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Court of Appeals
Division I
State of Washington

NO. 72515-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

E.C. EDWARD COBB,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether Cobb has failed to show that his right to a unanimous jury verdict was violated where the State presented evidence that he engaged in a "continuing course of conduct" to tamper with a witness.

2. Whether Cobb has failed to show that the State produced insufficient evidence to convict him of felony violation of a court order when viewing the evidence in the light most favorable to the State.

3. Whether Cobb's rights to a public trial and right to be present were violated, where the court took peremptory challenges in open court and excused jurors in open court, but the challenges were exercised in writing and the party who exercised them was later memorialized in the clerk's notes and placed on the record.

4. Whether Cobb's judgment and sentence should be corrected to strike the "domestic violence" finding where the jury did not reach a unanimous decision on the allegation.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged E.C. Edward Cobb with three counts of Felony Violation of a Court Order-Domestic Violence, and

Intimidating a Witness-Domestic Violence. CP 11-12. The court instructed the jury on the charged offenses, and the lesser-included offense of Tampering with a Witness-Domestic Violence. CP 255-74. A jury convicted Cobb of two counts of Felony Violation of a Court Order and Tampering with a Witness, and acquitted Cobb of the other charges. CP 167-72; 9RP 848-49.[1] The jury did not reach a "unanimous conclusion" on whether Cobb and the victim, Monique Bojang, were members of the same family or household prior to, or at the time, the crimes were committed. CP 167; 9RP 848. The court imposed standard-range, concurrent sentences on the two felony violation of a court order convictions, and an exceptional, 12-month consecutive sentence on the witness tampering conviction, based on the "free crimes" aggravating circumstance. CP 221-30; 9RP 880-81.

2. SUBSTANTIVE FACTS

Since 2007, Bojang and Cobb had been in an "on-again, off-again" romance. 6RP 439. In April 2014, Bojang believed that they were in a committed relationship, despite the existence of a

[1] The Verbatim Report of Proceedings consists of nine volumes designated as follows: 1RP (8/1/14), 2RP (8/11/14), 3RP (8/12/14), 4RP (8/13/14), 5RP (8/14/14 by Jackson Associates), 6RP (8/18/14 by Brian Killgore), 7RP (8/19/14), 8RP (8/20/14), 9RP (8/21/14 and 9/26/14). There are also two duplicative volumes, one entitled "Volume 5" by Brian Killgore, and another entitled "Volume I" by Jackson Associates. Both are contained in their entirety in 5RP and 6RP, respectively.

valid no-contact order prohibiting Cobb from having contact with Bojang. 6RP 439, 445. A few days prior to this incident on April 29, 2014, Bojang learned for the first time that Cobb had been unfaithful to her with another woman, Louise Lucas. 6RP 439-40. On April 29, Cobb called Bojang and asked her to come over so that they could talk. 6RP 446. Bojang initially refused to see Cobb, but ultimately relented because she wanted to hear what he had to say. 6RP 447.

Bojang picked up Cobb from Lucas's apartment, they ran a few errands together, and returned to Lucas's apartment. 6RP 453. As they sat in the parking lot talking in Bojang's car, Cobb became "aggressive" when Bojang refused to have sex with him. 6RP 452-54. Cobb grew upset and started hitting and slapping Bojang, using both his fists and open hands. 6RP 456, 516. Cobb hit Bojang a couple of times in the face, and along her side. 6RP 456. Despite Bojang's efforts to block Cobb's "punches," Cobb repeatedly hit her "through three cycles." 6RP 456, 516.

Bojang became scared and called 911. 6RP 457-58. When Bojang told Cobb who she was calling, he asked her to hang up while repeatedly apologizing and professing his love for her. 6RP 458. Bojang was livid because she could not believe that Cobb had

"put his hands on [her] again." 6RP 459. During the 911 call, Bojang can be overheard telling Cobb to "get away," and refusing to help him again. 6RP 464-65. Bojang told the emergency dispatcher that her "ex-boyfriend" had beaten her up, and that she needed to leave because she had to babysit children. 6RP 464-65.

Shortly thereafter, officers arrived and Bojang directed them to Lucas's apartment, where she believed that Cobb might have gone. 6RP 469. Cobb engaged in a multi-hour standoff with police while Bojang waited in her car nearby until police recorded her statement and photographed her injuries. 6RP 423, 470; 7RP 550, 556, 558. The responding police officer noted that Bojang had sustained a swollen and cut lip, and a scratch to her left cheek. 6RP 422-23, 502. Later that day, Bojang complained that she was suffering from a headache, and a "frickin' sore, swollen" face. Ex. 29B at 2; Ex. 30B at 4.

While Bojang waited in her car, Cobb called her cell phone three times. 6RP 490-96. In the first phone call, Cobb told Bojang that she needed to leave, and "fix" things with the police by writing a letter to help him. 6RP 490-92. During the second call, Bojang apologized to Cobb, saying that she "didn't want this to happen" and that she loved him. 6RP 494. In the third phone call, Bojang

asked Cobb if she had "anything to be worried about" if she was unable to "fix things" with the police, and Cobb said "it depended" on what she did. 6RP 495-96. Bojang felt threatened and scared by Cobb's comments. 6RP 499.

Following his arrest, Cobb called Bojang twice from the jail booking area.[2] 6RP 502; 7RP 586-90; Ex. 28A-30A. In his first couple of calls, Cobb repeatedly asked Bojang if she knew what she had to "say" and "do" in order to "take care of business." Ex. 28B at 2-3; Ex. 29B at 4. Cobb told Bojang to "hurry the f—k up" and "tell these people something" because he was facing "five years" with the points on his record. Ex. 28B at 3, 5. Cobb said that someone in his family would be in contact with Bojang "soon," and that she should call his sister. Ex. 28B at 4; Ex. 29B at 3, 5.

In his third phone call, Cobb took a different approach. Cobb told Bojang repeatedly that he loved her, asked for her forgiveness, and promised not to let her see him get that "ugly" or "off balance"

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[2] Although the transcripts of the recorded jail calls do not identify Bojang by name, Bojang testified that Cobb called her from jail, and her cell phone number matches the number called on the transcripts for Exhibits 28B-30B. 6RP 502-03. Further, the substance of the phone calls confirms Bojang's identity. See Ex. 28B at 3 (female stating "I'm freakin' shaken up still and irritated"), 6 (female stating "you didn't have to do that. You could have simply just got out of the car. And left me alone . . .You're the one that's just been slapping my head."); Ex. 29B at 5 (female stating "you just freakin' put hands on me in the car"); Ex. 30B at 4 (female stating "my face is frickin' sore, swollen, swelling up"). Additionally, the unique booking assignment number, or "BA number," assigned to Cobb is the one that was used each time to call Bojang. 7RP 561-62, 565, 568; Ex. 20.

again. Ex. 30B at 3, 7, 8. Cobb also told Bojang that they needed "to think about" what they were "gonna do and say," and that she needed to "be sending in stuff and letting 'em know," and that it was "okay" if she needed to "exaggerate it a little bit." Ex. 30B at 6.

That same day, Cobb also called Lucas from jail and asked her to call his sister "to take care of that business," and in an apparent reference to Bojang, "[t]o get that girl to go ahead and drop that."[3] Ex. 27B at 7. According to Cobb, his sister would "know what to do." Ex. 27B at 4. Additionally, Cobb appeared to suggest that Lucas contact Bojang, stating "Call her up, send her a text, or whatever and let her know what's going on. . . . [T]hat 'I wasn't nowhere, I didn't go nowhere' or whatever, 'she came over' . . . and she needs to tell these people what she needs to tell 'em." Ex. 27B at 5.

Over the next three months, Cobb made multiple phone calls from jail to Lucas, his sister, and a friend in order to secure Bojang's cooperation. In his phone calls to Lucas, Cobb stressed the importance of having "that chick . . . write something," and

[3] Although the transcript does not identify Lucas by name, she identified the number called as belonging to her cell phone. 7RP 630. Further, the unique "BA number" associated with the "caller" is the same one that belonged to Cobb. 7RP 568; Ex. 20.

having "it notarized." Ex. 36B at 1; Ex. 38B at 2.[4] Cobb reminded Lucas that time was "of the essence," while recognizing, "I don't know what you got . . . what you got to tell her. I don't know what you got to give her. But, I don't know. Make it rain." Ex. 37B at 2. Lucas assured Cobb that she was "working on it." Ex. 37B at 3.

In his phone calls to his sister, Cobb was significantly more candid about what steps needed to be taken to ensure that Bojang cooperated:

FEMALE[5]:	. . . Whatcha looking at?
CALLER[6]:	Uh, 60 months . . . But the thing is though I don't have to do it like if people do like they're supposed to be doing, you know what I'm saying. Have you, um, spoke to anybody?
FEMALE:	Just Louise (Lucas) through text . . .
CALLER:	You didn't get a hold of *her?*

[4] Lucas's same cell phone number is the number listed as called on Exhibits 36B, 37B, and 38B. Further, the "BA number" listed on Exhibits 36B and 38B is the same one that belonged to Cobb. 7RP 568; Ex. 20. Although the "BA number" listed on Exhibit 37B belonged to another inmate housed in Cobb's unit, the call appears to have been made by Cobb because it was made to Lucas's cell phone number and the substance of the conversation reflects that he was the caller. 7RP 574, 579; Ex. 37B at 2 ("I don't know what you got . . . what you got to tell her. I don't know what you got to give her. But, I don't know. Make it rain.").

[5] Although the transcript does not identify Cobb's sister by name, the number called is the number that Cobb indicated belonged to his sister in a phone call with Lucas. See Ex. 27B at 3-4 (Cobb providing his "sister's number"). Further, in a later conversation involving the same number, the "female" confirmed, "I'm your sister." Ex. 40B at 2. Exhibits 32B, 33B, 39B, 40B, and 41B all list Cobb's sister's number as the number called.

[6] Although the "BA number" listed on Exhibit 32B belonged to a second inmate housed in Cobb's unit, the call was made to Cobb's sister, and the substance of the conversation, as quoted above, confirms Cobb's identity as the caller. 7RP 574, 579; Ex. 32B at 3-4, 8-11, 13, 17.

FEMALE: No.
CALLER: She didn't get ahold of you?
FEMALE: No. . . .
CALLER: . . . [S]omehow tell her to get a hold of you okay and then, um, find out, when the Hawaii thing's going on because I'll get the money for that. Um . . .
FEMALE: What Hawaii thing? She knows about it? I'll talk to her about it.
CALLER: Okay. The Hawaii thing ask her when, when that's going on because, um, we'll make sure that, we'll get that going. Also, um, she need to know to, she needs to know to just refrain, you know what I'm saying? Refrain from everything . . . If, if there is no, um, interview, uh, if she's not, um, reachable by my attorney then this case gets dropped.
FEMALE: . . . I'm calling her. . . . I'll be on it because oh I'm gonna let her have it. Whoo, whoo, whoo . . . being nice don't work with her stupid ass. . . .
CALLER: . . . [I]f, um, somehow, um, that, that girl, man, um, puts a letter maintaining that, you know, it didn't happen, that she exaggerated because she was mad and everything then they have to let me go. . . . She's got to send one to the clerk. Send one to the, um, Superior Court and send one to the judge. . . . She got to refrain, and she got to, um, give these people no reason to expect her. . .
. . . [T]his is the time where somebody need to be reaching out. You know what I'm saying?
FEMALE: I know, 'cause they listening in on your shit.
CALLER: Exactly. . .
. . . [S]omebody need to stay in her ear, you know what I'm saying . . .

sometimes they be offering money and all that to people and what not.

FEMALE: . . . [S]he don't deserve a goddamn dime. . . . She deserves a f—king ass whooping.

CALLER: . . . I know but listen about that Hawaii thing, if she's gonna get there then we'll make sure that, um, you know we, we make that happen . . .

. . . [M]ake sure that, um, you know about the, the little interviews and stuff and everything, if that happens then there's no way that this stuff can get dropped, okay? She can't go to none of the interviews and stuff like that.

Ex. 32B at 3-4, 8-11, 13, 17.

A week later, Cobb called his sister, asking, "can you encourage her" because "she's supposed to be texting you, Louise, and everything and giving you some information for you to pass along. Because it has to be detailed in order for this to really work." Ex. 33B at 4. A month later, Cobb's sister reported that she had no "info . . . No call or nothing yet," and that she could not "chase this broad if she don't want nobody to be bothering her!" Ex. 40B at 1. In his final call to his sister, Cobb lamented that "I had a way out of five years and everything . . . I had the letters and stuff but I needed to prove that she actually wrote these to make it real simple, and so to have her admit to 'em, which she wouldn't do if she was gonna lie." Ex. 41B at 3.

Cobb also called a friend and asked the friend to contact his "broad." Ex. 34B at 3.[7] Three days later, Cobb called the same friend and asked if he had heard back from "the broad." Ex. 35B at 1-2.[8] The friend responded that he had tried to call her, but that her phone was off. Ex. 35B at 2. Cobb complained that he still had not received any "letters" about "what really happened," and that he needed "the clerk and all these people . . . to get a letter." Ex. 35B at 3.

The State played Cobb's jail calls to Bojang, Lucas, his sister, and his friend at trial, and argued that together they represented Cobb's ongoing efforts to tamper with Bojang. 8RP 787. The court did not provide the jury with a unanimity instruction that they had to unanimously agree on a particular alleged act in order to find that Cobb was guilty of witness tampering.

During closing argument, the State argued that Cobb was guilty of three counts of felony violation of a court order based on his contact with Bojang prior to the police arriving (count one), his

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[7] The "BA number" listed on Exhibit 34B is the same one that belonged to Cobb. 7RP 568; Ex 20.

[8] The "BA number" listed on Exhibit 35B is the same one that belonged to Cobb. 7RP 568; Ex 20.

telephone calls to Bojang in her car at the scene (count two), and his calls to Bojang from jail (count three). 8RP 770-71. Regarding the first count, the court instructed the jury as follows:

> (1) That on or about April 29, 2014, there existed a no-contact order applicable to the defendant . . .
>
> . . .
>
> (4) That
>
> (a) the defendant's conduct was an assault or
>
> (b) the defendant's conduct was reckless and created a substantial risk of death or serious physical injury to another person or
>
> (c) the defendant has twice been previously convicted for violating the provisions of a court order; and
>
> . . . If you find from the evidence that . . . any of the alternative elements (4)(a), (4)(b) or (4)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty . . . the jury need not be unanimous as to which of alternatives (4)(a), (4)(b) or (4)(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP 256. The jury found Cobb guilty of count one. CP 172.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON UNANIMITY.

Cobb argues that his witness tampering conviction violated his constitutional right to a unanimous jury verdict. He claims that the trial court should have instructed the jury that it must unanimously agree on the underlying act that constituted the crime

because the State produced evidence of 15 jail calls that could have formed the basis of the charge. Cobb's claim fails because the calls represented a continuing course of conduct with the ultimate purpose of tampering with Bojang.

A criminal defendant has a constitutional right to a unanimous jury verdict on the crime charged. Const. art. I, § 22; U.S. Const. amend. VI; State v. Furseth, 156 Wn. App. 516, 519, 233 P.3d 902 (2010). When the State alleges multiple criminal acts but charges the defendant with only one crime, either the State must elect the specific act that it is relying on to prove the crime, or the court must instruct the jury that it must unanimously agree that the same underlying criminal act has been proven beyond a reasonable doubt. Furseth, 156 Wn. App. at 520. No election or unanimity instruction is required, however, if the evidence shows that several acts constitute a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). The adequacy of jury instructions is reviewed *de novo*. State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014).

To determine whether a continuing course of conduct exists, a reviewing court will "evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts, and

(2) whether the criminal acts involved the same parties, location, and ultimate purpose." State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010). Evidence that a defendant engaged in a series of actions intended to secure the same objective indicates a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

For example, in State v. Brown, this Court concluded that the defendant's repeated efforts during a six-week period to contact the victim, in violation of a court order, constituted a continuing course of conduct. 159 Wn. App. at 13-15. The court noted that while the defendant's criminal acts did not occur at the same time, the time separating the acts was short, and the acts involved the same parties (the defendant and victim), the same locations (the victim's home and phones), and the same ultimate purpose (to contact and confront the victim). Id. at 15.

Here, all of Cobb's witness tampering efforts involved the same target, Bojang, and the same objective, securing her cooperation. Cobb's calls to Bojang, Lucas, his sister, and his friend were all aimed at pressuring Bojang into either falsifying her testimony, or absenting herself from the proceedings. For example, Cobb called Bojang from the jail booking area and implored her to

"hurry the f—k up" and "tell these people something" because he was facing "five years." Ex. 28B at 3, 5. A few hours later, Cobb changed tactics and while repeatedly professing his love for Bojang, insisted that together they needed to "think about" what they were "gonna do and say," and that Bojang needed to "be sending in stuff" and "exaggerate" if needed. Ex. 30B at 3, 6, 8.

Cobb sought Lucas's, his sister's, and his friend's help in convincing Bojang to send "letters" to the "clerk," "Superior Court," and "judge," maintaining that "it didn't happen, that she exaggerated because she was mad and everything." Ex. 32B at 10; see also Ex. 27B at 5 (lobbying Lucas to "Call her up, send her a text, or whatever and let her know what's going on. . . . [T]hat 'I wasn't nowhere, I didn't go nowhere' or whatever 'she came over' . . . and she needs to tell these people what she needs to tell 'em."); Ex. 34B at 3 (soliciting friend's help in calling his "broad"); Ex. 35B at 3 (telling friend that he told the "broad" "what to do and everything," but that he still had not received any "letters," and that he "needed the clerk and all these people . . . to get a letter"); Ex. 36B at 1 (stressing to Lucas the importance of having "that chick . . . write something" and getting "it notarized").

Alternatively, Cobb sought to compel Bojang's absence. Cobb suggested financing a trip for Bojang to Hawaii, and asked his sister to help him coordinate the timing of those efforts. Ex. 32B at 8-9 ("find out, when the Hawaii thing's going on because I'll get the money for that . . . we'll make sure that, we'll get that going"), 13 ("but listen about that Hawaii thing, if she's gonna get there then we'll make sure that, um, you know we, we make that happen"). Cobb even suggested straight out bribery. Ex. 32B at 13 ("somebody need to stay in her ear . . . and sometimes they be offering money and all that").

Further, Cobb insisted that his sister instruct Bojang to "[r]efrain from everything" because "if there is no . . . interview . . . then this case gets dropped." Ex. 32B at 9, 17 ("make sure that, um, you know about the, the little interviews and stuff and everything, if that happens then there's no way that this stuff can get dropped . . . She can't go to none of the interviews and stuff like that").

Although Cobb's calls spanned a little over three months and involved different intermediaries, they shared the same goal of tampering with Bojang. Indeed, the breadth and diversity of Cobb's

efforts convinced the judge to impose an exceptional sentence on the witness tampering conviction:

> . . . [Y]ou just kept doing stuff that got you in deeper: Calling Ms. Bojang from the jail. Calling everybody you could to go out and convince her not to meet with your lawyer because maybe then the charges would go away; convince her not to come to court. Gee, maybe even help pay for a trip to Hawaii . . . [I]f I sentence you to a DOSA, or even if I just sentence you to a standard range sentence, there is no penalty for any of that stuff.

9RP 878.

Cobb appears to argue that the Legislature's decision to amend the witness tampering statute to provide that "each instance or an attempt to tamper with a witness constitutes a separate offense," somehow requires the conclusion that "witness tampering is not a 'continuing offense.'" Appellant's Opening Br. at 10. Cobb's claim should be rejected. Although the Legislature amended the statute "to clarify" the unit of prosecution in response to State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010), neither the case, nor the amendment, compels the conclusion that Cobb proposes. Laws of 2011, ch. 165, § 1.

In Hall, the Washington Supreme Court held that the plain language of the witness tampering statute indicated that the Legislature "intended to criminalize inducing *'a' witness* not to

testify or to testify falsely." 168 Wn.2d at 737 (emphasis added). Consequently, the court concluded that the defendant's numerous telephone calls to his girlfriend constituted one unit of prosecution. Id.

The court did not address the precise issue presented here, specifically whether a number of telephone calls to four people over a limited time period, all aimed at influencing one person's testimony, constitute a continuing course of conduct. Based on the court's decision in Hall, the Legislature amended the witness tampering statute to clarify that the unit of prosecution for witness tampering is each instance that a defendant attempts to tamper with a witness. Laws of 2011, ch. 165, § 1, 3.

Here, the substance and intent behind Cobb's phone calls make sense only when considered as a whole. Cobb correctly argues that each phone call does not establish the offense beyond a reasonable doubt. The prosecutor properly argued that the jury should consider the calls as a whole, given Cobb's efforts to accomplish his singular goal of tampering with Bojang, while simultaneously attempting to circumvent detection by "speaking in code," and never referring to Bojang by name. Considering the calls together, in a commonsense manner, compels the conclusion

that Cobb's multiple jail calls reflected a continuing course of conduct aimed at securing Bojang's cooperation by convincing her to either testify falsely, or absent herself from the proceedings.

2. SUFFICIENT EVIDENCE SUPPORTS COBB'S FELONY VIOLATION OF A COURT ORDER CONVICTION.

Cobb argues that his felony violation of a court order conviction on count one should be reversed because the State failed to present sufficient evidence on the alternative means that his conduct was reckless and created a substantial risk of death or serious physical injury to Bojang. Viewing the evidence in the light most favorable to the State, Cobb's claim fails. There was sufficient evidence from which a rational trier of fact could reasonably conclude that Cobb recklessly hit and slapped Bojang in the head, creating a substantial risk of serious physical injury.

A criminal defendant's right to a unanimous jury verdict includes the right to a unanimous jury determination on the means by which the defendant committed the crime. Const. art. I, § 21; State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). Express jury unanimity is not required if there is sufficient evidence to support each of the alternative means of committing the crime. Owens, 180 Wn.2d at 95. If, however, there is insufficient evidence

to support any of the alternative means, then a particularized expression of jury unanimity is required. Id.

A person is guilty of felony violation of a court order if he knowingly violates a no-contact order and the person (1) assaults another, (2) engages in conduct that is reckless and creates a substantial risk of death or serious physical injury to another, or (3) has twice been previously convicted for violating the provisions of a court order. RCW 26.50.110(1), (4), (5). Although the Legislature has not defined the term "serious physical injury," it has defined "physical injury" as "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110(4)(a); see State v. Welker, 37 Wn. App. 628, 638 n.2, 683 P.2d 1110 (1984) (recognizing the lack of definition of "serious physical injury," and suggesting that the "term speaks for itself" and can be determined by common sense).

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201,

829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Here, the "to convict" instructions for felony violation of a court order as charged in count one required the State to prove that Cobb knowingly violated a no-contact order and that he committed an assault, engaged in reckless conduct that created a substantial risk of death or serious physical injury to another, or that he had twice previously been convicted of violating a court order. CP 256. The court instructed the jury that it "need not be unanimous as to which of the alternatives . . . has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." Id.

Cobb challenges solely the sufficiency of the State's evidence that he engaged in reckless conduct that created a substantial risk of death or serious physical injury to Bojang. Cobb's claim fails because there is substantial evidence from which a rational trier of fact could conclude that his conduct toward Bojang was reckless and caused a substantial risk of serious physical injury.

Bojang testified that Cobb repeatedly hit and slapped her with both his fists and open hands. 6RP 456, 516. Cobb hit Bojang's face and side a "couple of times," despite Bojang's efforts to "block his punches." 6RP 456. Cobb engaged in "three cycles" of hitting and slapping Bojang in her car. 6RP 456. Bojang sustained a swollen and cut lip, and a scratch on her left cheek. 6RP 422-23, 502. Bojang complained to Cobb later that day that she had a headache, and a "frickin' sore, swollen" face. Ex. 29B at 2; Ex. 30B at 4.

Given this record, there is substantial evidence from which a rational trier of fact could conclude that Bojang faced a *"substantial risk* of . . . serious physical injury." CP 256 (emphasis added). Cobb repeatedly hit Bojang in the face at close range. 6RP 456.

Cobb twice landed punches on Bojang's face and along her side. 6RP 456.

Using a common sense approach, a rational trier of fact could conclude that such reckless conduct by Cobb created a substantial risk that Bojang might suffer a serious physical injury. For example, a blow to the head could result in a concussion, a loss of consciousness, a fractured orbital socket, vision loss, a broken nose or jaw, a missing tooth, and other serious maladies. See State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999) ("Without question, any reasonable person knows that punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm.").

Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences therefrom, there is sufficient evidence from which a rational trier of fact could find that Cobb engaged in reckless conduct that created a substantial risk of serious physical injury to Bojang. Cobb's claim should be rejected.

3. CONDUCTING PEREMPTORY CHALLENGES IN WRITING DID NOT VIOLATE COBB'S RIGHT TO A PUBLIC TRIAL, OR RIGHT TO BE PRESENT.

Cobb argues that the court's procedure of conducting peremptory challenges in writing violated both his right to a public

trial, and right to be present. Cobb's claims are foreclosed by the Washington Supreme Court's recent, unanimous decision in State v. Love, __ Wn.2d __, 354 P.3d 841, 845-46 (2015), holding that the exercise of peremptory challenges in writing did not violate a defendant's right to a public trial, and that a defendant's absence from a bench conference where for-cause challenges were conducted did not violate a defendant's right to be present.

Article I, section 10 of the Washington Constitution provides, "Justice in all cases shall be administered openly." This provision guarantees the public's right to open, accessible proceedings. State v. Lormor, 172 Wn.2d 85, 91, 257 P.3d 624 (2011). A criminal defendant's right to a public trial is guaranteed by both the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The presumption of openness extends to voir dire. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). Whether the right to a public trial has been violated is a question of law that is reviewed *de novo*. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

In Love, the court concluded that the written exercise of peremptory challenges did not amount to a courtroom closure, reasoning:

> . . . [T]he public had ample opportunity to oversee the selection of Love's jury because no portion of the process was concealed from the public; no juror was questioned in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury . . . written peremptory challenges are consistent with the public trial right so long as they are filed in the public record.

354 P.3d at 845.

The facts of this case mirror those in Love. The court conducted all of voir dire in open court. Supp CP __ (sub. 29C at 7-11). No juror was questioned in chambers. Cobb, along with any other member of the public, could observe the court and counsel question the potential jurors, listen to their answers, and watch as counsel exercised their challenges at the bench and on paper. The court filed the piece of paper used by the parties to indicate their challenges, making public review possible. CP 278-79. Given this record and the court's holding in Love, Cobb's public trial rights claim fails.

Cobb's additional claim that the exercise of written peremptory challenges violated his right to be present also fails under Love. Both the state and federal constitutions guarantee a defendant's right to be present at "critical stages" of a criminal proceeding where the defendant's presence would contribute to the fairness of the procedure. U.S. Const. amend VI, XIV; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); Wash. Const. art. I, §§ 3, 22; State v. Rice, 110 Wn.2d 577, 616-17, 757 P.2d 889 (1988) (applying Stincer). Whether a defendant's constitutional right to be present has been violated is a question of law that is reviewed *de novo*. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

In Love, the court recognized that jury selection is a critical stage of a criminal trial under both the state and federal constitutions. 354 P.3d at 846. Nonetheless, the court held that the defendant's right to be present was not violated when the court heard for-cause challenges at a bench conference in the defendant's absence. Id. The court noted that the defendant was present in the courtroom during all of voir dire, and heard the potential jurors' answers to questions that formed the basis of the challenges. Id.

Further, the court distinguished the facts in Love from those in Irby, where the court held that the defendant's right to be present was violated where a portion of jury selection occurred between the court and counsel over email, without consultation with the jailed defendant. 354 P.3d at 846 (citing Irby, 170 Wn.2d at 884). The court reasoned that unlike the facts in Irby, nothing suggested that the defendant in Love "could not consult with his attorney about which jurors to challenge or meaningfully participate in the process." 354 P.3d at 846.

Similar to the defendant in Love, and unlike the defendant in Irby, Cobb was present for all of voir dire. Supp CP __ (sub. 29C at 7-11). He heard the questions asked of the potential jurors, he heard their answers, and he watched his counsel conduct peremptory challenges at the bench. Id. Cobb does not argue that he did not have the chance to consult with his attorney about which jurors to challenge, or that he was unable to participate in the process.

The only difference separating the cases is that the defendant argued in Love that the exercise of for-cause challenges at a bench conference, rather than written peremptory challenges, violated his right to be present. 354 P.3d at 845-46. This minor difference is immaterial. There is no reason to conclude that a defendant's right to

be present for peremptory challenges would be greater than his right to be present for for-cause challenges.

Cobb's suggestion in a parenthetical citation that another division of this Court has held "the right to be present violated by court's excusal of juror in Miller's absence," should be rejected as an inaccurate overstatement. Appellant's Opening Br. at 33 (citing State v. Miller, 184 Wn. App. 637, 646-47, 338 P.3d 873 (2014), review denied, 182 Wn.2d 1024 (2015)). In Miller, Division Two did not address the merits of the defendant's right to be present claim, but held instead that "even if Miller's right to be present was violated, this violation was harmless error." 184 Wn. App. at 646.

Further, Cobb's other parenthetical citation to a New York case purportedly holding that "exclusion of defendant from sidebar conference where jurors excused by agreement violated right to be present; court refused to speculate that defendant could overhear conversations," is also an overstatement. Appellant's Opening Br. at 33 (citing People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008)). In Williams, the defendant "was not present during the questioning of three potential jurors." 52 A.D.3d at 95. The court questioned three potential jurors individually at sidebar about their right to be impartial with only counsel present. Id. at 95-96. The facts

of Williams are a far cry from those presented here where no juror was questioned at sidebar, and where it is undisputed that Cobb was present for all of the venire's questioning.

This Court should follow the reasoning set forth in Love and hold that Cobb's right to be present was not violated by the exercise of written peremptory challenges where Cobb was present for all of voir dire and able to participate in the process.

4. COBB'S JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO STRIKE THE "DOMESTIC VIOLENCE" FINDING.

Cobb rightly argues that his judgment and sentence should be corrected to reflect that the jury did not find the domestic violence allegation. Both the *blank* special verdict form, and the foreperson's comments that the jury could not reach a "unanimous conclusion," confirm that the jury did not find beyond a reasonable doubt that Cobb and Bojang were members of the same family or household prior to, or at the time, the crimes were committed. CP 167; 9RP 848. Thus, this Court should direct the trial court to strike the domestic violence finding on the judgment and sentence.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Cobb's convictions.

DATED this 16th day of October, 2015.

Respectfully submitted,

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By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the Brief of Respondent, in State v. E.C. Edward Cobb, Cause No. 72515-7, 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.

Dated this 7 day of October, 2015.

Name:
Done in Seattle, Washington