71818-5

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Court of Appeals
Division I
State of Washington

NO. 71818-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDREA LYNN LISTER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant was convicted of felony stalking, misdemeanor assault and misdemeanor violation of a court order. She raises the following issues:

1. Did the charging document contain all the essential elements of the crime of felony stalking as charged in count 1?

2. Stalking is defined as a continuing offense. Did the jury need to be instructed that it had to be unanimous as to particular acts and particular protection orders violated?

3. Do the defendant's convictions for felony stalking and violation of a court order that occurred on different dates violate double jeopardy?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was convicted by a jury of felony stalking (count 1), fourth degree assault (count 2), and violation of a court order (count 4). CP 150-51, 153. The defendant was acquitted of one count of fourth degree assault (count 3). CP 152.

The defendant received a standard range sentence of 13 months on the felony stalking count. CP 123-31. This was

concurrent to the 364 day concurrent sentences the defendant received on the two misdemeanor counts. CP 132-34.

2. SUBSTANTIVE FACTS

Daniel Wiseman lives in a condo on Harbor Avenue in West Seattle. 10RP[1] 41. A 60-plus year resident of Seattle, he has owned and operated a West Seattle appliance store since 1981 called Wiseman Appliance. 10RP 41-42.

Wiseman first met the defendant in 2008 when she would come by his business looking for recyclables. 10RP 42. The defendant would come into the business and socialize, and at times, Wiseman would help her out financially by giving her money to buy food and gas. 10RP 43-44. This is just what Wiseman did for people who were "down and out." 10RP 45.

In July of 2010, Wiseman offered to take the defendant out of town because she needed to get away from things. 10RP 45. Wiseman drove the two of them to a casino and gave the defendant some money to gamble with. 10RP 45-46. Around this time, the relationship between Wiseman and the defendant had briefly become intimate. 10RP 47.

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[1] The verbatim report of proceedings is cited as: 1RP—7/30/13; 2RP—8/20/13; 3RP—12/17/13 (Beginning at 9:30); 4RP—12/17/13 (Beginning at 11:30); 5RP—12/18/13; 6RP—1/28/14; 7RP—3/20/14; 8RP—3/25/14; 9RP—3/26/14; 10RP—3/27/14; 11RP—3/31/14; 12RP—4/1/14; 13RP—4/2/14; 14RP—4/3/14.

Later, Wiseman opened up his home to the defendant, giving her a place to stay at times, do her laundry, and work on the many court cases she said she had going. 10RP 46, 49. Wiseman discussed with the defendant that he was willing to help her out but that she was not allowed to live at his condo. 10RP 52. Wiseman never gave the defendant a key to his condominium. 10RP 50-51.

In the spring of 2011, Wiseman was in Palm Springs on a business trip when he received a call from one of his neighbors concerned about his condominium. 10RP 54-55. Wiseman returned home to find that his doors and locks were different, the defendant's clothes were in his closet, and she had moved in. 10RP 49-50, 55.

Wiseman asked the defendant to leave, and she did, after about two months. 10RP 52-53. The leaving was not amicable as the defendant desired to be in a relationship with Wiseman. 10RP 59. Although Wiseman remained in contact with the defendant because he still wanted to help her out, he was never intimate with the defendant again. 10RP 60-61.

From here on out, the defendant began what can only be described as classic stalking behavior by an obsessed individual. The following is a summary of some of the defendant's activities:

Wiseman took three business trips each year to attend out-of-state business conferences. 10RP 64. He never told the defendant where or when the conferences were. 10RP 66. Still, in the spring of 2011, he was on one business trip with his friend and upstairs resident of the condominium building, Shirley Honey, only to find out upon arriving at their hotel that the defendant had cancelled the reservations. 10RP 66-67, 73.

By the summer of 2011, the phone at Wiseman Appliance would "ring off the hook" from the defendant's daily and persistent calling. 10RP 63. She would come into the store multiple times a week, many times at 5:30 when the rest of Wiseman's employees went home for the night. 10RP 63-64. Wiseman was forced to start locking the front and rear doors of his business when he was working alone at his store. 10RP 63. All of this occurred despite Wiseman's pleas for the defendant to stop. 10RP 64.

When Wiseman was at home, the defendant would call him from the front door intercom system. 10RP 68. On one such

occasion in June of 2011, when Wiseman refused to talk to her on the intercom, the defendant broke it. 10RP 68-69.

On August 23 of 2011, Wiseman was at a conference in Dallas but came home a day early. 10RP 78. Wiseman picked up Shirley Honey at the airport, as she was flying in at the same time from her new home in Alaska where she had moved. 10RP 79. When they arrived back at the condominium building – a secure building, and were in the lobby waiting for the elevator, they were suddenly accosted by the defendant. 10RP 80. The defendant screamed at Honey that Wiseman was hers and then screamed at Wiseman that he was a liar and that he had taken Honey to Dallas with him. 10RP 82.

Wiseman escorted Honey to the elevator but the defendant blocked the elevator door and pushed Honey's hand away from the elevator buttons. 10RP 82-83. Wiseman called 911 (the defendant can be heard in the background screaming "you're my goddamned boyfriend"). 10RP 82; Trial Exhibit 4 (Trial Exhibit 5 is a transcript of the call).[2] Wiseman ultimately had to grab the defendant's arm to get her away from Honey. 10RP 83.

[2] At one point, Honey also called 911. 10RP 123. Played for the jury, Honey is heard telling the operator that the defendant was attacking her and Wiseman. 10RP 123-26; Trial Exhibit 14 (Trial Exhibit 15 is a transcript of the call).

After Wiseman was able to get Honey safely out of the lobby, the defendant screamed at Wiseman and slapped him multiple times. 10RP 84-85. She then grabbed Wiseman's cell phone and ran. 10RP 86. The police arrived a short time later. 10RP 86.

As officers were talking with Wiseman in front of the condominium building, a tenant pointed out the defendant running across the street. 9RP 31. Officers found her crouched down in the passenger seat of her jeep trying to hide. 11RP 111. The defendant was agitated, did not want to get out of the car, and kept professing that she was not trespassing, that Wiseman was her boyfriend and she lived there. 9RP 32; 11RP 111-12. She admitted to the officers that she did not have a key to the condo or any proof of residency, telling the officers that "she just gets in." 11RP 111.

The next day, Wiseman obtained a temporary protection order from Seattle Municipal Court. 10RP 92; Trial Exhibit 6 (case # 11-2-01460-6).[3]

[3] The order indicates that a hearing for a permanent protection hearing was set for September 7, 2011. Trial Exhibit 6. On September 7, the temporary order was reissued, signed by the defendant, with a new hearing date set for November 9, 2011. Trial Exhibit 7. On November 9, the temporary order was reissued, signed by the defendant, with a new hearing date set for February 8,

Despite the protection order, in September of 2011, the defendant was calling Wiseman at home on nearly a daily basis. 10RP 101-13. Wiseman would hang up or not answer the phone. Id.

On October 13, 2011, the defendant sent Wiseman a letter telling him to drop the protection order. 10RP 127-28; Trial Exhibit 16.

On November 10, 2011, patrol officers saw the defendant's car in the area of Wiseman's condo. 11RP 113-14. Knowing that there was a protective order in place, the officers drove to Wiseman's condo. 11RP 115. Sure enough, a short time later they observed the defendant drive down the street in front of Wiseman's condo. 11RP 115-16. Upon being stopped, the defendant became

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2012. Trial Exhibit 8. On February 8, the temporary order was reissued, signed by the defendant, with a new hearing date set for April 19, 2012. Trial Exhibit 9. On April 19, a permanent order was entered, with service to be made by the Seattle Police Department. Trial Exhibit 10. The defendant then set a hearing and without Wiseman's presence in court, she was able to get the order terminated on August 21, 2012. Trial Exhibit 11; 10RP 97-98.

After the defendant was booked into the King County Jail, on April 22, 2013, Wiseman again obtained a temporary protection order with a hearing for a permanent protection order hearing set for May 6, 2013. Trial Exhibit 12 (case # 13-2-00076-8). On May 6, due to the defendant's pending criminal charges, the temporary order was reissued, signed by the defendant, with a hearing date of August 26, 2013. Trial Exhibit 13.

Three protective orders issued out of Seattle Municipal Court on criminal matters were also admitted into evidence to show that the defendant knew Wiseman did not want contact with her. Trial Exhibits 22, 23, and 24; 7RP 63-65, 102-03. The defendant proposed a limiting instruction that was provided to the jury. CP 99, 195.

argumentative, belligerent, and had to be placed under arrest for violation of a court order. 11RP 116-17.

In May of 2012, Wiseman was admitted to Swedish Hospital for a medical procedure. 10RP 130. Wiseman had alerted hospital staff, and a note was posted on his room door, that if the defendant showed up, she should not be allowed into Wiseman's room. 10RP 131. Still, the defendant somehow found out Wiseman was in the hospital and showed up at his room a couple of times, bringing flowers, a newspaper, and demanding to see the incision. 10RP 130-31.

That same spring, Wiseman was driving a woman friend to a meeting on the way to work when he noticed that the defendant was tailing him. 10RP 131-32. It was not until Wiseman started driving to the Southwest Precinct that the defendant finally terminated her pursuit. 10RP 132.

Through the spring, summer and the rest of the year, Wiseman would receive upwards of six to seven calls a day from the defendant. 10RP 133. Wiseman was forced to change his home phone number but the defendant somehow obtained his new number within three days. 10RP 136.

The defendant also continued coming into Wiseman Appliance whereupon she would start screaming at Wiseman and making a scene. 10RP 134-35.

Also in 2012, Wiseman went to conferences in D.C., Orlando and Las Vegas, and each time he received multiple calls from the defendant. 10RP 65. When he would hang up the phone, the defendant would call right back. 10RP 65.

On the evening of August 31, 2012, Wiseman went to pick up a woman friend of his for dinner. 10RP 138-39. When the woman walked out of her building towards Wiseman, the defendant ran up from an unknown location and handed the woman two photos of Wiseman and Shirley Honey that had been taken on a New Year's Eve cruise. 10RP 139, 141; 11RP 44-45. Wiseman had never seen the photos before. 10RP 141. The defendant yelled at the woman that she lived with Wiseman. 10RP 139; 11RP 45. She then ran to her jeep that was parked nearby and drove away. Id.

A short time later, Wiseman and the woman left for dinner only to discover that the defendant was tailing them. 10RP 140. The defendant drove off when Wiseman headed towards the South Precinct. 10RP 140. That morning, the woman had received a

phone call from a female caller telling her that the man that she thought was so nice was not so innocent and that he was not disease free. 11RP 49.

On September 1, 2012, an officer responded to Wiseman Appliance on a violation of protection order call. 10RP 20-21. Upon entering the business, Wiseman handed the phone to the officer. 10RP 21-22. The defendant was on the line, and when told that she was violating a court order, she became argumentative and told the officer that she did not care. 10RP 22-23.

Later, after being booked into jail yet again, the defendant continued her attempts to contact Wiseman. Jail phone records from November 22, 2012, through May 11, 2013, showed 105 calls to Wiseman's work and cell phones. 10RP 145-46; 11RP 85-92. The defendant also sent Wiseman two letters from jail that were admitted into evidence and postmarked January 14, 2013 and March 29, 2013. Trial Exhibits 17 and 18.

Wiseman testified that the defendant's stalking behavior impacted his life in a big way, that every time he stepped out the door he wondered if the defendant was around the corner or whether his phone was going to start ringing. 10RP 146-47. He

feared for his personal safety and the safety of his friends and family. 10RP 149.

The defendant testified and claimed that she had an intimate relationship with Wiseman that started in 2009 and ended only when she sent him a letter from jail in March of 2013 telling him that it was over. 11RP 146-50, 159. She claimed that she actually lived with Wiseman, "like married people," through 2010 and into 2011. 11RP 150, 158. In admitting to most of the incidents described above, the defendant testified that "you really love passionately and you really fight passionately," and that Wiseman knows she loves him. 12RP 33, 41. The defendant also admitted knowing about the protection orders, admitted to the contacts with Wiseman, but claimed they were lawful contacts because she was a pro se attorney working on a number of family law cases and car accident cases wherein Wiseman was a witness. 11RP 204-10.[4]

Additional facts are included in the sections below they pertain.

[4] At sentencing, the defendant refused to sign the no-contact order, professed that "I'm guilty of loving the wrong man," and asserted that she would win this case on appeal. 14RP 37, 45-47.

C. ARGUMENT

1. THE CHARGING DOCUMENT INCLUDED ALL THE ESSENTIAL ELEMENTS OF THE CRIME OF FELONY STALKING

The defendant asks this Court to reverse his felony stalking conviction because, he claims, the charging document did not contain all the "essential elements" of the crime. This argument, raised for the first time on appeal, is without merit.

An accused in a criminal case has a due process right to notice of the alleged crime the State intends to prove. State v. Kosewicz, 174 Wn.2d 683, 691, 278 P.3d 184 (2012). In superior courts in Washington, this is done by the filing of an "Information." See CrR 2.1(a)(1).

The sufficiency of the Information is subject to challenge. Commonly referred to as the "essential elements rule," by way of the Information, a defendant must be "apprised with reasonable certainty of the accusations against him." State v. Leach, 113 Wn.2d 679, 690, 782 P.2d 552 (1989). The purpose of the rule is to provide notice; to sufficiently apprise a defendant of the charges against him or her so that he or she may prepare a defense. Kosewicz, 174 Wn.2d at 691. Thus, in providing notice, the charging document must adequately identify the crime charged and

the facts supporting each element of the offense; i.e., it must contain all the "essential elements" of the crime charged. Leach, 113 Wn.2d at 689; State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

"Elements" are defined by the legislature and are the things that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. State v. Recuenco, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008). An element is "essential" if its "specification is necessary to establish the very illegality of the behavior." State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (internal citations omitted).

In meeting the requirements of the essential elements rule, "compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding." State v. Cosner, 85 Wn.2d 45, 51, 530 P.2d 317 (1975). Although it is "not necessary to use the exact words of the statute," it is "sufficient to charge in the language of the statute if the statute defines the crime sufficiently to apprise an accused person with reasonable certainty of the nature of the accusation." Leach, at 686.

A constitutionally defective information is subject to dismissal if it fails to state an offense by omitting allegations of the essential elements of the crime charged. Id. at 686-87. However, a charging document which states the statutory elements of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. Id.[5] The failure to request a bill of particulars at trial waives such a challenge on appeal. Id.

There are two different standards for reviewing the sufficiency of a charging document, the applicable standard being dictated by when an objection is first raised. State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). If a defendant challenges the charging document before a verdict is reached, the trial court will strictly construe the document to determine whether all of the crimes' essential elements are included. State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). However, when a charging document is not challenged until after a verdict is reached, the charging document will be more liberally construed in favor of validity than a charging document challenged before or during trial.

[5] A trial court may direct the filing of a bill of particulars upon request. See CrR 2.1(c). A bill of particulars functions "to amplify or clarify particular matters essential to the defense." State v. Holt, 104 Wn.2d 315, 321, 704 P.2d 1189 (1985).

Borrero, at 360. Having this more liberal standard where an objection is made post-verdict is intended to discourage "sandbagging." Id.[6]

Here, because no challenge was ever raised below, this Court will apply a liberal reading in determining (1) whether the necessary facts appear in any form, or by fair construction can be found, in the charging document; and, if so, (2) whether the defendant can nonetheless demonstrate actual prejudice suffered as a result of the imprecise, vague, or ambiguous charging language. Kjorsvik, at 105-06. "Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document." Kjorsvik, at 104.

"Since the chief purpose of the essential elements rule is to notify the defendant of the charges, it is necessary to evaluate the document from the perspective of a person of 'common understanding' rather than that of a legal expert."

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[6] If there were not two different standards, there would be no incentive for a defendant to bring a challenge prior to trial. A challenge made prior to trial would likely result in an amendment to the charging document or dismissal followed by the refiling of an adequate charging document. Kjorsvik, at 103. Waiting until after a guilty verdict would allow the defense to gamble on the verdict and then potentially gain a dismissal even where there was no prejudice based on the insufficient charging document. Id. Applying a more liberal construction when the issue is raised for the first time on appeal discourages this type of "sandbagging." Id.

State v. Valdobinos, 122 Wn.2d 270, 286, 858 P.2d 199 (1993) (citations omitted). The goal of providing proper notice "is met where a fair, commonsense construction of the charging document 'would reasonably apprise an accused of the elements of the crime charged.'" State v. Locke, 175 Wn. App. 779, 800-01, 307 P.3d 771 (2013) (quoting Kjorsvik, at 109), rev. denied, 179 Wn.2d 1021 (2014). The charging document will be interpreted to "include facts which are necessarily implied." Kjorsvik, at 109.

Here, the defendant was charged and convicted in count 1 of felony stalking. Under the statute, a person commits the crime of stalking if, without lawful authority,

> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either:
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if

> the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110(1).

Stalking is a felony offense if "the stalking violates ***any*** protective order protecting the person being stalked." RCW 9A.46.110(5)(b)(ii) (emphasis added).

Here, in defining the elements of the crime, the charging document read as follows:

> That the defendant Andrea Lister, in King County, Washington, between or about November 10, 2011 and June 1, 2013, did, without lawful authority, intentionally and repeatedly harass or follow Daniel Calvin Wiseman; and Daniel Calvin Wiseman was reasonably placed in fear that the defendant intended to injure Daniel Calvin Wiseman, or another person, or property of Daniel Calvin Wiseman, or property of another person; and the defendant either (i) intended to frighten, intimidate, or harass Daniel Calvin Wiseman; or (ii) knew or reasonably should have known that he was afraid, intimidated, or harassed even if the defendant did not intend to place Daniel Calvin Wiseman in fear or intimidate or harass Daniel Calvin Wiseman; and the stalking violates ***any*** protective order protecting Daniel Calvin Wiseman.

CP I (emphasis added).

As stated above, in meeting the requirements of the essential elements rule, "compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding." Cosner, 85 Wn.2d at 51.

For example, the Supreme Court has held that a citation containing the statutory reference "RCW 9.69.060" and the description "obstructing a police officer in performance of his duty" was constitutionally sufficient to apprise the defendant with reasonable certainty of the nature of the accusations against him so that he could prepare an adequate defense. Leach, 113 Wn.2d at 689 (citing State v. Grant, 89 Wn.2d 678, 686, 575 P.2d 210 (1978)). That, and more, was done in this case.

Here, the charging document provided full notice of the charge the defendant faced, the elements of the offense charged, the statutory citation, the date of the offense, the victim of the offense, and that the stalking conduct the defendant engaged violated a protective order protecting the victim of the stalking.

Relying on cases pertaining to a different statute, the defendant contends this was not enough. Specifically, relying on cases involving the charging of violation of a court order, the defendant asserts that the specific court order alleged to have been violated must be included in charging felony stalking. The cases the defendant relies are distinguishable, and in any event, the charging document here was sufficient even under these cases.

In State v. Termain, 124 Wn. App. 798, 103 P.3d 209 (2004) and City of Bothell v. Kaiser, 152 Wn. App. 466, 217 P.3d 339 (2009), the defendants challenged the charging documents that alleged they violated a court order. In each case, the charging document made reference to the statutory provisions but provided little else. In Kaiser, along with the violation date and location, the citation provided nothing more than the following language: that Kaiser "did then and there commit each of the following offenses 1. Violation/Statute Code RCW 26.50.110 DV violation of a no contact order." Kaiser, 152 Wn. App. at 469. In Termain, the Information provided that the defendant violated a restraint provision of a court order issued under the Seattle Municipal Code, any number of Revised Code of Washington chapters, or a foreign protection order. The Information did not identify the protected person, the restraint provision(s) violated or the act or acts that violated the particular restraint provision(s) of the order. Termain, 124 Wn. App. at 803.

A protection court order may be permanent or for a fixed term and may have a variety of restraint provisions entered at the discretion of the issuing judge. See e.g., Chap 26.50 RCW; City of Seattle v. Edwards, 87 Wn. App. 305, 941 P.2d 697 (1997),

overruled on other grounds, State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005); State v. Bunker, 169 Wn.2d 571, 238 P.3d 487 (2010). Protection orders include civil anti-harassment orders, domestic violence no-contact orders and even vulnerable adult protection orders. See e.g., State v. Rice, 180 Wn. App. 308, 320 P.3d 723 (2014) (case involving civil anti-harassment order issued under chapter 10.14 RCW); In re Knight, 178 Wn. App. 929, 317 P.3d 1068 (2014) (a vulnerable adult protection order may be issued under chapter 74.34 RCW).

In Termain, the court recognized that "the culpable act necessary to establish the violation of a no-contact order is determined by the scope of the predicate order....[and a] conviction cannot be obtained without producing the order as it will identify the protected person or location and any allowance for contact or the expiration date." Termain, at 804. Because some contacts may not violate a specific order, the court held that merely reciting the statutory elements of the crime was insufficient to put a defendant on sufficient notice to prepare a defense to a charge of violation of a protection order. The court held that more was needed. For example, "identification of the specific no-contact order, the issuance date from a specific court, the name of the protected

person, ***or sufficient other facts*** must be included in some manner." Id. at 805 (emphasis added), accord, Kaiser, supra.

There is a problem applying Termain and Kaiser to a stalking charge. First, the statutes are inherently different. While in any particular case there may be many protective orders and many restraint provisions (and exceptions) in each order, for violation of a court order, notice must be given of the specific restraint provision of the specific order that is violated. This is because the act alleged may not necessarily violate other restraint provisions or other orders. For example, the restraint provisions of a particular protective order may allow for indirect contact or contact through third persons but prohibit assaultive acts or in-person contacts. Without identifying the specific court order or the specific acts alleged to have violated that order, a defendant, or a court, would not know if an actual crime has been alleged, and a defendant would not be able to prepare a defense.

Felony stalking is different statutorily and as charged. First, unlike violation of a court order where the crime is committed by violating a specific restraint provision of a specific court order (see Bunker, supra), stalking is elevated to a felony where the actual acts constituting the crime of stalking violate "*any*" protective order

that protects the person being stalked. Thus, as the charging document here provides, the person protected was known, Daniel Wiseman; the acts that violate the order were known; these would be the acts that constitute the stalking; and this would include any provision violated of any order during the period charged.[7]

This is unlike Termain and Kaiser where the defendants would have to guess at what acts they were alleged to have committed and what provisions of what order the acts were alleged to have violated. While the charging document here could have provided more specificity (every charging document could), the Information cannot be said to have failed to put the defendant on notice of the elements of the crime charged and allowed the defendant to prepare a defense.[8]

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[7] In a similar example, in State v. Snapp, 119 Wn. App. 614, 623, 82 P.3d 252, rev. denied, 152 Wn.2d 1028 (2004), the Information alleged Snapp assaulted the victim and that the assault violated a protective order. There was no requirement that the Information specify the degree of assault committed -- Snapp was apprised that he was being charged with violating a protective order by assaulting the victim.

[8] The defendant also seems to imply that just because a fact or element is required to be included in a charging document when a specific crime is charged, (say charge A), where a different crime is charged (say charge B) that refers to that specific crime (charge A), the same fact or element that had to be included when charging charge A must be included when charging charge B. This is not correct. For example, where felony murder is charged, a murder committed in the course of committing another felony offense, the underlying elements of the predicate felony are not essential elements of felony murder and do not have to be included in the information. See State v. Hartz, 65 Wn. App. 351, 354, 828 P.2d 618 (1992) (citing State v. Anderson, 10 Wn.2d 167, 180, 116 P.2d 346

No reversible error exists where the Information "was sufficient to give the defendant reasonable notice of the elements of the charge against him" and "he suffered no prejudice from the manner in which the crime was charged." State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (citing Kjorsvik, 117 Wn.2d at 111). Any further specificity could have been obtained by way of a bill of particulars.

2. THE JURY WAS PROPERLY INSTRUCTED IN REGARDS TO FELONY STALKING

As to the charge of felony stalking, the defendant contends that the trial court erred in failing to instruct the jury that it had to unanimously agree on the particular protective order violated and the particular act that violated the order. The defendant is incorrect. This is *not* a "multiple acts" Petrich[9] situation. Stalking is a continuing offense. Thus, the jury needed only to be unanimous that the defendant committed a "unit of prosecution" of felony stalking.

A defendant may be convicted by a jury only if the jurors are unanimous that the defendant committed the criminal act for which

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(1941). This is true even where it is unknown which alternative means of the predicate felony that State would ultimately rely. Kosewicz, at 691-92.

[9] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

he is charged. Petrich, 101 Wn.2d at 569; Kitchen, 110 Wn.2d at 411. Where a single charge is based on evidence that the defendant committed multiple acts, any one of which would constitute the charged crime, either the State must elect a specific act on which it will rely for conviction or the trial court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. Petrich, at 572. On the other hand, a unanimity instruction is not required where the State does not allege that the defendant committed multiple acts, i.e., where only one "unit of prosecution" is charged. See e.g., State v. Furseth, 156 Wn. App. 516, 518, 233 P.3d 902, rev. denied, 170 Wn.2d 1007 (2010).

A "unit of prosecution" is the "act or course of conduct" that the legislature had proscribed. State v. Sutherby, 165 Wn.2d 870, 879, 204 P.3d 916 (2009); State v. Hall, 168 Wn.2d 726, 730, 230 P.3d 1048 (2010). The legislature can define a crime as a "continuing offense" or as a crime that is "committed anew" with each single act. Hall, 168 Wn.2d at 730 (holding that tampering with a witness is a continuing offense). If the legislative intent is not clear in this regard, "under the rule of lenity any ambiguity must be

resolved against turning a single transaction into multiple offenses." Id. (internal citations and quotations omitted).

There is no question, and the defendant does not dispute, that by its very definition stalking is a continuing offense.[10] As a result, when stalking is charged, the jury only need be unanimous that the defendant committed a single course of conduct or "unit of prosecution" of the crime. No unanimity instruction is required.

The "Petrich rule applies only to multiple act cases (those cases where several acts are alleged, any one of which could constitute the crime charged)." State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (finding a unanimity instruction was not required where multiple assaults occurred over a short period of time; the "continuous conduct" constituted the single act and the

[10] The stalking statute makes it unlawful where a person "*repeatedly* harasses or *repeatedly* follows" the victim. RCW 9A.46.110(1)(a) (emphasis added). "Follows" "means deliberately maintaining visual or physical proximity to a specific person *over a period of time*." RCW 9A.46.110(6)(b) (emphasis added). "Repeatedly" "means on *two or more separate occasions*." RCW 9A.46.110(6)(e) (emphasis added). "Unlawful harassment" "means a knowing and willful *course of conduct* directed at a specific person..." RCW 10.14.020(2) (emphasis added), applicable via RCW 9A.46.110(6)(c). "Course of conduct" "means a *pattern of conduct composed of a series of acts over a period of time*, however short, evidencing a continuity of purpose." RCW 10.14.020(1) (emphasis added), applicable via RCW 9A.46.110(6)(c). See also State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008) (stalking "amounts to a series of acts over a period of time"); State v. Kintz, 169 Wn.2d 537, 553, 238 P.3d 470 (2010) (stalking requires repeated acts over a period of time); State v. Parmelee, 108 Wn. App. 702, 711, 32 P.3d 1029 (2001) (stalking requires "repeated harassment or repeated following, i.e., repeated events constitute the crime of stalking"), rev. denied, 146 Wn.2d 1009 (2002).

jury would only need to be unanimous as to whether this conduct occurred). State v. Furseth, supra, provides a great example of the rejection of the defendant's argument.

Furseth was convicted of a single count of possessing depictions of minors engaged in sexually explicit conduct (child porn) for the multitude of depictions he possessed on his computer – some constituted child pornography, others did not. On appeal, Furseth argued that his conviction must be reversed because the jury was not instructed that it had to unanimously find that a single particular image of the many introduced into evidence constituted child pornography. Furseth, 156 Wn. App. at 519.

Years prior to Furseth's conviction, the court of appeals had ruled that the unit of prosecution for possession of child pornography was each individual depiction. See State v. Gailus, 136 Wn. App. 191, 197-98, 147 P.3d 1300 (2006). Had this been the state of the law at the time of Furseth's conviction, each depiction could constitute the crime charged and he would have been entitled to a unanimity instruction. Furseth, at 521. However, the Supreme Court had overruled Gailus and held that the "unit of prosecution" was the child pornography possessed at one time, regardless of the number of depictions possessed. Furseth, at

521-22 (citing Sutherby, supra). Thus, "[a]s a matter of law," Furseth could not have committed multiple acts of possession of child pornography, he could be charged with but a single count, he committed but a single act, and he was not entitled to a unanimity instruction. Id.[11]

The jury here needed only to be unanimous that the defendant committed the crime of stalking, a crime that spanned the charging period, and that the stalking behavior violated any protective order.

3. THE DEFENDANT'S CONVICTIONS FOR VIOLATION OF A COURT ORDER AND FELONY STALKING DO NOT VIOLATE DOUBLE JEOPARDY

The defendant contends that his convictions for violation of a court order and felony stalking violate double jeopardy because they were based on the same court order. The defendant is mistaken as to the law. Convictions do not violate double jeopardy unless they are based on the same act or acts. The defendant's acts that constituted the evidence of her violating a court order

[11] See also State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000 (unanimity that the defendant promoted prostitution was all that was required as the individual acts constituted but one continuing act) rev. denied, 111 Wn.2d 1012 (1988); State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989) (multiple acts of assault upon a single victim in an attempt to secure sexual relations constitutes a single act).

(count 4) were separate and distinct from her acts that constituted the evidence of her stalking conviction (count 1).

The constitutional prohibition against double jeopardy is violated when "the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other." State v. Freeman, 153 Wn.2d 765, 772, 108 P.3d 753 (2005). One of the tools used to determine legislative intent for double jeopardy purposes is the merger doctrine. The merger doctrine:

> applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).[12]

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983)).

In Parmelee, supra, this Court applied the double jeopardy merger doctrine to the crimes of felony stalking and violation of a court order and found that convictions of both crimes violated double jeopardy.

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[12] In pertinent part, the first-degree rape statute requires that the perpetrator engage in sexual intercourse with another person by forcible compulsion where the perpetrator either (1) kidnaps the victim or (2) inflicts serious physical injury upon the victim. RCW 9A.44.040.

Stalking is generally a gross misdemeanor requiring at least two separate occasions of harassment or following. RCW 9A.46.110. Stalking becomes a felony when "the stalking violates any protective order protecting the person being stalked." RCW 9A.46.110(5)(b)(ii).

Parmelee had three protective orders against him, all prohibiting contact with the same person, his ex-wife. From prison, Parmelee had fellow inmates mail a number of highly offensive letters to his ex. Based on these acts, Parmelee was convicted of three counts of violation of a protective order and one count of felony stalking, a felony due to the fact that his stalking behavior was in violation of a protective order.

In applying the merger doctrine, this Court held two of the court order violations merged with the stalking charge because proof of the two violations elevated the stalking to felony stalking. Such is not the case here.

The defendant was charged with stalking for acts committed between November 10, 2011, and June 1, 2013. CP 1. The defendant was charged with violating a court order for acts committed between September 10, 2011, and October 13, 2011. CP 2. The charging periods did not overlap. Thus, unlike the

situation in Parmelee, the acts the defendant committed that violated the court order for purposes of the violation of a court order charge were not the same acts that proved the felony stalking charge. For double jeopardy/merger to apply, it must be the same acts that prove both offenses, or in the case of merger, the same acts must elevate the level of one of the crimes. Freeman, 153 Wn.2d at 772; Eaton, 82 Wn. App. at 730.

The defendant suggests that merger applies because the same court order was a fact used by the jury in finding the defendant guilty of both charges. This is irrelevant. It is the acts of the defendant that are at issue in determining double jeopardy.

As an example, in the companion case to Freeman, supra, Zumwalt was convicted of second degree assault and first degree robbery for punching the victim in the face and robbing her of her money. The Court held that Zumwalt's punching of the victim, the assault, elevated the robbery from second degree to first degree robbery; that "without the conduct of the assault," Zumwalt would have committed only a robbery in the second degree. Freeman, at 778. Under the defendant's theory of double jeopardy, if Zumwalt had punched the victim in the face the day before he took her money, the two convictions would still violate double jeopardy. Also

under his theory of double jeopardy, once a protection order is issued, a defendant could be convicted of only a single crime of any number or type of crime that involves the same court order, regardless of the number of acts committed. This is simply not the law.

The defendant's convictions were not based on the same acts and thus double jeopardy/merger does not apply.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions.

DATED this 4 day of May, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Maureen Cyr at Washington Appellate Project, containing a copy of the Brief of Respondent, in STATE V. LISTER, Cause No. 71818-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

05/04/15

Date

Done in Seattle, Washington