No. 44996-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Aaron Johnson,

Appellant.

Thurston County Superior Court Cause No. 12-1-00645-1

The Honorable Judge James J. Dixon

Appellant's Opening Brief

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20. The trial court erred by imposing firearm enhancements, where the Information alleged deadly weapon enhancements.

ISSUE 8: An accused person may not be convicted of or sentenced for an uncharged enhancement. In this case, the state alleged that Mr. Johnson committed burglary and kidnapping while armed with a deadly weapon. Did the imposition of a firearm enhancement violate his Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Aaron Johnson and Sara Wojdyla dated on and off for two years. RP (trial) 723-24. They broke up and then got back together five to ten times. RP (trial) 725. The couple broke up again in April of 2012. RP (trial) 723-24. Afterwards, Mr. Johnson texted Wojdyla almost daily, asking her to take him back. RP (trial) 726, 745. Wojdyla changed her phone number. RP (trial) 748.

On the morning of May 14, 2012, Mr. Johnson went to Wojdyla's apartment building. RP (trial) 569. When someone left through the main entrance, he went into the building through the open door. RP (trial) 569. He went to Wojdyla's floor and approached her when she opened the door to leave for work. RP (trial) 570. Mr. Johnson put his arm around Wodjyla's waist to prevent her from leaving. RP (trial) 571.

When Wojdyla began to speak, Mr. Johnson put his hand to her mouth to shush her. RP (trial) 570, 1007. He asked her to call work and say that she would be late, which she did. RP (trial) 777. The couple sat down and had a long conversation about their relationship. RP (trial) 790-91, 807.

Wojdyla knew that Mr. Johnson had a concealed weapons permit and asked if he had his gun with him. RP (trial) 161, 802. Mr. Johnson

lifted up his shirt and showed her that he did. RP (trial) 802. Later, Mr. Johnson tried to hand the gun to Wojdyla. RP (trial) 813. She said she did not know how to use it and refused to take it. RP (trial) 813. Mr. Johnson unloaded the gun at her request. RP (trial) 814.

Afterwards, they had sex. RP (trial) 823. Mr. Johnson told Wojdyla that he did not want to have sex if she did not want to. RP (trial) 819. Wojdyla asked Mr. Johnson to give her an orgasm with his hand. RP (trial) 825.

The couple then walked to the parking lot together. RP (trial) 835. Wojdyla said she would talk to Mr. Johnson later, and they parted. RP (trial) 837. Wojdyla drove to work, passing the Lacey police precinct on her way. RP (trial) 842.

While en route, Wojdyla called her coworker and friend, Debra Cole, and told her that Mr. Johnson had pushed his way into her apartment, threatened to kill her, and forced her to have sex with him. RP (trial) 189-90, 842-43. Cole strongly urged Wojdyla to go to the police. RP (trial) 191, 843.

Several hours later, Wojdyla and Cole went to the police together. RP (trial) 848, 851. Wojdyla did not tell the police that she had called work to say she would be late. RP (trial) 1077-78. She told the detective that Mr. Johnson had her cell phone during the entire interaction. RP

(trial) 1077-78. She also did not tell the detective that she had asked Mr. Johnson to give her an orgasm. RP (trial) 853.

The state charged Mr. Johnson with first degree rape, first degree burglary, first degree kidnapping, harassment, and fourth degree assault. CP 2-3. A jury later acquitted Mr. Johnson of the rape charge. RP (trial) 1393.

The prosecution alleged that Mr. Johnson committed the burglary and kidnapping offenses while "armed with a deadly weapon, to wit: a silver and black semi-automatic handgun." CP 2-3. The Information did not allege a nexus between the handgun and each offense. CP 2-3.

After a pre-trial protection order was put in place, the police arrested Mr. Johnson driving near Bonney Lake. RP (trial) 645-46; Ex. 81. Wojdyla had called 911 to say that he was following her. RP (trial) 886. Following this incident, the state added felony stalking to Mr. Johnson's charges. CP 3.

The police impounded Mr. Johnson's car and got a warrant to search it. RP (trial) 684. The affidavit in support of the warrant described the May 14th incident and alleged that:

> … it is common to find papers, letters, billings, documents, and other writings which show ownership, dominion and control of their weapons, vehicles, residences, and/or businesses.

> ... it is common for persons involved in domestic violence and violation of protection order to secrete weapons, use of restraints, or any items that could be used to harm and/or subdue/restrain someone.
> Motion to Suppress (1/4/13), Supp. CP.

The warrant authorized search of the car and seizure of:

> All firearms, any containers, implements, fruits of the crime, equipment or devices used or kept for illegal purposes, evidence of ownership of such property or rights of ownership or control of said property; records including any notebooks or written or electronic records, associated with any firearms found in violation of RCW 9.41.098.
> Motion to Suppress (1/4/13), Supp. CP.

The searching officers did not find any guns in Mr. Johnson's car. RP (trial) 684. They found and seized a wig, a receipt for the wig's purchase, and a pair of sunglasses. RP (trial) 684; Exs. 105, 106, 108.

Wojdyla testified at Mr. Johnson's trial. Her testimony differed from statements she had made prior to trial. She told the detective and the prosecutor that Mr. Johnson had threatened her upon first entering her apartment. RP (trial) 1077, 1168. At trial, she testified that the threat did not occur until an hour into the interaction. RP (trial) 996-97.

Wodjyla told a sexual assault nurse that Mr. Johnson wore gloves into her apartment so he would not leave fingerprints. Ex. 100, p. 4. She testified that it was not true that he had worn gloves. RP (trial) 1069.

Wojdyla testified that, when Mr. Johnson came into her apartment, he pushed her and she hit her head on the wall. RP (trial) 772. She did

not make this allegation to the detective, defense counsel, the prosecutor, or the sexual assault nurse. RP (trial) 1005-05, 1008, 1075, 1167, 1173.

Wodjyla testified that Mr. Johnson had threatened to tie her up with zip ties. RP (trial) 793. She did not tell that to the detective during her interview. RP (trial) 279, 1075.

Wojdyla told defense counsel that Mr. Johnson had never brought his gun into her apartment before. RP (trial) 1009-11. At trial, she admitted that he had brought the gun into her apartment several times. RP (trial) 802.

Wojdyla testified that she had sex with Mr. Johnson because she did not feel that she had any other choice. RP (trial) 812. On cross-examination, she admitted that she'd previously said she just "decided to go with it." RP (trial) 962-65.

Wodjyla testified that Mr. Johnson said that if he could not have her, no one could. RP (trial) 800. She had never told that to the detective, or the prosecutor. RP (trial) 998, 1076, 1166.

Wojdyla testified that she had changed her phone number previously, but that the change did not relate to her relationship with Mr. Johnson. RP (trial) 755. On cross-examination, she admitted that she had told the detective she'd changed her number as a result of one of their breakups. RP (trial) 1014-15.

Wojdyla testified that she reached for her phone to call 911 when she saw Mr. Johnson at her door. RP (trial) 1043. She told the detective that she'd reached for her phone not to call 911, but rather to call her sister or her father. RP (trial) 1043-44.

The police searched Mr. Johnson's home and found a backpack that Wojdyla said he had brought with him to her apartment. RP (trial) 463-64; Ex. 92. The backpack contained gloves, a knife, a saw, a drop cloth, zip ties, paper towels, duct tape, a hat and a bottle of cleaning fluid. RP (trial) 463-64; Ex 92.

When the backpack was in her apartment, Wojdyla only briefly saw the zip ties, the paper towels, and the cleaning fluid. RP (trial) 788. The state offered the backpack and all of its contents at trial. Mr. Johnson objected that the danger of unfair prejudiced outweighed any probative value. RP (trial) 463-64.

The prosecutor argued in closing that the items found in the backpack showed that Mr. Johnson intended to commit a crime when he entered Wojdyla's apartment. RP (trial) 1258, 1262-63, 1267, 1271, 1363-64. The prosecutor argued that the things in the backpack weren't "innocent items." RP 1363-64.

The court also denied Mr. Johnson's motion to suppress the wig, receipt, and sunglasses the police found in his car. RP (suppression

hearing) 103-21. The prosecutor speculated in closing that Mr. Johnson had the wig and sunglasses as part of a plan to either disguise himself or to disguise Wojdyla. RP (trial) 1296.

The court instructed the jurors to determine whether or not Mr. Johnson was armed with a firearm during the commission of each offense. CP 198.

The jury found Mr. Johnson guilty of burglary, kidnapping, assault, harassment, and stalking. RP (trial) 1391-94. The jury returned special verdicts finding that Mr. Johnson was armed with a firearm during commission of the burglary and the kidnapping offenses. RP (trial) 1391-92.

This timely appeal follows. CP 15.

ARGUMENT

I. THE EVIDENCE ADMITTED AT TRIAL WAS SEIZED IN VIOLATION OF MR. JOHNSON'S RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ART. I § 7.

A. Standard of Review.

The validity of a search warrant is an issue of law reviewed *de novo*. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). An unconstitutional search can constitute manifest error affecting a

constitutional right, raised for the first time on review.[1] RAP 2.5(a)(3); *State v. Swetz*, 160 Wn. App. 122, 128, 247 P.3d 802 (2011) *review denied,* 174 Wn.2d 1009, 281 P.3d 686 (2012).

Constitutional errors require reversal unless harmless beyond a reasonable doubt. *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482, 486 (2013).

B. Search warrants must be supported by probable cause and must particularly describe the things to be seized.

Under the Fourth Amendment to the U.S. Constitution,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.[2]

Similarly, art. I, § 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. Art. I, § 7 provides stronger protection to an individual's right to privacy than that

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[1] The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); s*ee State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

[2] The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

guaranteed by the Fourth Amendment to the U.S. Constitution.[3] *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012).

Under both constitutional provisions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). An affidavit in support of a search warrant "must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Generalizations about what criminals generally do cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Id.* at 147-148.

Probable cause requires a nexus between criminal activity, the item to be seized, and the place to be searched. *Thein*, 138 Wn.2d at 140.

A search warrant must also describe the items to be seized with sufficient particularity to limit the executing officers' discretion and inform the person whose property is being searched what items may be seized. *State v. Riley*, 121 Wn.2d 22, 27-29, 846 P.2d 1365 (1993).

The particularity requirement prevents the issuance of warrants based on facts that are "loose, vague, or doubtful." *State v. Perrone,* 119

[3] Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to art. I, § 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Wn.2d 538, 545, 834 P.2d 611 (1992). The requirement also limits law enforcement officials from engaging in a "'general, exploratory rummaging in a person's belongings...'" *Id.,* at 545 (citations omitted). Conformity with the rule "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Id.,* at 546.

The particularity and probable cause requirements are inextricably interwoven. *Perrone,* 119 Wn.2d at 545. A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity. *State v. Maddox,* 116 Wn. App. 796, 805, 67 P.3d 1135 (2003).

C. The warrant to search Mr. Johnson's car was not based on probable cause to believe evidence of a crime would be found therein.

Generalizations and boilerplate regarding the activities of criminals are insufficient to establish probable cause. *Thein*, 138 Wn.2d at 147-48. In *Thein*, the court reversed a conviction based on evidence seized pursuant to a warrant authorizing search of a suspected drug dealer's home. *Id.* at 151. The affidavit in support of the warrant provided that drug dealers commonly keep inventory, large sums of money, and business records hidden in their homes. *Id.* at 139.

The Supreme Court held that the affidavit did not establish probable cause to believe that evidence or fruits of a crime would be found in the suspect's home. *Id.* at 148. The court refused to adopt a rule that probable cause to believe that a person is a drug dealer automatically provides probable cause to search that person's home:

> Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.... Blanket inferences of this kind substitute generalities for the required showing of reasonably specific "underlying circumstances" that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.

Id. at 147-48.

Here, the affidavit in support of the warrant to search Mr. Johnson's car provided that "it is common" for officers to find certain documents as well as weapons and restraints during warrant searches. Motion to Suppress (1/4/2013), Supp. CP.

The only other information in the affidavit related to any of the items listed on the warrant is general information about Mr. Johnson's possession of a gun during the May 14th incident. Motion to Suppress (1/4/13), Supp. CP. The affidavit also mentioned Mr. Johnson's practice of carrying a gun before he was prohibited from doing so by the protection order. Motion to Suppress (1/4/13), Supp. CP.

The affidavit did not establish probable cause to believe that evidence of a crime would be found in Mr. Johnson's car. *Thein*, 138 Wn.2d at 147-48. The officer's generalized statements about what is commonly found during warrant searches do not provide any information about the underlying circumstances in Mr. Johnson's case. *Id.* Nor do they provide any reason to believe that the categories of items listed would be found in Mr. Johnson's car specifically. *Id.*

Likewise, the affidavit's statements regarding Mr. Johnson's prior possession of a firearm did not provide probable cause to believe that a gun would be found in his car. The prior incidents referenced in the affidavit occurred several weeks earlier, before Mr. Johnson was legally prohibited from carrying a gun by the pre-trial protection order. Motion to Suppress (1/4/13), Supp. CP. The police had already seized Mr. Johnson's gun. RP (trial) 429; Ex. 9. The statements amounted to the propensity-based assertion that Mr. Johnson had carried a gun in the past so he was likely to do so again. Such a claim does not provide probable cause to issue a search warrant.

The warrant to search Mr. Johnson's car was issued without probable cause to believe that evidence of a crime would be found inside. *Thein*, 138 Wn.2d at 147-48. Mr. Johnson's convictions must be reversed and the evidence suppressed on retrial. *Id.*

D. The search warrant was unconstitutionally overbroad.

1. The search warrant authorized police to search for and seize items that were not described with sufficient particularity and for which the affidavit did not provide probable cause.

Three factors determine whether a warrant is unconstitutionally overbroad. *State v. Higgins*, 136 Wn. App. 87, 91-92, 147 P.3d 649 (2006). First, probable cause must exist to seize all items of a particular type described in the warrant. *Id.* Second, the warrant must set out objective standards by which officers can differentiate items subject to seizure from those which are not. *Id.* Finally, the warrant must describe the items as particularly as possible in light of the information available to the government at the time. *Id.*

A search warrant does not meet the particularity requirement if it allows the officer unbridled discretion. *State v. Reep*, 161 Wn.2d 808, 815, 167 P.3d 1156 (2007).

The warrant to search Mr. Johnson's car authorized the seizure of:

> All firearms, any containers, implements, fruits of the crime, equipment or devices used or kept for illegal purposes, evidence of ownership of such property or rights of ownership or control of said property; records including any notebooks or written or electronic records, associated with any firearms found in violation of RCW 9.41.098.
> Motion to Suppress (1/4/13), Supp. CP.

By permitting seizure of "any containers, implements… equipment or devices used or kept for illegal purposes," the warrant authorized a

general exploratory search of Mr. Johnson's vehicle for anything that looked like it could be used in any crime.

Under the *Higgins* factors, the warrant was unconstitutionally overbroad. *Higgins*, 136 Wn. App. at 91-92. First, the affidavit did not provide probable cause to believe that any of the listed items were located in Mr. Johnson's car. *Id.* The information that Mr. Johnson had previously carried a firearm before he was prohibited from doing so did not establish probable cause to believe that he had a firearm in his possession on the date of the warrant. In fact, the police had already seized Mr. Johnson's gun. RP (trial) 429; Ex. 9.

Likewise, nothing in the affidavit provides reason to believe that Mr. Johnson owned or had in his car any "any containers, implements, fruits of the crime, equipment or devices used or kept for illegal purposes" or "records including any notebooks or written or electronic records, associated with any firearms." Motion to Suppress (1/4/13), Supp. CP. The warrant and affidavit do not provide probable cause for all of the listed items, as required by the first *Higgins* factor. *Higgins*, 136 Wn. App. at 91-92.

Second, the warrant did not set out any standards for the officers to determine which items were subject to seizure. *Higgins*, 136 Wn. App. at 91-92. The provision authorizing seizure of "any containers, implements,

fruits of the crime, equipment or devices used or kept for illegal purposes" affords the officers almost unbounded discretion. Motion to Suppress (1/4/13), Supp. CP; *Reep*, 161 Wn.2d at 815. The warrant does not describe how an officer would know whether, for example, a container or implement is used or kept for illegal purposes or what the illegal purposes would be. Nor does it explain what might constitute "fruits" of the crime of violation of a protection order. The warrant fails the second factor described in *Higgins*. *Higgins*, 136 Wn. App. at 91-92.

Because the officers did not have probable cause to believe that they would find any evidence of a crime in Mr. Johnson's vehicle, the third *Higgins* factor – whether the warrant described the items with as much particularity as possible given the available information – is inapposite. *Id.*

The state cannot show that the admission of evidence seized pursuant to the overbroad search warrant was harmless beyond a reasonable doubt. *Lynch*, 178 Wn.2d 487. The state relied on the wig, sunglasses, and receipt to argue that Mr. Johnson intended to disguise himself or Wojdyla. RP (trial) 1296. This argument encouraged the jury to find Mr. Johnson guilty of stalking based on otherwise innocuous items. It also created the inference that Mr. Johnson was planning some other,

unspecified crime. The admission of the evidence seized pursuant to the overbroad warrant prejudiced Mr. Johnson.

The court erred by admitting evidence that had been seized pursuant to an unconstitutionally overbroad search warrant. *Reep*, 161 Wn.2d at 817. His convictions must be reversed and the evidence suppressed on retrial. *Id.*

2. The search warrant authorized police to search for and seize items protected by the First Amendment that were not described with sufficient particularity and for which the affidavit did not provide probable cause.

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily,* 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone* 119 Wn.2d at 547. In keeping with this principle, the particularity requirement "is to be accorded the most scrupulous exactitude" when the materials to be seized are protected by the First Amendment. *Stanford,* 379 U.S. at 485.

In this case, the warrant authorized police to search for and seize "records including any notebooks or written or electronic records,

associated with any firearms found in violation of RCW 9.41.098." Motion to Suppress (1/4/13), Supp. CP.

These items are protected by the First Amendment. Accordingly, the heightened standards outlined above apply. *Stanford,* 379 U.S. at 485; *Perrone,* 119 Wn.2d at 547.

The warrant was overbroad with regard to these materials. First, the majority of these broad categories—"notebooks or written or electronic records associated with any firearms…"—were not actually evidence of a crime. Neither the Fourth Amendment nor art. I, § 7 allow police to search for or seize items that are not themselves contraband or evidence of a crime, no matter how helpful they might be to the government. *See, e.g. United States v. McMurtrey,* 705 F.3d 502 (7th Cir. 2013).

Second, the affidavit provides no specific information suggesting that any notebooks or written or electronic records existed or would be found in the vehicle.

Additionally, the warrant did not include *any* language limiting the officers in their search through the notebooks and records in the car. Under these circumstances, officers were permitted to rummage through any paperwork or digital media they found regardless of whether it had anything to do with the crimes under investigation. The absence of any

limiting language renders the warrant invalid for failure to comply with the particularity requirement. *Riley,* 121 Wn.2d at 27.

The court erred by evidence seized pursuant to an overbroad warrant. *Perrone,* 119 Wn.2d at 547. Mr. Johnson's convictions must be reversed. *Id.*

E. The court erred by admitting items seized from Mr. Johnson's car that were not listed on the warrant and were not admissible under the plain view doctrine.

Under the plain view exception to the warrant requirement, an officer may lawful seize an item when (1) s/he is lawfully standing in the place where s/he sees the item and (2) s/he immediately knows that the item is incriminating evidence. *State v. Link*, 136 Wn. App. 685, 696-97, 150 P.3d 610 (2007) (*citing State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005)).

In the vast majority of cases, evidence seized by the police is in plain view when found. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The fact that an item is in plain view is only legally significant when the officers immediately recognize it as evidence of a crime. *Id.*

In Mr. Johnson's case, the officers seized a wig, a pair of sunglasses, and a receipt, which they found in his car. These items were not listed on the warrant. RP (trial) 688-89; Exs. 105, 106, 108. The plain

view doctrine does not justify seizure of these items. None of the items were immediately recognizable as evidence of a crime. *Link*, 136 Wn. App. at 696-97; *Coolidge,* 403 U.S. at 465.

The state relied heavily on the wig, sunglasses, and receipt to prove the stalking charge. RP (trial) 1296. The admission of the unlawfully seized evidence was not harmless beyond a reasonable doubt. *Lynch*, 178 Wn.2d 487.

The court erred by admitting evidence found in Mr. Johnson's car that was not listed on the warrant as was not admissible under the plain view doctrine. *Link*, 136 Wn. App. at 696-97; *Coolidge,* 403 U.S. at 465. Mr. Johnson's convictions must be reversed and the evidence suppressed on remand. *Id.*

II. THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. JOHNSON OF FELONY STALKING.

A. Standard of review.

Statutory interpretation is a question of law, reviewed *de novo*. *In re Bercier*, No. 31622-0-III, --- Wn. App. ---, 313 P.3d 491, 492 (Nov. 26, 2013).

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*,

169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. No rational trier of fact could have found Mr. Johnson guilty of felony stalking.

A person is guilty of stalking if, *inter alia*, "he or she intentionally and repeatedly harasses or repeatedly follows another person" RCW 9A.46.110(1)(a). "Repeatedly" means "on two or more separate occasions." RCW 9A.46.110(6)(e).

Stalking is raised from a misdemeanor to a felony if "the stalking violates any protective order protecting the person being stalked." RCW 9A.46.110(5)(b).

When interpreting a statute, the court must "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The inquiry "begins with the plain language of the statute." *State v. Christensen,* 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, the court must give statutory language its plain and ordinary meaning. *State v. Lilyblad,* 163 Wn.2d 1, 6, 177 P.3d 686 (2008).

If a criminal statute is ambiguous, the rule of lenity requires the court to construe it in favor of the accused. *State v. Slattum*, 173 Wn.

App. 640, 643, 295 P.3d 788 (2013) *review denied,* 178 Wn.2d 1010, 308 P.3d 643 (2013).

The plain language of the stalking statute permits conviction under subsection (5)(b) only if the accused follows or harasses the alleged victim on at least two occasions after the protection order is in place. RCW 9A.46.110. The felony provision refers explicitly to "the stalking" occurring in violation of a protection order. RCW 9A.46.110(5)(b). "Stalking," in turn, is defined to include *repeated* following or harassing. RCW 9A.46.110(1)(a) (emphasis added). If the legislature intended for stalking to become a felony if *any* of the conduct occurred in violation of a protection order, the provision would read: "A person who stalks another is guilty of a Class B felony if ... [one of the incidents of following or harassing] violates any protective order..." RCW 9A.46.110(5)(b) (modified).

Here, the protection order was put in place on May 15, 2012. Ex. 81. The state presented evidence of only one incident of following or harassing after the order's entry. RP (trial) 633-47; 721-903.

No rational trier of fact could have found that Mr. Johnson repeatedly followed or harassed Wojdyla in violation of a protective order. RCW 9A.46.110. The state presented insufficient evidence to convict him

of felony stalking. *Chouinard*, 169 Wn. App. at 899. The stalking conviction must be reversed and the charge dismissed with prejudice. *Id.*

III. THE COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE WHOSE PROBATIVE VALUE WAS OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

A. Standard of Review.

Evidentiary rulings are reviewed for abuse of discretion. *State v. Briejer*, 172 Wn. App. 209, 223, 289 P.3d 698 (2012). A court abuses its discretion when an evidentiary ruling is manifestly unreasonable or exercised on untenable grounds. *Id.*

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *Id.* at 228.

B. The court erred by admitting the contents of Mr. Johnson's backpack, which were unfairly prejudicial and of limited probative value.

ER 403 permits the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice."

Over Mr. Johnson's objection, the court admitted the contents of the backpack he had carried into Wojdyla's apartment. RP (trial) 65-75, 99. The evidence, however, was of limited probative value. The police found the backpack more than twelve hours after Mr. Johnson left Wojdyla's home. RP (trial) 400-410. Wojdyla only alleged that she had

seen the exterior of the bag, some zip ties, paper towels, and what appeared to be a bottle of cleaning spray. RP (trial) 788. In addition to these items, the court admitted multiple pairs of gloves, a knife, a drop cloth, duct tape, a hat, and a saw. Police found these items in the backpack when they seized it late that night. RP (trial) 463-64; Ex. 92. The state did not provide any evidence that those items had been in the backpack when Mr. Johnson took it into Wojdyla's apartment. RP (trial) 785-89.

The prosecutor relied heavily on the contents of Mr. Johnson's backpack to argue that he had the intent to commit a crime, stating that they "aren't innocent items." RP (trial) 1258, 1262-63, 1267, 1271, 1363-64. The prosecutor invited the jury to infer that Mr. Johnson intended to commit a crime far more serious than those for which he was charged. RP (trial) 1360-61.

There is a reasonable probability that the erroneous admission of these items materially affected the outcome of the trial. *Briejer*, 172 Wn. App. at 228. Wojdyla contradicted herself during her testimony and changed her story several times. Given Wojdyla's lack of credibility, the jury likely relied on these items, which the state claimed Mr. Johnson had brought into her apartment. The state's argument regarding Mr. Johnson's intent rested almost exclusively on the contents of the backpack. RP

(trial) 1258, 1262-63, 1267, 1271, 1363-64. The erroneous admission of these items prejudiced Mr. Johnson. *Briejer*, 172 Wn. App. at 228.

The court abused its discretion by admitting evidence whose probative value was substantially outweighed by the danger of unfair prejudice. ER 403. Mr. Johnson's convictions must be reversed. *Briejer*, 172 Wn. App. at 223

IV. THE IMPOSITION OF FIREARM ENHANCEMENTS VIOLATED MR. JOHNSON'S RIGHT TO NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, § 22.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt v. Harbor View Med. Ctr.*, 85367-3, 2013 WL 6022156, --- Wn.2d --- (Nov. 14, 2013). A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id, at* 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id, at* 105-106. A deficient Information requires reversal; the

reviewing court does not reach the question of prejudice.[4] *State v. Zillyette,* 178 Wn.2d 153, 162, 307 P.3d 712 (2013).

B. The Information was deficient because it failed to allege a nexus between the deadly weapon and each charged crime.

The Sixth Amendment to the federal constitution guarantees an accused person the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.[5] The Washington State Constitution secures a similar right. Wash. Const. art. I, § 22.

The charging document must allege all essential elements. *Zillyette*, 178 Wn.2d at 158. This includes non-statutory elements. *Id.* An element qualifies as essential if the state must prove it beyond a reasonable doubt in order to secure a conviction. *Id.* The rule applies to enhancements as well as substantive crimes. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).

Before a firearm or deadly weapon enhancement may be imposed, the prosecution must show that the weapon is easily accessible and readily available for use, and must also prove a nexus between the weapon and the

[4] On the other hand, if the missing element can be found by fair construction, reversal is required only upon a showing of prejudice. *Kjorsvik,* 117 Wn.2d at 104-106.

[5] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

offense. *State v. Brown*, 162 Wn.2d 422, 431-435, 173 P.3d 245 (2007). The two elements are distinct: the prosecution must prove both. *Id.*

In *Brown,* the defendant had actual possession of an AK-47 during a burglary. Despite this, the Supreme Court concluded the evidence insufficient to establish a nexus between the weapon and the crime. The court vacated the defendant's conviction for first-degree burglary and an accompanying firearm enhancement. *Id.,* at 435.

Under *Brown,* the "nexus" requirement qualifies as an essential element. The state must allege and prove a nexus before the court may impose a firearm or deadly weapon enhancement. *Zillyette*, 178 Wn.2d at 158.

Here, the Information failed to allege the required nexus. CP 2-3. Furthermore, the "nexus" requirement cannot be found by fair construction of the charging language. *Kjorsvik*, 117 Wn.2d at 105-106. Instead, the Information erroneously suggests that the enhancement can be imposed upon a showing that Mr. Johnson was "armed"—that is, that the handgun was easily accessible and readily available for use—even absent a nexus between the weapon and each offense. CP 3.

The Information failed to properly allege each firearm enhancement. *Id.* As a result, Mr. Johnson need not show prejudice.

Zillyette, 178 Wn.2d at 162. The firearm enhancements must be vacated and dismissed without prejudice. *Id.*

V. THE SENTENCING COURT UNLAWFULLY IMPOSED FIREARM ENHANCEMENTS IN VIOLATION OF MR. JOHNSON'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt,* 2013 WL 6022156, --- Wn.2d ---.

B. The sentencing court was not authorized to impose firearm enhancements because Mr. Johnson was not charged with firearm enhancements.

The state must properly allege any sentencing enhancements. *Recuenco*, 163 Wn.2d at 434. A sentencing court may not impose a firearm enhancement when the state has charged a deadly weapon enhancement. *In re Personal Restraint of Delgado*, 149 Wn. App. 223, 234, 204 P.3d 936 (2009) (citing *Recuenco*). This is so because a person can only be convicted of and sentenced for enhancements actually charged by the prosecution. *Delgado,* 149 Wn. App. at 234-235.

In *Delgado,* the prosecution alleged that the defendant was "armed with a deadly weapon, to wit: a firearm." *Id,* at 235. Some of the jury's verdicts indicated that the defendant was armed with a firearm; others

included a deadly weapon finding. *Id.,* at 230, 235-236. The sentencing court imposed firearm enhancements. *Id, at* 230, 236.

The Court of Appeals vacated all the firearm enhancements, reasoning, *inter alia,* that the state had not charged firearm enhancements, and thus the sentencing judge could not impose firearm enhancements. *Id, at* 237-238. The *Delgado* court did not distinguish between counts for which the jury returned firearm verdicts and those for which it returned deadly weapon verdicts. *Id.,* at 236 (citing *Recuenco*).

Here, the state alleged that Mr. Johnson "was armed with a deadly weapon, to wit: a silver and black semi-automatic handgun." CP 2-3. This is similar to the operative language in *Recuenco,* where the defendant was "charged by information with second degree assault 'with a deadly weapon, to-wit: a handgun.'" *Recuenco,* 163 Wn.2d at 431-432.

Upon a proper finding by the jury, this charging language authorized the sentencing court to impose deadly weapon enhancements. *Id.; Delgado,* 149 Wn. App. at 236-238. The sentencing court was not authorized to impose the lengthier firearm enhancement.[6] *Delgado,* 149 Wn. App. at 236-238.

[6] The title or caption of each offense charged here included a reference to the firearm enhancement statute. But such a reference cannot cure problems with a charging document. *See, e.g., City of Auburn v. Brooke*, 119 Wn.2d 623, 634-636, 836 P.2d 212 (1992); *Zillyette*, 178 Wn.2d at 162. Nor does recitation of a particular statutory provision

Mr. Johnson's case presents stronger reasons for vacating the firearm enhancements than the *Delgado* case. Here, the operative language of each charge does not even use the word "firearm." By contrast, the charge in *Delgado* accused the defendant of being armed "with a deadly weapon, to wit: a *firearm*." *Delgado,* 149 Wn. App. at 229 (emphasis added).[7]

Under *Delgado,* Mr. Johnson's firearm enhancements must be vacated. *Id.* The court must remand his case for imposition of deadly weapon enhancements. *Id.*

CONCLUSION

The court erred by admitting evidence seized pursuant to a warrant that was not based on probable cause and was unconstitutionally overbroad. No rational trier of fact could have found Mr. Johnson guilt of felony stalking beyond a reasonable doubt. The court abused its discretion by admitting evidence that was extremely prejudicial to Mr. Johnson and of limited probative value. Mr. Johnson's convictions must be reversed.

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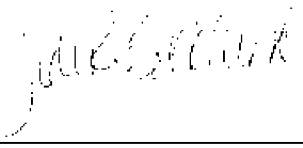
alter the crime—or in this case, enhancement—actually charged. *See, e.g., State v. Hopper*, 118 Wn.2d 151, 160, 822 P.2d 775 (1992).

[7] Neither the *Recuenco* court nor the *Delgado* court mentioned the title or caption of the charged crimes. Here, the state titled each count with the name of the substantive charge, and added "while armed with a deadly weapon-firearm/domestic violence." CP 2-3. These somewhat confusing titles suffered the same flaw as the operative language.

The court violated Mr. Johnson's constitutional right to notice of the charges against him by imposing firearm sentencing enhancements that were not charged in the Information. In the alternative, Mr. Johnson's firearm enhancements must be vacated.

Respectfully submitted on January 2, 2014,

BACKLUND AND MISTRY



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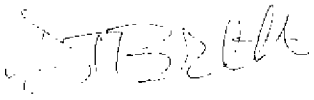

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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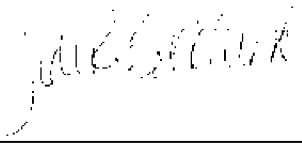
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on January 2, 2014.



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