SUPREME COURT NO. 103081-9

NO. 84986-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DERRICK FESINMEYER,

Petitioner.

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

The Honorable Patrick Moriarty, Joseph Wilson, George Appel & Jennifer R. Langbehn, Judges

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PETITION FOR REVIEW

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A. PETITIONER & COURT OF APPEALS DECISION

Petitioner Derrick Fesinmeyer seeks review of the Court of Appeals' April 22, 2024 unpublished decision in State v. Fesinmeyer, appended to this Brief. ("App.").

B. ISSUES PRESENTED FOR REVIEW

1. Where the State must prove prior convictions as an element of an elevated form of the same crime, a trial court can craft a bifurcated procedure—including bifurcation of jury instructions—to reduce unnecessary prejudice stemming from juries' tendency to conclude that the accused person therefore has a propensity to commit the charged crime. The constitution does not require automatic bifurcation. Contrary to the Court of Appeals' decision, however, can a trial court abuse its discretion by refusing to bifurcate when its reason for doing so is untenable? And was the court's decision an abuse of discretion, as well as prejudicial as to two of the petitioner's convictions?

2. Where the trial court failed to sustain defense objection, was the prosecutor's misconduct—urging jurors to put

themselves in the shoes of a complainant during an alleged assault—prejudicial, contrary to the Court of Appeals' decision?

C. STATEMENT OF THE CASE

In July of 2018, Fesinmeyer went to the Marysville house where he had been residing to collect some belongings. He was surprised to find his ex, Bodil Omnell, whom a no-contact order prohibited him from contacting, at the residence. 9RP[1] 530-31. A neighbor heard yelling from the house and called 9-1-1. 9RP 490.

Related these events, the State charged Fesinmeyer with first degree burglary[2] (Count 1) (elevated to first degree based on assault allegation); felony violation of a no-contact order[3] (Count

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[1] This petition assigns volume numbers to the verbatim reports as set forth in the Brief of Appellant.

[2] RCW 9A.52.020(1)(b).

[3] Former RCW 26.50.110(1)(a), (4), (5) (2017). RCW 26.50.110 was recodified in similar form under chapter 7.105 RCW. Laws 2021, ch. 215, § 170.

2) (elevated to felony based on alternative means of assault and/or two prior court order violations); and fourth degree assault[4] (Count 3). CP 198-99 (third amended information). The State alleged each was a crime of domestic violence. CP 198-99.

Fesinmeyer's defenses at trial were that, based on the specific no-contact order, he did not know he was prohibited from being at that specific residence and did not expect Omnell to be there, and thus his violation of the no-contact order was not willful. Further, any force used against Omnell was lawful because he was just trying to get away from her and leave the residence. E.g., 9RP 465-69 (opening statement).

As to Count 2, Fesinmeyer moved to bifurcate the jury's consideration of two 2013 convictions for unrelated no-contact order violations. 7RP 191; CP 174. Defense counsel pointed out that asking the jury to consider the priors separately would mitigate prejudice and would pose only minimal additional

[4] RCW 9A.36.041(1).

burden on judicial resources. Counsel estimated a bifurcated inquiry would only add 30 minutes to the entire trial, with the benefit of greatly enhancing fairness. 7RP 191-92.

The State objected, arguing decisional law did not *require* bifurcated proceedings. Further, providing the jury with a special verdict form asking which alternative, priors or assault, the jury had relied on would alleviate the prejudice of hearing Fesinmeyer had two prior convictions for the exact same crime. 7RP 192-94.

Defense counsel argued the presentation of evidence would not overlap[5] such that it made sense to try the matters together, and evidence regarding prior convictions for the same crime would unfairly suggest Fesinmeyer had a propensity to disregard court orders. 7RP 194-95.

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[5] See State v. Monschke, 133 Wn. App. 313, 335, 135 P.3d 966 (2006) (trial bifurcation is inappropriate if there is substantial overlap in evidence). Evidence of the prior orders solely consisted of certified docket entries admitted without a live witness. 9RP 429, 431.

The trial court denied the motion, noting (although its significance is unclear) that all *current* charges related to a single incident and, further, that the State's proposed special verdict form would alleviate "any potential for unfair prejudice." 7RP 195. The court did not explain *how* the proposed special verdict form, which would simply ask whether the jury relied on each alternative, would alleviate prejudice. Nor is it clear from the record.

Ultimately, the to-convict instruction for felony violation of a no-contact order included both assault and prior violation allegations. CP 100 (Instruction 14). Consistent with the plan discussed by the State, a special verdict form asked jurors to answer whether they unanimously found each of the two alternative means. CP 75 (special verdict form C).

At trial, the above-referenced 9-1-1 call was played. Michelle Edwards called 9-1-1 on July 13, 2018. Ex. 35; 9RP 488. "Derrick" had reportedly barged into the residence across

the street. Ex. 35. "Bo" (Omnell), whom Edwards had also seen at that residence, was yelling "ow" and "help." Ex. 35.

Omnell did not testify. But Edwards, the caller, testified. She had moved into that neighborhood in Marysville in 2013. 9RP 484. Fesinmeyer thereafter moved into the house across the street. 9RP 485, 493. Edwards began seeing Omnell at that residence around 2015 or 2016. 9RP 485-86, 493. Edwards also saw Fesinmeyer and Omnell together at the Tulalip Casino, where Edwards tended bar. 9RP 487, 493.

The evening of July 13, Edwards, who worked the overnight shift, was awoken by her children. Edwards heard a woman's voice screaming for help. 9RP 488. Edwards called 9-1-1 and walked out to her driveway. 9RP 488, 490. Edwards didn't recall if Omnell came outside right away. When Edwards later saw Omnell, however, she looked "frantic," and she was crying. 9RP 489.

Officer David Adams was dispatched. 9RP 509. Adams saw Fesinmeyer emerge from the residence in question and get into the passenger side of a vehicle. 9RP 510.

Adams spoke with Edwards and then located Omnell at the other residence. 9RP 513-14. Omnell was in the living room "on the floor, hyperventilating, crying." 9RP 514. Omnell had visible injuries, which Adams photographed. 9RP 516; Exs. 1-7, 15, 16 (admitted photos).

Another responding officer learned there was a court order preventing Fesinmeyer from contacting Omnell. 9RP 514. Police stopped the vehicle Fesinmeyer was riding in and arrested him. 9RP 526.

The no-contact order, entered July 6, 2018, prohibited Fesinmeyer from entering Omnell's residence as well as other specific acts. But the only address specifically listed was an Everett address at which Fesinmeyer could, with the assistance of law enforcement, recover his belongings. Ex. 29 (redacted

chapter 10.99 RCW no-contact order, admitted at trial); 9RP 526-28, 537-38.

Officer Adams spoke with Fesinmeyer later that evening, although the conversation was not audio recorded. 9RP 529, 540. Fesinmeyer said he went to the Marysville residence because he wanted to collect some belongings—the no-contact order did not list that address. 9RP 530-31. Fesinmeyer did not expect Omnell to be there. 9RP 531; 11RP 578. Adams testified, "But I asked [Fesinmeyer] if she lived there, and he said she did." 9RP 531. On cross-examination Adams acknowledged he had asked Fesinmeyer if Omnell "lived" there, but he did not explicitly say she was currently living there. 9RP 540.

According to Adams, Fesinmeyer also said Omnell immediately began yelling at him when he entered the residence. Fesinmeyer collected his belongings, but when he tried to leave, Omnell jumped in front of him, and he had to push past her to exit. 9RP 532, 579. Asked about Omnell's injuries, Fesinmeyer denied causing them. 9RP 532; 11RP 572-73, 578.

Regarding prior convictions for the same offense, the State introduced certified copies of Marysville municipal docket entries from 2013 indicating Fesinmeyer was twice convicted of violating no-contact orders in violation of former RCW 26.50.110. Exs. 33 & 34. The court admitted the exhibits pretrial as certified public documents, and it provided them to the jury for their deliberations. 9RP 429, 431. As noted above, admission of the exhibits did not require live testimony.

In closing, the prosecutor argued, relevant to the first degree burglary and no-contact order violation charges, that a court order prohibited Fesinmeyer from entering Omnell's residence, and there was evidence that Omnell resided at the home in question. 11RP 649-50. And, the fact that Edwards, on the 9-1-1 call, said Fesinmeyer had "barged in" provided circumstantial evidence that Fesinmeyer intended to commit a crime in the home, an element of burglary. 11RP 651. In addition, the 9-1-1 call, considered along with Adams's photos, proved that Fesinmeyer assaulted Omnell, despite the lack of

eyewitness. 11RP 652. As for the factors elevating the no-contact order charge to a felony, the State proved both that (1) Fesinmeyer assaulted Omnell and (2) that he had been convicted of violating an applicable court order on two prior occasions. 11RP 653-54.

In contrast, defense counsel argued Fesinmeyer was not guilty of first degree burglary. Fesinmeyer found himself in a difficult situation. Omnell did not then reside at the Marysville house—her driver's license listed, for example, a Camano Island address. 11RP 657-60; see Ex. 22. Thus, Fesinmeyer did not expect Omnell to be present. 11RP 658. Omnell tried to prevent Fesinmeyer from leaving, and any use of force against Omnell was lawful[6] because he was just trying to leave. 11RP 657, 670. Fesinmeyer told police what happened. But, instead of investigating properly, they jumped to conclusions. 11RP 658, 664. Neighbor Edwards did the right thing by calling the police.

[6] The trial court instructed the jury on the justifiable use of force. CP 109-10.

But she did not see what occurred. 11RP 657-58. Further, based on Edward's testimony—that her children woke her when *they* heard yelling—Edwards would not have actually seen Fesinmeyer "barge[] in." 11RP 662-63. Edwards simply assumed the worst because did not approve of Fesinmeyer. 11RP 663-64. As for the allegation Fesinmeyer violated a no-contact order, the State had failed to prove, in part, that Fesinmeyer knew he was violating a no-contact order. 11RP 667-69. As to the *underlying* burglary charge, which requires intent to commit a crime, the State failed to prove Fesinmeyer intended to commit a crime by entering the residence. 11RP 671.

The State argued in rebuttal that Adams's photos of Omnell proved Fesinmeyer did more than he needed to try to get away. 11RP 677. The prosecutor argued,

> That's not pushing someone out of the way. That's committing an assault.
>
> *I just want you to imagine how Ms. Omnell must have been feeling while she's being hit.*

> [Defense counsel]: And objection. That's clearly impermissible.
>
> THE COURT: Move on, counsel.

11RP 678 (emphasis added).

The prosecutor then argued Adams had seen Omnell on the floor hyperventilating and crying. 11RP 678. Further, the prosecutor claimed the fact that Fesinmeyer got a ride somehow indicated he arrived with ill intent—even though the State had also presented evidence suggesting Fesinmeyer did not have a driver's license. 11RP 679.

The jury convicted Fesinmeyer as charged. CP 75-82. It found by special verdict that Fesinmeyer had committed Count 2 by both charged alternatives (assault, two prior convictions). CP 75.

Fesinmeyer appealed, arguing his convictions should be reversed based on the issues identified above. See Br. of Appellant at 48 ("This Court should reverse . . . Counts 1 and 2, based on the court's prejudicial error in failing to bifurcate the

jury's consideration of prior convictions for the same crime. This Court should reverse the convictions for first degree burglary and misdemeanor assault, Counts 1 and 3, based on prejudicial prosecutorial misconduct.").

The Court of Appeals rejected these arguments in an unpublished opinion. App. at 8-19 (bifurcation); App. at 19-27 (misconduct). Fesinmeyer now asks that this Court grant review and reverse.

D. REASONS REVIEW SHOULD BE GRANTED

1. **This Court should grant review under RAP 13.4(b)(1) and (4).**

Review is appropriate under RAP 13.4(b)(1) and (4) because the Court of Appeals' decision, particularly as to bifurcation, conflicts with this Court's prior decisions. And clarification on this important issue would provide valuable guidance to trial courts, the defense bar, and prosecutor's offices, while improving the overall fairness of trials.

2. **Review is appropriate because the trial court abused its discretion when it denied bifurcation on the untenable ground that special verdicts would alleviate prejudice. Further, the Court of Appeals' decision misapprehends this Court's prior decisional law in rejecting the argument.**

This Court should accept review to clarify an important issue. That is, even though this Court does not recognize a freestanding constitutional right to bifurcation of trials where prior convictions for the same or similar offense form an element of the current crime, a trial court may nevertheless abuse its discretion in denying bifurcation when it does so on illogical and untenable grounds. The Court of Appeals' decision in this case reveals the extent of lower courts' confusion. See App. at 7-19.

Trial bifurcation may be appropriate where a unitary trial would significantly prejudice the defendant and there is not substantial overlap of relevant evidence such that bifurcation is overly burdensome. See State v. Monschke, 133 Wn. App. 313, 335, 135 P.3d 966 (2006). This Court reviews a trial court's decision on bifurcation of trial proceedings for an abuse of

discretion. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). A trial court abuses its discretion "when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons." Fowler v. Johnson, 167 Wn. App. 596, 604, 273 P.3d 1042 (2012).

If a trial court's refusal to permit bifurcated proceedings is an abuse of discretion, it results in the jury hearing evidence it should not have, which is, or is analogous to, evidentiary error. Such error is not harmless "if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). In contrast, improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole. Neal, 144 Wn.2d at 611. This is not a question of evidentiary sufficiency. See State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

A violation of a no-contact order may be punished only if the violation is "willful." State v. Briggs, 18 Wn. App. 2d 544, 550, 492 P.3d 218 (2021). "Willfulness requires a purposeful act." Id. (quoting State v. Washington, 135 Wn. App. 42, 49, 143 P.3d 606 (2006) (citing State v. Clowes, 104 Wn. App. 935, 944, 18 P.3d 596 (2001))). Inadvertent or accidental contact is not enough. Briggs, 18 Wn. App. 2d at 550. "'[N]ot only must the defendant know of the no-contact order; [they] must also have intended the contact'" or violation. Id. (quoting Clowes, 104 Wn. App. at 944-45) (alterations in Briggs). Proof that a person acted "knowingly" is proof that they acted "willfully." Briggs, 18 Wn. App. 2d at 550-51 (citing RCW 9A.08.010(4)).

Violation of a no-contact order is usually a gross misdemeanor, but it may be elevated to a class C felony if the State proves additional facts. See State v. Yelovich, 191 Wn.2d 774, 778, 426 P.3d 723 (2018). The elements of *felony* violation of a no-contact order, therefore, are: (1) That at the time of the event, there existed a no-contact order applicable to the

defendant; (2) that the defendant knew of the existence of this order; (3) that on or about a certain date, the defendant knowingly violated a provision of this order; (4) that the defendant had twice been previously convicted for violating the provisions of a court order *or* the violation was an assault not amounting to a first or second degree assault. Former RCW 26.50.110 (4), (5) (2017); see also State v. Rouse, noted at 14 Wn. App. 2d 1063, 2020 WL 6146464, *4 (unpublished decision cited as persuasive authority pursuant to GR 14.1).

This Court has indicated there is no freestanding constitutional right to trial bifurcation where prior conviction for the same or similar category of offense makes the current offense more serious. But that cannot mean that a trial court's decision to deny bifurcation is fully insulated from scrutiny. Bifurcation may be an important and easily achieved component of fair proceedings. And here, the trial court abused its discretion when, for untenable reasons, it allowed the jury to hear evidence of prior identical convictions for court-order violations while

evaluating whether Fesinmeyer willfully violated yet another court order.

Evidence of prior convictions similar or identical to the current charge is highly prejudicial. It is to be avoided where it is not relevant to, for example, proving an element of an underlying crime, see ER 404(b), or evaluating witness credibility, see ER 609(a). No one has argued that either exception applies here. And, generally speaking, a defendant's prior convictions are inadmissible because they are irrelevant to a determination of guilt and because they are highly prejudicial. State v. Vazquez, 198 Wn.2d 239, 252, 494 P.3d 424 (2021). Admission of such convictions "'may lead the jury to believe the defendant has a propensity to commit crimes'" and shift the jury's focus away from the merits of the present charge. Id. (quoting State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997)). Studies have shown that if a jury learns of the accused person's prior conviction, they are more likely to convict. See Hardy, 133 Wn.2d at 710-11. Admission of prior convictions

has frequently led to reversal, particularly where the prior conviction is the same as or similar to the current charge. See State v. Escalona, 49 Wn. App. 251, 256, 742 P.2d 190 (1987) (jury would use testimony that assault defendant had a criminal record and had stabbed someone to improperly conclude defendant had acted in conformity with past assaultive behavior); State v. Wilburn, 51 Wn. App. 827, 832, 755 P.2d 842 (1988) (reversing rape conviction when, in violation of order in limine excluding defendant's earlier convictions, witness testified that defendant said, "Yes, I did it again[.]"); but see State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993) (distinguishing Escalona and Wilburn on grounds that evidence in those cases indicated defendants had committed crimes similar or identical to the crimes for which they were on trial, whereas mere reference to being jailed did not indicate propensity to commit murder).

Unsurprisingly, this Court has acknowledged that admission of prior convictions of a crime to prove an element of

a later charge for that same crime may be "highly prejudicial," even if the underlying conviction is relevant to an element of the current crime. See Roswell, 165 Wn.2d at 198. "If an element of the crime is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime." Id. Because of this grave risk, trial courts may, where practical, structure trials to reduce unnecessary prejudice. Id.

This Court has therefore approved of trial adaptations designed to reduce prejudice. For example, in State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002), the trial court divided the "to convict" instruction and used a special verdict form to present the question of prior convictions only if the jury first found the defendant guilty of the other elements of the charged crime. Id. at 145, 147. Rejecting a claim that the to-convict instruction needed to contain all necessary elements, this Court reasoned, "[i]nstructional bifurcation with respect to criminal history . . . constrains the prejudicial effect of prior convictions upon the

jury while clearly maintaining the State's burden to prove each element beyond a reasonable doubt." Id.

In Roswell this Court held the trial court did not err in denying a specific form of bifurcation. Roswell, 165 Wn.2d at 198. Yet, that form of bifurcation was not permitted at all. Id. Roswell had asked the trial to be formatted such that a jury would decide whether there had been communication with a minor for immoral purposes, and then the *judge* would decide if there was a prior conviction for that crime that would then elevate the charge to a felony. Id. at 191. This Court held such an irregular procedure was not authorized simply because the prior convictions were, admittedly, quite prejudicial. Id. at 198.

Nonetheless, this Court stated, "[c]ourts should strive to afford defendants the fairest trial possible." Id. at 197. And this Court expressly approved, for example, the Oster bifurcation of instructions, where, "[a]fter the jury reached a verdict of guilty, it was then provided with a special verdict form instructing it to make a determination beyond a reasonable doubt as to whether

the defendant had any prior convictions." Roswell, 165 Wn.2d at 196. Thus, in Roswell, this Court explicitly approved the same procedure Fesinmeyer sought to employ here.

In the present case, however, the Court of Appeals unfortunately bypassed this Court's teaching in Roswell language and turned instead to this Court's decision in State v. Taylor, 193 Wn.2d 691, 444 P.3d 1194 (2019). There, this Court rejected the argument that Taylor should have been permitted to stipulate under Old Chief v. United States[7] to the very no-contact order Taylor was accused of violating. But the Court of Appeals reliance on and extensive discussion of Taylor is misplaced; Fesinmeyer has never argued the court erred in denying an offer to stipulate to the current no-contact order.[8]

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[7] 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

[8] And, although not necessary to distinguish Taylor, prior convictions for unrelated no-contact order violations are arguably more akin to felon status (as in Old Chief) than to a current accusation. Cf. Taylor, 193 Wn.2d at 700-02.

Based on the relevant cases, the rule to be gleaned is that underlying prejudicial evidence, even of the very worst sort, propensity evidence, does not create a right to have the existence of prior convictions removed from jury consideration. But a trial court should, if possible, craft a bifurcated procedure to avoid such prejudice, while maintaining the State's burden to prove each element of the crime.

Here the trial court failed to meet this standard. Fesinmeyer sought a minimally burdensome, legally permissible trial procedure that would greatly mitigate prejudice. 7RP 191-95. The State argued, incorrectly, that a special verdict form would mitigate prejudice. 7RP 193-94. The trial court agreed with the State. See 7RP 195 ("I would accept the proposal for purposes of a special verdict form[,] which I think alleviates any potential for unfair prejudice in this matter.").

But the trial court failed to grasp that a special verdict would do nothing to alleviate prejudice. The jury would still hear evidence of prior convictions contemporaneously to its

consideration of the current, identical offense. The trial court's rationale for denying the request was untenable—it does not make logical sense—and was therefore an abuse of discretion. Fowler, 167 Wn. App. at 604. Looking beyond the court's stated reasoning, the two factor test in Monschke, 133 Wn. App. at 335, likewise supports that the trial court abused its discretion.

Contrary to the Court of Appeals decision, moreover, the trial court's limiting instruction did not fix the problem. The instruction informed jurors that the docket entries in Exhibits 33 and 34 "may be considered only for the purpose of determining whether defendant has twice previously been convicted of violating the provisions of a court order." CP 103 (Instruction 17). But, although jurors are presumed to follow instructions, State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983), another important rule also exists—some evidence is so prejudicial it may not be cured by instruction. 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 (alteration in original) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)); see also State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965). As the Escalona and Miles courts observed, the admission of evidence concerning a crime similar to the charged offense has been deemed almost impossible to disregard. Escalona, 49 Wn. App. at 255-56; see also Miles, 73 Wn.2d at 71 (stricken testimony that defendant had committed robbery similar to charged crime was incurable by instruction).

Fesinmeyer's defense, reasonable on its face considering the specifics of the no-contact order, was that he did not know he was violating the order. Yet it would be extremely difficult for even a careful and conscientious juror to put the existence of prior convictions, for the exact same crime, out of their mind while evaluating the current charge.[9] Fesinmeyer has

[9] In a footnote, the Court of Appeals claims Fesinmeyer cannot show prejudice from contemporaneous admission of the two prior convictions because the jury also found the assault alternative applied. App. at 19 n.6. But Fesinmeyer has

demonstrated the error affected the convictions for burglary and no-contact order violation, Counts 1 and 2. This Court should grant review, reverse those charges, and remand for a new trial.[10]

3. **This Court should also grant review and address the prosecutor's misconduct.**

This Court should also grant review on the matter of the prosecutor's misconduct. Fesinmeyer argued on appeal that the prosecutor committed misconduct in rebuttal by urging jurors to

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consistently argued that the admission of the priors affected the jury's consideration of the willfulness of the current no-contact order violation—the underlying crime, not the elevating criteria. Further, he has consistently argued that the question of whether Fesinmeyer willfully violated the present no-contact order would have also affect the jury's consideration of burglary charge, i.e., whether Fesinmeyer entered his own residence with intent to commit a crime. E.g. Br. of Appellant at 34.

[10] This Court should remand for a new trial on those charges, instructing the trial court to exercise its discretion to determine whether there is a practical bifurcated procedure that would protect Fesinmeyer from unnecessary prejudice. For example, the jury could be asked to decide whether Fesinmeyer violated the no-contact order, and only then be asked to decide whether one or both elevating circumstances applied. See Roswell, 165 Wn.2d at 198. Evidence of an assault need not be presented separately, only evidence of the prior convictions.

put themselves in Omnell's shoes while Fesinmeyer was assaulting her—exhorting them to "imagine how [she] must have been feeling." 11RP 687. The Court of Appeals agreed that this was misconduct, but incorrectly determined it was not prejudicial. App. at 19-27.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments of the federal constitution, as well as article 1, section 3 and article 1, section 22 of the Washington Constitution. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive a defendant of their constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

This Court evaluates misconduct and its prejudicial effect in the context of the record and the circumstances of the trial as a whole. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 706, 286 P.3d 673 (2012). This Court's review of prosecutorial misconduct is not a matter of determining whether there is

sufficient evidence to convict. Id. at 710. Rather, the test is whether there is a substantial likelihood the misconduct affected the verdict, regardless of evidentiary sufficiency. Id. at 711.

The Court of Appeals agreed the State committed misconduct but found the argument did not affect the outcome of trial on the assault or burglary counts. The Court of Appeals is incorrect as to the latter assertion. There was a substantial likelihood that the rebuttal argument affected the outcome of trial on the burglary and assault counts.

The jury was tasked, not with imagining the pain of an allegedly battered woman, but with deciding whether Fesinmeyer assaulted Omnell at all. The State had to prove assault in order to prove first degree burglary, one means of committing felony violation a no-contact order, and the charge of simple assault itself. CP 93, 100, 107 (to-convict instructions for charged crimes). And the State had to prove beyond a reasonable doubt not only that an assault occurred, but that Fesinmeyer did not lawfully use force against Omnell when

Omnell tried to prevent him from leaving the residence. CP 109-10 (instructions defining lawful use of force). Despite photos of an injured Omnell, and reports that she was upset and emotional following her run-in with Fesinmeyer, defense counsel emphasized that there were no eyewitnesses to the altercation, and Fesinmeyer offered the police explanations for her injuries. 9RP 532; 11RP 572-73, 578. The jury could have concluded that Omnell became distraught because her romantic partner would not remain with her and resolve their differences. Argument urging jurors to place themselves in Omnell's position and imagine what it felt like to be hit would have been emotionally persuasive. But it was also unfair and highly improper.

Further, as the Court of Appeals recognizes, the trial court did not clearly sustain the defense objection to the argument. As such, the trial court failed to communicate necessary information to both defense counsel and the jury. As to defense counsel, ironically, the Court of Appeals recognizes the trial court reacted ambiguously to the objection, yet simultaneously faults defense

counsel for not requesting a curative instruction. App. at 26-27. As for the jury, ambiguity in the face of a proper objection undermines the effectiveness of the court's prophylactic curative instructions because jurors will fail to grasp that the improper argument is subject to the instruction and must be disregarded. E.g., CP 87 (Instruction 1). In summary, this Court should grant review on this ground, as well.

E. CONCLUSION

For the reasons stated, review is appropriate under RAP 13.4(b)(1) and (4).

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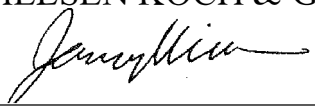
DATED this 16th day of May, 2024.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DERRICK STEPHEN FESINMEYER, Appellant.	DIVISION ONE No. 84986-7-I UNPUBLISHED OPINION

DWYER, J. — Derrick Fesinmeyer appeals from the judgment and sentence entered on the jury's verdicts convicting him of one count of burglary in the first degree, one count of felony violation of a no-contact order, and one count of assault in the fourth degree. Fesinmeyer asserts that the trial court erred by denying his request to bifurcate the trial proceedings as to his prior convictions for violating a no-contact order and that he was denied the right to a fair trial due to prosecutorial misconduct during closing arguments. Finding no error as to those assertions, we affirm the judgment entered on the jury's verdicts.

Fesinmeyer also asserts that the sentencing court erred by imposing upon him a victim penalty assessment despite his indigency. The State concedes error in this regard. Accordingly, we affirm in part and reverse in part, remanding

this matter to the sentencing court to strike the victim penalty assessment from Fesinmeyer's sentence.

I

For at least one year prior to the events in question, Fesinmeyer and Bodil Omnell were in a romantic relationship with one another. They shared a residence in Marysville.

In early July 2018, the Marysville Municipal Court entered a no-contact order on Omnell's behalf, prohibiting Fesinmeyer from assaulting her, having contact with her, or coming within 1,000 feet of her residence. Inscribed at the bottom of the order was a proviso stating that the "parties may exchange text messages on topic of 1) choosing new residence, 2) moving out. No other discussion allowed."

One week later, a neighbor heard a female voice screaming for help from within the Marysville residence that Fesinmeyer and Omnell had previously shared. The neighbor dialed 911. Police officers were dispatched to the residence, including Officer David Adams, who interviewed and observed Omnell within the residence, observed Fesinmeyer walking away from the residence, and later interviewed Fesinmeyer. Officer Adams took several photographs of visible scratch marks and redness on Omnell's hand, arms, cheek, and chest.

The State, by third amended information, charged Fesinmeyer with burglary in the first degree, felony violation of a no-contact order, and assault in the fourth degree. The State's felony no-contact order violation charge was

predicated on Fesinmeyer's alleged assault of Omnell and, in the alternative, on his two prior convictions for violating a no-contact order.

Prior to trial, Fesinmeyer moved to bifurcate the portion of the State's case regarding his prior no-contact order violation convictions. Fesinmeyer requested that such evidence be presented to the jury only if the jury were to first find that each of the other essential elements of the felony no-contact order violation offense had been proved. The State objected, offering as an alternative that the court (1) provide a jury instruction indicating that, in order to convict Fesinmeyer of the charged no-contact order offense, the jury could rely on either the assault element or the prior convictions element and (2) provide the jury with a special verdict form on which the jury could specify its findings as to those alternatives. The court agreed with the State and denied Fesinmeyer's request.

On the day the trial was set to commence, before the jury was sworn in, the State sought permission to admit as exhibits redacted copies of certain Marysville Municipal Court docket entries delineating that, in April 2013, the municipal court had, on two separate occasions, entered both findings and judgments convicting Fesinmeyer of one count of violating a "no contact/protection order." These redacted docket entries did not provide additional information concerning the underlying facts of those violations or of the no-contact orders that Fesinmeyer had violated. The court granted the request.

A two-day jury trial later commenced. In its opening statement, the State told the jury that the evidence would demonstrate that Fesinmeyer entered Omnell's residence in Marysville, started a verbal argument with her, and then

struck her, leaving her bruised and scratched, before he exited the residence. The State indicated that its evidence would include the testimony of the neighbor who called 911, an audio recording of that 911 call, Officer Adams' testimony, the July 2018 no-contact order signed by Fesinmeyer and Omnell, and photographs of Omnell's injuries taken by Officer Adams. During Fesinmeyer's opening statement, his counsel told the jury that the evidence would reflect that the residence in question was, in actuality, Fesinmeyer's residence, that he entered that residence only to collect his belongings, that he did not expect Omnell to be there, and that, as he was trying to leave, Omnell aggressively confronted him, requiring Fesinmeyer to defend himself.

The State opened its case in chief by calling to testify the neighbor who had dialed 911. The neighbor testified that she lived in Marysville, across the street from a residence in which she had observed Fesinmeyer and Omnell living for over one year prior to the events in question. She testified that, on the date in question, she was awakened when her children alerted her to sounds coming from the residence in question and that she could hear a man and a woman screaming from within. She testified that she went outside to her driveway, heard Omnell screaming for help, and saw Omnell, who looked frantic, scared, and crying. She testified that she dialed 911 as soon as she heard the yelling and screaming. The State moved to publish an audio recording of her 911 call, which was then played for the jury.

The State next called Officer Adams to testify. He testified that he was dispatched to the Marysville residence in response to the 911 call and that he

observed Fesinmeyer walking away from the residence and entering a nearby vehicle. He testified that he observed Omnell within the residence, in what appeared to be a living room, and that she was "clearly in distress," "on the floor hyperventilating, crying, just right there on the floor." He testified that he observed that her shirt appeared ripped and that she had scratch marks and redness on her arms, one of her hands and cheeks, and her chest. He testified that he used a camera to take photographs of those injuries as part of his investigation. The State offered to admit several of the photographs as exhibits. The court granted the request.

Officer Adams testified that he had interviewed Fesinmeyer, that Fesinmeyer had told him that he had entered the residence to collect his belongings, that he did not know that Omnell would be there, and that, in responding to the officer's question about whether Omnell lived there, Fesinmeyer stated that she did. Officer Adams also testified that Fesinmeyer told him that he had pushed past Omnell on his way out of the residence, that he had not touched her, and, with regard to Omnell's marks and injuries, that Omnell must have inflicted them upon herself.

Officer Adams also testified that he did not recall observing that Fesinmeyer had any obvious injuries.

The State rested its case. Fesinmeyer did not call any witnesses. The court thereafter provided instructions to the jury as to each of the charged offenses.

During closing argument, the State argued, in pertinent part, that Fesinmeyer knew that Omnell lived at the Marysville residence, that he entered the residence and remained there with the intent to both violate the no-contact order and assault her, and that the circumstantial evidence in the case—Officer Adam's observations of Fesinmeyer's emotional state, his photographs of her injuries, the 911 call audio, and the neighbor's testimony—all supported that Fesinmeyer assaulted Omnell.

Fesinmeyer's counsel argued, in pertinent part, that the State failed to prove that Fesinmeyer intended to violate the no-contact order because he was merely collecting his belongings from his own residence and did not expect Omnell to be there. Fesinmeyer's counsel further argued that no direct evidence supported that Fesinmeyer caused the injuries in question and that, even if he did make physical contact with her, he had a right to stand his ground by pushing her away when she did not let him leave the residence. Fesinmeyer's counsel also argued that, although there was evidence that Omnell was upset, "the reality is we don't know why she was upset. You have an absolute void of information when it comes to what happened in that house."

In rebuttal, the prosecutor argued that the circumstantial evidence in question constituted good evidence in support of the State's case that Fesinmeyer had assaulted Omnell. The prosecutor then suggested that the jury "imagine how [the alleged victim] must have been feeling while she's being hit." Fesinmeyer's counsel objected. The court told the prosecutor to "[m]ove on, counsel." The prosecutor then proceeded to argue that the testimony regarding

Omnell's emotional state at the time was evidence in support of the proposition that Fesinmeyer had just assaulted her.

The jury, in addition to receiving verdict forms relating to each of the charged offenses, was provided with a special verdict form concerning the charged no-contact order violation offense, which asked the jurors if they were unanimous as to (1) whether Fesinmeyer committed an assault in violation of the no-contact order and (2) whether he had been twice convicted for violating a no-contact order. The jury returned verdicts convicting Fesinmeyer as charged, including a response of "yes" as to whether Fesinmeyer had assaulted Omnell in violation of a no-contact order and a response of "yes" as to whether Fesinmeyer had two prior convictions for violation of a court order.

Fesinmeyer now appeals.

II

Fesinmeyer asserts that the superior court abused its discretion by denying his request to bifurcate the trial because the evidence of his prior convictions for violating a no-contact order was unfairly prejudicial to his case. Because bifurcations are disfavored and not constitutionally required, because establishment of Fesinmeyer's prior convictions was an element of the felony no-contact order violation offense elected to be proved by the State, and because the record supports that the admission of such evidence at trial did not result in unfair prejudice to Fesinmeyer, his assertion fails.

A

We review a trial court's decision on bifurcation for an abuse of discretion. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (citing State v. Monschke, 133 Wn. App. 313, 335, 135 P.3d 966 (2006); State v. Jeppesen, 55 Wn. App. 231, 236, 776 P.2d 1372 (1989)). A trial court abuses its discretion only when its decision is manifestly unreasonable, is based on untenable grounds, or constitutes a ruling that no reasonable judge would make. Monschke, 133 Wn. App. at 335 (citing State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)); State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing State v. Nelson, 108 Wn.2d 491, 504-05, 740 P.2d 835 (1987)).

B

Bifurcated trials "'are not favored.'" Monschke, 133 Wn. App. at 335 (quoting State v. Kelley, 64 Wn. App. 755, 762, 828 P.2d 1106 (1992)). "[T]he trial court has broad discretion to control the order and manner of trial proceedings." Monschke, 133 Wn. App. at 334-35 (citing ER 611; State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969)). As our Supreme Court has recognized,

> [w]e have specifically held that such bifurcation is constitutionally permissible but not required. State v. Mills, 154 Wn.2d 1, 10 n.6, 109 P.3d 415 (2005). And we certainly did not suggest that defendants have a right to waive their right to a trial by jury on certain elements so as to prevent the jury from hearing prejudicial evidence. Courts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue. Pettus v. Cranor, 41 Wn.2d 567, 568, 250 P.2d 542 (1952) (citing State v. Tully, 198 Wash. 605, 89 P.2d 517 (1939)).

Roswell, 165 Wn.2d at 197.[1]

However, the court in Roswell cautioned that it may be highly prejudicial "if an element of the crime is a prior conviction of the very same type of crime," because "there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime." 165 Wn.2d at 198. Nevertheless, the court explained, "[i]f a prior conviction is an element of the crime charged, evidence of its existence will never be irrelevant. One can always argue that evidence that tends to prove any element of a crime will have some prejudicial impact on the defendant." Roswell, 165 Wn.2d at 198. Furthermore, the court instructed, any unfair "prejudice created by evidence of the prior conviction may be countered with a limiting instruction from the trial court." Roswell, 165 Wn.2d at 198 (citing Spencer v. Texas, 385 U.S. 554, 561, 87 S. Ct. 648 17 L. Ed. 2d 606 (1967)). Accordingly, the court provided that, in considering a request to bifurcate, "trial courts may exercise their sound discretion to reduce unnecessary prejudice where practical." Roswell, 165 Wn.2d at 198.

Fesinmeyer contends that the trial court erred by denying his request to bifurcate the trial because the admission of his prior convictions for violating a no-contact order, offered to prove an element of the State's charged no-contact order violation offense, resulted in unfair prejudice to him. In addressing

[1] Indeed, the court continued, "[t]he United States Supreme Court in reviewing Texas' habitual offender statutes held that it was not unconstitutional to enact such statutes and to present evidence at trial that tends to prove the existence of a prior conviction." Roswell, 165 Wn.2d at 197-98 (citing Spencer v. Texas, 385 U.S. 554, 565-66, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967)).

Fesinmeyer's contention, our Supreme Court's decision in State v. Taylor, 193 Wn.2d 691, 444 P.3d 1194 (2019), is instructive.

In Taylor, the defendant was charged with a felony violation of a no-contact order and sought to stipulate to certain elements of the State's charged no-contact order violation offense, rather than have the no-contact order itself admitted into evidence.[2] 193 Wn.2d at 696. The trial court denied the defendant's request and admitted the no-contact order in question. Taylor, 193 Wn.2d at 696. On appeal, our Supreme Court addressed whether the trial court erred by denying Taylor's offer to so stipulate and whether the trial court's admission of such evidence unfairly prejudiced Taylor's case. In so doing, our Supreme Court considered whether it was appropriate to extend the ruling announced in Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), concerning felony status stipulations, to the matter before it. Taylor, 193 Wn.2d at 696-99. Our Supreme Court noted that

> [i]n Old Chief, the defendant was charged with violating a federal statute that prohibited possession of a firearm by anyone with a prior felony conviction.[3] Id. at 174. Prior to trial, the defendant offered to stipulate that he had been convicted of a qualifying felony. Id. at 175. The defendant "argued that the offer to stipulate to the fact of the prior conviction rendered evidence of the name and nature of the offense inadmissible under Rule 403 of the Federal Rules of Evidence, the danger being that unfair prejudice from that evidence would substantially outweigh its probative value." Id. The prosecution refused to join in the stipulation, seeking to admit the order of judgment for the defendant's prior conviction into evidence. Id. at 177. The trial court admitted the order of judgment, and the jury returned a guilty verdict. Id.

[2] In Taylor, the State's charged felony no-contact order violation offense was predicated on Taylor's alleged assault of the victim therein. 193 Wn.2d at 694-95.

[3] Old Chief's prior felony conviction was for "assault causing serious bodily injury." Old Chief, 519 U.S. at 175.

> The Supreme Court reversed the defendant's conviction, holding that a trial court abuses its discretion under Federal Rule of Evidence 403 when it rejects a defendant's offer to stipulate to the fact of a prior felony conviction to prove his or her felon status in a felon-in-possession prosecution. Id. at 174. Significantly, the Court was careful to limit its holding to "cases involving proof of felon status." Id. at 183 n.7. The Court reasoned that the trial court's decision to reject the defendant's offer to stipulate and admit the order of judgment amounted to an abuse of discretion because the danger of unfair prejudice substantially outweighed the order of judgment's probative value. Id. at 191.
>
> The Court noted that the prosecution is generally entitled to prove its case by evidence of its own choice in order to present its case with full evidentiary force. Id. at 186-87. However, the Court determined that this general rule has "virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." Id. at 190. The Court reasoned that the prosecution was required to prove only that the defendant's prior conviction fell within a broad category of qualifying felonies. Id. at 190-91. As a result, there was no appreciable difference in the evidentiary value of a stipulation to a qualifying felony and admission of the official record of that felony. Id. at 191. Moreover, the Court highlighted that "proof of the defendant's [felon] status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." Id.

Taylor, 193 Wn.2d at 697-99.

Our Supreme Court concluded that the rationale in Old Chief "is distinguishable from the admission of domestic violence no-contact orders." Taylor, 193 Wn.2d at 700. That was so, the court concluded, because "a no-contact order is closely related to a felony violation of a no-contact order charge, and the probative value of introducing that no-contact order into evidence is greater than the probative value of showing a general felony conviction in Old Chief." Taylor, 193 Wn.2d at 700-01. The court further concluded that, although the probative value of a State's offer to prove a felony conviction by evidence of a

judgment entry and that of a defendant's offer to stipulate to such a conviction is equivalent,

> the same cannot be said here. To prove Taylor's felony violation of a no-contact order charge, the State was required to prove that there was a no-contact order in place that applied to Taylor, as well as that he knew of the order, violated a provision of the order, and committed an assault. See RCW 26.50.110(1), (4). Taylor offered to stipulate that a no-contact order was in place and that he knew of the order, but his offered stipulation was insufficient in comparison to the no-contact order itself. By introducing the no-contact order, the State was able to show that a valid no-contact order was in place and the specific restrictions of the order Taylor violated. Excluding the no-contact order from evidence would allow Taylor to circumvent the full evidentiary force of the State's case. See Old Chief, 519 U.S. at 186-87 (stating that a "defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.").

Taylor, 193 Wn.2d at 701-02. The court also noted that "a trial court may redact any portion of a no-contact order that poses a risk of unfair prejudice." Taylor, 193 Wn.2d at 702 (citing State v. Roberts, 142 Wn.2d 471, 492-94, 14 P.3d 713 (2000)).

Accordingly, the court concluded that

> Taylor's domestic violence no-contact order was admissible under ER 403 because the probative value of the no-contact order far outweighed any danger of unfair prejudice. The no-contact order had significant probative value as to Taylor's felony violation of a no-contact order charge. The no-contact order provided the specific restrictions imposed on Taylor, was closely related to the charged offense, and offered evidence of multiple elements of the offense. In addition, there was nothing particularly inflammatory or unfairly prejudicial about the no-contact order. The no-contact order did not describe the nature of Taylor's prior domestic violence offense and was not more likely to stimulate an emotional, rather than a rational, decision from the jury. As a result, admission of the domestic violence no-contact order did not create a risk of unfair prejudice to Taylor. Consequently, the State was not required to accept Taylor's offered stipulation, and the trial court's decision to

> admit the no-contact order into evidence under ER 403 was based on tenable grounds.

Taylor, 193 Wn.2d at 702-03.

C

Here, the State charged Fesinmeyer with one count of felony violation of a no-contact order predicated on Fesinmeyer's alleged assault of Omnell or, alternatively, on his two prior convictions for violating a no-contact order. Accordingly, in order to prove all of the elements of the charged felony violation of a no-contact order offense, the State was required to prove either that Fesinmeyer had assaulted Omnell or that he had two prior convictions for violating a no-contact order.

Prior to trial, Fesinmeyer moved to bifurcate the proceedings as to the prior convictions element discussed above. He requested that such evidence be presented and argued to the jury—and for the jury to be instructed as to the State's purpose for offering such evidence—only if the jury were to first find that he had committed the other essential elements of that charged offense. Fesinmeyer argued that, if the jury became aware of his prior convictions for violating a no-contact order, it would necessarily create a risk of unfair prejudice to him because the jury would view him as a person with a propensity to violate no-contact orders.

The State objected to Fesinmeyer's bifurcation request and offered, as an alternative, that the court provide the jury with a limiting instruction and

corresponding special verdict form. The court agreed with the State and denied Fesinmeyer's motion.[4]

At trial, the court admitted into evidence copies of the Marysville Municipal Court's docket entries setting forth Fesinmeyer's two April 2013 convictions for violating a "no contact/protection order." The docket entries did not provide additional information concerning the underlying facts of those violations or of the no-contact orders that Fesinmeyer had violated.

After both parties rested their cases in chief, the trial court, as pertinent here, read the following instructions to the jury,

INSTRUCTION NO. 14

> To convict the defendant of the crime of felony violation of a court order, as charged in count two, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 13th day of July, 2018, there existed a no-contact order applicable to the defendant;
> (2) That the defendant knew of the existence of this order;
> (3) That on or about said date, the defendant knowingly violated a provision of this order;
> (4) (a) That the defendant's conduct was an assault; or
> (b) That the defendant has twice been previously convicted for violating the provisions of a court order; and
> (5) That the defendant's act occurred in the State of Washington.
>
> If you find from the evidence that elements (1), (2), (3) and (5), and any of the alternative elements (4)(a) or (4)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (4)(a) or (4)(b) has

[4] The court ruled as follows:
All right. In review of this, I'm going to deny the motion for the bifurcation at this time. The -- all of the charges in this case stem from one particular instance. I don't think it is necessarily unduly prejudicial for the jury. I would accept the proposal for purposes of a special verdict form if the parties agree on that, which I think alleviates any potential for unfair prejudice in this matter. So I'm going to deny that motion.

been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

. . . .

INSTRUCTION NO. 17

Certain evidence has been admitted in this case for only a limited purpose. Exhibits 33 and 34 may be considered by you only for the purpose of determining whether the defendant has twice previously been convicted of violating the provisions of a court order. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

. . . .

INSTRUCTION NO. 19

Exhibits 29, 33, and 34 (Certified Copy of the No-Contact Order and Certified Copy of Docket Entries) have been redacted. You are not to concern yourself with any redactions that have been made nor should the fact that the exhibit has been redacted be a part of your discussion during deliberations in any way.

In closing argument, the State addressed the prior conviction evidence as follows:

Now, the State also alleges that he had two prior convictions for -- for no -- for the no contact order violations. You'll receive in evidence certified copies of something that's called a docket entry, and in those certified copies of those dockets, you'll find that the defendant was found guilty twice in two different cases for those crimes. So that element is proven beyond a reasonable doubt.

The special verdict form provided to the jury reads as follows:

SPECIAL VERDICT FORM C

We, the jury, answer the question submitted by the court as follows:

QUESTION: Did the Defendant commit an assault in violation of the no-contact order as stated in jury instruction 14 in paragraph (4)(a)?

ANSWER: _____(write "yes" or "no" or "not unanimous")

> QUESTION: Has the Defendant been twice convicted for violating the provisions of a court order as stated in jury instruction 14 in paragraph (4)(b)?
>
> ANSWER: _____(write "yes" or "no" or "not unanimous")

The danger of unfair prejudice to Fesinmeyer in admitting evidence of his prior convictions for violating a no-contact order was properly accounted for by the trial court. As recognized in Taylor, in determining whether the resulting prejudice is unfair, the probative value of the evidence in question is an important consideration. 193 Wn.2d at 702-03 (citing ER 403). Here, evidence of Fesinmeyer's prior convictions had significant probative value. Unlike the more tangential relationship between Old Chief's prior felony assault conviction and his commission of the underlying unlawful possession of a firearm charge, evidence of Fesinmyer's prior convictions for violating a no-contact order was closely related to the State's charged no-contact order violation offense herein. See Old Chief, 519 U.S. at 174-75, 191. Furthermore, such prior conviction evidence was greatly probative because it offered direct proof of an element of one of the State's charged offenses. Taylor, 193 Wn.2d at 701; former RCW 26.50.110(5) (2022). Indeed, as discussed herein, the State was required to present proof of such prior convictions in order to prevail on one of its two alternative allegations of the charged no-contact order violation offense.

Furthermore, the admission of evidence of Fesinmeyer's prior convictions for violating a no-contact order was not unfairly prejudicial to him. As set forth above, although admission of certain evidence may prejudice a defendant, that does not indicate that the resulting prejudice is unfair. See Roswell, 165 Wn.2d

at 198. Indeed, it is clear that evidence of Fesinmeyer's prior no-contact order violation convictions, offered to prove an element of the State's charged no-contact order violation offense, was inherently prejudicial to him. However, given that our legislature has authorized the State to rely on the existence of such prior convictions—alongside the other necessary proof—in prosecuting a defendant for violating a no-contact order as a felony, rather than as a misdemeanor, we cannot say that the prejudice resulting from such proof is, by itself, unfair.[5] See RCW 7.105.450(5); former RCW 26.50.110(5); see also Spencer, 385 U.S. at 565-66.

Additionally, the record does not reflect that the State's presentation or argument regarding the evidence of Fesinmeyer's prior convictions was inflammatory or otherwise emotionally provocative. Indeed, the exhibits introduced by the State—the redacted municipal court docket entries indicating that Fesinmeyer had been convicted of two no-contact order violations and the date of such convictions—were tailored to the underlying prior convictions element and did not identify additional details concerning the underlying no-contact orders, including the manner in which Fesinmeyer violated those orders. See Taylor, 193 Wn.2d at 702 (citing Roberts, 142 Wn.2d at 492-94). In addition, during its closing argument, the State limited its discussion of such evidence to only a few unembellished statements as to where the jury would locate such

[5] Indeed, it follows that a "defendant may not stipulate or admit" or, as here, bifurcate "his way out of the full evidentiary force of the case as the Government chooses to present it." See Old Chief, 519 U.S. at 186-87.

evidence and that such evidence supported the State's allegation as to the charged prior convictions element in question.

Furthermore, the trial court's jury instructions and the special verdict jury form further mitigated the danger of unfair prejudice to Fesinmeyer. Roswell, 165 Wn.2d at 198 (citing Spencer, 385 U.S. at 561). The trial court instructed the jury that the evidence of Fesinmeyer's prior convictions was admitted for a limited purpose, that the evidence could only be considered for the purpose of the jury's consideration of the prior convictions element in question, and forbade the jurors from both considering such evidence for any other purpose and discussing such evidence in any other capacity during their deliberations. The court also provided the jury with a special to-convict instruction that corresponded with those instructions. Finally, the court also instructed the jury to disregard the existence of redactions presented in the docket entries. These precautionary measures—and the absence of an assertion by Fesinmeyer that the jury disregarded any of the instructions with which they were provided—further minimized the risk of unfair prejudice.

Given these circumstances, and given that we presume that the jury follows the court's instructions, State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994), the record does not reflect that the admission of evidence of Fesinmeyer's prior convictions was unfairly prejudicial to him. Thus, the trial court did not abuse its discretion either by denying his request to bifurcate the

proceedings or in the manner by which the court oversaw the jury's consideration of such evidence. Accordingly, the trial court did not err.[6]

III

Fesinmeyer next asserts that reversal of his convictions is required because the prosecutor engaged in prejudicial misconduct. This is so, Fesinmeyer contends, because the prosecutor improperly appealed to the jurors' emotions with regard to the alleged assault that was a predicate for several of the offenses for which he was convicted. Although the prosecutor's statement in question was indeed improper, the record does not reflect that such statement resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Accordingly, we disagree that appellate relief is required.

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[6] Even if the trial court erred by admitting such evidence—which it did not—Fesinmeyer fails to show how any resulting error might have harmed him.

> "Evidentiary error is grounds for reversal only if it results in prejudice." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" Neal, 144 Wn.2d at 611 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

In re Det. of Post, 145 Wn. App. 728, 748, 187 P.3d 803 (2008), aff'd, 170 Wn.2d 302, 241 P.3d 1234 (2010).

The record reflects that the evidence of Fesinmeyer's prior convictions was offered to prove one of two alternate elements in support of the State's charged felony no-contact order violation offense. The jury was instructed that, although they were required to be unanimous as to whether an alternative element was proved, they need not be unanimous as to which alternative element was proved. The jury's resulting special verdict reflected that the jury was unanimous as to the existence of each alternative element, finding beyond a reasonable doubt both that Fesinmeyer had two prior convictions for violating a no-contact order and that he had assaulted Omnell.

Given that, even if the trial court erred by admitting the evidence of his prior convictions, the record reflects that the jury nonetheless would have convicted him of the charged felony no-contact order violation offense in reliance on their unanimous finding that he had assaulted Omnell. Fesinmeyer does not present citations to the record, argument, or analysis in support of an assertion that there was a reasonable probability that the jury's verdict as to the assault charge would have changed if evidence of his prior convictions had not been admitted. Thus, Fesinmeyer's contentions are unavailing.

A

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citing Estelle v. Williams, 425 U .S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999)). "Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." Glasmann, 175 Wn.2d at 703-04 (citing State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)).

"In order to establish prosecutorial misconduct, a defendant must show 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)).

B

Fesinmeyer asserts that the prosecutor uttered a statement during rebuttal closing argument that was improper and prejudicial. This is so, he asserts, because the prosecutor asking the jury to imagine how the victim was feeling at the time of the alleged assault constituted an invitation to the jury to decide the case not on an evidentiary basis but, rather, on an emotional one. In that regard, we agree.

In delivering closing argument, a prosecutor "has wide latitude to argue reasonable inferences from *the evidence*." State v. Thorgerson, 172 Wn.2d 438,

448, 258 P.3d 43 (2011) (emphasis added) (citing State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)). However, it is a prosecutor's duty to seek a verdict based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998).

Here, during rebuttal closing argument, the prosecutor sought to respond to defense counsel's argument that there was an absence of evidence connecting Omnell's emotional state with Fesinmeyer's alleged assault and, in so doing, stated the following:

> [PROSECUTOR] Clearly [the alleged victim] wasn't just struck. There had to have been a struggle of some kind by Mr. Fesinmeyer tearing her clothing. That's good circumstantial evidence that he was beating her not just in the face, not just in the chest, not just in the arms, but he's trying to get at her body as well. She's got marks all over, and he has no injuries. You heard that from Officer Adams. He had nothing. That's not pushing someone out of the way. That's committing an assault.
>
> *I just want you to imagine how [the alleged victim] must have been feeling while she's being hit.*
>
> [DEFENSE COUNSEL]: And objection. That's clearly impermissible.
>
> THE COURT: Move on, counsel.
>
> [PROSECUTOR]: You know how she was feeling, because she was crying. She was on the floor, and she was hyperventilating. You know how she was feeling, because she was just assaulted.
>
> Now I want to talk about Mr. Fesinmeyer's statements. . . .

(Emphasis added.)

The prosecutor's suggestion to the jurors that they should imagine how the victim must have been feeling while she was being hit was improper. As an

initial matter, the State's appellate briefing concedes that "[h]ow a *juror* would feel in the victim's situation is irrelevant." Br. of Resp't at 29. Indeed, such a statement asking the jury to "imagine" a circumstance cannot be said to be an inference reasonably drawn from the evidence. Rather, such a statement improperly asks the jury to speculate on matters outside of the evidence presented at trial.

Furthermore, such a statement cannot be understood as an appeal to the jury's reasoned intellectual application of the law to the facts but, rather, such a statement constituted an improper appeal to the jury's emotions. See, e.g., State v. Craven, 15 Wn. App. 2d 380, 389, 475 P.3d 1038 (2020) ("It was improper for the prosecutor to insist a juror should 'feel right' and have a decision 'make sense' in the heart and in the gut when reaching a verdict."); State v. Whitaker, 6 Wn. App. 2d 1, 16, 429 P.3d 512 (2018) (concluding that the prosecutor's asking the jury multiple times to imagine what the victim was thinking and feeling in the hours leading up to her death constituted improper appeal to jury's emotions), aff'd, 195 Wn.2d 333, 459 P.3d 1074 (2020); State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) (holding that prosecutor's statements were improper because "[t]hat the [victims] would never have expected the crime to occur was not relevant to [the defendant's] guilt, nor were the prosecutor's assertions about the [victims'] future plans"). Thus, the prosecutor's statement suggesting to the jurors that they should imagine how the victim felt as she was being assaulted was improper.

C

Fesinmeyer next asserts that the prosecutor's improper statement prejudiced him. This is so, Fesinmeyer contends, because that comment related to the State's allegation that he had assaulted Omnell, and the State's assault allegation underlay several of the offenses for which he was convicted. Because the context of the entire trial does not indicate a substantial likelihood that the single improper statement by the prosecutor affected the jury's verdicts, Fesinmeyer's assertion fails.

Once a defendant establishes that a prosecutor's statement is improper, we must determine whether the defendant was prejudiced by such misconduct. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). As applicable here, to obtain appellate relief, when the defendant objected at trial, the defendant must demonstrate that "the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." Emery, 174 Wn.2d at 760 (citing State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009)).

When reviewing an assertion that prosecutorial misconduct requires reversal, we review the statements in the context of the entire case. Thorgerson, 172 Wn.2d at 443 (citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932).

Here, as detailed above, the State presented to the jury the testimony of Officer Adams and the neighbor who dialed 911, along with both the audio recording of the 911 call and the photographs that Officer Adams took of Omnell's injuries shortly after he arrived at the residence in question. Prior to closing arguments, an instruction that the court provided to the jury read, in pertinent part, as follows:

INSTRUCTION NO. 1

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. . . .
>
> . . . .
>
> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.
>
> You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.
>
> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.
>
> . . . .
>
> . . . You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

As set forth above, during rebuttal closing argument, the prosecutor improperly stated that "I just want you to imagine how [the alleged victim] must have been feeling while she's being hit." In response, defense counsel objected, the court told the prosecutor to "[m]ove on," and the prosecutor immediately proceeded to discuss how circumstantial evidence in the case regarding Omnell's emotional state supported the assault allegation and then proceeded to address certain statements that Fesinmeyer made to Officer Adams.

The context of the entire case does not establish a substantial likelihood that the prosecutor's improper statement affected the jury's verdict. Ample evidence was adduced at trial as proof of Fesinmeyer's alleged assault that the jury could have otherwise relied on for their verdicts, including the neighbor's testimony regarding Omnell's screams for help and her emotional state, the 911 call, the police officer's testimony regarding Omnell's emotional state, her visible injuries, the absence of visible injuries on Fesinmeyer, and the near-contemporaneous photographs of Omnell's injuries.

Furthermore, the trial court instructed the jury to consider only the evidence presented at trial, to disregard any statement by the court or the lawyers that is not supported by the evidence or the law, and, notably, to decide the case not on emotions but, rather, on their rational thought process. Again, absent indications to the contrary, we presume that the jury followed the court's instructions. Johnson, 124 Wn.2d at 77.

As to the improper statement itself, the statement in question was brief. It was not used as a central theme in closing argument. Rather, it was a single

sentence in rebuttal and, after the court indicated to the prosecutor to "[m]ove on," the prosecutor did so, immediately focusing on what the jury knew of the assault from the circumstantial evidence of Omnell's emotional state.

Furthermore, the trial court's utterance to the prosecutor to "[m]ove on" did not prejudice Fesinmeyer. Rather, the court's utterances in response to defense counsel's other objections during the State's closing argument suggest that the court's fourth such utterance constituted mild disapproval of the prosecutor's statement.[7] For instance, Fesinmeyer's counsel objected on four occasions during the State's closing argument and rebuttal argument. After three of these objections, the court instructed the State to "continue your argument," but in response to the objection in question, the court instructed the prosecutor to "[m]ove on." The court's use of the phrase "move on" rather than the word "continue" suggests a heightened level of chastisement short of sustaining the objection. Nevertheless, the trial court's phrasing suggests that the court was either issuing a neutral statement to the prosecutor to keep moving through his argument or uttering its disapproval short of sustaining the objection, thereby warning the prosecutor against continuing along such a line of argument. Given that the prosecutor immediately moved on from that statement and given that the court's other statements to the prosecutor in response to defense counsel's three other objections were even more neutral, the record suggests that the court

[7] The court's utterance of "move on" does not appear to have constituted either an express ruling on defense counsel's objection or an instance of the court's response adding legitimacy to the prosecutor's argument. Cf. Davenport, 100 Wn.2d 757.

intended its admonition to be perceived in the latter manner and that this was understood by counsel.

We also note that defense counsel did not request that a curative instruction be given to the jury in response to the prosecutor's argument and the court's direction. Although not dispositive, this also tends to suggest that the improper remark, in the context of the whole trial, did not appear to defense counsel at the time to be so prejudicial as to warrant further admonition to the jury.[8]

Accordingly, there does not appear to be a substantial likelihood that the single improper statement by the prosecutor affected the jury's verdict. Thus, the prosecutor's statement did not deny Fesinmeyer a fair trial. Hence, we find no impropriety warranting reversal.

IV

Fesinmeyer has submitted a pro se statement of additional grounds pursuant to RAP 10.10. None of these grounds for additional review entitle him to appellate relief.

Fesinmeyer first asserts that the trial court abused its discretion by issuing a ruling in response to Fesinmeyer's CrR 3.5 motion without holding an additional hearing on that motion. Fesinmeyer's assertion fails. The court issued a written ruling determining that, based on the undisputed testimony received at the first hearing, it had sufficient evidence to issue a ruling on Fesinmeyer's motion. The

[8] Indeed, in two earlier instances at trial, defense counsel had, immediately after the court had sustained her objections, requested a curative instruction from the court.

court denied Fesinmeyer's motion, holding that his statements made to certain police officers during the events in question were admissible. Fesinmeyer does not challenge the trial court's determination that additional evidence was not necessary to issue a ruling on his CrR 3.5 motion. Fesinmeyer's statement of additional grounds also does not (even informally) assign specific error to any portion of the court's ruling. We will not consider a defendant's statement of additional grounds for review if it does not inform us of the nature and occurrence of alleged errors. RAP 10.10(c).

Fesinmeyer next asserts that the trial court abused its discretion by denying his request for a continuance in order to reappoint counsel. Fesinmeyer's assertion fails. Fesinmeyer elected to proceed pro se more than three years earlier, in 2019, after a thorough colloquy with the superior court concerning the risks associated with proceeding pro se, and he was provided with stand-by counsel. His October 2022 request for a continuance was made on the Friday before trial in his case was set to commence on the following Monday. The trial court ensured that his long-appointed stand-by counsel would be available to provide him assistance and denied his request as untimely. The trial court did not abuse its discretion by so doing.[9]

[9] The record reflects that, from the end of 2019 until the middle of October 2022—on the eve of trial—Fesinmeyer had stand-by counsel available to him after he had elected to proceed pro se. Furthermore, after the trial court denied his requests—on the eve of trial—for a trial continuance and to reappoint counsel, his stand-by counsel indicated that she would be available to continue in such a role during the upcoming trial. Three days later, on the day that trial was set to commence, Fesinmeyer renewed his request to reappoint counsel in reliance on a health condition that had previously not been disclosed to the court. The trial court granted his request, appointed his stand-by counsel as his defense counsel, and, after ensuring that such counsel had sufficient time to make her preparations, continued his trial start date to the end of the month. At the resulting trial, Fesinmeyer was diligently and competently represented by his defense counsel.

Fesinmeyer next contends that the State did not present sufficient evidence to support his felony violation of a no-contact order conviction because, according to Fesinmeyer, those prior convictions were predicated on defective no-contact orders. However, Fesinmeyer does not provide us with evidence in support of this argument. Again, we are not obligated to search the record in support of claims made in a defendant's statement of additional grounds for review. RAP 10.10(c). Fesinmeyer's assertion fails.

Fesinmeyer next contends that the State did not present sufficient evidence to support his burglary conviction. Fesinmeyer's claim fails. As set forth above, the record contained ample circumstantial evidence that Fesinmeyer entered and remained in the residence where Omnell was residing and that he entered or remained therein with the intent to commit a crime against her. Accordingly, none of Fesinmeyer's additional grounds warrant appellate relief.[10]

V

Fesinmeyer next asserts that the sentencing court erred by imposing upon him a victim penalty assessment despite his indigency. The State concedes error in this regard. Because the sentencing court previously found the defendant indigent, we accept the State's concession. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023) (citing RCW 7.68.035(5)(b)). We remand this

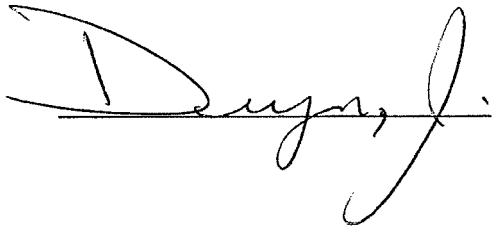
[10] On March 29, 2024 and April 5, 2024, Fesinmeyer's counsel submitted to the court handwritten documents prepared by the defendant himself to supplement his statement of additional grounds.

To the extent that the documents assert facts not in the record, the assertions have been ignored by the court, as such assertions are improper on direct appeal.

To the extent that the assertions contain legal arguments, the assertions have been considered by the panel. None demonstrate an entitlement to appellate relief.

matter to the superior court to strike the victim penalty assessment from Fesinmeyer's sentence.

Affirmed in part, reversed in part, and remanded.



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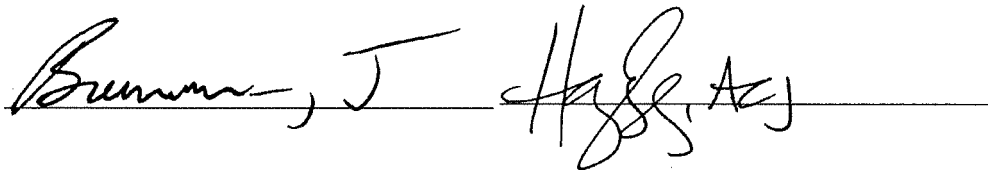

NIELSEN KOCH & GRANNIS P.L.L.C.

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