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Division I
State of Washington
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Supreme Court No. 97230-3

No. 77318-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MONTALVO,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED 4

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(b)(1). 4

1. The trial court abused its discretion by denying a mistrial, because a serious trial irregularity prejudiced the trial's outcome 4

a. A mistrial should have been granted due to the admission of non-cumulative excluded evidence, and the inadequacy of the instruction 6

b. Because of this serious irregularity, the Court's decision is in conflict with other decisions of the Court of Appeals and with decisions of this Court. This Court should grant review 10

2. The State failed to satisfy its burden to establish the predicate to elevate the conviction to a felony pursuant to RCW 26.50.110. 11

a. The State bears the burden of establishing a defendant's prior convictions – a fact which must be found by the jury beyond a reasonable doubt. 11

b. The State did not satisfy its burden to establish the admissibility of two predicate felony convictions as required by RCW 26.50.110(5) 12

c. The prosecution's failure to satisfy its evidentiary burden means the Court of Appeals decision is in conflict with its other decisions and with decisions of this Court.......... 16

F. CONCLUSION.......... 17

TABLE OF AUTHORITIES

Washington Supreme Court

Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (2002) 14

In re Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012). 16

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 16

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005) 14

State v. Johnson, 124 Wn.2d 57, 873 P.2d 514 (1994) 5

State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005). 12, 15

State v. Suleski, 67 Wn.2d 45, 406 P.2d 613 (1965) 8, 9

State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983) 5, 7, 11

Washington Court of Appeals

State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008).. 5, 7, 8, 10, 11

State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003) 12, 15

State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987) 5, 7, 8, 10, 11

State v. Gray, 134 Wn. App. 547, 138 P.3d 1123 (2006) 12

State v. McDonald, 2019 WL 1989620 (Wash. Ct. App. May 6, 2019) ... 9

United States Supreme Court

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 11

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) 11

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). 11, 17

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 16

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) 16

Washington Constitution

Const. art. I, § 3 11

United States Constitution

U.S. Const. amend. V 16

Statutes

RCW 26.50.110(5) 12, 13, 14, 15

SMC 12A.06 .... 14, 15

Rules

GR 14.1(a), ... 9

RAP 13.4(b)(1), (2) 4, 11, 17

A. IDENTITY OF PETITIONER

Anthony Montalvo, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Montalvo appealed his King County Superior Court conviction for felony violation of a court order as a domestic violence offense. The Court of Appeals affirmed on April 22, 2019. Appendix. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. A trial court should grant a mistrial where it finds a serious trial irregularity has occurred, and where the prejudice to the defendant can only be cured by a new trial. Where the jury heard the exact portion of audiotaped telephone calls that the court had previously ordered excluded due to their prejudicial content, did the irregularity affect the outcome of the trial? Did the court err by denying Mr. Montalvo's motion for a mistrial, and was the Court of Appeals decision therefore in conflict with decisions of this Court and with other decisions of the Court of Appeals, requiring review? RAP 13.4(b)(1), (2)?

2. The United States and Washington Constitutions require the State prove all essential elements of a charged offense. Did the State fail to establish the predicate offenses that elevated Mr. Montalvo's

conviction for felony violation of a no-contact order to a felony, and thus was the Court of Appeals decision in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

D. STATEMENT OF THE CASE

Anthony Montalvo and Toni Granger were involved for several years. RP 535. In July 2015, Mr. Montalvo pled guilty to a misdemeanor violation of a no-contact order (NCO) protecting Ms. Granger. Ex. 8, 9, 11. The factual basis of these violations or the order were not admitted at trial.

Although Ms. Granger was aware of the 2015 NCO, she allowed Mr. Montalvo to continue to live with her; this was partially due to Mr. Montalvo's serious medical condition, which required surgery. RP 684-90.

On July 21, 2016, Ms. Granger decided she wanted Mr. Montalvo to leave the apartment, calling the Renton Police Department to ask them to enforce the NCO. RP 541-42, 554-55. Ms. Granger gave the police Mr. Montalvo's name, and officers consulted a driver's license photograph of Mr. Montalvo before arriving. Id. Officers arrested Mr. Montalvo inside the building. RP 545-47.

Mr. Montalvo was charged with violating the 2015 NCO. CP 1-6; Ex. 8. Since the order also prohibited contact by phone or mail, Mr.

Montalvo's calls to Ms. Granger from jail the following day constituted an additional violation. CP 1-6. The State charged Mr. Montalvo with violation of the NCO as a felony, claiming he had been previously convicted of violating no-contact orders twice before. Id.

The State alleged that one of Mr. Montalvo's previous convictions had been in 2001; however, the Seattle Municipal Court file had been destroyed, so the State merely offered redacted clerk's minutes to support the felony violation charge. Ex. 10.[1]

Before trial, Mr. Montalvo moved to exclude portions of the audiotaped telephone calls that the State intended to introduce at trial. RP 106-08. The "jail calls" contained Ms. Granger's references to past allegations against Mr. Montalvo, including uncharged assaults, threats to have others assault Ms. Granger in the future, and threats against Ms. Granger's family. Id. The State and court agreed these and other statements from the jail calls were improper and highly prejudicial. RP 110-13. The parties and court agreed to a redacted version of the recording. RP 110-13.

[1] Since the Seattle Municipal Court had destroyed its 2001 file, the State offered no details as to underlying charges from the 2001 case, including the identity of the victim, the allegations, or the sentence. RP 570-71; Ex. 10.

Despite the earlier agreement to redact the improper and prejudicial portions, the deputy prosecutor played the wrong disk for the jury at trial – this disk contained the unredacted jail call. RP 491, 494-95. Mr. Montalvo moved for a mistrial. RP 498. Although the jury was exposed to highly prejudicial material the court had previously excluded, the court denied Mr. Montalvo's mistrial motion. RP 498. The court issued a curative instruction and proceeded with the trial. RP 512.

At the trial's conclusion, Mr. Montalvo was convicted of felony violation of a no-contact order. CP 56-57.

Mr. Montalvo appealed his convictions, assigning error to the issues raised herein. On April 22, 2019, the Court of Appeals affirmed his conviction and sentence, remanding only to strike the DNA fee under State v. Ramirez. Appendix (Slip Op.).

He seeks review in this Court. RAP 13.4(b)(1), (2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

1. The trial court abused its discretion by denying a mistrial, because a serious trial irregularity prejudiced the trial's outcome.

A mistrial is appropriate where a trial irregularity so prejudices a defendant "that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). An error is deemed prejudicial if it affects the outcome of the trial. Id.; State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

To determine whether the irregular occurrence affected the trial's outcome, a reviewing court examines: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. Johnson, 124 Wn.2d at 76; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987); State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008).

Despite agreeing the call contained inadmissible statements, the deputy prosecutor played the unredacted jail call for the jury:

> MS. GRANGER: You hit me once, you hit me twice, you hit me three times, okay, before –
>
> MR. MONTALVO: (inaudible).
>
> MS. GRANGER: -- in fact.
>
> MR. MONTALVO: (inaudible).
>
> MS. GRANGER: And then you threatened to take my life and some more shit and I'm not – no, you threatened to take my life all the way down to the sheepdog. Are you kidding me?
>
> MR. MONTALVO: What?

> MS. GRANGER: I said you were threatening to take my life and my family's life all the way down to the sheep – sheepdog. Talking about I got homies that will hunt you til you drop.
>
> MR. MONTALVO: And they will.
>
> MS. GRANGER: Okay. So I take that shit very seriously, okay. So how do (inaudible) ever going to do that. But anyway, this conversation is over. Good-bye. Have a good night.

RP 494-95.

After the excluded portions of the call were played for the jury, the deputy prosecutor asked for a recess and conceded he had played excluded material for the jury. RP 497 (STATE: "I agree with [defense counsel] that it's a violation of the Court's pretrial – well, the Court endorsed our agreement."). Mr. Montalvo moved for a mistrial. RP 498.

a. A mistrial should have been granted due to the admission of non-cumulative excluded evidence, and the inadequacy of the instruction.

The court should have granted a mistrial. The prosecutor's error was serious and in clear violation of the court's pre-trial order. The court recognized the State's violation of the order was "concerning." RP 499.

Further, the improperly admitted evidence was not cumulative. The excluded material contained highly prejudicial uncharged acts ("You hit me once, you hit me twice, you hit me three times before,..."). RP 494-95. There were no allegations of assault against Mr. Montalvo at

trial; the sole reference to assaultive behavior was this excluded call; the only reference to threats, likewise, was this excluded call. Id.

The Court of Appeals recognized the State was incorrect in asserting the excluded material was cumulative, holding, "The trial court did not admit any other evidence that Montalvo had physically assaulted Granger." Slip op. at 6. Accordingly, the Court found that the second factor – whether the excluded evidence was cumulative – "weighs against the trial court's decision." Id. at 6.

However, the Court of Appeals analysis of the third factor – whether the trial court properly instructed the jury to disregard the irregularity – is in conflict with its own decisions, as well as decisions of this Court, requiring review. Weber, 99 Wn.2d at 165. Although juries are presumed to follow court instructions, and while the trial court did instruct the jury here, the instruction was inadequate to cure the prejudice of the taint resulting from the excluded evidence.[2] Escalona, 49 Wn. App. at 255; Babcock; 145 Wn. App. at 164.

In Escalona, the defendant was charged with assault in the second degree. 49 Wn. App. at 254. A prosecution witness testified in violation

[2] The court instructed the jury here as follows: "The substance of statements in that call made by the female speaker are not to be taken as true, only that the call was made. You should not consider the substance of statements in the call made by the female speaker as evidence during your deliberations." RP 512-13.

of a pre-trial order, that Escalona already had a record and had stabbed someone. Id. The trial court instructed the jury to disregard the improper statement and denied the defense motion for a mistrial. Id. at 253. This Court applied the three-part Weber test and reversed the conviction, holding the irregularity was very serious; the improperly-admitted statement was not cumulative of other evidence at trial, and that a curative instruction would have been inadequate. Id. at 255-56.

Here, as in Escalona, the erroneously admitted evidence was, by its similarity to the charges, highly prejudicial. See Babcock, 145 Wn. App. at 165. Even where a jury is properly instructed, no instruction can "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn. App. at 255; Babcock, 145 Wn. App. at 164-66 (quoting State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) ("We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.").

The Court of Appeals erred by relying on Suleski, in order to distinguish the instant case, where this Court found over 50 years ago that a mistrial was necessary due to serious trial irregularities. 67 Wn.2d at 51. Recently, the Court of Appeals noted that this Court's decision in Suleski was premised upon the fact that "[s]erious irregularities occurred in

Suleski, including novel rather than cumulative evidence." State v. McDonald, 2019 WL 1989620, at *7 (May 6, 2019).[3]

The Court of Appeals correctly recognized that in Mr. Montalvo's case, the excluded evidence was not cumulative; thus, it was error for the Court to distinguish his case from Suleski, where the improperly admitted evidence was also "novel." Id. Without the erroneously admitted portion of the jail call, the jury would never have known about the prior assaults of the complaining witness. This is novel evidence.

This Court has found curative instructions, such as that given here, to be inadequate to remove the prejudice caused by such prosecutorial error. See Suleski, 67 Wn.2d at 51. Where the court simply instructs a jury to disregard "inherently prejudicial" evidence it has just heard, this Court has found such an instruction unlikely to "remove the prejudicial impression" left by such improperly-admitted evidence. Id.

It is beyond dispute that the jury's only source for the prior assaults was the unredacted jail call improperly played in court. This serious trial irregularity was not adequately addressed by the court's instruction, and the error affected the outcome.

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[3] This unpublished opinion, cited pursuant to GR 14.1(a), has no precedential value and is not binding on this Court.

b. Because of this serious irregularity, the Court's decision is in conflict with other decisions of the Court of Appeals and with decisions of this Court. This Court should grant review.

The State conceded and the trial court found the State violated the agreed pre-trial order to redact the jail calls. Yet the court denied Mr. Montalvo's mistrial motion, even though the jury heard excluded allegations of Mr. Montalvo's prior assaults of the complainant. RP 110, 498, 506-07.

The introduction of the prior allegations against Mr. Montalvo undoubtedly affected the verdict. In this trial where the complaining witness did not appear and could not be cross-examined, the jury heard unsupported allegations of prior uncharged assaults and threats to kill from this excluded material. RP 498. No curative instruction could remedy the harm caused by the jury's exposure to these excluded allegations. Escalona, 49 Wn. App. at 255; Babcock, 145 Wn. App. at 164.

The court erred when it denied the mistrial because it found the State had acted in good faith. RP 507. Bad faith is not required for prosecutorial misconduct or mismanagement to infect a jury's verdict, violating the right to a fair trial. In fact, in Weber, this Court recommended that appellate courts not consider whether prosecutorial error was "deliberate or inadvertent. That inquiry diverts the attention

from the correct question: Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?" Weber, 99 Wn.2d 164-65.

The admission of these excluded acts was irrelevant and highly prejudicial, and inevitably affected the verdict; thus, this Court should grant review. Weber, 99 Wn.2d 164-65; Suleski, 67 Wn.2d at 51; Escalona, 49 Wn. App. at 255; Babcock, 145 Wn. App. at 164.

The Court of Appeals decision affirming the jury's verdict is in conflict with this Court's decisions, and with other decisions of the Court of Appeals. This Court should grant review. RAP 13.4(b)(1), (2).

2. The State failed to satisfy its burden to establish the predicate to elevate the conviction to a felony pursuant to RCW 26.50.110.

a. The State bears the burden of establishing a defendant's prior convictions – a fact which must be found by the jury beyond a reasonable doubt.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amend. XIV; Const. art. I, § 3.

In State v. Carmen, the Court of Appeals held the "fact" of previous convictions is a matter to be determined by the jury beyond a

reasonable doubt; however, issues relating to admissibility of prior convictions are properly a question of law for the court. 118 Wn. App. 655, 663, 77 P.3d 368 (2003); see also State v. Gray, 134 Wn. App. 547, 555, 138 P.3d 1123 (2006). Issues for the trial court may include whether a defendant's prior convictions were based upon a violation of one of the enumerated statutes in RCW 26.50.110(5).

Carmen and Gray established that the statutory authority for previous NCOs is not an essential element of the crime to be decided by the jury, but a threshold determination for the court as part of its "gate-keeping function." Gray, 134 Wn. App. at 556; State v. Miller, 156 Wn.2d 23, 30, 123 P.3d 827 (2005).

b. The State did not satisfy its burden to establish the admissibility of two predicate felony convictions as required by RCW 26.50.110(5).

To establish a felony violation of no-contact order, the State is required to establish that two previous convictions qualified as predicate convictions for the purposes of RCW 26.50.110(5). Because the 2001 conviction from Seattle Municipal Court did not qualify, it should have been excluded at trial.

Pursuant to RCW 26.50.110, a violation of a court order may only be elevated to a felony under certain circumstances. The existence of two prior convictions for the violation of a court order is one of those

circumstances; however, the statute is specific as to which court orders – and which violations – will result in this heightened charging scheme:

> **RCW 26.50.110**
> **Violation of order—Penalties.**
>
> (5) A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

RCW 26.50.110(5).

The State alleged that on July 21, 2016, the date of Mr. Montalvo's arrest at the apartment building, he had two prior convictions for violating an order under the enumerated chapters in RCW 26.50.110(5). For one prior conviction, the State admitted a certified copy of a judgment and sentence from Mr. Montalvo's 2015 conviction for the violation of a NCO against Ms. Granger, as well as the NCO issued that day. RP 535; Ex. 8, 11.

However, the second prior conviction is more problematic. The State offered a Seattle Municipal Court conviction from 2001. RP 535; Ex. 10. The docket (SMC Case No. 409010) indicates only that Mr.

Montalvo pled guilty to a violation of Seattle Municipal Code 12A.06.180.[4] Ex. 10 (no other information was available, since the 2001 Municipal Court file had been destroyed).

A violation of SMC 12A.06.180 does not constitute a predicate conviction for purposes of elevating a violation of a NCO to a felony charge. RCW 26.50.110. Although the statutory language in various domestic violence provisions are similar, the plain language of the statute is clear. "[I]f the statute's meaning is plain on its face, then the court must give effect to the plain meaning as an expression of legislative intent." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005), quoting Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

The meaning of RCW 26.50.110(5) is plain on its face. The statue specifically enumerates the types of court orders that will give rise to felony charges: "A violation of a court order ... is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign

[4] The docket indicates the charge was Willful Violation of Protection Order. No other information was available from the docket. Ex. 10.

protection order." RCW 26.50.110(5). A violation of an order issued under SMC 12A.06 is not expressly listed.

Had the legislature intended to authorize the State to charge the violation of a NCO as a felony whenever a defendant had prior violations of any law, state or local, it could have stated so. The plain language of RCW 26.50.110(5) specifies that only multiple violations of specific types of NCOs give rise to a class C felony.

Since the court, rather than the jury, determines whether a prior NCO qualifies as a predicate conviction, the trial court erred in admitting the 2001 conviction. See Carmen, 118 Wn. App. at 664 ("RCW 26.50.110(5) raises an evidentiary barrier to the admission of evidence to the two prior convictions"); Miller, 156 Wn.2d at 31.

In addition, the State produced only a docket sheet for the 2001 conviction, stating the file had been destroyed. RP 570-71. It was not possible for the jury to properly consider the "fact" of the 2001 conviction, based upon the docket sheet alone. See Carmen, 118 Wn. App. at 662.

Accordingly, the 2001 conviction was erroneously admitted because the prior conviction, on its face, does not qualify as one of the enumerated offenses listed as a predicate for RCW 26.50.110(5). In addition, the State presented insufficient foundation for the 2001

conviction, proceeding with only a docket sheet. Thus, the State failed to meet its burden to prove the predicate for the felony violation.

c. The prosecution's failure to satisfy its evidentiary burden means the Court of Appeals decision is in conflict with its other decisions and with decisions of this Court.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson v. Virginia, 443 U.S. at 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's double jeopardy clause bars retrial of a case, such as this, where the State fails to prove an essential element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

The State failed to establish two predicate prior convictions in order to support the felony violation of a no-contact order, as charged in the information. Unlike in Carmen, this deficiency could no longer be cured by the time of the Court of Appeals decision. Because the misdemeanor was not submitted to the jury, the Court of Appeals also could not enter a conviction for a misdemeanor no-contact order violation. In re Heidari, 174 Wn.2d 288, 294, 274 P.3d 366 (2012).

The Court of Appeals was incorrect in declining to address the merits of this argument, determining Mr. Montalvo waived his objection. Slip op. at 8. The State bears the burden to prove all essential elements beyond a reasonable doubt. Winship, 397 U.S. 364. The State's failure to establish an essential element, such as to prove a predicate offense, can be raised for the first time on appeal. RAP 2.5(a)(3).

Because the Court of Appeals decision is in conflict with decisions of this Court and other decisions of the Court of Appeals, this Court should grant review under RAP 13.4(b)(1) and (2).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court and with other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

DATED this 20th day of May, 2019.

Respectfully submitted,

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APPENDIX

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4/22/2019
Court of Appeals
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY MAURICE MONTALVO, Appellant.	No. 77318-6-I DIVISION ONE UNPUBLISHED OPINION FILED: April 22, 2019

CHUN, J. — The State charged Anthony Montalvo with two counts of domestic violence felony violation of a court order. During pretrial motions, the State agreed to redact portions of a recorded jail telephone call that served as the basis for the second count. At trial, however, the State played an unredacted version of the recording. Montalvo moved for a mistrial. The trial court denied his motion but gave a limiting instruction to the jury.

Later at trial, Montalvo objected to the admissibility of Exhibit 10, a certified copy of a public record that served to establish a predicate conviction under RCW 26.50.110(5). The court admitted the evidence.

The jury convicted Montalvo on both counts.

On appeal, Montalvo assigns error to the trial court for denying his motion for a mistrial and admitting Exhibit 10. He additionally asserts the trial court erred by imposing a discretionary $100 DNA fee as part of his judgment and sentence.

We remand the judgment and sentence to strike the DNA fee, but affirm in all other respects.

I.
BACKGROUND

In 2015, the trial court issued a judgment and sentence after Montalvo pleaded guilty to a domestic violence misdemeanor violation of a court order. The court also entered a no-contact order to prevent Montalvo from coming within 500 feet of the residence or person of the victim Toni Granger, a former girlfriend.

Granger called the police on July 21, 2016, reporting that Montalvo was in her apartment and threatening her life. Officers arrived and arrested Montalvo.

At 1:00 AM on July 22, 2016, Montalvo called Granger from jail (the jail call). The relevant portion of the conversation provided as follows:

> Ms. Granger: You hit me once, you hit me twice, you hit me three times, okay, before — . . .
>
> And then you threatened to take my life and some more shit and I'm not — no, you threatened to take my life all the way down to the sheepdog. Are you kidding me?
>
> Mr. Montalvo: What?
>
> Ms. Granger: I said you were threatening to take my life and my family's life all the way down to the sheep — sheepdog. Talking about I got homies that will hunt you til you drop.
>
> Mr. Montalvo: And they will.
>
> Ms. Granger: Okay. So I take that shit very seriously. So how do (inaudible) ever going to go do that.
>
> But anyway, this conversation is over. Good-bye. Have a good night.

On December 23, 2016, the State filed an amended information[1] charging Montalvo with two counts of domestic violence felony violation of a court order. The State elevated the charges to felonies due to Montalvo's two prior convictions for violating the provisions of an order. The State supported its claim of prior convictions with (1) the judgment and sentence from Montalvo's July 24, 2015 conviction for domestic violence misdemeanor violation of a court order, and (2) a redacted certified copy of the court docket from Seattle Municipal Court Case No. 40910, showing a 2001 conviction for willful violation of a protection order.

During pretrial motions, Montalvo moved to exclude the portions of the jail call where Granger stated he had hit her three times and had threatened her life. The State agreed to redact the portion discussing the alleged physical assaults. The court allowed the portion where Granger said Montalvo had threatened her life.

However, at trial, the State played an unredacted version of the jail call. Montalvo then moved for a mistrial on the grounds that the jury heard highly prejudicial evidence and the State violated the stipulation to redact the jail call recording. The court denied Montalvo's motion but agreed to give a limiting instruction. The court instructed the jury as follows:

> Ladies and gentlemen of the jury, you have heard index one, a phone call. The substance of statements in that call made by the female speaker are not to be taken as true, only that the call was made. You

---

[1] In the original information, filed on July 26, 2016, the State charged only one count of domestic violence felony violation of a court order. It then added the second count based on the jail call.

> should not consider the substance of statements in the call made by the female speaker as evidence during your deliberations.

The jury convicted Montalvo of felony violation of a no-contact order. Montalvo appeals.

II.
ANALYSIS

A. Motion for a Mistrial

Montalvo argues the trial court erred by denying his motion for a mistrial because the State's introduction of the unredacted recording of the jail call deprived him of a fair trial. The State contends the error did not prejudice the trial. We agree with the State.

Because the trial court can make the best determination of the prejudicial effect of a statement, appellate courts review its decision whether to grant a mistrial for an abuse of discretion. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). A court abuses its discretion when no other reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

"The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried." Emery, 174 Wn.2d at 765. In determining whether the defendant received a fair trial, courts look to the trial irregularity and its effects. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). "In determining the effect of an irregularity, [courts] examine (1) its seriousness; (2) whether it involved

cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." Emery, 174 Wn.2d at 765.

Montalvo challenges the admission of the references in the jail call to both the uncharged assaults and the threats made against Granger and her family. He claims the State and court agreed to redact these statements from the call because they constituted improper and highly prejudicial evidence. However, the record demonstrates the State agreed to redact only the portion of the jail call relating to previous alleged assaults. The court allowed the portions relating to threats. Accordingly, we limit our inquiry to whether the court should have granted a mistrial based on the portions of the jail call relating to the alleged assaults.

First, as the State concedes, it should not have played the portion of the jail call regarding Montalvo assaulting Granger. The State, however, presented ample evidence to prove Montalvo had violated the no-contact order on the two occasions at issue in the trial. And this evidence mitigated against the seriousness of the error. As to the violation at Granger's apartment, the State produced a recording of the 911 call and testimony from the officers who apprehended Montalvo at Granger's apartment building. For the second count relating to the jail call, the State properly admitted all other portions of the recording of the jail call. This evidence demonstrated Montalvo committed the violations and rendered the error of admitting the unredacted version of the jail call less serious. Compare State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (considering the "paucity of credible evidence" of the charged crime in

determining the admission of improper evidence constituted a serious irregularity).

Second, we address whether the unredacted statement, "You hit me once, you hit me twice, you hit me three times" served as cumulative evidence. The trial court did not admit any other evidence that Montalvo had physically assaulted Granger. The State argues that, because the court properly admitted evidence of Montalvo's threats, the statement about the assaults constituted cumulative evidence of Montalvo's violence. We, however, do not view cumulative evidence so broadly. Evidence regarding threats and physical assaults concern different actions and may lead to different inferences by a jury. They do not constitute cumulative evidence. Accordingly, the second factor weighs against the trial court's decision.

Finally, we consider whether the trial court properly gave a limiting instruction. Here, the trial court stated it would give a limiting instruction when it denied Montalvo's motion for a mistrial. The court then received input from both parties about the content of the instruction. In the end, the trial court issued an instruction providing that the jury should not accept statements in the jail call for their truth, but only as evidence that Montalvo made the jail call. We "must presume that the jury followed the judge's instructions to disregard the remark." Weber, 99 Wn.2d at 166. Moreover, considering the unredacted portion did not relate to the charges at trial, it did not constitute evidence that "is inherently prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors" such that a limiting instruction could not remove the

prejudice. State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965). Accordingly, we determine the jury could assess the testimony as instructed.

In light of the foregoing, we conclude the trial court did not abuse its discretion in denying Montalvo's motion for a mistrial.

B. Prior Convictions

Montalvo next contends the State failed to establish two previous convictions that qualified as predicate offenses under RCW 26.50.110(5) to support the felony charges. Specifically, he claims the redacted copy of the court docket from Seattle Municipal Court Case No. 40910 (Exhibit 10) did not sufficiently establish a predicate conviction. The State asserts Montalvo waived the objection. We agree with the State.

RCW 26.50.110(5) provides:

> A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, *26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, *26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

The requirements of the section relate "to the *admissibility* of the State's proof of the prior convictions, rather than to an essential element of the felony crime." State v. Carmen, 118 Wn. App. 655, 663, 77 P.3d 368 (2003). A party wanting to challenge a ruling that admits evidence must assert a timely objection on specific grounds. State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). "To be

timely, the party must make the objection at the earliest possible opportunity after the basis for the objection becomes apparent." Gray, 134 Wn. App. at 557. We have previously found waiver where the defendant did not object to a document's admissibility under RCW 26.50.110(5) until after the prosecution had rested its case. See Carmen, 118 Wn. App. at 663, 668; see also Gray, 134 Wn. App. at 558.

Here, the parties first discussed Exhibit 10 during pretrial motions. When discussing the exhibit, Montalvo did not object to its admissibility under RCW 26.50.110(5). The State and Montalvo reviewed the record together and agreed on redactions. When the State moved to admit Exhibit 10 into evidence, Montalvo again failed to object. Only after the State rested its case did Montalvo object to the sufficiency of Exhibit 10 to establish a predicate conviction. Because Montalvo did not object to the admissibility of Exhibit 10 until after the State rested, we conclude he waived the objection and do not address the merits of his argument.[2]

C. Discretionary Costs

Both parties ask us to remand the Judgment and Sentence to the trial court to strike the $100 DNA fee pursuant to State v. Ramirez, 191 Wn.2d 732, 739, 426 P.3d 714 (2018). Ramirez, decided after the trial court imposed the DNA fee in this case, held that trial courts may not impose discretionary costs on

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[2] Montalvo argues that Exhibit 10 demonstrated that he pled guilty to a violation of Seattle Municipal Code 12A.06.180, which does not constitute a predicate conviction under RCW 26.50.110(5). Even if Montalvo had properly objected, this court rejected the merits of a similar argument in Gray. 134 Wn. App. at 558-59.

an indigent defendant. 191 Wn.2d at 746. We remand to the trial court to strike the fee from Montalvo's Judgment and Sentence.

We affirm in all other respects.

Chun, J.

WE CONCUR:

Mann, J.

Appelwick, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77318-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant   Date: May 20, 2019
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