No. 22-

IN THE

Supreme Court of the United States

FLOYD TAYLER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must the jury, in deciding whether a defendant has committed the domestic violence pattern aggravator, RCW 9.94A.535 (3) (h) (i), be instructed that they must be unanimous in their determination that the defendant committed each of the underlying aggravator incidents beyond a reasonable doubt?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Floyd Tayler, a resident of British Columbia, Canada, is the petitioner in this Court.

The State of Washington is the respondent in this Court. The State was the plaintiff in the criminal prosecution in the Superior Court of the State of Washington for Whatcom County, Washington, and was the respondent before the Washington State Court of Appeals and before the Washington State Supreme Court.

Because petitioner is not a corporation, a corporate disclosure statement is not required under Rule 29.6.

Pursuant to Supreme Court Rule 29 (c), the Court is advised that 28 U.S.C. sec. 2403 (4)(b) may apply. The State of Washington is a potential party under this section.

STATEMENT OF RELATED CASES

State v. Floyd Tayler, Washington Supreme Court No. 100785-0, Order denying Tayler's Petition for Review filed July 13, 2022.

State v. Floyd Tayler, Washington Court of Appeals Division One No. 81001-4-I; Opinion and Order affirming Tayler's conviction filed on January 3, 2022.

State v. Floyd Tayler, Whatcom County Superior Court, State of Washington, No. 19-1-00717-37; petitioner was convicted of charged offenses after jury trial. Judgment was filed on January 14, 2020.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PETITION FOR A WRIT OF CERTIORARI

Petitioner Floyd Tayler respectfully requests that this court grant a writ of certiorari to review the order and the judgment and opinion of the Court of Appeals of the State of Washington, Division One, entered January 3, 2022, an unpublished opinion reported at 2022 WL 19005.

OPINIONS BELOW

The order and opinion of the Court of Appeals of the State of Washington, Division One affirming petitioner's conviction on January 3, 2022 is reported at 20 Wash. App.2d 1040, 2022 WL 19005 and found in the Appendix at 3a-46a.

The order of the Washington Supreme Court denying review on July 13, 2022 is reported at 199 Wash.2d 1024, 512 P.3d 901 (2022) and found in the Appendix at 1a,2a.

The excerpts of the Superior Court of the State of Washington in and for the County of Whatcom on December 11, 2019 are found in the Appendix at 47a-60a.

JURISDICTION

The Washington Supreme Court denied review of the decision of the Washington Court of Appeals on July 13, 2022. This petition is timely filed. This court has jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A

AMENDMENT VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

AMENDMENT XIV provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RCW 9.94A.535 provides for departures from Washington State Sentencing Guidelines. Among the factors that can

support a sentence above the standard range for a felony is RCW 9.94A.535 (3) (h) (i):

> (h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:
>
> (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.

The statute is set forth in full in Appendix D, 61a-70a.

STATEMENT OF THE CASE

The instant case is just one of many cases that have been adjudicated since 1984 when Washington's Aggravator statute, RCW 9.94A.535, was enacted. Some of the aggravators require a finding of a specific fact such as deliberate cruelty (RCW 9.94A.535 (3)(a) or sexual motivation (RCW 9.94A.535 (3)(f). However, the statutory aggravator at issue here, RCW 9.94A.535 (3)(h) (i), problematically requires a jury to determine that the current offense was part of an ongoing "pattern" of abuse.

The jury found Tayler guilty of the felony of unlawful imprisonment for pushing his girlfriend onto a chair and refusing to let her leave for about ten minutes. The jury further found that Tayler's offense was aggravated because it was "part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims

manifested by multiple incidents over a prolonged period of time."

The consequence of the aggravator finding was that the defendant was sentenced to prison for a term of a year and a day. The standard range without the aggravator would have been one to three months.

Tayler requested that the jury be instructed to determine unanimously beyond a reasonable doubt whether or not he committed each of the alleged "multiple incidents", which were all uncharged acts of common law assault. Instead, the trial court gave a standard instruction that simply mirrored the language of the statute. See 11A Washington Practice, Washington Pattern Jury Instructions Criminal, WPIC 300.17 at 902 (5th ed. 2021). The jury had to be unanimous that Tayler's felony of unlawful imprisonment was part of a pattern, but the instructions provided no assurance that the jurors agreed on which previous incidents constituted the pattern.

The Court of Appeals for Division One affirmed the conviction. Tayler moved to reconsider and argued that the decision conflicted with State v. Price, 126 Wa. App. 617 (2005), abrogated on other grounds, State v. Hampton, 184 Wash. 2d 656 (2015).

In Price, a different aggravator statute provided that an aggravator could be found if at the time the person committed a murder, the person and the victim were "family or household members" and the person had previously engaged in a pattern or practice of three or more crimes of harassment or assault committed upon

the same victim within a five-year period, regardless of whether a conviction resulted. RCW 10.95.020(14). The Court of Appeals held that the trial court should have given an unanimity instruction regarding the alleged acts that established the pattern. Price, 126 Wn. App. at 624.

The Court of Appeals denied the motion to reconsider and denied Tayler's motion to publish the opinion.

Tayler filed a petition for review in the Washington Supreme Court. He briefed for the first time this Court's decision in Richardson v. United States, 119 S. Ct. 1707 (1999). Tayler argued that Richardson was directly on point and compelled reversal. The Washington Supreme Court denied review without comment.

This case is controlled by Richardson. There has been no express statement of intent by the Washington Legislature to override the usual procedure of requiring juror unanimity as to specific assaultive acts. When the Bill of Rights was adopted in 1791, a person charged with the crime of assault received a jury trial where the jury decided whether he committed each separate act of assault unanimously and beyond a reasonable doubt. A state legislature cannot abridge this constitutional right by criminalizing a pattern of conduct, the foundation for which is an allegation that the accused committed a series of individual acts of assault, but there is no requirement that a jury unanimously find beyond a reasonable doubt which specific predicate acts were actually committed. Tayler asserts that he has this constitutional right today and he was deprived of it. This court should grant certiorari and vacate petitioner's conviction or alternatively remand and direct the Washington Court of Appeals to consider

and address why this Court's decision in Richardson v. United States does not compel reversal of petitioner's conviction.

Facts of the Case

Events on Monday, June 17, 2019, led to Floyd Tayler being charged with unlawful imprisonment of his girlfriend, Rita Ross. (He was also charged and convicted of the misdemeanor of 4th degree domestic violence assault, but this conviction is not at issue nor is it relevant in this appeal.)

The unlawful imprisonment charge was based on Ross's accusation that when she and Tayler were arguing with each other, Tayler made her afraid to get up out of her chair. Unknown to Tayler at the time, Ross surreptitiously recorded their conversations on that date. In August of 2019, Ms. Ross gave the Whatcom County Sheriff over seven hours of the recordings. She also described to the Sheriff six assaultive incidents that occurred during their relationship prior to June 17, 2019. These will hereafter be referred to as "the six incidents". Shortly thereafter, the state amended its information to allege the six incidents as the basis for aggravating the penalty for the offense under RCW 9.94A.535 (3)(h)(i).

The court of appeals' opinion sets forth the details of what the parties said about the six incidents and other evidence concerning the tumultuous relationship between Tayler and Ross. Tayler does not challenge the Court of Appeals recitation of the evidence presented. However, in addition to those facts, the record reflects additional evidence demonstrating that if the trial court erred

by failing to assure juror unanimity, the error was not harmless.

The record reflects that Tayler is in his fifties, and prior to the events in question he had no criminal record. The record also reflects that when the charges were first filed after the initial complaint by Ms. Ross in June, 2019, the court issued a no-contact order. Notwithstanding this order, Ms. Ross contacted Tayler at the end of July by sending him a love poem and suggesting she had made a mistake. Tayler did not respond to this communication. It was only then, in August of 2019, that Ms. Ross drove down from Canada to Whatcom County to tell the sheriff about the six incidents.

Ms. Ross testified that she had surreptitiously recorded Tayler on several prior occasions. RP Vol. 5, page 520-522. She testified that she destroyed at least two of these prior tapes. Id., page 525-526.

Ms. Ross's destruction of these tapes denied Tayler impeachment evidence of her accusations. Given the animosity Ms. Ross possessed towards Tayler, it is highly unlikely that she would destroy tapes that would have shown damning conduct on the part of Tayler.

The surreptitious recordings Ms. Ross made on June 17, 2019 did corroborate her testimony about the felony charge of unlawful imprisonment. But her testimony about the six incidents is uncorroborated. Tayler testified and he disputed her account of each incident. The jury as the trier of fact had to decide whether these incidents actually occurred as Ms. Ross described them solely by judging the credibility of the two witnesses. In multiple

act cases, when the State fails to elect the act it relies on for conviction, controverted testimony demonstrates reasonable doubt in cases which are directly appealed. State v. Kitchen, 110 Wn2d 403 (1988).

REASONS FOR GRANTING THE PETITION

This case warrants review under this court's Rule 10 (c) because for the past almost forty years and each day Washington citizens accused of violating Washington's domestic violence pattern aggravator statute, RCW 9.94A.535 (3) (h) (i) are being convicted and sentenced to substantial periods of imprisonment in violation of this court's holding in Richardson v. United States 119 S. Ct. 1707 (1999) and in violation of the 6th amendment right to jury trial.

SUMMARY OF ARGUMENT

The disposition of this case is controlled by Richardson v. United States. Like Richardson, Taylor was charged with a pattern offense, that is, engaging in an ongoing pattern of domestic abuse. Richardson was accused of an ongoing drug dealing operation referred to in the federal statute as a continuing criminal enterprise ("CCE"). Like Richardson, Taylor argued that he was entitled to a unanimous jury determination as to the specific two, i.e., "multiple" acts referred to in the statute as "incidents" he committed which established the required predicate offenses. The predicate offenses in Richardson were violations of criminal laws against drug dealing, and the prosecution in that case offered to the jury evidence of more than three instances in which Richardson was allegedly engaged in drug dealing.

In Richardson, the Supreme Court construed the federal statute to require a specific jury unanimous determination that the defendant committed three specific predicate offenses of drug dealing. The Supreme Court in Richardson looked at the federal statute and did not see any legislative history supporting an interpretation of the statute which would deny Richardson a specific unanimous jury verdict as to the required three specific violations of drug dealing laws that he was accused of committing.

The statute in question in Richardson was federal. The Supreme Court in Richardson acknowledged in passing that the federal courts are powerless to change the interpretation of a state statute given by a state legislature or state courts. But the Court of Appeals in the present case did not engage in an analysis of legislative intent and did not decide that the legislature intended to defeat the ordinary unanimity instruction. And even if the opinion is viewed as making that holding implicitly, the requirement for juror unanimity applies to the states. Ramos v. Louisiana, 140 S.Ct.1390 (2020). This court can find that the statute itself—because it denies a defendant the right to a unanimous decision beyond a reasonable doubt as to what Richardson calls the "brute facts" of the alleged aggravating incidents— violates due process and the 6th amendment right to trial by jury. Alternatively, this court could remand the case to the Washington Court of Appeals to make a definitive interpretation of the statute in light of Richardson.

ARGUMENT

This petition for certiorari in this case is concerned solely with the application of Richardson v. United States, 119 S. Ct 1707 (1999) to the facts and law applied in the instant case.

Petitioner asserts that the United States Supreme Court decision in Richardson v. United States, 119 S. Ct. 1707 (1999) is directly on point. Richardson offers a template to resolution of this petition. The defendant was charged with engaging in a continuing criminal enterprise. The criminal enterprise statute imposed a mandatory minimum prison term of at least 20 years upon a person who engages in a continuing criminal enterprise. A person is engaged in a continuing criminal enterprise if:

> (1) he violated any provision of [the federal drug laws] the punishment for which is a felony,
>
> (2) such violation is a part of a continuing series of violations of [the federal drug laws]
>
> > (A) which are undertaken by such person with five or more other persons with respect to whom such person occupies a position of organizer (or supervisor or manager) and
> >
> > (B) from which such person obtains substantial resources.

The federal statute required a showing that Richardson committed at least three federal narcotic offenses. Richardson proposed to instruct the jury that it must

unanimously agree upon which three acts constituted the series of violations. Instead, the trial judge instructed the jurors that they must unanimously agree that the defendant committed at least three federal narcotics offenses, while adding that the jury did not have to agree as to the particular three or more federal narcotic offenses committed by the defendant.

The United States Supreme Court reversed the conviction. The issue was whether the jury in a continuing criminal enterprise case must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" made up that "continuing series," and then the jury must agree unanimously about which three crimes the defendant committed. Richardson, 119 S. Ct. at 1710. The court concluded that the statute required jury unanimity in respect to each individual violation. Richardson, 119 S. Ct. at 1713.

In reaching its decision, the United States Supreme Court rejected the government effort to characterize the specific criminal violation as means (thus not requiring a specific unanimous finding that the defendant committed the criminal predicate acts). The Court found nothing in the language of the statute indicating congressional intent to allow conviction without a specific and unanimous adjudication of whether the defendant committed the predicate violations. The Court recognized the longstanding tradition of requiring juror unanimity. Richardson, 119 S. Ct. at 1711. The court emphasized the potential unfairness of avoiding the unanimity requirement, referring to the likelihood that "permitting a jury to avoid discussion of the specific factual details of

each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do." Id. The court noted that "Congress may well have intended a jury to focus upon individual violations in order to assure guilt of the serious crime the statute creates." Id.

These are petitioner's concerns about what happened in his trial—that the jury, excused from focusing on and agreeing on the specific factual details of Ms. Ross's uncorroborated allegations about prior abusive conduct, may have simply concluded, in the words of the Supreme Court, that "where there is smoke there must be fire." See Richardson, 119 S. Ct. at 1711. This court should bear in mind that it was the jury's finding of the pattern that allowed the court to sentence Tayler to prison for one year and one day (and it could have been up to five years in prison), whereas without that finding only a county jail sentence would have been possible. It is possible that one juror may have been convinced that Tayler's offense was part of a pattern of abuse manifested by his having smashed some Christmas presents and purposely dropped a tray of glasses, but was not convinced beyond a reasonable doubt that any of the other incidents occurred as described by the girlfriend. Without an assurance of juror unanimity, it is possible that Tayler received this far more onerous penalty based on various jurors finding it likely that he did commit some abusive behavior in the past (without agreeing on specific abusive incidents) and deciding to go along with the finding of a "pattern".

Similar to the prosecution's argument in Richardson, the State in this case argues a flawed statutory interpretation. The State emphasizes the first clause of RCW 9.94A.535 (h)(i), the statutory aggravator,

that mentions finding an ongoing pattern, but fails to account for the clause stating "as manifested by multiple incidents over a prolonged period of time." The State has offered no specific reasons to interpret RCW 9.94A.535 (h)(i) as manifesting legislative intent to avoid the norm requirement that a defendant is entitled to a specific and unanimous determination by a jury that he committed the acts or so-called incidents upon which the conclusion that the defendant is engaged in a pattern is based. The prosecution did not present any legislative history to support such a construction of the statute and the Washington Court of Appeals did not cite any, only citing the WPIC instruction.

In Schad v. Arizona, 111 S.Ct. 2491(1991) which involved two alternative means to commit the crime of murder, a plurality of this court held that a jury finding as to which of the two alternative theories the jury found was not required. The instant case is not an alternative means to commit a crime case but a multiple acts case, State v. Petrich 101 Wash2d 566 (1984). Nevertheless, Schad v. Arizona is relevant because of this Court 's pronouncement on its deference to state court's interpretation and application of state statutes. The court in Schad pronounced:

> In cases, like this one, involving state criminal statutes, the dissent's "statutory alternatives" test runs afoul of the fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a State's courts. If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense,

> rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law. See Mullaney v. Wilbur, 421 U.S. 684, 690–691, 95 S.Ct. 1881, 1885–1886, 44 L.Ed.2d 508 (1975) (declining to reexamine the Maine Supreme Judicial Court's decision that, under Maine law, all intentional or criminally reckless killings are aspects of the single crime of felonious homicide); Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875). In the present case, for example, by determining that a general verdict as to first-degree murder is permissible under Arizona law, the Arizona Supreme Court has effectively decided that, under state law, premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element. The issue in this case therefore is not whether "the State must be held to its choice," post, at 2510–2511, for the Arizona Supreme Court has authoritatively determined that the State has chosen not to treat premeditation and the commission of a felony as independent elements of the crime, but rather whether Arizona's choice is unconstitutional. 111 S.Ct. 2499-2500.

This court is not bound by the construction of the statute given by the Washington Court of Appeals to RCW 9.94A.535 (3) (h) (i) as reflective of legislative intent to nullify the requirement of juror unanimity. Such a presumption of legislative intent would be unwarranted

given the decision of another Division of the Washington Court of Appeals in State v. Price, 126 Wash. App. 617 (2005). Price held an unanimity instruction was required as to the commission of predicate assaultive acts in RCW 10.95.020 (14), Washington's murder aggravator statute. Under that statute, a person is guilty of aggravated first degree murder if he or she commits first degree murder and one or more the following aggravating circumstances exist:

At the time the person committed the murder, the person and the victim were "family or household members". and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment ...; or

(b) Any criminal assault.

The trial court in Price did not instruct the jury that it had to be unanimous as to which of Price's alleged five assaultive acts constituted an aggravating circumstance. Division 2 of the Washington Court of Appeals held a unanimity instruction was required but found the error to be harmless; 126 Wa. App. at 646, 647.

The trial court erred in giving Instruction 16 (on the pattern aggravator) without also giving the Special Verdict Form requested by defendant that would have required the jury to find beyond a reasonable doubt the facts constituting the pattern.

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Blakeley v. Washington, 542 U. S. 296, 301 (2004). The Court's instructions No. 15 and 16 asked only whether the unlawful imprisonment was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time, and therefore was an act of aggravated domestic violence.

The jury should have been asked by special verdict to find which of the alleged six incidents supported the conclusion that he committed aggravated domestic violence. Absent such a finding, Tayler was deprived of his right to due process and his rights under Blakely. The trial court erred by accepting a conclusory and generic finding of a pattern supported only by evidence of multiple unspecified incidents. A specific and unanimous finding by each juror as to which particular incidents occurred, and that they actually constituted psychological, physical, or sexual abuse, would permit scrutiny of the evidence to determine it sufficiently supported the conclusion that the incident in the trailer at Whatcom Meadows was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time. Only by particularized findings representing the jury's deliberations and agreement as to whether the defendant committed any of these six acts could the jury make the finding that allowed an aggravated sentence. Thus, these six acts were the "brute facts" that had to be adjudicated and found beyond a reasonable doubt. The defense proposed a special verdict form that would have accomplished this necessary step.

The trial court, however, concluded:

> THE COURT: Okay, and I reviewed your brief, and I've considered this, and I do not agree that the jury has to find the underlying facts beyond a reasonable doubt. The jury needs to find beyond a reasonable doubt that the victim and the Defendant were family or household members, and they also need to find that there was an ongoing pattern of psychological, physical, or psychological abuse manifested by multiple incidents over a long period of time. RP Vol. 7, page 950, lines 19-25, page 951, lines 1-2. This discussion is part of the excerpt from the trial transcript in Appendix C at 47a-60a.

Petitioner's argument reflects the command of Blakeley v. Washington, supra, and Apprendi v. New Jersey 530 U.S. 466 (2000) that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

The Supreme Court made clear in Blakely that the statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum the judge may impose without any additional findings. Without the aggravator finding, the sentencing judge had no authority to sentence defendant beyond 90 days, which was the top of the applicable sentencing range under Washington's Determinate Sentencing Act for the commission of the crime of unlawful imprisonment. Tayler was sentenced to a year and a day.

Tayler's sentence was improper because the jury verdict did not find that Tayler committed any of the six alleged prior incidents. The jury was not asked to examine the underlying facts of those six incidents and to determine that the State had proved beyond a reasonable doubt that any of them occurred. There is no way to know how the jury reached its finding of a pattern. Given the evidence of multiple incidents, there is no showing of a unanimous jury agreement as to which facts they found. This violates the holding in State v. Kitchen, 110 Wash.2d 403 (1988).

The statutory definition of a domestic abuse aggravator in RCW 9.94A.535 (h) (i) aggravator is a conclusionary concept. It is a state of law which exists if the jury finds (a) charged crime was against a member of the household and (b)the charged offense was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a long period of time.

Part (a) of the factual inquiry is easy enough. But the jury verdict finding on (b) does not delineate which specific incident Tayler committed. The alleged incidents are in fact elements of the crime defined by the statutory aggravator. Each of the six incidents is equivalent to an assault, a crime for which Americans since 1791 have possessed the right to trial by jury and a right to a unanimous verdict.

Recent cases applying Blakeley give more insight into what facts must the jury find beyond a reasonable doubt to justify entry of an exceptional sentence. See, e.g., Alleyne v. United States, 133 S. Ct. 2151 (2013), in which the Supreme Court overturned an exceptional sentence

because the jury did not decide the necessary facts beyond a reasonable doubt. The jury indicated on the verdict form that Alleyne had "[u]sed or carried a firearm during and in relation to a crime of violence," but did not indicate a finding that the firearm was "[b]brandished." Alleyne, 133 S. Ct. at 2156.

Just recently, in Ramos v. Louisiana, 140 S.Ct.1390 (2020), this court has held the 6th amendment right to trial by jury necessarily means a unanimous jury and struck down practices pertaining in Louisiana and Oregon of allowing criminal convictions on less than unanimous jury verdicts. This court stated:

> The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it some meaning about the content and requirements of a jury trial.
>
> One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.
>
> The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law.[9] As Blackstone explained, no person could be

found guilty of a serious crime unless "the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion."[10] A " 'verdict, taken from eleven, was no verdict' " at all.[11]

This same rule applied in the young American States. Six State Constitutions explicitly required unanimity.[12] Another four preserved the right to a jury trial in more general terms.[13] But the variations did not matter much; consistent with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial.[14]

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. By that time, unanimous verdicts had been required for about 400 years.[15] If the term "trial by an impartial jury" carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.

Influential, postadoption treatises confirm this understanding. For example, in 1824, Nathan Dane reported as fact that the U. S. Constitution required unanimity in criminal jury trials for serious offenses.[16] A few years later, Justice Story explained in his Commentaries on the Constitution that "in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of

the jury is indispensable."[17] Similar statements can be found in American legal treatises throughout the 19th century.[18]

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."[19] A few decades later, the Court elaborated that the Sixth Amendment affords a right to "a trial by jury as understood and applied at common law, ... includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted."[20] And, the Court observed, this includes a requirement "that the verdict should be unanimous."[21] In all, this Court has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years.[22]

There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment.[23] This Court has long

> explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government.[24] So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court. 140 S. Ct. 1395-1397

Here, the State's amended information and supplemental declaration of probable cause did disclose (with the exception of the baseball bat accusation brought out in the middle of the trial) a summary of the six incidents it intended to rely on to prove the RCW 9.94.535 (h) (i) aggravated domestic abuser. But the jury verdict form did not track the amended information in that respect. This was error. The jury was required to decide any and every fact from which the increased punishment could flow.

If these same six incidents were to be charged as separate crimes, the information would contain six (6) counts. The affidavit of probable cause would present the facts with respect to each count. The trial court could assess probable cause and sufficiency of evidence with respect to each count. And the verdict form would require an express finding as to each count. The principles of the 6th Amendment right to trial by jury are the same for a charged sentencing aggravator as they are for a charged crime. If as here, the state alleges six prior acts of assault or other abusive conduct as a basis to increase the punishment, the jury verdict form should track those allegations.

The problem is the legislative definition of the aggravator as part of an ongoing pattern. The debate over the jury instructions demonstrates the fundamental disagreement between the court and the defendant as to what are the facts required to be adjudicated by the jury under Blakeley. The trial court adopted the standard WPIC instruction and rejected defendant's request for a precise jury vote on each of the enumerated six (6) different accusations of assaultive acts and/or other offensive conduct.

CONCLUSION

Washington's domestic violence pattern aggravator, RCW 9.94A.535 (3) (h) (i), as construed and applied by the Washington courts in this case, violates the firmly rooted right under 6th amendment to a jury determination that the accused committed each act for which punishment is imposed, here the commission of specific acts of assaults, referred to as incidents in the statute, individually and specifically, and unanimously and beyond a reasonable doubt. Washington's domestic violence pattern aggravator statute, RCW 9.94A.535 (3) (h) (i) relieves the prosecution of this burden and thus violates due process and the 6th amendment right to trial by jury and is in direct conflict with this Court's holding in Richardson v. United States.

Respectfully, petitioner requests that this Court grant certiorari and vacate petitioner's conviction or alternatively remand and direct the Washington Court of Appeals to consider and address why this Court's decision in Richardson v. United States does not compel reversal of petitioner's conviction.

Dated this day of October, 2022 at Bellingham, Washington

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER DENYING REVIEW IN THE SUPREME COURT OF THE STATE OF WASHINGTON, FILED JULY 13, 2022

IN THE SUPREME COURT
OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FLOYD TAYLER,

Petitioner.

No. 100785-0

ORDER

Court of Appeals
No. 81001-4-I

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis (Justice Stephens sat for Justice Montoya-Lewis), considered at its July 12, 2022, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

Appendix A

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 13th day of July, 2022.

For the Court

/s/ González
CHIEF JUSTICE

APPENDIX B — OPINION OF THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, FILED JANUARY 3, 2022

THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

FLOYD TAYLER,

Appellant.

No. 81001-4-I

DIVISION ONE

UNPUBLISHED OPINION

ANDRUS, J. — Floyd Tayler challenges his convictions for the unlawful imprisonment and assault of his girlfriend, R.R. He raises nine challenges to his conviction and sentence, none of which provide a basis for reversal. We affirm.

FACTS

Tayler and R.R., both Canadian citizens, lived together for approximately a year and a half before the incidents

leading to Tayler's conviction. In June 2019, Tayler invited his adult sons to spend Father's Day weekend with him and R.R. in Whatcom Meadows, a private park in which Tayler and R.R. owned a timeshare lot and a trailer. On the evening of June 15, Tayler and R.R. argued about Tayler's sons arriving late for dinner. R.R., who had a strained relationship with Tayler's sons, felt that they had acted disrespectfully.

The next morning, Tayler accused R.R. of ruining his Father's Day by making his sons feel unwelcome the night before. Tayler and his sons left the park and spent the day together golfing. That afternoon, after the sons left to return home, Tayler raised again his complaint that R.R. was to blame for making his sons feel unwelcome in the trailer.

On the morning of June 17, Tayler vented to R.R. about how hurt he was by his sons' action. R.R., who felt the sons manipulated Tayler, called the boys "motherf---ers." Tayler became angry at her comment and "just completely … lost it." Their argument escalated as the day went on. Tayler repeatedly yelled at R.R., demanding she apologize, but R.R., afraid at what would happen as he escalated, stayed quiet, hoping he would stop.

At some point, R.R. began recording Tayler with her cell phone because she "was afraid of what he was going to do" to her. At trial, R.R. described Tayler's threats and assaultive conduct, which the State corroborated by playing portions of R.R.'s recording. In this recording, Tayler can be heard threatening to "come over there

and grab [R.R.] by the throat," and told her she was "not going to win this time [because] you are not worth it." The recording demonstrated that as Tayler's anger increased, he began to throw household items at R.R., continued to verbally berate her, and accused her of being "f---ing twisted." At one point when Tayler was screaming into R.R.'s ear, she covered her eyes with her hands, but Tayler pulled them away and held them down. R.R. begged Tayler to "just leave me [inaudible], don't touch me, I am asking you," to which Tayler responded "Too bad."

When R.R. told Tayler she did not want to be with him anymore, Tayler ordered R.R. to leave the trailer and gave her one hour to gather her belongings. Tayler then began throwing and smashing her belongings. When she picked up a laundry basket to collect her personal possessions, Tayler refused to let her use it because, he said, it belonged to him. When she next tried to put her things in garbage bags, Tayler told her she could not use his bags either and threatened to slam her hands in cupboard doors.

When R.R. actually tried to leave the trailer, Tayler blocked the door and told her she could not leave. Tayler pushed R.R. down into a chair, removed her shoes, positioned a table in R.R.'s path, and sat down on it. The recording captured R.R. shouting in pain, and Tayler mimicking her pleas that he stop. He told R.R. "You see what happens, [R.R.], you see what happens? You are not going to overpower me, you are trying to, sit, sit."

R.R. told Tayler she did not want to be there and wanted to leave. Tayler responded that R.R. was "in no

shape to go outside the trailer." The recording captured R.R. repeatedly pleading to leave and telling Tayler she was afraid of him. Begging to get outside, R.R. told Tayler that he could not keep her there; he responded, "yeah[,] I can."

Tayler trapped R.R. inside the trailer for approximately 10 minutes. When she finally got outside, R.R. collapsed in a chair. After calming down, R.R. realized her purse, passport, keys, wallet, and medications remained inside. Tayler initially refused to let her in to collect her things, but eventually relented. R.R. ultimately decided not to leave because Tayler appeared to have calmed down.

Later that evening, after dinner, they sat around a campfire having a cocktail. Tayler told R.R. that after their argument that morning, he had visited a neighbor couple and told them what R.R. had said about his sons. R.R., upset at Tayler involving the neighbors in their dispute, decided to leave. She picked up her purse and sweater and started walking down the road. Tayler tried to stop her, but she told him to leave her alone.

When R.R. reached the end of the gravel road, she heard Tayler running up behind her. He grabbed her, spun her around, and threw her into the ditch. Although R.R. was not intoxicated, Tayler yelled at her to get up, accusing her of being drunk. Tayler grabbed R.R.'s purse, yanking the strap repeatedly even after R.R. told him he was hurting her. After he gained control of her purse, she picked up her sweater and realized it was ripped. Tayler said "Oh, did I rip your sweater? … [L]et me do it some

more." Because Tayler had her purse, passport, keys and wallet, R.R. realized she could not leave so she returned to the trailer with him.

After this incident, R.R. developed visible bruising on both of her arms where Tayler had grabbed her. She also developed bruising on her arms from the force of Tayler pulling her purse over her head.

Two days later, while packing to leave, R.R. told Tayler that she wanted to take all of her personal belongings home because she would never be comfortable there again. As she packed items, Tayler removed them and even hid some of them. At some point, Tayler either took R.R.'s purse again or refused to let her back into the trailer, so she left and walked to the park's office. Tayler drove their van to the office and insisted she get into the vehicle with him. R.R. refused and when Tayler got out of the van to talk to her, she grabbed her purse. He yelled profanities at her, got into the van and drove away. A staff member inside the park office, having seen this exchange, invited R.R. inside the office. The office manager called the police.

Whatcom County Sheriff Deputy Mason Stafford responded to the call and interviewed R.R. He described R.R. as agitated, emotional and crying throughout their conversation. Deputy Stafford photographed R.R.'s bruises on her hands and upper arms. Deputy Stafford located Tayler at a friend's trailer in a Ferndale RV Park where he placed Tayler under arrest.

Appendix B

The State charged Tayler with one count of unlawful imprisonment, domestic violence, and assault in the fourth degree, domestic violence. The State also alleged as an aggravating circumstance that the unlawful imprisonment was part of an ongoing pattern of abuse, pursuant to RCW 9.94A.535(3)(h)(i).

At trial, the State introduced evidence of numerous incidents of domestic abuse by Tayler that predated the June 2019 events. R.R. testified that in July 2018, she threw Tayler a birthday, after which Tayler became sullen. During an argument, Tayler flung a tray of glasses, shattering them on the floor. Tayler claimed he bumped into the tray by accident, but R.R. testified his conduct scared her because it was directed at her.

In the fall of 2018, while on vacation in Mexico, during an argument, Tayler threw a glass of water on R.R. before shoving her into a lounge chair. R.R. was so upset that she began packing to leave. Tayler removed her belongings from the suitcase and threw them on the floor. Tayler then alternatively told her to leave and prevented her from actually doing so. Tayler again testified he simply tripped and spilled his glass of water on R.R. by accident.

In December 2018, during another argument, Tayler got so angry at R.R. that he "stomped down on" a Christmas gift from R.R.'s daughter, took R.R.'s phone from her and threw her glasses. Tayler admitted he stepped on the gift but insisted this too was just an accident.

Next, on New Year's Eve 2018, Tayler and R.R. drove to Whatcom Meadows to celebrate the holiday. When Tayler decided to go to bed early, R.R. became upset about having to celebrate alone. They again argued. As during other arguments, Tayler took R.R.'s phone and keys, while at the same time repeatedly telling her to "get the f--- out." The next day, while R.R. was lying in bed, Tayler demanded that she leave and pulled her off the bed, onto the floor. Tayler admitted they argued but denied any physical altercation occurred.

In March 2019, during a trip to Las Vegas, the couple argued again after R.R. purchased a timeshare and Tayler complained that she had not made him feel included in the purchase. Tayler threatened to pour out the contents of a bottle of liquor they had purchased and, when he did not follow through with the threat, R.R. did it. In response, Tayler held R.R. down, and poured a bottle of beer over her. When R.R. tried to leave the room, Tayler stopped her. Tayler recalled the incident, admitting that he yelled at her for dumping out the bottle of alcohol, but denied pouring beer on her.

Finally, in May 2019, during an argument, R.R. retreated into their study to "try to get away from him because he was yelling." Tayler grabbed her and tried to force her into the bedroom. R.R. fell down inside the bedroom. Tayler "stomped his foot down beside [her] head." R.R., afraid that he would kill her, wet herself. When she told Tayler that she needed to go to the bathroom to change, Tayler refused to let her go and, instead, removed her wet pants and underwear.

Eventually, Tayler allowed R.R. to go to the bathroom. Tayler denied that this incident ever occurred.

The jury convicted Tayler as charged and found that the unlawful imprisonment constituted an aggravated domestic violence offense. The court sentenced Tayler to an exceptional sentence of 12 months and one day for the unlawful imprisonment and a concurrent sentence of 364 days for the assault.

ANALYSIS

1. Washington Privacy Act

Tayler first argues the trial court erred in admitting R.R.'s recording under the Washington Privacy Act, chapter 9.73 RCW. We disagree.

RCW 9.73.030(1)[1] makes it unlawful for any person to intercept or record a private communication without first obtaining the consent of all parties participating in the conversation. While private conversations recorded without the consent of all participating parties are inadmissible under RCW 9.73.050, conversations which "convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands" may be recorded with the consent of one party to the conversation. RCW 9.73.030(2)(b). Whether a private communication is

1. RCW 9.73.030 was amended in 2021. LAWS OF 2021, ch. 329, § 21. These amendments do not impact the analysis here. Any reference to the statute in this opinion are to the version in effect at the time of the crimes.

protected by the Privacy Act is a question of law which we review de novo. *State v. Gearhard*, 13 Wn. App. 2d 554, 561, 465 P.3d 336, *review denied*, 196 Wn.2d 1015, 473 P.3d 250 (2020) (citing *State v. Kipp*, 179 Wn.2d 718, 728, 317 P.3d 1029 (2014)).

On June 17, 2019, R.R. recorded her interactions with Tayler for seven hours in two separate recordings. Although she initially recorded Tayler without his consent, after approximately an hour and fifteen minutes, R.R. told Tayler that she was recording him, to which he responded "Good, record away, I don't give a f--k."[2]

Pretrial, the State sought to admit approximately 25 minutes of one of the recordings. The proposed 25-minute segment started at minute 42:00, shortly before Tayler can be heard threatening to grab R.R. by the throat. This threat was followed by several minutes of Tayler's uninterrupted ranting at R.R., sounds of Tayler throwing household items at R.R. and his shouting repeatedly, at the top of his lungs, and his demanding of R.R. "do you want me to yell in your ear again?" It also captured R.R. telling Tayler that he was hurting her, and his denial of doing so, with the demand that she "[p]rove it, prove it." There are then sounds of a physical assault during which R.R. can be heard begging Tayler not to touch her and shouting in pain. The recording also captured Tayler mocking R.R.'s

2. The transcripts of the recordings do not reflect any time stamps of what was said when. The durational information here is based on the court's independent review of Exhibit 8, the full audio marked for identification by the State and admitted at trial without objection from Tayler.

crying and when R.R. told Tayler not to touch her, Tayler responding, "I will touch you all I want." The next few minutes of the recording include more of Tayler's ranting, expletives, and sounds of a physical assault. Tayler can be heard telling R.R. she had to leave and demanding that R.R. get up to collect her things, followed by sounds of Tayler ranting, throwing and smashing things, and slamming cupboard doors.

Approximately an hour and five minutes into the recording, Tayler tells R.R. to sit, informing her that she won't be able to overpower him, and continuing to mock her as she cried. The recording picked up R.R. telling Tayler that she did not want to be there, that she wanted to leave, that she was afraid of him, and that she did not want him to touch her. R.R. repeatedly begged Tayler to let her out. The State's proposed portion of the recording ended approximately one hour and nine minutes into the recording, when Tayler allowed R.R. to leave the trailer.

Tayler objected to the admissibility of the recording but argued that, if the court admitted the 25-minute excerpt proposed by the State, "we would insist the entire tape be admitted" under ER 106's rule of completeness.

The trial court found that the recording "captures several incidents of physical assaults and threats of bodily injury by the defendant against [R.R.]," noting specifically Tayler's threat "at minute 42:30" where Tayler can be heard saying he could grab her by the throat and other threats of assault occurring "at minute 53." The trial court concluded that "the portions of the recording that contain

such threats, including necessary context" are admissible at trial. The court further ruled that, because a portion of the recording was admissible, the entire recording was admissible under ER 106, per Tayler's request.

At trial, the State played a portion of the recording for the jury and, rather than start at minute 42:30, it started the recording several minutes earlier, at minute 30:44, based on the trial court's ruling that the entire recording would be admitted. In these 12 minutes, the couple can be heard arguing but, as the State concedes, Tayler made no explicit threats to R.R.

Tayler first argues that, because R.R. started recording before Tayler made any threats, the entire recording is inadmissible under the Privacy Act. A similar argument was rejected by our Supreme Court in *State v. Williams*, 94 Wn.2d 531, 617 P.2d 1012 (1980). That case involved a federal investigation into racketeering activities in Pierce County, during which agents surreptitiously recorded several conversations, as allowed by the federal wiretap statute. *Id.* at 535. When the State charged the defendants with conspiracy to commit murder and arson, it sought to introduce some of the federal agents' recordings. The trial court suppressed the recordings and related testimony, except for the parts of the conversations that conveyed threats of extortion, blackmail, or bodily harm under RCW 9.73.030. *Id.* at 546.

On appeal, Williams argued that the threat exception applies only to emergency situations and cannot apply to planned police interceptions of conversations. *Id.* at

547. The court rejected the argument and concluded that neither the language nor the history of RCW 9.73.030(2) supported an interpretation limiting the exception to emergency situations. *Id.* at 548. "The language of the provision applies equally to emergency and nonemergency situations and the rules of statutory construction do not suggest a contrary interpretation." *Id.* at 549. It affirmed the trial court's ruling that even though the recordings captured more conversation than fit within the threat exception, the parts of the recordings relating to those threats were admissible.

As in *Williams*, R.R. started recording before Tayler made any threats. But also as in *Williams*, R.R. did not have to wait for an emergency to arise before she could legally start recording. Any portion of an otherwise inadmissible recording is admissible if the communication falls within the ambit of RCW 9.73.030(2)(b).

Tayler next argues that if any portion of the recording is admissible, the court erred in permitting the State to introduce portions that preceded and followed the explicit threats. There are several flaws in this argument.

First, the State had pared down the portions of the recording it initially offered to include only Tayler's explicit threat to strangle R.R., sounds of him assaulting R.R., and his statements refusing to allow her to leave the trailer. The State offered a lengthier portion of the recording only after Tayler asked to have the entire recording admitted. Tayler cannot now complain that the court admitted portions of the recording that he asked

to have admitted. The invited error doctrine prohibits the defendant from setting up an error at trial and then complaining of it on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). To the extent there was error in admitting portions of the recording that preceded and followed any explicit threats, Tayler invited this error.

Second, the threat exception does not cover only explicit threats but extends to statements that convey implicit threats by suggestion, implication, gestures and behavior. *State v. Caliguri*, 99 Wn.2d 501, 507-08, 664 P.2d 466 (1983). *State v. Babcock*, 168 Wn. App. 598, 608, 279 P.3d 890 (2012) is instructive in this regard. In that case, while in prison for child molestation, Babcock enlisted an undercover police officer to kill the father of one of the children he had raped. *Id.* at 601. Conversations between Babcock and the undercover officer were recorded and Babcock sought to exclude these recordings at his trial. Relying on the dictionary definition of the verb "to convey," we concluded that the phrase "convey a threat," as used in RCW 9.73.030(2)(b) should be broadly interpreted to include any statement made "'to impart or communicate either directly by clear statement *or indirectly* by suggestion, implication, gesture, attitude, behavior, or appearance'" *Id.* at 608 (citing Webster's New International Dictionary 499 (3d ed. 1966) (emphasis added).[3] We concluded that statements Babcock made to the undercover officer suggesting they had reached an

3. This is supported by Washington's criminal code definition of "threat" as "to communicate, directly *or indirectly* the intent" to take a certain action. RCW 9A.04.110(28) (emphasis added)

agreement on a plan to murder the child's father fell within the broad definition of conveying a threat, even though some of Babcock's statements did not include explicit threats. *Id.* at 609.

In this case, Tayler concedes the recording captures him explicitly threatening R.R. Tayler told R.R. that he could "come over there and grab [her] by the throat," that he "will touch [her] all [he] want[s]," and that he could make her stay in the trailer against her will. These statements were admissible as explicit threats of bodily harm.

But the recording also captured Tayler making statements that indirectly threatened R.R. with physical harm. Tayler's rage toward and domineering control over R.R., combined with his profanity, ridicule and derision, put the explicit threats into context. For example, throughout the recording Tayler mimicked R.R.'s screams of pain and mocked her when she cried. He screamed into R.R.'s ear, and then asked if she wanted him to do it again. When R.R. attempted to find a garbage bag for her belongings, Tayler angrily said "Watch your hand[,] don't get it slammed in the door there. Now be careful because these doors close sometimes unexpectedly" after which the recording picked up the sound of Tayler slamming cupboard doors. Tayler's statements, when considered in light of his conduct, indirectly suggested or implied threats to R.R.'s physical safety.

Finally, the recording is peppered with non-conversational sounds of physical assaults, screaming, and

general violence, all falling outside the scope of the Privacy Act. *See State v. Smith*, 189 Wn.2d 655, 664, 405 P.3d 997 (2017) (screams, shouting, and sounds of a violent assault do not constitute a "conversation" under the Privacy Act). These sounds are not inadmissible.

The trial court properly admitted the recording because it contained implicit and explicit threats of bodily harm, Tayler consented to the recording at a certain point, and Tayler invited any error in requesting that additional, non-threatening, portions of the conversation be admitted.

2. ER 404(b)

Tayler next argues that the trial court erred in admitting ER 404(b) evidence of prior arguments or physical altercations between Tayler and R.R. to show her state of mind during the unlawful imprisonment. We reject this argument.

Under ER 404, evidence of prior misconduct is not admissible when it is offered "for the purpose of proving a person's character and showing that the person acted in conformity with that character." The same evidence, however, may be admitted for proper purposes that include "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

> Before admitting evidence pursuant to ER 404(b), the trial court must

> (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Gresham, 173 Wn.2d at 421 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "This analysis must be conducted on the record, and if the evidence is admitted, a limiting instruction is required." *State v. Arredondo*, 188 Wn.2d 244, 257, 394 P.3d 348 (2017).

When the admissibility of evidence is challenged under ER 404(b), we review a trial court's ruling for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion if the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Prior acts of violence are admissible under ER 404(b) when they are relevant to prove an element of the crime. *State v. Ashley*, 186 Wn.2d 32, 41, 375 P.3d 673 (2016); *see also State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000). Here, to prove unlawful imprisonment, the State had to establish that Tayler restrained R.R. RCW 9A.40.040(1). "'Restrain' means to restrict a person's movements without consent and … in a manner which interferes substantially with his or her liberty. Restraint is 'without consent' if it is accomplished by (a) physical

force, intimidation, or deception . . . ." RCW 9A.40.010(6). Evidence of prior instances of domestic violence may be relevant to establish a lack of consent. *Ashley*, 186 Wn.2d at 41-42.

Here, the State introduced ER 404(b) evidence regarding prior acts of domestic abuse between Tayler and R.R. to establish that Tayler restrained her without her consent through intimidation and to prove the existence of an ongoing pattern of psychological or physical abuse. The trial court ruled that this evidence was admissible for these two purposes. The trial court provided a limiting instruction, informing the jury that it could consider only these prior incidents to determine R.R.'s state of mind during the alleged unlawful imprisonment and, if the jury found Tayler guilty of that crime, to determine whether the crime constituted an aggravated domestic violence offense. The trial court did not abuse its discretion in analyzing the admissibility of the ER 404(b) evidence or in providing the appropriate limiting instruct to the jury.

State v. Ashley is dispositive here. In that case, Ashley and his girlfriend dated for several years and had children together before separating. 186 Wn.2d at 35. Years later, when the girlfriend and children were visiting Ashley at his sister's home, police knocked at the door seeking to arrest him on an outstanding warrant for a robbery. *Id.* at 36. To avoid being arrested, Ashley detained the girlfriend and the children in a bathroom, only releasing them when police officers entered his sister's home. *Id.* The State charged Ashley with unlawful imprisonment for detaining the woman in the bathroom without her

consent. At trial, the court admitted evidence of Ashley's prior domestic violence against his girlfriend to prove he had restrained her through intimidation, despite the lack of any express threat. *Id.*

On appeal, Ashley challenged the admissibility of this ER 404(b) evidence. *Id.* at 40. Our Supreme Court concluded that the domestic violence evidence was both material and relevant to decide whether Ashley acted without the woman's consent and restrained her through intimidation. *Id.* at 42. The court acknowledged that the risk of unfair prejudice is very high in cases involving prior acts of domestic violence, but concluded that this type of evidence was "highly probative in assessing whether Ashley intimidated [his girlfriend,] such that she was restrained without her consent." *Id.* at 43.

The court distinguished *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014), a case on which Tayler relies. In *Gunderson*, the defendant had an altercation with his ex-girlfriend, who had a no-contact order against him, and her mother. *Id.* at 919. Gunderson was charged with a felony violation of a court order. *Id.* The mother reported that Gunderson had hit her and his ex-girlfriend. *Id.* at 919-20. His ex-girlfriend, however, testified that the altercation did not involve any physical violence. *Id.* at 920. At trial, the State sought to challenge the ex-girlfriend's credibility by admitting evidence of prior domestic violence episodes. *Id.* at 920-21.

Gunderson appealed the admission of the ER 404(b) evidence, arguing that the probative value of the

evidence was outweighed by its significant prejudicial effect. *Id.* at 923. Our Supreme Court agreed. *Id.* The court acknowledged that a history of domestic violence can be probative of a witness's credibility in cases where that witness has given conflicting statements about the defendant's conduct but ruled that such evidence is not equally probative in cases were a witness does not recant or give a conflicting account of events. *Id.* 923-24. Because the ex-girlfriend had neither recanted nor given a conflicting account of events, the Supreme Court concluded the evidence of prior domestic violence incidents was more prejudicial than probative. *Id.* at 926.

The *Ashley* court found *Gunderson* to be distinguishable:

> Our opinion [in *Gunderson*] was careful to balance the heightened prejudicial effects of domestic violence against the recognition that the probative value of such evidence could outweigh its prejudicial effects in certain circumstances. . . .
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> . . . .
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> Here, the evidence was properly introduced to explain how [the victim] could be intimidated by Ashley, which goes directly to the element of restraint without consent.

186 Wn.2d at 46-47. Here, as in *Ashley*, the ER 404(b) evidence was relevant to proving an element of the crime

charged—whether the restraint was without R.R.'s consent. And unlike *Gunderson*, the trial court did not admit the ER 404(b) evidence to bolster R.R.'s credibility.

The trial court did not abuse its discretion in admitting evidence of Tayler's prior acts of domestic violence because they were relevant to the restraint element of the charge of unlawful imprisonment and to the domestic violence aggravator.

3. Due Process Notice of Aggravating Factor Evidence

Tayler next contends that the trial court violated his due process rights by admitting evidence that he threatened to use a baseball bat against R.R.'s son if the son tried to help R.R. move out. We see no due process violation in admitting evidence about which Tayler had notice before trial.

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, specifies that the State may give notice that it intends to seek a sentence above the standard range "[a]t any time prior to trial or entry of the guilty plea," and that "[t]he notice shall state [the] aggravating circumstances upon which the requested sentence will be based." RCW 9.94A.537(1). Before trial, the State filed a written notice of its intention to introduce ER 404(b) evidence, and listed six incidents of Tayler's prior misconduct. Shortly thereafter, the State amended the information to include the aggravating circumstance under RCW 9.94A.535(3)

(h)(i).[4] In the accompanying supplemental affidavit of probable cause, the State listed the same six incidents to support the charged aggravator.

While R.R. was testifying about her history with Tayler generally, the State asked her if she had considered leaving Tayler. R.R. responded "I didn't, I was afraid because he, Floyd said that if, if [R.R.'s son] came to help me move, that he would, he would hit him with a baseball bat." Neither the ER 404(b) notice nor the affidavit of probable clause included this incident. He argues while the State notified Tayler of its intent to offer domestic violence incidents, it failed to notify him that it intended to support the charged domestic violence aggravator, thereby violating his due process rights.

Tayler objected to this evidence as ER 404(b) evidence not disclosed by the State in its written notice. The court sustained the objection and the State moved on to a different topic. Tayler then moved for a mistrial, arguing that the baseball bat comment was so prejudicial that it would be impossible to "unring that bell." Tayler also

4. The amended information read:

> The State further alleges the following aggravating circumstance [sic] exist pursuant to RCW 9.94A.535(3)(h): The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and the following was present: (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.

argued that if the evidence was admissible to prove the aggravating factor, then his due process right to pretrial notice was violated pursuant to *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012) (plurality opinion). After receiving additional briefing from the parties, the court rejected Tayler's due process argument, concluding that *Siers* required the State to provide Tayler with notice of the aggravating factor the State intended to prove at trial, which it had done here, and did not require pretrial notice of every fact the State intended to offer to prove that aggravating factor. The court also specifically found that R.R.'s statement regarding the baseball bat threat was contained in discovery produced to Tayler. The court denied Tayler's motion for a mistrial, finding the evidence admissible.

Tayler renews his due process claim on appeal. The due process clause of the state and federal constitutions require defendants to receive adequate notice of the nature of the charges against them in order to prepare a defense. U.S. CONST. amend VI; WASH. CONST., art. I, § 22. A defendant must receive pretrial notice of the State's intent to prove an aggravating circumstance listed in RCW 9.94A.535. *Siers*, 174 Wn.2d at 277. "Due process is satisfied when the defendant receives sufficient notice from the State to prepare a defense against the aggravating circumstances that the State will seek to prove in order to support an exceptional sentence." *Id.* at 278. We review Tayler's due process claim de novo. *Id.* at 274.

We conclude Tayler received sufficient notice from the State of the aggravating circumstances the State intended

to prove to support an exceptional sentence. First, the first amended information informed Tayler that the State intended to prove that his unlawful imprisonment of R.R. was part of an ongoing pattern of psychological and physical abuse under RCW 9.94A.535(3)(h). Second, Tayler received notice during discovery that R.R. alleged she had not left the relationship because he had threatened to harm her son with a baseball bat. Third, Tayler conceded below that he conducted a pretrial interview of R.R. after learning of her disclosure in a police report, and he had the opportunity to question her about the allegation. Under these circumstances, we cannot conclude Tayler's due process rights were violated. *Siers* does not require a contrary result.

4. Bifurcation

Tayler next argues that the trial court erred in denying his request to bifurcate the trial to have the jury decide if Tayler was guilty of unlawful imprisonment before it considered whether he had committed prior acts of domestic violence. We disagree.

A defendant is not entitled to a bifurcated trial, *State v. Roswell*, 165 Wn.2d 186, 197, 196 P.3d 705 (2008), and they are generally not favored in Washington. *State v. Kelley*, 64 Wn. App. 755, 762, 828 P.2d 1106 (1992). Bifurcation is inappropriate if there is a substantial overlap between evidence relevant to the proposed separate proceedings or if a single proceeding would not significantly prejudice the defendant. *State v. Monschke*, 133 Wn. App. 313, 335, 135 P.3d 966 (2006). We review a trial court's decision on

whether to bifurcate a trial for an abuse of discretion. *Roswell*, 186 Wn. 2d at 192.

Here, Tayler asked the court to bifurcate trial so the jury would consider the aggravating circumstance only after it found Tayler guilty of unlawful imprisonment. The trial court denied this request, relying on RCW 9.94A.537. Under RCW 9.94A.537(4),[5] if the State intends to present evidence of a pattern of abuse under RCW 9.94A.535(3)(e)(h)(i), the trial court "may" conduct a separate proceeding to determine the facts relating to that allegation but only if the evidence is not otherwise admissible in the trial on the underlying crime. As the trial court correctly noted, the evidence supporting the pattern of abuse was admissible to prove unlawful imprisonment, so the statutory condition precedent for bifurcation did not exist.

---

5. RCW 9.94A.537(4) provides:

> Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t). *If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding* if the evidence supporting the aggravating fact is not part of the res gestae of the charged crime, *if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime* (emphasis added).

Tayler contends the trial court should have bifurcated the jury instructions, even if it did not bifurcate the trial itself. In *State v. Oster*, 147 Wn.2d 141, 147, 52 P. 3d 26 (2002), the Supreme Court held that when an element of a charged crime includes the existence of a prior conviction, a trial court may bifurcate the jury instructions to avoid the risk that a defendant's prior criminal history would taint the jury's verdict on the underlying crime. But the Supreme Court later noted a defendant has no right to bifurcated jury instructions. *Roswell* 165 Wn.2d at 197. The court concluded that "[i]f a prior conviction is an element of the crime charged, evidence of its existence will never be irrelevant," and denying bifurcation on that basis is not an abuse of discretion. *Id.* at 198.

Tayler relies on *Roswell* to argue that the trial court erred in denying his request for bifurcated instructions. But *Roswell* does not help Tayler here. In that case, the State charged Roswell with child molestation and felony communication with a minor for immoral purposes, an element of which was a prior felony sex offense. 165 Wn.2d at 190. The State also alleged rapid recidivism as an aggravating factor. *Id.* at 191. At trial, Roswell asked for two different bifurcations. First, Roswell requested that he be allowed to stipulate to the existence of his prior sexual offense convictions and to waive his right to jury on that issue to prevent the jury from being informed of the prior convictions. *Id.* at 190. The trial court declined this request. *Id.* He also asked that the rapid recidivism aggravator special verdict form be given to the jury only if it convicted him of the underlying sex offenses, a request the court granted. *Id.* at 191.

On appeal, Roswell argued he was entitled to waive his right to a jury trial on the prior conviction element of the charged crime. The Supreme Court rejected that argument, holding that a prior sex offense conviction was an essential element of the crime charged and, although a defendant may waive his right to a jury determination of an aggravator, he had no right to do so with regard to a single element of the charged crime. *Id.* at 192.

Roswell's applicability to this case is questionable as Tayler did not seek to exclude evidence of prior convictions. But both *Roswell* and *Oster* are clear that Tayler did not have a right to bifurcated jury instructions and denying a request for bifurcated jury instructions is not an abuse of discretion.

Tayler contends that bifurcated instructions would have eliminated any inconsistency and confusion arising from Jury Instruction No. 17. Jury Instruction No. 17 said:

> Certain evidence has been admitted in this case regarding alleged acts of domestic violence committed prior to June 17, 2019. You may consider these acts only for the following limited purposes.
>
> 1. For determining the state of mind of [R.R.] during the alleged crime of Unlawful Imprisonment, and
>
> 2. If you find the defendant guilty of Unlawful Imprisonment, for the additional purpose

> of whether that crime constitutes an Aggravated Domestic Violence Offense.

This instruction is neither inconsistent with any other instruction, nor unduly confusing. It advised the jury that it could consider the ER 404(b) evidence only to determine R.R.'s state of mind during the alleged unlawful imprisonment. It further instructed the jury that *if* it found him guilty of that crime only then could it consider the same evidence to determine whether there was a pattern of psychological or physical abuse. The trial court did not abuse its discretion in denying Tayler's request to bifurcate trial or the jury instructions on the aggravator.

5. Jury Instruction and Special Verdict Form for Aggravator

Next, Tayler contends the trial court erred in refusing his proposed special verdict form requiring the jury to find whether each of six alleged prior acts of domestic violence had occurred and whether each constituted abuse. We reject this contention because the special verdict forms presented to the jury required it to make the requisite factual findings to support the statutory aggravating circumstance.

We review a trial court's decision regarding a special verdict form under the same standard we apply to decisions regarding jury instructions. *State v. Fehr*, 185 Wn. App. 505, 514, 341 P.3d 363 (2015). We review claimed legal errors in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Tayler asked the court to instruct the jury that "To find that the offense was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time, you must unanimously agree that the State proved beyond a reasonable doubt the incidents that manifest the ongoing pattern." Tayler proposed a special verdict form that asked the jury to unanimously find whether each alleged prior incident had occurred and whether each prior incident amounted to abuse. The trial court concluded that Tayler's proposed instructions were not accurate statements of the law and denied his proposed instruction and special verdict forms.

Tayler argues that the trial court's failure to give his proposed special verdict forms violated *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988) because the jury did not make unanimous findings as to which acts formed the basis of the pattern of abuse aggravating circumstance. We reject this argument for two reasons.

First, Tayler provides no authority for the proposition that *Blakely* requires a jury to find unanimously which of Tayler's acts formed the basis for its finding that he engaged in a pattern of abuse. Criminal defendants have a right to a unanimous jury verdict. *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015) (citing WASH. CONST. art. I, § 21). The State must prove each element of a charged offense beyond a reasonable doubt. *State v. Chacon*, 192 Wn.2d 545, 549, 431 P. 3d 477 (2018) (citing U.S. CONST.

amend. XIV). Under *Blakely*, any fact that increases the penalty above the standard range must also be found by a unanimous jury beyond a reasonable doubt. 542 U.S. at 301; *accord Alleyne v. United States*, 570 U.S. 99, 108, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (facts that increase a mandatory sentence are, in effect, elements of the charged offense that must be decided by a jury).

The question under *Blakely* is what "facts" actually increased Tayler's sentence. The domestic violence aggravator, RCW 9.94A.535(3)(h)(i), requires the State to prove that:

> The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:
>
> > (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.

The fact that increased Tayler's sentence here was not any one specific domestic violent incident but the existence of a pattern of abuse.

Jury Instruction No. 16 said

> To find that Unlawful Imprisonment is an aggravated domestic violence offense, each

> of the following two elements must be proved beyond a reasonable doubt:
>
> > (1) That the victim and the defendant were family or household members; and
> >
> > (2) That the offense was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time.

Instruction No. 16 used the statutory language verbatim, was identical in wording to the pattern jury instruction for this aggravator, and was a correct statement of the law. *See* 11A Washington Practice: Pattern Jury Instructions Criminal: WPIC 300.17 at 902 (5th ed. 2021) (WIPC).

The court presented the jury with two special verdict forms. The first asked whether Tayler and R.R. were members of the same family or household on June 17, 2019. This form corresponded to the first element of Instruction No. 16. The second asked whether the unlawful imprisonment was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time. This form corresponded to the second element of Instruction No. 16. The special verdict forms asked the jury to find, beyond a reasonable doubt, the facts necessary to establish the statutory "pattern of abuse" aggravating circumstance.

Alleyne, on which Tayler relies, is distinguishable. In that case, Alleyne was sentenced to a mandatory minimum sentence of seven years under 18 U.S.C. §924(c)(1)(A), which applies to anyone who "brandished" a firearm during a crime of violence. 570 U.S. at 103. The jury found that Alleyne used or carried a firearm during the crime, but did not find that he brandished the gun. *Id.* The Supreme Court reversed the sentence because the jury failed to make the factual finding required by statute. *Id.* at 117. This case is not analogous because Tayler's jury made the necessary statutory finding to support the aggravating circumstance under RCW 9.94A.535(3)(h)(i).

Nor does *United States v. Haymond*, ___ U.S. ___, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (2019) support Tayler's special verdict form argument. In that case, Haymond was found guilty of possessing child pornography and sentenced to a prison term of 38 months followed by ten years of supervised release. *Id.* at 2373. While on supervised release, the government moved to revoke the supervised release, alleging he possessed child pornography. *Id.* at 2374. A judge determined by a preponderance of evidence that Haymond had knowingly downloaded and possessed child pornography. *Id.* Under the applicable federal statute, the sentencing judge was required to impose an additional prison term of at least five years regardless of the length of the prison term otherwise authorized for the underlying conviction. *Id.* at 2375. A district court imposed a five year term and no jury was empaneled to find that Haymond had committed the violation. *Id.*

Appendix B

A plurality of the Supreme Court held that applying the statute's mandatory minimum sentence violated Haymond's right to a jury trial. *Id.* at 2384-85. But Justice Breyer's concurrence was the controlling opinion in *Haymond*. *United States v. Henderson*, 998 F.3d 1071, 1076 (9th Cir. 2021). This concurrence significantly narrowed the holding by agreeing with the plurality only on the issue of whether the specific provision of the supervised release statute, 18 U.S.C. §3583(k), which effectively imposed a prison term for a new criminal offense, was unconstitutional. The Ninth Circuit has refused to extend *Haymond* to other cases in which courts have revoked supervised release under different federal statutes. *Henderson*, 998 F.3d at 1076. *Haymond* is simply not applicable here.

Second, although a defendant has a right to a unanimous jury verdict, *Kitchen*, 110 Wn.2d at 409, and the State must elect the acts on which it relies for a conviction when it presents evidence of several acts that could form the basis of a charged crime or an aggravating circumstance, *State v. Price*, 126 Wn. App. 617, 646-47, 109 P.3d 27 (2005), *abrogated on other grounds by State v. Hampton*, 184 Wn.2d 656, 361 P.3d 734 (2015), an election is not required when a continuing course of conduct forms the basis for the charge. *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984); *State v. Lee*, 12 Wn. App. 2d 378, 394, 460 P.3d 701 (2020).

This court has previously held that the pattern of abuse aggravating circumstance of RCW 9.94A.535(3)(h)(i) contemplates an ongoing course of conduct rather than

a single action because a "'pattern' requires more than one act occurring in an ongoing scenario." *State v. Bell*, No. 62552-7-I, noted at 159 Wn. App. 1002 at *17 (2010) (unpublished).[6] In *Bell*, we rejected the argument that the defendant was entitled to a unanimous jury verdict as to which acts formed the basis for the pattern of domestic violence abuse, holding "[u]nanimity was only required as to Bell's course of conduct, not a particular action." *Id.* We find the reasoning of *Bell* persuasive and conclude that Tayler was not entitled to a unanimous jury verdict as to which of the alleged acts of psychological and physical abuse occurred and which acts were part of his pattern of abuse.

The trial court did not violate *Blakely* or *Kitchen* by rejecting Tayler's proposed special verdict forms.

6. Sufficiency of Evidence of Aggravating Factor

Tayler argues there was insufficient evidence to support the jury's finding of a pattern of abuse. We disagree.

We review the sufficiency of the evidence for an aggravating factor in the same way we review it for the elements of a crime. *State v. Burrus*, 17 Wn. App. 2d 162, 171, 484 P.3d 521 (2021). "'Under this standard, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have

6. Under GR 14.1(c), we cite this case here because doing so is necessary to this reasoned decision.

found the presence of the aggravating circumstances beyond a reasonable doubt.'" *Id.* (quoting *State v. Zigan*, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012)). We defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Linden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007).

It is unclear whether Tayler is challenging the legal sufficiency of the evidence or R.R.'s credibility, as he appears to argue that some of R.R.'s testimony was too "weak" to support a finding of abusive conduct. We will not reweigh R.R.'s testimony. We must assume that R.R.'s version of the prior domestic violence events is true. Under this framework, there is ample evidence that Tayler engaged in abusive behavior on multiple occasions between the time Tayler and R.R. started dating in July 2018 and the date he unlawfully imprisoned her in July 2019. Any rational trier of fact could have found beyond a reasonable doubt that these multiple incidents constituted a pattern of psychological or physical abuse. *See State v. Brush*, 5 Wn. App. 2d 40, 54-55, 425 P.3d 545 (2018) (criticism of another that is hurtful, mocking comments, threats that do not rise to the level of true threats, and vulgar insults can constitute psychological abuse).

Tayler suggests that we should evaluate the sufficiency of the evidence as we would when addressing an alternative means of committing a crime. Under this rule, a defendant may have the right to a unanimous jury determination as to the means by which they committed a crime when they are charged with an alternative means crime. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). In

reviewing this type of challenge, courts apply the rule that when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required. *Id.* If, however, there is insufficient evidence to support any means, a particularized expression of jury unanimity is required. *Id.*

But this rule only applies to alternative means statutes. An alternative means crime is one "that provide[s] that the proscribed criminal conduct may be proved in a variety of ways." *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Alternative means describe distinct acts that amount to the same crime. *State v. Espinoza*, 14 Wn. App. 2d 810, 819, 474 P.3d 570 (2020) (citing *State v. Barboza-Cortes*, 194 Wn.2d 639, 644, 451 P.3d 707 (2019)). But where there are alternative ways to satisfy each alternative means (i.e., "a means within a means"), the alternative means doctrine does not apply. *Smith*, 159 Wn.2d at 783 (quoting *In re Pers. Restraint of Jeffries*, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988)).

RCW 9.94A.535(3)(h)(i) does not describe distinct acts amounting to a pattern of abuse. While the statute talks about psychological, physical or sexual abuse, the State does not have to elect which form of abuse it contends occurred. Indeed, all three forms of abuse can be a part of the same pattern. The statute only requires that the jury find, and be unanimous in finding, that there was a pattern. Because RCW 9.94A.535(3)(h)(i) is not an alternative means statute, the jurors did not need to unanimously agree as to which specific incidents occurred and which

ones did not. Sufficient evidence supports the jury finding of abuse.

7. "True Threat" Instruction

Tayler next argues the trial court erred in denying his proposed jury instruction defining a "true threat." We reject this argument.

We review a challenge to a jury instruction de novo, evaluating the jury instruction "in the context of the instructions as a whole." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *Barnes*, 153 Wn.2d at 382.

Tayler requested that the jury be instructed that "[a] true threat is a statement made in a context or under such circumstances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat." He argued this instruction was necessary for the jury to determine whether Tayler had actually restrained R.R. by threatening her. The trial court declined his request, concluding that Tayler was still able to argue his theory of the case without it and that it was not relevant to an element the State had the burden of proving.

A trial court must give the jury an instruction defining "true threats" when crimes prohibiting threatening language, such as felony harassment, bomb threats,

telephone harassment, and the intimidation of a judge or other public servant. *State v. Clark*, 175 Wn. App. 109, 114, 302 P.3d 553 (2013); *State v. Tellez*, 141 Wn. App. 479, 483-84, 170 P.3d 75 (2007); *see also State v. Dawley*, 11 Wn. App. 2d 527, 455 P.3d 205 (2019). Tayler has identified no case in which a court has held that a true threat instruction is needed when the charge is unlawful imprisonment.

In order to establish unlawful imprisonment, the State had to prove that Tayler knowingly (1) restrained R.R.'s movements in a manner that substantially interfered with her liberty; (2) that such restraint was (a) without R.R.'s consent or (b) accomplished by physical force, intimidation, or deception; and (3) without legal authority. RCW 9A.40.040; RCW 9A.40.010(6). Tayler argues that because the State based its case on the theory that Tayler intimidated R.R. into remaining in the trailer against her will, rather than using force to do so, he can be criminally liable for this intimidation only if it rose to the level of a true threat and the State proved he intended to intimidate her.

The question, not addressed by Tayler, is whether the unlawful imprisonment statute regulates pure speech such that it "must be interpreted with the commands of the First Amendment clearly in mind." *Dawley*, 11 Wn. App. 2d at 537 (quoting *State v. Williams*, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001)) (internal quotations omitted). A statute that criminalizes pure speech is constitutionally overbroad and can survive a challenge by limiting its reach to true threats. *Id.* at 541. If, however, the crime is a mixed conduct and speech crime, "'a sufficiently

important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.'" *Id.* at 542 (quoting *State v. Strong*, 167 Wn. App. 206, 215, 272 P.3d 281 (2012)).

The key issue is whether the statute's objective is to regulate conduct, with only an incidental impact on speech. *Strong*, 167 Wn. App. at 215. In *Strong*, Division Three of this court rejected an argument that the extortion statute was an unconstitutional infringement on pure speech. It reasoned:

> A threat falling short of a true threat will be protected from punishment as pure speech. But when the threat is a part of verbal and other conduct whose criminal punishment can be justified independent of the speech, the wrong, collectively, is not guaranteed protection from criminal punishment.

Id. at 219-20 (citations omitted). We conclude that the unlawful imprisonment statute's objective is to regulate conduct—forcing someone to remain in a place they do not wish to be. The fact that this restraint may occur through threatening words does not render the statute overly broad or violate the First Amendment such that a true threat instruction is required. The trial court did not abuse its discretion in rejecting Tayler's proposed true threat instruction.

8. Jury Unanimity Instruction

Tayler argues that the trial court erred in giving Instruction No. 18 because it did not require jury unanimity to reject the alleged aggravating circumstance, as required. *State v. Guzman Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012). Here, the trial court instructed the jury that

> In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

Thus, the jury assumed it did *not* need to be unanimous to reject the State's pattern of abuse allegation. In *Guzman Nuñez*, our Supreme Court held that unanimity is required to answer either "yes" or "no" on an aggravating factor special verdict form. 174 Wn.2d at 716-17. The State concedes that Instruction No. 18 was incorrect under *Guzman Nuñez*.

Even had Tayler preserved this issue for appeal,[7] he has not demonstrated that the error caused him any actual prejudice. In fact, the instruction operated to Tayler's advantage. Because the jury was instructed it had to be unanimous to conclude that that the aggravator had been proven, but did not have to be unanimous to reject it entirely, the erroneous instruction did not relieve the State of its burden to prove each element of the aggravating factor beyond a reasonable doubt and was therefore harmless. *See State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002) (erroneous jury instruction omitting or misstating element is subject to harmless error to determine if error relieved State of burden to prove each element).

9. Judicial Discretion to Impose an Exceptional Sentence

Finally, Tayler argues his sentence violates the Sixth Amendment because the sentencing court has "unrestrained discretion" to accept or reject a jury finding of an aggravating factor and to decide the length of an

7. We question whether Tayler failed to preserve this issue for appeal. Failure to timely object usually waives the issue on appeal, including issues regarding instructional errors. RAP 2.5(a). Tayler objected to the instruction, based on the court's refusal to bifurcate the special verdict form on the sentencing aggravator, but did not argue that jury unanimity was needed to answer "no" on the alleged aggravator. *See State v. Loos*, 14 Wn. App. 2d 748, 757, 473 P.3d 1229 (2020) ("If a defendant raises one objection to an instruction at the trial level, but then challenges an instruction on different legal grounds for the first time on appeal, this court will not consider the new argument.").

exceptional sentence based on the jury's finding.[8] Tayler contends that under *Alleyne* and *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), a jury must not only find whether an aggravating circumstance exists but must also determine the sentence to be imposed. Neither case applies here.

Under the SRA, if a jury unanimously finds beyond a reasonable doubt the existence of "one or more of the facts alleged by the state in support of an aggravated sentence," the court may impose an exceptional sentence "if it finds, considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). "[O]nce the jury by special verdict makes the factual determination whether aggravating circumstances have been proved beyond a reasonable doubt, '[t]he trial judge [is] left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.'" *State v. Sage*, 1 Wn. App. 2d 685, 708, 407 P.3d 359 (2017) (quoting *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006)).

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8. The State argues that we should decline to address this issue because Tayler failed to raise it below. However, errors implicating a criminal defendant's Sixth Amendment right to a jury trial may be raised for the first time on appeal. *State v. Hughes*, 154 Wn.2d 118, 143, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *State v. O'Connell*, 137 Wn. App. 81, 89, 152 P.3d 349 (2007). Thus, we address it on its merits.

If the jury finds an aggravating circumstance beyond a reasonable doubt, and the trial court concludes that the finding is a substantial and compelling departure from the standard sentencing range, the sentencing court is permitted to use its discretion to determine the precise length of an exceptional sentence. *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). This discretion is not absolute; any exceptional sentence may not exceed the maximum allowed by RCW 9A.20.021 for the underlying conviction. RCW 9.94A.537(6). Any exceptional sentence is subject to review to ensure that the reasons given by the court for the sentence are supported by the record, or that the sentence is not clearly excessive. RCW 9.94A.585(4).

Unlawful imprisonment is a Class C felony, the maximum sentence for which is five years in prison and a $10,000 fine. RCW 9A.40.040(2), RCW 9A.20.021(1)(c). Tayler's sentence of twelve months and a day does not exceed the five years maximum allowed by law. Nor does he assign error to the sentence as unsupported by the record or clearly excessive.

Instead, Tayler contends the jury must decide the duration of his sentence. But neither *Alleyne* nor *Hurst* support this argument. As indicated above, the Supreme Court in *Alleyne* vacated an enhanced prison sentence because, under the Sixth Amendment, whether the defendant had brandished a firearm during the commission of a crime of violence (the fact that increased the statutorily mandated penalty), had to be decided by a jury, not the sentencing court. 570 U.S. at 115. *Alleyne* did not address whether the Sixth Amendment places any

limits on a sentencing court's discretion to determine the length of an enhanced sentence when that discretion is conferred by statute.

Nor does *Hurst* address this issue. In that case, the Supreme Court considered the constitutionality of Florida's death penalty statute that employed a hybrid proceeding in which a jury rendered an advisory sentence of life or death without specifying the factual basis for its recommendation and the sentencing court then weighed aggravating and mitigating circumstances and decided whether to impose a death sentence. 577 U.S. at 95-96. The court invalidated the statutory process under the Sixth Amendment because the jury did not make factual findings as to the existence of any aggravating circumstances. *Id.* at 98.

Tayler argues that, under *Hurst*, the aggravator must be linked to a sentence imposed with no discretion given to the trial judge. Otherwise, he contends, the sentence permitted under the Washington sentencing scheme becomes "untethered to the jury determination of the aggravator factor." But the issue in *Hurst* was not that the trial court was given discretion to decide what sentence to give. The issue was that the jury never made factual findings with regard to the existence of mitigating or aggravating circumstances and the trial court had no jury findings on which to rely when exercising its sentencing discretion. *Id.* at 99-100.

Washington's sentencing procedure does not suffer from the defect found in *Hurst*. RCW 9.94A.537 mandates

that a jury must determine whether an aggravating factor exists and the State must prove that aggravating circumstance beyond a reasonable doubt. The trial court's conclusion that an exceptional sentence was warranted did not violate the Sixth Amendment.

We affirm.

/s/ Andrus A.C.J.

WE CONCUR

/s/ Mann, C.J. /s/ Verellen, J.

APPENDIX C — EXCERPT OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WHATCOM, DATED DECEMBER 11, 2019

[934]IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF WHATCOM

COA No. 81001-4

Cs. No. 19-1-00717-37

STATE OF WASHINGTON,

Plaintiff,

vs.

FLOYD TAYLER,

Defendant.

TRIAL

VOLUME 7
PAGES 934-1096

VERBATIM REPORT OF PROCEEDINGS

WEDNESDAY, DECEMBER 11, 2019

THE HONORABLE LEE GROCHMAL, JUDGE

Appendix C

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[948]MR. JONES: But I don't have a copy of it.

THE COURT: I will get that from her.

All right. But otherwise, that's agreed then with those changes?

MR. JOHNSTON: Yes, yes, that's agreed.

THE COURT: And then let's get back to the special verdict form.

MR. JOHNSTON: Wait a second. We still have a concluding instruction.

THE COURT: That's what I mean. It's about 1.50.

MR. JOHNSTON: And I will object to this.

THE COURT: We're going to come back to that.

MR. JOHNSTON: Okay.

THE COURT: We'll put that aside for now.

MR. JOHNSTON: All right.

THE COURT: And then the basic concluding instruction 1.51, does that look okay?

MR. JOHNSTON: Yes.

THE COURT: Okay, and then the verdict forms that we need to discuss. Okay. So Mr. Jones has proposed the WPIC with the aggravating circumstance of aggravated domestic violence.

MR. JOHNSTON: So this is WPIC 300.02.

THE COURT: Yes, and that the instruction tells you, yes, if they find the defendant guilty of Unlawful [949] Imprisonment, then they must determine if the crime is an aggravated domestic violence offense, and then the next instruction gives the elements for aggravated domestic violence. Then they have to prove beyond a reasonable doubt that the victim and the Defendant were family or household members, which is defined in that other instruction we've already approved, and that the offense was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time.

They need to find each of those elements beyond a reasonable doubt in order to answer yes on the special verdict form. If they have a reasonable doubt as to either element, they must answer no on the special verdict form. I think that states the law accurately, but I think Mr. Johnston that you disagree with that.

MR. JOHNSTON: Yes, I would object to this, because it's my position that any act that results in the imposition of punishment in this case, the Court has no authority to

proceed beyond the, I think it's one to three months is the standard range. So what is it that Mr. Tayler did that results in his being punished, and the idea that he was a part of an ongoing pattern of whatever is not adequate, as is apparent from my proposed instruction. They have to have the two, would be 1(a), [950]that the Defendant committed the crimes or bad acts alleged. We can put that in there, and then we can finish it with my concluding instruction.

THE COURT: So Mr. Johnston, you're proposing that we instruct the jury that they need to find the underlying facts for the aggravating factor beyond a reasonable doubt?

MR. JOHNSTON: Correct.

THE COURT: Okay.

MR. JOHNSTON: Otherwise, they can't be used to increase the sentence.

THE COURT: I understand.

MR. JOHNSTON: In other words, the ongoing pattern, particularly of psychological abuse is an unusual crime or something that results in punishment. It's amorphous. I don't know what it means, but I do know what those six aggravator incidents and the baseball bat means. So my position is pretty clear, and I've said it in the brief.

THE COURT: Okay, and I reviewed your brief, and I've considered this, and I do not agree that the jury has to find the underlying facts beyond a reasonable doubt. The jury needs to find beyond a reasonable doubt that the victim and the Defendant were family or household members, and they also need to find that there was an ongoing pattern of psychological, physical, or psychological abuse [951]manifested by multiple incidents over a long period of time.

The 404(b) evidence that was admitted at trial was admitted as a basis for that factor, but the jury needs to find beyond a reasonable doubt that there was that pattern, the ongoing pattern, but multiple instances over a prolonged period of time. They do need to find that there were multiple incidents, and they do need to find that beyond a reasonable doubt, and that's what the instruction tells them, but they don't need to find each 404(b) incident that was admitted, they don't need to find beyond a reasonable doubt that that happened. They just need to find that there were multiple incidents over a prolonged period of time, and the other elements that are in the instruction. They need to find that beyond a reasonable doubt. So I'm going to deny your request to have an instruction that they need to find each factor beyond a reasonable doubt.

MR. JOHNSTON: Right, but just to respond respectfully to what the Court is saying, without addressing each specific act and having a jury decide whether the act was committed or not, you leave open Pandora's box. In other words, hypothetically, what if

there was my instruction given, and the jury bought the Christmas present incident and the glasses incident, and rejected the other four. [952]That would raise a question of a sufficiency of evidence to support the finding of a pattern, which results in an enhanced sentence.

THE COURT: They're required to find multiple incidents. That's what the instruction tells them.

MR. JOHNSTON: Multiple could be two, Judge.

THE COURT: And that would be satisfactory.

MR. JOHNSTON: But you wouldn't know what they found.

THE COURT: Right.

MR. JOHNSTON: I mean, I'm not trying to argue with the Court. I read those supreme court cases about where *Apprendi* is going, and it's my position that the operative facts, not pattern, not incidents, what did they do has to be addressed by the jury, but I've made my argument abundantly clear. I respect the ruling of the Court.

MR. JONES: If that were the state of the law, which it isn't, I don't believe, if it were, it would have the same effect as any evidence presented at trial where we ultimately ask the jury to make a finding beyond a reasonable doubt based on everything that's been admitted at the case and to try to line item everything that's been admitted and

have individual findings as to each piece of evidence that leads to a whole is not, that's not how the law works.

THE COURT: I agree with that, and we don't ask the [953]jury to find specific facts beyond a reasonable doubt to support their ultimate conclusion on the ultimate issue, so it's the same with an aggravating factor.

MR. JOHNSTON: Might I inquire what is the burden of proof of the jury's resolution of the six enumerated facts? Can they find that by a preponderance?

THE COURT: Well, the Court has always -- already found that they're admissible because --

MR. JOHNSTON: But one of the problems that I have with these instructions given my position as taken is the instructions are defective because they're unclear as to what the purpose is as to how, whether they determine the underlying incidents have been proven without --

THE COURT: The instruction is that they must find beyond a reasonable doubt that the offense was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time. So they need to find beyond a reasonable doubt that multiple incidents of abuse happened over a prolonged period of time. They do need to find that. If they think there was just one incident, that's not satisfactory, and they shouldn't find beyond a reasonable doubt that this is aggravated domestic violence. They need to find beyond a reasonable doubt, and that's what the instruction says,

multiple incidents over a prolonged [954]period of time. So if they have reasonable doubt about all of those prior incidents or even all but one of those prior incidents, then they should, they should answer no on that special verdict form. That' s the way I read that. I think that's pretty clear, and I think you can argue that.

MR. JOHNSTON: I'm understanding -- I want to make clear, it's not the aggravator. The support of the aggravator i s not limited to the enumerated 404 evidence.

THE COURT. Right.

MR. JONES:I've presented evidence about this entire relationship.

THE COURT: There may be others that support that factor.

I'm going to give 300.02 over objection of the Defense, and then 300.17, I'm also going to give that instruction over objection of the Defense.

Then we've got the family or household members that we already discussed, and then we've got the limiting instruction on the 404(b) evidence. So the State's proposed instruction indicates that certain evidence has been admitted in this case regarding alleged acts of domestic violence committed prior to June 17th, 2019. You may consider these acts only for the following limited purposes: One, the state of mind of Rita Ross during the [955]alleged crime of Unlawful Imprisonment; and two, if you find

the Defendant guilty of Unlawful Imprisonment for the additional purpose of whether that crime constitutes an aggravated domestic violence.

Mr. Johnston, are you objecting to this?

MR. JOHNSTON: Well, you know, to be consistent, Judge, we object to the admission of 404(b), so we would object to this. But in addition, I've already made the record clear that this is a confusing instruction if at the same time they're asked to consider these acts for the limited purpose, and at the same time they're asked as the Court has interpreted the instructions to find beyond a reasonable doubt multiple incidents. So they're considering it for a limited purpose, but they're also considering it as a factual issue to determine beyond a reasonable doubt. So they're considering it for two different purposes, and they're at odds with each other, but really, that objection is just derivative of my general position on bifurcation. The Court knows where I'm going.

THE COURT: If the evidence did come in because I allowed that evidence to come in, I assume you would want a limiting instruction so that the jury is not considering that evidence for improper purposes for showing propensity?

[955]MR. JOHNSTON: Well, I think they are considering it for the improper purpose of propensity, because that's what is inherent in the finding of the aggravator, and that' s why I told-- I said to the Court. The statute, you know, I don' t know the legislative history

of the statute, but as an old DUI lawyer, I'm thinking that the legislature is thinking they don' t want to have multiple incidents to infect the case, but they forget to figure out that second criteria, but you can' t have them consider it for a limited purpose, and then in the same deliberation with the same argument, they did this beyond a reasonable doubt. It's just -- because a juror might say, well, I thought we were supposed to be using this for a limited purpose. So to me, it's confusing.

THE COURT: Yes, it is confusing, I agree. It's a limited purpose, two limited purposes. It's admitted for two limited purposes. So we want to make sure that the jury doesn't use that evidence for improper purposes, which would be propensity.

So if you, if you want to propose something that you think is clearer, we can certainly consider that, an instruction that you think makes that more clear if you think there is one.

MR. JOHNSTON: I don' t think it's possible.

THE COURT: Okay. So then –

[957]MR. JOHNSTON: I don't think it's possible for them to consider it for a limited purpose that, just to show she was afraid in the chair, and then to show, beyond a reasonable doubt to show that it is a propensity he's a domestic violence repeater, and there's no way you can reconcile those except by bifurcation. So I object on that basis.

THE COURT: What I'm going to suggest on this instruction is that I would add in paragraph one, I would say for determining the state of mind of Rita Ross during the alleged crime of Unlawful Imprisonment; and then two, if you find the Defendant, you can leave that the way it is. I'm willing to put in some language if the Defense is requesting it that you are not to consider evidence of alleged acts of domestic violence committed prior to June 17th, 2019, for purposes of determining the Defendant's propensity to commit a domestic violence offense. I'm willing to put that in there if the Defense is requesting it, but if the Defense is not requesting it, then I will go with what the State is suggesting. This is a limiting instruction that's intended to help the Defense because of -- I've allowed the evidence in over your objection, and I'm instructing the jury for the limited purposes for which they can use that. So if you want to add something to that, this is your opportunity to do it. If you don't [958] want to, that' s fine. If you think that makes it more confusing, I understand, but I'm giving you that opportunity, and I can reserve if you want to come back on that.

MR. JOHNSTON: I don't know what I'm going to do on that one.

THE COURT: Okay.

MR. JOHNSTON: I think I stand on my objection of bifurcation.

THE COURT: Okay. All right. So then we'll – with that minor edit that I've given you, then we'll use this, this instruction over Defense objection.

Okay. Then we've got the special verdict form concluding instruction, 160.

MR. JOHNSTON: Well, I object to that as I've already objected. I'm sticking to my position on bifurcation.

THE COURT: Okay. I'm going to use this instruction 160.00, and then we have the verdict form which is proposed by the State. I understand your objection, your objections. I'm going to use the State's.

MR. JOHNSTON: This is the one about household?

THE COURT: No, just the Verdict Form A.

MR. JOHNSTON: Yes, about members of the family household?

THE COURT: No, no, this is Unlawful Imprisonment and [959]Assault in the Fourth Degree verdict form.

MR. JOHNSTON: Which one?

MR. JONES: It' s captioned as just verdict form.

MR. JOHNSTON: Oh, I see. I don't see anything wrong with that verdict form, just the regular verdict form.

THE COURT: Okay. Then the Special Verdict Form A is the household.

MR. JOHNSTON: Well, the problem with that is I would object to that. I would question on or about whatever the date we find beyond a reasonable doubt that Floyd and Rita Tayler were members of the same household, because I think the verdict forms --maybe I'm wrong in this regard.

THE COURT: Is there an instruction in that regard?

MR. JONES: Yes, I think it' s in the introduction to the special verdict forms that we just looked at. It's in 160.

THE COURT: Oh, okay.

MR. JONES: You must be unanimously satisfied beyond a reasonable doubt to answer yes on the verdict, special verdict forms. So it tells them - -

MR. JOHNSTON: Okay. All right. That was –

MR. JONES: One six zero.

THE COURT: Okay.

MR. JOHNSTON: We're objecting to these forms for bifurcation purposes.

[960]THE COURT: Okay.

MR. JOHNSTON: Other than that, it looks like what Mr. Jones said cures the problem I enunciated. This in Special Form A.

Appendix C

THE COURT: Noting Defendant's objection, I'm using State' s Special Verdict Form A and B.

Mr. Johnston, you have a proposed instruction on true threat?

MR. JOHNSTON: What's that?

THE COURT: You have a proposed instruction on true threat?

MR. JOHNSTON: Are we going to do Special Verdict Form B, because it looks like the introductory instruction makes clear that that's beyond a reasonable doubt, right?

MR. JONES: Right. So that, that looks like it's okay.

THE COURT: Okay.

MR. JOHNSTON: And now, yeah, true threat, I want to have that instruction given.

THE COURT: And why is that relevant?

MR. JOHNSTON: Because we have a situation here where we have an argument going back and forth, and the question is really is this what Mr. Tayler said, was the threat, is really that a true threat. I mean, I think the case cited was one where the student said I'm going to punch you with this and that, and the high court overturned the

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APPENDIX D — RELEVANT STATUTORY PROVISION

Effective: July 28, 2019

West's RCWA 9.94A.535

9.94A.535. Departures from the guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be

appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(k) The defendant was convicted of vehicular homicide, by the operation of a vehicle in a reckless manner and has committed no other previous serious traffic offenses as defined in RCW 9.94A.030, and the sentence is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(2) Aggravating Circumstances--Considered and Imposed by the Court

Appendix D

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances--Considered by a Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

(ff) The current offense involved the assault of a utility employee of any publicly or privately owned utility company or agency, who is at the time of the act engaged in official duties, including: (i) The maintenance or repair of utility poles, lines, conduits, pipes, or other infrastructure; or (ii) connecting, disconnecting, or recording utility meters.