NO. 71720-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY S. SOWERS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When Jeffrey Sowers picked up his fiancée Monica Galarosa's semi-automatic handgun, the couple's dog bit at him, and the gun went off. As a previously convicted felon, Mr. Sowers was not permitted to possess firearms, so while the couple summoned help, they also tried to hide his involvement in the accident.

Although Ms. Galarosa recovered fully and confirmed that Mr. Sowers was a loving, supporting, and positive force in her life, the State charged ahead with the notion that Mr. Sowers harmed her on purpose. The jury convicted him of assault in the third degree and two counts of unlawful possession of a firearm in the first degree.

Mr. Sowers is entitled to a new trial because the court below erred in allowing the State to use as substantive evidence the oral statement police took from Ms. Galarosa without first administering an oath as required under ER 801(d)(2). The conviction for unlawful possession of the handgun cannot stand because the trial court should have permitted Mr. Sowers to argue to the jury that temporary handling of the weapon was necessary to avoid a risk of even greater harm: Ms. Galarosa had recently shown signs of being suicidal, was on methamphetamines at the time, and had pointed the gun at Mr. Sowers while "playing" with the dogs.

Both firearm possession convictions must also be reversed because the jury should have been given a Petrich instruction regarding both weapons, including the unloaded shotgun found in the back of a closet. A resentencing is needed because the trial court refused to treat the two weapon offenses as constituting the same course of criminal conduct.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting Ms. Galarosa's prior statement as substantive evidence under ER 801(d)(1)(i).

2. The trial court erred in refusing Mr. Sowers's s request to instruct the jury on a necessity defense with respect to Count III, the unlawful possession of a firearm (Taurus .45 caliber pistol).

3. The trial court erred in not instructing the jury that it must be unanimous with respect to the act supporting the State's allegation in Count III.

4. The trial court likewise erred in not instructing the jury that it must be unanimous with respect to the act supporting the State's allegation in Count IV, unlawful possession of a firearm (Hawk 12 gauge shotgun).

5. At sentencing, the trial court erred in scoring Counts III and IV separately and not concluding that the two acts of unlawful possession of a firearm constituted the same criminal conduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prior inconsistent statement by a witness cannot be admitted as substantive evidence unless it was given under oath. The police took an oral statement from Ms. Galarosa, but did not administer an oath until she was done speaking. Given this error, should this Court reverse Mr. Sowers's conviction?

2. An accused has the constitutional right to present his defense, which includes the right to have the jury instructed on his theory of the case. Necessity is a common law defense that excuses otherwise criminal conduct when it is necessary to avoid a greater harm and is a defense available to the crime of unlawful possession of a firearm. Where Ms. Galarosa had shown signs of being suicidal, was high on drugs, and pointed the .45 Taurus semi-automatic at her fiancé, did the trial court commit reversible error in refusing to let Mr. Sowers argue to the jury that his temporary handling of the pistol was justified?

3. Any accused person has a constitutional right to a unanimous jury verdict. When the prosecution presents evidence of several acts that could form the basis of the charge, either the State must tell the jury which act to rely upon in its deliberations, or the court must instruct jurors that all of them must agree that the same underlying criminal act has

been proved beyond a reasonable doubt. Here, the jury heard evidence that Mr. Sowers may have been in actual possession of the pistol and shotgun at different times, in different places, including on days other than that of the accident. Did the trial court commit reversible error in not giving a unanimity instruction?

4. Multiple crimes encompass the "same criminal conduct" if they result from the same criminal intent, involve the same victim, and occur at the same time and place. The evidence that the two firearms were typically kept in the same place was so clear that the prosecutor argued in closing: "[e]verything associated with both weapons was in his side of the closet… [a]mmunition for both weapons, that carry case for the pistol… [t]he shotgun." 4RP 24. At sentencing, did the trial court err in refusing to treat the two unlawful possession of a firearm convictions as a single point in the calculation of Mr. Sowers's offender score?

D. STATEMENT OF THE CASE

On March 2, 2013, multiple Snohomish County Sheriff Deputies were dispatched to an Everett home because of a reported shooting, either a suicide attempt or accident "due to the gun possibly falling." 1RP 77, 97. Upstairs, the officers found a man, Jeffrey Sowers, kneeling and giving aid to a woman, Monica Galarosa. 1RP 81-83, 99, 106. A semi-automatic

handgun lay on the floor nearby. 1RP 82-83, 102. Ms. Galarosa was wounded in her back. 1RP 84. The police handcuffed Mr. Sowers and took him downstairs. 1RP 102. The already hectic scene was made even more chaotic by a barking dog. 1RP 126.

At trial, Ms. Galarosa testified that Mr. Sowers is her fiancé and that they have been in a happy dating relationship for several years. 2RP 4. She testified she owned a handgun and a shotgun. 2RP 6-7. She owned the firearms for personal protection and Mr. Sowers did not play a role in her getting the guns. 2RP 8. She testified she carried the handgun on her person and that the ammunition was in her car and closet. 2RP 9. She testified Mr. Sowers had told her "to get rid of them." 2RP 26, 33-34.

Ms. Galarosa testified that she was under the influence of methamphetamine on the afternoon of the accident. 2RP 14-15, 31-32. ("I was paranoid… I was out of my mind. I was whacked out. There was all kinds of things going on in my head." 2RP 17.) The couple had two dogs that needed to be walked, but in her state, she was unable to take them out. 2RP 6, 20. At some point that night, she took the handgun downstairs where Mr. Sowers was, and she used the gun's laser sight to amuse the dogs. 2RP 38. Mr. Sowers told her to put the gun down and she "tossed it down like an idiot," onto a table. 2RP 41, 54.

Mr. Sowers stayed downstairs. 2RP 25. She went back upstairs and "heard a big bang." 2RP 56. She had been shot. 2RP 40-41. In shock, she screamed Mr. Sowers's name and he came to help: "he was there… he put pressure on my back." 2RP 21. She went to the hospital. 2RP 23-24.[1]

Several days later, the police visited Ms. Galarosa at the hospital. She did not remember giving a recorded statement: "No, I don't. I would like to hear it." 2RP 24, 47-48. At the hospital, Ms. Galarosa was on narcotic pain medication that made her "very forgetful, foggy." 2RP 45-46. Another drug "made [her] feel very dark and suicidal." 2RP 46. She testified that she was affected by these medicines when the police interviewed her. 2RP 48.[2]

At trial, Detective Betts also testified about the hospital interview: "she was in a wheelchair, and we sat in front of her." 2RP 78. He said that Ms. Galarosa told him that she had shot herself and the jury was instructed that this information was presented "only for the purpose of

[1] Part of her testimony was inconsistent with the 911 recording which apparently included her saying "I shot myself," but Ms. Galarosa did not remember telling the 911 operator or the detectives that is what happened. 2RP 57, 64-65.

[2] A Harborview physician testified that the combination of the drugs that Ms. Galarosa had been given could affect someone's cognitive abilities. 3RP 14. The interviewing officers apparently were unaware that Ms. Galarosa had taken medications or that she specifically took narcotics. 3RP 23; 3RP 102-05. Detective Betts said she was "coherent and engaging" when interviewed, but had been "drowsy and drifting in and out" few days earlier. 3RP 114-15.

impeachment." 2RP 79. Detective Betts said he and his partner did not believe Ms. Galarosa and told her they "weren't going [to] entertain any lies." 2RP 79, 81. Ms. Galarosa agreed to give a recorded statement. 2RP 81. Over defense objection, the trial court allowed the State to admit the recording into evidence as Exhibit 56[3] without any limit on how the jury could use it. 2RP 82-83.

The interview starts off with the police asking Ms. Galarosa to to consent to being recorded. She tells the police she is in a relationship with Mr. Sowers and that she has been battling addiction for twenty years. She tells the police she was high on the day of the accident. She said she "played" with the gun in the living room and then went upstairs. She said that she did not immediately realize she was shot.

At the very end of the recorded statement, Detective Betts says:

> I'm going to end the statement now. Do you certify or declare under penalty of perjury under the laws of State of Washington that the facts stated on this tape are true and correct to the best of your knowledge and that this statement has been made freely voluntarily and without threats or promises of any kind? Would you like me to repeat that?

[3] The record refers to a transcript, but does not contain one. As such, what follows is undersigned counsel's best effort to transcribe the audio.

Ms. Galarosa answers: "I don't understand what that's saying." Detective Betts repeats the warning and she says "yeah, yeah… um, I understand that." Detective Betts ends the recording.

The physical evidence contradicted the idea that Ms. Galarosa shot herself. The police recovered a single shell casing in the downstairs living room. 2RP 99-100. The casing matched the semi-automatic handgun found upstairs. 3RP 53-54. The handgun functioned as designed and it had a working laser sight. 3RP 35, 38, 93-94. Other physical evidence showed that the gun was fired downstairs and the bullet upstairs before wounding Ms. Galarosa. 2RP 105-06; 121-26; 4RP 37-38. A State's witness opined that there was not a line of sight between where the shot was fired and where Ms. Galarosa was hit. 4RP 44-45; 53-54.

In an upstairs closet the police found a soft firearm case "sandwiched between the wall and the dresser itself," and in it, an unloaded shotgun. 2RP 114, 116. In the same space, the police found "a military surplus ammunition can… a pistol storage box… and [] cleaning gear for firearms." 2RP 114-15, 117-18. The ammunition box contained ammunition for both the 12-gauge shotgun and for the semi-automatic

handgun. 2RP 119.[4] Also inside the closet the police collected what they described as "occupancy letters for Mr. Sowers's residence." 2RP 120; Ex. 40-52 (photographs of the closet).

When Ms. Galarosa was shot, police detectives interviewed Mr. Sowers. Deputy Serrao said that Mr. Sowers said he "heard" the shot. 1RP 113. Mr. Sowers's tape-recorded statement to the detectives was admitted and played for the jury. 3RP 85; Exhibit 54.[5] There, Mr. Sowers again said that Ms. Galarosa was doing "oddball things" when he "heard the gunshot" from downstairs. (Exhibit 54 at 8:45).

Mr. Sowers said that Ms. Galarosa, an exotic dancer, had never had a gun before and recently got one for protection. Mr. Sowers said the gun had been in the house about two weeks and that he had cleaned it with supplies kept in the closet. He had also shown her how to use it. (Id. at 13:50.) Mr. Sowers said when Ms. Galarosa left the gun out, he moved it onto shelves in the closet because he did not want it lying around.

[4] State presented evidence that Mr. Sowers's DNA was on the shotgun. 3RP 69-74. However, he could not be either included or excluded as a contributor to the mixture of DNA found on the handgun. 3RP 75-76.

[5] The record also does not contain a transcript of this interview. What follows is undersigned counsel's best effort to transcribe the audio.

He told the police he did not know where the gun had been that day and had no idea how she was shot. He said the two of them were home alone with their dogs and there had been no issues. (Id. at 18:30.)

The interrogating detective challenged Mr. Sowers by claiming that "something happened" but "not the way you explained it." (Id. at 21:10.) The detective asserted: "you got angry; she got angry; tempers flared." (Id. at 22:00.) Mr. Sowers asked: "so what's the charge?" (Id. at 25:00.) The police pressed: "it's killing you… you know what the truth is and it isn't what you told me… you have a sense of honor… I know you're dying on the inside… now is the time for us to get this out in the open." Mr. Sowers demurred: "it's not like this is a therapy session, I'm not walking out of this car on my own" and left his statement unchanged.

Ms. Galarosa also gave testimony as a defense witness. 4RP 76. She confirmed she had not been given a transcript of the tape-recorded statement or an opportunity to hear it prior to trial. 4RP 78-79. She said there were inaccuracies and falsehoods in that statement. 4RP 79. She said that she was under the effect of pain medicine when the police interviewed her. 4RP 79-80.

Ms. Galarosa testified she was playing with the dogs, using the gun's laser, "like an idiot." 4RP 96-97, 104. She indicated that she pointed

the laser and gun at Mr. Sowers. 4RP 98. After her own court-appointed attorney interjected, Ms. Galarosa explained that she was "playing" when this happened. 4RP 99. She said Mr. Sowers asked her to put the gun down. 4RP 99. She said that Mr. Sowers is "not an aggressive, yelling type of person." 4RP 100. She said that a week earlier, she had been in the bathtub pointing the shotgun to her own head while high. 4RP 101. Ms. Galarosa explained that she relapsed into drug use after she miscarried. 4RP 102.

Finally, Mr. Sowers testified in his own defense and also related he had seen Ms. Galarosa's shotgun in the bathroom when she had been suicidal. 4RP 106, 114. He agreed that he cannot possess or own firearms and had her agree to remove them. 4RP 106. He said that he cleaned the shotgun so that Ms. Galarosa would return it to her daughter, and stuck it in the back of the closet. 4RP 107; 142-144.

He testified that Ms. Galarosa got a handgun for self-protection and kept it in her car. 4RP 114-15. He saw it again when she brought it into the house on the day she was shot. 4RP 115, 117-19. He did not know where she kept it all of the time, but the handgun box was in the closet. 4RP 127, 128.

Mr. Sowers testified that Ms. Galarosa put the pistol down on the table after he told her to but the laser light stayed on. 4RP 119. The couple's dog was "[n]ipping or trying to bite the light at the end of the laser, on the end of the gun," so Mr. Sowers picked up the gun and tried to turn the light off. 4RP 119-20. The dog jumped and clamped down on his hand; he "jerked and squeezed and a round went off." 4RP 120; 140-42.

Mr. Sowers testified that he wanted to put the gun away to eliminate the potential for Ms. Galarosa making another suicide attempt. 4RP 120. He admitted that he lied to Detective Betts in his statement. 4RP 122. Mr. Sowers did not think he stood a chance telling the truth to the police and he wanted to tell the truth to the jury instead. 4RP 124-25.

Defense requested that the jury be instructed on the defense of necessity, but that request was denied. 4RP 163-64. The jury acquitted Mr. Sowers of the charge of assault in the second degree, but convicted him of assault in the third degree, including a firearm enhancement. CP 81-82, 84. The jury also convicted him of two counts of unlawful possession of a firearm in the first degree. CP 78-79. (The parties stipulated as true that Mr. Sowers had been convicted of a serious offense. 4RP 55.)

At sentencing, Ms. Galarosa thanked the officers who came to her aid. 2/26/14RP 12, 16. She talked about the love and support that Mr.

Sowers has given her over the years, his strong work ethic, and their joint volunteer work. 2/26/14 RP 13-15. Her family was there with her, because they know that she and Mr. Sowers "are good for each other." 2/26/14RP 16. Mr. Sowers likewise expressed his love for Ms. Galarosa and his commitment to supporting her sobriety. 2/26/14RP 17-18.

The trial judge recognized that Mr. Sowers had succeeded in putting drug and alcohol use behind him and that he is a trusted and valued hard worker. 2/26/14RP 18-19. The trial judge also recognized that the sentencing impact of the assault charge "is far less than the range for simple possession of those firearms" and that running the firearm sentencing enhancement consecutive to the time that Mr. Sowers would have to serve for the substantive crime of unlawful possession of a firearm "creates an anomaly, and it's a bit troubling." 2/26/14RP 20. The trial judge rejected Mr. Sowers's argument that the unlawful possession of the shotgun and the unlawful possession of the semi-automatic handgun he was convicted of by the jury constituted the same course of criminal conduct. 2/2614RP 20-21 ("when you're in possession of separate weapons at separate locations within the home, that does not constitute the same criminal conduct"). Mr. Sowers timely appealed. CP 2-3.

E. ARGUMENT

1. The trial court erred in allowing the State to use as substantive evidence the oral statement police took from the complainant without first administering an oath as required under ER 801(d)(2).

a. In order for a statement to be admitted as substantive evidence under ER 801(d)(1)(i), the State must show it was given under oath.

The rule against hearsay generally requires exclusion of out-of-court statements that are offered in court for the truth of the matter asserted, ER 801(a)-(c); ER 802. A witness's prior inconsistent statement is not hearsay and may be admitted as substantive evidence if the declarant testified at trial, was subject to cross-examination, and the declarant gave the statement under oath subject to penalty of perjury "at a trial, hearing, or other proceeding, or in a deposition." ER 801(d)(1)(i); State v. Nieto, 119 Wn. App. 157, 161, 79 P.3d 473 (2003); State v. McComas, 186 Wn. App. 307, 312, 345 P.3d 36 (2015).

Pretrial, defense objected to the admission of Ms. Galarosa's audio-recorded statement to the police as substantive evidence under ER 801(d)(1), but acknowledged that any inconsistencies between the witness's in-court testimony and that statement could be admissible as impeachment, subject to a limiting instruction. 1RP 20-22. The trial court

overruled the objection. 2RP 67-70, 71, 82.[6] The trial court also refused to redact any part of the statement: "I will allow the statement in its entirety." 2RP 70-71.

A trial court's decision to admit evidence is reviewed for abuse of discretion. Nieto, 119 Wn. App. at 160. A trial court abuses its discretion when it conducts an incomplete legal analysis or bases its ruling on a misapprehension of legal issues. Id. The court is "obligated to construe ER 801(d)(1)(i) according to its plain meaning, and to give effect to all of its language." State v. Sua, 115 Wn. App. 29, 48, 60 P.3d 1234 (2003). When a statement is not given under oath, it is not admissible as substantive evidence under ER 801(d)(1)(i). Id. at 49; McComas, 186 Wn. App. at 319.

In Sua, the alleged victim told detectives her mother's boyfriend had touched her and the mother told detectives that the boyfriend expressed an interest in bearing a child with the alleged victim. 115 Wn. App. at 32. Each provided a written statement and signed under a paragraph that said: "The above is a true and correct statement to the best of my knowledge. No threats or promises have been made to me nor any duress used against me." Id. at 33. At trial, both the alleged victim and her

[6] Even the State would later acknowledge that Ms. Galarosa's in-court testimony was less inconsistent with the statement than expected. 2RP 69.

mother recanted. Id. at 33-34. The State initially sought to admit the prior statements as impeachment evidence, but after the defense moved to dismiss the case for insufficient evidence, the court admitted the statements as substantive evidence under ER 801(d)(1)(i). Id. at 34-36.

This Court reversed, finding that it could not "just ignore ER 801(d)(1)(i)'s requirement that the out-of-court statement of an in-court witness be 'given under oath subject to the penalty of perjury.'" Id. at 48. It distinguished the circumstances in Sua to those in Smith and Nelson, finding that in Smith, the victim took an oath from a notary public, and in Nelson, the statement was notarized and met the requirements of RCW 9A.72.085, which sets forth when an unsworn form may be treated as a sworn statement. Id.; State v. Smith, 97 Wn.2d 856, 858, 651 P.2d 207 (1982); State v. Nelson, 74 Wn. App. 380, 389, 874 P.2d 170 (1994). In Sua, the witness never went before a notary public and there was no evidence the statement had been "given under oath and subject to [the] penalty [of] perjury." 115 Wn. App. at 47 (internal quotations omitted).

This Court similarly reversed in Nieto, finding a prior statement inadmissible under ER 801(d)(1)(i) because the "boilerplate language" used on the witness's written statement was ambiguous. 119 Wn. App. at 162. The Court wrote:

> Unlike the police interviews in State v. Smith and State v. Nelson, no notary was present here, nor were any other formal procedures involved. [The witness] testified that she did not read the "penalty of perjury" language, and she said the language had no meaning to her.

Id. at 163.

McComas is consistent with Nieto and presents a factual scenario indistinguishable from what happened when the police took Ms. Galarosa's statement. In McComas, the police also tape-recorded statement from a woman who reported being harmed by her husband. McComas, 186 Wn. App. at 309. The police had the woman declare, "[a]t the end of her statement… under penalty of perjury, that 'the foregoing is true and correct.'" Id. But at trial, the woman recanted the accusation she made against her husband on tape. Id. at 310.

On appeal, relying on State v. Johnson, 40 Wn. App. 371, 378, 699 P.2d 221 (1985), a case which held that statements to police that were oral or unsigned were inadmissible under ER 801(d)(1)), this Court agreed with McComas that the admission of his wife's statement as substantive evidence was error: "her statement did not qualify as a sworn statement... she did not review, sign, and date the transcription… [the] prior statement did not satisfy the oath requirement in ER 801(d)(1)(i) or meet the minimal guarantees of truthfulness." McComas, 186 Wn. App. at 319.

b. Like the statement in McComas, Monica Galarosa's Statement was not given under oath and should not have been admitted.

Here, Ms. Galarosa also gave a recorded oral statement without a properly administered oath. She was not asked to declare her answers *would be* true and correct under penalty of perjury *before* she made them. Instead, after the fact, she was asked if her answers *had been* true and correct under penalty of perjury. McComas dictates that what occurred was insufficient under ER 801(d)(1)(i).

Unlike in Smith and Nelson, which involved written statements, Ms. Galorosa was never given the opportunity to review her statement prior to acknowledging its alleged truthfulness. 4RP 78-79; Smith, 97 Wn.2d at 858; Nelson, 74 Wn. App. at 383. Instead, having only given an oral statement, she was asked if she had just told the truth.[7] Notably, at trial, Detective Betts acknowledged that when he takes a *written* statement, a witness is given the opportunity to read it and change it before signing a declaration that what is written is true. 3RP 106. Detective Betts did not give that opportunity to Ms. Galarosa, did not

[7] Ms. Galarosa was hesitant when the "penalty of perjury" language was read to her at the tail end of the statement. Exhibit 56. At trial, she confirmed that the statement contains inaccuracies. 4RP 79-80.

play the taped statement back to her, and never gave her a copy of a transcript. 3RP 107; 4RP 153.

In McComas, this Court squarely held that this type of procedure is insufficient to satisfy ER 801(1)(d). Because the evidence shows that a proper oath was not administered, the trial court erred in admitting the statement as substantive evidence under ER 801(1)(d)(i).

c. The ensuing prejudice calls for reversal of all three convictions.

The wholesale admission of Ms. Galarosa's statement prejudiced Mr. Sowers. For one thing, it diminished what Ms. Galarosa had to say about the incident in open court, to the jury, and with a properly administered oath. Unlike the initial claim that Ms. Galarosa made about having shot herself – which was admitted only for impeachment – the entirety of the recorded statement came in against Mr. Sowers as substantive evidence.[8]

Indeed, the tape-recording painted Mr. Sowers as a violent man. A little over nine minutes into the interview, Ms. Galarosa says:

[8] Even when a witness is being impeached with an inconsistent statement, "[s]tatements that are not contradictory, as well as statements that tend to impeach on collateral issues, should be edited out." State v. Stepp, 18 Wn. App. 304, 311, 569 P.2d 1169 (1977). And, it is error to admit a wholesale witness statement "to introduce evidence under the guise of impeachment of the collateral matter of reputation." Id. Defense counsel tried to limit the damage but the trial court refused to redact the statement in any way whatsoever. 2RP 70-71 ("I will allow the statement in its entirety.").

> And he's done this, um, for we're out in the woods and he'd shoot up in the air… you know, so I don't, I think when that shot was fired, it was to kind of wake alert me, wake me up, or put a little not a scare…

The detective fills in: "[S]end a message to you?" and prods Ms. Galarosa to go along with the idea that while some people express their anger by slamming a fist on a table, clapping their hands, or shouting, Mr. Sowers is the type of man who, when angry, fires off a gun:

> Q: Are you saying that's what he does with that gun?...
> A: Um…
> Q: Sounds like what you're describing to me.
> A: Yeah
> Q: Is that accurate?
> A: Yeah.

In the same vein, toward the end of the interview, Ms. Galarosa tells the officer that Mr. Sowers "has improved his ways from where he used to be… on the streets homeless shooting up heroin, being just chaotically doing crimes and stealing cars."

Admittedly, Mr. Sowers himself told the jury that sobriety is important to him, because there was a time in his life when he was using drugs. 4RP 108. It is also true that the parties stipulated that he had previously been convicted of a serious offense. 4RP 55. Still, Ms. Galarosa's interview went further and into more detail than should have ever been revealed to the jury. The detective's speculative claim that Mr.

Sowers shoots guns to send a message was simply presented to the jury as true. Similarly, the colorful description of Mr. Sowers as a man "just chaotically doing crimes" paints a far more damaging picture than the sanitized stipulation the parties agreed on.

Last, some of the statement went directly to the contested factual question of who owned the handgun. At trial, Ms. Galarosa testified that Mr. Sowers was not involved in obtaining the pistol for he and that she controls it. 2RP 8-9. On the other hand, in the statement, she is recorded as saying "[h]e personally got that gun for me" and referred to it as a joint possession: "we just kind of keep it in the box, we don't have the laser on it, we only use it to play with the dog." Ex. 56.

Just because a witness has given a tape-recorded statement, does not mean it is admissible and it certainly does not mean that it is admissible in full. McComas 186 Wn. App. at 319; Johnson 40 Wn. App. at 378. As defense counsel argued, the most that the State should have been able to do with the recording was to use it for impeachment, subject to a limiting instruction. 2RP 69. But, impeachment evidence cannot be used as substantive proof of guilt. State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005).

The wholesale admission of Ms. Galarosa's statement impermissibly bolstered the State's case and also impugned Mr. Sowers's character, which should have never been at issue in the first place. The trial court's decision must be reversed, and each of Mr. Sowers's three convictions must be vacated.

2. The trial court's refusal to give Mr. Sowers's proposed necessity defense instruction violated his constitutional right to present his defense.

a. The accused is entitled to have the jury instructed on his theory of the case.

The federal and state constitutions provide the accused the right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). "Whether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes, 547 U.S. at 324 (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)).

In order to honor this constitutional right, the defendant is entitled to have the jury instructed on his theory of the case, and the trial court's failure to do so is reversible error. State v. Williams, 132 Wn.2d 248, 259-

60, 937 P.2d 1062 (1997). If supported by evidence, a proposed instruction should be given if it properly states the law, is not misleading, and allows the party to argue his theory of the case. Redmond, 150 Wn.2d at 493.

"[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). When a defendant raises an affirmative defense, such as necessity, he is entitled to have the jury instructed as to the defense if he produces sufficient admissible evidence to support the instruction. State v. Ginn, 128 Wn. App. 872, 878-79, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006). This Court reviews a trial court's decision not to give a defendant's proposed instruction de novo if the refusal is based on a ruling of law, but reviews for an abuse of discretion if the decision is based upon factual reasons. State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007).

Necessity is a common law defense that excuses otherwise criminal conduct when it is necessary to avoid a greater harm. Jeffrey, 77 Wn. App. at 224; Shaun P. Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. 1527 (2005).

> The necessity defense essentially permits an accused to admit the elements of an offense but avoid punishment if

> her illegal acts were designed to obtain a greater good. A driver may exceed the speed limit to rush an injured person to the hospital. An onlooker is permitted to destroy a home to prevent a fire from spreading. A prisoner may leave a burning jail. A captain may enter an embargoed port in a storm.

Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. at 1727-28. The necessity defense is a long-standing component of the Anglo-American criminal law that has been adopted in every American jurisdiction. Id. at 1532-33, 1535-36; Laura Schulkind, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L.Rev. 79, 83 (1989).

Necessity is an available defense to the crime of unlawful possession of a weapon. State v. Stockton, 91 Wn. App. 35, 43-44, 955 P.2d 805 (1998); State v. Jeffrey, 77 Wn. App. 222, 225-26, 889 P.2d 956 (2011). This defense applies when the defendant acts in defense of another as well as when he acts in self-defense. United States v. Newcomb, 6 F.3d 1129, 1135-36 (6th Cir. 1993); United States v. Paolello, 951 F.2d 537, 542 (3rd Cir. 1991) (defendant knocked gun out of man's hand to prevent him from attacking another and retained gun to prevent being shot himself).

b. The trial court erred in refusing to allow Mr. Sowers to argue that he picked up the handgun out of necessity to protect himself and his suicidal fiancée.

Mr. Sowers asked that the jury be instructed on the defense of necessity to the crime of unlawful possession of a firearm in the first degree. 4RP 159, 162, 165. The trial court denied the request, agreeing with the State's suggestion that there were reasonable alternatives available to Mr. Sowers, other than picking up the gun. 4RP 163-64. This weighing of the viability of the defense was error.

In evaluating whether the evidence is sufficient to support a jury instruction, the court must "interpret the evidence most strongly in favor of the defendant" as it is the job of the jury, not the court, to weigh the evidence and evaluate witness credibility. State v. Ginn, at 879. In other words, the defendant is to be given the benefit of the doubt with respect to the initial instruction. In the end, the jury may reject this affirmative defense, but the trial court must allow the defendant to have a fighting chance to argue his theory of the case.

While the record does not appear to contain a specific written proposed defense instruction, the parties all understood what law would be explained in a necessity instruction. The pattern instruction on necessity, WPIC 18.02, reads:

> Necessity is a defense to the charge of (fill in appropriate offense) if
>
> (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
>
> (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and
>
> (3) the threatened harm was not brought about by the defendant; and
>
> (4) no reasonable legal alternative existed.
>
> This defense must be established 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].

11A Washington Practice: Washington Pattern Jury Instructions Criminal, 18.02 (3rd ed.) (WPIC).

The "reasonable legal alternative" requirement is based upon Jeffrey, 77 Wn. App. at 224-26. WPIC 18.02, Note on Use. There, the defendant proposed the following instruction:

> It is a defense to the charge of unlawful possession of a short firearm or pistol that the unlawful possession was necessary under the circumstances.
>
> Unlawful possession of a short firearm or pistol is necessary when all of the following elements are present:
>
> 1. The Defendant reasonably believed he or another was under unlawful and present threat of death or serious bodily injury; and

> 2. The Defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; and
>
> 3. The defendant had no reasonable alternative; and
>
> 4. There was a direct causal relationship between the criminal action and avoidance of the threatened harm.
>
> This defense must be established 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.

Jeffrey, 77 Wn. App. at 224.

The instruction was based upon United States v. Lemmon, 824 F.2d 763 (9th Cir. 1987). The test is now utilized in some form in all federal circuits that have addressed whether the defense of "justification" is available for a possession of a firearm offense. United States v. Alston, 526 F.3d 91, 94 n.4, 95 (3rd Cir. 2008) (and cases cited therein); United States v. Gomez, 92 F.3d 770, 774-75 (9th Cir. 1996); see United States v. Panter, 688 F.2d 268, 271 (5th Cir. 1982) ("We do not believe Congress intended to make ex-felons helpless targets for assassins.").

Here, suggesting that Mr. Sowers should have been calling "a neighbor, 911, or any first responder," the trial court refused to give a

necessity instruction. 4RP 163-64. But, unlike the defendant in Jeffrey, Mr. Sowers was in immediate danger.

In Jeffrey, the defendant's wife saw someone outside their window in the evening, and the couple called the police who searched the surrounding area. Jeffrey, 77 Wn.App. at 223. Jeffrey called a friend who stayed at their home for an hour and then left a handgun under the Jeffrey's couch. Id. Unlike what Mr. Sowers experienced, there was no ongoing emergency, and no present threat.

When Jeffrey heard noises and saw a silhouette outside the bedroom window, he retrieved his friend's gun, fired a shot, and directed his wife to call the police. Id. When the police arrived, Jeffrey was still holding the gun and was charged with unlawful possession of a firearm. Id. The Jeffrey Court found a necessity instruction was not appropriate because Mr. and Mrs. Jeffrey were not in danger that could not be addressed by calling the police for help. Id. at 227. But, in so ruling, the court made it clear that a felon is not required to forgo the use of a weapon if he is threatened with immediate danger.

> We agree it is clear that handgun legislation in Washington is designed to prohibit and punish potentially dangerous felons from possessing handguns. **However, the statute does not address the unforeseen and sudden situation when an individual is threatened with impending danger.** Certainly, the Legislature did not intend for a

> person threatened with immediate harm to succumb to an attacker rather than act in self-defense.

Id. at 226. (emphasis added).

Here, the necessity instruction should have been given. Not long before this tragic event, Ms. Galarosa resumed using drugs because she was despondent that she had miscarried. 4RP 102. Just two weeks earlier she put a shotgun to her head while in the bathroom and Mr. Sowers knew of this suicidal behavior. 4RP 101, 106, 114. Mr. Sowers had asked her to get rid of the guns. 2RP 26, 33-34.

While Jeffrey was not permitted to assert a necessity defense because he was scared of a shadow, Mr. Sowers faced a real gun held by an unstable Ms. Galarosa. 2RP 17 ("I was out of my mind."). She waved it around, apparently for the dogs' benefit. 2RP 38, 4RP 96-97. She pointed the loaded handgun right at Mr. Sowers. 4RP 98-99. He told her to put it down. 2RP 41; 4RP 99. "Like an idiot," she tossed it on top of a table and walked up the stairs. 2RP 54. Unlike Jeffrey, Mr. Sowers did not have constructive possession of the weapon before he picked it up; it had been in Ms. Galarosa's hands. Jeffrey, 77 Wn. App. at 227.

When Mr. Sowers picked up the handgun, he did so to deal with the danger posed to himself by Ms. Galarosa and with the danger she posed to herself. 4RP 120. The argument that he should have picked up the

telephone instead and asked for someone to come over to retrieve the loaded gun his unstable and intoxicated fiancée just pointed at him is something the State should have been asking the jury to decide. It is tragic that Mr. Sowers's attempt had the opposite effect from what he intended, but the trial court should have granted the necessity defense instruction nonetheless.

What occurred was similar to United States v. Newcomb, where the defendant's convictions for possession of an unregistered firearm and being a felon in possession of ammunition were reversed because the federal district court did not instruct the jury it could find the possession was justified. Newcomb was watching television in his girlfriend's home when she informed him her son, Louis, had grabbed a gun and was threatening to kill someone. Newcomb, 6 F.3d at 1131. Because Louis had harmed others in the past, Newcomb, his girlfriend, and Louis's brother were all afraid Louis would actually harm someone. Id. They went looking for Louis, found him in a nearby alley, and Newcomb unloaded Louis's weapon and put it in an abandoned couch. Id.

On appeal, the Sixth Circuit found the trial decision not to instruct on the justification, or necessity, defense to be reversible error. Id. at 1139.

Newcomb was entitled to the instruction even though he literally went to the danger – the gun-toting Louis – rather than call 911.

Under Newcomb and Paolello, Mr. Sowers would have been able to grab the gun out of Ms. Galarosa's hands when she pointed it at him. The fact that he asked her to set the weapon down and waited to touch it until she had moved away does not make his actions any less reasonable or necessary. The loaded gun presented an immediate threat. Despite his prior felony conviction, Mr. Sowers should have been allowed to argue that he had to pick it up and remove it from the vicinity to protect himself from Ms. Galarosa, to protect her from herself, and to protect both of them from the riled-up dog.

c. Mr. Sowers's conviction for unlawful possession of a firearm in the first degree in Count III must be reversed.

In Count III, Mr. Sowers was charged with unlawful possession of a firearm in the first degree, RCW 9.41.040(1). CP 168. The elements of the crime are that (1) the defendant knowingly had a firearm in his possession or control, (2) in the State of Washington, and (3) the defendant had a prior felony conviction. RCW 9.41.040(1); State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000); CP 104 (Instruction 16).

By failing to instruct the jury on necessity, the trial court prohibited Mr. Sowers from presenting his one defense to the charge of unlawful possession of a firearm in Count III. The denial of a defendant's opportunity to present his defense is a constitutional issue, and the constitutional harmless error standard applies. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). Constitutional error is presumed prejudicial, and this Court must reverse unless the State demonstrates the error is harmless beyond a reasonable doubt. Id; Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1976).

Here, the State cannot show this was a harmless error. In fact, even the prosecuting attorney acknowledged that the reasonableness of Mr. Sowers's decision to pick up the handgun mattered to the jury's analysis of Mr. Sowers's intent. In closing argument, the State argued: "He makes some statement about what was he supposed to do when the gun was dropped on the ground? Well, how about calling 911 at that point or leaving the residence or calling a friend. He had a lot of options other than deciding to pick it up." 5RP 44-45.

The State's dominant theory in this prosecution was that Mr. Sowers was guilty because he handled (or rather mishandled) the semi-automatic pistol. In contrast, the evidence with respect to the constructive

possession theory for the pistol was weaker. (See e.g. testimony of Ms. Galarosa indicating that she kept the handgun on her person or in her car. 2RP 89.).

This Court cannot be convinced beyond a reasonable doubt that the verdict on Count III would have been the same with the appropriate defense instruction. Accordingly, that conviction for unlawful possession of a firearm must be reversed and remanded for a new trial. State v. Vander Houwen, 163 Wn.2d 25, 40, 177 P.3d 93 (2008) (reversing conviction because trial court did not give correct instruction concerning defendant's right to kill protected game when necessary to protect his property even though jury instructed on necessity); Redmond, 150 Wn.2d at 495 (reversing conviction due to failure to provide no duty to retreat instruction).

3. Ms. Sowers constitutional right to jury unanimity was violated because the jury was not instructed it must agree on the particular act that violated the prohibition against unlawful possession of a firearm.

a. In Washington, a criminal defendant has a constitutional right to a unanimous jury verdict as to the particular criminal act committed.

In Washington, a defendant may be convicted only when a unanimous jury concludes that 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 the charge, either the State must tell the jury which act to rely upon in its deliberations, or the court must instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). 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." Kitchen, 110 Wn.2d at 409; Const. art. I, § 22; U.S. Const. amend VI. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411.

The Petrich rule applies in cases where the State presents evidence of "several distinct acts" and does not apply where the evidence indicates a "continuing course of conduct." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Id. For example, "where the evidence involves conduct at different times and places, then the evidence tends to show 'several distinct acts.'" Id.

The appellate courts construe the temporal limit to the continuing course of conduct exception narrowly. State v. Locke, 175 Wn. App. 779, 803, 307 P.3d 771 (2013) review denied, 179 Wn. 2d 1021, 336 P.3d 1165 (2014) (three threats sent "within the short span of four minutes"); State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) (assault against a child lasting two-hours); State v. Marko, 107 Wn. App. 215, 221, 27 P.3d 228 (2001) (defendant's statements made over a period of 90 minutes to two people constituted a continuous course of conduct for the crime of intimidating a witness).

When a unanimity instruction is required but the trial court failed to provide it, the jury verdict will be affirmed only if the error was "'harmless beyond a reasonable doubt.'" Kitchen, 110 Wn.2d at 409 (quoting Chapman v. California, 386 U.S. at 24). The error is presumed prejudicial and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each alleged act established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. If there was conflicting testimony as to any of the alleged acts, or a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred, the conviction must be reversed. Id. at 412. Failure to provide a unanimity instruction when required is a manifest

constitutional error that may be raised for the first time on appeal. State v. Moultrie, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3).

b. Constitutional error occurred because the jury was not instructed it must be unanimous as to the particular acts Mr. Sowers committed that constituted the two alleged counts of unlawful possession of a firearm in the first degree.

Mr. Sowers had a constitutional right to a unanimous jury verdict as to which of his actions violated the prohibition on him possessing a firearm. The issue is made somewhat complicated by virtue of the fact that the State brought two separate unlawful possession of a firearm counts. In Count III, the State was required to prove beyond a reasonable doubt that Mr. Sowers unlawfully possessed the "Taurus .45 caliber pistol." CP 104; Instruction 16. In Count IV, the State was required to prove beyond a reasonable doubt that Mr. Sowers unlawfully possessed the "Hawk 12 Gauge shotgun." CP 105; Instruction 17. For both counts, the jury was instructed on both actual and constructive possession. CP 106; Instruction 18.

However, the jury was not instructed it must be unanimous as to which of Mr. Sowers's alleged acts was a crime. The State did not elect the specific acts it was relying upon to prove either offense. To the

contrary, in closing argument, the State argued that separate and distinct acts, occurring at different times, and places, constituted the same crime.

The prosecutor argued that Mr. Sowers was guilty of Count III because he touched the pistol on the charged offense date: "When he picked up the gun, the Taurus gun, he is in possession of it." 4RP 24. The prosecutor also argued that the "DNA on the shotgun tells us he was in actual possession of that weapon as well," without specifying when that may have occurred. 4RP 24, 46.

The prosecutor also advanced the theory that Mr. Sowers was guilty of the two gun offenses because:

> he was in constructive possession of both weapons. They were both in his home. Everything associated with both weapons was in his side of the closet. Ammunition for both weapons, that carry case for the pistol is in his side of the closet with his paperwork. The shotgun is in the corner. Again, all in close proximity to the other items.

4RP 24, 25.

The error below was quite similar to what occurred in State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), where the defendant was charged with unlawful possession of a controlled substance. At the outset, the Court found the "continuing course of conduct" exception inapplicable:

> The State's evidence tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers-the Tylenol bottle and the fanny pack. One alleged possession was constructive; the other, actual.

Id., at 903.

King asked for a unanimity instruction, but the court denied the request because the State promised to make an election in argument. Id. However, in closing argument, "the State offered both the Tylenol bottle and the fanny pack as a basis for conviction." Id. This Court reversed, because the strength of the State's case – on its competing theories of King's guilt – was mixed. "[C]onflicting evidence exists as to which one of the car's occupants constructively possessed the Tylenol bottle… evidence is also conflicting as to King's alleged [actual] possession of the cocaine in the fanny pack." Id. at 903-04.

c. The failure to provide a unanimity instruction was not harmless beyond a reasonable doubt

Because the jury was not instructed it must unanimously agree as to which specific acts constituted unlawful possession of a firearm, and because the prosecutor did not elect the acts it was relying upon, Mr. Sowers constitutional right to jury unanimity was violated. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570. As in King, the trial court's

failure to instruct the jury on unanimity was not harmless beyond a reasonable doubt and reversal is required.

The strength of the State's evidence was indeed varying. The State could have argued that Mr. Sowers had constructive possession over the Hawk shotgun as it was stored in the bedroom closet, but there was no evidence that Mr. Sowers had actual possession of that weapon on the day when Ms. Galarosa was injured. But, there was evidence that he had previously cleaned it, or maybe handled it on another day still, in the woods, or after Ms. Galarosa pointed the shotgun at herself. Ex. 54; 4RP 107; 142-144.

There was less evidence still that Mr. Sowers had constructive possession over Ms. Galarosa's semi-automatic Taurus, which she testified she kept in her car, or on her person, and which she brought into the living room. 2RP 9, 38. While there was evidence that he had actual possession of the pistol when it went off, as argued above, Mr. Sowers should have been able to defend against that allegation by way of a necessity defense.

Notably, there is reason to believe that the jury itself struggled with the mixed evidence regarding Mr. Sowers's possession of the weapons and the dual prosecution theories of actual and constructive possession. During

deliberations, the jury asked the court to define the term "on or about" as it appears in the "to convict" instruction for the shotgun. CP 51, 105.

This valid jury inquiry highlights that the error in the failure to provide a unanimity instruction was not harmless beyond a reasonable doubt. The two convictions for unlawful possession of a firearm in the first degree must be reversed. Kitchen, 110 Wn.2d at 411-12; King, 75 Wn. App. at 904.

4. At sentencing, the two unlawful possession of a firearm convictions, committed at the same time, place, and against the same "victim," should have been treated as one, not two, points in calculating Mr. Sowers's offender score.

a. The trial court must make a correct calculation of the offender score, including a correct analysis of the "same criminal conduct" rule.

At sentencing, the trial court has the "responsibility to accurately determine the standard range sentence." State v. Haddock, 141 Wn. 2d 103, 108, 3 P.3d 733 (2000). This includes calculating past crimes and current offenses. RCW 9.94A.360; RCW 9.94A.400. When "two current offenses encompass the "same criminal conduct," as defined in RCW 9.94A.400(1)(a), then those current offenses together merit only one point." Haddock, at 108. That statute defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed

at the same time and place, and involve the same victim." Id., at 109-10. "[T]he victim of the offense of unlawful possession of a firearm is the general public." Id., at 110-11.

Below, Mr. Sowers argued that under the "same criminal conduct" rule of RCW 9.94A.400(1)(a), the two convictions for unlawful possession of a firearm in the first degree should be counted as one point in the calculation of his offender score. 2/26/14RP 7-8. The trial court rejected this argument. 2/26/14RP 20-21. In reaching this conclusion, the trial court relied on State v. Stockmyer, 136 Wn. App. 212, 214, 148 P.3d 1077 (2006) (holding that a small gun arsenal spread out throughout one house meant the guns were found in different 'places' for purposes of the same-criminal-conduct test).

b. The anomaly of Stockmyer cannot be applied literally to these very different facts.

The defendant in Stockmyer was using his Olympia home for an illegal marijuana grow operation while on probation. 136 Wn. App. 214. When a SWAT team executed a warrant at his residence, he grabbed the .380 semi-automatic pistol he "had been sleeping with" and shot at them. Id. "The bullet passed so close to the officers' faces that they could feel its concussion." Id. Stockmyer was able to nearly murder the police because he had stockpiled weapon after weapon in his home, intentionally placing

them so they would be at arm's reach. Id. at 219-20. He had: 1) a rifle by the front door entryway, 2) a .44 semi-automatic handgun on top of the refrigerator in the kitchen, and 3) the .380 semi-automatic pistol that he kept in his bedroom, but also slept with when in the front room. Id. at 214, 219.

In rejecting his argument that convictions for his unlawful possession of these three firearms constituted the same criminal conduct, the Court reasoned that:

> multiple guns in different rooms in felons' homes increase the peril to both law enforcement and the general public in that they provide felons with easier and more ready access to guns in the home, thus increasing the possibility of harm to others

Id., at 219.

Indeed Stockmyer deliberately put the guns throughout the house so he could use them:

> Stockmyer testified that (1) he kept his loaded firearms in various locations around the house to protect himself from uninvited intruders, robbers, and police; (2) he kept the pistol in his bedroom so it would be handy anytime he needed it; and (3) on a sill outside his front door, he displayed empty cartridge cases from bullets he had fired, specifically to alert anyone standing on his porch that he was armed and dangerous.

Id., at 219-20.

Given those facts, on appellate review, this Court could not "say as a matter of law" that what occurred was same criminal conduct. Id., 219-20.

But, it appears that the trial court at Mr. Sowers's sentencing failed to appreciate the unique factual context of the Stockmyer case and took an unnecessarily restrictive view of that case holding.2/26/14RP 20-21. ("when you're in possession of separate weapons at separate locations within the home, that does not constitute the same criminal conduct."). Stockmyer created no such per se bar. Moreover, unlike Stockmyer, Mr. Sowers's put the shotgun away into the closet and it was Ms. Galarosa who brought the handgun out into the living room.

The State was well within its right to press a separate unlawful possession of a firearm charge against Mr. Sowers for the handgun and the shotgun. But, "[c]harging, however, is different from sentencing." State v. Simonson, 91 Wn. App. 874, 885, 960 P.2d 955 (1998). In Simonson, the defendant was convicted of six firearm counts after the police discovered multiple loaded guns in the bedroom area of a trailer used to manufacture methamphetamine. Id. at 877. This Court reversed the finding below that the guns did not constitute same criminal conduct, holding that the six guns Simonson procured to guard his meth lab should only count as one

point toward his offender score, because, they were found at the same time and place, and each involved the public at large as the victim. Id. at 885.

It is without question that a trial court must exercise the discretion vested by statute and this includes the obligation to "make its own determination whether [] crimes are the same criminal conduct." State v. Mehaffey, 125 Wn. App. 595, 601, 105 P.3d 447 (2005) citing to State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995). Failure to do so requires reversal. Mehaffey, 125 Wn. App. at 597 (remanding where trial court refused to consider whether past crimes constituted same criminal conduct).

Indeed, since Stockmyer, this Court has made it plain that there is no per se rule as to whether offenses committed within one residence constitute – or do not constitute – same criminal conduct. State v. Davis, 174 Wn. App. 623, 300 P.3d 465 (2013). Davis was convicted of assault in the first degree as well as attempted murder. He shot at a sheriff's deputy, first with a handgun and then a shotgun. Id. at 630. At sentencing, the trial court found the two offenses constituted same criminal conduct and the State appealed that ruling. Id. at 630. The trial court made the finding that the crimes occurred in the same place, even though Davis's first attempt to shoot the deputy was inside the cabin and the second a ways away:

> Davis aimed the gun at Deputy Cortani's head; Deputy Cortani *ducked and ran off the deck and down the beach from the cabin*… Deputy Cortani returned fire as he ran and *took cover behind a log on the beach.*… Davis stopped shooting and went into the cabin. Deputy Cortani moved along the log for better cover. *Davis then returned from the cabin carrying a shotgun, moving toward and focused on the spot where Deputy Cortani had first gone over the log.* Deputy Cortani yelled to Davis to drop the weapon, but *Davis brought the shotgun up, pointed it at Deputy Cortani*, and Deputy Cortani started firing again.

Davis, at 630 (emphasis added).

Even though Davis chased he deputy out of the dwelling, "off the deck and down the beach from the cabin," on appeal, this Court upheld the trial court determination that this constituted the "same place" for same criminal conduct purposes. Id. at 643. The State argued that the trial court erred because "the initial assault occurred approximately 50 feet away from the attempted murder." Id. In so doing, this Court made clear that Stockmyer is not a per se pronouncement: "the specific facts of the [Stockmyer] case [were needed] to resolve this issue." Id. The Court made it clear that the "same place" question is a matter of judicial discretion. Id. ("Where, as here, the different physical locations are adjacent and within a short distance of each other, we cannot say that the trial court abused its discretion by finding them to be the same place.")

c. Reversal and remand is necessary because the trial court misunderstood Stockmyer and Davis and failed to exercise its discretion.

In advancing a theory that Mr. Sowers had constructive possession of both weapons, the prosecuting attorney acknowledged the evidence was clear that the two guns were kept in the same place:

> Everything associated with both weapons was in his side of the closet. Ammunition for both weapons, that carry case for the pistol is in his side of the closet with his paperwork. The shotgun is in the corner. Again, all in close proximity to the other items.

4RP 24, 25.

Ms. Galarosa testified that she is the one who brought the handgun into the living area where Mr. Sowers was and she used the gun's laser sight to amuse the dogs. 2RP 38. The police photographed the upstairs closet where both firearms were kept. Ex. 42-50. Exhibit 45 shows a dresser, deep in the closet's corner. Exhibit 46 and 47 show that the black soft case – containing the unloaded shotgun – was "sandwiched between the wall and the dresser itself." 2RP 114, 116. Mr. Sowers testified he stuck it there so that Ms. Galarosa would give it away to her daughter. 4RP 107; 142-144. Exhibits 48 and 49 show the case on top of the dresser, after the police pulled it out from its hard-to-access home. The shotgun was unloaded and the single ammunition box in the closet held ammunition for both the shotgun and the semi-automatic handgun. 2RP 119. Ms. Galarosa

testified that she typically carried the handgun on her person and kept the ammunition for it in the closet. 2RP 9.

On these facts, the two firearm violations occurred in the same place. This error impacted the standard range that Mr. Sowers faced at sentencing and requires correction. Because the trial court rejected Mr. Sowers's argument, essentially treating Stockmyer as a pro se rule, the matter should be reversed and remanded for a new sentencing.

F. CONCLUSION

Because Ms. Galarosa's statement was not given under oath, the trial court erroneously admitted it as substantive evidence under ER 801(1)(d)(i). Accordingly, Mr. Sowers is entitled to have the trial court's decision reversed, his convictions vacated, and the case remanded for further proceedings. The trial court's refusal to instruct on the necessity defense, and the lack of a unanimity instruction, requires reversal of Count III. In addition, the lack of a unanimity instruction requires reversal of Count IV. In the alternative, the trial court's refusal to treat the two unlawful possession of a firearm offenses as one offender score point, calls for reversal and remand for a new sentencing.

DATED this 18th day of September 2015.

Respectfully submitted,

/s Mick Woynarowski

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

STATE OF WASHINGTON, Respondent, JEFFREY SOWERS, Appellant.	)))))))))	NO. 71720-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	JEFFREY SOWERS 930147 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLEROCK, WA 98556	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 18TH DAY OF SEPTEMBER, 2015.

X_____

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