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Court of Appeals
Division I
State of Washington

COA NO. 75245-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN HOLCOMB,

Appellant.

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

The Honorable Michael E. Rickert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information is defective because it omits an essential element or necessary supporting fact of the charged crime of interfering with reporting domestic violence. CP 7.

2. The jury instructions for the offense of interfering with reporting domestic violence using fourth degree assault as the underlying crime are improper. CP 21-24.

3. The court erred in denying the motion to arrest judgment based on the defective information and improper instructions on the interference count.

4. Appellant was denied his constitutional right to jury unanimity.

Issues Pertaining to Assignments of Error

1. A charging document must properly notify a defendant of the charge by including the essential elements of the crime and necessary facts supporting the elements. Is reversal of the conviction for interfering with reporting of domestic violence and dismissal with prejudice required because the information failed to set forth the underlying domestic violence crime at issue?

2. Whether the jury instructions directing the jury to consider fourth degree assault as the predicate crime for the interference charge

constitute instruction on an uncharged crime requiring reversal and dismissal with prejudice?

3. Whether appellant's right to an expressly unanimous jury verdict was violated because there was insufficient evidence to prove an alternative means of committing the crime of interfereing with reporting domestic violence?

B. STATEMENT OF THE CASE

1. The Charging Document

The State originally charged John Holcomb with second degree assault under count 1, alleging:

> On or about September 15, 2015, in the County of Skagit, State of Washington, the above-named Defendant did intentionally assault another person, to wit: Shaunna Marie Holcomb, by strangulation or suffocation, contrary to Revised Code of Washington 9A.36.021(1)(g); AND FURTHERMORE, the defendant did commit the above crime against a family or household member; contrary to Revised Code of Washington 10.99.020. CP 27.

The State later filed an amended information, adding a count of interfering with reporting domestic violence under count 2. CP 6-7. The amended information pertaining to count 2 alleges:

> On or about September 15, 2015, in the County of Skagit, State of Washington, the above-named Defendant did commit a crime of domestic violence as defined in RCW 10.99.020 and did prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or

making a report to any law enforcement official, contrary to Revised Code of Washington 9A.36150(1). CP 7.

2. Trial

John Holcomb and Shaunna Holcomb were married and shared a home at the time of the events at issue. RP[1] 50-51. They had two young children. RP 51-52. Their marriage was troubled. RP 72, 272. There was talk of divorce. RP 72. During the week leading up to the incident, John had talked about his desire to leave his wife. RP 73.

John was in nursing school at the time. RP 314. He had a close friend in nursing school, a young woman by the name of Ms. Liddle. RP 219. On September 13, 2015 — two days before the event at issue — Liddle was at the Holcomb residence for dinner. RP 220. Shaunna expressed hostility toward Liddle's relationship with her husband. RP 72, 271-72. She confronted Liddle over her use of pet names for John ("honey" and "dear") and the frequency with which the two talked with one another. RP 222, 233. She was upset that John confided in Liddle about things that he did not confide to his own wife, and disapproved of the relationship. RP 69, 71-72.

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[1] The verbatim report of proceedings is referenced as follows: RP - four consecutively paginated volumes consisting of 3/21/16, 3/22/16, 3/23/16, 4/1/16, 5/11/16.

Shaunna and John gave divergent accounts of what happened two days later on September 15. According to Shaunna, she returned home from a school function that night, noticed Legos on the floor of the kids' bedroom, and asked them to pick the toys up. RP 52-53. John responded angrily, saying he would whip them across the face if he heard them get up. RP 52-53. Shaunna put the kids to bed and went to his office to talk about his reaction. RP 53-54. A fight quickly developed. RP 54. John said he was going to leave. RP 54. He pushed her out of the office. RP 54, 75. She walked back in and insisted on talking. RP 54. He pushed her out and pinned her arms to the wall opposite the office door, yelling in her face. RP 54. She told him to get her hands off her. RP 54. He held onto her arms, which hurt "a little bit." RP 55.

Shaunna further testified she had her phone in her hand and tried to dial 911. RP 55. John saw her dialing 911 and tried to get her phone. RP 55, 76. She went to the bedroom. RP 55, 77. She possibly told him she was a mandatory reporter and was going to report him for what he said to his daughter. RP 78. John pulled the phone from her hand and threw it overhand against the wall. RP 56, 81-82. The phone was undamaged. RP 56, 64, 82. It left a scuffmark on the wall. RP 56.[2]

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[2] Shaunna testified she took a photo of the mark left by the phone on the wall that night. RP 63-65. She did not show police the photo when she

Shaunna hit John on the back of the head. RP 57. He grabbed her around the throat with his arm so that her neck was in the crook of his arm. RP 57. He pulled her down to the bed and choked her "really tight." RP 57, 84. She started to black out. RP 57. It got fuzzy and dark. RP 57. He then let her go. RP 57. She got her phone and left the house. RP 57. He followed her outside and reached around her to get her phone. RP 57. In so doing he put her hands on her. RP 58. He was able to see she was trying to dial 911 because the phone had a big screen. RP 58. She kept the phone away from him and dialed 911. RP 57. He stopped and let her go at this point. RP 57. He went back inside the house, got his jacket, and left while she was on the phone with dispatch. RP 58. The police arrived a couple minutes later. RP 59.

Officer Wright, who responded to the scene, testified that Shaunna complained of pain to her arms and neck. RP 127, 165. But Shaunna testified she was not in pain at the time and felt physically okay. RP 60, 90. Officer Wright took photos at the scene. RP 125. Wright testified he

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met with them the next day. RP 93. The time stamp on the photo showed it was taken before the alleged altercation at issue, but she maintained the time stamp was inaccurate. RP 93-94. Police never went into the bedroom and conducted no investigation into whether the phone was thrown as described by Shaunna. RP 132-33. Officer Howard, who was present at the residence during the civil standby on September 18, testified Shaunna never showed him anything inside the house and never showed him the photo of the mark on wall. RP 266-68.

saw some redness on her arm, but could not see if it was an injury. RP 127. Wright saw no bruising on her arm. RP 127. Wright further testified he saw marks or redness on her neck. RP 125-26. But he also acknowledged telling Shaunna that she should contact him if marks should appear. RP 129. Wright also admitted saying there were no marks when interviewed by the defense. RP 131. He did not call for medical aid. RP 156.

The next morning, Shaunna noticed a mark on her arm and went to the police station. RP 66. She thought this mark was the result of John holding her by the arm. RP 55. Shaunna testified it was not quite a bruise. RP 55. Officer Vandyk, who took the photos, described the inch- long mark as a bruise. RP 170-72, 178. According to Vandyk, this was the only visible injury Shaunna had. RP 171-772. Vandyk also took photos of Shaunna's neck. RP 172. She did not observe any injuries, marks, or redness on her neck. RP 179. Shaunna acknowledged the photo taken of her neck at the police station showed no marks on her neck. RP 67.[3]

In a defense interview, Shaunna said no marks ever showed up on her neck. RP 90. At trial, Shaunna explained she didn't look at herself or the police photos, and so was not aware of any marks. RP 90-91. She

[3] Ms. Liddle's father, a police officer, was present during the civil standby on September 18. RP 205-06. He did not recall seeing any marks on Shaunna at the time. RP 207.

elsewhere testified she looked at herself four or five hours after incident, by which time the marks had faded. RP 193-94. She also testified photos of red marks on her neck taken at the scene represented what she looked like when police arrived. RP 62-63.[4]

John offered a different version of events. According to John, Shaunna was angry after checking on the kids and confronted him in the office, saying one of the kids had complained that if they didn't go to sleep John would hit them in the face with a belt. RP 277-78. John told her he did not say that, and what actually happened was that one of the children had hit her sibling over the head with a toy. RP 278. Shaunna didn't let it go and remained angry. RP 278. John said he was going to leave. RP 278-79. She wanted him to stay and talk. RP 279. He went to the bedroom to get dressed. RP 279. She followed and led him to understand she wanted to call the police and accuse him of threatening to hurt the kids. RP 279. He told her she could get in trouble for making a false accusation. RP 281. He picked up her phone from the bed. RP 280-81. She grabbed for it. RP 281. As he pulled back in reaction, the phone slipped from his grip and hit the wall behind him. RP 281.

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[4] Shaunna acknowledged being fair-skinned and that she flushed when she was upset, but denied bruising easily. RP 186, 189. John testified Shaunna blushes profoundly when emotional, and that her appearance in the photos was no different than what she looked like when she was emotional. RP 292.

Shaunna started hitting him. RP 281-83. He made it to the living room and began putting his pajamas on. RP 283. She had her phone in her hand. RP 283. She led him to believe she was going to call the police and accuse him of attacking and strangling her. RP 283. She walked to the front porch, turned around outside the front door, stood there with her hand on her hip, challenging him to do something. RP 283-84. He approached and asked her to think about what she was doing, as it could destroy her career and his. RP 284. Shaunna spun around, screamed and started dialing the phone. RP 284. He left in a panic. RP 284. He called Ms. Liddell and she picked him up. RP 285-86.[5] He was upset, trying to piece together what had just happened. RP 286

The next day, he stopped at his home to dress in preparation for going to the police department. RP 288. He noticed a little spot on the wall where the phone hit. RP 288. An elongated smear on the wall was not there the day before. RP 289. He went to the police station and told them what happened. RP 290. He denied laying a hand on his wife or harming her. RP 300.

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[5] Ms. Liddle testified about picking John up that night and driving him to a motel. RP 224-25, 227. He seemed scared. RP 227.

3. Jury Instructions

On the charge of interfering with reporting domestic violence, the jury was instructed on the definition of the crime:

> A person commits the crime of interfering with reporting of domestic violence if the person commits a crime of domestic violence and prevents or attempts to prevent the victim or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.
>
> Assault in the Fourth Degree is a crime of domestic violence when committed by one family or household member against another. CP 21 (Instruction 11).

The jury was also given a "to convict" instruction for this count, which provides in relevant part:

> To convict the defendant of the crime of interference with the reporting of a domestic violence offense, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 15, 2015, the defendant committed the crime of Assault in the Fourth Degree against Shauna Holcomb;
>
> (2) That on that date the defendant was a family or household member of Shaunna Holcomb;
>
> (3) That the defendant prevented or attempted to prevent Shaunna Holcomb from calling a 911 emergency communication system or making a report to any law enforcement officer; and
>
> (4) That the prevention or attempted prevention occurred in the State of Washington, County of Skagit, City of Mount Vernon. CP 22 (Instruction 12).

Further, the jury was instructed that "A person commits the crime of assault in the fourth degree when he or she commits an assault." CP 23

(Instruction 13). The jury was also instructed on the elements of fourth degree assault:

> To convict the defendant of the crime of assault in the fourth degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about September 15, 2015, the defendant assaulted Shaunna Holcomb, and
> (2) That this act occurred in the State of Washington.
> CP 24 (Instruction 14)

The State proposed these instructions. RP 244-45. Defense counsel objected to them because they were confusing, as the fourth degree assault was not a charged offense or offered as a lesser offense. RP 245-46, 249, 317. The trial prosecutor said she "elected" not to put the second degree assault crime in the interference instructions "because really it could be any crime of domestic violence." RP 245. The prosecutor believed nothing was wrong with making an uncharged crime the predicate for the interfering charge. RP 245-47. The prosecutor acknowledged "it is confusing given that assault 4 isn't alleged in this case," but thought it could be explained to the jury. RP 247.

The court thought it would be less confusing to just instruct on second degree assault as the predicate domestic violence crime for the interfering count. RP 247-48. Then discussion ensued about whether the assault could occur after the interfering and still qualify as the predicate crime for the interference charge. RP 248-49. Defense counsel

maintained her exception to the instructions, but did not want to be limited in arguing to the jury regarding whether the second degree assault to the fourth degree assault was at issue for the interference count. RP 249-50. The court said if the jury was instructed on second degree assault as the domestic violence crime at issue for the interference count, then defense counsel could not argue inapplicability because the second degree assault happened after the interfering charge. RP 250. Counsel said she did not want to be limited because the State interpreted it one way or another. RP 250. The State responded if defense counsel wanted to argue that, then the instructions should remain as is, with fourth degree assault as the predicate crime. RP 250. The court agreed to leave the instructions the way they were. RP 250.

The court noted the presence of an elements instruction for fourth degree assault. RP 252. The prosecutor said she included that instruction "to alleviate the confusion that will come from putting assault 4 in there out of nowhere." RP 252-53. The court said that was "weird" because "99.8 percent of the time the interfering is going to come after the predicate assault that is charged by the State." RP 253. The prosecutor said there just needed to be some sort of domestic violence crime that's been committed and then interference with reporting it. RP 253. The court said "Well, I guess that's something the Court of Appeals will have

to figure out, because if we switch it, Ms. Neal is going to argue that, well, the instruction -- the assault in the second degree, the predicate offense, didn't occur until after" the interfering. RP 253-54. The prosecutor said defense counsel's argument would be that "it didn't occur at all." RP 254. Counsel said she would have her argument when she made it to the jury, but wanted to make her exception to the instructions clear. RP 254.

4. Outcome

The jury acquitted Holcomb of second degree assault by strangulation under count 1. CP 51. The jury found Holcomb guilty of interfering with reporting domestic violence under count 2, and returned a special verdict that Mr. Holcomb and Mrs. Holcomb were members of the same household or family. CP 50, 52.

5. Post-Trial Motion for Arrest of Judgment

Defense counsel filed a motion to arrest judgment under CrR 7.4(a)(2) ("the indictment or information does not charge a crime") and (3) ("insufficiency of the proof of a material element of the crime"). CP 38-40. Counsel argued the information was defective because it did not set forth the nature of the underlying domestic violence crime. CP 39-40 (citing State v. Laramie, 141 Wn. App. 332, 169 P.3d 859 (2007)); RP 376-77. The information needed to specify the second degree assault

under count 1 was the domestic violence crime at issue for the interference offense under count 2. Id.

Counsel further argued the information prejudiced the defense: 'If we walked into trial not knowing that the State was going to be arguing an assault 4 uncharged, un-referred to, then how do we prepare for that? We came into trial prepared for an assault in the second degree and an interfering with reporting domestic violence in conjunction with that charge." RP 378. Defense counsel "prepared for the charges that the State presented and notified us of. That's the charges that were prepared for." RP 378.

Counsel also argued the evidence was insufficient to convict for interfering with reporting domestic violence under count 2 because Holcomb was acquitted of second degree assault under count 1. CP 40; RP 379-80.

The State opposed the motion to arrest judgment, contending the information might have been inartful but did not omit an essential element. CP 53-57; RP 381-82. The State claimed Holcomb was not prejudiced by the inartful language. CP 57-58; RP 381-82. It further argued the jury was adequately and clearly instructed on the elements of count 2, and the State proved each of those elements. CP 58-59; RP 382.

The court thought it was "an extremely close call." RP 384. The court had agonized and wondered over the matter since the fourth degree assault instructions were proposed by the State. RP 384. When the jury came back with its verdict, the court "really started wondering about" what it described as a "unique" situation. RP 384-85. The jury was instructed on fourth degree assault and by returning a guilty verdict must have found all the elements of that crime proven beyond a reasonable doubt. RP 385-86. The court was "leaning" towards the defense position when it noticed the note to WPIC 36.57, which says "for the rare case in which the underlying domestic violence offense is not being tried along with this offense, an instruction should be drafted citing forth [sic] the elements of the underlying domestic violence offense." RP 386. The court thought this was one of those "rare" cases, in that the fourth degree assault "was not being tried along with the interference." RP 386. The court remarked the amended information "could have been cleaner," but thought it sufficed to "sufficiently refer to the defendant the nature of what he was being charged with and being tried for." RP 386-87.

6. Sentence

The court gave Holcomb credit for 2 days of jail time served and suspended the remaining 362 days of the sentence. CP 29. Holcomb appeals. CP 41-47.

C. ARGUMENT

1. THE INFORMATION IS CONSTITUTIONALLY DEFECTIVE BECAUSE IT DID NOT PROVIDE ADEQUATE NOTICE OF THE DOMESTIC VIOLENCE CRIME UNDERLYING THE CHARGE OF INTERFERENCE WITH REPORTING DOMESTIC VIOLENCE.

The charging document is defective because it omits an essential element or necessary supporting fact. The information alleges Holcomb committed two crimes: second degree assault by strangulation as a crime of domestic violence, and interfering with reporting a crime of domestic violence. Reading the information as a whole in a fair and commonsense manner results in the accused being misled into believing the predicate crime for the interference count is the other charge contained in the information: the second degree assault designated as a domestic violence crime. The State, however, decided to seek conviction on the interference count by relying on the uncharged crime of fourth degree assault as the predicate crime. Under these circumstances, the predicate crime for the interference charge needed to be specified in order to provide constitutionally adequate notice to Holcomb of the charged crime. That wasn't done and now the conviction must be reversed and the charge dismissed with prejudice.

a. The failure to include all essential elements and necessary supporting facts of the charged crime in the information renders the information constitutionally defective.

RCW 9A.36.150 defines the crime of "Interfering with the reporting of domestic violence" as follows:

> (1) A person commits the crime of interfering with the reporting of domestic violence if the person:
> (a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and
> (b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

RCW 9A.36.150(2) provides "Commission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence." There are no less than 23 different crimes of domestic violence. RCW 10.99.020(5). The information in Holcomb's case is deficient in failing to set forth the domestic violence crime that was alleged to have been committed as part of the interference charge.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend.

VI; Wash. Const. Art. I, § 22. "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). Stated another way, essential elements are those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime. Zillyette, 178 Wn.2d at 158.

"More than merely listing the elements, the information must allege the particular facts supporting them." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (citing State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). This is a requirement of the essential elements rule. State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011). "Failure to provide the facts 'necessary to a plain, concise and definite statement' of the offense renders the information deficient." Nonog, 169 Wn.2d at 626 (citing Leach, 113 Wn.2d at 690 (quoting JCrR 2.04(a)). "An information omitting essential elements charges no crime at all." State v. Sutherland, 104 Wn. App. 122, 130, 15 P.3d 1051 (2001).

The purpose of the essential element rule is to "apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." Vangerpen, 125 Wn.2d at 787. Another purpose is to bar "any

subsequent prosecution for the same offense." Nonog, 169 Wn.2d at 226 (quoting Leach, 113 Wn.2d at 688).

The standard for evaluating the sufficiency of the information is determined by when the challenge is made. City of Bothell v. Kaiser, 152 Wn. App. 466, 471, 217 P.3d 339 (2009). "When a charging document is challenged for the first time *after* the verdict, it is to be 'liberally construed in favor of validity.'" State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002) (quoting State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991)). Under a liberal standard of review, the appellate court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06.

A challenge to the sufficiency of a charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). The trial court's decision on the matter therefore receives no deference. For the reason set forth below, the trial court erred in denying Holcomb's motion to arrest judgment.

b. Bait and switch of the crime underlying the interference charge rendered the information constitutionally infirm.

In State v. Nonog, the Court of Appeals held "an information that is challenged for the first time on appeal sufficiently defines the charge of interfering if the count alleging the crime contains all the statutory elements *and makes clear that the underlying crime of domestic violence is delineated elsewhere in the information*." State v. Nonog, 145 Wn. App. 802, 805, 187 P.3d 335 (2008), aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010) (emphasis added). In Holcomb's case, the State secured a conviction for the charge of interfering by positing fourth degree assault as the underlying domestic violence crime. But fourth degree assault was not alleged elsewhere in the information. Under Nonog, the information in Holcomb's case is constitutionally defective.

The Court of Appeals framed its analysis by recognizing "[i]n addition to adequately identifying the crime charged, the charging document must allege facts supporting every element of the offense." Nonog, 145 Wn. App. at 806 (citing Leach, 113 Wn.2d at 689. "'This is not quite the same' as a requirement to state every statutory element of the crime charged." Nonog, 145 Wn. App. at 806 (quoting Leach, 113 Wn.2d at 688). According to the Court of Appeals, "the particular underlying domestic violence crime" was neither a statutory nor implied element of

the crime of interfering with domestic violence reporting, but rather a fact that must be alleged to support the elements of the crime. Nonog, 145 Wn. App. at 807.

The information in Nonog did not specify the underlying domestic violence crime for the interfering charge. Id. at 807. Under a liberal standard of review, the interference charge (count 4) was sufficient because the domestic violence crime at issue was sufficiently defined by considering the interference charge in conjunction with the rest of the information. Id. at 808-11 (citing State v. Laramie, 141 Wn. App. 332, 339-40, 169 P.3d 859 (2007)). Counts 1 and 2 were domestic violence crimes that occurred on the same date as the interference charge. Id. at 808. "A person of common understanding would know, by reading Counts 1 and 2, which domestic violence crimes [the victim] was trying to report when Nonog allegedly interfered with her." Nonog, 145 Wn. App. at 811.

Using the same analysis, Holcomb's case compels the opposite conclusion. The second degree assault offense was the only other charged crime in this case. It was expressly designated a domestic violence offense under RCW 10.99.020 and alleged to have occurred on the same date as the interference charge. CP 27. Following Nonog, a person of common understanding, reading the information as a whole, would

understand the underlying domestic violence crime for the charge of interfering was the second degree assault charged elsewhere in the information. And if Holcomb had been convicted of interfering based on the underlying crime of second degree assault, there would be no constitutional problem. But he wasn't. He was convicted of interfering with fourth degree assault as the underlying domestic violence crime. Fourth degree assault was not charged. Fairly reading the information as a whole, Holcomb had no notice that the fourth degree assault was the underlying domestic violence crime for the interfering charge.

The Supreme Court affirmed the Court of Appeals decision in Nonog, holding "the information, when liberally construed, was sufficient because it reasonably apprised the defendant that the underlying domestic violence crimes were those alleged elsewhere in the information. Nonog, 169 Wn.2d at 223. The Supreme Court punted on whether the specific underlying crime of domestic violence was an "essential element." Id. at 228. Consistent with the Court of Appeals analysis, it recognized "[m]ore than merely listing the elements, the information must allege the particular facts supporting them." Id. at 226. The Supreme Court determined it "need only decide whether Nonog's information, as a whole, made it clear that the crimes alleged to have occurred on March 30, 2006 in counts I and II were the domestic violence crimes referenced in count IV." Id. at 228.

Under a liberal standard, the information must be construed as a whole, which means the charged counts are viewed in relation to one another. Id. at 226-29. "Regardless of whether the underlying domestic violence crime is an element of interfering with domestic violence reporting, the information here reasonably apprised Nonog that the underlying offenses were the domestic violence crimes set out in counts I and II." Id. at 231.

Again, Holcomb's case is a study in contrast. In Holcomb's case, the underlying domestic violence offense the State relied on to prove the interference charge was not alleged elsewhere in the information. Fourth degree was assault was not charged. Reading the information as whole, as commanded by Nonog, would lead a reasonable person to believe the underlying domestic violence at issue for the interfering charge was the other offense that was charged: second degree assault. Indeed, the trial court noted "99.8 percent of the time the interfering is going to come after the predicate assault that is charged by the State." RP 253.

Under Nonog, the information did not sufficiently apprise Holcomb that the underlying domestic violence offense for the interfering charge was fourth degree assault. The specific crime of domestic violence underlying the crime is at minimum a necessary fact supporting the elements, but it is nowhere to be found in the information when construed as a whole. The particular facts necessary to charge Holcomb with

interfering with a domestic violence report do not appear in any form, or by fair construction, in the information.

The trial court thought it was "an extremely close call," but denied the motion to arrest judgment because the jury instructions on fourth degree assault as the underlying crime were supposedly proper and envisioned by the pattern instruction committee. RP 384-86. The trial court overlooked the fundamental point that jury instructions, even proper ones, cannot cure a defective charging document. Vangerpen, 125 Wn.2d at 788. "Jury instructions and charging documents serve different functions." Id. A charging document must inform defendants of the nature and cause of the accusation against them so that they can prepare a defense. State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). Jury instructions, on the other hand, "allow[ ] each party to argue its theory of the case" and "must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Below, the State claimed it was sufficient that the information used the language of the statute. But as Leach counsels: "Because statutory language may not necessarily *define* a charge sufficiently to apprise an accused with reasonable certainty of the nature of the accusation against that person, to the end that the accused may prepare a defense and plead

the judgment as a bar to any subsequent prosecution for the same offense, mere recitation of the statutory language in the charging document may be inadequate." Leach, 113 Wn.2d at 688. Holcomb's case is a textbook example. To prepare a defense to the interference charge, he needed to know the underlying domestic violence crime at issue. Simply reciting the generic statutory language in RCW 9A.36.150(1) did not inform him of this.

Any general description of a crime based on the statutory language "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific [offense], coming under the general description, with which he is charged." Hamling, 418 U.S. at 117-18. The charging document must "descend to particulars" when the definition of an offense includes generic terms. Russell v. United States, 369 U.S. 749, 765, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962). The generic term here is the unspecified crime of domestic violence underlying the interfering charge. The State needed to specify the domestic violence offense at issue in the information to provide adequate notice.

Holcomb notes his disagreement with the Court of Appeals decision in Nonog that the underlying domestic violence crime is not an essential element, as opposed to being a necessary fact supporting an

element. Nonog, 145 Wn. App. at 807. The interference statute specifies "[c]ommission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence." RCW 9A.36.150(2). Essential elements are those elements defined by the legislature that "the prosecution must prove to sustain a conviction." Williams, 162 Wn.2d at 183 (quoting State v. Miller, 156 Wn.2d 23, 27, 123 P.3d 827 (2005)). The State needed to prove a particular crime of domestic violence to sustain a conviction for the interference charge. As such, it is an essential element.

But in the end, the result is the same whether the underlying domestic violence crime is considered an essential element or a necessary fact supporting an essential element. Either way, the information is deficient. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because a necessary element for the interference charge is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Holcomb's conviction. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010).

Although unnecessary to the resolution of this case, Holcomb was prejudiced by the deficient information. In making this argument, he disclaims any suggestion that the information was merely inartful as opposed to constitutionally infirm. But it bears noting this isn't a case of simple omission. The information, because of the interplay between the charged crimes, affirmatively misled Holcomb into believing the underlying domestic violence crime for the interference charge was the charged crime of second degree assault. Defense counsel forcefully argued the information prejudiced the defense: "If we walked into trial not knowing that the State was going to be arguing an assault 4 uncharged, un-referred to, then how do we prepare for that? We came into trial prepared for an assault in the second degree and an interfering with reporting domestic violence in conjunction with that charge." RP 378.

One line of defense to the interference charge, based on the belief that the second degree assault was the underlying crime, is that the State could not prove its case because the alleged strangulation occurred *after* Holcomb allegedly grabbed the phone while his wife tried to call 911. Defense counsel's remarks during the jury instruction conference suggested this was a potential line of attack until the trial court shut it down and did not change the jury instructions. RP 249-50. The statute requires the commission of a domestic violence crime and "[p]revents or

attempts to prevent the victim of . . . that domestic violence crime from calling a 911 emergency communication system . . . or making a report to any law enforcement official." RCW 9A.36.150(1). The statute presumes the commission of domestic violence crime followed by an attempt to stop the victim from reporting it. There can be no attempt to prevent a victim from calling 911 to report a domestic violence crime when the domestic violence crime has not yet occurred. This was a viable argument that could of been made to the jury had the State not engaged in a bait and switch of the underlying domestic violence crime.

c. The remedy is dismissal of the interference charge with prejudice because double jeopardy, mandatory joinder and the statute of limitations bar further prosecution.

The usual remedy for a deficient charging document is dismissal without prejudice. Vangerpen, 125 Wn.2d at 791. But this isn't a usual case. The remedy here is dismissal with prejudice.

The constitutional prohibition against double jeopardy prevents the State from recharging the interference crime with second degree assault as the underlying domestic violence offense. U.S. Const. amend. V; Wash. Const. art. I, § 9. This is so because the jury acquitted Holcomb of committing second degree assault. As a result, the State is collaterally estopped from securing an interference conviction by attempting to prove Holcomb committed second degree assault at a second trial.

"Among many other things, 'the Double Jeopardy Clause incorporates the doctrine of collateral estoppel.'" In re Pers. Restraint of Moi, 184 Wn.2d 575, 579, 360 P.3d 811 (2015) (quoting Dowling v. United States, 493 U.S. 342, 347, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)). "Under the collateral estoppel doctrine, 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit,' including a criminal prosecution." Moi, 184 Wn.2d at 579 (quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). "A factfinder's determination that the government failed to carry its burden on an issue in the first proceeding has preclusive effect in a subsequent proceeding raising that same issue, provided that both proceedings are governed by the same standard of proof." Id. at 585 (quoting Wilkinson v. Gingrich, 800 F.3d 1062, 1069-70 (9th Cir. 2015)).

In Moi, for example, the defendant was tried for the murder of Keith McGowan and for unlawful possession of the gun that killed McGowan. Moi, 184 Wn.2d at 577. The jury was unable to reach a verdict on the murder charge but, based on the same evidence, acquitted Moi of unlawful possession of the gun. Id. On its second try, the State secured a murder conviction, arguing McGowan was killed with the gun Moi was acquitted of possessing. Id. The same issue of ultimate fact was

decided in both trials and the State was collaterally estopped under the double jeopardy clause from obtaining a conviction for murder at the second trial. Id.

In Holcomb's case, the ultimate fact at issue was whether he committed second degree assault by strangulation. The State would need to prove he committed this crime as part of an interference charge at a second trial. But the jury acquitted him of this offense at the first trial. The State is collaterally estopped from relitigating whether Holcomb committed the second degree assault because a jury has already decided he didn't. "[W]here a jury in acquitting the defendant necessarily found that the State failed to prove a fact essential to convict the defendant, the State cannot relitigate the same fact in a later proceeding against the defendant." State v. Stein, 140 Wn. App. 43, 61-62, 165 P.3d 16 (2007). As a result, the State cannot refile a charge of interference with second degree assault as the underlying domestic violence offense. Further, the ends of justice do not allow the State to get a second bite of this apple. As in Moi, "the State had its full and fair opportunity to present its case. It did not prevail. Double jeopardy prevents it from placing the defendant in jeopardy again." Moi, 184 Wn.2d at 586.

The State could have chosen to properly charge Holcomb with committing interference with the predicate domestic violence of fourth

degree assault. For some reason, it chose not to do so. Now it must live with the consequence. It is not the appellate court's job to rescue the State from its own failed trial strategy. In re Pers. Restraint of Heidari, 159 Wn. App. 601, 615, 248 P.3d 550 (2011), aff'd, 174 Wn.2d 288, 274 P.3d 366 (2012).

The State is also barred on remand from charging the offense of interfering with fourth degree assault as the underlying domestic violence crime. As argued above, the State never charged Holcomb with committing the crime of interference based on the underlying crime of fourth degree assault. Mandatory joinder prevents the State from doing so on remand. "Under the mandatory joinder rule, CrR 4.3.1(b)(3), two or more offenses must be joined if they are related, subject to exceptions identified in the rule." State v. Gamble, 168 Wn.2d 161, 167-68, 225 P.3d 973 (2010). "'Related offenses' are two or more offenses within the jurisdiction and venue of the same court that are based on the same conduct." Gamble, 168 Wn.2d at 168 (citing CrR 4.3.1(b)(1)). "'Same conduct' is conduct involving a single criminal incident or episode." Id. Where, as here, two offenses are related and could have been properly joined in the original information but weren't, an unjoined charge advanced in a subsequent trial is subject to dismissal under the mandatory joinder rule. State v. Dallas, 126 Wn.2d 324, 326, 331-32, 892 P.2d 1082

(1995). The mandatory joinder rule is "intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor's intent. Whether the prosecutor intends to harass or is simply negligent in charging the wrong crime, [CrR 4.3.1(b)(3)] applies to require a dismissal of the second prosecution." Dallas, 126 Wn.2d at 332.

The fourth degree assault claimed by the State undeniably was involved in the same criminal episode as the alleged second degree assault. Under the mandatory joinder rule, the crime of interference with the underlying crime of fourth degree assault needed to be charged as part of the first trial. The State cannot bring that charge at a second trial. Dallas, 126 Wn.2d at 331-32. For the same reason, the State is barred from bringing a stand-alone charge of fourth degree assault following this appeal. Dismissal of Holcomb's case with prejudice is required.

There is another reason why an interference charge with fourth degree assault as the predicate crime cannot be retried. Any attempt to do so would be barred by the statute of limitations. The crime of interfering is a gross misdemeanor. RCW 9A.36.150(3). The statute of limitations for a gross misdemeanor is two years from the date of commission of the offense. RCW 9A.04.080(1)(i). That period has come and gone. And the State cannot rely on a "relation-back" theory to turn back the clock.

In Sutherland, the court dismissed an information omitting an essential element and held that the State could not use the relation-back doctrine to refile and add charges that were barred by the statute of limitations. Sutherland, 104 Wn. App. at 134. In that case, the State charged the defendant with felony hit and run a few days before the statute of limitations had run. Id. at 126. Almost a year later, the State filed an amended information adding charging language that the defendant's acts resulted in an injury. Id. The court held that the original information was constitutionally deficient because it omitted an essential element and the amended information alleging the injury offense was time-barred by the statute of limitations. Id. at 134. The court further held the State could not rely on the relation-back doctrine to refile the injury accident offense based on the time the State originally charged him with felony hit and run, which was within the statute of limitations. As the court explained: "Although the State timely filed the original information, it was defective and, thus, failed to charge a crime. Consequently, there is no information to relate back to." Id.; accord Kaiser, 152 Wn. App. at 469, 477-78.

The amended information in this case was filed within the statute of limitations, but is constitutionally defective because it omitted an essential element. Thus, it failed to charge a crime. There is no charging document to which an amended charge of interfering with fourth degree

assault as the underlying domestic violence crime could relate back to. The statute of limitations bars further prosecution and this case must be dismissed with prejudice. Kaiser, 152 Wn. App. at 478.

2. THE COURT COMMITTED CONSTITUTIONAL ERROR IN INSTRUCTING THE JURY ON AN UNCHARGED CRIME, AND THE CASE MUST NOW BE DISMISSED WITH PREJUDICE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVICT HOLCOMB OF THE CHARGED CRIME.

Defense counsel objected to the court's jury instructions on fourth degree assault as the predicate crime for the interference charge because that crime was not charged in the information. RP 245-46, 317. Counsel's objection was spot on. The court erred by instructing the jury in this manner and erred in failing to arrest judgment.

When a charging document alleges one crime, it is constitutional error to instruct the jury on a different, uncharged crime. State v. Kirwin, 166 Wn. App. 659, 669, 271 P.3d 310 (2012); State v. Olds, 39 Wn.2d 258, 260-61, 235 P.2d 165 (1951); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. As argued above, the information when fairly read charged interference with second degree assault as the predicate crime. The information did not charge interference with fourth degree assault as the predicate crime. But the jury was instructed on that crime and Holcomb was convicted of it. The court erred by instructing the jury on that

uncharged crime. Because the evidence is insufficient to convict Holcomb of the crime that was charged, as shown by the jury's acquittal for second degree assault, the remedy is dismissal with prejudice.

Kirwin dictates this remedy. In that case, the evidence presented at trial was insufficient to support the crimes with which the defendant was charged. Kirwin, 166 Wn. App. at 661. The State's adequate proof of a different offense mistakenly described in the jury instructions, including the "to convict" instruction, could not sustain the convictions. Id. at 661, 670. As a matter of due process, the sufficiency of evidence is based on the crime as charged in the information, not the crime as instructed to the jury. Id. at 670, 672-73. Because the State did not prove the crime that was charged, due process required not only reversal of the convictions but also dismissal of the charges with prejudice. Id. at 673.

Holcomb's case presents the same dynamic. The State charged one crime (interference with second degree assault as the underlying domestic violence offense) but proved an uncharged crime (interference with fourth degree assault as the underlying domestic violence offense). The evidence was insufficient to convict on the crime that was charged. The jury acquitted Holcomb of second degree assault — the crime that was an element of the interference charge. The jury was instructed on fourth degree assault as the predicate crime for interference and the jury

convicted Holcomb of that uncharged crime. But the sufficiency of evidence is measured based on the crime charged, not the uncharged crime on which the jury is instructed. Kirwin, 166 Wn. App. at 670, 672-73. As a matter of due process, Holcomb's conviction must be reversed and the case dismissed with prejudice. Id. at 673; U.S. Const. amend. XIV; Wash. Const. Art. I, § 3.

Dismissal is also the appropriate remedy under a double jeopardy analysis. The constitutional prohibition against double jeopardy is violated where insufficient evidence supports the charged crime, the State proves an uncharged crime, and then following reversal amends the information in an attempt to prove the same crime it proved during the first trial. State v. Goldsmith, 147 Wn. App. 317, 320, 326, 195 P.3d 98 (2008); U.S. Const. amend. V; Wash. Const. art. I, § 9.

In Goldsmith, the information adequately notified the defendant of the necessary elements of the crimes the State alleged he committed. Goldsmith, 147 Wn. App. at 325. The State failed to prove the charged crimes but succeeded in proving uncharged crimes. Id. at 320, 325. The trial court arrested judgment and the convictions were vacated. Id. The State then amended the information and sought to try Goldsmith for the crime it proved but did not charge at the first trial. Id. at 322. The trial court denied Goldsmith's motion to dismiss the amended information. Id.

The Court of Appeals held the prohibition against double jeopardy prevented retrial. Id. at 320, 326.

The Court of Appeals rejected the argument that the problem was a defective pleading or lack of notice: "The information adequately charged and notified the defendant of the essential elements of the crime the State charged, just not the elements that the State proved or that the court instructed on. The fact that the court's instructions set out the correct elements of the crime does not resolve the problem." Id. at 325. The problem was that "the State did not prove the essential elements of the crime it charged," which meant Goldsmith could not be retried on the amended charge without violating double jeopardy. Id. at 326.

As in Goldsmith, the State did not prove the essential elements of the crime it charged: interference with second degree assault as the underlying domestic violence crime. Double jeopardy prevents the State on remand from seeking to try Holcomb for the crime it did not charge: interference with fourth degree assault as the underlying domestic violence crime. Holcomb's case must be dismissed with prejudice.

3. VIOLATION OF THE RIGHT TO A UNANIMOUS JURY VERDICT REQUIRES REVERSAL OF THE CONVICTION.

The offense of interfering with reporting domestic violence may be committed by the alternative means of preventing the victim from (1)

calling a 911 emergency communication system or (2) making a report to any law enforcement official. There was insufficient evidence to support a finding of guilt under the law enforcement means. Reversal is required because there is no particularized expression of jury unanimity on each of the alternative means of proving these offenses.

In criminal prosecutions, the accused has a constitutional right to "an expressly unanimous *verdict*." State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); Wash. Const., art. 1, § 21. It is well established a unanimity error amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. Peterson, 174 Wn. App. 828, 849 n.5, 301 P.3d 1060, review denied, 178 Wn.2d 1021, 312 P.3d 650 (2013).

In certain situations, the right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged. Ortega-Martinez, 124 Wn.2d at 707. "If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." Id. at 707-08. But "if the evidence is *insufficient* to present a jury question as to whether the

defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." Id. at 708.

The sufficient evidence test is satisfied only if the reviewing court is convinced "a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." In re Detention of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006) (quoting State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)).[6] Sufficiency of the evidence is a question of law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

There are three alternative means of committing the crime of interference with reporting domestic violence: preventing or attempting to prevent the victim from (1) "from calling a 911 emergency communication system," (2) "obtaining medical assistance," or (3) "making a report to any law enforcement official." Nonog, 145 Wn. App. at 812-13. This is an alternative means offense because "[i]nterference is culpable only when a victim or witness is trying to report the crime to a particular entity." Id. at 813.

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[6] "Though some cases refer to the required quantum of evidence as 'substantial evidence,' the analysis has consistently been conducted according to the sufficiency of the evidence standard." State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012).

The "to convict" instruction in this case presented the jury with two alternative means of committing the charged offense: John Holcomb prevented or attempted to prevent Shaunna Holcomb from "calling a 911 emergency communication system or making a report to any law enforcement officer." CP 22. Looking at the evidence in the light most favorable to the State, the evidence establishes one of the alternatives but not both. The evidence shows Shaunna attempted to call the 911 emergency communication system. RP 55-58, 76, 81-82. There is no evidence she tried to make a report to any law enforcement official apart from the 911 call.

There was no jury instruction requiring jury unanimity on the alternative means. Further, there was no special verdict specifying which of the alternative means the jury found. There was only a general verdict. "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing Ortega-Martinez, 124 Wn.2d at 708); accord State v. Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87 (2015); State v. Garcia, 179 Wn.2d 828, 843-44, 318 P.3d 266 (2014).

In Nonog, the alternative means error was found to be harmless. Nonog, 145 Wn. App. at 813. Nonog is distinguishable from Holcomb's

case. The "to-convict" instruction in Nonog limited consideration to just one means: "That the defendant prevented or attempted to prevent Nanette Estandian from calling a 911 emergency communication system." Id. The "to convict" instruction in Holcomb's case contained two alternative means and one was unsupported by sufficient evidence, thus signaling to jurors that both means were to be considered. CP 22. Based on the Supreme Court precedent of Ortega-Martinez, Kintz, Sandholm and Garcia, a unanimity error resulting from insufficient evidence on an alternative means presented to the jury in a "to convict" instruction requires reversal of the conviction.

4. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . *may* require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680

(2015). The concerns expressed in Blazina are applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

At sentencing, defense counsel asked the court to only impose mandatory costs because Holcomb qualified for a lawyer at public expense for the trial, he was a student, and he was not working. RP 388-89. The trial court followed the defense recommendation and waived all discretionary costs. RP 391-92; CP 30. Holcomb qualified for indigent defense services on appeal. CP 34-35. There is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). There is no finding that he will have the ability to pay in the future. Sinclair, 192 Wn. App. at 393. Holcomb testified an accusation of committing a crime is enough to cause problems in getting a nursing license. RP 313. Holcomb asks this Court to soundly exercise its discretion by denying any request for appellate costs. See State v. Cardenas-Flores, 194 Wn. App. 496, 521-22, 374 P.3d 1217 (2016) (waiving appellate costs in light of defendant's indigent status, and presumption under RAP 15.2(f) that she remains indigent "throughout the review" unless the trial court finds that her financial condition has improved).

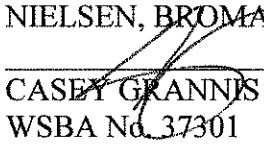
D. CONCLUSION

For the reasons set forth, Holcomb requests reversal of the conviction and dismissal of the case with prejudice.

DATED this 24th day of October 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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