behavior may, in fact, be linked.” RP 410-11.

A presentence report would have explored Ellis’s military service and his PTSD, and the chemical dependency screening would have explored his substance abuse issues. See CrR 7.1(b). These are the same

factors the court stated would have resulted in a different sentence. A presentence report also would have allowed the Department to make a sentencing recommendation after investigating and considering all relevant factors. By not ordering the reports and proceeding with sentencing, the court acted contrary to the statute's plain language, as well as its duty to "possess the fullest information possible concerning the defendant's past life and personal characteristics." *State v. Russell*, 31 Wn.App. 646, 648, 644 P.2d 704 (Div. I 1982).

2. The Court's Refusal to Allow Ellis Time to Obtain His Military Service Records Was Manifestly Unreasonable.

RCW 9.94A.500(1) also provides the court may continue the sentencing hearing for good cause. As mentioned during the sentencing hearing, pretrial services apparently never asked about his military service, which the court characterized as "critical" information. RP 409. Ellis's counsel wanted more time to obtain his military service records, but even though the court acknowledged the defendant's difficulty in obtaining his DD-214's while incarcerated, it refused to allow him any additional time. RP 411.

Given that Ellis had been incarcerated for months, the short period of time between trial and sentencing, and the court's statement that his service would have resulted in a different sentence, and since RCW

9.94A.500(1) required a presentence report and chemical dependency screening, there was good cause to continue the hearing in order to obtain that critical information. With Ellis facing his first prison sentence, it was manifestly unreasonable to deny him the opportunity to obtain the very documents the court stated would have resulted in a different sentence, presumably one geared towards veterans and the unique chemical dependency and mental health issues they face.

Finally, since Ellis couldn't have known before the hearing that the court required official documentation before it would consider his service, by denying him the opportunity to obtain and present that documentation, the court deprived him of his due process right to notice and a meaningful opportunity to be heard at sentencing. See *State v. Moro*, 117 Wn.App. 913, 920, 73 P.3d 1029 (2003) (discussing due process in sentencing hearings).

3. The Court Impermissibly Refused to Consider the Defendant's Request for a Mitigated Exceptional Sentence.

While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (Div. I 1997). Provided the court imposes a sentence within the presumptive range and

the defendant has not alleged that any mitigating factors exist, a court will not be deemed to have abused its discretion. *Garcia-Martinez* at 329. Appellate review is proper where the trial court refused to exercise discretion at all or relied upon an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Schloredt*, 97 Wn.App. 789, 801-02, 987 P.2d 647 (Div. I 1999). Ellis presented both enumerated and non-enumerated mitigating factors in support of his request.

a. Enumerated Factors.

The SRA provides that certain “failed defenses” may constitute mitigating factors supporting an exceptional sentence below the standard range, including necessity and diminished capacity. *Schloredt* at 801; RCW 9.94A.535(1)(c) (defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct); RCW 9.94A.535(1)(e) (defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired). The court possessed information regarding the defendant’s PTSD, heard the trial testimony about his unusual actions (which it called “erratic”), and specifically recognized its likely link to his conduct, yet did not consider it as a mitigating factor

because, as detailed below, Ellis did not have official service records. RP 410-11. Similarly, the court was familiar with the necessity-type circumstances presented at trial, some of which were corroborated by Ms. Johnson at sentencing, but did not consider them in mitigation.

b. Non-Enumerated Factors.

RCW 9.94A.535(1)'s list of mitigating factors is not exhaustive. In determining whether a non-enumerated factor legally supports departure from the standard sentence range, the court employs a two-part test: first, a trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing the standard sentence range; second, non-enumerated mitigating factors must relate to the crime and make it more, or less, egregious and distinguish the defendant's crime from others in the same category. *State v. Fowler*, 145 Wn.2d 400, 404-405, 38 P.3d 335 (2002); *State v. Ha'Mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).

1) The Defendant's Military Service.

The court would not consider Ellis's military service as a mitigating factor because he did not have official service records with him:

Had I known and had I had evidence about this prior service area -- the Courts are not totally adequate but they're becoming more adequate to address the needs of veterans and provide a

balance of recognition of the seriousness of the impact of the injuries on people when these incidents occur, but also the benefits of solid, quality treatment to stop, to stop this conduct from happening. I do not have that level of information before me to be considering some sort of a specially tailored sentence. And it is for that reason the Court has fashioned what it has.

RP 413.

A defendant's service to his country was recognized as a mitigating factor in *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), where the trial court indicated it was open to a mitigated exceptional sentence because of the defendant's military service, but mistakenly believed it could not impose one by running the sentences concurrently. *In re Mulholland* at 333-34. The Court remanded for re-sentencing because the court's comments were "sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly." *Id.* at 334.

In the present case, the judge likewise expressed openness to an alternative sentence because of Ellis's military service, but concluded she could not consider it because he did not have official service records in his possession. The SRA contains no such official documentation requirement; the only evidentiary standard RCW 9.94A.535 imposes is that mitigating factors be established by a preponderance of the evidence. That standard was amply satisfied when Ellis, his attorney and Ms.

Johnson all confirmed his military service and related substance abuse issues. RP 394, 404, 408. The court's conclusion that the lack of official documentation meant the factor was not "available for litigation purposes" and precluded it from considering his service and PTSD as mitigating factors was erroneous. Similarly, its refusal to consider the evidence of his service presented by Ellis and Ms. Johnson ("had I had evidence about this prior service area") is at odds with RCW 9.94A.535(1). Like *In re Mulholland*, the court's comments are sufficient to conclude a different sentence might have been imposed had it applied the law correctly and considered his military service as a mitigating factor.

Furthermore, rather than allow additional time for the defendant or his attorney to obtain whatever records the court wanted (the court never specified what type of evidence was necessary), the court simply declared it was too late and went forward with sentencing, which was tantamount to categorically refusing to consider an exceptional sentence because of an incarcerated man's inability to obtain official military records in a few weeks time. See *Garcia-Martinez* at 330 (refusal to consider exceptional sentence for class of offenders is a failure to exercise discretion).

2) Aberrational Behavior and Facts That Distinguish Ellis's Offense From Other Burglaries.

In *Fowler*, the Supreme Court discussed federal court decisions recognizing a defendant's "aberrational behavior" as a mitigating factor. The defendant's "aberrational behavior" claim was based solely on his lack of criminal history and police contacts. *Fowler* at 407-08. The Court concluded that factor was already taken into account by the standard ranges for offenders with no criminal history, but did not foreclose considering the federal standard under other circumstances. Instead, it went on to explain, "[e]ven if we were inclined to follow the lead of the federal circuit courts that have recognized that aberrational behavior may justify a departure from the standard range, Fowler's conduct does not resemble the type of conduct that those courts have found to be aberrational." *Fowler* at 408.

Fowler's behavior did not qualify because he committed the crime with planning and foresight, armed himself with a gun and a knife to attempt to collect a debt, and used those weapons to commit a robbery that was "hardly a spontaneous act." *Id.* The Court also determined none of the factors evidencing aberrational behavior in the federal cases – the defendant suffered from a psychological disorder, was under external

pressure, was motivated by something other than personal gain, and took steps to mitigate his actions – were present. *Id.*

Nearly all of those factors exist in Ellis's case: there was no planning or foresight, Ellis was not armed, was not motivated by personal gain, suffered from PTSD (at least one witness described his behavior as "not rational"), was under external pressure from his pursuers, and the conduct was spontaneous. This Court should follow the federal cases and hold that, under the facts and circumstances presented to the sentencing court, Ellis's conduct qualifies as "aberrational behavior" which warrants a mitigated exceptional sentence. Alternatively, should the Court not adopt the federal standard, those same factors qualify as non-enumerated mitigating factors under *Fowler* and *Ha'Mim*.

In addition to those factors, the burglary was based solely on the motor home's geographic location within the fenced lot. The offenses occurred exclusively on/in the Brahams' property; Ellis committed no crime, nor was there any evidence he intended to commit a crime, against Mr. Chavez or his property. This fact alone distinguishes Ellis's offense from other burglaries and makes it less egregious. It is difficult to imagine a less egregious burglary than one which consists of the taking of a few steps along a dirt path.

The court's brief mention of this distinguishing factor – a total of two sentences – did not compare the facts and circumstances of the defendant's burglary to others in the same category or analyze whether his burglary was less egregious in comparison to most burglaries, which involve the commission of some crime against the property owner's person or property, even as minor as a broken lock or window. Instead, the court made a curious reference to the common law and "standalone damage with regard to breaking and entering that premises," RP 412, even though there was no damage to Chavez's property, either to the gate or to the lot itself.

A mitigated exceptional sentence was authorized by at least three mitigating factors, and the court erred by refusing to consider them, and by refusing to continue the sentencing hearing. The Court should reverse the trial court's denial of the mitigated exceptional sentence and remand for re-sentencing after considering all relevant mitigating factors and the reports required by RCW 9.94A.500(1).

V. CONCLUSION.

For the reasons set forth above, the defendant requests the Court reverse his convictions and remand for a new trial or, in the alternative, reverse the sentence and remand for re-sentencing.

DATED: August 28, 2017. Respectfully submitted:



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CERTIFICATE OF SERVICE

I certify that, on August 28, 2017, having obtained prior permission, I served a copy of Appellant's Brief as follows:

Brian Clayton O'Brien
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County City Public Safety Building () Hand Delivery
Spokane, WA 99260 (X) E-mail
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* Served via Division III's
e-service feature

In addition, I emailed PDF versions of the verbatim report of proceedings to Respondent at scpaappeals@spokanecounty.org

A copy of Appellant's Brief was also mailed to:

Scott Ellis
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By:



JOSEPH BROADBENT

APPENDIX A

RCW 9.94A.500**Sentencing hearing—Presentencing procedures—Disclosure of mental health services information.**

(1) Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing.

Except in cases where the defendant shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW **10.95.030** for the crime of aggravated murder in the first degree, sentenced to death, the court may order the department to complete a risk assessment report. If available before sentencing, the report shall be provided to the court.

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter **69.50** RCW, a criminal solicitation to commit such a violation under chapter **9A.28** RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense. In addition, the court shall, at the time of plea or conviction, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders. If the court determines that the defendant may be a mentally ill person as defined in RCW **71.24.025**, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. Copies of all risk assessment reports and presentence reports presented to the sentencing court and all written findings of facts and conclusions of law as to sentencing entered by the court shall be sent to the department by the clerk of the court at the conclusion of the sentencing and shall accompany the offender if the offender is committed to the custody of the department. Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.

(2) To prevent wrongful disclosure of information and records related to mental health services, as described in RCW **71.05.445** and **70.02.250**, a court may take only those steps necessary during a sentencing hearing or any hearing in which the department presents information related to mental health services to the court. The steps may be taken on motion of the defendant, the prosecuting attorney, or on the court's own motion. The court may seal the portion of the record relating to information relating to mental health services, exclude the public from the hearing during presentation or discussion of information and records relating to mental health services, or grant other relief to achieve the result intended by this subsection, but nothing in this subsection shall be construed to prevent the subsequent release of information and records related to mental health services as authorized by RCW **71.05.445**, **70.02.250**, or **72.09.585**. Any person who otherwise is permitted to attend any hearing pursuant to chapter **7.69** or **7.69A** RCW shall not be excluded from the hearing solely because the department intends to disclose or discloses information related to mental health services.

[2013 c 200 § 33; 2008 c 231 § 2; 2006 c 339 § 303; 2000 c 75 § 8. Prior: 1999 c 197 § 3; 1999 c 196 § 4; 1998 c 260 § 2; 1988 c 60 § 1; 1986 c 257 § 34; 1985 c 443 § 6; 1984 c 209 § 5; 1981 c 137 § 11. Formerly RCW 9.94A.110.]

NOTES:

Effective date—2013 c 200: See note following RCW 70.02.010.

Intent—2008 c 231 §§ 2-4: "It is the legislature's intent to ensure that offenders receive accurate sentences that are based on their actual, complete criminal history. Accurate sentences further the sentencing reform act's goals of:

- (1) Ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Ensuring punishment that is just; and
- (3) Ensuring that sentences are commensurate with the punishment imposed on others for committing similar offenses.

Given the decisions in *In re Cadwallader*, 155 Wn.2d 867 (2005); *State v. Lopez*, 147 Wn.2d 515 (2002); *State v. Ford*, 137 Wn.2d 472 (1999); and *State v. McCorkle*, 137 Wn.2d 490 (1999), the legislature finds it is necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing. These amendments are consistent with the United States supreme court holding in *Monge v. California*, 524 U.S. 721 (1998), that double jeopardy is not implicated at resentencing following an appeal or collateral attack." [2008 c 231 § 1.]

Application—2008 c 231 §§ 2 and 3: "Sections 2 and 3 of this act apply to all sentencings and resentencings commenced before, on, or after June 12, 2008." [2008 c 231 § 5.]

Severability—2008 c 231: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2008 c 231 § 62.]

Intent—Part headings not law—2006 c 339: See notes following RCW 74.34.020.

Intent—2000 c 75: See note following RCW 71.05.445.

Severability—1999 c 197: See note following RCW 9.94A.030.

Construction—Short title—1999 c 196: See RCW 72.09.904 and 72.09.905.

Severability—1999 c 196: See note following RCW 9.94A.010.

Intent—1998 c 260: "It is the intent of the legislature to decrease the likelihood of recidivism and reincarceration by mentally ill offenders under correctional supervision in the community by authorizing:

- (1) The courts to request presentence reports from the department of corrections when a relationship between mental illness and criminal behavior is suspected, and to order a mental status evaluation and treatment for offenders whose criminal behavior is influenced by a mental illness; and
- (2) Community corrections officers to work with community mental health providers to support participation in treatment by mentally ill offenders on community placement or community supervision." [1998 c 260 § 1.]

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17-35: See note following RCW 9.94A.030.

Severability—Effective date—1985 c 443: See notes following RCW 7.69.010.

Effective dates—1984 c 209: See note following RCW 9.94A.030.

Effective date—1981 c 137: See RCW 9.94A.905.

APPENDIX B

WESTLAW Washington Criminal Jury Instructions[Home Table of Contents](#)*WPIC 18.02 Necessity—Defense*Washington Practice Series TM
Washington Pattern Jury Instructions--Criminal

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Washington Practice Series TM
Washington Pattern Jury Instructions--Criminal
October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part IV. Defenses
WPIC CHAPTER 18. Miscellaneous Defenses

WPIC 18.02 Necessity—Defense

Necessity is a defense to a charge of (fill in crime) if

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and**
- (2) harm sought to be avoided was greater than the harm resulting from a violation of the law; and the**
- (3) the threatened harm was not brought about by the defendant; and**
- (4) no reasonable legal alternative existed.**

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

NOTE ON USE

Use in every case in which the common law defense of necessity is asserted and there is an adequate factual and legal basis. Do not use when a statute, or case law, provides exceptions or defenses dealing with the specific situation involved. See the Comment below.

For certain medical necessity cases, paragraph (4) may need to be revised to add the phrase "equally effective." See discussion in the Comment below.

COMMENT

Availability of common law defense. The common law defense of necessity was recognized in *State v. Diana*, 24 Wn.App. 908, 604 P.2d 1312 (1979). "[N]ecessity is available as a defense when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law." *State v. Diana*, 24 Wn.App. at 913. The defense is not available when the "physical forces of nature or the compelling circumstance have been brought about by the accused or where a legal alternative is available to the accused." *State v. Diana*, 24 Wn.App. at 913–14.

It was observed in *State v. Turner*, 42 Wn.App. 242, 247, 711 P.2d 353 (1985) that, in contrast to a duress defense (properly allowable in that case), a necessity defense would require that the pressures came "from the physical forces of nature rather than from other human beings." Subsequent cases, however, have not drawn this distinction. See, for example, *State v. Jeffrey*, 77 Wn.App. 222, 889 P.2d 956 (1995) and *State v. Stockton*, 91 Wn.App. 35, 955 P.2d 805 (1998) (both cases involving charges of unlawful possession of a firearm with a necessity defense based upon human pressures).

Instruction generally does not apply to crimes that have a statutory necessity defense. Statutory defenses on necessity supersede the common law defense. See *State v. Diana*, 24 Wn.App. at 913–14 (quoting Section 3.02(1)(b) of the Model Penal Code). Accordingly, before giving WPIC 18.02, the court should determine that (1) neither the criminal code nor other laws defining the offense provide exceptions or defenses dealing with the specific situation involved, and (2) a legislative purpose to exclude the justification claimed does not otherwise appear. *State v. Diana*, 24 Wn.App. at 914. Finally, the court must determine whether the Legislature, in enacting a specific statutory defense, indicated an intention not to abrogate the common law defense of necessity. Thus, in *State v. Kurtz*, 178 Wn.2d 466, 309 P.3d 472 (2013), the Washington Supreme Court held that the common law medical necessity defense to charges of possession of marijuana was not abrogated by enactment of the Washington State Medical Use of

Marijuana Act. This result was based upon the 2011 amendment to RCW Chapter 69.51A providing that “[n]othing in this chapter establishes the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions as defined in RCW 69.51A.010,” which suggested the Legislature did not intend to supplant or abrogate the common law. *State v. Kurtz*, 178 Wn.2d at 476; RCW 69.51A.005(3).

Several statutes supersede the common law defense of necessity for particular crimes, including:

- Bail jumping: RCW 9A.76.170(2); WPIC 19.16 (Escape—First and Second Degree—Unforeseen Circumstances—Defense);
- Escape, first and second degree: RCW 9A.76.110(2) and 9A.76.120(2); WPIC 19.16 (Escape—First and Second Degree—Unforeseen Circumstances—Defense);
- Eluding: RCW 46.61.024(2)(a); WPIC 94.10 (Attempting to Elude a Police Vehicle—Reasonable Belief that the Pursuer is Not a Police Officer—Defense);
- Medical marijuana, qualifying patient defense: RCW 69.51A.040; WPIC 52.10 (Marijuana—Qualifying Patient—Defense);
- Medical marijuana, designated provider defense: RCW 69.51A.040; WPIC 52.11 (Marijuana—Designated Provider—Defense).

Practitioners should consult the applicable statutes, including the most recent legislative enactments for any new defenses, before using WPIC 18.02.

Instruction does not apply to defending property from wildlife damage. When the defendant kills or injures wildlife in order to protect property, the jury should be instructed with instructions based on *State v. Burk*, 114 Wash. 370, 195 P. 16 (1921) and RCW 77.36.030, rather than with the pattern instruction on necessity. See *State v. Vander Houwen*, 163 Wn.2d 25, 177 P.3d 93 (2008) (holding that the constitutional right to protect property requires the State to bear the burden of proof).

Burden of proof. “[T]he defendant must prove by a preponderance of the evidence that (1) he or she reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, and (3) no legal alternative existed.” *State v. Gallegos*, 73 Wn.App. 644, 651, 871 P.2d 621 (1994); *State v. Bailey*, 77 Wn.App. 732, 893 P.2d 681 (1995).

“Reasonable legal alternative.” The instruction’s paragraph (4) uses the term “reasonable legal alternative.” The reasonableness requirement is based on *State v. Jeffrey*, 77 Wn.App. 222, 224–26, 889 P.2d 956 (1995); see also *State v. Parker*, 127 Wn.App. 352, 354–55, 110 P.3d 1152 (2005) (citing *Jeffrey* with approval).

“Equally effective.” For medical necessity cases, the term “equally effective” may need to be added to the instruction’s paragraph (4). See *State v. Pittman*, 88 Wn.App. 188, 943 P.2d 713 (1997) (in cases for which a defense of medical necessity is still available, the defendant will be required to show that there is no equally effective legal drug).
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WESTLAW Washington Criminal Jury Instructions

[Home Table of Contents](#)*WPIC 18.20 Diminished Capacity—Defense*

Washington Practice Series TM
 Washington Pattern Jury Instructions--Criminal
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Washington Practice Series TM
 Washington Pattern Jury Instructions--Criminal
 October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part IV. Defenses
 WPIC CHAPTER 18. Miscellaneous Defenses

WPIC 18.20 Diminished Capacity—Defense

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form(fill in requisite mental state).

NOTE ON USE

Use this instruction when diminished capacity is claimed. Fill in the requisite mental state in the space provided. If there is more than one crime charged or an offense has multiple mens rea, it may be necessary to include more than one mental state.

COMMENT

In general. Diminished capacity may be raised as a defense when either specific intent or knowledge is an element of the crime charged. If specific intent or knowledge is an element, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state. *State v. Thomas*, 123 Wn.App. 771, 779, 98 P.3d 1258 (2004).

The pattern instruction may be submitted to the jury only if the defendant satisfies the following three requirements: (1) the crime charged must include a particular mental state as an element; (2) the defendant must present evidence of a mental disorder; and (3) expert testimony must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime charged. *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001); *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); *State v. Griffin*, 100 Wn.2d 417, 418–19, 670 P.2d 265 (1983); *State v. Guillot*, 106 Wn.App. 355, 363, 22 P.3d 1266 (2001). If evidence on any element is lacking, the instruction should not be given. *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 715 (1995).

In *State v. Griffin*, 100 Wn.2d 417, 670 P.2d 265 (1983), the court held that a generalized instruction on criminal intent may not be sufficient to apprise the jury of a mental disorder that may diminish the defendant's capacity to commit a crime. The court stated that the defendant is entitled to a more specific instruction on diminished capacity whenever there is substantial evidence of such a condition and such evidence logically and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged. But see *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 706, 737 P.2d 670 (1986) (under the facts of the case the trial court did not err in refusing the defendant's requested instruction on diminished capacity); *State v. Cienfuegos*, 144 Wn.2d 222, 229–230, 25 P.3d 1011 (2001) (defense attorney's failure to request a diminished capacity instruction when the evidence supports one is not per se reversible error as the instructions on knowledge and intent will still allow the defendant to argue his theory of the case).

Burden of proof. The "to convict" instruction will clearly provide that the State has the burden of proving beyond a reasonable doubt that defendant acted with the requisite mental state. This is appropriate because diminished capacity negates an element of the crime. *State v. Nuss*, 52 Wn.App. 735, 739, 763 P.2d 1249 (1988). *Nuss* was cited with approval in *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

Comparison with insanity. The opinion in *State v. Gough*, 53 Wn.App. 619, 768 P.2d 1028 (1989), discusses the differences between the defense of diminished capacity and the defense of insanity and holds that the defense of diminished capacity is not a "lesser included defense" encompassed within the defense of insanity.

Post-traumatic stress disorder. If other requirements are met, evidence of post-traumatic stress disorder impairing a defendant's ability to premeditate may support a diminished capacity instruction. *State v. Janes*, 64 Wn.App. 134, 822 P.2d 1238 (1992), remanded on other grounds at 121 Wn.2d 220, 850 P.2d 495 (1993).

Comparison with intoxication. For a discussion of the relationship between diminished capacity and voluntary intoxication instructions, see the Comment to WPIC 18.10 (Voluntary Intoxication).

For a general discussion of the burden of proof on defenses, see WPIC 14.00 (Defenses—Introduction).
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WPIC 4.25 Jury Unanimity—Several Distinct Criminal Acts—Petrich Instruction

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Washington Practice Series TM
Washington Pattern Jury Instructions--Criminal
October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part I. General Instructions
WPIC CHAPTER 4.20. Elements of the Crime—Format

WPIC 4.25 Jury Unanimity—Several Distinct Criminal Acts—Petrich Instruction

The [State] [County] [City] alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime).

NOTE ON USE

Use this instruction, together with the appropriate “to convict” instruction, when the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct. For a detailed discussion of when this instruction is applicable, see the Comment below.

If there is evidence of multiple distinct occurrences of the crime, but the prosecution elects to rely upon a specific occurrence to support a conviction, then this *Petrich* instruction should not be used. Instead, use WPIC 4.26 (Jury Unanimity—Several Distinct Criminal Acts—Election to Specify a Particular Act).

If this pattern instruction applies to more than one count of the charged crime, then the to-convict instructions need to clearly distinguish the acts that the jurors may consider for each count, so that jurors will not use the same act to support two separate counts. See discussion in the Comment.

If the particular crime requires proof of a series of acts, then revise the instruction accordingly.

COMMENT

Petrich instruction. This instruction is based on *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), and its progeny. In *Petrich*, the court held that in cases in which the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt. When the prosecution chooses not to elect, a jury instruction must be given to assure the jury's understanding of the unanimity requirement. *State v. Petrich*, 101 Wn.2d at 572. Failure to follow one of these options is “violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). See also *State v. Hepton*, 113 Wn.App. 673, 684, 54 P.3d 233 (2002); *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990).

The current version of the pattern instruction was approved in *State v. Moultrie*, 143 Wn.App. 387, 392–94, 177 P.3d 776 (2008).

Applying the *Petrich* instruction. The *Petrich* rule applies only to multiple act cases—cases in which several distinct acts are alleged, any one of which could constitute the crime charged. *Petrich* does not apply to “alternative means” cases or cases involving a “continuous act.” *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991) (finding that a *Petrich* instruction was not required because the defendant's conduct constituted a “continuous act”); *State v. Handran*, 113 Wn.2d 11, 775 P.2d 453 (1989); *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When a statute sets forth a single offense that may be committed by alternative means, there must be jury unanimity as to guilt for the single crime charged. However, unanimity is not required as to the means by which the crime was committed, provided there is substantial evidence to support each of the alternative means. *State v. Crane*, 116 Wn.2d 315; *State v. Kitchen*, 116 Wn.2d 315; *Petition of Jeffries*, 110 Wn.2d 326, 752 P.2d 1338 (1988); *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976). Also see the Introduction to WPIC 4.20. To determine whether criminal conduct constitutes one continuing act, “the facts must be evaluated in a commonsense manner.” *State v. Petrich*, 101 Wn.2d at 571. If the evidence involves conduct at different times and places, then the evidence tends to show “several distinct acts.” On the other hand, if the criminal conduct occurred in one

place during a short period of time between the same aggressor and victim, then the evidence tends to show one continuing act. *State v. Handran*, 113 Wn.2d at 17.

In *State v. Hanson*, 59 Wn.App. 651, 800 P.2d 1124 (1990), the court set forth a three prong analysis for determining whether *Petrich* is applicable. The *Hanson* court stated:

To apply *Petrich*, three questions must be asked. First, what must be proven under the applicable statute? With most criminal statutes, this will be a single event, such as a burglary, robbery or assault. With some, though, it will be a continuing course of conduct, such as operating a prostitution enterprise. RCW 9A.88.060(1); *State v. Elliott*, 114 Wn.2d 6, 14, 785 P.2d 440 (1990). When the requirements of a particular statute are disputed, the rules of statutory construction will govern.

Second, what does the evidence disclose? As with all proposed jury instructions, this involves looking at the evidence in the light most favorable to the proponent of the instruction. *Seattle v. Cadigan*, 55 Wn.App. 30, 37, 776 P.2d 727 (1989); *Lundberg v. All-Pure Chemical Co.*, 55 Wn.App. 181, 187, 777 P.2d 15 (1989).

Third, does the evidence disclose more than one violation of the statute? This requires a comparison of what the statute requires with what the evidence proves. If the evidence proves only one violation, then no *Petrich* instruction is required, for a general verdict will necessarily reflect unanimous agreement that the one violation occurred. On the other hand, if the evidence discloses two or more violations, then a *Petrich* instruction will be required, for without it some jurors might convict on the basis of one violation while others convict on the basis of a different violation. In the latter situation, the result is a lack of jury unanimity with respect to the facts necessary to support conviction, and a consequent abridgment of the right to jury trial.

State v. Hanson, 59 Wn.App. at 656–57.

Duty to elect specific acts. The court in *State v. Newman*, 63 Wn.App. 841, 822 P.2d 308 (1992), discussed double jeopardy and sufficiency of the evidence issues that arose from the State's failure to elect specific acts that formed the basis of each count of statutory rape. If the prosecution fails to elect which incident it is relying upon for conviction or the trial court fails to instruct that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to any one of the incidents alleged. *State v. Kitchen*, 110 Wn.2d 403, 409, 411, 756 P.2d 105 (1988); *State v. Hepton*, 113 Wn.App. 673, 684, 54 P.3d 233 (2002).

Continuous course of conduct. In a one count cocaine delivery case, providing a "small sample" at one site followed by delivering a "significantly larger amount" at a different location was held to be part of a "continuing course of conduct" that did not require a unanimity instruction. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 899 P.2d 1294 (1995). Central to the court's analysis was what it termed the "commonsense consideration" that the two acts, though separated in time and place, were intended to bring about a single "ultimate purpose." 78 Wn.App. at 726.

To the same effect is *State v. Love*, 80 Wn.App. 357, 908 P.2d 395 (1996), in which the defendant faced a single count of possession with intent to deliver. He was arrested with five rocks of cocaine on his person and forty more were found in his residence. The court held that a *Petrich* instruction was not required as the evidence established "a continuing course of conduct involving an ongoing enterprise with a single objective." 80 Wn.App. at 363.

In a second degree assault prosecution, repeated assaults on a child, during a three week period, constituted a continuing course of conduct, not requiring juror unanimity on a single criminal act. *State v. Craven*, 69 Wn.App. 581, 849 P.2d 681 (1993).

For other continuous course of conduct cases, see also *State v. Marko*, 107 Wn.App. 215, 27 P.3d 228 (2001) (intimidation of witnesses during a 90-minute period); *State v. Garman*, 100 Wn.App. 307, 984 P.2d 453 (1999) (scheme to steal money from city); *State v. Stockmyer*, 83 Wn.App. 77, 920 P.2d 1201 (1996) (evidence presented of several assaultive acts occurring in small time frame); *State v. Doogan*, 82 Wn.App. 185, 917 P.2d 155 (1996) (profiting from prostitution); *State v. Dyson*, 74 Wn.App. 237, 872 P.2d 1115 (1994) (telephone harassment). But see *State v. Brooks*, 77 Wn.App. 516, 892 P.2d 1099 (1995) (State failed to specify which of two alleged burglaries it was relying on to convict; error not to give unanimity instruction).

Multiple counts. If the instruction is being modified for multiple counts, then the instruction needs to clearly require unanimity for one particular act for each count charged. See *State v. Watkins*, 136 Wn.App. 240, 148 P.3d 1112 (2006).

In *State v. Holland*, 77 Wn.App. 420, 891 P.2d 49 (1995), the defendant was charged with several counts, and the jury was instructed simply that it must agree that defendant had sexual contact with a minor female between certain dates, with subsequent counts "on an occasion other than the one found to support [prior counts]." The court held that it was error to give the instruction without telling the jury that it must unanimously agree as to which act or acts had been proved beyond a reasonable doubt. See also *State v. Hayes*, 81 Wn.App. 425, 914 P.2d 788 (1996) (sexual abuse, also multiple counts in same charging period).

In some instances, the prohibition against double jeopardy may be violated by convicting the defendant of multiple counts on the basis of a single act. When this is true, the jury should be clearly told that each count requires proof of a different act. *State v. Ellis*, 71 Wn.App. 400, 859 P.2d 632 (1993); *State v. Borsheim*, 140 Wn.App. 357, 165 P.3d 417 (2007). For example, in a multi-count case, each count can be drafted based on the following format: "That on or about (beginning date) through (ending date), the defendant had sexual contact with (victim's name), separate and distinct from those acts alleged in Counts II and III."

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