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STATE OF WASHINGTON

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No. 40341-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Antwaun Owens,

Appellant.

Clark County Superior Court Cause No. 08-1-01864-4

The Honorable Judge Barbara Johnson

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Owens's convictions were obtained in violation of his constitutional right to a jury trial under the Sixth and Fourteenth Amendments.
2. Mr. Owens's convictions were obtained in violation of his constitutional right to a jury trial under Article I, Sections 21 and 22 of the Washington Constitution.
3. Officer Donaldson invaded the province of the jury by expressing an opinion on Mr. Owens's guilt when he testified that he believed Ms. Gomez's initial accusations.
4. The prosecutor improperly introduced vouching testimony in the form of Officer Donaldson's testimony that he believed Ms. Gomez's initial statements.
5. The prosecutor committed misconduct requiring reversal.
6. The prosecutor improperly vouched for certain evidence in closing argument.
7. The prosecutor improperly referred to "facts" not in evidence during closing arguments.
8. The prosecutor committed misconduct in closing by making legal arguments that contradicted the court's instructions.
9. The prosecutor improperly appealed to passion and prejudice by telling the jury that its job was to protect Ms. Gomez from future harm perpetrated by Mr. Owens.
10. The trial judge abused her discretion by refusing to dismiss counts 1, 2, 3, 5, and 6.
11. The prosecution mismanaged its case and prejudiced Mr. Owens by amending the Information to add charges and enhancements two days before trial.
12. The trial court erred by admitting evidence of Mr. Owens's purported telephonic statements to Detective Bachelder without proper foundation.
13. The trial court erred by admitting evidence of an April 24th telephone conversation between an unidentified person and Ms. Gomez.

14. The trial court erred by admitting, without proper foundation, evidence of Mr. Owens's purported telephonic conversations with a woman alleged to have been Ms. Gomez's mother.
15. The trial court erred by admitting, without proper foundation, evidence of Mr. Owens's purported telephonic conversations with a woman named "Varnia."
16. The trial court erred by admitting Ms. Gomez's out-of-court statements to Detective Boswell without proper foundation.
17. The trial court erred by admitting Ms. Gomez's out-of-court statements to Officer Bivens without proper foundation.
18. The trial court erred by failing to give limiting instructions restricting the jury's consideration of evidence admitted for a limited purpose.
19. Mr. Owens's felony harassment conviction violated his Sixth and Fourteenth Amendment right to notice of the charges against him.
20. Mr. Owens's felony harassment conviction violated his Article I, Section 22 right to notice of the charges against him.
21. The Information was deficient because it failed to allege an essential element of felony harassment.
22. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Owens and his court-appointed attorney.
23. The trial judge erred by ignoring Mr. Owens's request for appointment of new counsel.
24. Mr. Owens was denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.
25. Defense counsel was ineffective for failing to request instructions on the inferior-degree offense of Assault in the Fourth Degree.
26. Defense counsel was ineffective for failing to object to inadmissible and prejudicial hearsay.
27. Defense counsel was ineffective for failing to object to the admission of improper vouching testimony.
28. Defense counsel was ineffective for failing to request a mistrial after the introduction of vouching evidence.
29. Defense counsel was ineffective for failing to object to the admission of irrelevant and prejudicial testimony suggesting that Ms. Gomez's actions were typical for a domestic violence victim.

30. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing arguments.
31. Defense counsel was ineffective for failing to request limiting instructions after the court admitted certain evidence for a limited purpose.
32. Upon remand, Mr. Owens may not be retried on counts 1 and 7.
33. The trial court erred by discharging the jury without Mr. Owens's explicit consent.
34. The trial court erred by discharging the jury without asking the jurors if they agreed with the presiding juror that they were hopelessly deadlocked.
35. The trial court erred by discharging the jury without considering the length of the deliberations in light of the length of the trial and the complexity of the issues.
36. The trial court erred by discharging the jury without finding that discharge was necessary to the proper administration of public justice.
37. The trial court erred by discharging the jury without making a finding of manifest necessity.
38. The trial court erred by discharging the jury without finding that extraordinary and striking circumstances required discontinuation of the trial, in order to obtain substantial justice.
39. The trial judge's decision to discharge the jury violated Mr. Owens's constitutional right to a verdict from the jurors who began deliberations on his case.
40. The trial court erred by sentencing Mr. Owens with an offender score of 6 on counts 2 and 3.
41. The trial court erred by sentencing Mr. Owens with an offender score of 5 on counts 6 and 8.
42. The evidence was insufficient to prove that Mr. Owens's current offenses all should be scored separately.
43. The trial court erred by finding that counts 2, 3, and 6 did not comprise the same criminal conduct.
44. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A “nearly explicit” opinion on an ultimate issue violates an accused person’s constitutional right to a jury trial. Here, Officer Donaldson told the jury that he believed Ms. Gomez’s initial out-of-court accusations. Did the officer’s opinion testimony invade the province of the jury and violate Mr. Owens’s right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?
2. A prosecutor may not vouch for evidence introduced at trial. In this case, the prosecutor vouched for Ms. Gomez’s initial out-of-court accusations by telling the jury that her statements, introduced under the medical exception to the rule against hearsay, were deemed “trustworthy.” Did the prosecutor violate Mr. Owens’s Sixth and Fourteenth Amendment rights by improperly vouching for the evidence?
3. A prosecutor commits misconduct by arguing that information not introduced at trial supports conviction. In this case, the prosecutor told the jury that Ms. Gomez’s out-of-court statements were deemed “trustworthy,” and that Smith affidavits are prepared because victims of domestic violence “more likely than not... have to alter [their] testimony.” Did the prosecutor violate Mr. Owens’s Sixth and Fourteenth Amendment rights by improperly suggesting that “facts” not in evidence supported conviction?
4. A prosecutor may not make legal arguments that contradict the court’s instructions. In her closing argument, the prosecutor contradicted the court’s instructions when she told the jury that certain statements were deemed “trustworthy,” and argued that Mr. Owens “obviously” committed assault by standing over Ms. Gomez with a knife. Did the prosecutor violate Mr. Owens’s Sixth and Fourteenth Amendment rights by making legal arguments that contradicted the court’s instructions?
5. A prosecutor commits misconduct by appealing to jurors’ passions and prejudices. Here, the prosecutor inappropriately argued that the jury’s role was to protect Ms. Gomez from future harm perpetrated by Mr. Owens. Did the prosecutor violate Mr. Owens’s Sixth and Fourteenth Amendment rights by appealing to the jury’s passions and prejudices?

6. A trial court may dismiss charges under CrR 8.3 whenever government mismanagement prejudices an accused person's right to a fair trial. In this case, the prosecutor amended the Information two days before trial to elevate one charge from second-degree to first-degree rape, and to add one felony, two misdemeanors, and four deadly weapon enhancements. Did the trial court abuse its discretion by refusing to dismiss charges as a result of governmental mismanagement?

7. Evidence of a telephone conversation may not be admitted absent proper authentication. At trial, the prosecutor failed to properly authenticate several telephone conversations. Did the trial court err by admitting evidence without a proper foundation under ER 901?

8. A prior inconsistent statement may not be admitted into evidence unless the declarant is given an opportunity to explain or deny the statement. Here, the court admitted statements Ms. Gomez made to Officer Bivens and Detective Boswell, even though Ms. Gomez was not provided an opportunity to explain or deny the statements. Did the trial court err by admitting certain statements in violation of ER 613?

9. When evidence is admitted for the limited purpose of impeaching a witness, the court must provide an instruction limiting the jury's consideration of that evidence to its proper purpose. The trial court admitted Ms. Gomez's prior statements for the purpose of impeachment, but failed to instruct the jury as to the limited purpose for which the evidence was admitted. Did the trial court violate Mr. Owens's Fourteenth Amendment right to due process by failing to give a limiting instruction?

10. A criminal Information must set forth all essential elements of an offense. The Information charging Felony Harassment in this case failed to allege that Mr. Owens made a "true threat." Did the Information omit an essential element in violation of Mr. Owens's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

11. An accused person has a right to be represented by conflict-free counsel. When Mr. Owens asked for the appointment of new counsel and described problems in the attorney-client relationship, the trial court discouraged him from explaining the problem further and ignored his request. Did the trial court's refusal to inquire into Mr. Owens's relationship with his attorney violate his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

12. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. In this case, defense counsel unreasonably failed (a) to request instructions on the inferior-degree offense of Assault in the Fourth Degree, (b) to request appropriate limiting instructions, (c) to object to inadmissible and prejudicial evidence, (d) to object to prosecutorial misconduct, and (e) to request a mistrial. Was Mr. Owens deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

13. An accused person has a constitutional right to receive a verdict from the jury he or she selected for trial. The trial court discharged the jury before it had completed its task, without obtaining Mr. Owens's explicit consent and without making a finding of manifest necessity based on extraordinary and striking circumstances that substantial justice could not be obtained without discontinuing the trial. Is the prosecution barred from retrying Mr. Owens on counts 1 and 7 because of the manner in which the jury was discharged?

14. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred at the same time and place and if they were committed for the same overall criminal purpose. Here, the prosecutor failed to prove that the burglary, assault and felony harassment charge occurred at different times, different places, or with differing criminal intent. Did the trial judge violate RCW 9.94A.525 by scoring counts 2, 3, and 6 separately in calculating Mr. Owens's offender score?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A. Events on November 3 and 4, 2008

Antwaun Owens and Vanita Gomez were in a romantic relationship. RP 241, 260, 595-596. They had two children together, aged two and three.¹ RP 240. They lived together until October of 2008, but even after that, Mr. Owens still came over to her house and spent a few

¹ This was their ages at the time of trial. RP 240.

nights at her home each week. RP 241-242, 271. Ms. Gomez used Mr. Owens's truck to get to and from work. RP 252, 272.

On November 4, 2008, Ms. Gomez had a date with a coworker. RP 243. She shared two bottles of wine with her coworker while out. RP 273. Mr. Owens was not happy about her date, and texted her multiple times that evening, becoming increasingly frustrated. RP 243-252. Ms. Gomez drove Mr. Owens's vehicle to and from her date, and Mr. Owens made it clear he wanted the truck returned to him. RP 240-252, 273, 409. After she got home, he went to her house, knocked on the door, and got the keys to the truck from her, without entering the home. RP 252, 409.

Ms. Gomez went to sleep. RP 252-253, 255, 274. She woke up and saw Mr. Owens standing over her. He appeared calm, but could have been under the influence of the two beers he told her he'd had. RP 253. She had not given him permission to be in the house at that time, but did not object to him coming in. RP 274-275. He told her, in effect, that she was messing with the wrong person, and left the room. RP 256. He came back in with a knife from the kitchen. RP 256. Ms. Gomez said he didn't scare her and tried to take the knife away, receiving a small cut on her hand. RP 257.

Both Ms. Gomez and Mr. Owens confirmed that they had the type of relationship that included joking about cheating on each other, mock violence, and inflicting self-harm. RP 276, 278-279, 412-413, 416, 428.

He asked her if she'd cheated, and if he could smell her vagina to see for himself. RP 257. She said no, but did not resist when he put his hand on top of her vagina. RP 257-258, 279. This, too, was something that they both had done to each other in the past. RP 278. Mr. Owens tried to take her phone when it rang, and it fell onto the floor and broke open. RP 258. She asked him to get into bed and go to sleep with her, but instead he left. RP 258, 280, 413.

Ms. Gomez called him after he left, but was unable to reach him, because he'd gone to his new girlfriend's house. RP 281-283. This made her mad, and Ms. Gomez called 911 and reported that she was the victim of domestic violence. She told the operator that she was no longer involved with Mr. Owens, and that she had changed the locks to keep him out of her home. RP 259, 281-283. Police responded and Mr. Owens was arrested days later. RP 37-39, 47-48, 208-213.

B. Charging and Pretrial Issues

On November 8, 2009, Prosecutor Camara Banfield charged Mr. Owens with Assault in the Second Degree, Rape in the Second Degree, Burglary in the Second Degree, Unlawful Imprisonment, Felony Harassment, and Interfering with Domestic Violence Reporting. CP 1-3. Regarding the harassment charge, the Information alleged that Mr. Owens "knowingly and without lawful authority, did threaten to kill another,

immediately or in the future... [and] the Defendant by words or conduct placed the person threatened in reasonable fear that the threat would be carried out..." CP 16.

Later that month, the prosecution added one count of Tampering with a Witness, as well as three counts of Violation of a No-Contact Order, a gross misdemeanor. CP 4-6. The court arraigned Mr. Owens on November 25, 2008. RP 71. The state later added Residential Burglary to Mr. Owens's charges. CP 10-13.

Ms. Gomez attempted to contact the prosecutor's office multiple times, telling them that she did not want to prosecute Mr. Owens, and that she had lied about what had happened on November 4th. RP 301.

Prosecutor Banfield sought and obtained a material witness warrant for Ms. Gomez the week before trial. RP 541. Officers went to her place of employment and arrested her, and she was held in jail over the weekend. RP 548, 577. She posted bail and was released. RP 89.

On April 30, 2009, two days before trial was set to start, Prosecutor Banfield amended the Information yet again. RP 17-18; CP 14-18. This amendment changed the Rape 2 charge to Rape 1, added deadly weapon allegations to five of the charges, charged Obstructing a Law Enforcement Officer, and added another count charging Violation of a No Contact Order. CP 14-18.

The defense objected to the late amendment, and noted that it significantly changed the sanctions Mr. Owens would be facing if convicted. RP 19. The prosecutor responded that the underlying facts were unchanged, as were the available defenses, and claimed that she had given the defense written notice of her intention to add charges.² RP 19-20. The court overruled Mr. Owens's objection. RP 21, 23-28.

At that same hearing, Mr. Owens addressed the court directly and asked the judge to appoint a new attorney. RP 21-23. The judge commented that it was too late for such a motion. RP 21. Mr. Owens addressed the court with his request:

DEFENDANT: Your Honor, the attorney was appointed to my case on November the 4th and we went to court later in that month and he wished to be withdrawn from that case, Your Honor, because he said he didn't deal with three-strike cases. But, when he was appointed to it the first time, I told him that it wasn't a three-strike case. And, when we come to the court for him to say that he didn't want to be on that case, Your Honor, I told that to the judge and the judge asked him, "Well, what have you all been doing? It's not a three-strike case, if you look at it." And, I have asked him to file several motions, Your Honor, and asked -- gave -- asked him to collect certain evidence and he hasn't done it, Your Honor. And, the prosecutor had filed a warrant for my girlfriend's arrest but saying that she wasn't compliant or anything like that when, in fact, she was compliant and talking to my attorney saying that she was going to come to court, Your Honor. And, stuff like that. And, I don't think he is prepared and he hasn't been prepared and here it is a week from my court date and we haven't even talked about a final defense strategy or anything, Your Honor. And, I think he is

² The prosecutor's plea offer, upon which Banfield relied in making this assertion, did not support her assertion that she'd provided written notice. CP 25-27.

unprepared and hasn't took any interest in the case at all. And, I would have fired my attorney, Your Honor, but the prosecutor went to my house around February and promised my girlfriend that she was going to drop all the charges except one. (Prosecutor laughs.) And, offer me a reasonable plea because since the first day I was incarcerated the victim, which is my girlfriend, contacted the prosecutor, Your Honor, and told her that she was upset and you know, a lot of the things were fabricated, Your Honor.
RP 22-23.

Without comment on Mr. Owen's statement and request, the court arraigned him on the amended charges. RP 23-28.

On the first day of trial (May 4, 2009), Mr. Owens moved to dismiss counts 1, 2, 3, 5 and 6 under CrR 8.3(b), due to prosecutorial vindictiveness and/or mismanagement in the late filing of the Third Amended Information. RP 70-81; CP 19-28. Mr. Owens's attorney reminded the court that the prosecutor had learned no new facts since the original charges were filed 6 months before, and argued that Mr. Owens was now faced with the choice of waiving speedy trial or proceeding to trial with an attorney unprepared to meet the new charges. RP 72.

Prosecutor Banfield suggested that defense counsel was given written notice of her intention to increase the charges in a plea offer dated April 24, 2009.³ CP 25-28; RP 78. The prosecutor again acknowledged that she had done no additional investigation and learned no new facts relating to

³ That offer made no reference to amending the Information or adding charges and enhancements. CP 26-28.

the new charges. RP 78-80. The court again denied the motion. RP 82-85. The court also denied Mr. Owens's motion to continue the trial. RP 85-90.

C. Trial – Ms. Gomez's Testimony and Statements

When Ms. Gomez was called to testify, she told the jury that she lied to the 911 operator, as well as to law enforcement officers. She said she wanted the truck back so that she could get to work, and that the false report worked – she did get the truck back and was able to drive it to work that day. RP 259-260, 281-283. She indicated her report that Mr. Owens twisted her arm behind her back was not true, that he did not force her legs apart and that he did not penetrate her vagina – her statements otherwise were lies. RP 262. She said she felt forced by the officer to write a statement, and that he told her what to say. RP 264. Ms. Gomez also testified she lied at the emergency room when the police pressured her to go in for an examination. RP 268.

A statement she'd written for the police was admitted without defense objection, and read out loud by Ms. Gomez to the jury. RP 264-267; Exhibit 56 (Gomez Statement), Supp. CP.

After Ms. Gomez's testimony, Officer Bivens, who had responded to her 911 call, relayed to the jury statements Ms. Gomez had made to

him. RP 345-351. Without objection or limitation⁴, Bivens testified that Ms. Gomez stated: (1) Mr. Owens had a knife already when she woke up, (2) she was afraid for her own safety, (3) Mr. Owens removed the battery from her phone, (4) he twisted her arm, (5) he used force to put his fingers into her vagina, and (6) she did not feel free to leave her room. RP 348-350. Bivens had already testified (without objection or any request for a limiting instruction) that Ms. Gomez told him that Mr. Owens broke into her house, stood over her with a knife, and made threatening gestures. RP 210, 213. He described her as calm, fearful, embarrassed, not impaired, tearful, and having a “closed demeanor”. RP 211-214.

Officer Donaldson, the other officer who responded to the incident, testified (without objection or limitation) that Ms. Gomez had told him that she was afraid. He told the jury that he believed her because she looked him in the eyes and stated it directly. RP 352-353.

Detective Boswell also testified to Ms. Gomez’s out-of-court statements, after the court overruled Mr. Owens’s hearsay objection. RP 519-521. Boswell testified that Ms. Gomez had said that Mr. Owens pushed her legs apart, touched her vagina from her clitoris to the inside, and she was so afraid that she was in the fetal position. RP 521-522.

⁴ The only objection during this testimony was to whether she had allowed him into her home generally during this time period. The court overruled that hearsay objection. RP 346.

Boswell also testified that she found out what Ms. Gomez told other officers, opining that her out-of-court statements were all consistent. RP 522-523.

The prosecutor asked Boswell “Did Ms. Gomez indicate that she was concerned the defendant had been in the home while you were at the hospital?” The court overruled a hearsay objection, and gave the only limiting instruction provided during the entire trial: “when it is referred to that a prior statement is offered as impeachment or is admitted as impeachment, this means it is admitted solely for the purpose of evaluating the credibility of the witness, the believability of the witness, and for no other purpose.” RP 525-526.

Joan Sundqvist, the nurse who met with Ms. Gomez at the hospital, also relayed statements made by Ms. Gomez. RP 305-307. According to Sundqvist, Ms. Gomez told her she’d been sexually assaulted by Mr. Owens. Sundqvist testified that Ms. Gomez said Mr. Owens stood over her with a knife and wiped his fingers in her vagina. Ms. Gomez said she received a small cut while she was trying to keep her phone, and she feared Mr. Owens. RP 321-324. Dr. Hanley, who treated Ms. Gomez in the emergency room, testified that she told him her ex-boyfriend held a knife to her, and she resisted when he forced her legs open and put his fingers into her vagina. RP 400-403.

Prosecutor Banfield also introduced the testimony of Amy Harlan, the victim advocate who worked with her in the prosecuting attorney's office. RP 325-326. Harlan testified that Ms. Gomez never told her she had lied about what happened, but Harlan did acknowledge Ms. Gomez stated that she had exaggerated. RP 329, 335, 341. Without objection from defense counsel, Harlan also told the jury that it was not uncommon for DV victims to avoid speaking with the prosecutor, that they "generally still recant or minimize their statement to [me] so that [I] can let the prosecutor know", and that Ms. Gomez did not sit down with the prosecutor (Banfield) to recant her statement. RP 337.

D. Trial – Telephone Conversations

Detective Bachelder, who investigated the case, indicated he called Mr. Owens twice between the incident and his arrest, but he could not recall where he got the phone number he used; he later testified Officer Bivens may have been the source. RP 51, 54, 390. He did not know Mr. Owens prior to the call, and could not identify his voice. RP 54. According to Bachelder, the speaker identified himself as Mr. Owens, and seemed familiar with Ms. Gomez. RP 51-52. The court ruled this conversation admissible, in part because Mr. Owens (who testified at the CrR 3.5 hearing) did not deny he'd spoken to Bachelder. RP 67.

Bachelder told the jury that Mr. Owens indicated that he went over and picked up his truck, and that nothing happened inside the residence. During a second call, Bachelder said Mr. Owens cried, stated he did not want to live, and did not want to go to jail for life. RP 390-393.

The state also offered recordings and transcripts of two calls purporting to be from the incarcerated Mr. Owens to Ms. Gomez's mother. RP 436-467, 475-490. The state did not call Ms. Gomez's mother to testify about the calls. RP 436-490. Boswell claimed that she knew the mother's phone number and that she recognized Mr. Owens's voice from listening to other recordings she believed to be of his voice. RP 480, 487-488.

The court permitted Detective Boswell to tell the jury about these calls. Boswell indicated Mr. Owens made the calls, and described the contents. She claimed Mr. Owens asked Ms. Gomez's mother if she had spoken with Ms. Gomez, and if Ms. Gomez would help Mr. Owens. RP 529-536. Boswell testified that Mr. Owens told her in both calls to tell Ms. Gomez to come to court and tell the court she made it all up, to tell the judge that she was upset and lied. RP 534-539. Boswell also testified that Mr. Owens said he would give Ms. Gomez his truck if she would have the charges dropped. RP 539-540.

The state also introduced recordings and transcripts of three calls allegedly from Mr. Owens to Ms. Gomez. Ms. Gomez did not confirm that the transcripts were accurate, and said she could not understand all of the words on the recordings. RP 454, 464. The court admitted the recordings and allowed the jury to review the transcripts. RP 489-490, 492-505, 561-571.

Boswell was permitted to describe the calls. She said Mr. Owens called Ms. Gomez, told her his charges, and asked her to go to court to tell the judge that it didn't happen. RP 528-530. She noted that Mr. Owens did not ask Ms. Gomez why she made it up or explicitly accuse her of lying. RP 530. The recording was played; it contained a woman telling a man that he may not be convicted of all charges, and a man telling her that she should not have signed the paper and she should tell the court that she was upset and lied. RP 561-565.

The state also sought (over defense objection) to introduce a recorded call from a jail inmate, not Mr. Owens, purportedly making a call to Ms. Gomez. RP 93-95; CP 33-35. The prosecutor alleged that this call was at Mr. Owens's behest, but presented no evidence relating to this, arguing instead that the content of the call between Ms. Gomez and the unnamed inmate established Mr. Owens's role. RP 99-101. The caller was never identified and did not testify at trial, Ms. Gomez disputed the

accuracy of the transcript prepared by Boswell, and said she did not recognize the caller's voice. RP 291-294, 300, 369, 464, 542-544.

Even so, the court admitted the recording with a transcript, as Exhibits 61 and 67. RP 567. The caller told Ms. Gomez about a warrant the court issued for her arrest that day, warned her that they planned to arrest and hold her until trial, and urged her to leave her work and hide to avoid arrest. RP 567-571.

Finally, the court admitted Exhibits 70 and 71, which purported to be a recorded call (and transcript) from Mr. Owens to a woman named "Varnia." RP 544-547. The prosecutor did not produce Varnia, Mr. Owens never acknowledged that he had made the call, and Ms. Gomez did not recognize the woman's voice on the recording. RP 370, 544-547. The jury heard a woman tell a man she had not heard from "her." The man said he would call "her" later, and the woman said she didn't know if "she" had been picked up. RP 544-547.

E. Closing Arguments and Verdict

After the state rested, the court dismissed the charges of Unlawful Imprisonment and Residential Burglary. RP 602, 608.

During her closing argument, Prosecutor Banfield urged the jurors to care about Ms. Gomez and protect her: "[W]hy should you care? You care because of that. This is the one you fight for. This is the person you

look at and say, ‘I have to help this person...’ RP 700. During rebuttal, she returned to this theme: “But, your job today is to really protect her. Your job today is to say that you are not going to put up with that... Please do your job.” RP 755-756. She also told the jury “the moment she wakes up to having this man standing over her with a knife obviously he has committed [assault.]” RP 670.

Prosecutor Banfield told the jury that certain evidence had been deemed “trustworthy”:

You get to take certain evidence into consideration. Evidence that happened prior to testimony. And, there is a reason for that. It is deemed somewhat -- how should I say the word -- you can -- trustworthy due to the nature of the evidence, itself. For instance, medical testimony. Things that you give -- tell a doctor and things that you tell a nurse for medical treatment. You can consider that as direct evidence, not as hearsay. Not used simply to impeach someone, which means to contradict what they are saying. You get to use it as a fact of the case.
RP 733.

Prosecutor Banfield encouraged the jury to use Ms. Gomez’s written statement as substantive evidence to convict Mr. Owens, and said “these statements, at the time, are sworn statements by a victim of domestic violence who is more likely than not going to come in and have to alter her testimony.” RP 749.

The defense did not object to her arguments. RP 645-702, 732-757.

After deliberation, the jury indicated that they could not reach a verdict on counts 1 and 7 (Rape in the First Degree and Tampering with a Witness). The court declared a mistrial, but did not obtain Mr. Owens's explicit consent and did not make any findings explaining why a mistrial was required. RP 769, 776-782. The jury found Mr. Owens guilty on the remaining counts. RP 769-775.

F. Post-Trial and Sentencing

Mr. Owens's attorney filed a Motion for Substitution of Attorney. CP 105-106. Mr. Owens believed his right to testify in his own defense had been violated; this claim created a conflict for defense counsel. CP 106; RP 783-784. The court did not rule on the Motion for Substitution of Attorney, and the record does not indicate that the motion was withdrawn. RP 783-822.

At sentencing, Mr. Owens argued that his convictions for Burglary in the First Degree, Felony Harassment, and Assault in the Second Degree were the same criminal conduct and should score as only one point. RP 801-805; Defendant's Memorandum, Sentencing Memorandum, Supp. CP. The court found that they were not the same criminal conduct because the events occurred over time. CP 110; RP 815. The court sentenced Mr. Owens to 108 months in prison. CP 112, 123-124. This timely appeal followed. CP 132; Order of Indigency, Supp CP.

ARGUMENT

I. MR. OWENS’S CONVICTION WAS OBTAINED IN VIOLATION OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 21 AND 22 OF THE WASHINGTON CONSTITUTION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, ___, 236 P.3d 858 (2010).

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁵ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

B. Mr. Owens’s convictions violated his constitutional right to a jury trial because they were based in part on impermissible opinion testimony.

⁵ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

Under Article I, Section 21 of the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Impermissible opinion testimony on the accused person’s guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wash.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wash.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue is forbidden if it is a “nearly explicit” or “almost explicit” statement by the witness that the witness believes the accused is guilty. *Kirkman*, at 937. Furthermore, the prosecution cannot indirectly vouch for a witness by eliciting testimony from a police officer as to the credibility of a key witness. *State v. Chavez*, 76 Wash.App. 293, 299, 884 P.2d 624 (1994) (cited with approval by *State v. Korum*, 157 Wash.2d 614, 651, 141 P.3d 13 (2006)).

In this case, conviction hinged on whether or not the jury believed Ms. Gomez’s out-of-court statements to law enforcement and medical

personnel. If believed, these statements, though contradicted by her testimony at trial, established that Mr. Owens acted without her consent and outside the framework of their relationship.

In context, Officer Donaldson’s testimony—that “[he] believed her” when Ms. Gomez “looked [him] directly in the eyes” and told him “she was very afraid of [Mr. Owens]”—amounted to a “nearly explicit” or “almost explicit” statement that he believed Mr. Owens to be guilty. RP 352-353. If, as Ms. Gomez testified at trial, Mr. Owens acted with her consent and in a manner that made sense within the context of their relationship, she had no reason to be afraid of him.⁶ RP 239-283. Officer Donaldson’s personal opinion—that he believed Ms. Gomez—was irrelevant and highly prejudicial. It encouraged the jury to believe her out-of-court version of events, to ignore her trial testimony, and to conclude that Mr. Owens was guilty of the charged crimes.⁷

The improper admission of this testimony created a manifest error affecting Mr. Owens’s Sixth and Fourteenth amendment right to a jury trial.⁸ Review is therefore appropriate under RAP 2.5(a)(3).

⁶ There was testimony that the two of them engaged in play involving mock violence. RP 276, 278-279, 412-413, 416, 428.

⁷ The problem was compounded by the introduction of testimony suggesting that Ms. Gomez’s recantation was typical of domestic violence victims. RP 337.

⁸ In the alternative, defense counsel’s failure to object deprived Mr. Owens of the effective assistance of counsel, as argued elsewhere in this brief.

- C. The violation of Mr. Owens's constitutional right to a jury trial was not harmless beyond a reasonable doubt.

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. Mr. Owens sought to raise a reasonable doubt based on Ms. Gomez's trial testimony. RP 702-731. Officer Donaldson's testimony suggested that what Ms. Gomez told the jury was fabricated and that the jury should only trust her out-of-court statements. Donaldson's belief—that she told him the truth—directly contradicted Mr. Owens's position. The problem was exacerbated when Detective Boswell

was later permitted to testify that Ms. Gomez's out-of-court statements to her were consistent with what Ms. Gomez told other officers. RP 522-523.

Under these circumstances, the error was not trivial, formal, or merely academic; it prejudiced Mr. Owens and likely affected the final outcome of the case. *Lorang*, at 32. A rational juror could have entertained a reasonable doubt about whether or not Ms. Gomez told the truth in her out-of-court statements. Because the error was not harmless, the conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. OWENS'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Standard of Review

Prosecutorial misconduct may be raised for the first time on appeal when it amounts to a manifest error affecting a constitutional right. RAP 2.5(a); *see, e.g., State v. Jones*, 71 Wash.App. 798, 809-810, 863 P.2d 85 (1993) ("*Jones I*"). Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.⁹ *Toth*, at 615.

B. A guilty verdict may not be based on facts not introduced into evidence, legal arguments that contradict the instructions, or sympathy and prejudice.

⁹ Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, such misconduct requires reversal if it is "so flagrant and ill-intentioned" that no curative instruction would have negated its prejudicial effect. *Id.*, at 800.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

It is misconduct for a prosecutor to vouch for evidence or otherwise suggest information not presented at trial supports conviction. *State v. Jones*, 144 Wash.App. 284, 293-94, 183 P.3d 307 (2008) (“*Jones II*”); *State v. Perez-Mejia*, 134 Wash.App. 907, 916, 143 P.3d 838 (2006).

In addition, a prosecutor’s statements to the jury upon the law must be confined to the law set forth in the instructions. *State v. Davenport*, 100 Wash.2d 757, 760, 675 P.2d 1213 (1984); *State v. Huckins*, 66 Wash.App. 213, 218-219, 836 P.2d 230 (1992). Any statement of law not contained in the instructions is improper, even if it is correct. *Davenport*, at 760. Such misconduct is a “serious irregularity having the grave potential to mislead the jury.” *Id.*, at 764. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury’s verdict. *Id.*, at 762.

Furthermore, a prosecutor may not appeal to passion or prejudice. *Perez-Mejia*, at 915-16. Such appeals encourage the jury “to base its

verdict on the powerful emotions, concerns or prejudices that arise from the facts of the case, rather than on the facts themselves.” *Id.*, at 920.

C. The prosecutor committed misconduct by vouching for the evidence and by making arguments that were not supported by the court’s instructions when she told the jury that certain evidence was deemed “trustworthy.”

1. The prosecutor’s comments were improper and require reversal.

In this case, the prosecutor vouched for evidence and made argument that conflicted with the court’s instructions when she told the jury that out-of-court statements to a medical professional were deemed “trustworthy.” RP 733. Nothing in the evidence or in the court’s instructions supported this argument. It suggested to jurors that they should give greater weight to Ms. Gomez’s statements to Nurse Sundqvist and Dr. Hanley than they otherwise might. Furthermore, the prosecutor’s statement regarding trustworthiness conflicted with the court’s instruction that jurors are the sole judges of credibility and weight of the testimony. CP 40.

The state’s argument also invited the jury to infer that the judge herself believed the evidence, and suggested that the judge had commented on the evidence by admitting it for consideration as substantive evidence. Throughout the trial, the jurors had seen the judge rule on questions of admissibility, and understood that the judge functions

as a gatekeeper, charged with admitting and excluding evidence. If, as the prosecutor explained, certain evidence was “deemed” trustworthy, jurors cannot be faulted for believing that the judge herself considered it reliable by admitting it. This conflicted with the court’s instruction explaining the constitutional prohibition against judicial comments on evidence. CP 41.

The prosecutor’s comments violated Mr. Owens’s right to a verdict based solely on the evidence and the court’s instructions. This misconduct created a manifest error affecting Mr. Owens’s Sixth and Fourteenth Amendment rights to due process and to a jury trial.¹⁰ Accordingly, his convictions must be reversed and the case remanded for a new trial.

2. The Court should not follow Division III’s decision in *Sandoval*.

Division III’s opinion in *State v. Sandoval* was wrongly decided, and should not be followed by Division II. *State v. Sandoval*, 137 Wash.App. 532, 540-41, 154 P.3d 271 (2007). In *Sandoval*, Division III excused misconduct similar to that committed by Prosecutor Banfield in this case. The prosecutor in *Sandoval* told jurors that certain hearsay statements were admissible because they were “deemed reliable.” *Sandoval*, at 536. Division III refused to reverse the conviction. The court

¹⁰ In the alternative, defense counsel’s failure to object deprived Mr. Owens of his right to the effective assistance of counsel, as argued elsewhere in this brief.

should not follow Division III’s decision for the reasons set forth in the dissent to that case. *See Sandoval*, at 541-545 (Schulties, J., dissenting).

In addition, the appellant in *Sandoval* argued only that the prosecutor had expressed a personal opinion about the evidence. The *Sandoval* majority dismissed this argument by noting that the prosecutor “did not directly or indirectly state a personal belief that a witness was telling the truth.” *Sandoval*, at 541.

Here, by contrast, Mr. Owens argues that the prosecutor invited a decision based on “facts” outside the record, argued legal principles not contained in the instructions, and invited the jury to believe that the judge had commented favorably on the evidence by admitting it.

Division III also found any error harmless. *Id.* In this case, however, the error cannot be considered harmless. Conviction turned on whether or not the jury believed Ms. Gomez’s out-of-court statements, in light of her trial testimony. The *Sandoval* case did not involve competing versions of the truth offered by a single witness.¹¹

The *Sandoval* decision invites litigants to make inappropriate arguments to jurors. Absent a clear personal opinion, any attorney can rely on *Sandoval* and reference—either explicitly or by inference—a rule, a

¹¹ It appears from the opinion that the alleged victim in *Sandoval* did not testify.

statute, a case, or the legal reasoning underlying such authority. This conflicts with the general rule that an attorney may not make legal arguments that are unsupported by the court's instructions. *Davenport, supra*.

For all these reasons, the court should decline to follow *Sandoval*. Instead, the court should hold that the prosecutor's misconduct violated Mr. Owens's Sixth and Fourteenth Amendment rights to due process and a jury trial. His convictions must be reversed, the case remanded for a new trial.

D. The prosecutor improperly bolstered Ms. Gomez's written statement and argued "facts" not in evidence when she told the jury that *Smith* affidavits are prepared because victims of domestic violence "more likely than not... have to alter [their] testimony."

During closing arguments, the prosecutor told the jury (referring to *Smith* affidavits) that "these statements, at the time, are sworn statements by a victim of domestic violence who is more likely than not going to come in and have to alter her testimony." RP 749. This improperly bolstered Ms. Gomez's written statement and referred to "facts" not in evidence, creating a manifest error affecting Mr. Owens's Sixth and Fourteenth Amendment rights.¹²

¹² In the alternative, defense counsel's failure to object deprived Mr. Owens of his right to the effective assistance of counsel.

The testimony at trial did not establish that *Smith* affidavits are produced because domestic violence victims “more likely than not” recant their accusations when they testify at trial. Nor was there evidence that domestic violence victims “have to alter [their] testimony.” In fact, it is likely that at least some witnesses testify in a manner inconsistent with their *Smith* affidavits because they lied, exaggerated, succumbed to police pressure, or were mistaken when they signed the affidavit. It is also likely that some witnesses choose to “alter” their testimony not because they are afraid of future violence (as the prosecutor implied), but because they regret calling the police and wish to preserve an important relationship.

Even the improper testimony of the advocate did not establish the “facts” referred to by the prosecutor. Advocate Harlan testified that it is not uncommon for DV victims to refuse to speak to the prosecutor, and that such witnesses often recant when speaking with the advocate; she said nothing about trial recantations or the purpose of *Smith* affidavits. RP 337.

The prosecutor’s comment in this case was similar to the misconduct in *Jones II, supra*. In that case, the court found improper remarks that implied “that police (1) would suffer professional repercussions if they used an untrustworthy informant and (2) would have discontinued using an informant if they doubted his sobriety or trustworthiness.” *Jones II, at 294*. Here, as in *Jones II*, the misconduct

violated Mr. Owens's Sixth and Fourteenth Amendment right to a verdict based solely on the evidence. *Turner*, at 472; *Sheppard*, at 335. His conviction must be reversed and the case remanded for a new trial. *Jones II*, *supra*; *Perez-Mejia*, *supra*.

- E. The prosecutor committed misconduct by making arguments that contradicted the court's instructions when she told the jury that Mr. Owens had "obviously" committed assault by standing over Ms. Gomez holding a knife.

Under the court's instructions,

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

No. 20, Court's Instructions, CP 62.

In her closing argument, the prosecutor told the jury "the moment she wakes up to having this man standing over her with a knife obviously he has committed [assault.]" RP 670. This is an incorrect statement of the law, and contradicts the court's instruction defining assault in three ways.¹³

¹³ The error may be raised for the first time on review under RAP 2.5(a)(3). In the alternative, defense counsel's failure to object violated Mr. Owens's right to the effective assistance of counsel.

First, conviction requires proof of an overt act:

The line between violence menaced and violence actually begun is a thin one but there must be some physical effort by the actor to carry into execution the violence menaced before it can be said that an assault has been committed. The overt act, sufficient to establish an ‘attempt’, must reach far enough toward the accomplishment of the target crime to amount to the commencement of the consummation.

State v. Murphy, 7 Wash.App. 505, 512, 500 P.2d 1276 (1972). Proof that Mr. Owens swiped at Ms. Gomez or held the knife to her throat would have been sufficient. Merely standing with a knife is not. The prosecutor’s argument improperly directed the jury to disregard the requirement of an overt act.

Second, the prosecutor’s argument encouraged the jury to ignore the necessity of proof that the act “creates in another a reasonable apprehension and imminent fear of bodily injury...” CP 62. This element is the essence of the third definition, and was contested at trial.

Third, the argument improperly suggested that Mr. Owens’s intent was irrelevant. However, intent to create apprehension and fear of bodily injury is an essential element of the offense. CP 62. Conviction requires proof of more than an intent to intimidate: “intimidation involves influencing future conduct, while the intent to cause apprehension and fear of bodily injury speaks to an immediate reaction or result from the

unlawful conduct.” *State v. Byrd*, 72 Wash.App. 774, 778, 868 P.2d 158 (1994) *aff’d*, 125 Wash.2d 707, 887 P.2d 396 (1995).

The prosecutor’s suggestion—that an assault was “obviously” committed “the moment she wakes up to having this man standing over her with a knife” was an incorrect statement of the law and contradicted Instruction No. 20. RP 670; CP 62. The misconduct requires reversal of the assault conviction and remand for a new trial. *Davenport, supra*.

F. The prosecutor improperly appealed to jurors’ passions and prejudices by asking them to vote guilty in order to protect Ms. Gomez from future harm.

Prosecutorial misconduct “occurs when a prosecutor ‘interject[s] issues having no bearing on the defendant’s guilt or innocence and improperly appeal[s] to the jury to act in ways other than as dispassionate arbiters of the facts.” *United States v. Ayala-Garcia*, 574 F.3d 5, 16 (1st Cir. 2009) (alterations in original) (quoting *United States v. Mooney*, 315 F.3d 54, 59 (1st Cir.2002)).

Except in unusual circumstances,¹⁴ a jury must not consider anything outside the historical facts and the court’s instructions in reaching its verdict; accordingly, a prosecutor may not urge jurors to

convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking

¹⁴ Such as when considering future dangerousness in the sentencing phase of a capital case. See RCW 10.95.070(8).

in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984)

(footnotes omitted).

The jury's task was to decide the facts, apply the law set forth in instructions, and convict only if convinced beyond a reasonable doubt that Mr. Owens was guilty. CP 39, 43. The jurors were also instructed not to allow their emotions to overcome rational thought processes, or to be swayed by sympathy, prejudice, or personal preference. CP 41.

Despite this, the prosecutor urged the jury to "look at [Ms. Gomez] and say, 'I have to help this person...'" RP 700. She also told jurors "your job today is to really protect [Ms. Gomez]". RP 755-756. These arguments were improper because they encouraged jurors to see themselves as responsible for Ms. Gomez's well-being, and render a verdict based on the possibility of future harm, rather than on the evidence.

The prosecutor's arguments conflicted with the court's instructions and urged a decision based on improper factors. They created a manifest error affecting Mr. Owens's constitutional rights to a jury trial and to due

process, and thus can be reviewed under RAP 2.5(a)(3). U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Ayala-Garcia, supra*. Mr. Owens's convictions must be reversed and the case remanded for a new trial. *Id*; *Davenport, supra*.

G. Cumulative prosecutorial misconduct requires reversal.

Cumulative misconduct by a prosecutor may be aggregated and evaluated for its overall effect. *Henderson, at* 804-805. In this case, multiple instances of prosecutorial misconduct violated Mr. Owens's right to a fair trial. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id*.

III. THE PROSECUTION VIOLATED MR. OWENS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ADDING CHARGES AND ENHANCEMENTS TWO DAYS BEFORE TRIAL.

A. Standard of Review

A trial court's ruling under CrR 8.3(b) is reviewed for a manifest abuse of discretion. *State v. Michielli*, 132 Wash.2d 229, 240, 937 P.2d 587, 593 (1997). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes relying on unsupported facts, taking a view that no reasonable person would take, applying the wrong legal standard, or ruling based on an erroneous view

of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

B. The trial court should have dismissed counts 1, 2, 3, 5 and 6 because governmental mismanagement denied Mr. Owens a fair trial.

The federal constitution prohibits a state from depriving a person of liberty without due process of law.¹⁵ U.S. Const. Amend. XIV. Criminal proceedings must comport with prevailing notions of fundamental fairness such that the accused person is given a meaningful opportunity to present a complete defense. *State v. Greiff*, 141 Wash.2d 910, 920, 10 P. 3d 390 (2000).

CrR 8.3(b) allows a trial court to dismiss any prosecution in the furtherance of justice “due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” CrR 8.3(b). Dismissal may be premised upon simple mismanagement; the governmental misconduct “need not be of an evil or dishonest nature.” *State v. Brooks*, 149 Wash.App. 373, 384, 203 P.3d 397 (2009). Accordingly, a finding of “good faith” does not excuse the government’s mismanagement of a prosecution. *Id.*

¹⁵ Our state’s due process right is coextensive with the federal right. Wash. Const. Article I, Section 3; *see also Ongom v. Dep’t of Health*, 159 Wash.2d 132, 152, 148 P.3d 1029 (2006).

An accused person is prejudiced when the mismanagement negatively impacts “the right to a speedy trial and the ‘right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of [the] defense.’” *Michielli, at 240* (quoting *State v. Price*, 94 Wash.2d 810, 814, 620 P.2d 994 (1980)).

Here, the prosecutor mismanaged her case by filing charges only two days prior to trial. The new charges were based on evidence within the prosecutor’s knowledge since the inception of the case. RP 19. The prosecutor did not present any information justifying the late charging decision. RP 17-30, 70-90. Even if plea negotiations were ongoing, nothing prevented the prosecutor from amending the Information in a timely fashion; any increase in charges could have been reversed had a plea agreement been reached.

The prosecutor’s dilatory conduct forced defense counsel, upon only two days notice, to defend against new charges of first-degree rape (elevated from second-degree rape), tampering with a witness, violating a no-contact order, and obstructing a law enforcement officer. CP 10-18. Defense counsel was also faced with four previously uncharged deadly weapon enhancements. CP 10-18.

Although information relating to these new charges had apparently already been disclosed during the normal course of discovery, defense

counsel made clear that he would need additional time to prepare for trial, especially in light of the elevation of count 1 to first-degree rape. RP 85, 89. Furthermore, it is objectively unreasonable to expect even the most seasoned attorney to prepare a jury trial with only two days notice. *See, e.g., State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010) (outlining minimal steps to be taken by counsel before advising entry of a guilty plea); *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (“[A]n attorney must, at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’”) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)).

The prosecution mismanaged its case and thereby prejudiced Mr. Owens. Accordingly, his convictions must be reversed and the case dismissed with prejudice. *Brooks, supra*. In the alternative, the case must be remanded for a new trial.

IV. THE TRIAL COURT ERRED BY ADMITTING INADMISSIBLE EVIDENCE THAT PREJUDICED MR. OWENS.

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wash.2d 727, 750, 202 P.3d 937 (2009); *Hudson*, at 652. An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wash.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there

is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

B. The trial court erroneously admitted telephone conversations (and associated transcripts) without proper foundation.

Under ER 901, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). As an example, the rule sets forth one method for authenticating a telephone conversation: evidence of a telephone conversation is admissible upon proof “that a call was made to the number assigned at the time by the telephone company to a particular person or business, if... [the] circumstances, including self-identification, show the person answering to be the one called...” ER 901(b)(6).

Recordings of telephone conversations are typically admissible if one participant testifies that the exhibit is accurate. *State v. Jackson*, 113 Wash.App. 762, 769, 54 P.3d 739 (2002).

In this case, the prosecutor failed to establish the foundation for admission of five telephone conversations. Despite this, the court overruled Mr. Owens’s objections and admitted the conversations.

First, the trial court should not have admitted testimony summarizing a telephone conversation that Detective Bachelder

purportedly had with Mr. Owens. RP 390-392. At no time did Bachelder testify that the number he dialed belonged to Mr. Owens; instead, he could not recall where he got the number (although he later surmised that he got it from one of the other officers). RP 51, 54, 390. When Mr. Owens objected (prior to trial) on the grounds that the phone call had not been authenticated, the court noted that Mr. Owens had not testified at the CrR 3.5 hearing that he was *not* the person on the phone and admitted the conversation. RP 61, 67.

Second, the court should not have admitted Exhibits 63, 66, 68, and 69, which purported to be recorded telephone conversations (and associated transcripts) between Mr. Owens and an unidentified woman, whom the prosecutor alleged was Ms. Gomez's mother. RP 489-490. Neither purported participant provided foundational testimony; thus, there was no proper demonstration of the identity of either person on the recording, nor was there a basis to conclude that the recordings and transcripts were accurate. Instead, Detective Boswell testified that she knew Ms. Gomez's mother's telephone number (but did not explain how she obtained the number) and that based on listening to other recordings she believed to be of Mr. Owens, she recognized Mr. Owens's voice. RP 480, 487-490.

Third, the court should not have admitted Exhibits 61 and 67, which purported to be a call from an unknown inmate to Ms. Gomez, allegedly relaying a message from Mr. Owens. The caller was never identified, and Ms. Gomez disputed the accuracy of the transcript. RP 93-101, 291-294, 300, 369, 464, 542-544.

Fourth, the court should not have admitted Exhibits 70 and 71, which purported to be a recorded call (and transcript) from Mr. Owens to a woman named “Varnia.” The prosecutor did not produce Varnia, and Mr. Owens never acknowledged that he had made the call. RP 370, 544-547.

Mr. Owens was prejudiced by the erroneous admission of all of these calls. The telephone conversations, if authentic, showed consciousness of guilt and suggested an attempt to tamper with evidence. The trial court should not have admitted the evidence without proper authentication. ER 901.

C. The trial court erroneously admitted, for impeachment, prior statements without proper foundation, and improperly failed to limit the jury’s consideration of such evidence.

Extrinsic evidence of a prior inconsistent statement is inadmissible absent a proper foundation. *State v. Horton*, 116 Wash.App. 909, 914, 68 P.3d 1145 (2003) (“*Horton I*”). The proponent must confront the witness with each inconsistent statement and provide an opportunity to explain or deny it. ER 613(b). If the witness admits having made the prior statement,

extrinsic evidence is not admissible. *State v. Dixon*, 159 Wash.2d 65, 76, 147 P.3d 991 (2006). Furthermore, the rule (by its own terms) requires that the out-of-court statement be inconsistent with the witness's testimony. ER 613.

When evidence is introduced for a limited purpose, the court must give a limiting instruction to ensure that the jury considers the evidence only for the appropriate purpose. *State v. Russell*, 154 Wash.App. 775, 225 P.3d 478 (2010) (where evidence is admitted under ER 404(b), a limiting instruction must be given). The burden rests with the court to give the instruction, whether requested or not. *Id.*, at 483. This is especially true when jurors are required to consider "all of the evidence" relating to a proposition, "in order to decide whether [that] proposition has been proved..." CP 40. *See also Russell*, at 483-484.

At trial, the prosecutor was allowed to introduce Ms. Gomez's out-of-court statements for "impeachment," without a proper foundation. Both Officer Bivens and Detective Boswell were permitted to testify (over defense objection) that Ms. Gomez had said Mr. Owens was not allowed in her house at the time of the alleged offense. RP 346, 519. The prosecutor did not ever confront Ms. Gomez with her prior statements to the two officers; accordingly, extrinsic evidence of these prior statements should have been excluded. ER 613(b).

In addition, the court failed to contemporaneously instruct the jury on the limited purpose for which the evidence was admitted. Instead, the court advised the jury only once, in passing, on the use of impeachment evidence. RP 526. Absent a limiting instruction, the jury was permitted to use the evidence for any purpose. *See State v. Myers*, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997) (In the absence of a limiting instruction, “evidence admitted as relevant for one purpose is deemed relevant for others.”) In fact, the court’s instructions actually *required* the jury to consider the robbery evidence as proof of guilt. CP 40; *Russell*, at 786.

The erroneous admission of this evidence without proper foundation and unaccompanied by appropriate limiting instructions prejudiced Mr. Owens because there is a reasonable probability that the errors materially affected the outcome at trial. *Asaeli*, at 579. Mr. Owens’s convictions must be reversed and the case remanded to the trial court for a new trial. *Id.*

V. MR. OWENS’S FELONY HARASSMENT CONVICTION VIOLATED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO ADEQUATE NOTICE, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.

A. Standard of Review

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after

verdict, the reviewing court construes the document liberally. *Id.*, at 105.

The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v.*

Courneya, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v.*

McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. To obtain a conviction for felony harassment, the prosecution must allege and prove the nonstatutory element of a “true threat.”

An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992). (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)). Felony harassment occurs when a person knowingly threatens to kill another and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. There is an additional, nonstatutory element: to avoid a First Amendment violation, the state must prove the threat constitutes a “true threat” rather than idle chat.¹⁶ *State v. Williams*, 144 Wash.2d 197, 26 P.3d 890 (2001) (“*Williams I*”).

¹⁶ Division I has decided that the requirement of a “true threat” is not an element of the offense, and need not be alleged in a charging document. *State v. Tellez*, 141 Wash.App. 479, 483-484, 170 P.3d 75 (2007). This is incorrect: a threat that is not a “true threat” is not

Continued

- C. The Information was deficient because it failed to allege that Mr. Owens made a “true threat.”

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI. This right is also guaranteed to people charged in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948). A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *Johnson*, at 147.

Here, the state alleged that Mr. Owens “knowingly and without lawful authority, did threaten to kill another, immediately or in the future... [and] the Defendant by words or conduct placed the person threatened in reasonable fear that the threat would be carried out...” CP 16. The Information did not allege that Mr. Owens’s threat constituted a “true threat.” Accordingly, the allegation in the Information was not (by itself) sufficient to charge a crime. *Williams I, supra*. Because the Information was deficient, Mr. Owens’s felony harassment conviction

illegal. Thus the existence of a “true threat” is essential “to establish the very illegality of the behavior.” *Johnson*, at 147. The Supreme Court has explicitly reserved ruling on the question. *See Schaler*, at 289 n. 6.

must be reversed and the case dismissed without prejudice. *Kjorsvik, supra.*

VI. MR. OWENS WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006) (“*Horton II*”).

A trial court’s refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wash.2d 580, 607, 132 P.3d 80 (2006). The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court’s inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.* A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248 -1250 (10th Cir, 2002); *see also State v. Lopez*, 79 Wash.App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wash.2d 629, 965 P.2d 1072 (1998).

B. When Mr. Owens asked to have his attorney removed, the trial judge failed to adequately inquire into the nature and extent of the conflict and erroneously ignored his request.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI.¹⁷ The state constitution includes a similar guarantee. Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wash.2d 798, 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)). Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused’s Sixth Amendment right to the effective assistance of counsel, even in the absence of prejudice. *Cross*, at 607. To compel an accused to ““undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.”” *United States v. Williams*, 594

¹⁷ This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

F.2d 1258, 1260 (9th Cir. 1979) (quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, at 607-610; *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Id.*, at 610. The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’ ...The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’” *Id.*, at 776-777 (citations omitted). Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Id.*, at 777-778. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Id.*, at 778-779.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict. Mr. Owens requested the appointment of new counsel when he appeared in court on April 30, 2009. RP 21-24. He complained that his attorney had made a very basic mistake about the case early in the representation. RP 22. He told the judge that he’d asked his attorney “to file several motions” and to “collect certain evidence.” RP

22. He didn't feel that defense counsel was prepared, noted that they hadn't "even talked about a final defense strategy or anything," and complained that counsel didn't seem to have "any interest in the case at all." RP 22-23. He explained that his request for new counsel was late because he'd been under the impression that "a reasonable plea" offer was close at hand. RP 23.

Instead of inquiring into the specifics of Mr. Owens's complaints and the extent of his discomfort, the judge ignored his request for new counsel without comment, and continued to arraign him on the Third Amended Information. RP 23-28. Further problems developed, as evidenced by defense counsel's post-trial motion to withdraw, in which counsel relayed Mr. Owens's feeling that his attorney had prevented him from exercising his right to testify.¹⁸ RP 783-784; CP 105-106.

Because the trial court failed to adequately inquire into the conflict, Mr. Owens was denied the effective assistance of counsel. *Cross, supra*. His conviction must be reversed and the case remanded for a new trial. *Craven, supra*. In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict, and for a new trial if the conflict was sufficient to require appointment of new counsel. *See,*

¹⁸ The court apparently never ruled on this second request. RP 785-822.

e.g., *Lott*, at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

C. Defense counsel's deficient performance prejudiced Mr. Owens and deprived him of the effective assistance of counsel.

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); *see also State v. Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, it is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kylo*, 166 Wash.2d 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-

79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

1. Defense counsel provided ineffective assistance by failing to seek instructions on the inferior-degree offense of Assault in the Fourth Degree.

Failure to seek instructions on an inferior degree offense can deprive an accused person of the effective assistance of counsel. *State v. Grier*, 150 Wash.App. 619, 635, 208 P.3d 1221 (2009) *review granted at* 167 Wash.2d 1017, 224 P.3d 773 (2010) (citing *Pittman, supra*, and *State v. Ward*, 125 Wash.App. 243, 104 P.3d 670 (2004)). Counsel’s failure to request appropriate instructions on an inferior-degree offense constitutes ineffective assistance if (1) the accused person is entitled to the instructions and (2) under the facts of the case, it was objectively unreasonable for defense counsel pursue an “all or nothing” strategy.¹⁹ *Grier*, at 635.

¹⁹ A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person’s own version of events. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000). For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances: “If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.” *Fernandez-Medina*, at 460-461.

RCW 10.61.010 guarantees the “unqualified right” to have the jury pass on the inferior degree offense if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984), (quoting *State v. Young*, 22 Wash.273, 276-277, 60 P. 650 (1900)). The appellate court views the evidence in a light most favorable to the accused person. *Fernandez-Medina*, at 456. The instruction should be given even if there is contradictory evidence, or if other defenses are presented. *Id.* The right to an appropriate inferior-degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, at 164.

An offense qualifies as an inferior degree offense if “(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense...” *Fernandez-Medina*, at 454 (internal quotation marks and citations omitted). Under this definition, Assault in the Fourth Degree is an inferior degree offense of Assault in the Second Degree. *See* RCW 9A.36.021; RCW 9A.36.041.

To obtain a conviction for Assault in the Second Degree, the prosecutor was required to prove that Mr. Owens assaulted another person with a deadly weapon. RCW 9A.36.021. The phrase “deadly weapon” was

defined as “any weapon, device, instrument, substance or article which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” CP 52.

Mr. Owens was entitled to instructions on Assault in the Fourth Degree because the evidence, when taken in a light most favorable to him, suggests that he was only guilty of that crime. Ms. Gomez testified that he never assaulted her with the knife, but that he did touch her vagina without her consent.²⁰ RP 257-258, 278. The jury was entitled to credit this testimony and decide that he was not guilty of Assault in the Second Degree but guilty of Assault in the Fourth Degree.

In addition, it was objectively unreasonable for defense counsel to pursue an “all or nothing” strategy. Mr. Owens could have asserted the same consent defense to the lesser charge. Had he been convicted of Assault in the Fourth Degree (instead of Assault in the Second Degree), he would have been facing a maximum sentence of one year in jail, instead of

²⁰ Furthermore, even Ms. Gomez’s out-of-court statements did not establish that the knife was “used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm” as required to prove that it was a deadly weapon under Instruction No. 11. CP 52.

a standard range of (as calculated by the court) 33-43 months with a 12-month deadly weapon enhancement.²¹ CP 111.

Defense counsel should have proposed instructions on the inferior-degree offense. His failure to do so violated Mr. Owens's right to the effective assistance of counsel. *Grier, supra*.

2. Defense counsel provided ineffective assistance by failing to object to inadmissible and prejudicial hearsay.

A defense attorney's failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

Generally inadmissible, hearsay includes any out-of-court statement offered for its truth. ER 801, 802. Defense counsel should have objected to inadmissible hearsay on at least three occasions.

First, defense counsel should have objected to Exhibit 56. Exhibit 56, Supp. CP; RP 266. Although a witness's prior inconsistent statements

²¹ In addition, a fourth-degree assault conviction would not have added two points to his offender score on Count II. This would have reduced his standard range on the first-degree burglary charge from 57-75 months to 36-48 months. See Sentencing Guidelines Commission, *Adult Sentencing Manual*, (2008) III-62.

made under oath are generally admissible as non-hearsay (under ER 801(d)(1)), the proponent must lay a proper foundation before a so-called “*Smith* affidavit” may be admitted. *State v. Thach*, 126 Wash.App. 297, 307-09, 106 P.3d 782 (2005) (citing *State v. Smith*, 97 Wash.2d 856, 651 P.2d 207 (1982)). Here, prosecutor Banfield made no effort to lay the foundation for introduction of the *Smith* affidavit as substantive evidence; despite this, defense counsel did not object. RP 266. The document contained damaging evidence establishing elements of rape, burglary, assault, felony harassment, and interfering with the reporting of domestic violence. Exhibit 56, Supp. CP; RP 266. Although some of Exhibit 56 was inconsistent with Ms. Gomez’s testimony, some of it did not contradict her testimony, and thus was inadmissible under ER 801(d)(1).

Second, defense counsel should have objected when the prosecutor introduced hearsay through Officer Bivens. Bivens first testified that dispatch told him the caller’s “ex-boyfriend had broke into her house, stood over her with a knife, made some threatening gestures and comments...” Bivens also relayed statements allegedly made by Ms. Gomez, including: (1) her statement that she’d changed the locks on her house when Mr. Owens moved out, and (2) a complete description of the alleged offense. RP 345-346, 347-350.

Third, defense counsel should have objected when the prosecutor introduced hearsay through Detective Boswell. Like Officer Bivens, Boswell relayed statements made by Ms. Gomez, including: (1) that she'd had Mr. Owens's name removed from her lease prior to the offense date, (2) a graphic and detailed description of the alleged rape, (3) a description of her fear on the night of the incident, and (4) that she was concerned about her safety after leaving the hospital. RP 520-527.

There was no basis to admit any of this evidence, and defense counsel should have objected. Even if some of the evidence were admissible for a limited purpose—such as to impeach Ms. Gomez's testimony-- counsel should still have objected and requested a limiting instruction.²² *Russell, supra*. In the absence of a limiting instruction, the jury was permitted to consider the evidence for any purpose, including as substantive evidence of guilt. *Myers, at* 36.

This prejudiced Mr. Owens. By repeatedly introducing Ms. Gomez's out-of-court statements as substantive evidence, the prosecutor was able to suggest to the jury that those statements be given greater weight than was warranted by the circumstances. *See, e.g., State v. Alexander*, 64 Wash.App. 147, 152, 822 P.2d 1250 (1992) (“repetition is

not generally a valid test for veracity”) (quoting *State v. Harper*, 35 Wash.App. 855, 857, 670 P.2d 296 (1983)). The statements to Bivens and Boswell provided direct evidence that Mr. Owens entered or remained unlawfully in Ms. Gomez’s residence, an essential element of burglary.

Defense counsel should have objected to the inadmissible evidence. His failure to do so deprived Mr. Owens of the effective assistance of counsel. *Saunders, supra*.

3. Defense counsel should have objected and moved for a mistrial in response to Officer Donaldson’s irrelevant and prejudicial testimony that he believed Ms. Gomez when she told him she was afraid of Mr. Owens.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

²² In fact, very little of the evidence was even arguably admissible for impeachment purposes. Furthermore, the prosecutor failed to lay an adequate foundation for its admission under ER 613(b).

In this case, defense counsel failed to object or move for a mistrial when Officer Donaldson testified that he believed Ms. Gomez when she told him that she was very afraid of Mr. Owens. RP 352. His belief was irrelevant under ER 401 and overly prejudicial under ER 403. It also violated ER 701 and invaded the province of the jury, because it was a nearly explicit opinion that Mr. Owens was guilty. *Kirkman*, at 937; *Chavez*, at 299.

Defense counsel should have objected and moved for a mistrial. Officer Donaldson's testimony—that he believed Ms. Gomez when she told him she was very afraid of Mr. Owens—went directly to the primary decision facing the jury: whether or not to believe Ms. Gomez's out-of-court statements.²³ See Prosecutor Banfield's closing arguments, RP 645-702, 732-757. The testimony prejudiced Mr. Owens and its admission served no strategic purpose. Accordingly, Mr. Owens was deprived of the effective assistance of counsel. *Saunders*, *supra*.

4. Defense counsel should have objected to irrelevant and prejudicial testimony suggesting that Ms. Gomez's recantation and her refusal to meet with the prosecutor were typical of domestic violence victims.

Defense counsel should also have objected and moved for a mistrial when a domestic violence advocate told the jury that Ms. Gomez's

recantation and her refusal to meet with the prosecutor were typical of domestic violence victims. RP 337. This testimony bolstered the out-of-court statements, and improperly encouraged jurors to disregard Ms. Gomez’s testimony in favor of her prior statements, especially when combined with Officer Donaldson’s improper testimony that he believed her out-of-court statement that she was very afraid of Mr. Owens. It was inadmissible under ER 401, ER 403.

Defense counsel’s failure to object prejudiced Mr. Owens and deprived him of his right to the effective assistance of counsel. *Saunders, supra*. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

5. Defense counsel should have objected to prosecutorial misconduct in closing argument.

A failure to object to improper closing arguments is objectively unreasonable “unless it ‘might be considered sound trial strategy.’” *Hodge v. Hurley*, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of

²³ This is especially true in light of his testimony that he had been to “multiple domestic violence training seminars.” RP 220.

the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

In this case, defense counsel should have objected when the prosecutor argued that certain evidence was deemed “trustworthy,” when she told the jury that it was common for domestic violence victims to change their story, when she argued that Mr. Owens committed Assault in the Second Degree by standing over Ms. Gomez with a knife, and when she told the jury that its job was to protect Ms. Gomez from future crimes. RP 645-701, 732-757. Counsel’s failure to object constituted deficient performance; at a minimum, defense counsel should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Mr. Owens was prejudiced by defense counsel’s failure to object. Specific objections and curative instructions might have alleviated the prejudice. Accordingly, Mr. Owens was denied the effective assistance of counsel. His convictions must be reversed, and his case remanded for a new trial. *Reichenbach*.

VII. THE TRIAL JUDGE SHOULD NOT HAVE DISCHARGED THE JURY WITHOUT FINDING A MANIFEST NECESSITY, BASED ON EXTRAORDINARY AND STRIKING CIRCUMSTANCES, THAT SUBSTANTIAL JUSTICE COULD NOT BE OBTAINED WITHOUT DISCONTINUING THE TRIAL.

The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V.²⁴ This provision protects an individual from being held to answer multiple times for the same offense:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Double jeopardy prevents retrial following an acquittal “even though ‘the acquittal was based upon an egregiously erroneous foundation.’” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), citing *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). The constitutional prohibition against double jeopardy “also embraces the defendant’s ‘valued right to have his trial completed by a particular tribunal.’” *Arizona v. Washington*, at 503, quoting *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974,

²⁴ A similar prohibition is set forth in Article I, Section 9 of the Washington Constitution. Wash. Const. Article I, Section 9.

(1949). A second prosecution may be grossly unfair, even if the first trial is not completed:

[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, at 504-05 (footnotes omitted).

Historically, English judges had the power to discharge juries “whenever it appeared that the Crown’s evidence would be insufficient to convict.” *Arizona v. Washington*, 434 U.S. at 507-08. The constitutional prohibition against double jeopardy in the U.S. “was plainly intended to condemn this ‘abhorrent’ practice.” *Arizona v. Washington*, at 507-08.

Since discharging the jury inevitably implicates the double jeopardy clause, a trial court’s discretion to declare a mistrial is not unbridled. *Arizona v. Washington*, at 514; *State v. Juarez*, 115 Wash.App. 881, 889, 64 P.3d 83 (2003). Discharge of the jury without first obtaining the accused’s consent is equivalent to an acquittal, unless such discharge is necessary to the proper administration of public justice. *Juarez*, at 889. A mistrial frees the accused from further prosecution, unless prompted by “manifest necessity.” *Juarez*, at 889. To justify a mistrial, “extraordinary

and striking circumstances” must clearly indicate that substantial justice cannot be obtained without discontinuing the trial. *Juarez*, at 889. The extraordinary and striking circumstances upon which the judge relies must have a factual basis in the record. *State v. Jones*, 97 Wash.2d 159, 641 P.2d 708 (1982) (“*Jones III*”).

If the jury “through its foreman and of its own accord, acknowledges that it is hopelessly deadlocked, there would be a factual basis for discharge *if the other jurors agree with the foreman.*” *Jones III*, at 164 (emphasis added). Under such circumstances, the court must consider the length of the jury deliberations in light of the trial length and the complexity of the issues.²⁵ *State v. Kirk*, 64 Wash.App. 788, 793, 828 P.2d 1128 (1992). A mechanical focus on any one factor does not justify a mistrial and discharge of the jury. *State ex rel. Charles v. Bellingham Mun. Court*, 26 Wash.App. 144, 148-149, 612 P.2d 427 (1980). Where the

²⁵ Although the court in *Kirk* used the word “should” (“a trial court should consider the length of the jury deliberations in light of the length of the trial and the complexity of the issues,” *Kirk*, at 793, citing *Jones III*, at 164), it is clear from the original context in *Jones* that the inquiry is mandatory. The Supreme Court in *Jones III* also used the word “should,” but went on to add the following: “After considering the length and difficulty of the deliberations, and making such limited inquiries of the jury as do not amount to impermissible coercion, the judge must then determine whether to exercise his discretion to discharge the jury. It is this determination, weighing the relevant considerations, which is subject to great deference from a reviewing court and which will not lightly be upset.” *Jones III*, at 165. This implies that a decision to discharge the jury without “weighing the relevant considerations” will not be entitled to deference.

trial court discharges a hung jury too quickly, the accused person's right to a verdict from that jury is abridged. *Jones III*, at 163.

In this case, Mr. Owens did not explicitly consent to discharge of the jury. RP 764-782. Accordingly, the discharge was equivalent to an acquittal unless it was supported by "extraordinary and striking circumstances" indicating that substantial justice could not be obtained without discontinuing the trial. *Juarez*, at 889. That test is not met here.

First, the judge did not ask the jurors if they agreed with the presiding juror's claim that the jury was hopelessly deadlocked. RP 765-782. Accordingly, she failed to follow the first requirement set forth in *Jones*—ascertaining whether discharge was truly warranted by determining whether or not the other jurors agreed with the presiding juror. *Jones*, at 164.

Second, there was no indication that the judge considered the length of deliberations, the length of the trial, or the complexity of the issues. RP 765-782. Thus she did not weigh even the minimal "relevant considerations" prior to discharging the jury. *Jones*, at 165.

Third, the judge did not make the findings required for discharge of a jury short of verdict. She did not find that release of the jury was necessary to the proper administration of public justice, prompted by manifest necessity, or supported by extraordinary and striking

circumstances that required discontinuation of the trial to obtain substantial justice. *Juarez at 889.*

For all these reasons, the court's decision to discharge the jury violated Mr. Owens's constitutional right to receive a verdict from the jury he selected. Accordingly, retrial on counts 1 and 7 would violate his constitutional right to the protections of the double jeopardy clause. *Jones III, supra.*

VIII. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT MR. OWENS'S CURRENT OFFENSES WERE NOT THE SAME CRIMINAL CONDUCT.

A. Standard of Review

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wash.2d 103, 110, 3 P.3d 733 (2000).

B. Counts 2, 3, and 6 should have scored as the same criminal conduct, yielding offender scores of three (for the burglary and assault charges) and two (for the remaining felony charges).

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score:

PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), *review denied at* 131 Wash.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v. Jones*, 110 Wash.2d 74, 750 P.2d 620 (1988) (“*Jones IV*”); *State v. Gurrola*, 69 Wash.App. 152, 848 P.2d 199, *review denied*, 121 Wash.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court “should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.... [P]art of this analysis will often include the related issues of whether one crime furthered the other...” *State v. Garza-Villarreal*, 123 Wash.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wash.2d 207 at 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988)).

RCW 9.94A.589(1)(a) requires analysis of whether the offender’s criminal intent, objectively viewed, changed from one crime to the next. *Haddock*, at 113; *see also State v. Anderson*, 72 Wash.App. 453, 464, 864

P.2d 1001 (1994). Sometimes this necessitates determination of whether one crime furthered another. *Haddock*, at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998) (“*Williams II*”); *State v. Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

Two appellate cases illustrate the analysis. In *State v. Miller*, 92 Wash.App. 693, 964 P.2d 1196 (1998), the Court of Appeals held that the charges of Attempted Theft of a Firearm and Assault in the Third Degree constituted the same criminal conduct under the facts of that case. In *Miller*, the defendant assaulted an officer while struggling to get his gun. The court held that the “assault on [the officer,] when viewed objectively, was ‘intimately related’ to the attempted theft. Miller could not deprive [the officer] of his holstered weapon without assaulting him.” *Miller*, at 708. Similarly, in *State v. Taylor*, 90 Wash.App. 312, 950 P.2d 526 (1998), the court held that the two crimes at issue—Assault in the Second Degree and Kidnapping—constituted the same criminal conduct under the facts of that case:

The evidence established that [the defendant’s] objective intent in committing the kidnapping was to abduct [the victim] by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade [the victim], by the use of fear, to not resist the

abduction. The assault began at the same time as the abduction, when [the defendant] entered the car. It ended when the kidnappers exited the car and the abduction was over. And there is no evidence that [the defendant] engaged in any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.

Further, because the assault and kidnapping were committed simultaneously, it is not possible to find a new intent to commit a second crime after the completion of the first crime... Thus, this record supports only a finding that the offenses were part of the same criminal conduct and [the defendant] is entitled to have the two offenses counted as one crime.

Taylor, at 321-322.

Here, Mr. Owens was convicted of first-degree burglary, felony harassment, and second-degree assault. According to the prosecutor's evidence at trial, Mr. Owens broke into Ms. Gomez's residence, threatened to kill her, and assaulted her with a deadly weapon. The three crimes occurred at the same time (although they were not simultaneous), they occurred at the same place, and they involved the same victim.

Furthermore, under the state's theory of the case, Mr. Owens's overall criminal purpose did not change from one crime to the next. Instead, according to the prosecutor, each crime furthered the next: the burglary, the threat, and the assault were all part of the Mr. Owens's plan to intimidate and control Ms. Gomez. RP 645-702, 732-757. Because of this, the crimes—committed in an uninterrupted sequence of events—comprised the same criminal conduct, and should not have scored against

each other in Mr. Owens's criminal history. RCW 9.94A.589(1)(a);

Garza-Villarreal.

The trial court misapplied the law by requiring simultaneity and by failing to examine the overall criminal purpose. RP 815. *See Williams II, at 368; Porter, at 183*. Mr. Owens should have been sentenced with an offender score of three (on the burglary and assault charge) and an offender score of two (on the other charges).²⁶ Accordingly, his sentence must be vacated and the case remanded to the trial court for correction of the offender score and resentencing. *Haddock, supra*.

²⁶ After making the "same criminal conduct" determination, the sentencing judge could elect to apply the burglary anti-merger statute, but only to score the burglary separately. RCW 9A.52.050; *State v. Lessley*, 118 Wash.2d 773, 782, 827 P.2d 996 (1992). In other words, the felony harassment and second-degree assault would still score as only one point, rather than two points, yielding offender scores of four (for the burglary and assault) and three (for the remaining charges).

CONCLUSION

For the foregoing reasons, Mr. Owens's convictions must be reversed. The case must be remanded to the trial court with instructions to dismiss counts 2, 3, and 6. Mr. Owens may not be retried on counts 1 and 7.

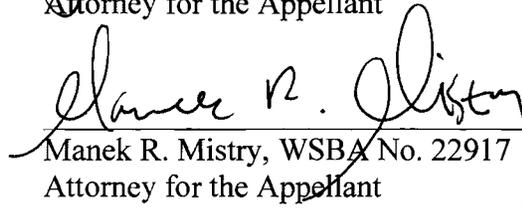
In the alternative, if Mr. Owens's convictions are not reversed, the sentence must be vacated and the case remanded for correction of the offender scores and a new sentencing hearing.

Respectfully submitted on October 1, 2010.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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BY _____
DEPUTY

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on October 1, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 1, 2010.



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