

NO. 66554-2-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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THE STATE OF WASHINGTON,

Respondent,

v.

MARLOW TODD EGGUM,

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Appellant Marlow Todd Eggum (“defendant”) was imprisoned from 2007-2009 for repeatedly stalking his ex-wife. The defendant continued to stalk his ex-wife from prison, and further threatened to kill her in numerous letters he wrote from prison. Defendant also threatened to kill the community corrections officer and deputy prosecutor who had contributed to his incarceration. As a result, the defendant was convicted in the present case of multiple felony crimes to include intimidating a public servant, felony harassment, and stalking. The jury further found aggravating circumstances for each separate crime.

The four issues raised in the present appeal arise from the trial court’s imposition of an exceptional sentence. First, the trial court properly determined that counts involving the same victims were separate criminal conduct because the crimes occurred at different times or involved different objective criminal intents. Second, the trial court permissibly imposed consecutive sentences as part of the exceptional sentence. Third, an exceptional sentence for felony stalking was proper because the facts of the aggravating circumstance were not necessary to prove stalking. Finally, a harmless jury instructional error pertaining to the aggravating circumstances was invited by the defendant, was not preserved below, and cannot be raised for the first time on appeal.

## II. STATEMENT OF THE CASE

### A. Facts

Janice Gray was born and raised in St. Johns, Newfoundland, Canada. RP 72-73. Gray's family still resides in St. Johns. RP 73.

Gray married appellant Marlow Todd Eggum ("defendant") in 1992 and the two lived in a home they purchased in Lynden, WA. RP 73-74, 192. They had one child, a daughter born in 1993. RP 75.

During the marriage the defendant displayed controlling behaviors. He told Gray that no other man would ever have a relationship with her. RP 86. He also made sexually explicit video recordings of Gray, which he later threatened to publicize. RP 75-76, 215. Gray regretted that she allowed the defendant to make the videotapes. RP 251. She was able to destroy some of the videotapes before the marriage ended, but not all of them. RP 251. The defendant was so obsessed with the recordings that he cried when Gray destroyed some of the tapes, acting as if she "had killed someone." RP 251.

Gray left the defendant in November 2001 after 9 years of marriage. RP 76. Because of his controlling behavior and past statements, Gray feared that the defendant would kill her if she told him she was leaving, so she secretly secured a new residence in Lynden. RP 78, 196, 247. On the day she left, Gray removed her 8-year-old

daughter from school and they fled together to the new residence. RP 78, 195. Gray did not tell the defendant where she had moved; instead, she asked her attorney to let the defendant know that she had left. RP 79, 196.

Despite her efforts to keep her new residence secret, the defendant found Gray the very next morning. RP 79. The defendant entered Gray's residence and assaulted her. RP 85. Gray reported the assault to police and the defendant was convicted of assault. RP 85-86.

Gray filed for divorce in April 2002. RP 77. The divorce proceedings were not amicable. RP 77. The defendant was convicted for continually stalking Gray and violating the no-contact order during 2002-2003. RP 87.

The court granted the divorce in July 2003. RP 77. However, the divorce proceedings continued well after Gray's petition for dissolution was granted in 2003 due to the defendant's obsession with the sex tapes, some of which<sup>1</sup> had been seized by police. On May 6, 2005, the divorce court entered an order that specifically awarded to Gray sole custody of all videotapes containing images of Gray. RP 219, 246. The order further restrained the defendant from disseminating images of Gray. RP 246. The court entered an order prohibiting the defendant from contacting Gray for the remainder of his life. RP 77.

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<sup>1</sup> It is unknown whether police seized all of the tapes in existence.

Despite the divorce decree, the no-contact order, and the restraining order for the videos, the defendant's behavior did not change. RP 88. Gray's family (including her daughter), friends, and neighbors did not know about the videotapes. RP 251-252. Gray did not want any of them to know about the videotapes. RP 251. The defendant knew this and used the videotapes to harass Gray. RP 209-10, 251.

In 2005, before police seized the videotapes, the defendant followed Gray around Lynden and left sexually explicit depictions of Gray at businesses patronized by Gray. RP 206, 248, 282-83. Gray reported the incidents to law enforcement, as well as to the defendant's probation officer at the Department of Corrections (DOC), Melissa Hallmark. RP 206-207, 212, 385. In investigating Gray's report, Hallmark found sexually explicit images of Gray in the defendant's vehicle that were copies of the same depictions that were being left around town. RP 388-89. Hallmark arrested the defendant because his actions violated the terms of his probation from his last conviction for stalking. RP 354, 387 451-53. Defendant has been incarcerated ever since. RP 476-477.

Eric Richey prosecuted the defendant in 2005. RP 208, 212-213. The 2005 case lasted until January 2007, when the Defendant pleaded guilty to multiple counts of felony stalking and harassment. Exhibit 27; RP 88-90. The court found an aggravating circumstance—that the

defendant's crimes were domestic violence and part of an ongoing pattern of psychological abuse manifested by multiple incidents over a prolonged period of time. Exhibit 27. The court imposed an exceptional sentence of 72 months in prison because of the aggravating circumstance. Exhibit 27; RP 88-90.

Prior to his departure to prison in 2007, the defendant's mother gave his 30-30 rifle to her neighbor, Garnett Heaven, who in turn gave the gun to her son Paul Heaven. RP 257. Heaven kept the gun until contacted by police in 2009. RP 258.

On April 12, 2007, DOC transferred the defendant to McNeil Island Corrections Center ("McNeil Island"). RP 34. Defendant was incarcerated at McNeil Island until June 25, 2009. RP 34. Defendant was a prolific writer during his time at McNeil Island, sending numerous letters to various individuals.

In June 2007, approximately one month after the defendant arrived at McNeil Island, DOC received a request from the Whatcom County Sheriff's Office (WCSO) to screen the defendant's outgoing mail. RP 38. DOC copied the defendant's outgoing mail for later review by WCSO, but otherwise allowed most of the original letters to be sent in the mail after they were copied. RP 38-39, 42, 57.

Defendant's letters expressed admiration for violent criminals; loathing for Gray, Hallmark, and Richey; and a desire to hurt Gray, Hallmark, and Richey when he was released from prison. For example, the defendant wrote to his mother after arriving at McNeil Island and professed his admiration for mass-murderer Timothy McVeigh. Exhibit 9. Defendant praised McVeigh for blowing up a federal building and killing 176 human beings. Exhibit 9. Defendant blamed McVeigh's action on government behavior that the defendant compared to the behavior of Whatcom County and DOC. Exhibit 9. Defendant described McVeigh as "brave" because McVeigh knew he would be caught and executed, but he did not fear the consequences and completed the mass murder regardless. Exhibit 9. Defendant compared himself to McVeigh and professed himself a "prisoner of war" due to a "tyrannical prosecutor." Exhibit 9. Defendant vowed that he, too, "would stand up and take action" like McVeigh. Exhibit 9.

In the same letter, in an excerpt that would prove particularly traumatizing to both Eric Richey and Melissa Hallmark, the defendant described a case where a convicted offender was released from prison and thereafter murdered the 6-year-old child of the prosecutor who prosecuted him. Exhibit 9. The defendant's letter described how the offender abducted the child, murdered the child, and then chopped the child's body

into pieces and hid them. Exhibit 9. Defendant described how the offender called the prosecutor on the child's birthday every year after the murder, "taunting her . . . [m]aking her pay." Exhibit 9. The defendant concluded, "What a show. My God, if that doesn't make one stop and think." Exhibit 9.

On December 21, 2007, the defendant wrote to his mother that he would use the sexually explicit images of Gray to force Gray to talk to him. Exhibit 7. He elaborated that the only reason people were "still alive and standing" was that he still had videotapes of Gray. Exhibit 7. Defendant compared himself to O.J. Simpson and described Simpson cutting the head off of his ex-wife, Nicole ("My God, that had to have hurt . . . ouch."). Exhibit 7; RP 146-47. Defendant included a clipping from the Lynden Tribune containing that week's engagement and wedding announcements, noted the absence of Gray's name, and said Gray had "one more week of reprieve." Exhibit 7.

In Spring 2008 the defendant wrote a letter to Pastor Grant Fishbook of Christ the King Church in Bellingham, where Gray had attended church in the past. Exhibit 21. Defendant repeatedly referred to Gray as "my wife" throughout the letter, despite the fact that the two had been divorced for 5 years. Exhibit 21. Defendant told Pastor Fishbook that he did not accept the divorce and he still considered Gray to be his

wife. Exhibit 21. Defendant claimed he obtained a tattoo of Gray's name with the words "Forever Married" under it, which he described as a "silent warning." Exhibit 21.

In a letter to his father in May 2008, the defendant wrote that his daughter was "smart" for fearing that the defendant would kill Gray when he was released from prison. Exhibit 12. Defendant wrote that Gray was in "impending danger." Exhibit 12. He blamed Gray for his incarceration and stated that he would hold Gray "accountable" and that his prison sentence "will come at an exceptional cost to Janice one day." Exhibit 12. He further wrote that he was "counting the days until it's my turn to go again, so I can equalize things, even the score." Exhibit 12.

In a second letter to Pastor Fishbook in May 2008, the defendant told Pastor Fishbook about the murder of a co-worker, Krystal Way, in 1995. Exhibit 22. Defendant blamed Way's murder on the no-contact order that Way obtained against her ex-husband. Exhibit 22. The defendant described the no-contact order as "a death warrant" for Way because she should have done as her husband told her to do. Exhibit 22. Defendant compared the no-contact order protecting Gray to the no-contact order that was supposed to protect Krystal Way. Exhibit 22. Defendant warned Pastor Fishbook that when he was released he would

return to the church and there could be a deadly confrontation involving the defendant and Gray. Exhibit 22.

Defendant wrote a third letter to Pastor Fishbook where he described a lengthy dream that he interpreted as a “prophecy.” Exhibit 23. In the defendant’s prophecy, he was shot to death by police after a “tragic occurrence.” Exhibit 23. It was apparent from the context of the letter, and other letters, that the “tragic occurrence” was the defendant’s act of murdering Janice Gray. RP 112.

In another letter to his mother, the defendant wrote that he had “until death do us part” tattooed on his arm below Janice’s name; and that he was considering getting a new tattoo that read, “Covet thy wife, pay the price, be forewarned.” Exhibit 11. Defendant again threatened to send sexually explicit images of Gray to her hometown of St. Johns, Newfoundland. Exhibit 11.

In yet another letter to his mother, the defendant acknowledged that he was aware that DOC would read the letter. Exhibit 6. The defendant reminded his mother of the “prophecy” and told her that nothing could be done to avoid fulfillment of the prophecy. Exhibit 6. The defendant told his mother about “best friends” he had made in prison. Exhibit 6. The defendant wrote page after page describing the murderers he had befriended in prison and the violent crimes they had committed

against loved ones. Exhibit 6. Defendant described inmates and others who had killed their wives, and he mocked the no-contact orders that were supposed to protect the victims. Exhibit 6. Defendant wrote that he received advice from the murderers. Exhibit 6. The defendant described as “very wise” his attorney’s prediction that the defendant would commit murder when released from prison. Exhibit 6. Defendant re-emphasized that he did not recognize the divorce Gray had obtained. Exhibit 6. Defendant blamed Richey for taking the videotapes of Gray away from him. Exhibit 6. Defendant vowed to send sexually explicit images of Gray to her sister’s neighbors in Newfoundland; or alternatively to go get his “tool” from Paul’s house and “pound[ ] some nails.” Exhibit 6. Defendant stated that “someone is going to get killed,” and called Richey “shortsighted” and “stupid” for believing that only Gray was at risk. Exhibit 6.

The defendant wrote his mother again in April 2008 and acknowledged that he knew that DOC and Hallmark would read the letter. Exhibit 5. The defendant reemphasized that “Janice has no divorce.” Exhibit 5. Defendant promised to distribute sexually explicit images of Gray to anyone who tried to date her, as well as that person’s friends and family, noting, “That should be enough to drive him away.” Exhibit 5. Defendant promised to cause “hurt,” “damage,” and “suffering” if the

defendant did not get what he wanted from Gray. Exhibit 5. Defendant said he was “going to snap and go off on the whole lot of them, starting at the top, and working my way down the list.” Exhibit 5. Defendant told his mother that if Hallmark “continues to fuck with me, she had better consider moving.” Exhibit 5.

In July 2008, the defendant wrote his mother that he was giving away images of Gray to “rapists and child molesters who are being released from prison.” Exhibit 7. Defendant wrote that he was giving these same rapists and child molesters maps to Gray’s neighborhood in Lynden. Exhibit 7. Defendant wrote that one inmate who was released had sent the defendant a photograph that he took of Gray while he watched her in Lynden. Exhibit 7. Defendant repeated his threat to give sexually explicit images of Gray to neighbors in Lynden and in her hometown of St. Johns, Newfoundland. Exhibit 7. Defendant warned that he would harm Gray if she ever dated anyone. Exhibit 7. Defendant warned that he would kill if his movies were taken away from him. Exhibit 7. Finally, the defendant described for his mother what he was going to do to Gray and others who had wronged him: “As soon as I get out (shortly), I’m going to hit back, and hit hard, and hit relentlessly, and I’m going to hit viciously.” Exhibit 7.

In February 2009 the defendant wrote his mother that he expected to be released from prison in June 2009. Exhibit 4. Defendant wrote that after he was released, he would engage those who had wronged him in “all out warfare” to achieve “a nasty and vicious outcome.” Exhibit 4. Defendant wrote that he would always be able to find Gray and her daughter. Exhibit 4. Defendant vowed, “If I can’t have her, then I’ll make sure no one else can.” Exhibit 4. Defendant vowed to ensure that “no one dates my wife” and he would disseminate sexually explicit images of Gray to anyone who attempted to date her. Exhibit 4. Finally, the defendant promised, “I don’t care if I’m 80 [expletive] years old, I’m going to go after her and my money until I have both. Big period on end of sentence.” Exhibit 4.

The above-referenced excerpts are just a sampling of the threats expressed in the defendant’s letters. Exhibit 4-12, 21-23. Several recipients of the letters, including the defendant’s father and Pastor Fishbook, were so alarmed by the letters that they turned them over to law enforcement. RP 46-47, 61. DOC continued to copy letters and provide them to WCSO. RP 488. Approximately 70 letters authored by the defendant were received by WCSO. RP 488.

Many of the defendant’s letters boasted that he would go to Paul’s house, grab his “tool” and go “pound some nails,” or similar language.

RP 62. WCSO contacted Paul Heaven and learned that Heaven did not have any of the defendant's possessions other than the rifle, which Heaven gave to the police. RP 62-63, 258.

Defendant was scheduled to be released from prison in June 2009 to be supervised by DOC under conditions of community custody. RP 390. DOC's supervision of community custody required DOC to approve the defendant's residence and living arrangements. RP 390. Defendant reported to DOC that he intended to live with his mother in Whatcom County when he was released from prison. RP 390-91. DOC did not believe that Whatcom County was a safe and suitable living arrangement for the defendant given his criminal history and the fact that Gray was still living in Whatcom County. RP 391, 454-55. Hallmark approved a decision not to allow the defendant to reside in Whatcom County, and the defendant was notified of Hallmark's decision. RP 392.

Defendant responded to Hallmark in writing in April 2009. Exhibit 25. He wrote that because of Hallmark's decision to reject his proposed living arrangements, he would sue her and also send sexually explicit images of Gray to St. Johns, Newfoundland. Exhibit 25. Defendant told Hallmark that he would protect his videos with "deadly force." Exhibit 25. Defendant further told Hallmark that he would hold

Hallmark “personally responsible” if his mother died before he was released from custody. Exhibit 25.

Hallmark knew from working with Gray in 2005 that Gray was raised in St. Johns, Newfoundland. RP 398-99. Hallmark also knew from past experience that the defendant was fully capable of maliciously disseminating images of Gray. Hallmark believed that if she did not change her official decision regarding the defendant’s living arrangements, the defendant would embarrass Gray by sending sexually explicit videos to her friends and family in St. Johns. RP 399-401, 407.

On April 22, 2009, based upon the defendant’s attempt to intimidate Hallmark into changing her decision, Richey charged the defendant with intimidating a public servant. RP 268-69. Richey requested and obtained an arrest warrant that would prevent the defendant’s scheduled release from custody in June 2009. RP 271. The defendant responded by filing a bar complaint against Richey. RP 284.<sup>2</sup>

Defendant also wrote Richey directly. Exhibit 26. Defendant threatened that if Richey did not cancel the warrant, he would sell images of Gray in Gray’s hometown in Newfoundland, as well as sell images of Gray to inmates at McNeil Island, including sex offenders. Exhibit 26.

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<sup>2</sup> The Bar later dismissed the complaint. RP 285.

Defendant told Richey he would drop the bar complaint if Richey dismissed the charge and canceled the arrest warrant. Exhibit 26.

Defendant's letter caused Richey to fear that the defendant would embarrass Janice Gray, and pursue a frivolous bar complaint, if Richey did not change his official decisions. RP 281-82, 370. Richey declined to dismiss the charge or rescind the arrest warrant despite the defendant's threats. RP 283.

The Whatcom County Prosecutor's Office amended the information to add a second charge of intimidating a public servant based upon the defendant's threats to Richey. RP 286. Richey was removed from the case, and the Attorney General's Office assumed prosecution of the case to avoid any conflict of interest. RP 286-87.

Defendant wrote his mother on June 14, 2009, after he was informed that the new charge would delay his release from custody. Exhibit 10. In the letter, he discussed Shawn Roe, a DOC inmate who was released to DOC supervision and then murdered a federal police officer. RP 432. Defendant expressed his disdain for Hallmark and DOC and lauded Roe's act of killing a police officer in order to make a point to DOC. Exhibit 10. Defendant discussed teaching DOC "a lesson" as Shawn Roe had done. Exhibit 10.

Defendant encouraged his mother to telephone “that fucker Eric Richey and tell him to please knock it off and let me go.” Exhibit 10. Defendant stated that Richey was “escalating things to the extremely dangerous zone” and Richey would “have bigger problems than he has ever imaged . . . [a]n eye for an eye, a tooth for a tooth.” Exhibit 10.

WSCO Detective John Allgire was alarmed by what he read and concerned for the safety of Gray, Hallmark, and Richey because the defendant’s scheduled release from prison was approaching. RP 220. In April 2009, out of concern for Gray’s safety, Detective Allgire began sharing with Gray the letters that were intercepted by DOC (including Exhibits 4-12) and provided by Pastor Fishbook (including Exhibits 21-23). RP 64, 90, 221.

Gray felt “worthless” after reading the defendant’s letters. RP 122. Gray feared that the defendant would humiliate and embarrass her by disseminating sexually explicit videos of her to any man she met. RP 121, 126, 154-56, 179. Gray further feared that the defendant would continue his ongoing pattern of psychological abuse by isolating her from her friends and family via dissemination of the videos. RP 158-59, 179-81.

Gray was further alarmed that despite leaving the defendant in 2001, and the divorce becoming final in 2003, the defendant still referred to Gray as “my wife.” RP 95. It was obvious to Gray that the defendant

refused to accept that the divorce was valid and final. RP 95. Gray feared that the “tool” from Paul’s house was a gun; and “pounding some nails” with his “tool” meant killing somebody with the gun. RP 134. Gray feared that an inmate from prison would rape and kill her. RP 156-57, 161, 165. Gray feared for her life, and the life of her daughter, after reading the defendant’s letters. RP 91, 122, 138, 142-48, 152-153, 156-57, 161, 165, 179-81.

In July 2009, Detective Allgire shared the letters with Melissa Hallmark out of concern for her safety. RP 66-67. Hallmark read the letters admitted as Exhibits 5 and 6 and knew that the defendant was aware that DOC, and Hallmark in particular, would read the letters that he wrote to his mother. RP 414. Hallmark feared for her life<sup>3</sup> and the life of her children after reading the defendant’s threats. RP 411, 415, 430, 433, 437, 441. Hallmark was unsure if the defendant would make bail pending trial. RP 447. Hallmark began carrying a firearm off-duty for personal protection, something she had never done before. RP 447.

Detective Allgire also shared the contents of the letters with DPA Richey, including the passage about the murder of the prosecutor’s child, out of concern for Richey’s safety given the uncertainty as to when the defendant would be released. RP 69, 287-89, 495. Richey had a long

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<sup>3</sup> Hallmark testified in great detail about the letters she read and why they caused her to fear for her life. RP 408-445.

history with the defendant, having twice prosecuted and convicted the defendant for stalking and other crimes in 2004 and 2005. RP 262-68. Defendant has been in custody ever since he was charged by Richey in 2005. RP 354. Defendant received an exceptional sentence as a result of Richey's 2005 prosecution. Exhibit 27.

Richey knew that the defendant disliked him and blamed him for the loss of his videos and his present incarceration. RP 294-95, 308, 378. Richey believed that the "tool" at Paul's house was a gun. RP 310. After reading the letters, Richey believed that the defendant threatened to kill him and would carry out the threat if he could. RP 288, 290-92, 295-96, 308-09. Richey took the defendant's threats seriously. RP 310.

## **B. Procedure**

On April 22, 2009, the State charged the defendant with one count of intimidating a public servant for attempting to influence the official decisions of his probation officer, Melissa Hallmark, through intimidation. CP 235-236. The State later amended the information to add charges of threatening to kill Hallmark; attempting to intimidate and threatening to kill Eric Richey; and stalking and threatening to kill his ex-wife, Janice Gray. CP 100-105. The fourth amended information reflected the following charges:

<u>Count</u>	<u>Offense</u>	<u>Victim</u>
I	Intimidating a Public Servant	Melissa Hallmark
II	Felony Harassment	Melissa Hallmark
III	Intimidating a Public Servant	Eric Richey
IV	Felony Harassment	Eric Richey
V	Felony Stalking	Janice Gray
VI	Felony Harassment	Janice Gray

The fourth amended information further alleged a separate aggravating circumstance for each count. CP 100-105.

The court ruled pretrial that the defendant's prior bad acts against Janice Gray were admissible, in part to prove the aggravating circumstance that the defendant engaged in an ongoing pattern of psychological abuse of Janice Gray over a prolonged period of time. CP (Order on ER 404(b)). Many of the prior bad acts ruled admissible predated the charging period for the offenses involving Gray. CP (Order on ER 404(b)).

The case was tried to a Whatcom County jury in December 2010. The State and the defense filed written proposed jury instructions at the start of trial. RP 3-4; 278-79, 500-544. For reasons unknown, the trial court did not file the written jury instruction packets submitted by each party. However, the defendant concedes that the defense proposed the instruction that was later adopted by the court and given as Court's Instruction to the Jury No. 32. App. Br. at 42 (citing RP 507). The

defense did not object when the court advised that it would give Instruction No. 32. RP 552.

The jury found the defendant “guilty” of Count I and Counts III-VI. CP 42, 45, 48, 50, 55. The jury found the defendant “not guilty” of Count II. CP 52. The jury also returned special verdicts finding an aggravating circumstance for each separate crime. CP 40, 43, 46, 49, 54. The jury found that the crime committed against victim Hallmark was committed in retaliation for Hallmark’s duties as a public official in the criminal justice system. CP 54. The jury found that the crimes committed against victim Richey were committed in retaliation for Richey’s duties as an officer of the court in the criminal justice system. CP 46, 49. The jury found that the crimes committed against victim Gray were domestic violence and part of an ongoing pattern of psychological abuse manifested by multiple incidents over a prolonged period of time. CP 40, 43.

At sentencing, the court found that the two offenses involving victim Eric Richey (Counts III and IV) were separate criminal conduct. CP 6-18; RP 678. The court also found that the two offenses involving victim Janice Gray (Counts V and VI) were separate criminal conduct. CP 6-18; RP 678.

The trial court concluded that each aggravating circumstance was itself a substantial and compelling reason to depart from the standard range. CP 238-240 (Conclusion of Law 8); RP 711. The court imposed an exceptional sentence above the standard range for Counts I and IV. CP 6-18; CP 238-240. The court further ordered that the sentences for Counts IV and VI run consecutive to each other and consecutive to Count I. CP 6-18; CP 238-240. This appeal follows. CP 19-33.

### III. ARGUMENT

**A. The Trial Court Properly Scored Counts III & IV And Counts V & VI As Separate Criminal Conduct Because The Offenses Occurred At Different Times And/Or Did Not Share The Same Objective Criminal Intent.**

Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by scoring all current offenses as if they were prior convictions. RCW 9.94A.589(1)(a). However, if two current offenses are “same criminal conduct,” then the other current offense is not scored as a prior conviction. *Id.* The phrase “same criminal conduct” is construed narrowly. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

Two offenses constitute “same criminal conduct” if the two offenses:

- (1) require the same criminal intent;
- (2) are committed at the same time and place; and
- (3) involve the same victim.

RCW 9.94A.589(1)(a). The absence of any one of the three elements precludes a finding of “same criminal conduct.” *Id.*

The sentencing court has discretion when determining whether two crimes are “same criminal conduct” and will be reversed only upon an abuse of discretion. *Grantham*, 84 Wn. App. at 857. To determine if two crimes share a criminal intent, the court focuses on whether the defendant’s intent, viewed objectively, changed from one crime to the next. *Id.* at 858. The court also considers whether one crime furthered the other such that the defendant had to commit one crime in order to accomplish the other. *Id.* If so, the two crimes share the same objective intent. *Id.* But the fact that multiple crimes occur sequentially or close in time does not mean that the crimes shared the same criminal intent. *Id.*

In *Grantham*, the defendant forcibly raped the victim. *Grantham*, 84 Wn. App. at 856. After the rape was completed, the defendant stopped, threatened the victim, and raped her again. *Id.* The court held that the two rapes were separate criminal conduct because “*Grantham*, upon completing the act of [rape], had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *Id.*

- 1. The crimes of intimidating a public servant and felony harassment committed against victim Richey were separate criminal conduct because the two offenses occurred during different periods of time and did not share the same objective criminal intent.**

The offenses charged in Counts III and IV did not occur at the same time. Count III, intimidating a public servant, was based upon a letter that the defendant wrote to Richey on June 7, 2009. Exhibit 26. The charging period for Count III was the month of June 2009. CP 100-105. Count IV, felony harassment (threats to kill), was based upon numerous letters that were written by the defendant between June 2007 and July 2009, almost all of which were written months or years prior to June 2009. CP 100-105. Counts III and IV clearly occurred at different times and cannot be “same criminal conduct.”

Additionally, Counts III and IV did not share the same objective criminal intent. “The relevant inquiry for the intent prong is to what extent the criminal intent, when viewed objectively, changed from one crime to the next.” *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Here, the objective criminal intent required for Count III, intimidating a public servant, was the intent to immediately influence Richey’s decision to charge the defendant with a crime. The objective criminal intent for Count IV, on the other hand, was to knowingly utter a threat to kill Richey, without any connection to the intent to influence

Richey's April 2009 charging decision. Indeed, the defendant threatened to kill Richey numerous times from January 2007 to April 2009, months and years prior to the defendant having any motive to influence Richey's April 2009 charging decision.

Additionally, like the defendant in *Grantham*, the defendant had the opportunity to pause, reflect, and cease his criminal conduct after threatening to kill Richey from January 2007 to April 2009. Instead, the defendant chose to attempt to influence and intimidate Richey's official duties by writing the letter of June 7, 2009. The two offenses were separate criminal conduct.

**2. Counts V and VI were separate criminal conduct because the two offenses did not share the same objective criminal intent.**

Count V (felony harassment) and Count VI (felony stalking) against victim Gray were also separate criminal conduct because the two offenses did not share the same objective criminal intent. Felony harassment (Count V) required that the defendant knowingly uttered a single threat to kill Gray, regardless of whether he intended to "repeatedly harass" her as required for felony stalking (Count VI). Similarly, there was no requirement that the defendant "knowingly threaten to kill" Gray in order to intentionally and repeatedly harass her as required for felony stalking. A person can repeatedly harass someone

without threatening to kill them. The two offenses did not require the same objective criminal intent.

Nor did one crime further the other. Defendant argues that his intent for both crimes was to get Gray to sit down and talk. The evidence presented below does not support the defendant's argument. The most rational inference from the evidence was that the defendant's intent in threatening to kill Gray was not to get her to sit down and talk (indeed, he did not know Gray would ever read the letters to his mother), but rather a simple expression of his desire to kill Gray when he was released from prison. Stalking, on the other hand, required an intent to harass without any expression of a desire to kill. It was not necessary for the defendant to threaten to kill Gray in order to harass and stalk her. One crime did not further the other. The trial court did not abuse its discretion by finding that the two offenses were separate criminal conduct.

**B. The Trial Court Properly Imposed Consecutive Sentences Based Upon Multiple Aggravating Circumstances Found By The Jury.**

The court may impose a sentence outside the standard sentence range if there are substantial and compelling reasons to do so. RCW 9.94A.535. Facts supporting an exceptional sentence above the standard range must be proved to the trier of fact beyond a reasonable doubt. RCW 9.94A.537(3).

When an aggravating circumstance is proved beyond a reasonable doubt, the trial court may impose as an exceptional sentence a term of confinement up to the statutory maximum penalty for that crime. RCW 9.94A.537(6); RCW 9A.20.021. Where multiple offenses are involved, the court may impose consecutive sentences as part of an exceptional sentence. RCW 9.94A.535; RCW 9.94A.589(1).

Here, the jury found multiple aggravating circumstances beyond a reasonable doubt. The jury found that the defendant committed Count I (intimidating a public servant) in retaliation for Melissa Hallmark's role in the criminal justice system. CP 54. The jury found that the defendant committed Count IV (felony harassment) against Richey in retaliation for Richey's role in the criminal justice system. CP 46. The jury found that the defendant committed Count VI (felony harassment) against a family or household member, Janice Gray, and that the offense was part of an ongoing pattern of psychological abuse of Gray. CP 40. These were all proper aggravating circumstances under RCW 9.94A.535(3) and the defendant does not argue otherwise.

The trial court had discretion to impose an exceptional sentence on every count, for a total possible maximum sentence of 35 years.<sup>4</sup>

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<sup>4</sup> Counts I and III were class B felonies each punishable by up to 10 years prison. Counts IV, V, and VI were class C felonies each punishable by up to 5 years prison.

Based upon the three separate aggravating circumstances for Counts I, IV, and VI, which involved three separate victims, the court imposed an exceptional sentence that totaled 20 years.

The court imposed exceptional terms of confinement of 120 months (63 months above the standard range) for Count I; and 60 months for Count IV (3 months above the standard range). CP 6-18; CP 238-240. The trial court imposed standard range sentences for counts III, V, and VI. CP 6-18.

The court further ordered that the exceptional 60-month sentence for Count IV run consecutive to the 120-month exceptional sentence for Count I; and that the 60-month standard range sentence for Count VI run consecutive to the sentences imposed on Counts I and IV. For practical purposes, the exceptional sentence for Count IV was the only sentence that involved two sentencing components: a term of confinement above the standard range and a consecutive sentence.

Defendant argues that the trial court was required to base each exceptional aspect of each sentence upon a separate aggravating circumstance. Neither statutes nor case law support this argument.

RCW 9.94A.589(1)(a) provides, "Sentences imposed under this subsection shall be served concurrently [and c]onsecutive sentences may only be imposed under the exceptional sentence provisions of

RCW 9.94A.535.” RCW 9.94A.535 provides, “A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section.” Notably, there is no statutory limitation to imposing a sentence that is both above the standard range and consecutive to other counts when (1) the jury finds an aggravating circumstance, and (2) the court concludes that the circumstance is a substantial and compelling reason to depart from the standard range.

Defendant nevertheless argues that case law subsequent to a Washington Supreme Court opinion requires a different result. In *State v. Batista*, the defendant received consecutive sentences based on a “clearly too lenient” aggravating factor. *State v. Batista*, 116 Wn.2d 777, 779-780, 808 P.2d 1141 (1991). The trial court did not impose a sentence above the standard range because it believed that the aggravating factor at issue could only be used to impose a consecutive sentence. *Id.* at 780. The Washington Supreme Court disagreed, explaining that “[i]f a presumptive sentence is clearly too lenient, this problem could be remedied either by lengthening concurrent sentences, *or* by imposing consecutive sentences.” *Id.* at 785-86 (emphasis added).

In a series of cases, Division Three of this court misinterpreted *Batista*'s use of the word “or” in the sentence above as disjunctive rather

than conjunctive (and/or). *State v. McClure*,<sup>5</sup> *In re PRP of Holmes*,<sup>6</sup> and *State v. Quigg*<sup>7</sup> all relied on this sentence from *Batista* to conclude that a term of confinement above the standard range, and a consecutive sentence flowing from that same count, cannot follow from one aggravating circumstance. The question is whether these cases correctly interpreted *Batista*. They did not.

The Washington Supreme Court rejected the reasoning of these cases in *State v. Smith*. In *Smith*, the defendant was convicted of three separate counts of burglary, as well as an aggravating circumstance for each count. *State v. Smith*, 123 Wn.2d 51, 864 P.2d 1371 (1993), *overruled in part on other grounds by State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). The trial court imposed a term of prison above the standard range for each count; and further ordered that the sentences be served consecutively. *Id.* at 54. On appeal, the defendant cited *Batista* to argue “that the trial court acted improperly by imposing an exceptional sentence which was both beyond the standard range, and consecutive.” *Id.* at 57. The Washington Supreme Court rejected this interpretation of *Batista*. *Id.* at 57-58. The court noted that *Batista* also said, “[w]here multiple current offenses are concerned, in addition to lengthening of

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<sup>5</sup> 64 Wn. App. 528, 827 P.2d 290 (1992).

<sup>6</sup> 69 Wn. App. 282, 848 P.2d 754 (1993), *overruled on other grounds by State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995).

<sup>7</sup> 72 Wn. App. 828, 866 P.2d 655 (1994).

sentences, an exceptional sentence may also consist of imposition of consecutive sentences where concurrent sentencing is otherwise the standard.” *Id.* at 58. The court held that “it is permissible to impose an exceptional sentence which includes both sentencing components.” *Id.* at 57–58.

*Smith* further noted that the Court had approved this form of exceptional sentence in other cases. In *State v. Oxborrow*, the defendant was convicted of multiple counts and the court found multiple aggravating circumstances. *State v. Oxborrow*, 106 Wn.2d 525, 723 P.2d 1123 (1986). The trial court imposed an exceptional sentence that included both lengthened sentences and consecutive sentences. *Id.* at 528. The Washington Supreme Court affirmed, noting that the sentencing court could impose the statutory maximum for each count, *and* run the sentences consecutive. *Id.* at 535-36.

*Smith* clarified that the rationale expressed in *McClure* and its progeny is no longer good law to the extent that *McClure* held that a sentence that is both consecutive and outside the standard range requires two separate aggravating circumstances. The Supreme Court reaffirmed this holding from *Smith* in *In re Breedlove*, 138 Wn.2d 298, 304-05, 979 P.2d 417 (1999) (“a trial court has authority to impose sentences which

are beyond the standard range, up to the maximum permitted, and then to order that the sentences be served consecutively”).

This court expressly rejected *McClure* and followed *Smith* in *State v. Flake*. In *Flake*, the defendant was convicted of vehicular homicide and hit-and-run. *State v. Flake*, 76 Wn. App. 174, 883 P.2d 341 (1994). There was no aggravating circumstance for the hit-and-run count, but there was for the vehicular homicide count. *Id.* at 178-79. The court imposed a term of confinement above the standard range for the vehicular homicide count; and ran the sentence for vehicular homicide consecutive to the hit-and-run count. *Id.* at 179. On appeal, Flake cited *McClure* and argued that the court illegally imposed two exceptional sentences for the vehicular homicide count. *Id.* at 181-82. Relying on *Smith* and explicitly rejecting Flake’s interpretation of *McClure*, this court held that “a sentencing court may impose both types of exceptional sentences simultaneously.” *Id.* at 183.

The Washington Supreme Court and this court have interpreted Chapter 9.94A RCW to allow exactly what the sentencing court did here. *Smith*, 123 Wn.2d at 57-58; *Flake*, 76 Wn. App. at 183.<sup>8</sup> Presented with

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<sup>8</sup> Despite *Flake* and *Smith*, the defendant argues that *McClure* is still good law because this court cited *McClure* in a post-*Smith* opinion, *State v. Stewart*, 72 Wn. App. 885, 901, 866 P.2d 677 (1994). In *Stewart*, the court stated that “[w]here numerous aggravating factors are present, more than one exceptional sentence may be imposed.” *Id.* at 901 (citing *McClure*, 64 Wn. App. at 534). Notably, *Stewart* did not cite *McClure*

multiple aggravating circumstances for multiple counts, the trial court was well within its discretion to impose an exceptional sentence that included both a term of confinement above the standard range and consecutive sentences.

**C. The Trial Court Properly Imposed An Exceptional Sentence For Count VI Because The Aggravating Circumstance Found By The Jury Was A Factual Finding In Addition To The Essential Elements Of The Crime.**

A reviewing court employs a two-part test to determine whether an aggravating circumstance supports a departure from the standard sentence range:

- (1) The trial court may not base an exceptional sentence on factors the legislature necessarily considered in establishing the standard sentencing range for the underlying offense; and
- (2) The aggravating circumstance must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.

*State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997). Defendant argues in this appeal that part (1) of the test was not satisfied. App. Br. at 38-40. Defendant's argument fails because proof of the aggravating circumstance attached to the felony stalking offense charged in Count VI was not necessary to prove felony stalking.

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for the proposition that each component of an exceptional sentence must be based on a separate aggravating factor. Rather, *Stewart* stated a general principle consistent with RCW 9.94A.535 and that follows *Flake* and *Smith*. *Stewart* does not support the interpretation of *McClure* that is argued by the defendant.

When a crime involves domestic violence and is also part of an ongoing pattern of psychological abuse of the victim, manifested by multiple incidents over a prolonged period of time, the trial court has discretion to impose an exceptional sentence above the standard range. RCW 9.94A.535(2)(h)(i); RCW 9.94A.537(6). In the present case, the jury found that this circumstance was present for Count VI, thus aggravating the underlying crime of felony stalking. CP 40.

The essential elements of the crime of felony<sup>9</sup> stalking as charged in the present case were:

- (1) That during the period from January 24, 2007 through August 5, 2009, the defendant intentionally and repeatedly harassed Janice Gray;
- (2) That Janice Gray reasonably feared that the defendant intended to injure her;
- (3) That the defendant either:
  - (a) intended to frighten, intimidate, or harass Janice Gray;  
or
  - (b) knew or reasonably should have known that Janice Gray was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her;
- (4) That the defendant acted without lawful authority; and

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<sup>9</sup> The crime of stalking is generally a gross misdemeanor, but is elevated to a class C felony if the State proves beyond a reasonable doubt that the defendant was previously convicted of a “crime of harassment” against the same victim. RCW 9A.46.110(5)(a)(b). There was no dispute in this case that the defendant was previously convicted of numerous crimes of harassment against Janice Gray.

(5) That any of these acts occurred in the State of Washington.

CP 57-97 (Instruction No. 29); RCW 9A.46.110(1). “Repeatedly” means on two or more separate occasions. RCW 9A.46.110(6)(e); WPIC 36.24; CP 57-97 (Instruction No. 27). The State was only required to prove that the defendant harassed Gray on two separate occasions between January 2007 and August 2009.

For the crime of felony stalking, the State proved that the defendant harassed Gray at least twice between January 2007-August 2009; and that he was previously convicted of a “crime of harassment” against Gray. CP 41-42. The State was not required to prove that the crime was committed against a family or household member in order to convict the defendant of stalking. Nor was the State required to prove an ongoing pattern of psychological abuse of the victim manifested by multiple incidents over a prolonged period of time in order to convict the defendant of stalking. Nevertheless, the State presented evidence of multiple incidents of harassment during 2007-2009 that were in addition to the minimum two (2) necessary for a stalking conviction; and further presented evidence of multiple incidents of harassment that occurred prior to 2007, which were in addition to the single conviction on the crime of harassment necessary to elevate the stalking charge to a felony.

Defendant nevertheless argues that proof of the essential elements of stalking necessarily proved the aggravating circumstance such that there was no “aggravating” fact proved. This same argument was rejected in *State v. Zatkovich*. In *Zatkovich*, the defendant was convicted of stalking his ex-wife. *Zatkovich*, 113 Wn. App. 70, 73, 52 P.3d 36 (2002). The State presented evidence that the victim feared for her life, she feared for the safety of her family members, and she suffered from anxiety as a result of the defendant’s ongoing criminal conduct towards her. *Id.* at 74-78. The trial court imposed an exceptional sentence based upon “ongoing pattern of psychological abuse manifested by multiple incidents over a prolonged period of time.” *Id.* at 81. The court of appeals affirmed, noting that the defendant’s “extreme domestic violence,” in addition to the facts of the felony stalking, justified an exceptional sentence. *Id.* at 80-82.

Like *Zatkovich*, the defendant herein was convicted of stalking his ex-wife. Like *Zatkovich*, the State was required to prove only that the defendant harassed Janice Gray on two or more occasions during the relevant charging period in order to convict the defendant. CP 57-97 (Instruction No. 27). Like *Zatkovich*, the State presented evidence of “extreme domestic violence” that was in addition to the proof required for a stalking conviction.

Moreover, the “extreme domestic violence” in this case was worse than *Zatkovich*. Here, the State proved over a dozen acts of harassment (Exhibit 4-12, 21-23) that the defendant committed during the 2007-2009 charging period, which were far in excess of the minimum “two” acts of harassment required for a conviction for stalking. The State further presented evidence of multiple incidents of domestic violence causing psychological abuse that occurred prior to 2007. Indeed, the trial court admitted evidence of prior bad acts against Janice Gray that predated the charging period as specific proof of an ongoing pattern of psychological abuse over a prolonged period of time. CP (Order on Admissibility of Defendant’s Prior Bad Acts). The jury heard evidence that the defendant committed assault, violation of a no-contact order, harassment, and multiple counts of stalking against Janice Gray between 2001 and 2007 before he ever began the conduct that constituted the felony stalking charged in Count VI.

It is hard to imagine a longer, more intense pattern of psychological abuse against a former spouse than that suffered by Janice Gray. At sentencing, Gray described in painful detail the psychological effect that the defendant’s ongoing psychological abuse had on Gray and her minor daughter. RP 684-88. The defendant engaged in “extreme

domestic violence” above and beyond that necessary to prove felony stalking. The trial court appropriately imposed an exceptional sentence.

**D. The Special Verdicts Finding Aggravating Circumstances Should Be Affirmed Because (1) The Defendant Did Not Preserve Jury Instructional Error, (2) Any Error Was Harmless, And (3) Any Deficiency In Defense Counsel’s Representation Was Not Prejudicial.**

In *State v. Bashaw*, the Washington Supreme Court held that it is error to instruct the jury that it must be unanimous to answer “no” to a special verdict form pertaining to a sentencing enhancer. *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (July 2010). The State concedes in the present case that the Court’s Instruction to the Jury No. 32 was a misstatement of the law under *State v. Bashaw*.

However, the defendant waived error by proposing Instruction No. 32 and declining to object to it. RP 507, 554. Furthermore, any error was harmless and defense counsel’s decision not to object to the instruction did not affect the outcome of the trial.

**1. The court should decline review of this assignment of error because the error was not preserved below.**

The court should decline review of the defendant’s assignment of error because (a) the error was invited, (b) the error was not preserved, and (c) the error is not constitutional

**a. The doctrine of invited error precludes the defendant's assignment of error.**

“Under the invited error doctrine, a defendant may not request that instructions be given to the jury and then complain upon appeal that the instructions are constitutionally infirm.” *State v. Aho*, 137 Wn.2d 736, 744–745, 975 P.3d 512 (1999). The invited error doctrine applies even when the alleged error is of constitutional magnitude. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Here, the defendant correctly acknowledges that the defense proposed the instruction that he now complains was error. App. Br. at 42 (citing RP 507).<sup>10</sup> Whether or not the claim of error is of constitutional magnitude is immaterial because the defense contributed to the claimed error. *Henderson, supra*. The court should decline to consider the claim under the doctrine of invited error.

**b. The defendant waived a claim of error by declining to object at trial.**

An appellant must preserve an issue for appeal with an objection at trial. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Failure to object at trial prevents the trial court from correcting

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<sup>10</sup> As noted above, the trial court did not file the written proposed instructions that the parties submitted for filing. The written proposed instructions were clearly before the court. RP 3-4, 278-79, 500-544. Given that the appellant concedes that he proposed the instruction that became Court's Instruction No. 32, the State will forego a motion to supplement the record.

an error and leads to needless appeals and additional trials. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Appellate courts refuse to address a claim raised for the first time on appeal unless the claim involves “manifest constitutional error.” RAP 2.5(a)(3); *McFarland*, 127 Wn.2d at 332-33. CrR 6.15(c) specifically requires the parties to make a record of exceptions to the jury instructions before the court instructs the jury. The duty of a party to preserve error has specific applicability to the failure to challenge jury instructions. *Scott*, 110 Wn.2d at 685.

Here, the trial court discussed the proposed written jury instructions with both parties outside the presence of the jury as required by CrR 6.15(c). RP 500-544. The defendant did not object to the court’s proposed instruction that became Instruction No. 32; indeed, the defense proposed the instruction. RP 507; App. Br. at 42. The defendant’s decision to accept the instruction without objection deprived the trial court of the opportunity to address and/or correct the error the defendant now raises for the first time on appeal. The court should decline review of this claim of error pursuant to RAP 2.5(a).

**c. The claim of error does not involve manifest constitutional error.**

The Rules of Appellate Procedure provide an exception to the general rule requiring an objection at trial. RAP 2.5(a)(3) allows an

appellant to raise a claim of “manifest error affecting a constitutional right” for the first time on appeal.

Appellate courts do not assume that claimed errors meet the constitutional threshold for the exception in RAP 2.5(a)(3). *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An appellant must identify a constitutional error in order to obtain review under RAP 2.5(a)(3). *McFarland*, 127 Wn.2d at 333. Appellate courts refuse to hear claims of error first raised on appeal absent this showing. *Scott*, 110 Wn.2d at 688.

Here, the defendant suggests that his appeal involves a constitutional due process issue that that can be raised for the first time on appeal. App. Br. at 45. At the outset, it should be noted that the Washington Supreme Court has accepted review of this very issue in two cases, *State v. Nunez*, 160 Wn. App. 150, 159-60, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011) and *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011), *review granted*, 172 Wn.2d 1004 (2011). Current case law, however, persuasively establishes that the defendant’s challenge to Instruction No. 32 is not a constitutional claim.

First, neither the federal nor Washington State Constitutions provide textual support for a due process claim based upon a jury instruction that is erroneous under *Bashaw*. *State v. Nunez*, 160 Wn.

App. 150, 159-60, 248 P.3d 103, *review granted*, 172 W.2d 1004 (2011). The Washington State Supreme Court based its decision in *Bashaw* on common law and policy considerations, not constitutional law. See *Bashaw*, 169 Wn.2d at 146 n.7 (rejecting a constitutional basis for the court's holding). Five (5) recent decisions of the court of appeals recognize that the error identified in *Bashaw* is non-constitutional and cannot be raised for the first time on appeal. *State v. Bertrand*, \_\_\_ Wn. App. \_\_\_ (Slip. Op. 40403-6-II, Dec. 8, 2011); *State v. Grimes*, \_\_\_ Wn. App. \_\_\_ (Slip. Op. 40392-7-II, Dec. 2, 2011); *State v. Morgan*, 163 Wn. App. 341, 348-352, 261 P.3d 167 (2011); *State v. Rodriguez*, 163 Wn. App. 215, 259 P.3d 1145 (2011); *State v. Nunez*, 160 Wn. App. at 161-63; *But see State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011); *State v. Cham*, \_\_\_ Wn. App. \_\_\_ (65071-8-I, Dec. 12, 2011); and *State v. Reyes-Brooks*, \_\_\_ Wn. App. \_\_\_ (64012-7-I, Dec. 5, 2011) (holding that *Bashaw* error is manifest constitutional error that can be raised for the first time on appeal).

Second, “[t]he requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted.” *Scott*, 110 Wn.2d at 690. Here, the jury instructions informed the jury of the essential elements of each crime, and

that the jury had to be unanimous in order to answer the special verdict forms “yes.” CP 57-97. Instruction No. 32<sup>11</sup> properly informed the jury that it must unanimously agree that the State proved the aggravating circumstance beyond a reasonable doubt in order to answer the special verdict form “yes.” CP 57-97. Instruction No. 38<sup>12</sup> further emphasized that the jury had to be unanimously convinced beyond a reasonable doubt before answering any special verdict form “yes.” CP 57-97.

Divisions Two and Three of this court have repeatedly concluded that the “*Bashaw* error” raised in the present appeal is not manifest constitutional error that can be raised for the first time on appeal. *State v. Bertrand*, \_\_\_ Wn. App. \_\_\_ (Division Two, Slip. Op. 40403-6-II, December 8, 2011); *State v. Grimes*, \_\_\_ Wn. App. \_\_\_ (Division Two, Slip. Op. 40392-7-II, December 2, 2011); *State v. Rodriguez*, 163 Wn. App. 215, 233-34, 259 P.3d 1145 (Division Three 2011); *State v. Nunez*, 160 Wn. App. at 161-63 (Division Three), *review granted*, 172 Wn.2d 1004, 258 P.3d 676 (2011).

This court, however, is split as to whether a *Bashaw* error can be raised for the first time on appeal. Two panels of this court held that the

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<sup>11</sup> “In order to answer a question on a special verdict form ‘yes,’ you must unanimously be satisfied beyond a reasonable doubt that ‘yes’ is the correct answer.”

<sup>12</sup> “The State has the burden of proving the existence of each circumstance described in the special verdict forms beyond a reasonable doubt. In order for you to find the existence of such a circumstance in answering any special verdict form, you must unanimously agree that the circumstance has been proved beyond a reasonable doubt.”

*Bashaw* instructional error implicates due process and is manifest constitutional error. *State v. Reyes-Brooks*, \_\_\_ Wn. App. \_\_\_ (64012-7-I, December 5, 2011); *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011). Another panel of this court explicitly rejected *Ryan* and sided with Divisions Two and Three that no constitutional right is at issue when a *Bashaw* error occurs. *State v. Morgan*, 163 Wn. App. 341, 348-352, 261 P.3d 167 (2011). Still another panel was split, with the majority following *Ryan* and the dissent following *Morgan*. *State v. Cham*, \_\_\_ Wn. App. \_\_\_ (Slip. Op. 65071-8-I, December 13, 2011). The Washington Supreme Court presumably will issue an opinion resolving the split of opinion in the court of appeals.

Until that time, the court should reaffirm *Morgan*. The court should decline review because the instructional error in this case was non-constitutional error that cannot be raised for the first time on appeal.

**2. The instructional error was harmless.**

An erroneous jury instruction is generally subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). Even misleading instructions do not require reversal unless the complaining party can show prejudice. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). A jury instruction that incorrectly informs the jury that it must be unanimous to answer a special verdict form finding a sentencing

enhancement is subject to harmless error analysis. *Bashaw*, 169 Wn.2d at 147; *State v. Grimes*, \_\_\_ Wn. App. \_\_\_ (Slip. Op. 40392-7-II, Dec. 2, 2011).

In *Bashaw*, the jury had to answer a special verdict form asking whether Bashaw sold drugs within 1,000 feet of a school bus stop. *Bashaw* at 137. At trial, Bashaw contested the means used to calculate distances between the bus stop and the alleged drug transaction. *Id.* at 139. Witnesses testified that at least one of the sales may have occurred more than 1,000 feet from the nearest bus stop. *Id.* Whether Bashaw was within 1,000 feet of a bus stop was a disputed factual issue squarely before the jury. The jury was erroneously instructed that it had to be unanimous in order to answer the special verdict form “no.” On appeal, the court concluded that it could not find the instructional error harmless beyond a reasonable doubt. *Id.* at 147-48.

In *State v. Grimes*, the sentencing factor at issue was also whether a drug sale occurred within 1000 feet of a school bus route. The court noted that there was “uncontroverted evidence” that the drug sale occurred within 1000 feet of a bus route. Accordingly, the court concluded beyond a reasonable doubt that the error was harmless and affirmed the sentencing enhancement. *Grimes*, \_\_\_ Wn. App. \_\_\_ (Slip. Op. 40392-7-II, Dec. 2, 2011).

In the present case, like *Grimes*, there was no factual dispute about the aggravating circumstances related to Hallmark (Count I) and Richey (Counts III and IV). Hallmark and Richey had no connection to the defendant other than their positions within the criminal justice system. Defendant's letters proved that he despised both Hallmark and Richey because of their actions against him as probation officer and prosecutor respectively. The evidence was overwhelming that the motivation for the offenses was retaliation for Hallmark and Richey performing their duties within the criminal justice system. There was no contrary evidence presented.

Similarly, like *Grimes*, the evidence supporting the aggravating circumstances for Counts V and VI was also overwhelming and uncontroverted. The State presented unrefuted evidence describing the defendant's 9-year campaign of psychological torture against Gray. The defendant's lengthy criminal history of crimes against Gray, which was admitted as evidence, was proof itself of the ongoing psychological torture suffered by Gray. Defendant did not present any evidence to refute the State's evidence. Unlike *Bashaw*, and like *Grimes*, the evidence proving the aggravating circumstance was overwhelming and uncontroverted.

Finally, the jurors never asked the court any questions about unanimity. If the jurors could not agree, they would have so notified the court and asked for guidance as they do in every other case where they are deadlocked. The jury was polled after returning its verdict and the jurors confirmed their unanimous verdicts. RP 661. There can be no question that the jury was unanimous.

The “*Bashaw* error” in this case was unfortunate but had no effect on the outcome of the case. The error was harmless.

**3. Defendant’s claim of ineffective assistance of counsel fails because the jury instruction at issue did not actually prejudice the defendant.**

The State concedes that defense counsel’s performance was deficient because he proposed a jury instruction that was declared erroneous in *Bashaw*, an opinion published four months prior to the trial. However, this deficiency does not entitle the defendant to relief.

A claim of ineffective assistance of counsel places on the defendant the burden of showing not only deficient performance by trial counsel, but also that the deficiency resulted in actual prejudice. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome of the case would have differed. *State v.*

*Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), *cert. denied*, 532 U.S. 1008 (1998).

In *Bashaw*, the jury was properly instructed that it must be unanimous in order to answer the special verdict form “yes.” *Bashaw*, 169 Wn.2d at 139. The jury returned a unanimous special verdict of “yes.” *Id.* Without any real explanation, the court determined that the misstatement in the instruction requiring unanimity was prejudicial. *Id.* at 147-48. The *Bashaw* court seemed to presume that the jurors did not follow the instruction to answer “yes” only if they unanimously agreed that “yes” was the correct answer, an analysis sharply criticized by the dissent. *Bashaw* at 151 (Madsen, J., dissenting).<sup>13</sup> Alternatively, the *Bashaw* court may have presumed that because of the factual dispute regarding the distance between the bus stop and the drug deal, the error could not be harmless. The court did not elaborate.

Here, unlike *Bashaw*, the instructional error is reviewed within the confines of a claim of ineffective assistance of counsel. Unlike *Bashaw*,

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<sup>13</sup> “The majority suggests that a different outcome might have resulted under proper instructions. The majority is therefore either suggesting that the jury might not have followed the jury instructions when it returned its unanimous findings—which would be antithetical to the presumption that juries follow the instructions they are given, or the majority is suggesting that the jury was coerced or influenced by the unanimity instruction into reaching a conclusion it would not otherwise have reached—which is equally unacceptable given that unanimity is required for guilty verdicts. We certainly do not infer from a unanimous verdict on guilt that the jury was coerced or improperly influenced by an instruction on unanimity. Why does the majority doubt the unanimous verdict here?”

the defendant in the present case has the burden of establishing actual prejudice in order to prevail on an ineffective assistance of counsel claim. Defendant must persuade this court that there is a probability that the outcome of the trial would have been different but for the instructional error in order to obtain relief. *Stenson*, 132 Wn.2d at 705-06. Unlike *Bashaw*, he must overcome the presumption that the jurors did follow their instructions and reached unanimous special verdicts of “yes.” The analysis of the *Bashaw* dissent is therefore apropos in the present case.

There is no probability that the outcome of the trial in this case would have been different. As discussed earlier, the jurors were presented with overwhelming and uncontroverted evidence that the answer to each special verdict form was “yes.” The jurors were properly instructed in Instructions Nos. 32 and 38 to answer “yes” only if they were unanimous that “yes” was the correct answer. Washington courts have long held that jurors are presumed to follow the court’s instructions, *State v. Ingle*, 64 Wn.2d 491, 499, 392 P.2d 442 (1964).

There is simply no reason to believe that the jurors in this case did not follow their instruction and unanimously agree that “yes” was the correct answer to the special verdict forms. The jurors never asked the court any questions about unanimity. The jury was polled after returning its verdict and confirmed the unanimous verdicts. RP 661. The only

reasonable probability to be discerned from the evidence presented, and the verdicts of the jury, is that the 12 jurors followed their instructions and unanimously agreed that “yes” was the correct answer to each of the special verdict forms. Defendant fails to show that the outcome would have been any different if the jurors were instructed that they could answer “no” if they could not agree on the answer to the special verdict forms, a situation that did not occur in this case. Accordingly, the defendant’s claim of ineffective assistance of counsel fails.

**4. The remedy for the instructional error would be to affirm the convictions and remand to impanel a jury to consider the aggravating circumstances.**

Where a *Bashaw* instructional error compels vacation of an exceptional sentence, the trial court may impanel a jury upon remand to consider the aggravating circumstance(s) with proper instructions. *State v. Reyes-Brooks*, \_\_\_ Wn. App. \_\_\_ (64012-7-I, December 5, 2011) (*citing State v. Thomas (Thomas II)*, 150 Wn.2d 8921, 850, 83 P.3d 970 (2004)).

There was no preserved or reversible error in the present case. It would be a tragedy to put the victims through another hearing given that the court can conclude from the record that the jury would have returned the same special verdicts even without the *Bashaw* error. But if the court disagrees, the court should affirm the defendant’s convictions, which are not challenged in this appeal, and remand to the trial court to allow a new

jury to hear evidence of the aggravating circumstances with a proper instruction on unanimity.

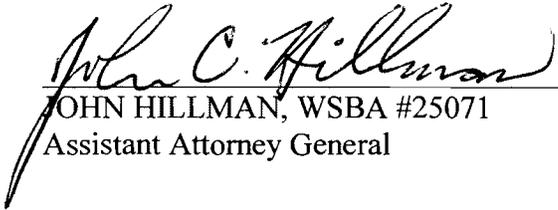
#### IV. CONCLUSION

The trial court properly calculated the defendant's offender score. The defendant did not preserve a challenge to the jury instructions and the court should decline review of that issue. The *Bashaw* error that occurred was harmless. The defendant's sentence should be affirmed.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of December, 2011.

ROBERT M. MCKENNA  
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By:

  
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Assistant Attorney General

NO. 66554-5

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent,

v.

MARLOW TODD EGGUM,

Petitioner.

DECLARATION OF  
SERVICE

ALLISON CLEVELAND declares as follows:

On Friday, December 30, 2011, I deposited into the United States

Mail, first-class postage prepaid and addressed as follows:

Dana M. Nelson  
Nielson Broman & Koch PLLC  
1908 E Madison St  
Seattle, WA 98122-2842

Copies of the following documents:

- 1) Brief of Respondent
- 2) Declaration of Service

I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of December, 2011.

  
ALLISON CLEVELAND

FILED  
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STATE OF WASHINGTON  
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