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STATE OF WASHINGTON
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NO. 38344-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY WILLIAM GOLDSBERRY,

Appellant.

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

The Honorable Jill Johanson and Steven Warning, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

- 1. THE HARASSMENT JURY INSTRUCTIONS OMITTED A REQUIRED ELEMENT. (SEE INSTRUCTIONS ATTACHED AS APPENDIX A.)**
- 2. THERE WAS INSUFFICIENT EVIDENCE ON COUNT 2, THAT GOLDSBERRY COMMITTED FELONY HARASSMENT AGAINST NORENE WILLIAMS¹ (“WILLIAMS”).**
- 3. GOLDSBERRY’S OFFENDER SCORE WAS MISCALCULATED. THE SECOND DEGREE ASSAULT AND FELONY HARASSMENT AGAINST PHILOMENA² THOMAS (“THOMAS”) WERE SAME CRIMINAL CONDUCT.**
- 4. DEFENSE COUNSEL FAILED AS EFFECTIVE COUNSEL WHEN HE DID NOT ARGUE THAT THE SECOND DEGREE ASSAULT AND FELONY HARASSMENT CONVICTIONS AGAINST PHILOMENA THOMAS WERE SAME CRIMINAL CONDUCT.**
- 5. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT IMPOSED NO CONTACT ORDERS ON WILLIAMS AND THOMAS THAT EXCEEDED THE STATUTORY MAXIMUM OF THE CONVICTED CRIME.**

¹ Norene Williams and Norene Goldsberry are the same person. She was married to appellant Randy Goldsberry at the time of the charged incident. By the time the case went to trial, the Goldsberrys were divorced and Norene had changed her last name to Williams. 1RP 100-101.

² “Philomena” is the spelling of Ms. Thomas’ first name in the Information. CP 1-4. It is spelled “Filamena” in the verbatim report of proceedings. For the sake of consistency, “Philomena” is be used in Appellant’s Brief.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. THE HARASSMENT JURY INSTRUCTIONS FOR COUNTS 2 AND 4 WERE BIFURCATED BETWEEN A TO-CONVICT INSTRUCTION AND A SPECIAL VERDICT INSTRUCTION. READ TOGETHER, THE INSTRUCTIONS OMIT THE REQUIRED ELEMENT THAT THE JURY FIND THAT NORENE WILLIAMS AND PHILOMENA THOMAS REASONABLY FEARED THAT GOLDSBERRY WOULD CARRY OUT THE THREAT TO KILL. WAS GOLDSBERRY DENIED A FAIR TRIAL BECAUSE OF THE OMITTED ELEMENT?**
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C. STATEMENT OF THE CASE

1. Procedural history.

Appellant Randy Goldsberry was charged and tried before a jury on a six-count information as follows:

Count 1 – second degree assault (deadly weapon³) with a deadly weapon enhancement, against Norene Goldsberry⁴.

Count 2 – felony harassment (threat to kill⁵) with a deadly weapon enhancement, against Norene Goldsberry.

³ RCW 9A.36.021(1)(a), (c), Second degree assault:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or . . . (c) Assaults another with a deadly weapon;

⁴ Again, Norene Goldsberry is referred to as Norene Williams in Appellant's brief. See Fn. 1.

⁵ See RCW 9A.46.0202 (felony harassment) in a later footnote.

Count 3 – second degree assault (deadly weapon) with a deadly weapon enhancement, against Philomena Thomas.

Count 4 – felony harassment (threat to kill) with a deadly weapon enhancement, against Philomena Thomas.

Count 5 – second degree assault (recklessly inflict substantial bodily harm) against Kathleen Goldsberry.

Count 6 – malicious mischief in the third degree.

CP 1-4; CP 49-62; 1RP -2RP.⁶

Defense counsel did not object to the trial court bifurcating the harassment instructions between a to-convict instruction and a special verdict form. CP 29, 30, 50, 52, 58, 61⁷; 2RP 256, 260. The instructions also told the jury that while the state alleged multiple acts of assault and harassment, the jury had to be unanimous on a particular act to return a guilty verdict. CP 36.

The jury failed to reach a verdict on count 1 and a mistrial was declared on that count. The jury found guilt on the charges and the enhancements on counts 2, 3, 4, and 5. The jury found Goldsberry not guilty on count 6.

Rather than retrying count 1, the assault on Williams, the state moved at sentencing for its dismissal. 3RP 334.

⁶ "1RP" is the pre-trial hearings and the first day of trial.
"2RP" is the second of the two-trial days.
"3RP" is sentencing.

⁷ See instructions attached as Appendix A.

Goldsberry, who had no scoring criminal history, did not object to the offender score calculation. 3RP 334. With the weapon enhancements added to his total sentence, he received 42 months. CP 69.

As part of the sentence, the court entered a domestic violence no contact order prohibiting Goldsberry from having any contact with Norene Williams for 10 years. CP 77-78. The court also entered a harassment no contact order prohibiting Goldsberry from contacting Philomena Thomas for 10 years. See Supp. Designation of Clerk's Papers (sub nom. 68).

Goldsberry appealed each part of his judgment and sentence. CP 63.

2. Trial facts.

Randy Goldsberry was highly intoxicated when he showed up at the Shell station where his wife worked. 1RP 49-52. Goldsberry's wife, Norene Williams, was not at work. 1RP 52. She was home sick with the flu. 1RP 52. But Williams' friend and co-worker, Philomena Thomas, was at work so she called Williams. 1RP 53. Thomas agreed to drive Goldsberry home. 1RP 53. During the 10-minute drive to Goldsberry's home, he made

suggestive comments to Thomas that made her uncomfortable.
1RP 54-55.

After arriving at the home, Thomas went to the living room to use a phone to call for a ride back to work as she had driven Goldsberry home in his own truck. 1RP 54, 56. Goldsberry headed to the back of the home where Williams was sick in bed. 1RP 56-57, 102-103. Goldsberry was very mad and screamed about wanting his keys. 1RP 104. He said that if he did not get his keys, someone was going to get hurt. 1RP 104. Williams took this as a serious threat. 1RP 104. Goldsberry drove off after finding a second set of keys but returned in a few minutes later. 1RP 105. This time, he went back to his bedroom and grabbed a compound bow case from the side of his bed. 1RP 105. Goldsberry was angry and upset. 1RP 106. Williams wrestled with Goldsberry in an effort to keep the bow away from him. 1RP 107. She was unsuccessful. 1RP 111.

Goldsberry took the bow into the living room where Thomas was waiting for her ride. 1RP 58-59, 111. Williams followed. Goldsberry was in a rage and "looked like he was crazy" per Thomas. 1RP 58. Goldsberry put an arrow in the bow, pulled the bow back, and pointed it at Thomas' forehead and said, "Are you

ready to die?" 1RP 59. Thomas was both angry and scared for her life. 1RP 62.

Goldsberry ordered the two women outside. 1RP 114. The record is unclear if Thomas stood on the porch or in the yard. 1RP 64-69. Goldsberry had an arrow in the partially pulled back bow. He told Thomas, "You take one more move, you're dead." 1RP 65.

Goldsberry told Williams to walk across the street so he could shoot her. 1RP 115. She told him, "No." 1RP 115. Williams did not think he was serious. 1RP 115. He was acting strangely. 1RP 115. His tone of voice was monotone. 1RP 115. There had never been any violence between the couple. 1RP 136, 137. Although she told the police later that night that Goldsberry had pointed the bow and arrow at her, she had no specific memory of that when she testified. 1RP 131-33.

Before returning to the house, Goldsberry pulled the arrow back in the bow, pointed it at Thomas and said, "You are going to die right now." 1RP 69.

Williams and Goldsberry re-entered the home. 1RP 118-19. Thomas stayed outside and hid in the back yard. 1RP 72. Williams heard her 2 year-old grandson, Jacob, cry. 1RP 117. She found her daughter, Kathleen ("Kathleen") Goldsberry, in Jacob's

bedroom. 1RP 118. Kathleen was packing a bag. 1RP 118. Goldsberry was in the bedroom wanting to hold Jacob. 1RP 119. Kathleen adamantly refused to give Jacob to Goldsberry. 1RP 119. Goldsberry grabbed Kathleen by the throat and threw her on the bed. 1RP 120; 2RP 160. Goldsberry was on top of Kathleen with his hands around her throat. 2RP 161. She had difficulty breathing and felt dizzy. 2RP 162. Williams pulled Goldsberry's hair and slapped his face in an effort to get him off of Kathleen. 1RP 120. Kathleen was able to get her feet under Goldsberry and kick him off of her. 1RP 121. Kathleen called 911 on her cell phone. 1RP 121; 2RP 162. Goldsberry told her, "If that's 911, that's the last thing you will ever do." 1RP 121.

Goldsberry left the home on foot as the police were arriving. 2RP 199. He was arrested nearby. 2RP 185. He expressed a great deal of anger while being processed for booking. 2RP 190. He made angry statements that he was going back to kill his wife and anybody in the house. 2RP 187, 190.

The only time Williams personally feared Goldsberry during the incident was when he had a hold on Kathleen. 1RP 122.

Pre-trial, Goldsberry was twice-interviewed by Dr. Melissa Dannelet from Western State Hospital. During the interviews,

Goldsberry acknowledged that he had been drinking, that he yelled in the house, that he waved the bow and arrow around, and that he had choked Kathleen but that she had been able to breathe. 2RP 231-244.

D. ARGUMENT

1. OMISSION OF AN ESSENTIAL ELEMENT IN THE HARASSMENT JURY INSTRUCTIONS DENIED GOLDSBERRY A FAIR TRIAL.

Goldsberry was charged in counts 2 and 4 with felony harassment of Williams and Thomas respectively. CP 1-4. Under RCW 9A.46.020⁸, a person is guilty of harassment if he knowingly

⁸ RCW 9A.46.020 provides as follows:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person

threatens to cause bodily injury immediately or in the future to the person threatened, or another person, and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(b). When the threat to cause bodily injury is a threat to kill, the harassment is a felony. RCW 9A.46.020(2)(b)(ii).

When a defendant is charged with felony harassment, it is not enough that the state prove the alleged victim was placed in fear. A conviction for felony harassment based on a threat to kill requires proof that the person threatened reasonably feared the threat to kill would be carried out. State v. C.G., 150 Wn.2d 604, 606, 610, 80 P.3d 594 (2003). The jury instructions must clearly set forth this requirement. State v. Mills, 154 Wn.2d 1, 15, 109 P.3d 415 (2005).

In Mills, the defendant was charged with felony harassment. The to-convict instruction set forth the elements of misdemeanor harassment based on a threat to cause bodily injury. In addition, a special verdict form asked the jury whether the threat to cause bodily injury was a threat to kill. The Washington Supreme Court

harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

(3) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

held that such bifurcation is constitutionally permissible where the legislature has created a base crime with elevated penalties upon a finding of an additional fact, as long as the jury finds the additional element beyond a reasonable doubt. Mills, 154 Wn.2d at 10. The Mills court nonetheless reversed because neither the to-convict instruction nor the special verdict form required the jury to find beyond a reasonable doubt that the alleged victim was placed in reasonable fear that the threat to kill would be carried out. Id. at 15.

The to-convict instruction in Mills informed the jury that it needed to find beyond a reasonable doubt that the defendant threatened to cause bodily injury and that the defendant's words or conduct placed the person threatened in fear that the threat would be carried out. Mills, 154 Wn.2d at 13. The special verdict form then asked whether the state proved beyond a reasonable doubt that the threat to cause bodily harm was a threat to kill, but it did not ask whether the state had proved that the alleged victim was placed in reasonable fear that the threat to kill would be carried out. Id. at 13-14. Since the to-convict instruction referred to the threat to cause bodily injury, the jury might have convicted the defendant based on the belief that she placed the victim in reasonable fear of

bodily injury, without ever considering whether she placed the victim in reasonable fear of being killed. Id. at 15. Thus, the instructions did not meet the requirement that all elements of the offense be clearly set forth, and reversal was required. Id.

The felony harassment instruction given in Goldsberry's case contains the same flaw as the instructions in Mills, and reversal is required in this case as well. It should first be noted that Goldsberry may raise the issue on appeal even though defense counsel did not take exception to the court's instructions at trial. The court's failure to instruct the jury on every element of the charged crime is an error of constitutional magnitude which may be raised for the first time on appeal. Mills, 154, Wn.2d at 6; RAP 2.3(a)(3).

Here the two to-convict instructions for count 2 read as follows:

To convict the defendant of the crime of harassment in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about January 22, 2007, the defendant knowingly threatened to cause bodily injury immediately or in the future to Norene Goldsberry⁹, and

⁹ Aka Norene Williams.

(2) That the words or conduct of the defendant placed Norene Goldsberry in reasonable fear that threat would be carried out;

(3) The defendant acted without lawful authority; and

(4) That the acts occurred in the State of Washington.

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

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

CP 29.

The to-convict instruction for count 4 was identical except for the victim's name - Philomena Thomas. CP 30. In addition, for each of these counts the jury was asked in a Special Verdict,

Did the defendant's threat to cause bodily harm consist of a threat to kill the person threatened or another?

CP 58, 61.¹⁰ As in Mills, neither the to-convict instructions nor the special verdict questions informed the jury that it had to find beyond a reasonable doubt that the alleged victims were placed in reasonable fear that the threat to kill would be carried out. This omission relieved the state of its burden of proving all of the essential elements of felony harassment.

¹⁰ The court's to convict and special verdict instructions are attached as Appendix A.

Moreover, this error cannot be deemed harmless. Such instructional error is harmless only if the state proves beyond a reasonable doubt that the error did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

In Mills, the court recognized that it was clear from the evidence that the defendant made a threat to kill. Moreover, the victim testified that she was very scared by the threat and, after learning about the defendant's criminal history, she thought the defendant would carry out what she said she would do. Mills, 154 Wn.2d at 5. Although there was ample evidence that the victim was placed in reasonable fear that the defendant would carry out the threat to kill, the Court could not say beyond a reasonable doubt that the jury would have found the victim was placed in reasonable fear of being killed. Id. at 12, 15 n.7.

In Goldsberry's case, as in Mills, there was evidence that Goldsberry threatened to shoot both Williams and Thomas with an arrow. But Williams never testified that she thought Goldsberry would carry out the threat. To the contrary, she testified that she was not afraid of Goldsberry or fearful that he would carry out the

threat. Thomas testified that she never had any prior problem with Goldsberry. 1RP 62. Yet, she testified that she did think Goldsberry would kill her when he pointed the arrow at her in the living room. 1RP 62. As in Mills, whether Thomas was placed in reasonable fear by Goldsberry's words and actions was a question only the jury could answer. It is reasonably likely that the jury convicted Goldsberry of harassment because it found Goldsberry would cause bodily injury to Williams and Thomas. As such, the instructional error was not harmless, and reversal is required.

2. IN ADDITION TO THE INSTRUCTIONAL ERROR, THE EVIDENCE DID NOT PROVE THAT GOLDSBERRY COMMITTED FELONY HARASSMENT AGAINST THOMAS.

There was insufficient evidence that Goldsberry committed felony harassment against Norene Williams. The state failed to prove beyond a reasonable doubt that Williams reasonably believed Goldsberry's threat to kill her. As such, Goldsberry's felony harassment conviction against Williams (count 2) should be reversed and dismissed.

In a criminal prosecution, due process requires that the state prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. Amend. 14; Wash. Const.

Art. 1, § 3. “The reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).¹¹

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. State v. Devries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of the state’s evidence and all reasonable inferences that can be drawn therefrom. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In determining whether the necessary quantum of proof

¹¹ The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” *In re Winship*, 397 U.S. at 364.

exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the reviewing court need only be satisfied that substantial evidence supports the state's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) review denied, 119 Wn. 1003, 832 P.2d 487 (1992), abrogated on other grounds by State v. Trujillo, 75 Wn. App. 913, 883 P.2d 329 (1994).

A person being tried on a criminal charge can be convicted only on evidence, not by innuendo. State v. Yoakum, 37 Wn.2d 137, 144, 22 P.2d 181 (1950). In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 932 (1999). Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn. 2d 634, 638 P.2d 99 (1980).

To convict Goldsberry of felony harassment, the state had to prove beyond a reasonable doubt that (1) Goldsberry knowingly threatened to cause bodily injury to Norene Williams, and (2) that his words or conduct placed Williams in reasonable fear that a

threat to *kill* would be carried out. RCW 9A.46020(1)(a)(i), (1)(b); C.G., 150 Wn.2d at 610; State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995).

The record establishes that Goldsberry told his wife, Williams, that she should walk across the street so he could shoot her. 1RP 115. This is a threat to kill. But no evidence supports any inference that Williams reasonably believed that Goldsberry would try to make good on the threat. Williams' testimony was to the contrary. 1RP 137. She had known Goldsberry for 25 years. 1RP 136. They had been together for 18 years and married for 15 years. 1RP 136. During all of their years together, there had never been any violent episodes. 1RP 136. Although she had never seen Goldsberry as she saw him that day, based on her long history with him, she was not afraid that he would follow through on the threat to kill. 1RP 136-37. She did testify to two times that she had some fear: first, when Goldsberry first arrived at the house and wanted his car keys; and second, when Goldsberry was holding daughter Kathleen down on the bed. 1RP 104, 122. But when Goldsberry wanted his car keys, he had yet to make a threat to kill Williams. And when Goldsberry was holding Kathleen down,

Williams was afraid for Kathleen's safety and not for her own safety. 1RP 122.

Goldsberry's felony harassment conviction against Williams should be dismissed. Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1081 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence). A person whose conviction has been reversed based upon insufficient evidence cannot be retried. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), cert. denied, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982) (citing Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981); Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 1 (1978)).

3. GOLDSBERRY'S SECOND DEGREE ASSAULT AND FELONY HARASSMENT AGAINST THOMAS ARE THE SAME CRIMINAL CONDUCT. GOLDSBERRY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CHALLENGE GOLDSBERRY'S OFFENDER SCORE.

A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); State v.

Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. Amend 6¹²; Wash. Const. Art I, § 22¹³. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to afford defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942)).

An accused’s right to be represented by counsel is a fundamental component to our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel’s performance was deficient,

¹² The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

¹³ Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel”

and (2) that the deficient performance prejudices the defense. Strickland, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct 1029, 145 L. Ed. 2d 985 (2000); see also, Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”) (quoting Strickland, 466 U.S. at 688). While an attorney’s decisions are treated with deference, his acts must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. Hendrickson, 129 Wn.2d at 78. The defendant must demonstrate grounds to conclude a reasonable probability of a different outcome exists, but need not show the attorney’s conduct

altered the result of the case. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

Pursuant to RCW 9.94A.589, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. However, if the Court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses are counted as one crime. The same criminal conduct means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. In Goldsberry's case, the second degree assault and the felony harassment of Philomena Thomas, counts 3 and 4, are same criminal conduct. Goldsberry's counsel was ineffective for failing to raise this challenge.

Goldsberry committed the two crimes against the same victim, Thomas, at the same time and place. Thus, the only issue under the same criminal conduct analysis is on whether Goldsberry's two crimes share the same criminal intent. The focus is on whether the defendant's intent, viewed objectively, changed

from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988). Courts shall also consider whether one crime furthered the other, State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992), and whether the two or more crimes were part of the same scheme or plan and whether the criminal objective changed. State v. Maxfield, 125 Wn.2d 378, 402-03, 886 P.2d 123 (1994).

Guidance for our case is found in State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, (1996). Defendant Calvert pled guilty to various charges to include five counts of forgery. Id. at 572. At sentencing, the Court asked the parties to address whether any two or more of the forgeries constituted the same criminal conduct. Id. at 574. Both of the parties agreed that two of the checks were presented to the bank on the same day. The state argued that the two checks could not have been forged or deposited at the same moment. Id. at 573. The trial court found that the two checks could be counted as one forgery and calculated his offender score on that point using a same criminal conduct analysis. Id. at 574.

On appeal, the state challenged the trial court's holding that the two forgeries were the same criminal conduct. Id. at 577. In

denying the state's challenge, the court acknowledged that although possession and presentation of one forged check did not further the possession or presentation of the other, both were deposited in Calvert's account on the same day as part of the same scheme with the same criminal objective: to defraud. As such, the Court affirmed the trial court's use of its discretion. Id. at 578.

Similarly, the facts of State v. Walden, 69 Wn.App. 183, 847 P.2d 956 (1993), also provide guidance under our facts. Walden was convicted of one count of rape in the second degree and one count of attempted rape in the second degree. Id. at 184. Thirteen year-old D.K. was riding a bike when Walden approached him and asked to use his bike. When D.K. stepped off the bike, Walden took the bike behind a nearby store. D.K. followed whereupon Walden dragged him up a hill and forced him to masturbate and performed fellatio upon him. Walden then unsuccessfully attempted to perform anal intercourse. Id. at 184. The trial court found that the rape (fellatio) and the attempted rape (anal intercourse) were not the same criminal conduct for scoring purposes. Id. at 187. On review, the Court determined that the trial court abused its discretion in applying its same criminal conduct analysis. The Court found that the same criminal intent viewed

objectively in both instances was the same – sexual intercourse.

Id. at 188.

State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), is distinguishable. L.S. went with Grantham to an apartment after a party. In a bedroom, Grantham attempted to kiss L.S. She resisted and asked to go home. In response, Grantham repeatedly slammed her head into a wall and forcibly undressed her. He then anally raped her. Id. at 856. When Grantham finished, he started kicking L.S. and calling her names. He also threatened her not to tell. L.S. pleaded to go home. Grantham then forced L.S. to perform oral sex on him using force to get her to comply with his request. Id. at 856.

Grantham was convicted of two counts of rape in the second degree. Id. at 857. At sentencing, the trial court made a finding that the two acts did not constitute the same criminal conduct. Id. at 857. The Court focused on the fact that between the first and second rape, Grantham had the presence of mind to threaten L.S. not to tell, that in between the two crimes she begged him to stop and to take her home, and that Grantham had used new physical force to obtain sufficient compliance to accomplish the second rape. Based upon this, the court found that Grantham had the time

and the opportunity to pause, reflect and either cease his criminal activity or proceed to commit a further criminal act. The fact that he chose the latter indicated that he had formed a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. Moreover, the evidence supported the trial court's conclusion that each act of sexual intercourse was complete in itself. One did not depend upon or further the other. Id. at 859.

In Goldsberry's case, the jury was instructed that from the state's perspective, there were multiple acts of harassment and assault and that to convict, they had to be unanimous that at least one act occurred. CP 36. The evidence presented three separate instances where Goldsberry, arguably, committed second degree assault and felony harassment against Thomas while demonstrating the same criminal intent: to scare Thomas.

In the first instance, Goldsberry took the bow into the living room where Thomas was waiting for her ride. Goldsberry put an arrow in the bow, pulled the bow back, and pointed it at Thomas' forehead and said, "Are you ready to die?" 1RP 59. In the second instance, Thomas was outside. Goldsberry had an arrow in the partially pulled back bow. He told Thomas, "You take one more

move, you're dead." 1RP 65. In the third instance, Goldsberry, before going back inside the home, pulled the arrow back in the bow, pointed it at Thomas and said, "You're going to die right now." 1RP 69.

Of course it is not known which, if not all, of these instances the jury used to reach a unanimous verdict. But what is clear, as in Calvert, 79 Wn. App. 569, and Walden, 69 Wn.App. 183, the defendant's intent did not change. To prove an assault in this instance, the state had to prove that Goldsberry acted with the intent to create in Thomas apprehension and fear of bodily injury and which in fact created in Thomas apprehension and imminent fear of bodily injury. CP 23. Unlike, Grantham, 84 Wn. App. 854, Goldsberry's assault and harassment of Thomas was simultaneous or continuous, not sequential.

Had defense counsel challenged the offender score calculation, the trial court would have found the harassment and second degree assault of Thomas the same criminal conduct. As such, the point score for all four of Goldsberry's convictions would have been reduced by a point in the offender score calculation. The two felony harassment convictions would have scored as 4-12 months and the two second degree assaults – only one with a

weapon enhancement – would have scored at 13-17 months. CP 66; RCW 9.94A.510. The 12 months of enhancement time on the class B felony second degree assault and the 6 months of enhancement time on the each of the two class C felony harassment convictions add a total consecutive 18 months to the standard range. RCW 9.94A.333(4). Adding the 18 months to the correctly calculated standard range leaves Goldsberry with a maximum sentence of 35 months if the court sentenced at the top of the range on either second degree assault. A maximum sentence of 35 months is less than the 42 months imposed by the court. CP 69.

4. THE 10-YEAR NO CONTACT ORDERS IMPROPERLY EXCEEDED THE STATUTORY MAXIMUM OF 5 YEARS ON GOLDSBERRY'S TWO FELONY HARASSMENT CONVICTIONS.

At sentencing, the court imposed a 10-year domestic violence no contact order and a 10-year harassment no contact order for Norene Williams and Philomena Thomas respectively. While a 10-year no contact order may be appropriate for a class B felony with a statutory maximum of 10 years, no contact orders cannot exceed the statutory maximum for the underlying offense. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

Goldsberry was convicted only of felony harassment of Norene Williams. CP 49, 50. Felony harassment is a class C felony and has a statutory maximum of 5 years.

The Thomas no contact order failed to specify which charge or charges it applied to. Goldsberry was convicted of both second degree assault, a class B felony, and felony harassment, a class C felony, against Thomas. CP 51, 52. By failing to specify which count or counts the no contract order pertains to, the order seemingly applies to both counts even though it is error to enter a 10-year order on the felony harassment.

Goldsberry must be remanded for clarification of both no contact orders.

E. CONCLUSION

Based on the above, Goldsberry respectfully requests this court to reverse and dismiss his felony harassment conviction in count 2 (Williams). Alternatively, the court should reverse and remand for retrial the felony harassment convictions under counts 2 (Williams) and 4 (Thomas) because the jury instructions omitted required elements. Goldsberry's case should also be remanded for resentencing because ineffective assistance at sentencing left Goldsberry with an extra point in his offender score as the assault

and harassment of Thomas was same criminal conduct. Finally, the trial court needs to clarify the length of the domestic violence and harassment no contact orders issued at sentencing.

Respectfully submitted this 16th day of March 2009.

A handwritten signature in black ink, appearing to read "LISA E. TABBUTA", is written over a horizontal line. The signature is somewhat stylized and loops back to the left.

LISA E. TABBUTA WSBA #21344
Attorney for Appellant

APPENDIX A

INSTRUCTION NO. 16

A person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person or to subject another person to physical confinement or restraint and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

INSTRUCTION NO. 17

To convict the defendant of the crime of harassment in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 22, 2007, the defendant knowingly threatened to cause bodily injury immediately or in the future to Norene Goldsberry, and
- (2) That the words or conduct of the defendant placed Norene Goldsberry in reasonable fear that the threat would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the acts occurred in the State of Washington.

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

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

INSTRUCTION NO. 18

To convict the defendant of the crime of harassment in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 22, 2007, the defendant knowingly threatened to cause bodily injury immediately or in the future to Philomena Thomas, and
- (2) That the words or conduct of the defendant placed Philomena Thomas in reasonable fear that the threat would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the acts occurred in the State of Washington.

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

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

INSTRUCTION NO. 20

Threat means to communicate, directly or indirectly, the intent:

To cause bodily injury in the future to the person threatened or to any other person; or, to subject the person threatened or any other person to physical confinement or restraint.

INSTRUCTION NO. 2/

To convict the defendant of harassment, the words or conduct used by the defendant must be a "true threat." A "true threat" is a statement made in a context or under such circumstances that a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm upon another individual or to subject the person threatened or any other person to physical confinement or restraint. Whether a threat constitutes a "true threat" does not depend on whether the defendant intended to carry out the threat.

INSTRUCTION NO. 23

If you find the defendant guilty of harassment, you will complete the Special Verdict Form provided to you for this purpose. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict. If you find the defendant not guilty of harassment, do not use the special verdict form.

If you find that the State has proved beyond a reasonable doubt that the defendant's threat to cause bodily harm was a threat to kill the person threatened or another person, it will be your duty to answer the special verdict "yes".

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant's threat to cause bodily harm was a threat to kill the person threatened, it will be your duty to answer the special verdict "no".

FILED
SUPERIOR COURT

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COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY _____



SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

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No. 07-1-00113-9

v.

VERDICT FORM B

RANDY WILLIAM GOLDSBERRY,

Defendant.

We, the jury, find the defendant, Randy William Goldsberry Guilty
(Write in "not guilty" or "guilty")

of the crime of Harassment as charged in Count II.

Dated: 9/16, 2008


PRESIDING JUROR

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FILED
SUPERIOR COURT

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COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY _____ *[Signature]*

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,)
)
)
v.)
)
RANDY WILLIAM GOLDSBERRY,)
)
)
Defendant.)

No. 07-1-00113-9

VERDICT FORM D

We, the jury, find the defendant, Randy William Goldsberry Guilty
(Write in "not guilty" or "guilty")

of the crime of Harassment as charged in Count IV.

Dated: 9/16, 2008

[Signature]
PRESIDING JUROR

(49)

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FILED
SUPERIOR COURT

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SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY
RONI A. BOOTH, CLERK

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
)
 RANDY WILLIAM GOLDSBERRY,)
)
)
 Defendant.)

BY _____ *JB*
No. 07-1-00113-9

SPECIAL VERDICT FORM D

**THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS
THE DEFENDANT GUILTY OF HARASSMENT IN COUNT II.**

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the defendant's threat to cause bodily harm consist of a threat to kill the person
threatened or another person?

ANSWER: YES
(Yes or No)

DATED: 9/16/08

Don Leland

PRESIDING JUROR

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RONI A. BOGARD

BY _____ *jh*

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 RANDY WILLIAM GOLDSBERRY,)
)
 Defendant.)

No. 07-1-00113-9

SPECIAL VERDICT FORM G

THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF HARASSMENT IN COUNT IV.

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the defendant's threat to cause bodily harm consist of a threat to kill the person threatened or another person?

ANSWER: Yes
(Yes or No)

DATED: 9/16/08

Ben R. Lewis

PRESIDING JUROR

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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON,)	Court of Appeals No. 38344-6-II
)	
Respondent,)	
)	CERTIFICATE OF MAILING
vs.)	
)	
RANDY WILLIAM GOLDSBERRY,)	
)	
Appellant.)	
)	
)	
)	

I, Lisa E. Tabbut, certify and declare:

That on the 16th day of March 2009, I deposited into the mails of the United States Postal Service, a properly stamped and addressed envelope, containing the Brief of Appellant and Certificate of Mailing (PA and Court only) addressed to the following parties:

Mr. David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Susan I. Baur

CERTIFICATE OF MAILING - 1 -

LISA E. TABBUT
ATTORNEY AT LAW
P.O. Box 1396 • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 425-9011

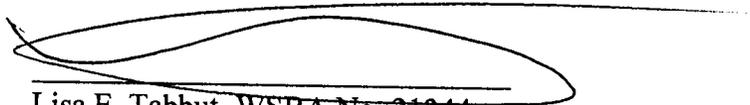
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Cowlitz County Prosecuting Attorney
312 S.W. 1st Ave.
Kelso, WA 98626

Randy W. Goldsberry/DOC# 290403
Washington State Reformatory
P.O. Box 777
Monroe, WA 98272-0777

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

Dated this 16th day of March 2009, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant