Supreme Court No. 100636-5
(COA No. 37788-1-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Shawn VanZandt,

Petitioner.

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

PETITION FOR REVIEW

Kate L. Benward
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katebenward@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Statutes

Rules

Constitutional Provisions

Washington Court of Appeals Decisions

A. INTRODUCTION

Voir dire is where "inflammatory history can be planted like a mustard seed at the infancy of a case, tainting all that follows."[1] Randee VanZandt did not cooperate with the State's prosecution of her son, Shawn VanZandt, for violating a no-contact order and for burglary. The State elected not to call Ms. VanZandt as a witness, believing she was not necessary to the State's case. However, the prosecutor told the jury in voir dire that Ms. VanZandt was not appearing at trial because she was a domestic violence victim. The prosecutor questioned the jury at length about why domestic violence victims don't come to court in a way that presupposed Mr. VanZandt committed domestic abuse against his elderly mother.

The prosecutor continued to capitalize on Ms. VanZandt's absence by arguing in closing that Ms. VanZandt

[1] *State v. Ellis*, 53691-9, 2021 WL 3910557, at *12 (2021) (GR 14.1).

took specific, volitional steps in obtaining and enforcing the order which was not the evidence at trial.

Mr. VanZandt represented himself. His mental health issues were apparent, and he did not object to most of the prosecutor's misstatements. The Court of Appeals found the prosecutor "may have gone beyond the proper purposes of juror examination," but affirmed on the basis that "any mistake was not ill-intentioned."[2] The Court of Appeals failed to consider the harm of interjecting this inflammatory theme at trial. This Court should accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Shawn VanZandt asks this Court to accept review of the Court of Appeals decision terminating review, issued on January 13, 2022, pursuant to RAP 13.3 and RAP 13.4.

[2] *State v. Shawn Lee Van Zandt*, No. 37788-1-III, 16 (January 13, 2022) (Attached in Appendix).

C. ISSUES PRESENTED

1. The prosecutor misinformed the jury that Mr. VanZandt's mother was absent at trial because she was a domestic violence victim and belabored this theme in voir dire and closing argument. Does the Court of Appeals decision condoning this conduct conflict with decisions by this Court and the Court of Appeals that properly conclude a prosecutor's interjection of prejudicial themes deprive the accused of a fair trial?

2. Is independent evidence of an intent to violate a no contact order required when this is the predicate offense for burglary?

3. Was the Court of Appeals' inference from an affidavit of service of the no-contact order Mr. VanZandt stated he never viewed sufficient to establish he knowingly violated the no-contact order the State charged him with violating?

D. STATEMENT OF THE CASE

1. A no-contact order between Mr. VanZandt and his mother is dismissed and a new one entered later, unbeknownst to Mr. VanZandt.

In November of 2019, a no-contact order that was entered the previous month between Shawn VanZandt and his mother, Randee VanZandt, was rescinded. CP 12. However, in December of 2019, a court entered another protection order prohibiting Mr. VanZandt from contacting his mother and their home. Ex. P1. The order spanned three months—from December 5, 2019 to March 5, 2020. Ex. P1.

Mr. VanZandt was at the apartment he shared with his mother on February 29, days before the December order was set to expire, when police were notified he was at the home. RP 37, 164, 192. Deputy Keys responded. RP 167. He did not state who made the call. RP 164. Ms. VanZandt opened the door and let the deputy inside. RP 167. The deputy saw Mr. VanZandt in a bedroom off the entryway. RP 167. Officer Keys immediately arrested Mr. VanZandt. RP 168. Mr. VanZandt told the officer

that the no-contact order had expired or had been dismissed. RP 168. Mr. VanZandt asked if he could retrieve the paperwork showing this, but Deputy Keys did not let him. RP 179-80.

The officer's probable cause statement cited to the rescinded October 2019 order, but the State charged Mr. VanZandt with violating the December order. CP 1-2.

2. Mr. VanZandt represents himself believing this is an "open and shut case" due to a mistake about the rescinded no-contact order.

Mr. VanZandt represented himself because he believed this was an "open-and-shut case." 4/23/20 RP 3. Because he believed the only no-contact order was the October one referenced in the affidavit of probable cause, he did not understand how he could be prosecuted because, as he repeatedly informed the court, that order was rescinded. 4/23/20 RP 4.

The court thought that perhaps the confusion came from the fact that the December order was a civil, not criminal no-

contact order, and so it was likely entered in Mr. VanZandt's absence. RP 47-48.

Mr. VanZandt's statements at the time of his arrest reflected what he believed then and throughout trial: "All this stems from is a rescinded NCO that didn't get put into the database, and then now as a result the -- the frickin' cause number got moved over to -- to a December date. And that's not factual." RP 151. Mr. VanZandt believed the jury would understand this error, and proceeded to trial to prove this mistake and his innocence. RP 6, 43, 184, 242.

3. Contrary to the prosecutor's real reasons for not calling Ms. VanZandt at trial, the prosecutor tells the jury she is absent at trial because she is a domestic violence victim.

The State first only charged Mr. VanZandt with violation of a protection order for being at his mother's apartment. CP 1. However, because Mr. VanZandt went to trial, the State added the charge of residential burglary predicated on the alleged no-contact order violation. CP 27; RP 10-13.

Mr. VanZandt's mother did not want to participate in the State's prosecution of her son, and the State did not force her to appear, believing her appearance "doesn't impair the state's case." RP 84-85. Still the prosecutor asked for more time in jury selection to talk about "why witnesses don't come for trial." RP 85. In voir dire, the prosecutor informed the jury that Ms. VanZandt had been on the State's witness list, "but will not be coming today. So I want to talk to you a little bit about domestic violence victims." RP 124. The prosecutor asserted, "with domestic violence, there's always a victim that's involved. In this case the victim is Randee VanZandt, who is Mr. VanZandt's mother." RP 124. Even though the "domestic violence" label in this case simply designated a relationship between the parties, not an element, the prosecutor elicited from the jury reasons that a domestic violence victim might not appear at trial, including shame, fear and the potential for future abuse based on what has "happened to them." RP 124-29.

The State's evidence turned on Officer Keys' "assumption" Mr. VanZandt was served with the order based on another officer checking a box on the affidavit of service in December. RP 170; Ex. P2. Mr. VanZandt denied he received anything other than the October order, which he threw away because he knew that order had been dismissed. RP 180. The prosecutor argued to the jury that Ms. VanZandt took volitional steps in obtaining and enforcing the no-contact order, which was not the evidence at trial. RP 210, 216-17.

The jury convicted Mr. VanZandt of both violation of a no-contact order and residential burglary and found that Mr. VanZandt and his mother were members of the same family or household. CP 55-58.

The pre-trial sentencing report provided the court insight about Mr. VanZandt's situation, including the "significant" fact that Mr. VanZandt suffered from schizophrenia for which he was not currently receiving medication. RP 133, 243-44. The court remarked, "I'm seeing all of this information swirling

around this presentence report that explains a lot of why you are here." RP 244. The court sentenced Mr. VanZandt to a prison-based DOSA. RP 249-54.

Mr. VanZandt asked the court and prosecutor, "So now that it's handled, is it okay to call Mom?" RP 229. The prosecutor and court agreed it was fine, and the court removed this prohibition from Mr. VanZandt's conditions of release. RP 230.

4. The Court of Appeals concludes the prosecutor's unfounded assertion and belabored questioning in voir dire about Ms. VanZandt's domestic violence status was not "ill-intentioned" and that there is no case law prohibiting this kind of questioning.

The Court of Appeals affirmed Mr. VanZandt's convictions. Though the Court of Appeals found the prosecutor's statements in voir dire "may have gone beyond the proper purposes of juror examination," the Court found "any mistake was not ill-intentioned." Op. at 16. Ignoring the prejudice of labeling Mr. VanZandt his mother's domestic violence abuser, the Court of Appeals noted, "there is no case in

which the court ruled that questioning the venire about the victim failing to appear constituted misconduct." Op. at 16.

In assessing the prejudice of the prosecutor arguing facts not in evidence, the Court of Appeals found that because there was evidence supporting the jury's verdict, there was no prejudice, ignoring how this improper argument advanced the theme that Ms. VanZandt was her son's domestic violence victim. Op. at 18.

E. ARGUMENT

1. The Court of Appeals' decision that condones a prosecutor's introduction of gratuitous, inflammatory themes in voir dire and throughout trial conflicts with case law from other divisions and this Court.

The Court of Appeals tolerated the prosecutor's gratuitous, prejudicial accusation of domestic violence in voir dire and his improper argument that continued to capitalize on Ms. VanZandt's absence, which prejudiced the jury against Mr. VanZandt. Its decision is contrary to decisions by the Court of Appeals and this Court that recognize the introduction of inflammatory themes in voir dire and throughout trial deprive

the accused of a fair trial. This Court should accept review. RAP 13.4(b)(1)-(3).

a. The prosecutor inflamed the jury in voir dire by falsely blaming Ms. VanZandt's absence at trial on her status as Mr. VanZandt's domestic violence victim.

A person's jury trial right includes the right to an unbiased and unprejudiced jury. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000); U.S. Const. amend. VI; XIV, §I; Const. art. I, §§ 3, 22. There must be no "lingering doubt" that a person received a fair trial in accordance with this principle. *Id.*

Voir dire may not be used "to educate the jury panel to the particular facts of the case," or "to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369 (1985); *see also* CrR 6.4(b).

This Court recognizes the risk of unfair prejudice is very high in domestic violence cases. *State v. Gunderson*, 181

Wn.2d 916, 925, 337 P.3d 1090 (2014). Division II recently observed "[v]oir dire is where . . . inflammatory history can be planted like a mustard seed at the infancy of a case, tainting all that follows." *Ellis,* 2021 WL 3910557, at *12 (GR 14.1).

Mr. VanZandt was charged with violating a civil restraining order, not a no-contact order entered as a result of a domestic violence criminal conviction. Ex. P1. Mr. VanZandt's charges were designated as domestic violence offenses because of the family relationship with his mother. CP 27-28; RP 212.

Before voir dire, the prosecutor put on the record that Ms. VanZandt was making herself unavailable as a witness. RP 84-85. The prosecutor stated he was not going to force her to appear because her testimony was necessary to prove the State's case, and because of her age and COVID-19. RP 85. There was no evidence that Ms. VanZandt was not testifying because she was a victim of domestic violence.

In voir dire, the prosecutor began by informing the jury that Ms. VanZandt was a domestic violence victim:

> MR. JOLSTEAD: So with domestic violence, there's always a victim that's involved. In this case the victim is Randee VanZandt, who is Mr. VanZandt's mother. Now, she will not be coming today. She was on the witness list, but she will not be coming today.

RP 124. The prosecutor did not inform the jury he had the tools to make Ms. VanZandt appear but chose not to use them for reasons unrelated to her purported status as a domestic violence victim. Instead, the prosecutor questioned the jury about why domestic violence victims do not appear in court:

> MR. JOLSTEAD: So I want to talk to you a little bit about domestic violence victims. When we think of domestic violence victims, what do we think of? Number 13?
>
> JUROR NO. 13: Um, people that have been harmed.
>
> MR. JOLSTEAD: Okay.
>
> JUROR NO. 13: By someone else.
> . . .
>
> MR. JOLSTEAD: Okay. And people that have been harmed, how do you think they feel coming into this process?
>
> JUROR NO. 13: Ah, nervous.
>
> MR. JOLSTEAD: Okay.

JUROR NO. 13: Upset.

RP 124.

The prosecutor guided the jury in considering the motivations of a domestic violence victim who has been harmed:

> MR. JOLSTEAD: Okay. When -- so expand on that a little bit more for me. What do you mean by -- by shame?
>
> JUROR NO. 14: Well, I guess, I mean, if it's your family member, family's typically somebody you would trust, you know, somebody -- and that. So if this happens, maybe they're -- they feel ashamed that –
>
> MR. JOLSTEAD: Something happened to them?
>
> JUROR NO. 14: -- something happened to them and they didn't...
>
> MR. JOLSTEAD: Okay. . .

RP 125. After inquiring about the jurors' individual experiences with domestic violence, the prosecutor again returned to questioning them about why a domestic violence victim "would not want to come and testify in court," asking:

> MR. JOLSTEAD: Okay. If you were a victim of domestic violence, why do you think you wouldn't want to come to court if something had happened to you?
>
> JUROR NO. 18: You don't want other people to know. You don't want to be judged, I guess.
>
> MR. JOLSTEAD: Okay. So similar to what Juror No. 14 was saying? You don't want to be judged? You're – you're sad that that happened to you?
>
> JUROR NO. 18: Yeah.

RP 126.

The prosecutor's insistence that "you wouldn't want to come to court if something had happened" created the indelible impression that Mr. VanZandt abused his mother, and that she did not come to court because of her status as a domestic violence victim. Repeated questioning unearthed even more damaging theories for her absence:

> MR. JOLSTEAD: Okay, thank you. Juror No. 17, for you, what are some reasons you can think of why someone would not want to come and testify if they're a victim?
>
> JUROR NO. 17: Besides what's been expressed already, possibly the fact that their -- the potential for future abuse.

> MR. JOLSTEAD: Okay.
> . . .
>
> JUROR NO. 17: Yeah....Restraining orders aren't the -- timing-wise, they -- they take too much time; somebody could re-abuse.

RP 127. This repeated questioning planted the idea that Ms. VanZandt had reason to fear future violence from her son.

The prosecutor encouraged the jury to blame Ms. VanZandt's absence on her status as Mr. VanZandt's domestic violence victim, at no point revealing that the prosecutor simply elected not to call her as a witness:

> MR. JOLSTEAD: Okay. Juror No. 19, what about for you? Would it bother you if a victim didn't come in to testify?
>
> JUROR NO. 19: No. Especially with domestic, I think situations where family dynamics and emotions are challenging and difficult. And, you know, there's that -- just I think that a victim sometimes can feel really vulnerable and might not be able to -- to come in and -- and -- and face that person that they love but are also, you know, obviously very upset with. So just...
>
> MR. JOLSTEAD: Okay, thank you. I appreciate that.

RP 128-29.

The prosecutor's voir dire identified Mr. VanZandt as an abuser, and blamed his mother's absence on him, even though the prosecutor informed the court he could have compelled her to appear but chose not to. This tainted the trial by turning Ms. VanZandt's absence into a highly prejudicial condemnation of Mr. VanZandt as an abuser before trial even began and was an impermissible use of voir dire. *Frederiksen*, 40 Wn. App. at 752.

b. The prosecutor capitalized on Ms. VanZandt's absence throughout trial.

The Court of Appeals also failed to acknowledge how the prosecutor capitalized on Ms. VanZandt's absence by arguing in closing that she took volitional steps in obtaining and enforcing the no-contact order against her son, which was not the evidence at trial.

The prosecutor may argue inferences from the evidence, but may not argue the jury should convict based on evidence outside the record. *State v. Sullivan*, 196 Wn. App. 277, 294,

383 P.3d 574 (2016). Here, the State's evidence did not establish who called 911 to report a no-contact order violation. Deputy Keys testified only that "[t]he call was for an order violation." RP 164. Still the prosecutor argued twice in closing that it was Ms. VanZandt who called 911, over Mr. VanZandt's objection:

> His mother called the police. She met Officer Keys -- excuse me, Detective Keys at the door. She met him at the apartment. She let him in to where he found Mr. VanZandt in the dwelling. He knew there was an order. And his mom obviously knew there was an order because she called the police.
>
> MR. VANZANDT: No, she didn't

RP 216-17 (emphasis added).

The prosecutor also argued that Ms. VanZandt personally obtained the protection order by taking specific steps, which was not the evidence at trial:

> We heard testimony that she had to come to court in order to get a protection order, an order of protection, that's what happened here, against her son, Mr. Shawn VanZandt, and that order was granted on December 5th and that it was served on him on December 17th.

RP 210. However, the only evidence about the entry of a protection order came from Deputy Keys, who testified generally about how a person obtains a protection order. RP 164. There was no testimony about how the no-contact order was entered. It was misconduct to argue that Ms. VanZandt took volitional steps to obtain and enforce an order against her son when this was not the evidence at trial. The Court of Appeals ignored how this argument advanced the theme planted by the prosecutor in voir dire, that that Ms. VanZandt was a domestic violence victim and unable to protect herself against her son.

c. This Court should accept review.

The Court of Appeals opinion ignored decisions by this Court and other panels that recognize the specific harm of introducing inflammatory themes to prejudice to jury against the accused.

Pervasive misconduct and repeated emphasis on impermissible themes may deprive the accused of a fair trial

because "[r]epetitive misconduct can have a cumulative effect." *State v. Loughbom*, 196 Wn.2d 64, 76, 470 P.3d 499 (2020) (internal citations omitted). In *Loughbom*, this Court determined that the prosecutor's use of an impermissible theme that began in opening and continued into closing, meant it "would have been too late to negate the prejudice that built up" over the course of trial. *Id.* "[I]nflammatory history" in voir dire is especially likely to taint the trial. *Ellis*, 2021 WL 3910557, at *12.

The prosecutor capitalized on Ms. VanZandt's absence at trial to impermissibly label Mr. VanZandt a domestic violence abuser and to impute to Ms. VanZandt a knowledge and volition in obtaining and enforcing the no-contact order that was not the evidence at trial. This undercut Mr. VanZandt's defense that there was not a valid order in December and built on the prejudice of labeling Ms. VanZandt a domestic violence victim, which was an impermissible theme that had a

cumulative effect over the course of trial. *Loughbom*, 196 Wn.2d at 76.

Ignoring decisions by this Court and lower courts, the Court of Appeals simply concluded the prosecutor's conduct was unintentional and ignored the inflammatory theme that could not be cured by an instruction. This Court should accept review. RAP 13.4(b)(1,)(2),(3).

2. This Court should also accept review to resolve whether there must be independent evidence of intent to violate a court order when this is the predicate offense for burglary.

Residential burglary requires a showing that by entering or remaining unlawfully in a dwelling, the person intended to commit a crime against a person or property therein. RCW 9A.52.025(1); *State v. Devitt*, 152 Wn. App. 907, 911, 218 P.3d 647 (2009).

The Court of Appeals misconstrued *State v. Stinton*, 121 Wn. App. 569, 89 P.3d 717 (2004) in finding sufficient, independent evidence of intent for burglary. *Stinton* squarely addressed whether violation of a no-contact order can serve as a

predicate offense for a burglary. The no-contact order in *Stinton*— as here – included various, distinct provisions, one of which prohibited Stinton from coming within a certain proximity to the protected party's residence, and a second provision prohibiting Stinton from harassing or threatening the protected party. *See id.* at 575.

Noting that each provision prohibited "separate and distinct conduct," the court found the violation of the no-contact order could serve as a predicate because even after violating the provision of the order prohibiting him from coming onto the premises, Mr. Stinton entered the residence with the intent to violate the separate provision of the order "restraining him from making harassing contact." *Id*. Crucially, *Stinton* explicitly disavowed the idea that the initial violation could serve to support the burglary, agreeing that "it is improper to prove [Stinton's] intent to commit a crime therein merely with evidence that he unlawfully entered the premises." *Id*.

Here, unlike in *Stinton,* there was not sufficient evidence Mr. VanZandt engaged in conduct separate and distinct from the purported unlawful entry into the home. *Stinton,* 121 Wn. App. at 576. Deputy Keys responded to a call over dispatch about "an order violation" about 2:00 or 3:00 in the morning RP 163-64. The State presented no other evidence about who made the call, or the circumstances surrounding the call.[3]

When the officer arrived at the residence listed on the order, Ms. VanZandt was at the front door to the apartment. RP 167. Nothing appeared to be amiss. RP 167. Ms. VanZandt allowed the officer to enter the residence. RP 167. Officer Keys saw Mr. VanZandt in a bedroom off the front door. RP 167. Mr. VanZandt appeared neither surprised nor unsurprised to see the officer. RP 167.

[3] The prosecutor's claim in closing argument that Ms. VanZandt made this call is not supported by the evidence at trial as addressed in section 1(b) regarding prosecutorial misconduct.

The Court of Appeals found Mr. VanZandt's equivocal reaction to police entering his mother's home established his intent. Op at 18. This is not sufficient evidence under *Stinton.* Without evidence about Mr. VanZandt's entry or conduct while entering or remaining in the residence beyond his mere presence and equivocal response, there was insufficient evidence of intent. *Stinton,* 121 Wn. App. 575.

This Court should accept review because the Court of Appeals decision conflicts with *Stinton,* which required independent evidence, beyond the accused's mere presence in the home, of an intent to violate the no-contact order when it is the predicate offense for burglary. RAP 13.4(b)(2),(3).

3. The evidence was insufficient to establish Mr. VanZandt knowingly violated a no-contact order**.**

The evidence was also insufficient to prove Mr. VanZandt committed the crime of violating a no-contact order. For this offense the State had to establish Mr. VanZandt had (1) willful contact with another; (2) the contact was prohibited by a

valid no-contact order; and that Mr. VanZandt (3) had knowledge of the no-contact order. *State v. Washington*, 135 Wn. App. 42, 49, 143 P.3d 606 (2006) (citing *State v. Clowes*, 104 Wn. App. 935, 944, 18 P.3d 596 (2001)); RCW 10.99.050(2)(a) ("[w]illful violation of a court order ... is punishable under RCW 26.50.110"); CP 44-45.

Accidental or inadvertent contact will not result in a violation of a no-contact order. *State v. Sisemore,* 114 Wn. App. 75, 78, 55 P.3d 1178 (2002). The evidence will be insufficient to sustain a conviction for the offense unless there is proof the defendant "knew the order existed and willfully, that is, knowingly and intentionally, contacted or remained in contact" with the protected party. *Id.*

Courts have found that a certified copy of a no-contact order containing the signature of the defendant is sufficient evidence to establish knowledge. *State v. France,* 129 Wn. App. 907, 911, 120 P.3d 654 (2005); *see also State v. Thomas*, 15 Wn. App. 2d 1045, *4, No. 53002-3-II (2020) (the evidence

was sufficient for jury to find the defendant knew about the order because he signed it and it stated that he had reviewed and understood the no-contact order) (GR 14.1).

Mr. VanZandt did not sign the protection order the State accused him of violating. Ex. P1, p.6/6. The order indicates that he was not provided "actual notice of the hearing." Ex. P1, p. 1/6. Notice of the hearing was by mail to an unknown address. Ex. P1, p. 1/6. The State did not call the officer who was listed as having served the order on Mr. VanZandt in December. Ex. P2. Instead, Deputy Keys testified that another officer checked the box stating, "'I served the respondent,' and then listed Shawn VanZandt's name and the address where it was served and what time." Officer Key's "assumption" was that this was personal service. RP 170. But the evidence did not establish if the "personal service" was on the correct person or performed in a way that resulted in Mr. VanZandt being apprised of the order and its provisions.

Mr. VanZandt believed he was only served with a copy of an order from October, with the old cause number, "the same old one that was taken care of." RP 194. He clarified that there was no "second serving" after he was incarcerated following dismissal of the October no-contact order. RP 196. Mr. VanZandt also did not believe it was his mother's signature on the December protection order that he was shown for the first time at trial. RP 195.

Intent may not be inferred from conduct that is patently equivocal, though it may be inferred from conduct that plainly indicates such intent "as a matter of logical probability." *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985). Other than the return of service that Deputy Keys assumed indicated an order was served on Mr. VanZandt, but which Mr. VanZandt denied he received, the State introduced no additional direct or circumstantial evidence from which the jury could infer knowledge of the order he was accused of violating.

Mr. VanZandt was unwavering in his insistence there was no December no-contact order: "If December -- if December were real, it would have been on the police database at the time in question." RP 186. When presented with the December no-contact order he was being prosecuted for violating, he believed it was "a cover page stapled to a fictitious NCO." RP 191. Mr. VanZandt denied having seen the December order before: "What does this have to do with me? I—I've never seen this before in my life. I don't understand." RP 194.

Mr. VanZandt's statements at the time of the arrest indicated he was only aware of an October order, which he believed had expired. RP 180. Mr. VanZandt's reaction when the officer at the home was patently equivocal at best, and does not support the inference that he was aware of any no-contact order. *Bergeron*, 105 Wn.2d at 20.

Absent evidence that Mr. VanZandt had knowledge of the December no-contact order or its terms when he entered the

family home days before it was set to expire, there was insufficient evidence he knowingly violated it. This Court should accept review. RAP 13.4(b)(3).

F. CONCLUSION

Based on the foregoing, petitioner Mr. VanZandt respectfully requests this that review be granted pursuant to RAP 13.4(b).

Per RAP 18.17(c)(10), the undersigned certifies this petition contains 4,766 words.

DATED this the 9th day of February 2022.

Respectfully submitted,

Kate L. Benward (WSBA 43651)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

FILED
JANUARY 13, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON, Respondent, v. SHAWN LEE VAN ZANDT, Appellant.	)	No. 37788-1-III UNPUBLISHED OPINION

FEARING, J. — Shawn Van Zandt appeals, on insufficiency of evidence and prosecutorial misconduct grounds, his convictions for burglary and the violation of a domestic violence protective order. We hold that sufficient evidence supported his two convictions. We further hold that the prosecuting attorney committed error, but such error was harmless. We affirm Van Zandt's two convictions.

FACTS

This prosecution arises from the relationship between appellant Shawn Van Zandt (Van Zandt) and his mother Randee Van Zandt (Randee). According to the State's information, on December 5, 2019, Randee procured an order for protection against her son Van Zandt. The no-contact order listed Randee as the petitioner. The order expired on March 5, 2020. The order excluded Van Zandt from Randee's residence and from

knowingly approaching within two blocks of her home.

Shawn Van Zandt signed no paper indicating that he received a copy of the protection order. A return of service avers that a law enforcement officer served him with the protection order on December 17, 2019.

We lack any testimony from Randee Van Zandt or Shawn Van Zandt. During the early morning hours of February 29, 2020, Spokane County Sheriff's Department Detective Michael Keys responded to a call that Van Zandt was violating a protection order by having entered the home of his mother, Randee. During trial, Detective Keys did not identify the caller to law enforcement. When responding to the call, Detective Keys reviewed the protection order. Keys entered Randee's home, located Shawn within, and arrested him. Van Zandt did not appear surprised to see a law enforcement officer in the home. Report of Proceedings (RP) (Aug. 25, 2020) at 168.

PROCEDURE

The State of Washington charged Shawn Van Zandt with felony violation of a domestic violence protection order and residential burglary. Shawn elected to defend himself pro se.

Before voir dire, the State's attorney commented to the trial court that Randee Van Zandt would not testify.

> [PROSECUTOR]: . . . The other comment I did have is that we attempted to contact Ms. Randee Van Zandt, who is the victim in this matter, last night. She informed us she was not going to be here and that

> she would not be home so that we could not find her. I noted that the last trial that we went to, Mr. Van Zandt—excuse me, went to with Mr. Cruz, a material witness warrant was sought and granted. However, in this case, given the fact that there's a detective witness, the event in the home, and the fact that she is a rather elderly woman and we have COVID, I'm not going to seek a material witness warrant at this time. It doesn't—
>
> MR. VAN ZANDT: Thank you.
>
> [PROSECUTOR]: It doesn't impair the state's case, but I would like a little bit of extra time with the jury about why witnesses don't come for trial, your Honor.
>
> . . . .
>
> [PROSECUTOR]: Thank you.
>
> MR. VAN ZANDT: (Hand raised.)
>
> . . . .
>
> MR. VAN ZANDT: I mean, his position on this, I—I wanted to say thank you. My mother's elderly and she's not competent to testify. She doesn't need to go through this thing. I appreciate it. Thank you, guys. Thank you.

RP (Aug. 25, 2020) at 84-85.

During voir dire, the trial court informed potential jurors that the State charged Shawn Van Zandt with violation of a protective order and burglary. In turn, the prosecutor questioned the venire panel about their views of domestic violence and protection orders. The prosecutor also broached the fact that Randee Van Zandt would not testify during the trial:

> [PROSECUTOR]: So with domestic violence, there's always a victim that's involved. In this case the victim is Randee Van Zandt, who is Mr. Van Zandt's mother. Now, she will not be coming today. She was on the witness list, but she will not be coming today. So I want to talk to you a little bit about domestic violence victims. When we think of domestic violence victims, what do we think?
>
> Number 13?
>
> JUROR NO. 13: Um, people that have been harmed.

. . . .

[PROSECUTOR]: Okay. And people that have been harmed, how do you think they feel coming into this process?

JUROR NO. 13: Ah, nervous.

[PROSECUTOR]: Okay.

JUROR NO. 13: Upset.

RP (Aug. 25, 2020) at 124. The prosecutor continued:

[PROSECUTOR]: . . . Juror No. 14, can you think of a reason why a domestic violence victim wouldn't want to come testify in court?

JUROR NO. 14: I guess pride, shame, don't want other people to know, I guess. I don't know.

[PROSECUTOR]: Okay. When—so expand on that a little bit more for me. What do you mean by—by shame?

JUROR NO. 14: Well, I guess, I mean, if it's your family member, family's typically somebody you would trust, you know, somebody—and that. So if this happens, maybe they're—they feel ashamed that—

[PROSECUTOR]: Something happened to them?

JUROR NO. 14: —something happened to them and they didn't . . .

. . . .

[PROSECUTOR]: Juror No. 18, because you're right there next to the microphone, do you agree with what Juror No. 14 said?

. . . .

JUROR NO. 18: Not entirely sure what he was getting at with that—

[PROSECUTOR]: Okay.

JUROR NO. 18: —but, you know, everyone has their own opinions.

[PROSECUTOR]: Okay. For you, then, why—what are some reasons you can think why a domestic violence victim would not want to come and testify in court?

JUROR NO. 18: It's—I see it as something kind of—I don't know. I'm not entirely sure actually.

[PROSECUTOR]: Okay. Not entirely sure?

JUROR NO. 18: Yep.

[PROSECUTOR]: Okay. If you were a victim of domestic violence, why do you think you wouldn't want to come to court if something had happened to you?

JUROR NO. 18: You don't want other people to know. You don't want to be judged, I guess.

> [PROSECUTOR]: Okay. So similar to what Juror No. 14 was saying? You don't want to be judged? You're—you're sad that that happened to you?
>
> JUROR NO. 18: Yeah.

RP (Aug. 25, 2020) at 125-26. The prosecutor turned his attention to juror seventeen:

> [PROSECUTOR]: . . . Juror No. 17, for you, what are some reasons you can think of why someone would not want to come and testify if they're a victim?
>
> JUROR NO. 17: Besides what's been expressed already, possibly the fact that their—the potential for future abuse.
>
> [PROSECUTOR]: Okay.
>
> . . . .
>
> JUROR NO. 17: . . . I would think that they would be afraid of future abuse. Restraining orders aren't the—timing-wise, they—they take too much time; somebody could re-abuse.
>
> [PROSECUTOR]: Okay, thank you. Does that—does that bother you that a victim wouldn't come in to testify?
>
> JUROR NO. 17: I would need to know more about a particular case and why the person might not.

RP (Aug. 25, 2020) at 127. The State's attorney questioned juror nineteen:

> [PROSECUTOR]: . . . Juror No. 19, what about for you? Would it bother you if a victim didn't come in to testify?
>
> JUROR NO. 19: No. Especially with domestic, I think situations where family dynamics and emotions are challenging and difficult. And, you know, there's that—just I think that a victim sometimes can feel really vulnerable and might not be able to—to come in and—and—and face that person that they love but are also, you know, obviously very upset with. So just . . .
>
> [PROSECUTOR]: Okay, thank you. I appreciate that.

RP (Aug. 25, 2020) at 128-29. Finally, the prosecutor asked juror seven:

> [PROSECUTOR]: . . . Juror No. 7, I'm going to pick on you again. So same question: Does that bother you if the victim wasn't—show up to testify?

> JUROR NO. 7: No, I don't think that it would bother me for them not to show up. Just like other people have expressed, it could just be a range of reasons why they wouldn't want to actually come to the courtroom. But, I mean, I guess I could see at the same time it would make me feel more confident in reaching certain verdicts—
>
> [PROSECUTOR]: Mm-hm.
>
> JUROR NO. 7: —if they were there so you could kind of judge their demeanor—
>
> [PROSECUTOR]: Okay.
>
> JUROR NO. 7: —not just read their statements on paper.
>
> [PROSECUTOR]: Right. Okay, thank you. I appreciate that.

RP (Aug. 25, 2020) at 129. The prosecutor ended the line of questioning by posing a question to the entire panel:

> [PROSECUTOR]: . . . Is there anyone here that would be bothered by the fact that a victim doesn't show up in this case, that Ms. Randee Van Zandt is not going to show up at trial today? Is there any—does that bother anyone?

RP (Aug. 25, 2020) at 129-30. No juror responded.

Shawn Van Zandt, as his own counsel, never objected to the prosecutor's questioning of the venire panel. He asked no questions of the panel himself. Van Zandt argued in opening that his arrest for violation of a domestic violence protective order rose from a rescinded October 5 protection order and that the December 5 protection order was fictitious.

During trial, Detective Michael Keys recounted visiting Randee Van Zandt's residence. The prosecution inquired about the return of service on Van Zandt of the domestic violence protection order, which Keys had not served.

> [PROSECUTOR]: Okay. What's a return of service?
> [DETECTIVE KEYS]: So when a law enforcement office on patrol serves an order on someone, we complete what's called a return of service documenting who we served the order to, how we served it, the location, date, and time. And then that is sent to the records department to show that the order was served and that the person that was served upon has knowledge of that order now.
> . . . .
> [PROSECUTOR]: And then, Detective Keys, on that second page, could you tell me whether or not this order was served on Mr. Van Zandt?
> [DETECTIVE KEYS]: It was.
> [PROSECUTOR]: Okay. What went—what date was it? Excuse me.
> [DETECTIVE KEYS]: The 17th of December of 2019.
> [PROSECUTOR]: Okay. And how—how was it served on him? Does it say?
> [DETECTIVE KEYS]: Ah, it says, "I served the respondent," and then lists Shawn Van Zandt's name and the address where it was served and what time.
> [PROSECUTOR]: Okay. So personal service?
> [DETECTIVE KEYS]: Yes, that would be my assumption.

RP (Aug. 25, 2020) at 169-70.

The trial court admitted the no-contact order as Exhibit 1. The exhibit listed Randee Van Zandt as the petitioner for the order.

Shawn Van Zandt testified on his own behalf. He presented more argument than percipient testimony. Van Zandt argued that the December 5 protection order never truly existed and resulted from a clerical error. RP (Aug. 25, 2020) 186-87.

On cross-examination, the prosecutor asked Shawn Van Zandt to examine the December 5 protection order. Van Zandt responded by asking:

> [SHAWN VAN ZANDT]: What does this have to do with me? I—I've never seen this before in my life. I don't understand.
>
> [PROSECUTOR]: So Mr.—
>
> [SHAWN VAN ZANDT]: That's not what I was served with. I was—I was served with another copy of the same old cause number. I mean, the same old—the same old one that was taken care of. I just threw it in the garbage, the 19-2-0. This is—this is fictitious. This—this whole—this whole thing is.

RP (Aug. 25, 2020) at 194.

During closing, the prosecutor argued that Randee Van Zandt had called the police to report the presence of her son in her residence. Shawn Van Zandt interjected.

> [PROSECUTOR]: . . . Mr. Van Zandt on February 29th entered Ms. Van Zandt's home. He may have used to live there, but he was no longer lawfully able to live there per the order of the court. He went in. *His mother called the police.* She met . . . Detective Keys at the door. She met him at the apartment. She let him in to where he found Mr. Van Zandt in the dwelling.
>
> He knew there was an order. *And his mom obviously knew there was an order because she called the police.*
>
> [SHAWN VAN ZANDT]: No, she didn't.

RP (Aug. 25, 2020) at 216-17 (emphases added). The State's attorney also commented during summation:

> We heard testimony that *she had to come to court in order to get a protection order*, an order of protection, that's what happened here, against her son, Mr. Shawn Van Zandt, and that order was granted on December 5th and that it was served on him on December 17th.

RP (Aug. 25, 2020) at 210 (emphasis added).

In closing, Shawn Van Zandt commented on his mother's absence from trial:

> And as far as everything else goes, why wouldn't my mom show up today? I mean, *if she wants me in trouble, she would have showed up.* I mean, she knows that there was—it was already handled. She didn't call the police. We—we had people removed from our house, and they were just running—
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Okay, sustained.
>
> [SHAWN VAN ZANDT]: Okay.
>
> Well, she didn't show up in court today because it's a bunch of malarkey. This has already been handled. Like I said, the cause number and the date go to October 5th. It's on record. There was no—there was no rebuttal. The signature there on that fictitious NCO [no-contact order], it's not my mom's signature.

RP (Aug. 25, 2020) at 220-21 (emphasis added). To repeat, during colloquy before trial, Van Zandt had declared that his mother lacked competency to testify.

The jury returned guilty verdicts on violation of the protective order and burglary. The trial court imposed a prison-based Drug Offender Sentencing Alternative (DOSA) sentence. The court sentenced Shawn Van Zandt to thirty months' confinement and thirty months' community custody on the charge of violating a domestic violence no-contact order and 36.75 months' confinement and 36.75 months' community custody on the burglary charge.

The sentencing court found Shawn Van Zandt indigent for purposes of appeal. Under "community custody conditions," the court ordered Van Zandt to "pay the statutory rate to DOC [Department of Corrections], while on community custody, to offset the cost of urinalysis." Clerk's Papers (CP) at 68. Regarding fees and costs, the

sentencing court commented: "There's a $500 Victim Assessment. I'll waive everything else. $5 a month." RP (Sept. 29, 2020) at 254.

LAW AND ANALYSIS

Sufficiency of Evidence - Violation of Protection Order

On appeal, Shawn Van Zandt contends the State deprived him of due process by convicting him of a felony violation of a no-contact order without evidence. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State. We ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence carry equal weight on review. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). This court defers to the jury's decision and does not consider questions of credibility, persuasiveness, and conflicting testimony. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

The trial court instructed the jury that, for the State to convict Shawn Van Zandt of violation of a protective order, the State needed to prove:

> 1) That on or about February 29, 2020 there existed a protection order applicable to [Shawn Van Zandt];
> 2) That [Shawn Van Zandt] knew of the existence of the order;

> 3) That on or about said date, [Shawn Van Zandt] knowingly violated a provision of the order;
> 4) That [Shawn Van Zandt] had twice been previously convicted for violating the provisions of a court order; and
> 5) That [Shawn Van Zandt's] acts occurred in the State of Washington.

CP at 44; *see also* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL 36.51.02, at 714 (5th ed. 2021). Van Zandt disputes that the evidence sufficiently demonstrated elements two and three of the instruction— his knowledge of the order and knowing violation of a provision of the order.

RCW 9A.08.010(1)(b) defines "knowledge:"

> KNOWLEDGE. A person knows or acts knowingly or with knowledge when:
> (i) He or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) He or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

Despite the constructive definition of "knowledge" under RCW 9A.08.010(1)(b)(ii), Washington case law requires the State to prove a subjective standard of "knowledge" in order to convict the accused of most crimes. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980); *State v. Jones*, 13 Wn. App. 2d 386, 404, 463 P.3d 738 (2020).

Shawn Van Zandt underscores that the December 5 protection order lacks his signature to prove he received a copy of the order. Van Zandt highlights *State v. France*,

129 Wn. App. 907, 911, 120 P.3d 654 (2005), wherein this court held that a certified copy of a no-contact order with the defendant's signature suffices to prove the accused's knowledge of the order. Van Zandt argues that the testimony of Detective Michael Keys supplied no proof because Keys never served Van Zandt. Instead, Keys referenced his belief of service as an "assumption." RP (Aug. 25, 2020) at 170.

The State responds that the jury could consider the admitted return of service as evidence for any purpose. The return demonstrates that a law enforcement officer served Shawn Van Zandt on December 17, 2019. The State highlights Van Zandt's testimony, when asked by the prosecutor to examine the December 5 protection order at trial.

We conclude that the State submitted sufficient evidence to convict Shawn Van Zandt of violation of a protective order. The jury reviewed the return of service and heard Shawn Van Zandt's testimony of being served a document with the same cause number, which document he claimed to have discarded immediately. The jury could have reasonably decided, based on this evidence, that Van Zandt possessed knowledge of the contents of the protection order.

State v. France, 129 Wn. App. 907 (2005) held that a certified copy of the no-contact order signed by the accused suffices to show knowledge by the defendant. Nevertheless, *State v. France* does not preclude other methods of proof.

Sufficiency of Evidence - Burglary

Shawn Van Zandt also argues that the State produced insufficient evidence to establish his conviction for burglary.

A burglary conviction requires the State to prove that a defendant entered or remained unlawfully in a dwelling with intent to commit a crime against a person or property therein. RCW 9A.52.025(1). This court has found that violation of a protection order may constitute the underlying crime predicating a burglary conviction. *State v. Sanchez*, 166 Wn. App. 304, 308, 271 P.3d 264 (2012); *State v. Spencer*, 128 Wn. App. 132, 139-41, 114 P.3d 1222 (2005); *State v. Stinton*, 121 Wn. App. 569, 576, 89 P.3d 717 (2004). Shawn Van Zandt does not ask us to abandon this precedent.

Shawn Van Zandt contends the State presented insufficient evidence to show he entered his mother's home with intent to commit a crime. Washington law defines intent:

> INTENT. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

RCW 9A.08.010(1)(a).

The State presented testimony that Shawn Van Zandt knew of the order precluding him from entering his mother's dwelling. The State also supplied testimony that Shawn Van Zandt expressed no surprise when Detective Michael Keys found him inside his mother's dwelling. Thus, the jury heard sufficient evidence to convict Van Zandt of the intent to violate an order by entering his mother's residence.

Prosecutorial Misconduct

Voir Dire

Shawn Van Zandt argues that the prosecutor's statements and questioning, during voir dire, of the jury panel regarding Randee Van Zandt's failure to testify and the State's attorney's comment during closing that Randee called law enforcement constituted prosecutorial misconduct. We first address the voir dire questioning. In doing so, we outline principles of prosecutorial misconduct and then rules regarding voir dire.

To establish prosecutorial misconduct, a defendant must show that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373 (2015). The burden to establish prejudice requires a defendant to prove a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011).

Shawn Van Zandt failed to object to the prosecuting attorney's questioning during voir dire. When a defendant fails to object to improper remarks at trial, the defendant waives review of the error unless the remarks were so flagrant and ill intentioned that they caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). A pro se defendant is not entitled to special consideration and the inadequacy of a pro se defense cannot provide a basis for a new trial or an appeal. *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). The "flagrant and ill intentioned" standard sets a much

higher bar for reversal than the "improper and prejudicial" standard and applies only in a narrow set of cases when the court holds concern about the jury drawing improper inferences from the evidence. *State v. Loughbom*, 196 Wn.2d 64, 74, 470 P.3d 499 (2020). Under this heightened standard, the defendant must show (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).

CrR 6.4(b) governs voir dire in criminal cases:

> A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

The purpose of voir dire

> is to enable the parties to learn the state of mind of the prospective jurors so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges.

State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985) (quoting *State v. Laureano*, 101 Wn.2d 745, 758, 682 P.2d 889 (1984).

> [I]t is not a function of the voir dire examination to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a

> particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.

State v. Frederiksen, 40 Wn. App. at 752 (internal quotation marks, and alterations omitted) (quoting *People v. Williams*, 29 Cal. 3d 392, 628 P.2d 869 (1981).

In Shawn Van Zandt's prosecution, the prosecutor's statements in voir dire may have gone beyond the proper purposes of juror examination. Rather than only asking the jury its thoughts about a hypothetical victim failing to testify at trial, the State announced to the venire that victim Randee Van Zandt would not testify before them. Thus, the prosecutor submitted facts of the case to the jury. The State's attorney then posed the question about why any domestic violence victim, not Randee, may not appear to testify. But the prosecuting attorney had already mentioned Randee's prospective absence from trial and impliedly asked potential jurors to draw conclusions regarding Randee's failure to testify. Those conclusions could include a fear to testify because of possible retaliation by Shawn Van Zandt. Also, the prosecuting attorney never informed the jury, during questioning, of the State's right to subpoena the witness or obtain a material witness bench warrant.

We do not decide whether the prosecutor engaged in an improper voir dire, because we may rest our decision on another ground. We conclude that any mistake was not ill-intentioned. Shawn Van Zandt cites no case in which the court ruled that questioning the venire about the victim failing to appear constituted misconduct. More

importantly, the State's attorney announced to the trial court and Van Zandt, before voir dire, that he intended to question the jury about the victim's failure to appear at trial. Van Zandt never objected.

Closing Argument

Shawn Van Zandt next assigns error to the prosecutor's argument during closing that Randee Van Zandt had called law enforcement about him. No evidence at trial established this fact. Van Zandt also complains that the prosecuting attorney commented that Randee needed to obtain a protection order when no one testified to this fact. The State responds that inferences from the evidence support both of the prosecuting attorney's comments. The State highlights that Exhibit 1 showed Randee to be the no-contact order petitioner.

In response to the prosecutor's assertion that Randee Van Zandt had called police, Shawn Van Zandt interjected, "No, she didn't." RP (Aug. 25, 2020) at 217. In a footnote, the State argues that Van Zandt's interjection did not constitute an objection. Br. of Resp't 29 n.8. Argument raised in a footnote need not be considered by this court. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). We proceed as if Van Zandt properly objected to the State attorney's comments. Therefore, the lower "improper and prejudicial" standard applies.

In closing argument, counsel is given wide latitude to argue the facts in evidence and reasonable inferences. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

Nevertheless, counsel may not make prejudicial statements not sustained by the record. *State v. Dhaliwai*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003).

We agree with the State that strong inferences from the evidence showed that Randee Van Zandt sought the protection order. The order, admitted as an exhibit, established her to be the petitioner.

We agree with Shawn Van Zandt that no direct testimony established that his mother telephoned the police for assistance on leap day. We do not resolve whether inferences from the State's evidence supported the prosecuting attorney's suggestion of this fact during closing, because we find no prejudice.

The guilt of Shawn Van Zandt did not depend on the identity of the caller to law enforcement. Overwhelming evidence established that Van Zandt received a copy of the protection order and that he entered his mother's home in violation of the order. In addition to the return of service, Van Zandt testified he received a copy of an order with the same cause number. Van Zandt did not act surprised when arrested inside the home.

Cumulative Prejudice

Even when discrete instances of misconduct do not separately justify a new trial, repetitive misconduct can have a "'cumulative effect.'" *State v. Loughbom*, 196 Wn.2d 64, 77 (2020). We question whether the prosecutor committed any misconduct. Regardless, as already written, overwhelming evidence supported Shawn Van Zandt's convictions such that any misconduct did not cause prejudice.

Community Custody Urinalysis Fees

Shawn Van Zandt argues that the sentencing court imposed a discretionary community custody fee without conducting an inquiry into his indigent status. Thus, he asks that, in the event this court affirms his convictions, we strike the part of the judgment and sentence that orders him to pay community custody urinalysis fees. The State acknowledges that the sentencing court did not specifically state whether it intended to impose the fees. The State asks that this court remand for clarification as to the sentencing court's intent.

Despite Shawn Van Zandt's argument to the contrary, the sentencing court inquired about his financial capability and entered a finding of indigence. The court also waived all costs other than the mandatory $500 victim impact assessment. The imposition of the community custody supervision fee may have been a clerical error.

A sentencing court may waive an offender's requirement to pay supervision fees during a term of community custody. RCW 9.94A.703(2)(d). The Washington Supreme Court recently held that the imposition of a discretionary supervision fee that a trial court had orally waived during the sentencing hearing should be stricken from the final judgment and sentence. *State v. Bowman*, __ Wn.2d __, 498 P.3d 478, 489-90 (2021). The Court cited with approval a case in which Division I of this court reached the same conclusion, *State v. Dillon*, 12 Wn. App. 2d 133, 152-53, 456 P.3d 1199, *review denied*, 195 Wn.2d 1022, 464 P.3d 198 (2020). In accordance with the Supreme Court's holding

in *Bowman*, we remand for the purpose of striking the discretionary community custody urinalysis fee.

CONCLUSION

We affirm Shawn Van Zandt's convictions for burglary and violation of a protection order. We remand to the sentencing court for the purpose of striking the fee imposed for urinalysis during community custody.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, J.

Pennell, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 37788-1-III
SHAWN VAN ZANDT,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF FEBRUARY, 2022, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	GRETCHEN VERHOEF [gverhoef@spokanecounty.org] [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF FEBRUARY, 2022.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

February 09, 2022 - 4:20 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37788-1
Appellate Court Case Title:	State of Washington v. Shawn Lee Van Zandt
Superior Court Case Number:	20-1-00851-7

The following documents have been uploaded:

- 377881_Petition_for_Review_20220209162008D3188827_4671.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.020922-09.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- gverhoef@spokanecounty.org
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org
- wapofficemai@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20220209162008D3188827