IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66632-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
JESSE MARION WHITE,	)	
	)	
Appellant.	)	FILED: August 20, 2012

Schindler, J. — A jury convicted Jesse Marion White of assault in the second degree while armed with a deadly weapon, assault in the second degree by strangulation, felony harassment, reckless endangerment, and unlawful possession of a firearm. The jury also found that White was armed with a firearm and the crimes of assault in the second degree and felony harassment were aggravated domestic violence offenses. White claims the convictions for assault in the second degree while armed with a deadly weapon and assault in the second degree by strangulation violate double jeopardy. White also claims the information did not allege an essential element of the crime of felony harassment, and his attorney provided ineffective assistance of counsel. We affirm.

FACTS

Jesse White and Raina Stevens started dating in 2005. The couple began living together in February 2006, and in July 2007, their daughter N.W. was born.

Stevens testified that White's use of drugs was an "ongoing battle" during their relationship. Stevens said that beginning in March 2010, his behavior became "erratic," he was "very controlling," and was acting "very strange." Stevens testified that White threatened "to commit suicide constantly," and "told our daughter that he was going to die, that this was the last time . . . she was going to see him." After Stevens found e-mail and text messages that showed White was selling, as well as using, drugs, Stevens decided that she needed to move out and "get my daughter out of that situation."

In early April, White left to go to Portland for a few days. While he was gone, her father Bill Spies helped Stevens move out of the house and into an apartment. During the move, Spies found a revolver, a holster, an air pistol, and two speed-loaded cartridges in a hat in the master bedroom. Spies told Stevens they "needed to get rid of [the guns]." Spies testified that he "knew that if [the guns] were there and if Jesse . . . got a[ ]hold of them that there could potentially be a danger in that, and also he wasn't supposed to have handguns." Stevens placed the revolver in a plastic bag and buried it in the backyard.

Stevens called White before he returned from Portland to tell him that she had moved out. On April 11, Stevens, N.W., and her father drove to the train station to pick up White. When they arrived at the house, they talked for approximately an hour. Before Spies left, White asked him about his gun. Spies told him, " 'Well, you don't

need any guns. You know that you can't have them or you could be in big trouble.' "

Spies testified that before he left, he and White talked a little bit more.

> [W]e talked a little bit more about what his -- what had gone wrong and why things were the way they were. . . . [W]e talked about what he was going to be doing different in the future and in order to have any chance of having things go back to the way they were before [Stevens] moved out.

Stevens and N.W. left to get dinner. White called to ask about his gun. Stevens told White that her father had the gun. White then called Spies. Spies told White that he did not have the gun, and White should talk to Stevens.

When Stevens and N.W. returned, White insisted Stevens tell him where she put the gun. "[H]e was really focused on the gun. He said I want to know where my gun is. I need to know where my gun is." Before she left, Stevens told White she buried the gun in the backyard.

White got into his car and followed Stevens. When Stevens pulled into a parking lot, White pounded on the car window, demanding to talk to her. Stevens told White she would talk with him the next day. Before returning to her apartment, Stevens made sure White was no longer following her.

Stevens said that she agreed to meet with White the next day because she "really wanted to find an agreement" and do what was best for N.W. Stevens and N.W. arrived at White's house sometime between 1:30 p.m. and 2:00 p.m. N.W. was asleep in the car. Stevens carried N.W. into the house. Stevens testified she only had her car keys and cell phone with her.

While N.W. took a nap, Stevens and White talked about their relationship and

N.W. White told Stevens that N.W. should stay with him "all the time," and did not want Stevens "to take [N.W.] from the house at all." Stevens said White "focused on the gun again." He accused her of lying about the location of the gun and "wanted to know where his gun was." Stevens went out on the deck and showed White where she buried the gun in the backyard. Stevens heard N.W. waking up and went inside to take care of her.

When White came back inside, he slammed the door and cursed Stevens, calling her a " 'fucking bitch' " and " 'fucking idiot.' " Stevens carried N.W. to the living room and sat at the end of the u-shaped couch. White sat down on the other end of the couch. After White continued "cussing," Stevens told him, "I don't want [N.W.] to hear that. . . . [M]aybe we should try to work this out at another time." In response, White told Stevens she was not going to take N.W. with her.

> [N]o, this is what we're going to do. [N.W.] is going to stay here with me. [I]f you ever want to see her, you're going to come here. You're never going to take her from this house, and you're going to just have to come back here to see her.

Stevens told White, "[N]o, that's not the way it's going to work." She said that if they could not reach an agreement, she would have to go to court. White then pulled out a gun, pointed it at Stevens, and threatened to kill her. White said, "[N]o, that's not the way it's going to work. I'm going to fucking kill you." Stevens pushed N.W. to the side and stood up.

> Immediately after I said if we can't figure it out between each other we're going to have to get the court involved, [White] immediately stood up and pulled a gun from behind him and pointed it at me. And I still had [N.W.] on my chest. So I immediately just pushed her to the side and stood up . . . . so he wasn't pointing the gun at both of us.

White grabbed Stevens by the hair, threw her face-down on the floor, and repeatedly hit her in the back of the head. Stevens covered her neck with her hands. White told her that she was going to "fucking die." N.W. was screaming, "just hysterical screaming." When Stevens started to get up, White placed his hands around her neck "so [she] couldn't breathe." When Stevens "saw the gun sitting down by [her] feet," she lunged for the gun. Stevens grabbed the barrel of the gun, trying to point it away. At the same time, White grabbed the handle of the gun.

As they struggled over the gun, Stevens told White he could hurt N.W. Eventually, White said, " 'I'll let go, you let go.' " Stevens let go of the gun, grabbed N.W., and sat on the couch.

White told Stevens that it was all her fault, slapped her, and threatened to kill her, kill N.W., and kill himself if she called the police.

> "You better not even be thinking about calling the police because if you do I'm going to kill you and kill [N.W.] and kill myself. We're all going to die. If you ever leave here and call the police I will kill [N.W.] and I will kill myself."

White also threatened to kill her family if they contacted the police. " 'If any of your family calls the police, I will kill every single member of your family starting with your mother.' " White told Stevens, " 'I know people right now that will kill your mother. Believe me, all I have to do is make a call.' "

Stevens said that she tried to "get the situation to a point where it was under control. . . . [J]ust doing anything I could to appease [White] and to agree with him and to basically saying anything I could to just get him calmed down." Stevens told White she was sorry and that she and N.W. would spend the night. When Stevens tried to

leave with N.W. to get the child's pajamas, White "ripped [N.W.] out of my arms," pushed Stevens outside, and locked the door. Stevens said that N.W. was screaming, " 'Mommy, please don't leave me.' Just a terrified scream."

Stevens called her mother, and then called 911. Stevens told the 911 operator that she was afraid White would hurt their child because he "pulled" a gun on Stevens, threw her on the ground, hit her, and threatened to kill her if she called the police.

Approximately ten minutes after the 911 call, Snohomish County Sheriff's Deputy Joan Herwick met Stevens at her apartment. Deputy Herwick said that Stevens had obvious bruises on her neck and arms, and was "visibly upset" and scared. Deputy Herwick said that Stevens was "afraid that [White] was going to kill their daughter if he found out that she called 911." Deputy Herwick testified, in pertinent part:

> Q. Did you -- were you able to observe [Stevens'] demeanor at any point with regard to her voice, what it sounded like while you were on the phone with her?
> A. Yes, sir. She was very shaky. You could tell she was crying. She had to stop several times because she was crying. She was very concerned about the well-being of her daughter. That was repeatedly said during our conversation.
> Q. How long did you talk to her for at this point?
> A. Not very long. A few minutes. I wanted to -- I told her that I wanted to see her face-to-face, that I would need things like statement forms and things like that from her. So she told me the address of her apartment and we agreed to meet there. It was only a few minutes away.
> Q. Did you respond to that location?
> A. I did.
> Q. How long do you think it took you from the time you got dispatched to the time that you made it to the location where you were meeting her?
> A. Not very long. Maybe ten, 15 minutes.
> Q. So what happened -- you apparently went to that location.
> A. Uh-huh.
> Q. What did you do then?
> A. I knocked on her door. I found her vehicle. She had said that she

> would meet me there. I, you know, found her vehicle, knocked on her door. She was -- when I saw her for the first time she was visibly upset, smeared makeup, face was red from crying, tears coming down her face, eye makeup running down because of the tears. She had obvious bruises, fresh bruises on her neck and her arms. She was very shaky. Any time while we were talking -- it's an apartment building so you can hear sounds from other buildings, any time there was any sort of cracks or thuds or anything coming from any other apartment, she would jump, her eyes would dart around. She appeared very afraid.

Deputy Herwick, Deputy Marti Weinbaum, Deputy Carl Gilje, Deputy Randall Murphy, and a number of other officers went to White's house to retrieve N.W. When they arrived, Deputy Murphy saw White running down a steep wooded ravine behind the house with N.W. After pursuing White for approximately 15 minutes, the police found him crouched behind some bushes holding N.W. N.W. was crying. N.W. held out her arms to Deputy Murphy and said, " '[P]lease hold me.' "

Deputy Murphy testified that when he arrested White, White said, " 'Shoot me. Please shoot me.' " In a search of the house, officers found "speed loaders and some ammunition and the holster on top of a cabinet, . . . drug paraphernalia, and . . . the revolver in the closet" of the master bedroom.

The State charged White with assault in the first degree while armed with a deadly weapon, Count I; assault in the second degree by strangulation, Count II; felony harassment, Count III; unlawful possession of a firearm in the second degree, Count IV; and reckless endangerment, Count V. The information also alleged that White committed the assaults while armed with a firearm, and that the commission of the assaults and felony harassment were aggravated domestic violence offenses. White pleaded not guilty. White claimed that he acted in self-defense.

A number of witnesses testified at trial, including Stevens, her father Bill Spies, Deputy Herwick, Deputy Murphy, a forensic nurse, and an emergency room doctor. The court admitted a number of exhibits into evidence, including the 911 call, photos of the injuries sustained by Stevens and N.W., as well as the items seized from the home. Forensic nurse Paula Skomski testified that she examined Stevens and took photographs of her injuries. Skomski said Stevens had swelling on her forehead, and bruising and marks on her neck consistent with strangulation.

White testified that Stevens attacked him and he acted in self-defense. According to White, after Stevens told him she would not leave without N.W., he told her to "get the fuck out of my house." White said Stevens then pulled a gun from her purse, pointed it at him, and said, " 'Fuck you, Jesse.' " White testified that he ran toward Stevens and grabbed her arm to get the gun away from her.

White admitted that he grabbed Stevens by the hair, pulled her down to the floor, and straddled her.

> . . . I grabbed her arm and I grabbed the gun at the same time and I started wrenching it away from her, pulling it up and away from myself. I was trying to pull it away from myself. I couldn't get it to clear my body. I thought I was going to get shot at any second.
>
> So I grabbed her hair and pulled her down and I went down with her. As soon as I got her on the floor, I straddled her and I held her arm down and I got --
>
> Q. Jesse, okay. So how -- did you grab the left side of her -- which hand did you grab her hair with?
> A. I grabbed her with my right hand.
> Q. With the left you were holding the gun?
> A. Yes.
> Q. So you pulled her down. You literally pulled her at an angle?
> A. My adrenaline was going. I yanked her hard and I went down with her.

White testified that he choked Stevens because she would not let go of the gun. White said that after Stevens let go of the gun, he placed the gun on the counter. White said that Stevens then grabbed N.W., sat on the couch, and told him she was sorry.

> A. . . . I was trying to wrench the gun out of her hand with my thumb. "Raina, let go of the gun. Let go of the gun, Raina."
> Q. What was she doing?
> A. She wouldn't let go, and [N.W.] was like stop, stop, stop. This wasn't getting anywhere. So at that point I started to choke her and I said, "Raina, let go of the gun. Let go of the gun." And --
> Q. You were choking her with your right hand?
> A. Yes, choking her with my right hand. I had my left hand behind the trigger holding onto the gun in her hand. After choking her for a few seconds, she finally let go of the gun.
>
> As soon as she let go of the gun, I grabbed it, stood up, and there is a bar area that divides our kitchen and our living room, I put it right on the bar area and I said, "What just happened?" I was completely shocked about what had just happened. And Raina, she grabbed [N.W.] and she went on the couch and she said, "I'm sorry, I'm sorry, I'm sorry." And she had [N.W.] and [N.W.] was trying to help out, petting her face.
>
> And then I noticed that there was some hair on the ground. It was Raina's hair. I pulled out some of her hair. [N.W.] goes, "Mommy's hair." And I got up and grabbed the hair and took it back to the kitchen and then I walked back after that. I believe at that point I was like, "Are you okay? Did I hurt you? Did you need anything?"
> Q. Was Raina crying?
> A. No, she was definitely scared and frantic. We were both kind of shocked, very shocked about what had just happened.

White testified that he told Stevens to leave, and she left N.W. with him.

> I said, you know, "Maybe you can come back later and we'll talk later. Maybe after dinner or something. But right now you have to go." She didn't really want to go.
>
> She said, "Okay. Well, can I come back later? I'll bring [N.W.] some pajamas. She doesn't have any pajamas. I'll bring her pajamas for tonight."
>
> I say, "Okay. Maybe we can do that. I need to go get groceries. I'm going to go. I'll call you later. We'll talk later. But

right now we can't be together right now. It's obviously things just went way too far."
Q. So she left?
A. She left.

White said that the "main problem throughout our relationship has been the medications I've taken for my back pain." But White admitted that he sold drugs. On cross-examination, White also admitted that the syringes and other drug paraphernalia found in the house belonged to him, and he "snort[ed]" drugs. In addition, White admitted that he had been previously convicted of theft in the second degree, forgery in the first degree, and "bribe giving." White said that he ran from the police because he was scared for his safety and the safety of N.W.

The court instructed the jury on self-defense and instructed the jury on the lesser included offense of assault in the first degree while armed with a deadly weapon.

The jury convicted White of assault in the second degree with a deadly weapon, assault in the second degree by strangulation, felony harassment, unlawful possession of a firearm in the second degree, and reckless endangerment. The jury also found that White was armed with a firearm and the crimes of assault in the second degree and felony harassment were aggravated domestic violence offenses.

ANALYSIS

Double Jeopardy

White argues that his convictions for assault in the second degree while armed with a deadly weapon in violation of former RCW 9A.36.021(1)(c) (2007),[1] and assault in the second degree by strangulation in violation of former RCW 9A.36.021(1)(g)

[1] The legislature amended RCW 9A.36.021 in 2011 to add the words "or suffocation" to "[a]ssaults another by strangulation" in subsection (1)(g). Laws of 2011, ch. 166, § 1.

violate double jeopardy.

Whether the convictions violate double jeopardy is a question of law we review de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). The double jeopardy clause of the Fifth Amendment of the United States Constitution and article I, section 9 of the Washington State Constitution protect a defendant against multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 774-75, 888 P.2d 155 (1995).[2]

White asserts the convictions for assault in the second degree while armed with a deadly weapon and by strangulation violate double jeopardy because the legislature did not define the unit of prosecution in the assault statute, and "all acts occurring during the course of an assault constitute one unit of prosecution." Double jeopardy protects a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002).

When a defendant is convicted of multiple violations of the same statute, the court must determine what unit of prosecution the legislature intends as the punishable act under the statute. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). Subject to constitutional constraints, the legislature has the power to define criminal conduct and set out the appropriate punishment for that conduct. Calle, 125 Wn.2d at 776; State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). When a statute does not clearly identify the unit of prosecution, we resolve any ambiguity under the rule of

[2] The Fifth Amendment states, in pertinent part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution also guarantees that "[n]o person shall . . . be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9.

lenity to avoid " 'turning a single transaction into multiple offenses.' " Adel, 136 Wn.2d at 634-35 (quoting Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)).

The legislature defines the unit of prosecution in the assault statue in former RCW 9A.36.021 by setting forth seven distinct means of committing assault in the second degree. Former RCW 9A.36.021 states:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
> (c) Assaults another with a deadly weapon; or
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
> (e) With intent to commit a felony, assaults another; or
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
> (g) Assaults another by strangulation.
> (2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.
> (b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

Each distinct means of committing assault "comprises the criminal activity measured by the 'unit of prosecution.' " State v. Smith, 124 Wn. App. 417, 432, 102 P.3d 158 (2004).

Although there may be circumstances where two or more means occur simultaneously and result in only one offense, the record in this case does not support that conclusion. While the assault with the deadly weapon and the assault by strangulation were separated by only a brief period of time, each act constitutes a

separate means of committing the crime of assault in the second degree under former RCW 9A.36.021(1). White pulled out the gun, pointed it at Stevens, and told her that he was going to kill her. White grabbed Stevens by her hair, threw her face down on the floor, and punched her in the back of the head and neck, telling her she was going to die. But White then let go of the gun and used both hands to strangle Stevens. Accordingly, the convictions for assaulting Stevens with a deadly weapon, followed by a separate assault of her by strangulation, do not violate double jeopardy.

Charging Document

White asserts he is entitled to reversal because the amended information did not allege an essential element of the crime of felony harassment. White claims that "true threat" is an essential element of the crime. The information alleged, in pertinent part:

> [O]n or about the 12th day of April, 2010, without lawful authority, [White] knowingly threatened to kill another, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out; proscribed by [former] RCW 9A.46.020(1) and (2)(b)(ii)[(2003)[3]], a felony.

A charging document must allege "[a]ll essential elements of a crime, statutory or otherwise," to provide a defendant with sufficient notice of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). The primary purpose of the rule is to give the defendant sufficient notice of the charges so he can prepare an adequate defense. State v. Tandecki, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005).

Where the defendant does not challenge the sufficiency of the charging document, and instead raises his challenge for the first time on appeal, we construe the

[3] The legislature amended RCW 9A.46.020 in 2011 to add subsections (2)(b)(iii), (3), (4), and (5) addressing "harassment against criminal justice participants." Laws of 2011, ch. 64, § 1.

document liberally in favor of validity. State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). In determining the sufficiency of the charging document, we look at (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information; and (2) if so, whether the defendant nonetheless was actually prejudiced by the unartful language used. Brown, 169 Wn.2d at 197-98.

To avoid infringement of protected speech, the felony harassment statute prohibits only true threats. State v. Kilburn, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004).[4] Our supreme court defines "true threat" as follows:

> "[A] statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of

[4] Former RCW 9A.46.020 provides, in pertinent part:

(1) A person is guilty of harassment if:
(a) Without lawful authority, the person knowingly threatens:
(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.
[(2)](b) A person who harasses another is guilty of a class C felony if . . . (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened.

another person."

State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting Kilburn, 151 Wn.2d at 43).[5] The defendant need not actually intend to carry out the threat. "It is enough that a reasonable speaker would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283.

In Schaler, our supreme court held that a jury must be instructed that the State "must establish that a reasonable person in the defendant's position would foresee that his statements or acts would be interpreted as a serious expression of intention to carry out the threat." Schaler, 169 Wn.2d at 292. But the court expressly declined to reach the question of whether "the constitutionally required mens rea" of "true threat" is an essential element of a felony harassment charge, and expressly notes our decision in State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007). Schaler, 169 Wn.2d at 288, n.6.

> The situation is not identical to omitted-element cases. Whether the constitutionally required mens rea is an "element" of a felony harassment charge is a question that we need not decide. (We note that there is a Court of Appeals opinion on point, State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007), but we express no opinion on the matter.)

Schaler, 169 Wn.2d at 288, n.6.[6]

In Tellez, we rejected the argument that the State must allege "true threat" in the charging document as an essential element of the crime of felony harassment. Tellez, 141 Wn. App. at 483-84. We held that because the true threat "merely defines and limits the scope of the essential threat element, [it] is not itself an essential element of

[5] (Internal punctuation and quotation marks omitted.)

[6] (Emphasis in original.)

the crime" that must be alleged in the charging document. Tellez, 141 Wn. App. at 484; see also State v. Atkins, 156 Wn. App. 799, 805, 236 P.3d 897 (2010); State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784 (2011), review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011). We adhere to our decision in Tellez and reject White's argument that the State must allege true threat in the charging document.[7]

Ineffective Assistance of Counsel

Next, White claims his attorney provided ineffective assistance of counsel by failing to (1) request a limiting instruction on drug and drug paraphernalia evidence, (2) object to giving the first aggressor instruction, and (3) argue at sentencing that the convictions for assault in the second degree and felony harassment were the same criminal conduct.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, the defendant must demonstrate both (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) resulting prejudice. Strickland, 466 U .S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to establish either prong, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a strong presumption that trial counsel provided effective assistance. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). If defense counsel's trial

[7] We also note that although the amended information did not include the phrase "true threat," the language used conveys the true threat concept.

conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

We conclude that the decision to not request a limiting instruction for the drug-related evidence can be characterized as a legitimate strategy to avoid reemphasizing damaging evidence. See State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). And because there was conflicting testimony as to whether White or Stevens precipitated the altercation, the failure to object to the first aggressor instruction can also be characterized as a legitimate trial tactic or strategy. "An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." State v. Riley, 137 Wn.2d 904, 910, 976 P.2d 624 (1999).

For purposes of calculating the offender score at sentencing, multiple offenses encompass the same criminal conduct if the crimes involve the same (1) objective criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), aff'd, 148 Wn.2d 350, 60 P.3d 1192 (2003). If any one of these three elements is missing, the trial court must count the offenses separately. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). In deciding whether crimes involve the same intent, the court focuses on whether the defendant's intent, objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). The test takes into consideration how intimately related the crimes are, whether there was a change in the criminal objective, and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788

P.2d 531 (1990).

Here, while the offenses involved the same victim and were committed in the same place, White cannot establish that his intent, objectively viewed, was the same for the assault and felony harassment convictions. After committing the crimes of assault with a deadly weapon and assault of Stevens by strangulation, White had the opportunity to reflect and form a new intent to commit the separate and distinct crime of felony harassment. White's threat to kill Stevens, N.W., and her family also had a different objective. State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007). Stevens testified that after White assaulted her while armed with a deadly weapon and choked her, she grabbed N.W. and sat on the couch. White then threatened to kill her, kill N.W., and kill " 'every single member of [her] family' " if she called the police. Because White fails to meet his burden of showing the result of sentencing probably would have been different, his claim of ineffective assistance of counsel fails.

Statement of Additional Grounds

In his statement of additional grounds, White contends the trial court erred in instructing the jury that it must be unanimous to answer "no" on the special jury verdict form for the aggravating factors in violation of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). In State v. Nunez, Nos. 85789-0, 85947-7, 2012 WL 2044377, at *1 (Wash. June 7, 2012), our supreme court overruled the nonunanimity rule set forth in Bashaw, concluding that it "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." In reaching this decision, the court noted that for aggravating

circumstances, under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the legislature "intended complete unanimity to impose or reject an aggravator." Nunez, 2012 WL 2044377, at *4 (citing RCW 9.94A.537(3)). There was no error in the special verdict instructions.

White also asserts that the trial court erred by imposing a 36-month firearm enhancement for his conviction for domestic violence assault in the second degree while armed with a deadly weapon. But under RCW 9.94A.533(3)(b), the sentencing court must add "[t]hree years for any felony defined under any law as a class B felony" if the offender was armed with a firearm, the trial court did not err in imposing the firearm enhancement.[8]

Next, White claims for the first time on appeal that the prosecutor committed misconduct in closing argument by improperly relying on facts not in evidence, misrepresenting the burden of proof and the presumption of innocence, and asserting a personal belief in White's guilt. White cannot show that the arguments were so flagrant or ill-intentioned that any prejudice could not have been cured by an instruction from the court. See State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

We affirm.

WE CONCUR:

[8] White also argues that the trial court violated his right to a fair trial by responding to inquiries from the jury during deliberations. But the record does not include any information regarding the trial court's review of the jury's inquiries, or court communication with counsel before responding to the inquiries. See McFarland, 127 Wn.2d at 338, n.5.