Supreme Court No. 93749-4
(Court of Appeals No. 71720-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY S. SOWERS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND OPINION BELOW

Pursuant to RAP 13.4(b)(1), (2), (3) and (4), Jeffrey Sowers asks this Court to accept review of the August 29, 2016 opinion of the Court of Appeals in State v. Sowers, 71720-1-1 decision terminating review designated in Part B of this petition. Copy attached as Appendix A.

While the complainant was not advised at the outset of her oral statement to the police that what she was saying was "under oath," the Court of Appeals found that the statement was properly admissible as substantive evidence under ER 801(d)(1)(i). Additionally, the Court of Appeals affirmed the trial court's decision to count two convictions for unlawful possession of a firearm separately, even though both weapons were in the same place and at the same time.

B. ISSUES PRESENTED FOR REVIEW

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 the complainant, but did not administer an oath until she was done speaking. As such, the case is indistinguishable from State v. McComas, 186 Wn. App. 307, 309, 345 P.3d 36 (2015), review denied, 184 Wn.2d 1008, 357 P.3d 666 (2015), where the Court of Appeals held that a tape-recorded statement ending with the complainant

"declar[ing], under penalty of perjury, that "the foregoing is true and correct," failed to satisfy the oath requirement of ER 801(d)(1)(i).

Recently, this Court re-approved of the use of some police interviews as "other proceedings" within the meaning of ER 801(d)(1)(i), in part on the assumption that "Washington courts have proved themselves well up to the task of evaluating evidence sought to be admitted pursuant to ER 801(d)(1)(i) in a consistent, evenhanded manner." State v. Otton, 185 Wn.2d 673, 689, 374 P.3d 1108 (2016).

If the Court of Appeals opinion in Mr. Sowers' case directly conflicts with McComas and offends a basic assumption of Otton, should review be granted?

2. 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. RCW 9.94A.400(1)(a). Mr. Sowers was convicted of unlawfully possessing a handgun and a shotgun, at the same place (his residence) at the same time.

Taking an unreasonably narrow reading of the "same criminal conduct" rule, the trial court refused to treat the two unlawful possession of a firearm convictions as a single point in the calculation of Mr. Sowers's offender score, because there was some evidence that the

handgun – typically kept with the shotgun in a bedroom closet – had been temporarily handled in the downstairs living room and then brought back upstairs where the police found it.[1]

Should review be granted to explain to the lower courts that State v. Stockmyer, 136 Wn. App. 212, 214, 148 P.3d 1077 (2006), is limited to its unusual facts and that the two weapons involved here were, for all practical purposes, possessed in the same place?

C. STATEMENT OF THE CASE

When Jeffrey Sowers handled his fiancée Monica Galarosa's semi-automatic Taurus, the couple's dog bit at him, and the gun went off, injuring Ms. Galarosa.[2] 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,[3] the State charged ahead with the notion that Mr. Sowers harmed her on purpose.

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[1] Ex. 42 (photograph showing the handgun within an arm's reach of the closet where the shotgun was found).

[2] See 1RP 77, 81-84, 97, 99, 102, 106; 2RP 25-41. A full recitation of the facts can be found at pages 4-13 in the Appellant's Opening Brief, in the Opinion, pages 3-14.

[3] See 2/26/14 RP 13-18.

After a contested trial, a jury convicted him of assault in the third degree and two counts of unlawful possession of a firearm in the first degree.

Over objection, the trial court allowed 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). 2RP 82-83; Ex. 56 (audio recording). Ms. Galarosa was under the influence of narcotic pain medication when interviewed at the hospital. 2RP 24, 45-48.[4] At trial, she did not remember giving a recorded statement or what she said. 2RP 24, 47-48.

The Opinion accurately documents that Ms. Galarosa was not told at the beginning of the statement, that the police wanted what she was saying to them to be under oath. Opinion at 16. All that she did, on tape, was give her permission to have her words recorded. Id.

The police request about an oath comes after Ms. Galarosa is done talking. Id. And, when the "penalty of perjury" language is recited to her, she answers: "I don't understand what that's saying." She only says "yeah, yeah... um, I understand that" after the warning is repeated. Id.

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[4] 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.

There never was a transcript of the statement for Ms. Galarosa to review and no one played the recording back to her when the questioning ended so she could review what it is that she had said. 4RP 78-79 (Ms. Galarosa testifying at trial there were inaccuracies and falsehoods in the statement); compare with 2RP 79, 81 (police testifying they had told her, on her hospital bed, they "weren't going [to] entertain any lies.").

Separately, the trial court denied Mr. Sowers' request that his handling of the handgun was necessary to avoid even greater harm: Ms. Galarosa had recently shown signs of being suicidal and was on methamphetamines when she pointed the gun at Mr. Sowers while "playing" with the dogs. 4RP 96-104; 106, 114, 119-20; 140-42.[5]

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; Ex. 42-50 (photographs). 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

[5] 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.) 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.

ammunition box contained ammunition for both the 12-gauge shotgun and for the semi-automatic handgun. 2RP 119. 4RP 107; 142-144.

Witness testimony supported the idea that both weapons were typically kept in the same closet, but Ms. Galarosa also testified that she carried the handgun on her person and kept ammunition in her car and the closet. 4RP 127, 128; 2RP 9. Mr. Sowers had told her "to get rid of" the guns. 2RP 26, 33-34.

At sentencing, the trial court refused to treat the two weapon offenses as constituting the same course of criminal conduct: "when you're in possession of separate weapons at separate locations within the home, that does not constitute the same criminal conduct." 2/26/14RP 20-21.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Review should be granted because the Court of Appeals opinion conflicts with State v. McComas and this Court's assertion in State v. Otton that ER 801(d)(1)(i) evidentiary rulings are being made "in a consistent, evenhanded manner."

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). This Court recently held, on *stare decisis* principles, that police interviews may qualify as an "other proceeding." State v. Otton, 185 Wn.2d at 690, discussing State v. Smith, 97 Wn.2d 856, 858, 651 P.2d 207 (1982).

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. 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.

As this Court made clear in Otten, "admissibility pursuant to ER 801(d)(1)(i) is not conditioned on each individual trial court's unrestrained assessment of reliability. Washington courts must work within a specific four-factor framework." 185 Wn.2d at 689 (emphasis added).

The third factor – and the one at issue in this case – is whether the prior statement was given under oath and subject to the penalty of perjury. Id.at 679.[6]

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 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, and just like in Mr. Sowers' case, the court admitted the statements as substantive evidence under ER 801(d)(1)(i). Id. at 34-36.

The Sua 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,

[6] Mr. Sowers' complaint has always been about the lack of a proper oath. It is unclear why the Court of Appeals incorrectly reframes this as an "assert[ion] the

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 at 858; State v. Nelson, 74 Wn. App. 380, 389, 874 P.2d 170 (1994). Again, 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

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statement did not meet minimum guarantees of truthfulness." Opinion at 14.

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. (emphasis added).

The Court of Appeals 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.

The problem in Mr. Sowers' case is the same. The declarant was not informed prior to making the oral statement that what she was saying had the weight of a statement made under oath.

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). The Court of Appeals present attempt at distinguishing the two cases – "[u]nlike in McComas, the recorded statement was not transcribed" – is unavailing. Opinion at 17.

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

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). The Opinion affirming Mr. Sowers conviction is inconsistent with McComas. Review should be granted. Accord State v. Otton, 185 Wn.2d at 689 (noting absence of conflict

[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.

among Washington cases in applying the ER 801(d)(1)(i) framework as reason to re-affirm Smith).

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

Mr. Sowers' opening brief discussed, at length, the prejudicial effect of the wrongful admission of Ms. Galarosa's statement. See AOB at 10-13. The Court of Appeals dismisses of the prejudice question in four sentences. Opinion at 18-19. This short-shrift belies the record and suggests an attempt to minimize a real error.

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] The recorded statement diminished what Ms. Galarosa had to say about the incident in open court, to the jury, and with a properly administered oath.

The tape-recording painted Mr. Sowers as a violent man, who, when angry, fires off a gun, used to run around doing drugs and "chaotically" committing crimes. See AOB 11-13.

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[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.

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 her 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).

But for the error, the State's case would have been weaker. This Court should grant review and reverse.

2. Review should also be granted because the lower courts are misapplying the "same criminal conduct" rule in cases such as this one, where multiple firearms are unlawfully possessed by a single individual in one place and at one time.

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).

However, 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 stored 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 of Appeals 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 laid out 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.

On those facts, what occurred was not same criminal conduct as a matter of law. Id., 219-20.

Here, 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 for a period of time.

The Court of Appeals, erroneously, repeats the overly narrow and overly literal approach taken by the trial court. Opinion at 26. The claim that "undisputed evidence establishes the Tuarus was in the downstairs living room and the shotgun was in the upstairs walk-in closet" is just not accurate. Id.[9] Even the prosecutor argued in closing that the two firearms were generally kept together and in the closet:

> 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.

A trial court must "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

[9] 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.

Wn. App. at 597 (remanding where trial court refused to consider whether past crimes constituted same criminal conduct).

But, failing to score these two offenses as one point against Mr. Sowers, on these facts, appears arbitrary and unfair. State v. Simonson, 91 Wn. App. 874, 885, 960 P.2d 955 (1998) (defendant convicted of six firearm counts after the police discovered multiple loaded guns in the bedroom area of a trailer used to manufacture methamphetamine and each weapon counted only as one point toward his offender score).

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) (affirming trial court determination that an assault in the first degree and an attempted murder committed inside and outside a cabin, with the offender chasing his victim "off the deck and down the beach from the cabin" had occurred at the same place and thus constituted same criminal conduct); see AOB at 44-45.

Review should be granted because offender scoring – and the ensuing sentencing ramifications – should not be so dependent on the whimsy of a sentencing judge's interpretation of what "same place" means.

F. CONCLUSION

This Court should grant Mr. Sowers' petition for review in order to correct the lower courts' errors with respect to the ER 801(1)(d)(i) issue and the firearm offense offender scoring.

The issues presented in this appeal are highly likely to repeat in other criminal cases. By granting review, the Court will not only remedy the errors in Mr. Sowers' case, but also provide much-needed guidance to the lower courts throughout the State of Washington.

DATED this 28th day of September 2016.

Respectfully submitted,

/s Mick Woynarowski

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

STATE OF WASHINGTON, Respondent, v. JEFFREY SEAN SOWERS, Appellant.	)	No. 71720-1-I UNPUBLISHED OPINION FILED: August 29, 2016

SCHINDLER, J. — A jury convicted Jeffrey Sean Sowers of domestic violence assault in the third degree of his girlfriend M.G. while armed with a firearm, first degree unlawful possession of a .45 caliber semiautomatic Taurus, and first degree unlawful possession of a Hawk 12 gauge shotgun. Sowers argues the court erred by (1) admitting the recorded statement of M.G. as substantive evidence under ER 801(d)(1)(i), (2) refusing to instruct the jury on the defense of necessity for unlawful possession of the Taurus, and (3) failing to give a unanimity instruction. In the alternative, Sowers claims the court abused its discretion by counting the two convictions of unlawful possession of a firearm in the first degree as part of his offender score. We reject his arguments, and affirm.

FACTS

At approximately 7:30 p.m. on March 2, 2013, Jeffery Sean Sowers called 911. Sowers told the 911 operator his girlfriend M.G. had a gunshot wound to the "right side." In response to whether the gunshot was "intentional or accidental," Sowers said, "Accidental. . . . There was a gun, it was dropped." Sowers said M.G. was holding the gun when it dropped. M.G. can be heard in the background saying, "I shot myself."

Snohomish County Sheriff Deputy Brandon Lynch, Deputy Matthew Barker, and Deputy Donavan Serrao arrived within minutes of the 911 call. As he approached the front door, Deputy Lynch heard a male voice yelling for help from upstairs.

There is a half-wall at the top of the upstairs hallway. Deputy Lynch went upstairs and saw M.G. on the hallway floor on her left side "rolling around . . . in pain." Sowers was kneeling next to M.G. "holding his hand on her upper right side of her back, kind of just below her right shoulder blade area." Deputy Lynch saw a semiautomatic handgun "behind where she was laying." M.G. told Deputy Lynch she "had the firearm when she was shot." Emergency medical personnel took M.G. to Harborview Medical Center.

Sowers waived his Miranda[1] rights. Sowers told Deputy Serrao that he and M.G. lived together in the house and had been involved in a romantic relationship for approximately two years. Sowers said he had been downstairs cleaning his leather jackets and M.G. was upstairs. Sowers said he "heard the gunshot, he heard her call out for him. And he went upstairs to check on her and found a gunshot wound and called 911." Sowers said he did not know how it happened. In his written statement,

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Sowers also states the .45 caliber Taurus was on loan from his friend Aaron Suitor. Sowers signed the written statement under penalty of perjury. Sowers gave the police consent to search the house.

Detective Tedd Betts and Detective Dave Bilyeu entered through the front door and went upstairs. The upstairs bedroom has a large walk-in closet. The .45 caliber semiautomatic Taurus was on the floor near the bathroom.

While Detective Bilyeu took photographs, Detective Betts went back downstairs. Detective Betts found a nylon holster in the living room near a chest of drawers and an ammunition magazine inside the holster. The magazine contained 10 live rounds of .45 caliber "Blazer" ammunition. Detective Betts found a bullet casing from a fired round of .45 caliber Blazer ammunition "next to and partially underneath a pillow that was on the couch" in the living room. Detective Betts found a bullet hole in the upstairs half-wall and a chest of drawers next to the half-wall indicating the bullet was fired from the downstairs living room. Detective Betts believed "[t]he shooter would have been on the bottom floor, in the living room area, shooting toward the top floor where we were standing." The detectives left the house to apply for a search warrant.

In the meantime, Detective Betts and Detective Bilyeu asked Sowers if he was willing to give a recorded statement. Sowers agreed.

Sowers told the detectives he works as a machinist and M.G. is an exotic dancer. Sowers said they "talked about protection and for her to have protection because she's a dancer." Sowers said that approximately two weeks earlier, he got the Taurus handgun "from Aaron and . . . we brought it home." Sowers cleaned the gun and taught M.G. how to "use it. . . . I've showed her, you know, how to scrub the barrel, how to, you

know, oil it, . . . wipe it down, . . . how to load the magazine." Sowers admitted he "shot the gun" in the woods but "never . . . in the house." Sowers said the gun was "normally kept . . . wherever [M.G.] leaves it" but "I've moved it, I've put it on top of the dresser, . . . on the shelves in the closet. . . . I see it out laying around, I move it."

Sowers told the detectives he was downstairs and had just finished cleaning his leather jackets when "[I] heard the gunshot and I turned around and ran upstairs and [M.G.] was on the floor squirming and screaming." M.G. did not say "how it happened." Sowers "went into a panic" and called 911. According to Sowers, the gun was on the floor nearby and he never "found out how she got shot." Sowers insisted he had "no idea how she was shot."

Detective Betts told Sowers "we found a bullet hole" and "the shell casing" and "it didn't happen the way you explained it, . . . it's a physical impossibility." Detective Betts said the evidence they found showed the gun was fired from downstairs while M.G. was upstairs and asked Sowers to tell them what really happened. Sowers said, "I'm gonna stick with my statement" and told the detectives to talk to M.G.

The detectives returned to the house after obtaining the search warrant. The Taurus contained 9 rounds of .45 caliber Blazer ammunition. The large walk-in closet in the upstairs bedroom contained women's clothing on the right and men's clothing and a dresser on the left. On the left side of the closet between the dresser and the wall, Detective Betts found a soft firearm case that contained a Hawk 12 gauge shotgun. On a shelf directly above the shotgun, the detectives found a military-style ammunition box containing 12 rounds of shotgun ammunition, 68 rounds of .45 caliber Blazer ammunition, a storage box for the Taurus, and gun cleaning supplies. Detective Betts

found a black laptop case on the left-hand side of the closet that contained documents addressed to Sowers and an application Sowers had completed for a concealed weapon license.

On March 5, Detective Betts went to Harborview to talk to M.G. M.G. was "groggy" and "drifting in and out" of sleep. Detective Betts decided to return "when she was more alert."

On March 7, M.G. called Detective Betts and asked him to "visit her to take her statement." Detective Betts and Detective Bilyeu went to Harborview the next day. M.G. was "alert, . . . tracking and answering questions." M.G. told the detectives that she "was twirling a gun on her finger," that she "bumped into a Buddha statue," and that the gun fell and discharged and the bullet "hit her in the back." Detective Betts told M.G. her explanation "was a physical impossibility."

> [I] [e]xplained to her that it was a physical impossibility for the gun to have discharged upstairs in her presence, since we found the casing downstairs on the couch and a bullet hole through the wall, apparently leading from downstairs to upstairs.

M.G. said she did not "want to see Mr. Sowers go to prison." Detective Betts told her they would "be happy to take her statement" but they "weren't going to entertain any lies." M.G. agreed to give a recorded statement.

In the recorded statement, M.G. says she has been battling a methamphetamine addiction for approximately 20 years but had been successful during her 2-year relationship with Sowers. M.G. described her relationship with Sowers as "good. Off and on we've had our rollercoaster rides. Uh, the only offs was my, uh, drug use has affected, um, our confrontations and stuff."

M.G. said Sowers got her the Taurus a month or two before because she did not feel safe in the house, "He personally got that gun for me because I was not—I didn't feel safe in that house." M.G. said the Taurus was normally kept "in a holster, but he doesn't wear it . . . , he was gonna fix it and alter it. Um, he has one, um, we just kind of keep it in the box." She said the "only time we . . . use that laser is to play with our dog." M.G. said the shotgun belonged to her daughter and it had been in her possession for about a year.

M.G. said she relapsed "the day of the accident." M.G. said at one point while she was downstairs in the living room, she had the gun. "I just picked it up and, you know, and just you know played with it for a little bit." M.G. said she left the gun on a table before she went upstairs "because I think he was cleaning it." M.G. said that while she was upstairs, she was "stomping around acting like a little child" to get his attention and Sowers told her to "shut up."

> I was stomping around acting like a little child um seeking attention for attention, um, interrogating him and and subliminal, uh, messages by not really throwing—kinda throwing stuff in his face—I don't remember the remarks I was saying but I just know how I am. . . . I pretty much was pushing his buttons . . . . I was gettin' my clothes ready and getting ready to put my pajamas on . . . but I was screaming the whole time and he, he was just like, "just shut up. . . . Just stop."

M.G. was in the upstairs hallway and yelling at Sowers. "There was words being exchanged. And he was like, 'Quiet!' you know and I, and I was like, just kept on going and going and going." M.G. said that while walking to the bedroom, Sowers fired a shot from the Taurus to "alert me or wake me up."

> I was walking back towards my bedroom, he didn't know. You can't see, uh, up in the um where the staircase is. If you look at it, you can't really see past— . . . through there. . . . And he's done this, um, where we're out

> in the woods and he'll shoot up in the air. . . . I think when that shot was fired it was to kinda wake—alert me or wake me up.

In response to the question, "Is there anything else that you would like to . . . include in this statement that we haven't asked you?" M.G. said, "I feel this isn't a total accident," but Sowers "is the person for me. I love him. I love him very much. . . . I don't want anything to happen to him."

M.G. states at the end of the recorded statement that she certifies under the penalty of perjury that the statements she made are true.

The State charged Sowers with domestic violence intentional assault of M.G. with a firearm in the second degree, count I; domestic violence criminal negligence assault in the third degree with a firearm, count II; unlawful possession of the Taurus .45 caliber semiautomatic handgun in the first degree, count III; and unlawful possession of the Hawk 12 gauge shotgun in the first degree, count IV.

At the beginning of trial, Sowers addressed the admission of M.G.'s recorded statement. Sowers argued ER 801(d)(1)(i) applied to only a written not a recorded statement and M.G. had "no opportunity to review the statement." Sowers also argued the recorded statement did not "meet the standards under [ER] 801."

The court rejected the argument that ER 801(d)(1)(i) applies to only a written statement but reserved ruling on the admission of the recorded statement.

> [I]t strikes me that where you often have a circumstance where police interview someone, and the officers then write out a written statement and have a witness sign it under penalty of perjury, the likelihood that the statement may be inaccurate or incomplete is heightened as compared to a recorded statement — although I suppose there could be challenges to tampering with the recorded statement.
>
> That's certainly less likely than a written statement suffering from errors or information that's not, you know, included in the written statement. Even though it may have been provided orally to the officers

> who wrote the statement, that's less of a concern where the witness himself or herself writes out the statement.
>
> But it strikes me that there's no inherent flaw with a recorded statement in terms of the reliability aspects that the rule is focused on.
>
> So presumptively, if the witness testifies as the State has indicated she may in its brief, I would anticipate allowing the contradictory statements to be offered through playing the audio recording. But I will reserve a final ruling on that so I can revisit the rule.

The court read the charges the State filed against Sowers to the jury before opening statements. The court instructed the jury on the presumption of innocence, the State's burden of proof, and the duty to determine the facts from the evidence produced in court.

In opening statement, the defense asserted the evidence would show the shooting was accidental and because Sowers is a convicted felon, he did not tell the police what actually happened.

> This is an accidental shooting by someone who couldn't tell, because he was afraid because he was a convicted felon. And if he tells them he touched that gun, he knows the jig is up.
>
> I can't tell. With tears in his eyes, he said just that story. Go ask [M.G.]. That's the evidence that you're going to hear. And that's consistent with everything that Mr. — that you heard from the deputy prosecuting attorney. Nothing inconsistent.
>
> First words out of his mouth to someone who asked him what happened was, An accident. It was an accidental shooting. It was accidental. That's this case.

The State called a number of witnesses to testify at trial including M.G., Deputy Lynch, Deputy Serrao, Detective Betts, Detective Bilyeu, and forensic experts. The court also admitted into evidence the 911 call and Sowers' written statement and recorded statement.

M.G. testified she acquired the Hawk shotgun and the Taurus handgun from friends for her protection. M.G. said Sowers played no role in obtaining the firearms.

M.G. testified that a couple of weeks before March 2, she contemplated killing herself with the Hawk shotgun.

M.G. testified that on March 2, she was high on methamphetamine. "I was out of my mind. I was whacked out. There was all kinds of things going on in my head." M.G. said she used the laser sight on the Taurus handgun to play with the dog in the living room. M.G. said she "tossed" the Taurus handgun on a table in the living room and went upstairs. "Next thing you know, I heard a big bang." M.G. denied Sowers ever told her to "be quiet" or "shut up" that night. M.G. testified Sowers never fired a "warning shot[ ]" to either "quiet things down" or as a "wake up shot." M.G. said she did not remember giving a recorded statement to Detective Betts.

The court ruled the recorded statement M.G. gave to Detective Betts met the requirements of ER 801(d)(1)(i) and admitted the statement as substantive evidence. The State played the recorded statement for the jury.

Washington State Patrol Crime Laboratory (WSPCL) firearm and toolmark forensic scientist Brian Smelser testified about the safety features of the .45 caliber semiautomatic Taurus handgun. Smelser testified the Taurus would not fire if dropped. Smelser testified the shell casing found on the living room couch had been fired from the Taurus handgun.

WSPCL DNA[2] forensic scientist Lisa Yoshida tested the Taurus handgun and Hawk shotgun for DNA. Yoshida determined the DNA from Sowers matched the dominant male profile on the Hawk shotgun. Yoshida testified an "estimated probability

[2] Deoxyribonucleic acid.

of selecting an unrelated individual at random from the U.S. population with a matching profile is 1 in 27 quintillion."

Yoshida testified the results of DNA testing on the Taurus handgun showed a mixture of "at least four individuals, including male and female" DNA. "[D]ue to the complexity of the mixture," Yoshida could not include or exclude Sowers as a substantial DNA contributor.[3]

Shooting scene reconstruction expert Detective Brian Wells testified. After examining the path of the bullet hole through the upstairs half-wall and the chest of drawers, the trajectory showed the shooter had been downstairs near the living room couch.

M.G. testified again on behalf of the defense. M.G. said she was in the living room using the laser sight on the Taurus to play with the dog. M.G. testified Sowers had been "frustrated and irritated" with her but denied he yelled at her or told her to "shut up." M.G. said that a week before, she had been "high" and "had a shotgun, my shotgun, to my head and was sitting in the bathtub."

Sowers testified. Sowers said he met M.G. "at an [Alcoholics Anonymous] meeting in Renton." Sowers described M.G. as a "managing addict." Sowers admitted he used drugs in the past and had been convicted of felonies. Sowers testified that "[s]obriety is the most important thing to me." Sowers said he had not used drugs or alcohol since May 23, 2008.

Sowers testified M.G. was an exotic dancer and she wanted to get a handgun to protect herself. Sowers said he lied to the police when he told Detective Betts he

[3] Yoshida testified there was no "indication of any sort of dog DNA" on the Taurus handgun.

"bought the gun from Aaron Suitor, [he] brought it into the house." Sowers said he only "arranged" for M.G. to meet with his friend to purchase a gun and he "introduced [M.G.] to Aaron to purchase the weapon." Sowers testified he gave M.G. the money to buy the Taurus. Sowers admitted the paperwork found in the laptop case in the walk-in closet belonged to him. Sowers admitted he filled out the "concealed pistol license application." Sowers later learned his prior convictions prevented him from obtaining the permit.

Sowers testified that in late February 2013, he found the Hawk shotgun on the bathroom floor and M.G. told him she considered using the shotgun to harm herself. Sowers testified he "dismantled," "cleaned," and put the Hawk shotgun away and told M.G. she needed to remove the weapons from the house.

> In my mind, at that point, there's no question the weapons need to leave the house. We — knowing that I can't possess, I can't own any firearms, I — I basically, made her agree to remove them. And she promised me that she would.

Sowers testified that when M.G. returned home the afternoon of March 2, she told him she had "gotten high" and wanted to go out. Sowers did not want to go out in public with her and "told her to just go get some rest."

> . . . I assumed that she had been up for quite some time. She was very erratic; her behavior was very erratic.
>
> Q Did — did she express a desire to go outside or go do anything or —
>
> A Yeah. She wanted to go do stuff, and I didn't — I didn't want — it's — I'm sorry, but it's embarrassing. It's embarrassing because of the behavior. I didn't want to go out in public.

But instead of going upstairs to the bedroom, Sowers said M.G. started using the laser sight on the Taurus handgun to play with the dog in the living room. Sowers "told her to put the gun down" and she "threw" the gun "onto the table." M.G. "stormed off.

She wanted me to show her how to clean the gun. And I said, No. There's not going to be cleaning of the gun. There isn't going to be anything to do with the gun."

Sowers testified the dog was "[n]ipping or trying to bite the light at the end of the laser, on the end of the gun, I walked over and I picked up the gun and attempted to turn the laser off." Sowers admitted his finger "was on the trigger" when he picked up the gun.

Q I'd also like to ask you, I want to go back to the moment where the dog grabbed your hand. O.K.
So, back to that. Do you remember where your finger was on —
A On the trigger.
Q It was on the trigger?
A Yes.
Q And why was it on the trigger?
A That's just how I picked it up.
Q Just happened to grab it that particular way?
A Yes. That is how I picked up the gun.

Sowers testified the dog "jumped up, and as [the dog] was clamping down on my hand, I jerked and squeezed and a round went off." He then heard M.G. "yell my name and I ran upstairs. And I dialed 911."

Sowers stipulated he has a prior conviction for assault in the second degree. The court also instructed the jury that Sowers had previously been convicted of a serious offense.

In closing argument, the prosecutor asserted Sowers was guilty of intentional assault in the second degree. The prosecutor argued the evidence showed Sowers "deliberately and intentionally shot her" with the intent to scare M.G. and "recklessly inflicted substantial bodily harm." The prosecutor argued that if the jury believed the testimony Sowers gave at trial, he was guilty of negligent assault in the third degree with

a firearm. "[E]ven by his own testimony, he's guilty of third degree assault while armed with a firearm."

The prosecutor asserted Sowers was guilty of unlawful possession of the Taurus in the first degree because he admitted picking up the Taurus and shooting it. The prosecutor argued Sowers was guilty of unlawful possession of the Hawk shotgun because he admitted cleaning it and the DNA on the shotgun showed "actual possession." The prosecutor also argued the evidence established constructive possession of the Taurus handgun and Hawk shotgun.

> When he picked up the gun, the Taurus gun, he is in possession of it. The DNA on the shotgun tells us he was in actual possession of that weapon as well. But it's also true that 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.

Defense counsel conceded the statements Sowers gave to the police were "inconsistent with the physical evidence that Detective Betts had come with just prior to going to that car. No question about that." The attorney argued Sowers' testimony at the trial was credible and he was not guilty of assault in the second degree.

> Mr. Sowers wanted the opportunity to tell you his version of events. He chose to elect trial as the ultimate decisionmaker. He chose 12 jurors and not 12 police officers. . . . His fate is on you that you will follow your charge.
>
> . . . Jeff Sowers was comfortable coming into court and telling his version of events. And some of those didn't exactly help him, you know.
>
> Jeff Sowers admitted to previously cleaning that weapon consistent with the DNA evidence. He admitted that. There's no question about that. He also told a version of events consistent with the very sophisticated physical evidence that was presented to you in this case. There's nothing inconsistent.

Defense counsel argued M.G. was not credible.

> Now, I realize in assessing credibility of the witnesses, we do have [M.G.]'s testimony which is to anyone who has practiced in the course, it was unique. The Court gave both counsel leeway in how we could try to help the witness give answers to the questions that could be admitted here. And — and what you saw was the effect of 20 years of methamphetamine use, how it just ravages, and that is sad.

The jury found Sowers not guilty of intentional assault in the second degree. The jury found Sowers guilty of domestic violence assault in the third degree with a firearm. By special verdict, the jury found Sowers was armed with a firearm during the assault and he and M.G. were members of the household. The jury found Sowers guilty of the two counts of unlawful possession of a firearm in the first degree.

ANALYSIS

Admission of Recorded Statement

Sowers claims the court abused its discretion by admitting the recorded statement M.G. gave to the police as substantive evidence under ER 801(d)(1)(i). Sowers asserts the statement did not meet minimum guarantees of truthfulness.

ER 801(d)(1) provides that an out-of-court statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

ER 801(d)(1)(i) permits the admission of a witness's prior inconsistent statement as substantive evidence if the statement is "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." An "other proceeding" includes statements made to investigating police officers. State v. Smith, 97 Wn.2d 856, 862,

651 P.2d 207 (1982); State v. Otton, ___ Wn.2d ___, 374 P.3d 1108, 1111-12 (2016). In Smith, the court held, "We do not interpret the rule to always exclude or always admit . . . . The purposes of the rule and the facts of each case must be analyzed. In determining whether evidence should be admitted, reliability is the key." Smith, 97 Wn.2d at 861.[4]

We review the decision to admit or exclude evidence for abuse of discretion. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). A court abuses its discretion only if "no reasonable person would take the view adopted by the trial court." State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

In determining the reliability of a prior inconsistent statement under ER 801(d)(1)(i), the court considers four factors:

> "(1) [W]hether the witness voluntarily made the statement, (2) whether there were minimal guaranties of truthfulness, (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause, and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement."

Otton, 374 P.3d at 1111 (quoting State v. Thach, 126 Wn. App. 297, 308, 106 P.3d 782 (2005)).

Sowers claims that because the recorded statement was not made under oath, the court erred in admitting the statement as an exhibit under ER 801(d)(1)(i). The record does not support his argument.

[4] Footnotes omitted.

At the beginning of the recorded statement, Detective Betts states the date and time of the recorded statement.

> This is the statement of [M.G.] . . . . Today's date is March 8, 2013. The time now is 12:17 hours. I'm Detective Betts with the Snohomish County Sheriff's Office and this statement is being recorded at Harborview Medical Center.

M.G then gives her consent to a recorded statement.

> DETECTIVE BETTS: [M.G.], do you understand this statement is being recorded?
>
> M.G.: Yes, I do.
>
> DETECTIVE BETTS: And do I have your permission to do this?
>
> M.G.: Yes.

At the end of the recorded statement, M.G. declares under the penalty of perjury that the facts in her statement are true and Detective Betts signs as a witness.

> DETECTIVE BETTS: I'm gonna be, uh, ending this statement now. Uh, do you certify or declare under penalty of perjury under the laws of the 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?
>
> M.G.: I — I don't understand what that's saying.
>
> DETECTIVE BETTS: Okay let me repeat it to you again slowly. Do you certify or declare under penalty of perjury under the laws of the state of Washington that the facts that you stated on this tape are true and correct?
>
> M.G.: Yeah.
>
> DETECTIVE BETTS: To the best of your knowledge?
>
> M.G.: Yeah.
>
> DETECTIVE BETTS: And that this statement was made freely, voluntarily, and without threats or promises of any kind.

M.G.: Um. I understand that.

M.G. also signed a document certifying the statements on the recording were made under the penalty of perjury. Detective Betts asks M.G. to "go ahead and sign down here please where it says signature." After M.G. signs, Detective Betts signs as a witness, stating, "OK, I'll sign underneath your name."[5]

The statement complied with the requirements of RCW 9A.72.085. RCW 9A.72.085[6] states, in pertinent part:

> (1) Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:
>
> (a) Recites that it is certified or declared by the person to be true under penalty of perjury;
>
> (b) Is subscribed by the person;
>
> (c) States the date and place of its execution; and
>
> (d) States that it is so certified or declared under the laws of the state of Washington.

State v. McComas, 186 Wn. App. 307, 345 P.3d 36 (2015), is distinguishable. In McComas, the court concluded the recorded statement "did not qualify as a sworn statement under RCW 9A.72.085" because "[t]he police transcribed her oral statement, but she did not review, sign, and date the transcription." McComas, 186 Wn. App. at 319. Unlike in McComas, the recorded statement was not transcribed. And unlike in

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[5] The listener can hear the scratching sound of a pen or pencil on paper as M.G. and Detective Betts sign the statement.

[6] We note the legislature amended RCW 9A.72.085 in 2014. LAWS OF 2014, ch. 93, § 4. Because the amendments did not change the pertinent language quoted here, we cite the current version of the statute.

McComas, the recorded statement in this case met the requirement of reliability under ER 801(d)(1)(i). See Smith, 97 Wn.2d at 861-62.

The other cases Sowers cites, State v. Sua, 115 Wn. App. 29, 60 P.3d 1234 (2003), and State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003), are also inapposite. In Sua, the declarants did not attest to the truth of the statements under the penalty of perjury. Sua, 115 Wn. App. at 33. In Nieto, the language of the oath was ambiguous. Nieto, 119 Wn. App. at 161-62. Here, unlike in those cases, the recorded statement reflects the date and time the statement was taken and M.G. attests to the truth of the statement under the penalty of perjury.

For the first time on appeal and without citation to authority, Sowers claims the oath should be given at the beginning of the recording and M.G. should have been given the opportunity to review the statement before acknowledging it was truthful. But below, Sowers conceded the "language that the detective used at the end of the statement . . . is the type of language that is accepted under [ER] 801."

We conclude the record establishes the recorded statement was made under oath subject to the penalty of perjury and complied with the requirements of RCW 9A.72.085. The court did not abuse its discretion in admitting the prior inconsistent statements of M.G. under ER 801(d)(1)(i).

In any event, we conclude that within reasonable probability, the jury would have reached the same verdict even without the recorded statement of M.G. Sowers admitted he fired the semiautomatic weapon on March 2 and the jury convicted him of the lesser included offense of third degree assault, criminal negligence. Sowers admitted he cleaned and dismantled the shotgun the week before and his DNA was on

the shotgun. The State also presented unrebutted evidence of his constructive possession and control of the Taurus handgun and Hawk shotgun.

Necessity Jury Instruction

Sowers contends the court violated his constitutional right to present a defense by refusing to give his proposed instruction on the defense of necessity for unlawful possession of the Taurus in the first degree.[7]

A defendant can assert the affirmative defense of necessity to the charge of unlawful possession of a firearm in the first degree. State v. Jeffrey, 77 Wn. App. 222, 226, 889 P.2d 956 (1995); State v. Stockton, 91 Wn. App. 35, 44, 955 P.2d 805 (1998). But the defendant must demonstrate by a preponderance of the evidence:

> (1) He was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Jeffrey, 77 Wn. App. at 225.

We review a trial court's refusal to give a proposed jury instruction based on a factual dispute for abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005) (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)).

Below, Sowers argued the court should give a necessity defense instruction because of his "measured response" to the threat.

> I think the elements of necessity are here because we had a measured response, we have — what was the threat was touching the gun to shut off the laser sight or get the bullets out of the gun. I think that's a response, and I think necessity should be applied.

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[7] Sowers did not designate his proposed necessity defense instruction on appeal. RAP 9.6(b)(1)(G) states, "The clerk's papers shall include, at a minimum: . . . any jury instruction given or refused that presents an issue on appeal."

The court ruled insufficient evidence supported giving a necessity defense instruction.

> [T]here's insufficient evidence to support a necessity defense for possession of the firearm. Mr. Sowers testified that he picked up the weapon to turn the laser off. It wasn't his testimony that he picked up the gun to get it out of the house or to be sure that the safety was on or to clear the weapon of any possible live rounds.
>
> And he also didn't testify to any concern that the dog would fire the gun. The evidence from his testimony was that the dog was snapping at some point in front of the gun, but never came in contact with the weapon itself.
>
> If there was a lawful necessity for taking possession of the handgun, then there would also need to be concomitant evidence that there was no reasonable alternative to taking possession.
>
> Mr. Sowers knew that he was not allowed to possess the firearm. [M.G.], regardless of whatever her condition or thoughts may have been, was not near the weapon but had gone upstairs. There's no reason that he could not have called a neighbor, 911, or any first responder, and asked that they take possession of the weapon.

United States v. Newcomb, 6 F.3d 1129 (6th Cir. 1993), does not support Sowers' argument that the court erred in refusing to instruct the jury on the defense of necessity. In Newcomb, the defendant was at his girlfriend's apartment when her son ran out of the apartment with a gun threatening to kill someone. Newcomb, 6 F.3d at 1131. The defendant chased the son down an alley, took the ammunition out of the gun, and placed the shells in his pocket. The son said he would find another gun and ran off. Newcomb, 6 F.3d at 1131. The defendant chased after him but lost him. When the defendant returned to the alley, a police officer patrolling the area stopped him, found the ammunition, and arrested him. Newcomb, 6 F.3d at 1131. The court concluded the defendant possessed the ammunition for "only moments after" the son ran off and there was enough evidence "that he possessed the ammunition only for the duration of the emergency situation" to support a necessity instruction. Newcomb, 6

F.3d at 1138. Unlike in Newcomb, according to Sowers' testimony, M.G. left the living room and was upstairs when he picked up the gun. Sowers also admitted he could have gotten rid of the Taurus before March 2.

The record supports the court's refusal to give a necessity defense instruction. Sowers testified he picked up the Taurus handgun to turn off the laser sight, not because of a present threat of harm.

> Q Mr. Sowers, did [M.G.] eventually put the gun down?
> A Yeah. She tossed it onto the table, onto this table right here.
> Q Was the laser sight still on?
> A Yes.
> . . . .
> Q And what did you do next?
> A I walked over and I picked up the gun and attempted to turn the laser off.

Sowers acknowledged he previously considered calling a friend to take the firearms out of the house.

> Q . . . So it's just before the shooting occurs that you decided it was time to get rid of the guns; is that right?
> A No. I made that decision earlier, and [M.G.] had agreed with me.
> Q You were going to rely on her to get rid of them?
> A Yes.
> Q I see. Did you consider calling a friend, perhaps, and just having him come over and get the guns?
> A Yeah. We discussed that, sure.
> Q Why didn't you decide on that course of action?
> A I don't know why we didn't. She assured me that she would get rid of them.

Unanimity Instruction

For the first time on appeal, Sowers contends the court erred in failing to give a unanimity instruction on the two counts of unlawful possession of a firearm in the first degree. A defendant has a right to a unanimous jury verdict under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington

Constitution. State v. Fisher, 165 Wn.2d 727, 755, 202 P.3d 937 (2009) (citing State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). A defendant may be convicted only when a unanimous jury decides the defendant committed the charged crime. State v. Crane, 116 Wn.2d 315, 324-25, 804 P.2d 10 (1991).

As a general rule, an alternative means crime is set forth in a statute defining a "single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Under State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), if the State presents evidence of multiple distinct acts that could form the basis of one charge, the court must instruct the jury to agree on a specific act. See also State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); Crane, 116 Wn.2d at 325.

Sowers argues he was entitled to a Petrich instruction because the jury must agree on the act for the two counts of unlawful possession in the first degree of the Taurus and the Hawk shotgun. His argument is without merit. Unlawful possession of a firearm in the first degree is not an alternative means crime. The statute defining the crime of unlawful possession of a firearm does not set forth alternative means.

The amended information charged Sowers with two separate counts of unlawful possession of a firearm in the first degree in violation of RCW 9.41.040(1): possession of the .45 caliber semiautomatic Taurus firearm, count III; and possession of the 12 gauge Hawk shotgun, count IV. The amended information states, in pertinent part:

> COUNT III: UNLAWFUL POSSESSION OF FIREARM IN THE FIRST DEGREE, committed as follows: That the defendant, on or about the 2nd day of March, 2013, having previously been convicted in this state or elsewhere of a serious offense as defined in RCW 9.41.040, to-wit: Second Degree Assault, did knowingly own or have in his possession or

under his control a firearm, to-wit: Taurus .45 caliber pistol; proscribed by RCW 9.41.040(1), a felony.

COUNT IV: UNLAWFUL POSSESSION OF FIREARM IN THE FIRST DEGREE, committed as follows: That the defendant, on or about the 2nd day of March, 2013, having previously been convicted in this state or elsewhere of a serious offense as defined in RCW 9.41.040, to-wit: Second Degree Assault, did knowingly own or have in his possession or under his control a firearm, to-wit: Hawk 12 gauge shotgun; proscribed by RCW 9.41.040(1), a felony.

The court instructed the jury on the two separate counts of unlawful possession of a firearm in the first degree. Jury instruction 16 states:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 2nd day of March, 2013, the defendant knowingly had a firearm, to wit: Taurus .45 caliber pistol, in his possession or control;

(2) That the defendant had previously been convicted of a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Jury instruction 17 states:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 2nd day of March, 2013, the defendant knowingly had a firearm, to wit: Hawk 12 Gauge shotgun, in his possession or control;

(2) That the defendant had previously been convicted of a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The jury instruction defining possession as either actual or constructive does not create alternative means of committing the crime of unlawful possession of a firearm in the first degree. Smith, 159 Wn.2d at 785-86. Jury instruction 18 states:

> Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), is distinguishable. In King, the State charged the defendant with one count of possession of cocaine and there was conflicting evidence of the defendant's possession. King, 75 Wn. App. at 901, 903-04. At trial, the defendant testified the officers planted the cocaine on him. King, 75 Wn. App. at 901-02.

Offender Score

In the alternative, Sowers claims the court erred in calculating his offender score and including the two convictions of unlawful possession of a firearm in the first degree

as separate crimes. Sowers asserts the two crimes constitute the "same criminal conduct" and should count as only one offense.

Under RCW 9.94A.589, a sentencing court calculates an offender score by separately counting other prior convictions and current offenses unless one or more of the current offenses encompass the same criminal conduct.[8] "Same criminal conduct" as used in the statute means "two or more crimes that require the same criminal intent . . . are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

"Deciding whether crimes involve the same time, place, and victim often involves determinations of fact." State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). The sentencing court's determination will not be disturbed unless the court abuses its discretion or misapplies the law. Graciano, 176 Wn.2d at 536-37.

The court found the two convictions for unlawful possession of a firearm in the first degree did not constitute the same criminal conduct.

> They're separate weapons, you were in possession of two firearms that you had no business possessing. I don't find that that constitutes the same criminal conduct because those separate weapons happened to have been found or used or possessed in the same residence. . . .
>
> . . . The [State v. Stockmyer, 136 Wn. App. 212, 148 P.3d 1077 (2006),] decision, I think, is clearer. But I think factually here when you're in possession of separate weapons at separate locations within the home, that does not constitute the same criminal conduct.

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[8] RCW 9.94A.589(1)(a) provides, in pertinent part:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

The record supports the finding that the two convictions do not meet the "same place" element of RCW 9.94A.589(1)(a).

> Because we narrowly construe the "same place" requirement, we cannot say as a matter of law that [the defendant]'s possession of multiple firearms in these three different locations constituted the same criminal conduct. Moreover, 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.

Stockmyer, 136 Wn. App. at 219. The undisputed evidence establishes the Taurus was in the downstairs living room and the shotgun was in the upstairs walk-in closet.

Statement of Additional Grounds

In his statement of additional grounds, Sowers argues the court erred in denying his CrR 3.6 motion to suppress evidence obtained during the search of the house.[9] We review the court's findings of fact on a motion to suppress for substantial evidence. State v. Mitchell, 190 Wn. App. 919, 924, 361 P.3d 205 (2015) (citing State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006)). We review conclusions of law de novo. Mitchell, 190 Wn. App. at 924 (citing Levy, 156 Wn.2d at 733). We treat unchallenged findings as verities on appeal. State v. Homan, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The unchallenged findings establish probable cause justified detaining Sowers and Sowers gave the police written consent to search his house. The unchallenged findings state Sowers neither limited the scope of his consent nor attempted to revoke

[9] The statement of additional grounds states:

> Could the information surrounding my detainment while my home was searched and the search of my home. [sic] I had given them permission to search but they had locked me up in a patrol car, alone, while they conducted their search. The patrol car was parked down the street out of view of my home.

his consent. The court did not err in denying Sowers' CrR 3.6 motion to suppress evidence.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71720-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

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Date: September 28, 2016