No. 44996-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON JOHNSON,

Appellant.

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

The Honorable James J. Dixon, Judge
The Honorable Carol Murphy, Judge
Cause No. 12-1-00645-1

BRIEF OF RESPONDENT

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2. Whether the State produced sufficient evidence to support Johnson's conviction for felony stalking

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B. STATEMENT OF THE CASE.

1. Substantive facts.

Aaron Johnson and Sara Wojdyla had an on-and-off romantic relationship for approximately two years. RP 722-24.[1] They had lived together for about two months and had spent nights together before that. RP 754, 1031. Johnson knew where she worked, her work schedule, and when she usually went to bed. RP 753-54.

1 Unless otherwise noted, references to the Verbatim Report of Proceedings are to the nine-volume trial transcript.

Wojdyla ended the relationship for the final time approximately two weeks before her birthday, which was April 25, in 2012. RP 722, 724. For the first time in their relationship, she told Johnson not to contact her. Nevertheless, he contacted her repeatedly via text messages and a couple of phone calls. Wojdyla responded to most of the texts but did not answer the calls. RP 726-28. Those responses were to tell Johnson to cease contact and that the relationship was over. RP 729.

Wojdlya had not seen Johnson for approximately two weeks before April 25, 2012. He texted her four or five times that day, asking to see her for her birthday. She refused. That evening, as she exited her apartment building to meet a man who was to take her to dinner, Johnson was waiting. RP 729, 731-32. Johnson told Wojdyla's date that she was his girlfriend and the man should leave. He did. RP 735. It was raining that evening and Johnson was both angry and soaking wet. RP 738. Johnson told Wojdyla that she was the sixth f***ing female who had done this to him. RP 734. Wojdyla returned to her apartment without interference, but shortly after she went inside Johnson telephoned her, again expressing anger at what he apparently perceived as a betrayal. RP 739-40.

After that, Wojdyla received many text messages from Johnson every day, in which he claimed to love her. In more than two of those messages he threatened to harm himself. He also made phone calls, which she did not answer. RP 741-43. She did respond to some of the text messages. RP 744. Wojdyla was concerned that Johnson would harm her and/or himself, and at midnight on the evening of May 13-14, 2012, she changed her phone number. RP 748. Even so, her e-mails came directly to her telephone, and within moments she received an e-mail from Johnson requesting that she contact him. She did not respond, and blocked his e-mails from her phone. RP 756-58.

Wojdyla lived in a secure apartment building where the main doors are kept locked and persons who did not have keys had to be admitted by a resident. Johnson did not have a key. RP 763. On the morning of May 14, 2012, Wojdyla, carrying her purse and cell phone, opened the door of her apartment to leave for work. Johnson was waiting outside the door and immediately pushed his way in, forcing her back into the apartment, and put his hand over her mouth when she asked what he was doing. He closed and locked the door. RP 773. He also turned on the television so it would sound as if there were normal activity in the apartment. RP

835. Johnson said something to the effect that he was not leaving. RP 765-66. Wojdyla tried to unlock her phone but Johnson yanked it out of her hand and she was unsuccessful in her efforts to get it back. RP 768. Sometime later she noticed a sore on her finger that she believed occurred when Johnson took the phone away from her. RP 769-70.

Wojdyla asked several times to be allowed to go to work but Johnson refused. RP 772, 800. He did give her phone back to her and allowed her to call an associate at work, but Johnson warned her not to tell anybody he was there. RP 187, 776. When the call ended, Johnson took the phone back. RP 778. Johnson was wearing jeans, a hooded sweatshirt with a pocket across the front, and a knit cap. RP 779. In the pocket Wojdyla could see the outline of what she called a billy club. During their time together Johnson had worked at the gate to Ft. Lewis and as a security guard at a state office in Seattle and she had seen him with the club on his duty belt before. RP 780-81. She had never seen it when he wasn't wearing his utility belt. RP 782. Johnson was also carrying a backpack when he came into the apartment. She had seen it in his garage but he had never brought it to her apartment before. RP 784-85. He made no reference to it and set it on a

small couch, but at one point he opened it and Wojdyla saw it contained a roll of paper towels, a bottle of what looked like window cleaner, and some zip ties, two of them looped but not pulled tight. She had never seen Johnson with zip ties before. RP 786-88.

Wojdyla described Johnson's affect as different than she had seen it before and she was alarmed. His face was empty; "he had no soul." RP 783, 798. They engaged in a lengthy conversation that focused on Johnson's intense interest in the man Wojdyla had planned to date on her birthday and an incident that had occurred with one of her girlfriends. RP 790-91. At one point Johnson held the zip ties in his hand, standing between her and the door, but when she asked him about them he merely laughed in a sarcastic manner. RP 792-93. The conversation turned to their relationship, and Wojdyla attempted to soothe Johnson by telling him what he wanted to hear—that they would be okay, even though she was not really considering resuming the relationship. RP 794-95. When Wojdyla would ask to leave, Johnson would say something along the lines of "if I can't have you, no one can." Frightened, Wojdyla asked Johnson if he had a gun with him; he replied, "Actually, I do," and lifted his sweatshirt to display the gun in a holster. RP 800-03.

Johnson told Wojdyla that he was going to kill her, then himself. Wojdyla believed him, based on the gun, club, and zip ties. RP 804-06. She estimated that by this time he had been in the apartment an hour. RP 807. Using a vulgarity, Johnson asked if they were going to have sex, and laughed when she said no. It occurred to her then that perhaps this is why he really came and although she did not want to have sex with him, she thought that if she did he might let her go, so she agreed. RP 810-11. Johnson then took the gun out of the holster and tried to hand it to her, but Wojdyla refused and at her request he removed the clip and set the clip and gun on the back of a couch. RP 813-14.

Johnson and Wojdyla went into the bedroom and had intercourse. In an effort to make the encounter seem normal, Wojdyla asked him to manually bring her to orgasm, but that was unsuccessful. Afterward they both dressed. Johnson returned Wojdyla's phone to her, and when she asked again if she could go to work he nodded "yes." RP 823-27. They left her apartment together. RP 832, 834. Wojdyla drove away from the apartment building very quickly and headed for her place of employment on Ft. Lewis. RP 838, 840. While en route, she called a co-worker, Debra Cole, to let her know she was coming. RP 188-90, 842-43.

She stayed at her place of employment for some time, then went with Cole to the Lacey Police Department to make a report. RP 192-95, 851-52. Later that day she was examined at St. Peter's Hospital in Olympia by a sexual assault nurse practitioner. RP 480, 872-74.

Wojdyla went to her apartment long enough to gather some belongings, but she never stayed there again, and moved out on May 19. RP 855-57. She then lived with her father in Bonney Lake; Johnson had never been there. RP 857-58. She obtained a no-contact order against Johnson. RP 878.

Detective Jaime Newcomb of the Lacey Police Department took the report from Wojdyla and located Johnson at his residence in Lakewood. RP 551-52. He and Detective Bev Reinhold met Lakewood and Pierce County officers at that residence. RP 387, 402, 553. The officers made unsuccessful efforts to get Johnson to come out. RP 403,554-56. Detective Reinhold obtained a search warrant for the residence, RP 406, and a Pierce County deputy with a K-9 unit entered the house. Johnson was located in a crawl space under the house, accessed by a trap door in the floor of a bedroom closet. RP 229-231. The dog, which was trained to bite, was sent down into the crawl space. RP 233. A short time later,

Johnson emerged from the crawl space, the dog still holding onto his foot. RP 235, 238. Shortly thereafter, Johnson was taken to the hospital for treatment of the dog bite injuries. RP 565.

Detective Reinhold obtained an addendum to the search warrant permitting a search of two vehicles located in the garage of Johnson's residence. RP 407. During the search of the house officers located a 9mm automatic handgun, with a round in the chamber, in the crawl space. RP 452, 456. A gun case was located in a dresser in Johnson's bedroom, along with a loaded magazine. RP 424. In a black BMW, parked closer to the door of the garage than a Honda Civic, they found an empty asp[2] holder, a roll of toilet paper, and a backpack containing a knife, some zip ties, a roll of duct tape, a handsaw, a roll of paper towels, a drop cloth like those used by painters, leather gloves, rubber gloves, a hat, and a water bottle. RP 436-41, 459, 463-64.

At the scene, Newcomb advised Johnson of his *Miranda*[3] warnings. RP 566. At the hospital, Johnson admitted that he had been at Wojdyla's apartment that morning. He said that he had been sending text messages to Wojdyla in an attempt to reconcile

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2 An asp is an expandable baton. RP 436-37.
3 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

with her. He admitted that she had asked him to stop contacting her, that the previous night she had changed her cell phone number, and that one of the reasons he went to Lacey is because he was unable to otherwise contact her. He said he entered the apartment building by waiting outside until someone left and he was able to get in while the door was open. RP 568-69. He said that when Wojdyla opened her apartment door she started to cry and he placed his hand around her mouth in an effort to keep her quiet. RP 570. Johnson admitted that he did not have permission to enter the apartment, and that he had put his arm around her waist to prevent her from leaving. He denied pushing Wojdyla against the wall of the apartment, but rather described it as a hug. RP 571. Johnson further admitted to taking the phone from Wojdyla's hand so that she could not contact law enforcement. He denied threatening to harm Wojdyla but admitted to threatening to kill himself. RP 572. He admitted that he had a gun with him and that he had shown it to Wojdyla. RP 573. He said that she had asked to leave and he had told her she could not until they finished their conversation. RP 574. He said that they had consensual sex, and that he had removed his gun before that at Wojdyla's request. RP 575-76. Johnson told Newcomb he had taken a backpack into

Wojdyla's apartment; he called it a survival bag. When asked why there was a hand saw in the bag, he replied that it had fallen off the wall of his garage and he had put it into the car. He did not explain why it was in the backpack. RP 578-79. He told the officer that the zip ties and duct tape in the backpack were for fastening cables around his residence, but did not answer when asked why he took those items to Wojdyla's apartment. RP 579.

On June 22, 2012, Wojdyla left her workplace at Ft. Lewis and was driving north on I-5 toward Bonney Lake when she saw behind her in traffic a black BMW that she believed was Johnson's car. RP 877. The BMW stayed behind her, passing at least two exits that Johnson could have taken to get to his own residence. RP 880-81, 883. The BMW followed her when she exited I-5, heading for Highway 512. She gave it ample opportunities to pass her but it remained behind her, maintaining a constant distance. RP 883-86. Wojdyla called 911 and explained the situation. She was directed to flash her emergency lights so Washington State Patrol troopers in the area could identify her car. RP 635, 887, 892. Wojdyla was further directed to stop her car at a Chevron station; when she turned to enter the lot, the black BMW suddenly made a left turn from a through lane into a lot on the opposite side of the

highway. RP 673-74, 895-96. Trooper Jason Caton contacted Johnson, the driver of the BMW, who said he was meeting a friend at a sushi place in Bonney Lake but he did not know the friend's name; he had to call her. RP 676. He later identified the friend as "Sara" and gave a last name Trooper Caton could not recall at trial. RP 677. Trooper Caton verified that a no-contact order was in place naming Wojdyla as the protected party and Johnson was arrested. RP 678, 683.

The BMW was left in the parking lot where Johnson was arrested, but the following day, after more information was obtained, it was impounded, towed to a WSP facility, and eventually searched incident to a search warrant. RP 683-84. The officers found and seized a roll of duct tape, a pair of black gloves, a black hat, and a bag containing a woman's black wig, a pair of black sunglasses, and two receipts from a beauty supply store in Lakewood, both dated June 22, 2012. RP 684, 687; CP 239.

2. Procedural facts.

Johnson was charged by a second amended information with one count each of first degree burglary while armed with a firearm, domestic violence, and with a firearm enhancement; first degree kidnapping while armed with a firearm, domestic violence,

and with a firearm enhancement; first degree rape while armed with a firearm, domestic violence, and with a firearm enhancement; felony harassment, domestic violence; felony stalking, domestic violence, and fourth degree assault, domestic violence. CP 2-3. A hearing was held on January 28, 2013, on defense motions to suppress evidence, his objection to the State amending the information to add the charge of stalking, and a motion to suppress his statements to the police. 1/28/13 RP 6-8. The trial court ruled that all of the contested statements were admissible, 1/28/13 RP 68-71. The court denied the motion to prohibit the State from charging the stalking offense, 1/28/13 RP 102-03, and denied the motion to suppress evidence. 1/28/13 RP 119.

A jury trial began on April 22, 2013, and verdicts were entered on May 3. Johnson was convicted of all of the above charges, with enhancements, except first degree rape. RP 1391-94; CP 138-151. On June 11, 2013, Johnson was sentenced within the standard range to a total of 209 months, including the firearm enhancements. CP 8. The trial court found that the first degree kidnapping and felony harassment constituted the same criminal conduct for sentencing purposes. CP 5.

C. ARGUMENT.

1. The search warrant issued on June 25, 2012, in Pierce County Superior Court, was constitutionally sufficient under both the Fourth Amendment and Art. I, § 7.

Johnson raises a number of claimed errors regarding the search warrant obtained by Washington State Patrol officers on June 25, 2012, and served on a black BMW that was driven by Johnson on the evening of June 22, 2012, shortly before he was arrested for violation of a no-contact order. CP 231-39. Johnson sought suppression in the trial court of the evidence seized from his car. 1/28/13 RP 103-21.

a. There was probable cause to believe evidence of a crime would be found in the BMW.

A search warrant must be based upon probable cause, which is defined as "the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime. It is only the probability of criminal activity and not a prima facie showing of it which governs the standard of probable cause." State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001) (citing to State v. Seagull, 95 Wn.2d 898, 906-07, 632 P.2d 44 (1981). The issuing magistrate may draw reasonable inferences

from the facts set forth in the affidavit, and his or her determination is given great deference. Clark, 143 Wn.2d at 748. The magistrate's decision will be reversed only on a showing of abuse of discretion. The affidavit for the search warrant is to be read in a commonsense manner, and any doubts should be resolved in favor of the warrant. Id. A search warrant is entitled to a presumption of validity. State v. Wolken, 103 Wn.2d 823, 827-28, 700 P.2d 319 (1985). It is a "deliberately deferential" standard of review. State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007)

Probable cause may be based upon evidence that would be inadmissible at trial, such as hearsay, a confidential informant's tip, or other "unsrutinized" evidence. Chenoweth, 160 Wn.2d at 475. Probable cause is more than suspicion or speculation, but less than certainty. Id. at 476.

Johnson asserts that the affidavit contains nothing more than boilerplate language, the language disapproved in State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999), that the information about his possession of a gun on May 14th was too remote to support the search warrant, and the information in the affidavit relied on propensity evidence. Appellant's Opening Brief at 13-15.

In Thein, the police had evidence connecting the defendant with a marijuana grow operation in a house he owned but rented to others. Thein, 138 Wn.2d at 137-38. They obtained a search warrant for Thein's own residence based on nothing more than stock language that drug traffickers are known to keep drugs, records, and related paraphernalia at their residences. The affidavit lacked any evidence to believe specifically that Thein would have evidence of a crime at his home, *i.e.*, that there was any nexus between the place and the crime. Id. at 138-39, 147. In Johnson's case, however, even though there was some boilerplate language in the affidavit regarding conduct common to persons who violate domestic violence protection orders, CP 232, the affidavit also contained the following information: (1) the victim reported that she had a no-contact order against her ex-boyfriend and she was being followed by a black BMW registered to him, that it swerved in and out of traffic without signaling, and it changed lanes when she did, CP 232-33; (2) the affiant observed the BMW make an unsafe lane change and turn into a parking lot at the same time the victim pulled off into a different parking lot, CP 233; (3) the driver of the BMW, identified as Johnson, didn't know the name of the friend he was in the area to meet, CP 233; (4) Johnson had

been arrested for stalking the same victim during an incident in which he held her at gunpoint and forcibly raped her, CP 234; (5) Johnson had a history of carrying firearms on his person and in his vehicle, and had a firearm on his person when he was arrested following the earlier incident. CP 234. The affidavit does not specify when that earlier incident occurred.

The above facts are far more than boilerplate language and permit an issuing magistrate to make a reasonable inference that Johnson likely had a gun in the car at the time of the June 22 incident. While propensity evidence might not be admissible at trial, ER 404(b), the facts contained in affidavits of probable cause need not meet the same standards governing admissibility of evidence at trial. State v. Withers, 8 Wn. App. 123, 125, 504 P.2d 1151 (1972). Indeed, Johnson's habit of carrying a firearm is very relevant to the likelihood that he was carrying one in the vehicle while he was following the victim.

The facts contained in the affidavit create are more than sufficient to permit an ordinarily cautious person to form a reasonable suspicion that Johnson was guilty of the crime of violation of a protection order with firearm restrictions. CP 236, Clark, 143 Wn.2d at 748. Johnson was driving in a very suspicious

manner and the trooper had information from Lacey Police officers that a gun had been involved in an earlier incident with the same victim. The manner in which Johnson followed the victim certainly leads to the conclusion that he intended to do something that would constitute a crime, such as he had done before. In order to do that, he would almost certainly have carried in the car whatever instruments ("weapons or other things by means of which a crime has been committed or reasonably appears about to be committed," CP 236) he planned to use to accomplish that goal. The nexus is established because Johnson was driving the car at the time he was committing the crime.

Johnson seems to find it relevant that he was not prohibited from possessing a gun at the time of the earlier incident with the victim. Appellant's Opening Brief at 15. But whether he carried the gun legally or not is not the focus of concern. The concern is whether a gun was in the car, available to be used against the victim, and indicating to some extent his intent. The crime at issue was violation of a protection order, not unlawful possession of a firearm. CP 236. The warrant was intended to discover evidence that he was intentionally following the victim, rather than coincidentally traveling the same direction on the same roads and

at the same speed as the victim. There was a "nexus between criminal activity and the item to be seized", as well as "between the item to be seized and the place to be searched." Thein, 138 Wn.2d at 140.

b. The warrant was not overbroad.

Johnson argues that the search warrant was so broad that it permitted the officers to search for evidence of any crime. Appellant's Opening Brief at 16-19. "Whether a search warrant contains a sufficiently particularized description is reviewed de novo. State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992).

The officers executing this warrant were authorized to:

> Seize, if located, the following property or person(s): All firearms, any containers, implements, fruits of the crime, equipment or devices used or kept for illegal purposes, evidence of ownership to such property or rights of ownership or control of said property; records including any notebooks or written instruments or electronic records, associated with any firearms found in violation of RCW 9.41.098.

CP 236.

General exploratory searches are unreasonable. Thein, 138 Wn.2d at 149. A determination that a warrant meets the particularity requirement of the Fourth Amendment is reviewed de novo. State v. Stenson, 132 Wn.2d 668, 691, 940 P.2d 1239

(1997). The person executing the warrant must be able to identify the property to be seized with reasonable certainty. Id., at 691-92.

> General warrants, of course, are prohibited by the Fourth Amendment. "The problem [posed by the general warrant] is not that of intrusion, per se, but of a general, exploratory rummaging in a person's belongings. . . "

Id., at 691 (citing to other cases). When the precise identity of items to be sought cannot be determined at the time the warrant is issued, a generic or general description is sufficient when probable cause is shown and it is impossible to give a more specific description. Id., at 692.

A common sense reading of the warrant here does not support Johnson's argument. In the initial paragraph, there is a finding for probable cause for the crime of "Violation of Protection order with Brady "Firearm" Restrictions." CP 236. The warrant authorizes seizure of "fruits of *the* crime" (emphasis added), and "records . . . associated with any firearms found in violation of RCW 9.41.098.". A reasonable person would read this warrant as permitting search for the listed items as they pertain to the crime for which probable cause was found, not all crimes.

> A search warrant must describe the items to be seized with such particularity as is reasonable and practical under the circumstances. A warrant is not

> constitutionally defective when it limits the officers' discretion on what is to be seized."

State v. Reid, 38 Wn. App. 203, 212, 687 P.2d 861 (1984). In Reid, the challenged search warrant used the phrase "any other evidence of the homicide," which the reviewing court found adequate to prevent a general exploratory search. Id.

RCW 9.41.098 addresses firearms which a court may order forfeited—in other words, it is unlawful for anyone to own them under the circumstances described. Under the plain view doctrine, officers could seize any contraband located even if the warrant does not authorize that specific item. *See* State v. Chambers, 88 Wn. App. 640, 645, 649, 945 P.2d 1172 (1997).

The officers executing this search warrant did not have unbridled discretion, and the factors identified in State v. Higgins, 136 Wn. App. 87, 91-92, 147 P.3d 649 (2006), were satisfied. It was not overbroad.

c. The search warrant did not authorize the seizure of any materials protected by the First Amendment.

Johnson maintains that the search warrant was so overbroad that it included materials protected by the First Amendment. Appellant's Opening Brief at 19-21. The warrant authorized the seizure of "records including any notebooks or

written instruments or electronic records, associated with any firearms found in violation of RCW 9.41.098." CP 236. Johnson claims that these records are protected by the First Amendment.

First, the records to be seized were restricted to those "associated with any firearms found in violation of RCW 9.41.098," as well as evidence of ownership or right of control of other items listed. CP 236. Contrary to Johnson's argument, this limited the police to items associated with evidence of a crime. Second, these items are not protected by the First Amendment just because they involve writing or electronic data.

> "'Not all speech is of equal First Amendment importance,'" however, and where matters of purely private significance are at issue, First Amendment protections are often less vigorous. . . That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship on matters of public import."

Snyder v. Phelps, 131 S. Ct., 1207, 1215-16, 179 L. Ed. 2d 172 (2011) (internal cites omitted). Johnson cites to Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965), for the idea that when the things to be seized are books, the search warrant

must be especially exact. Appellant's Opening Brief at 20. That case, however, says:

> In short, what this history indispensably teaches is that the constitutional requirements that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain.

Id. at 485. "A 'book' which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case." Id. at 485, n. 16. In Standford, the petitioner's home had been searched for evidence relating to the Communist Party and more than 2000 items were seized.

The First Amendment does not protect writing just because it is writing. "'A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . '" Miller v. California, 413 U.S. 15, 25, n.7, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (internal cite omitted). The written instruments or electronic records that the search warrant authorized to be seized were records regarding any firearms that were unlawful to possess, or evidence of ownership or control over property subject to seizure. CP 236.

Johnson also argues that there was no specific evidence that such records existed or would be found in the vehicle. Appellant's Opening Brief at 20. But there is no requirement that there be specific evidence that such items are in the vehicle, only a reasonable suspicion. Clark, 143 Wn.2d at 748. In the context of examining an affidavit for missing or incorrect information, our Supreme Court has referred to a "catch-22 situation for the police: requiring police to thoroughly investigate the accuracy of an affidavit, a feat impossible to do without a warrant." Chenoweth, 160 Wn.2d at 476. It is reasonable to infer that records pertaining to a firearm would be kept with the firearm.

Johnson further argues that the warrant did not include any language limiting the officers in their search through notebooks and records in the car, and cites to State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993). Appellant's Opening Brief at 20-21. The Fourth Amendment, however, requires particularity regarding the things to be *seized*. Id. at 28. While it is true that a general rummaging through a person's belongings is prohibited, Stenson, 132 Wn.2d at 691, it is glaringly obvious that an officer searching for items that may be seized will have to look at all items which might meet that description. It follows that the only particularity requirement

regarding the items to be *searched* is that they must be items that could conceivably be items authorized by the warrant to be seized. Here the limitation to records regarding firearms found in violation of RCW 9.41.098, or evidence of ownership or control of seizable items, limits the search to documents, whether paper or electronic, that could answer that description.

d. The items seized from Johnson's car were all implements of the crime of violation of a protection order.

Johnson argues that the items seized were not specifically listed in the warrant and not admissible under the plain view doctrine. Appellant's Opening Brief at 21. The warrant identified the crime for which probable cause was found as violation of a protection order with a firearm restriction. CP 236. It authorized the seizure of implements of the crime. Id. It is a reasonable inference that a wig and sunglasses could be implements of the crime of violation of a protection order, given that they would be effective disguises for either Johnson or the victim. The warrant also authorized the seizure of evidence of ownership of such implements, and receipts are generally considered to be evidence of ownership. The trial court did not err in admitting all of the items taken from the black BMW.

II. The State produced sufficient evidence to support Johnson's conviction for felony stalking.

Johnson claims there was insufficient evidence to support his conviction for felony stalking. He does not argue that he did not stalk Wojdyla, only that there was insufficient evidence that it was a felony. Appellant's Opening Brief at 23-25. Stalking is prohibited by RCW 9A.46.110, which says, in pertinent part:

> (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime;
>
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either:
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110(5)(b) makes stalking a felony if one of several conditions also apply to the above-described conduct. The only circumstance relevant to this case is (5)(b)(ii), that the stalking violated any protective order protecting the person being stalked. Here there was evidence of a number of incidents of stalking, but

only one occurred after the protection order was put in place. Johnson argues that the statute is clear that at least two incidents must occur after the protective order is obtained, and in the alternative that the statute is ambiguous and the rule of lenity operates in his favor. Appellant's Opening Brief at 23-25.

Statutory construction is a question of law reviewed de novo under the error of law standard. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). When interpreting a statute, the court must give effect to the plain meaning of the statutory language. In re Wissink, 118 Wn. App. 870, 874, 81 P.3d 865 (2003). A court may not engage in statutory construction If the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court's notions of what is good policy, recognizing the principle that "drafting of a statute is a legislative, not judicial, function." State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court's goal in statutory interpretation is to identify and give effect to the legislature's intent, if the language of a statute is unambiguous, the language of the statute is not subject to judicial interpretation. State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (*citing* State v. Bright, 129 Wn.2d

257, 265, 916 P.2d 922 (1996)), *review denied*, 145 Wn.2d 1013 (2001). When the legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.2d 1216 (2002). Under the rule of lenity, any ambiguity is interpreted to favor the defendant. Spandel, 107 Wn. App. at 358.

Washington case law has interpreted and applied the stalking statute broadly. State v. Kintz, 169 Wn.2d 537, 549, 238 P.3d 470 (2010). Johnson followed the victim in his vehicle at a time a protection order was in place, and by the plain terms of the statute, that stalking conduct raises the offense to a felony.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, supra, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical

probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The evidence here was sufficient to establish felony stalking.

Even if Johnson were correct, which the State does not concede, the remedy would not be reversal and dismissal with prejudice, as he argues, but remand for entry of judgment and sentence for gross misdemeanor stalking. The gross misdemeanor is an inferior degree of felony stalking, and a defendant may be found guilty of an inferior degree of the crime charged. RCW 10.61.003. Johnson does not dispute that there was sufficient evidence of gross misdemeanor stalking.

III. The court acted within its discretion in admitting the contents of Johnson's backpack.

Johnson argues that the contents of his backpack, seized some hours after the incident on May 14, 2012, where he held Wodjyla in her apartment, were more prejudicial than probative and the court abused its discretion in admitting them. Appellant's Opening Brief at 25-27.

Admission of evidence is within the trial court's "sound discretion" and will not be disturbed on review absent an abuse of that discretion. State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d

306, *review denied*, 108 Wn.2d 1033 (1987). A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." Id.

In Johnson's case, the trial court did a careful weighing of the relevance of the evidence against its prejudicial effect, taking into account Evidence Rules 401, 402, and 403. RP 96-100. The court found that the evidence was highly probative of Johnson's intent and although prejudicial to him, the prejudice did not outweigh the probative value. RP 99. The court offered to give a cautionary instruction if Johnson requested one, RP 99-100, which he did not. While another court might have ruled differently, the

standard is, as set forth above, whether any reasonable person would have ruled as this court did.

Johnson argues that the probative value of the items in the backpack was limited because it was seized more than twelve hours after the incident and Wojdyla did not see all of the items. Appellant's Opening Brief at 25-26. However, whether Wodjyla saw them or not has nothing to do with Johnson's intent. The time span was not so long as to make the contents of the backpack irrelevant, and there is reason to believe all of the items seized were in the backpack when he took it into Wojdyla's apartment. When he was asked to explain the hand saw in the backpack he said it had fallen off the wall in his garage and he'd put it in his car, but had no explanation as to why it was in the backpack, nor did he deny that it was in the backpack when he carried it into the victim's apartment. RP 578-79.

Wojdyla testified that Johnson threatened to kill her and refused to let her leave for more than two hours. The State charged him with first degree burglary, an element of which is the intent to commit a crime in the building where he entered or remained unlawfully. CP 2. He was also charged with first degree kidnapping, which has an intent element. CP 2. The items in the

backpack were extremely relevant to proving his intent for those offenses, and while they were indeed prejudicial, they were not unduly so. It would be an odd result if offenders could commit odious crimes and then have the evidence suppressed because it cast them in an unfavorable light. The trial court was well within its discretion to find that the probative value of the evidence outweighed the prejudicial effect. RP 98-99.

IV. The nexus between the crime and the firearm defines the enhancement but is not itself an essential element that must be alleged in the charging document.

Johnson argues that the language charging him with first degree burglary and first degree kidnapping, both with firearm enhancements[4], was deficient under both the Sixth Amendment and art. I, § 22 of the Washington Constitution. Appellant's Opening Brief at 28-30. The State does not dispute that sentencing enhancements must be pled in the information. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). Nor does the State dispute that when a firearm enhancement is alleged it must prove that a nexus existed between the weapon and the crime. State v.

4 A firearm enhancement was also added to the charge of first degree rape, CP 3, but he was acquitted of that charge. RP 1393.

Brown, 162 Wn.2d 422, 431-35, 173 P.3d 245 (2007). Johnson raises this claim for the first time on appeal.

Under the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington State Constitution, a charging document must set forth all of the essential elements of the alleged crime so that a criminal defendant can be apprised of the nature of the charge and can prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of the charging document is raised for the first time on appeal, the court will engage in a liberal construction of the document in order to determine its validity. Under that liberal analysis, the appellate court examines: (1) whether the essential elements of the alleged crime appear in any form in the charging document, or whether they can be found by fair construction; and if so, (2) whether the defendant can show that he was nonetheless actually prejudiced by the inartful language used in the document. Kjorsvik, 117 Wn.2d at 105-106. The charging document is read as a whole according to common sense and including facts that are implied. State v. Nonog, 169 Wn.2d 220, 227, 237 P.3d 250 (2010).

Not everything that the State must prove is an essential element of the crime and definitions of essential elements need not be alleged in the charging document. State v. Phuong, 174 Wn. App. 494, 542, 299 P.3d 37 (2013). For example, *see* State v. Tinker, 155 Wn.2d 219, 222, 118 P.3d 885 (2005) (the value of the stolen property is not an essential element of third degree theft); State v. Lorenz, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004) (sexual gratification is not an essential element of first degree child molestation, but rather a definition clarifying the essential element of sexual contact); State v. Allen, 175 Wn.2d 611, 630, 294 P.3d 679 (2013) (the concept of a true threat defines and limits the essential element of a threat in felony telephone harassment but is not itself an essential element).

To prove the sentencing enhancement, the State is required to prove that the weapon was easily accessible, readily available for use, and that there was a connection between the defendant, the crime, and the weapon. State v. Eckenrode, 159 Wn.2d 488, 490-91, 150 P.3d 1116 (2007). The enhancement itself is what must be pled, not all terms defining it. Nor is it reversible error to fail to instruct the jury as to the nexus requirement if the defendant did not seek such an instruction. Id. at 491.

Johnson does not claim that the jury instructions were constitutionally insufficient, nor does he claim that the State failed to prove the nexus between the firearm, the crime, and himself. Because the nexus requirement defines the firearm enhancement, it is not an essential element and need not be charged.

V. The firearm enhancement was properly charged and the court properly imposed the firearm enhancement.

Johnson argues that the State did not allege a firearm enhancement and thus he can only be sentenced to deadly weapon enhancements rather than the firearm enhancements he received. CP 8, Appellant's Opening Brief at 30-32. The State alleged the enhancement for both the first degree burglary charge and the first degree kidnapping charge in identical language, as follows:

> It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to-wit: a silver and black semi-automatic handgun.

CP 2. The charging document references both RCW 9.94A.825, the statute permitting a deadly weapon enhancement and which includes any firearm in the definition of deadly weapon, and RCW

9.94A.533(3), the statute which specifies the length of the firearm enhancement. Id.

Johnson raises this challenge for the first time on appeal. The standard of review of a charging document challenged for the first time on appeal is set forth in the preceding section. He does not challenge the jury instructions or the special verdict forms.

Johnson relies on In re Pers. Restraint of Delgado, 149 Wn. App. 233, 204 P.3d 936 (2009), to argue that the State only charged a deadly weapon enhancement. In Delgado, the court noted that:

> [T]he informations did not specify that the State was charging Meza and Delgado under former RCW 9.94A.510(3), the section relating to firearm enhancements, rather than, or in addition to, former RCW 9.94A.510(4), the section relating to deadly weapon enhancements.

Id. at 229. Here the information did cite to both sections, as well as specifically referring to a "silver and black semi-automatic handgun." CP 2. The information provided adequate notice to Johnson that he was facing a firearm enhancement.

Furthermore, Delgado was not decided on the issue of notice or sufficiency of the charging language. In Delgado, the jury was instructed as to deadly weapons but the verdict forms specified

firearms, and thus the court lacked the authority to impose a firearm enhancement that was unauthorized by the verdict. Id. at 237. Here, the information referenced the firearm statute, the firearm was specifically described, the jury was instructed as to the firearm enhancement, CP 198, and the special verdicts found Johnson armed with a firearm at the time of the crimes. CP 147, 150. Accordingly, the imposition of the firearm enhancements was proper.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Johnson's convictions and sentencing enhancements.

Respectfully submitted this 21st day of March, 2014.

Carol La Verne, WSBA# 19229
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THURSTON COUNTY PROSECUTOR

March 21, 2014 - 8:21 AM

Transmittal Letter

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