

63163-2

63163-2

NO. 63163-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHANNON JOHNSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. **ISSUES PRESENTED**

1. Whether 911 calls from the victim and her son were admitted in violation of the Confrontation Clause when the statements in question were made to enable the authorities to respond to an ongoing emergency and were therefore not testimonial.

2. Whether the victim's statements regarding her identity were admitted in violation of the Confrontation Clause when they were not offered for the truth of the matter asserted.

3. Whether the trial court correctly ruled that Johnson's prior convictions for domestic violence violation of a no-contact order were admissible because domestic violence no-contact orders can be issued only under a qualifying statute.

4. Whether the charging document contained all of the essential elements of the offenses charged where the information that Johnson claims was erroneously omitted is factual information that should be requested via a bill of particulars, and not an element of the crime.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Shannon Johnson, with two counts of domestic violence felony violation of a court order for having contact with his girlfriend, Tralenea Givens, on September 15, 2008 and on November 7, 2008. CP 1-4, 6-7. These crimes were felonies because Johnson had been convicted of violating a no-contact order on three prior occasions. CP 4, 6-7; Ex. 7, 8, 9.

Johnson's jury trial took place in February 2009 before the Honorable Jeffrey Ramsdell. During the trial, Johnson objected to the admissibility of his prior convictions on grounds that the judgments did not indicate that the no-contact orders violated had been issued under one of the statutes enumerated in RCW 26.50.110(5). RP (2/19/08) 5-9. The trial court made its ruling after the State rested its case, and found the documents sufficient to establish that Johnson had violated a domestic violence no-contact order, which can only be issued under a qualifying statute. RP (2/18/08) 21-32.

At the conclusion of the trial, the jury convicted Johnson of both counts as charged. CP 85-86. The trial court imposed a

standard-range sentence of 45 months on each count, to be served concurrently. CP 87-95. Johnson now appeals. CP 96.

2. SUBSTANTIVE FACTS

Johnson and Tralenea Givens have had an on-and-off relationship marred by domestic violence. As a result of Johnson's 2006 conviction for domestic violence felony violation of a court order, a no-contact order was issued that does not expire until 2011. Ex. 5.

On September 15, 2008, Givens's 15-year-old son, Jelani Givens-Jackson, called 911 to report that Johnson had assaulted Givens while driving Jelani to school, that Givens's hand was bleeding, and that Jelani had been left by the side of the road on Dearborn in Seattle. Johnson had then driven away with Givens still in the car. Because Jelani lived in Burien, he had no idea where he was. Ex. 14.

A short time later, Givens also called 911 to report that she had been left by the side of the road on Dearborn. Givens told the operator that Johnson had assaulted her, that her hand was "bleeding off," and that she had no idea where her son was.

Givens also repeatedly shouted the license plate number of the green Honda that Johnson was driving. Ex. 14.¹

Seattle Police Officer Kyle Squires responded to Jelani's and Givens's 911 calls, and he contacted Givens at 18th and Dearborn. RP (2/18/09) 77-78. When Squires arrived, Givens's hand was covered in blood and she was crying. RP (2/18/08) 79. She was also extremely worried about her son, who still had not been located. RP (2/18/08) 80. Squires convinced Givens to have a medic examine her hand. RP (2/18/08) 80. In addition, Squires confirmed the existence of the no-contact order prohibiting Johnson from contacting Givens. RP 81-82. While Squires was still at the scene, Jelani finally arrived. RP (2/18/08) 83. Johnson could not be located. CP 3.

A few weeks later, on November 7, 2008, Seattle Police Officer Ryan Keith was on patrol in the Central District when he noticed a green Honda CRV parked the wrong way on 19th Avenue, blocking a driveway. He ran a check of the license plate, and it came back as a stolen vehicle. RP (2/18/08) 37-40. Officer

¹ As will be discussed in the first argument section below, neither Jelani nor Givens testified at trial, but their 911 calls were admitted and played for the jury. The trial court ruled that Jelani's call was admissible as a present sense impression under ER 803(a)(1), and that Givens's calls were admissible as excited utterances under ER 803(a)(2).

Keith called for backup, and the officers performed a felony arrest of the two occupants of the Honda. RP (2/18/09) 40. The male in the driver's seat had identification; it was Johnson. RP (2/18/09) 41. The female passenger gave the name "Latenea Givens." RP (2/18/08) 42.

After Johnson and the female were taken to the police station, Officer Keith discovered that a no-contact order prohibited contact between Johnson and "Tralenea Givens." RP (2/18/09) 43. Suspecting that the female passenger was lying about her identity, Keith obtained a booking photo of Tralenea Givens, and immediately recognized that the booking photo depicted the same person that he presently had in custody. RP (2/18/08) 43-44. Johnson continued to insist that his passenger was "Latenea Givens." RP (2/18/09) 45. When confronted with the booking photo, however, the female admitted that she was Tralenea Givens.² RP (2/18/09) 46-47.

² As will be discussed in the second argument section below, the trial court admitted this statement for non-hearsay purposes. RP (2/18/09) 31.

C. **ARGUMENT**

1. **THE 911 CALLS FROM THE VICTIM AND HER SON WERE CALLS FOR HELP, AND THUS, THE STATEMENTS MADE DURING THESE CALLS WERE NOT TESTIMONIAL.**

Johnson first argues that his right to confrontation was violated by the admission of 911 calls from Tralenea Givens and her son, Jelani Givens-Jackson, during the September 15, 2008 incident. Johnson argues that these 911 calls contained testimonial hearsay that should not have been admitted without an opportunity for cross-examination. Johnson further argues that the trial court abused its discretion in ruling that Jelani's call constituted a present sense impression. Appellant's Opening Brief, at 6-21.

These claims should be rejected. The three 911 calls admitted in this case were calls for help, not statements made for the purpose of assisting in a later prosecution. Thus, they were not testimonial. Moreover, the trial court was within its discretion in ruling that Jelani's call, which was made immediately after Johnson threw him out of the car and while Johnson's assault on Tralenea Givens was ongoing, was admissible as a present sense impression. No error occurred, and this Court should affirm.

The Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004),

fundamentally changed the focus of Confrontation Clause analysis. Whereas prior case law had focused on the reliability of out-of-court statements to determine admissibility, Crawford shifted the focus to the question of whether such statements are "testimonial" in nature. Accordingly, under Crawford, a witness's "testimonial" out-of-court statements are not admissible unless the defendant has been given an opportunity to cross-examine that witness. However, Crawford "le[ft] for another day any effort to spell out a comprehensive definition of "testimonial.'" Id. at 68.

Some further guidance was provided by the Court's later decision in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In Davis, the Court ruled that a 911 caller's statements were not testimonial in nature because they were made to assist the police in responding to an emergency, not to assist in a later court proceeding:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Accordingly, non-testimonial statements made during an ongoing emergency fall outside the scope of the Confrontation Clause entirely. Id.

The Washington Supreme Court then applied these principles from Davis in State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007). In further defining the test for determining whether the primary purpose of an interrogation is to meet an ongoing emergency or not, the Ohlson court identified four factors that courts should consider: 1) the timing of the statements; 2) the level of harm threatened; 3) the level of need for the information; and 4) the formality of the questioning. Ohlson, 162 Wn.2d at 15. Based on these factors, the court concluded that statements that the victim had made to the first officer on the scene following a serious assault with racial overtones were not testimonial; thus, they were admissible as excited utterances despite the victim's failure to testify at trial. Id. at 16-19. In so holding, the court found it significant that the assailant was still at large when the statements were made, and therefore, the threat posed was great. Id.

Recently, the Washington Supreme Court again attempted to clarify what constitutes a testimonial statement for purposes of the Confrontation Clause in State v. Koslowski, 166 Wn.2d 409,

209 P.3d 479 (2009). In Koslowksi, the victim of a home-invasion robbery made statements to the police officers who responded to her home in response to her 911 call after the crime. She made some statements initially to the first officer who arrived, and then made more detailed statements several minutes later when a second officer arrived. Koslowski, 166 Wn.2d at 414-15. The victim died prior to trial, so the issue was whether her statements were testimonial such that they were admitted in violation of the Confrontation Clause in the absence of cross-examination.

In considering the issue, the Koslowski court expanded on the factors from Davis, as utilized in Ohlson, that courts should consider in distinguishing testimonial statements from statements made for the purpose of enabling a response to an ongoing emergency:

(1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past event? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were

necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate that the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (footnote and citation omitted). In other words, the timing of the statements, the nature of the questions and answers, the formality of the questioning (or lack thereof), and whether an objective listener would interpret the statements as requests for immediate assistance are all relevant in determining whether statements are testimonial under Crawford and Davis.

In Koslowski, the court ultimately determined that the victim's statements were testimonial, because they were made when the danger had passed and there was no longer an ongoing emergency or need for immediate assistance. Koslowski, 166 Wn.2d at 421-22. But in contrast, based on the same standards as set forth above, the statements at issue in this case are not testimonial.

Jelani Givens-Jackson called 911 immediately after Johnson

left him by the side of the road and drove away with Tralenea Givens. Jelani called to report that his mother had been assaulted and her hand was bleeding. In addition, to state the obvious, he was also calling because he was a minor who had been left behind in a neighborhood that was totally unfamiliar to him. Ex. 14. The purpose of Jelani's call was not to offer information about past events in order to assist in a future prosecution. Indeed, given that Jelani was not even sure of his location, the type of car Johnson was driving, and many other salient details, Jelani's call was not terribly helpful in any event. However, when viewed objectively, the record shows that the purpose of his call was to try to obtain help for his mother, who was still in the car with her assailant and bleeding, and also to obtain help for himself.

Tralenea Givens's 911 calls were also calls for help. Givens called to report that Johnson had just left her by the side of the road, that she had just been assaulted, that her hand was bleeding, and that she had no idea where her 15-year-old son was. She repeatedly provided the license plate number of the car Johnson was driving, often in a totally nonresponsive manner as far as the 911 operator's questions were concerned. She also provided pertinent information about Johnson himself, not for the purpose of

assisting in a future prosecution, but for the purpose of enabling the police to assist her with her ongoing emergency, which included the fact that her son was missing. Ex. 14.

The four factors as set forth in Koslowski demonstrate that these calls were not admitted in violation of the Confrontation Clause. First, as to the timing of the statements, both Jelani Givens-Jackson and Tralenea Givens called 911 at the earliest possible opportunity, i.e., immediately after Johnson left each of them by the side of the road. Second, a reasonable listener would understand that these calls were made for the purpose of obtaining immediate police assistance. Third, the nature of the questions asked and the answers given demonstrate that the purpose of each call was to provide basic information to enable an appropriate police response. And fourth, there was no formality to the questioning whatsoever. Moreover, far from being in a tranquil setting and out of danger, both Jelani and Givens had been dumped by the side of the road, and Givens was clearly frantic when she spoke to the operator.

Accordingly, the statements made during these calls are not testimonial, and they fall outside the scope of Crawford's Confrontation Clause analysis. Moreover, because a proper

foundation was laid for their admissibility under the hearsay rules, the trial court did not abuse its discretion in admitting these statements as present sense impressions and as excited utterances under ER 803(a)(1) and (2).

Nonetheless, Johnson argues that the trial court abused its discretion in admitting Jelani's call as a present sense impression, mainly because Jelani's call was re-initiated by 911 after Jelani was initially disconnected. Appellant's Opening Brief, at 17-19. This claim should be rejected.

Evidentiary rulings are addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, *or immediately thereafter.*" ER 803(a)(1) (emphasis supplied). This exception is interpreted "in a

sufficiently restrictive manner" such that it does not apply where there are insufficient guarantees of trustworthiness. State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), *overruled on other grounds*, 107 Wn.2d 97, 727 P.2d 239 (1986). The trustworthiness of a present sense impression "is based upon the assumption that its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant." Id. Accordingly, "[t]he time limit [for present sense impressions] is considerably shorter than the time limit associated with the exception for excited utterances." 5A K. Tegland, Wash. Prac., Evidence § 803.4, at 417 (4th ed., 1999).

As noted above, Jelani Givens-Jackson called for police assistance as soon as he was left by the side of the road and Johnson drove away with his mother. Therefore, he called to report a crime immediately after it had occurred. Moreover, his own predicament -- being left behind in an unfamiliar area -- was still occurring. Accordingly, the trial court did not abuse its discretion in ruling that Jelani's 911 call was admissible as a present sense impression. Moreover, the fact that 911 had to re-establish contact with Jelani is of no moment, as the timing of the call was still

sufficiently immediate for purposes of ER 803(a)(1). This Court should reject Johnson's arguments, and affirm.

2. THE VICTIM'S STATEMENTS REGARDING HER IDENTITY WERE NOT OFFERED FOR THEIR TRUTH, AND THEIR ADMISSION IS HARMLESS.

In a related claim, Johnson argues that Tralenea Givens's statements to Officer Keith regarding her identity during the November 7, 2008 incident are also testimonial statements that were admitted in violation of the Confrontation Clause. Appellant's Opening Brief, at 14-17. This claim should also be rejected, but for different reasons. Statements that are not offered for the truth of the matters asserted do not violate the Confrontation Clause, even if they are testimonial. Moreover, any possible error in admitting these statements is harmless. Accordingly, this Court should affirm.

As discussed above, under Crawford, the Confrontation Clause requires that testimonial hearsay statements made by an absent declarant should not be admitted at trial unless the defendant had a prior opportunity for cross examination. Crawford, 541 U.S. at 53-54. "Testimony" in this context means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 51 (citation omitted).

Therefore, because the very definition of "testimony" for confrontation purposes is a "solemn declaration or affirmation *made for the purpose of establishing or proving some fact*,"³ the Confrontation Clause is not implicated by any statements offered for non-hearsay purposes. As the United States Supreme Court observed, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)).

In this case, the trial court ruled that that Tralenea Givens's conflicting statements to Officer Keith regarding her identity were admissible for non-hearsay purposes. First, Tralenea Givens's original assertion that she was Latenea Givens was clearly not offered for the truth. Indeed, the State's theory of the case was that this statement of identification was a lie, and that Officer Keith resorted to obtaining a booking photo of Tralenea Givens in order to ascertain her true identity. RP (2/18/09) 29. Second, Tralenea Givens's admission of her true identity after being confronted with

³ Crawford, 541 U.S. at 51 (emphasis supplied).

the booking photo was also admitted by the trial court for non-hearsay purposes, i.e., "to show that she lied about the first identification that she gave." RP (2/18/09) 31. Because both of these statements were admitted for non-hearsay purposes, the question of whether they are testimonial or not is irrelevant, and Johnson's claim should be rejected.

But if this Court were to conclude that Tralenea Givens's statement of identity when confronted with her booking photo was testimonial hearsay, Johnson's conviction on count II should still be affirmed because any possible error is harmless.

Even if statements are admitted in violation of the Confrontation Clause, a conviction should be affirmed if the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Smith, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002). An error is harmless beyond a reasonable doubt if there is no "reasonable probability that the outcome of the trial would have been different had the error not occurred." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

In this case, aside from Tralenea Givens's belated admission of her identity, Officer Keith testified that he had no doubt

whatsoever that the female he had arrested was Tralenea Givens, not Latenea Givens, based on the booking photo. RP (2/18/09) 46. Both the booking photo and Tralenea Givens's Washington State identification card were admitted as evidence, so that the jury could accurately deduce her identity for themselves. RP (2/18/09) 44, 79; Ex. 2, 6. Moreover, the stolen vehicle that Johnson and Givens were arrested in on November 7, 2008 is the same vehicle Johnson was driving when he assaulted Givens on September 15, 2008. RP (2/18/09) 38-40; Ex. 14. In sum, there is no reasonable probability that the verdict would have been different if Officer Keith's testimony had not been admitted. Therefore, this Court should affirm.

3. THE TRIAL COURT PROPERLY ADMITTED PROOF OF JOHNSON'S THREE PRIOR CONVICTIONS, AND HIS CLAIM OF INSUFFICIENT EVIDENCE IS IMPROPERLY FRAMED.

Johnson next claims that his convictions are supported by insufficient evidence. More specifically, he argues that the State failed to prove that the no-contact orders he violated for purposes of two of his three prior convictions were issued under the authority

of a particular, enumerated statute.⁴ Thus, he argues that his case should be remanded for sentencing on two counts of misdemeanor violation of a court order because there was insufficient proof of the prior convictions that elevates these offenses to felonies.

Appellant's Opening Brief, at 21-27. This claim should be rejected because, as the trial court found as a matter of law, Johnson's prior convictions were admissible in this case. Moreover, Johnson's argument is improperly framed as a sufficiency claim, because the admissibility of the prior convictions is a legal question, not a question of fact for the jury. The jury in this case has already found beyond a reasonable doubt that Johnson's prior convictions exist, which is all that is required to sustain the conviction. Accordingly, this Court should affirm.

Under RCW 26.50.110(5), the violation of a court order is a class C felony if the defendant has at least two prior convictions for violating the provisions of a court order issued under RCW 7.90 10.99, 26.09, 26.10, 26.26., 26.50, or 74.34, or "a valid foreign

⁴ Johnson agrees that State's Exhibit 8, the judgment and sentence for his prior conviction for felony violation of a court order from 2006 in King County Superior Court, contains sufficient information to qualify as proof of the current felony charges. Appellant's Opening Brief, at 24; Ex. 8.

protection order as defined in RCW 26.52.020[.]” In State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005), the court adopted this Court's reasoning in State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003), and held that the *existence* of the defendant's prior convictions under RCW 26.50.110(5) was a question of fact for the jury, but that the question of whether a prior conviction was based on the violation of an order issued under an enumerated statute was a question of law for the trial court. Miller, 156 Wn.2d at 830-31 (citing Carmen, 118 Wn. App. at 665).

Subsequently, this Court reiterated that the admissibility of the prior convictions on statutory grounds is a threshold determination that the trial court makes in its "gate-keeping capacity." State v. Gray, 134 Wn. App. 547, 556, 138 P.3d 1123 (2006). This Court further noted that the trial court's determination should be made before admitting the prior convictions, although the failure to do so is not fatal to the defendant's conviction. Gray, 134 Wn. App. at 555 n.19. Moreover, because the admissibility of the prior convictions is a question of law, this Court reviews the trial court's determination de novo. Id. at 558. It is therefore appropriate to go outside the State's evidence to determine admissibility. Id.

Johnson contends that the State did not establish that his two prior misdemeanor convictions for violating a court order qualified as predicate convictions under RCW 26.50.110(5). Under Miller, Carmen, and Gray, this claim clearly does not raise a question of evidentiary sufficiency. Indeed, where evidentiary sufficiency is concerned, there is no dispute whatsoever that Johnson's prior convictions *exist*, which is all that the jury must find in order to sustain a conviction. Rather, Johnson's claim involves a question of law that was properly resolved by the trial court in this case, because the record and the applicable statutes support the trial court's determination that Johnson's prior misdemeanor convictions were necessarily valid predicate convictions under RCW 26.50.110(5).

Gray is directly on point in this regard. As this Court observed in Gray,

RCW 26.50.110(1) provides that a violation of an NCO is a criminal offense "[w]hen an order is granted under this chapter [26.50], chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020." The plain language of the statute demonstrates that a violation of an NCO that is a criminal offense under 26.50 RCW necessarily means that the NCO was issued under the authority of one of the listed state statutes, even if the NCO itself lists only the local statutory authority.

Gray, 134 Wn. App. at 559 (alterations in original) (footnote omitted). In other words, violation of a no-contact order is a crime only if the order that is violated has been properly issued under an enumerated statute.

In this case, as the trial court found, it is plain from the face of the prior judgments that both the 2008 conviction from Seattle Municipal Court and the 2005 conviction from Renton Municipal Court were convictions for domestic violence violation of a no-contact order. Ex. 7, 9. More specifically, the Seattle Municipal Court judgment is a conviction for "DV-VNCO" (Ex. 9), and the Renton Municipal Court judgment is a conviction for "DV - No Contact Order Violatio" (sic) (Ex. 7). As the trial court observed, "[n]o-contact orders by definition have to arise from criminal charges." Thus, after ruling on the felony judgment that Johnson does not challenge on appeal, the trial court ruled as follows with respect to Johnson's two prior gross misdemeanor convictions:

When it comes to the municipal court one, which is Exhibit 9, that clearly states on its face that it's a domestic violence violation of a no-contact order. Again, the mere fact that it references a domestic violence no-contact order in effect tells us that it was under a qualifying statute.

To the extent that they could have done a better job of spelling it out, I think I agree with you, counsel. I don't think that that means it's not a qualifying Judgment and Sentence. Furthermore, to the extent that it only says NCO instead of no-contact order, page two checks the box and says "no contact with" and then crosses it out because that was part of the redaction process. So, even if there was some confusion as to what an NCO means, the second page kind of fills in the blank for you and tells you there's a no-contact order that went along with this. I think that makes it pretty simple.

The weakest of the three, if you want to put it that way, is the Renton Municipal Court one where it's basically check the boxes and so forth. But I think it's pretty self-evident that G -- when it says plea and it says there's a box for NG, a box for G and a slash for Alford, the only thing that can mean is guilty plea. Up at the top of the document, it says DV no-contact order violation. Again, I can't really see a basis for finding that it's not a qualified offense.

RP (2/19/09) 30-31.

This ruling is correct. As noted by this Court in Gray, domestic violence no-contact orders must be issued under the authority of Chapter 10.99 RCW, even if issued directly under the auspices of the Seattle Municipal Code. Gray, 134 Wn. App. at 559 (citing SMC 12A.06.130). Moreover, the Renton Municipal Code has specifically adopted RCW 26.50.110 and the relevant provisions of Chapter 10.99 RCW that apply to the issuance of domestic violence no-contact orders. RMC Title VI, Ch. 10,

§ 6-10-1. Accordingly, the trial court properly ruled that State's Exhibits 7 and 9 admissible, as each misdemeanor judgment clearly stated that Johnson was convicted of violating a domestic violence no-contact order, which by definition had to be issued under a qualifying statute. Thus, the trial court properly performed its gate-keeping function in admitting these documents for the jury's consideration, and no error occurred.

Nonetheless, Johnson argues that the lack of a specific statutory citation on the face of the misdemeanor judgments constitutes a failure of proof. Appellant's Opening Brief, at 25-26. This argument should be rejected. First, as previously noted, this issue is not properly framed as a failure of proof, but as a legal question of admissibility for the trial court. Second, as the trial court ruled, there is no way to issue a domestic violence no-contact order outside the auspices of a qualifying statute in the context of a criminal case, as the relevant municipal code provisions demonstrate. Therefore, the nature of the prior crimes themselves establishes the admissibility of these convictions. The trial court's ruling should be affirmed.

Moreover, even if this Court were to find Johnson's Renton Municipal Court conviction inadmissible, reversal of Johnson's

current felony conviction is not required. Rather, Johnson's felony conviction should still be affirmed based on the prior felony conviction that Johnson does not challenge on appeal, and based on the Seattle Municipal Court conviction, which is necessarily valid under Gray. Finally, even if this Court were to find that the record is insufficient to establish admissibility as to both misdemeanor convictions, this Court should remand for the trial court to consider additional information. Because the jury found the existence of the prior convictions as a matter of fact, such a procedure would not violate Johnson's right to have the State prove the elements of the crime beyond a reasonable doubt, and this Court has stated that a post-trial determination is sufficient to cure an "evidentiary gap" on this question of law. Carmen, 118 Wn. App. at 668.

4. THE CHARGING DOCUMENT CONTAINS THE ESSENTIAL ELEMENTS OF THE CRIMES CHARGED.

Lastly, Johnson claims that the charging document was insufficient because it omitted an essential element of felony violation of a court order. Specifically, Johnson argues that the charging document must contain specific, identifying information regarding the two or more prior convictions that elevate a court order violation to a felony under RCW 26.50.110(5). Appellant's

Opening Brief, at 28-33. This claim should be rejected. The specific information that Johnson claims should have been in the charging document does not constitute an essential element of the offense. Rather, it is the kind of particularized factual information that should be requested in a bill of particulars. Accordingly, this Court should affirm.

It is well-settled that "[a]ll essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). In this context, "[a]n 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

When, as here, a charging document is challenged for the first time on appeal, the reviewing court liberally construes the document in favor of its validity. Kjorsvik, 117 Wn.2d at 102. Under the liberal construction standard, the information is valid if it reasonably apprises the defendant of all the elements of the crime. Ward, 148 Wn.2d at 813. However, even if a charging document is

sufficient when liberally construed, the defendant may still prevail if actual prejudice is shown. Kjorsvik, 117 Wn.2d at 106. The remedy for an insufficient charging document is dismissal without prejudice to the State's ability to refile charges. State v. Vangerpen, 125 Wn.2d 797, 805, 888 P.2d 1185 (1995).

The starting point for this analysis is the language of the statute that defines the substantive crime. Generally, "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." State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). Furthermore, the essential elements of the crime must be distinguished from other factual information that need not be set forth in the charging document. Thus, "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," but is not constitutionally insufficient. Leach, 113 Wn.2d at 687. A defendant who did not request a bill of particulars at trial may not challenge a charging document on grounds of vagueness on appeal. Id.

The distinction between the essential elements of a crime and other factual information that must be requested via a bill of

particulars is best illustrated by the use of examples. For instance, in State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005), Division Two of this Court found an information sufficient to charge the crime of assault in the second degree when it stated that "the Defendant did assault another with a deadly weapon" in Clallam County on a particular date. Winings, 126 Wn. App. at 81. The information was sufficient because it mirrored the language of the applicable statute, and it gave fair notice of the conduct forming the basis of the charge. Id. at 85-86. Accordingly, the court held that any further information, such as the identity of the person who was assaulted and the deadly weapon that was used, was factual information that the defendant should have requested in a bill of particulars. Id.

In a more analogous case, this Court concluded that the classification of the underlying crime is not an essential element of bail jumping. In State v. Gonzalez-Lopez, 132 Wn. App. 622, 132 P.3d 1128 (2006), this Court held "that the express essential elements of the crime of bail jumping stated in section (1) of the statute do not include the penalty classes of bail jumping as essential elements of the crime" based on the plain language of the statute. Id. at 629. Moreover, although this Court further held that

the underlying crime must be identified in the charging document because it provides notice of the penalty the defendant will face, the classification of the underlying crime need not be specified because the penalty section of the statute does not contain the essential elements of the crime. Id. at 636.

In so holding, this Court rejected Division Two's reasoning in State v. Ibsen, 98 Wn. App. 214, 989 P.2d 1184 (1999), which held that the penalty provisions of the bail jumping statute contains essential elements of the crime. Gonzalez-Lopez, 132 Wn. App. at 634. Notably, the Washington Supreme Court also subsequently rejected the Ibsen court's analysis in favor of this Court's analysis in Gonzalez-Lopez. See State v. Williams, 162 Wn.2d 177, 184, 170 P.3d 30 (2007) (holding that this Court's analysis is correct because "the actual elements of [bail jumping] are clearly set forth in the first section, without reference to the penalty section").

The statute proscribing court order violations as charged in this case is structured similarly to the bail jumping statute at issue in Gonzalez-Lopez and Williams in that the statutory elements of the substantive crime are set forth in one section, and additional penalty provisions are set forth in other sections. The first section of the statute sets forth the express elements of the substantive

crime, i.e., willfully violating the terms of a court order with knowledge that the order exists. RCW 26.50.110(1)(a). Additional penalty provisions that elevate the substantive crime from a gross misdemeanor to a class C felony are set forth separately. RCW 26.50.110(4) and (5). Accordingly, under the reasoning of Gonzalez-Lopez and Williams, although it is necessary to include language in the charging document sufficient to notify the defendant that he faces a felony rather than a misdemeanor and upon what grounds, these additional penalty provisions do not constitute essential elements of the crime of violation of a court order.

The charging document in this case specifically alleged that Johnson had committed a felony because he had "at least two prior convictions for violating the provisions of an order issued" under one of the enumerated statutes when he committed the current offenses. CP 6-7. This language mirrors the language of the applicable penalty provision, and is sufficient to provide notice of the additional penalties Johnson faced as a result of his three prior convictions. RCW 26.50.110(5). Therefore, the charging document is sufficient because it contains the essential elements of the crime, and provides notice of grounds for additional penalties

based on criminal history. Any further factual information about that criminal history should have been requested in a bill of particulars,⁵ and thus, Johnson's claim fails.

Nonetheless, Johnson argues that the information was deficient for failure to contain specific identifying information regarding the prior convictions. In support of this proposition, Johnson relies primarily on this Court's decision in City of Seattle v. Termain, 124 Wn. App. 798, 102 P.2d 183 (2004). Johnson's reliance is misplaced.

In Termain, the issue was whether a charging document sufficiently apprised the defendant of the essential elements of the substantive crime of violating a court order. The charging document in question did not contain any facts identifying the order that was violated, the court that had issued the order, the person who was protected by the order, or what acts the defendant had committed in violation of the order. Rather, the criminal complaint simply recited every possible statutory alternative that could

⁵ A bill of particulars was most likely not requested because the bail summary filed with the original information listed Johnson's three prior convictions, and because the record demonstrates that Johnson was provided with copies of the prior judgments. CP 4; RP (2/12/09) 5, 25-27, 32.

potentially constitute the crime, and contained no facts whatsoever.

Termain, 124 Wn. App. at 800-01.

In holding that the complaint was insufficient, this Court observed that "the culpable act necessary to establish the violation of a no-contact order is determined by the scope of the predicate order." Id. at 804. Therefore, in order to provide sufficient notice of the acts constituting the substantive crime, this Court correctly concluded that a charging document must contain facts sufficient to describe those particular acts in some manner. Id. at 805-06.

Unlike Termain, the charging document in this case described with particularity what Johnson had done to commit the substantive crimes with which he was charged. The information alleged that on two particular dates, Johnson had violated the terms of an order issued in December 2006 by the King County Superior Court for the protection of Tralenea Givens. CP 6-7. The information further alleged that when Johnson committed these substantive crimes, he had at least two prior convictions for violating a court order. CP 6-7. Therefore, the information is sufficient under Termain because the substantive crimes are described with sufficient particularity, and the applicable penalty

provision provides sufficient notice under Gonzalez-Lopez and Williams. Again, Johnson's claim fails.

Furthermore, as discussed at length in the previous argument section, in order to obtain a conviction for felony violation of a court order, the State need prove only that at least two prior convictions exist at the time of the commission of the substantive crime. The State is not required to prove any facts underlying those prior convictions. RCW 26.50.110(5). The existence of at least two prior convictions is precisely what was alleged in the charging document in this case. CP 6-7. Therefore, to the extent that the penalty provision is the equivalent of an essential element because it must be found by the jury, the charging document in this case passes constitutional muster because it mirrors precisely what the jury must find, i.e., the existence of at least two priors. CP 81.

Finally, Johnson argues that he was prejudiced by the claimed deficiencies in the charging document because the trial court did not grant his motion to dismiss due to claimed deficiencies in the prior judgments introduced by the State, and because the trial court would not let him argue these issues to the jury. Appellant's Opening Brief, at 32-33. This argument is specious. Indeed, the record is clear that Johnson made a strategic decision

to wait to challenge the evidence of his prior convictions until the last possible moment, hoping that the State would be unable to cure any potential defects. RP (2/19/08) 5-6, 21-32. If Johnson had any legitimate issues with respect to his prior convictions, he could have requested a bill of particulars and addressed the issue before trial. This Court should reject Johnson's attempt to characterize a deliberate trial strategy as prejudice due to an alleged charging defect.

In sum, there is no constitutional requirement that information specifically identifying a defendant's prior convictions must be contained in a charging document for felony violation of a court order because such information does not constitute an essential element of the crime. Instead, this is quintessentially the type of factual information that should be requested in a bill of particulars. This Court should reject Johnson's claims to the contrary, and affirm.

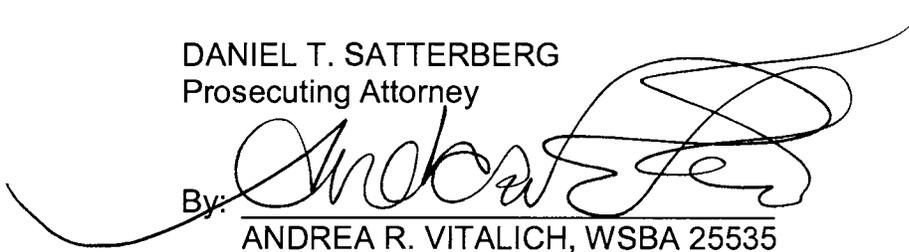
D. CONCLUSION

The trial court properly admitted the 911 calls from the victim and her son because the statements contained therein were not testimonial and because the statements fit within applicable exceptions to the hearsay rule. The trial court also properly admitted Johnson's prior misdemeanor convictions for violation of a court order. The charging document contained all the essential elements of the crimes charged, and Johnson could have requested a bill of particulars if he required further factual information. For all of the reasons stated above, this Court should affirm Johnson's convictions for two counts of domestic violence felony violation of a court order.

DATED this 9th day of November, 2009.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

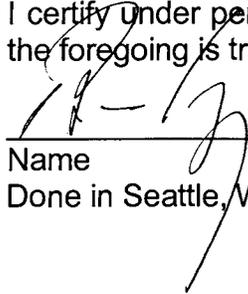
By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SHANNON JOHNSON, Cause No. 63163-2-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

Done in Seattle, Washington



Date