

70147-9

70147-9

NO. 70147-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARK CURTIS HUDSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. When a prior conviction for dishonesty, used to impeach a defendant's credibility, is subsequently reversed for insufficient evidence, a new trial is appropriate unless it is clear beyond a reasonable doubt that any reasonable jury would have reached the same result had the prior conviction not been admitted. The fact that Hudson was previously convicted of witness tampering was admitted to impeach his credibility pursuant to ER 609. However, the conduct underlying the prior conviction was independently admitted under ER 404(b), and the jury convicted Hudson only of the charges supported by independent, third-party witness testimony and video documentation of the crimes. Was the introduction of Hudson's witness tampering conviction harmless beyond a reasonable doubt?

2. RCW 26.50.110 criminalizes the violation of no-contact order provisions prohibiting acts or threats of violence, stalking, or contact; provisions excluding a person from a residence, workplace, school, or day care; and provisions prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location. The no-contact order here prohibited Hudson, among other things, from "keeping the protected person under surveillance," and from coming within 1,000 feet of the protected party's "person." Surveillance

means a “close watch kept over one or more persons,” or “continuous observation of a person or area.” A “location” is “a position or site occupied or available for occupancy.” The jury was instructed that one of the elements it must find in order to convict Hudson of violation of a court order is that he “violated a provision of [the existing court] order.” Was the jury properly instructed that any violation of the no-contact order in this case could constitute a criminal act?

3. Even if the jury was improperly instructed as to the elements of violation of a court order, reversal is unwarranted when the jury, as instructed, necessarily found facts that establish guilt beyond a reasonable doubt on every essential element. Here, the evidence supporting the two court order violations was such that the jury could not have determined that Hudson “kept the protected party under surveillance,” or came within 1,000 feet of her “person,” without also finding that he came within 1,000 feet of her workplace or residence. Was any error in the to-convict instructions harmless?

4. When there is evidence of multiple acts, any one of which could form the basis of the charged count, either the State must tell the jury which act to rely on in its deliberations, or the court must instruct the jury to unanimously agree on a specific criminal act. The prosecutor specifically told the jury during closing argument that the violation of a

court order charged in count five was premised on Hudson's act of going to the protected person's workplace. Was it proper for the court to not provide a unanimity instruction to the jury?

5. Residential burglary requires proof of unlawful entry or unlawful remaining in a dwelling with the intent to commit a crime against a person or property therein. Violation of a no-contact order is a crime against a person regardless of the manner in which it is committed. Residential burglary requires only the intent to commit a crime, not the actual commission of a crime. Can a no-contact order violation serve as the predicate crime against a person or property therein if the protected party is not physically present inside the residence at the time of the offense?

6. Evidence is sufficient to support a conviction if, taken in the light most favorable to the State, any rational jury could have found the elements of the offense beyond a reasonable doubt. Residential burglary requires the unlawful entry or remaining in a dwelling with the intent to commit a crime against a person or property therein. Violation of a no-contact order is a continuing offense. As long as the defendant remains in a prohibited zone, he continues to violate the no-contact order. There was a no-contact order prohibiting Hudson from coming within 1,000 feet of his wife's residence. When Hudson entered her home,

stayed for over two hours, took property belonging to her without permission, was arrested immediately after leaving the residence, and told the police that he had only gone to the residence to retrieve some tools but no tools were with him, could a rational jury have inferred that Hudson intended to commit a crime against a person or property inside the residence?

7. Before admitting a defendant's statements to prove he committed a crime, the corpus delicti rule requires independent, corroborating evidence of the crime. Statements made before or during the commission of a crime are not subject to the corpus delicti rule. Additionally, the failure to comply with the corpus delicti rule is a non-constitutional error, and to preserve the issue for appeal, a proper objection in the trial court is required.

Hudson told his wife, over the telephone, that their young child was in the car with him; the statement was made during the same general time frame that the eluding occurred. Hudson did not object to the admission of his statement on corpus delicti or other grounds. Has he failed to preserve this claim for appeal? Has he failed to establish that the corpus delicti rule applies to his statement?

The independent evidence necessary to establish corpus delicti may be either direct or circumstantial, and need not rise to the level of a

preponderance of the evidence. The truth of the State's evidence is assumed and all reasonable inferences are drawn from it. Immediately prior to the eluding, Officer Jones saw Hudson's car in his driveway, knocked on Hudson's door, spoke with Hudson, saw a young child standing behind Hudson, and observed no one else home. Officer Jones left, but returned just minutes later. The car was gone and no one answered the door or appeared to be home. Officer Jones then observed Hudson driving the car nearby and the eluding occurred. Was Hudson's statement that his child was with him in the car corroborated by sufficient independent evidence of the corpus delicti for the endangerment enhancement on the eluding charge?

8. To establish ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. When Hudson failed to show error, or when any error was harmless, has he failed to establish ineffective assistance of counsel for failing to object to the court's instructions as to the residential burglary and violation of a court order charges?

To establish a claim of ineffective assistance based on the failure to request an instruction, a defendant must show that he was entitled to the instruction, that his counsel was deficient for failing to request it, and that the failure to request it caused prejudice. There was no evidence in the

record that the property Hudson took from his wife's residence was community property. Has Hudson established ineffective assistance of counsel based on the failure to request instructions regarding community property and theft on the residential burglary charge?

**B. STATEMENT OF THE CASE**

1. SUBSTANTIVE FACTS.

a. Background.

Appellant Mark Hudson and Rebecca Hudson (maiden name Brooks) have been married for over thirteen years. 7RP 41, 43.<sup>1</sup> Rebecca<sup>2</sup> works at Highline Medical Center. 7RP 41. They have three children together. 7RP 45. Their relationship turned rocky when Hudson became unemployed. 7RP 46-47. Hudson was controlling of the couple's finances. Id. He paid the bills and Rebecca received an "allowance." 7RP 46.

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<sup>1</sup> The Verbatim Report of Proceedings consists of 13 volumes. They are referred to in this brief as follows: 1RP (entitled "Volume #1 of 2" - T. Marshman); 2RP ("Volume #2 of 2" - T. Marshman); 3RP (Volume #2A of 2" - T. Marshman); 4RP (1/3/13 Jury Selection); 5RP (1/3/13 Opening Statements); 6RP (1/3/13 Oral Instructions and Testimony); 7RP (1/7/13); 8RP (1/8/13); 9RP (1/9/13); 10RP (1/10/13); 11RP (1/14/13 Closing Arguments); 12RP (1/14/13 Jury Questions); and 13RP (1/15/13). There are also two duplicative volumes, one entitled "Volume #1 of 1" by T. Marshman, and one that includes a portion of the proceedings from 1/7/13. The entirety of these two volumes is contained in 2RP and 7RP, respectively.

<sup>2</sup> Because Ms. Hudson shares the same last name with Appellant, she will be referred to in this brief as Rebecca. No disrespect is intended.

In September of 2010, Hudson and Rebecca argued over money, and Hudson became angry and began “tearing up the house,” damaging their property. 7RP 48-49. Hudson was ultimately charged with assaulting Rebecca with a knife. 7RP 52. At Hudson’s urging, Rebecca did not appear in court, and the case was dismissed. 7RP 54. Also during September of 2010, Hudson became upset when one of Rebecca’s friends called the house; Hudson accused Rebecca of having an affair. 7RP 65. Rebecca sought and received a protection order. CP 154-64; 7RP 52, 66.

In April of 2012, Hudson went to trial on charges of Tampering with a Witness Domestic Violence, Domestic Violence Misdemeanor Violation of a No-Contact Order, and Assault in the Second Degree Domestic Violence, all involving Rebecca. CP 5; 9RP 91-93. The second-degree assault charge was the same charge that had been dismissed in September of 2010 when Rebecca failed to appear in court. 9RP 93. The witness tampering charge stemmed from a phone call that Hudson had made to Rebecca from the King County Jail, while the case was pending. 9RP 120; 10RP 101-02.

During Hudson’s trial in April of 2012, Rebecca appeared in court, but she testified untruthfully. 7RP 55. She believed Hudson when he promised her that their relationship would improve, and she testified in accordance with what Hudson told her to say. 7RP 56-57, 69. Hudson

“fed” her lines, and instructed her to take notes and memorize what to say. 7RP 56-57, 67-69.

Despite Rebecca’s false testimony, Hudson was convicted of the witness tampering and violation of a no-contact order charges. CP 5, 128; 9RP 92-93. The jury was undecided as to the assault charge. Id. Hudson was sentenced on April 27, 2012, and a domestic violence no-contact order was entered. Ex. 15. Hudson was released from the King County Jail on June 17, 2012. 10RP 154. Hudson’s actions immediately following his release from jail on June 17<sup>th</sup> form the basis for the charges in this case.

b. The Current Charges.

On June 17, 2012, the same day Hudson was released from jail, he accused Rebecca of changing the passwords to her bank and email accounts. 7RP 76-77. He ordered her into their bedroom and “got all in [her] face.” 7RP 70. Hudson continued to demand the passwords, becoming angry. 7RP 80-81. He pushed her and prevented her from leaving the bedroom. 7RP 82-83. Hudson hit Rebecca in the head and pushed her onto the bed. 7RP 83-84. He got on top of her and put his knees on her shoulders, pinning her down. 7RP 84, 96. Rebecca told Hudson that he should have stayed in jail because he did not learn anything, which angered him further. 7RP 97-98. He got up, retrieved a

belt from the floor, buckled it, and tried to put it around Rebecca's neck. 7RP 98. She struggled, and was able to escape to the bathroom. 7RP 98-99. Rebecca's neck and shoulders were red from being pinned down, and her ear was ringing from when Hudson had hit her head. 7RP 101-02.

The next day, on June 18, 2012, Rebecca called her sister, who lived in Texas. 7RP 105. Rebecca did not call the police because she "just wanted there to be peace." 7RP 106. The following morning, June 19, 2012, just two days after Hudson had been released from jail, Seattle Police Officer Todd Jones was dispatched to 5611 South Bangor Street. 6RP 22-23. Rebecca's sister had called and requested that the police check on Rebecca's welfare at that location. 6RP 23, 91-92. Prior to responding to the residence, Officer Jones learned of the no-contact order involving Hudson and Rebecca. 6RP 90-91.

When Officer Jones arrived at the Bangor Street home, things appeared quiet and calm. 6RP 25. Officer Jones observed a green BMW four-door sedan parked in the driveway. 6RP 29-30, 32. When Officer Jones and his partner knocked on the door to the house, a man opened the door and greeted them. 6RP 25. Officer Jones told the man why they were there, and asked him if he was "Mark." 6RP 26. The man stated that he was, told the officers that he had not seen Rebecca, and said she was not home. Id. The man asked Officer Jones if there was anything else he

could help them with, and then abruptly shut the door. Id. While Officer Jones was talking to the man, he had seen a little girl standing in the hallway of the house. 6RP 27. Officer Jones did not see anyone else in the home. 6RP 28.

After speaking to the man at the residence, Officer Jones returned to his car and viewed a photograph of Hudson, immediately recognizing him as the man with whom he had just spoken. 6RP 28-29. Jones also requested his dispatcher to run the license plate number of the BMW, and received information that Hudson was the registered owner. 6RP 30. Because Officer Jones had not yet confirmed that Rebecca resided at the Bangor Street residence, he did not arrest Hudson at that time. 6RP 90-92.

Instead, Officer Jones called Rebecca on the phone and learned that she was on a bus, approaching a stop nearby. 6RP 37, 44. Having spoken to Rebecca, Officer Jones returned to the Bangor Street house to arrest Hudson. 6RP 40-41. The BMW was no longer in the driveway, and no one answered his knock on the door. 6RP 42. Officer Jones began to drive toward Rebecca's location nearby, and as he did, he observed her walking toward his patrol car. 6RP 44. As he drove toward Rebecca, Officer Jones saw the green BMW coming toward him in the opposite lane of travel. Id.

As the BMW passed him, Officer Jones observed Hudson driving it, and observed that the license plate was the same one that he had called in earlier. 6RP 51-52. Officer Jones made a U-turn and attempted to stop the BMW. Id. However, Hudson accelerated away from Officer Jones, ran a stop sign, pulled into the oncoming lane of traffic, and sped away, losing Officer Jones. 6RP 49-51. Jones returned to Rebecca's location. 6RP 51.

As he approached Rebecca, Officer Jones observed that she was on the phone. 6RP 53. She told Officer Jones that she was talking to Hudson. 6RP 54. She appeared scared, and her voice trembled. 6RP 54, 77. Rebecca told Officer Jones that Hudson had had their three-year-old daughter in the car with him when he sped away from them in the BMW. 6RP 78.

Officer Jones accompanied Rebecca to her residence on Bangor Street and took a statement from her. 6RP 79. While they spoke, Rebecca's phone rang repeatedly, and Jones could see the name, "Mark," appear on the caller ID feature of the phone. 6RP 80; 7RP 115. Officer Jones observed redness and slight swelling to Rebecca's cheek and eye. 6RP 82-83. She had pain and some redness to her upper chest area. 6RP 83-84. Rebecca told Officer Jones about Hudson's assault of her two days earlier, on June 17. 6RP 84, 88, 94.

Later that afternoon, after Rebecca gave a statement to Officer Jones, Hudson told Rebecca that they could not return to the Bangor Street house together. 7RP 117. He took Rebecca to a motel and told her that she would stay there. 7RP 117-18. That evening, Hudson drove Rebecca to work at Highline Medical Center. 7RP 118. He told her that he would pick her up when she was finished working. 7RP 119. Later, Hudson texted Rebecca that he was at the hospital, waiting for her outside. 7RP 120. At the time of the text, Rebecca was on the phone with her sister, who told her that she was going to call 911. 7RP 120. Rebecca stated that she would call herself, and she did. 7RP 120.

At approximately 11:30 p.m., King County Sheriff's Deputy Chris Pelczar was dispatched to Highline Medical Center in response to Rebecca's 911 call. 7RP 15, 17. When he arrived at the hospital, he saw a vehicle matching the description given by Rebecca, and he observed Hudson sitting in the driver's seat of the car, with the engine running. 7RP 15-17. Deputy Syson also responded to the hospital, spoke to Rebecca, learned that Hudson had texted Rebecca that he was present at the hospital, and confirmed the existence of the no-contact order. 7RP 29, 31-33, 35. Hudson was arrested. 7RP 21-22, 33.

On June 22, 2012, the State charged Hudson in this case, relating to his violations of the no-contact order and eluding. CP 1-4. On July 9,

2012, Hudson's mother posted \$500,000 cash bail, and Hudson was released. CP 134; 9RP 26-27. King County Sheriff's Detective Chris Johnson, who was the investigator on Hudson's prior witness tampering and no-contact order violation case, placed a surveillance camera in a location where he could monitor the front of Rebecca's house on Bangor Street. 7RP 154-55; 10RP 97, 101.

On August 14, 2012, Det. Johnson observed, via the surveillance camera, a motor scooter parked in the driveway of Rebecca's house. 7RP 155. He determined from the license plate that the motor scooter was registered to Hudson. 7RP 157. Det. Johnson was able to switch from the live feed and rewind the video to observe the scooter pulling up to the house; he observed a man who looked like Hudson get off of the scooter and go inside. 7RP 158-59. Det. Johnson alerted a patrol unit to stop the scooter if it left the residence, and he began to drive to the house. 7RP 159-60. As he drove, Det. Johnson was able to view the live surveillance camera feed via his laptop computer. 7RP 160, 168. He observed a person that appeared to be Hudson exit the house and leave on the scooter. 7RP 160. He captured a screen print from the video. Ex. 25. He asked King County Sheriff's Deputy Lim to stop the scooter, and Hudson was detained approximately a quarter of a mile from the Bangor Street house. 7RP 168-69. According to the video surveillance, Hudson was inside of

Rebecca's home on Bangor Street for approximately 2 hours and 20 minutes. Ex. 26; 8RP 19-20.

Detective Johnson responded to Deputy Lim's location and spoke with Hudson. 8RP 6. Hudson admitted that he had gone to the Bangor Street residence, but claimed that he went there to retrieve some tools, and that he thought it was "okay" to be there as long as Rebecca was not there. 8RP 6-7, 20-21. Hudson was arrested. 8RP 9. He had no tools with him. 8RP 7, 9.

## 2. PROCEDURAL FACTS.

The State ultimately proceeded to trial on the following charges: Domestic Violence Felony Violation of a Court Order (count 1) for assaulting Rebecca in violation of the no-contact order on June 17, 2012; Attempting to Elude (count 2) for fleeing Officer Jones on June 19, 2012; Domestic Violence Misdemeanor Violation of a Court Order (count 3) alleged to have occurred on May 29, 2012; Domestic Violence Misdemeanor Violation of a Court Order (count 4) alleged to have occurred on June 17, 2012; Domestic Violence Misdemeanor Violation of a Court Order (count 5) alleged to have occurred on June 19, 2012; Residential Burglary – Domestic Violence (count 6) alleged to have occurred on August 14, 2012; and Domestic Violence Misdemeanor

Violation of a Court Order (count 7) alleged to have occurred on August 14, 2012. CP 37-41.

Counts 1, 2, and 6, the three felonies, each included an allegation of rapid recidivism pursuant to RCW 9.94A.535(3)(t). The State further alleged that counts 1 and 6 were aggravated domestic violence offenses due to an ongoing pattern of abuse, pursuant to RCW 9.94A.535(3)(h)(i). CP 38, 41. Finally, the State alleged that during the commission of count 2 (the eluding) a person other than Hudson or the pursuing law enforcement officer was threatened with injury or harm, pursuant to RCW 9.94A.533(11) and RCW 9.94A.834. CP 38.

Following a jury trial, Hudson was convicted of eluding Officer Jones on June 19<sup>th</sup> (count 2), misdemeanor violation of a no-contact order on June 19<sup>th</sup> (count 5), residential burglary domestic violence on August 14<sup>th</sup> (count 6), and misdemeanor violation of a no-contact order on August 14<sup>th</sup> (count 7). CP 94, 97-99; 13RP 4-5. The jury also found the presence of the endangerment enhancement and the rapid recidivism aggravator as to the eluding charge. CP 102, 105-06; 13RP 6. It also determined that the residential burglary was an aggravated domestic violence offense due to an ongoing pattern of abuse, and also found that the rapid recidivism aggravator had been proved. CP 107-08; 13RP 6.

The jury was unable to reach a consensus as to the felony violation of a no-contact order on June 17<sup>th</sup> (count 1), or the misdemeanor violation of a no-contact order on June 17<sup>th</sup> (count 4). CP 93, 96; 13RP 4-5.

Hudson was found not guilty of the misdemeanor violation of a no-contact order alleged to have occurred on May 29<sup>th</sup> (count 3). CP 95; 13RP 5.

On March 22, 2013, Hudson was sentenced to a total of 33 months of incarceration. CP 125; 2RP 390. The court entered a no-contact order prohibiting Hudson from contact with Rebecca. CP 176-77; 3RP 395-96. This timely appeal follows. CP 133.

**C. ARGUMENT**

1. THE USE OF A PRIOR CONVICTION, SUBSEQUENTLY REVERSED ON APPEAL, TO IMPEACH HUDSON DOES NOT WARRANT REVERSAL.

Hudson argues that all of his convictions must be reversed because the State introduced, under ER 609, the fact of his prior conviction for witness tampering that was subsequently reversed on appeal for insufficient evidence. Although admission of the prior conviction itself was erroneous in light of its later reversal, its introduction here was harmless. First, only the fact of the prior conviction itself was improperly admitted under ER 609; the conduct underlying the prior conviction was independently admitted under ER 404(b) to assist the jury in evaluating

Rebecca's credibility. Additionally, the jury either acquitted or failed to reach a consensus on all of the counts where a verdict required a credibility determination regarding Hudson and Rebecca's conflicting testimony. Instead, the jury convicted Hudson only of crimes for which there was independent corroborative evidence in the form of video footage of the crimes in progress and police testimony. Reversal is unwarranted.

A prior conviction for a crime of dishonesty is admissible to impeach the credibility of a witness. ER 609(a)(2). The pendency of an appeal does not render such a conviction inadmissible, but the fact that the appeal is pending may be introduced. ER 609(e). Despite its admissibility pending appeal, if the prior conviction is later reversed for an error that rendered the fact-finding process inherently unreliable, its introduction at the current trial violates due process. See Loper v. Beto, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972) (where defendant charged with statutory rape, and the only two witnesses were the victim and the defendant, defendant's impeachment with four prior convictions obtained without the benefit of counsel violated due process); State v. White, 31 Wn. App. 655, 644 P.2d 693 (1982) (theft conviction reversed when based in part on impeachment of defendant with a prior perjury conviction subsequently reversed for insufficient evidence); compare State v. Murray, 86 Wn.2d 165, 167-68, 543 P.2d 332 (1975) (not error to admit prior

conviction subsequently invalidated for reasons that do not go to the integrity of the fact-finding process, such as illegal seizure of evidence).

The introduction of Hudson's prior witness tampering conviction, which was later reversed for insufficient evidence,<sup>3</sup> was erroneous. However, the error does not require reversal. A constitutional error is harmless when the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); Chapman v. California, 286 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

In Loper, the Court reversed based on the improper impeachment because the outcome of the trial turned entirely on whether the jury would believe the child-victim or the defendant, and because "the sole purpose for which the prior convictions were permitted to be used was to destroy the credibility of Loper's testimony in the eyes of the jury." 405 U.S. at 482. In White, this Court determined that it could not "divine what weight the jury must have given to the perjury conviction in deciding whether to believe White's testimony," but assumed that a prior perjury conviction would "have a great adverse effect." 31 Wn. App. at 666. When

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<sup>3</sup> This Court concluded that there was insufficient evidence to support an extraneous element that the State, through the jury instructions, assumed the burden to prove. See State v. Hudson, No. 68807-3-1 (Wn. App. Jan. 21, 2014) (unpublished).

determining whether reversal is appropriate, this Court must decide whether the fact of Hudson's prior witness tampering conviction "might well have influenced the outcome of the case" such that it deprived him of due process. Loper, 405 U.S. at 480.

Unlike the facts of White and Loper, the conduct underlying Hudson's prior witness tampering conviction was independently admitted under ER 404(b) to assist the jury in assessing Rebecca's credibility. See CP 29 (Order on Motions in Limine, No. 4). Prior misconduct may be admitted in a domestic violence case to help the jury evaluate the victim's prior statements or conduct that might affect the jury's understanding of her credibility. State v. Magers, 164 Wn.2d 174, 186, 190 P.3d 126 (2008); State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996); State v. Baker, 162 Wn. App. 468, 470-71, 259 P.3d 270 (2011).

Here, Rebecca testified that when Hudson was originally charged with assault in 2010, he told her "not to show up." 7RP 54. She also admitted that when she appeared in court during the trial that resulted in the tampering conviction at issue, she lied under oath. 7RP 56. She explained that Hudson "was feeding me lines and I was writing them down, and I had to memorize everything." 7RP 56. The State introduced a "script" of notes that she had taken of what Hudson had told her to say during that earlier trial. 7RP 56-57, 66-67. Evidence concerning the fact

that Hudson made multiple phone calls to Rebecca while incarcerated during the last trial was admitted. 8RP 115; 9RP 119.

In the instant trial, Rebecca was cross-examined about this evidence. 7RP 137. Hudson himself testified surrounding the circumstances of the prior tampering conviction, and told the jury that the previous jury did not convict him of assault, despite the fact that it found him guilty of witness tampering. 9RP 93; 10RP 115-21.

Hudson does not challenge the admission of any of this evidence on appeal. Because the conduct underlying the witness tampering conviction was itself independently admissible under ER 404(b), the prejudicial effect of admitting the fact of the conviction for that conduct is greatly diminished.

And importantly, it is clear that the jury did not use the fact of the conviction to “tip the scales,” and determine whose version of events to believe. Rather, the jury only convicted Hudson of crimes that were independently corroborated by video evidence and police eyewitness testimony. The jury either hung or acquitted Hudson on every count that did not involve independent, corroborating evidence. Specifically, the jury found Hudson guilty only of the following: count two, Eluding, where the evidence included police officer testimony and a dash-cam recording of the crime itself (Ex. 3); count five, Misdemeanor No-Contact

Order Violation, where a police officer found Hudson sitting in a car outside of Rebecca's workplace; counts six and seven, Residential Burglary and Misdemeanor No-Contact Order Violation, where video evidence of Hudson entering and remaining in Rebecca's residence was introduced (Ex. 25, 26) and where Hudson was arrested upon leaving. CP 94, 97-99. The jury either hung on all charges that required it to make a credibility determination between Hudson and Rebecca, or found him not guilty, indicating that it affirmatively resolved the issue of credibility in Hudson's favor. CP 93, 95-96. And, the evidence as to the counts for which Hudson was convicted was overwhelming; it included video footage and independent witness testimony, and was not dependent upon a determination of Hudson's credibility.

In sum, the admission of the reversed prior conviction was cumulative of other evidence, and the verdicts themselves provide overwhelming proof that the conviction was not used by the jury to determine Hudson's credibility adversely. Because this Court can determine from the record that the admission of the witness tampering conviction did not influence the outcome of the present case, the error in admitting it is harmless beyond a reasonable doubt.

2. THE “TO CONVICT” INSTRUCTIONS FOR COUNTS FIVE AND SEVEN PROPERLY INFORMED THE JURY OF THE ELEMENTS OF VIOLATION OF A COURT ORDER.

Hudson contends that the jury instructions permitted the jury to convict him of no-contact order violations in counts five and seven for acts that are not criminal. Specifically, he argues that the violation of two specific restraint provisions in the no-contact order is not criminalized by RCW 26.50.110. Thus, he concludes that the “to-convict” instructions were erroneous when they informed the jury that an element of the crime was that Hudson “knowingly violated a provision of the order.” However, read in conjunction, the relevant statutes unambiguously criminalize the violation of any provision of the no-contact order that was issued against Hudson. Moreover, even if the plain language of RCW 26.50.110 is ambiguous, Hudson’s interpretation would frustrate clear legislative intent. His argument must be rejected.

The jury was instructed as to counts five and seven, in relevant part, as follows:

To convict the defendant of the crime of violation of a court order as charged in Count V [Count VII], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 19, 2012, [August 14, 2012,] there existed a no-contact order applicable to the defendant;

- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order; and
- (4) That the defendant's act occurred in the State of Washington.

CP 73, 79.

The primary goal of statutory construction is to discern and carry out the legislature's intent. If that intent cannot be discerned from the plain text of the statute, the court applying the statute should resort to principles of statutory construction, legislative history, and relevant case law to discern the legislature's intent. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

'The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.' Further, '[a]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous.'

State v. Bunker, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010) (internal citations omitted). The entire legislative scheme must be considered so that provisions are analyzed in context. In re Pers. Restraint of Adams, 178 Wn.2d 417, 309 P.3d 451 (2013) (analyzing exceptions to statutory time bar on the filing of collateral attacks on a judgment). Statutory

construction claims are reviewed *de novo*. State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008).

A court derives the meaning of an unambiguous statute from the wording of the statute itself. State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). Each word must be accorded meaning so that no portion of the statute is rendered superfluous. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002); State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). A statute is ambiguous only if it is susceptible of more than one reasonable interpretation. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).

The no-contact order entered against Hudson was issued under the authority of RCW 10.99.050. Ex. 15. The purpose of the statute is “to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.” RCW 10.99.010; State v. Spencer, 128 Wn. App. 132, 138-39, 114 P.3d 1222 (2005). A willful violation of a 10.99 order is punishable under RCW 26.50.110. RCW 10.99.050(2)(a). A no-contact order issued under RCW 10.99 must be in writing, and “shall contain the court’s directives and shall bear the legend: Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a

felony.” RCW 10.99.050(1), (2)(b). The no-contact order issued against Hudson complies with this statutory mandate. Ex. 15.

RCW 26.50.110(1)(a) imposes criminal liability in the form of a gross misdemeanor for violations of “any of the following provisions” of a no-contact order issued under RCW 10.99. Those provisions are listed as:

- (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
- (ii) A provision excluding the person from a residence, workplace, school, or day care;
- (iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;
- (iv) A provision prohibiting interfering with the protected party’s efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or
- (v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

RCW 26.50.110(1)(a)(i)-(v).

Hudson argues that a violation of the no-contact order provisions prohibiting him from “keep[ing] under surveillance the protected person,” and knowingly coming within 1,000 feet of the protected “person,” do not constitute a violation of “any of the following provisions” under RCW 26.50.110(1)(a). However, this argument is contrary to a plain reading of the statute.

“Surveillance” or “to keep under surveillance,” is not statutorily defined. Its common meaning is, “close watch kept over one or more persons,” or “continuous observation of a person or area.” Webster’s New International Dictionary 2302 (3rd. ed. 1993); State v. Noah, 103 Wn. App. 29, 44, 9 P.3d 858 (2000). While the word “surveillance” is not explicitly contained in RCW 26.50.110(1)(a), other terms indicating a prohibition against “keeping a close watch over the protected person,” and the “continuous observation of the protected person,” are indeed present. The statute explicitly references restraint provisions prohibiting “stalking,” “contact,” “excluding a person from a residence, workplace, school, or day care,” and “coming within a specified distance of a location.” RCW 26.50.110(1)(a)(i), (ii), and (iii). It would be impossible for a defendant to “keep a close watch” or “continuously observe” the protected person without also violating one of the other, explicitly referenced, restraint provisions. Even in an electronic age, the technical devices necessary to remotely “watch” or “observe” someone would need to be physically placed at one of those protected locations prior to their use. Thus, a plain reading of RCW 26.50.110 leads to the conclusion that it criminalizes the violation of the no-contact provision against “keeping the protected person under surveillance.”

Moreover, the prohibition against coming within 1000 feet of the protected person is itself “[a] provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location” as that term is used in RCW 26.50.110(1)(a)(iii). A “location” is “a position or site occupied or available for occupancy.” Webster’s New International Dictionary 1327 (3rd. ed. 1993). Certainly, a person’s physical body occupies “a position or site.” A defendant’s knowing violation of the provision of a no-contact order prohibiting him from coming within a specified distance of the protected person’s physical “location” is punishable as a gross misdemeanor under the plain language of RCW 26.50.110(1)(a)(iii).

In sum, the plain language of RCW 26.50.110 criminalizes the violation of no-contact order provisions prohibiting a defendant from “keeping the protected party under surveillance,” and from coming within a specified distance of the protected party’s “person.” Further evidence of this conclusion is found in RCW 10.99.050, which dictates that a “[w]illful violation of a court order issued under this section is punishable under RCW 26.50.110,” and directs that the written no-contact order itself must inform the defendant that, “Violation of this order is a criminal offense.” RCW 10.99.050(2)(a), (b). There are no exceptions made.

If this Court determines that RCW 26.50.110 is ambiguous, Hudson's interpretation would frustrate clear legislative intent. In 2007, the legislature amended RCW 26.50.110 to remove a provision relating to mandatory arrests. LAWS OF 2007 Ch. 173 § 2. Its stated intent in doing so was to make clear "that a willful violation of a no-contact provision of a court order is a criminal offense and shall be enforced accordingly to preserve the integrity and intent of the domestic violence act." LAWS OF 2007 Ch. 173 § 1. Our State Supreme Court, interpreting a prior version of RCW 26.50.110, concluded that the plain language of the statute criminalized all violations of no-contact order restraint provisions. Bunker, 169 Wn.2d at 579. And the legislative amendment in 2007 did not "broaden the scope of law enforcement power or effectuate any substantive change to any criminal provision in the Revised Code of Washington." LAWS OF 2007 Ch. 173 § 1. See also Bunker, 169 Wn.2d at 582 ("The nature of the former and 2007 versions of [RCW 26.50.110] are substantively the same, and both criminalize all no-contact order violations." (emphasis added)).

As outlined above, the plain language of RCW 26.50.110 criminalizes all violations of the no-contact order issued against Hudson. The jury was properly instructed.<sup>4</sup>

3. EVEN IF THE TO-CONVICT INSTRUCTIONS FOR COUNTS FIVE AND SEVEN WERE ERRONEOUS, ANY ERROR WAS HARMLESS.

Even if the jury instructions were erroneous, any error was harmless under the facts of this case.

Errors in jury instructions are susceptible of harmless error review.<sup>5</sup> State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)); State v. Jackson, 87 Wn. App. 801, 813-14, 944 P.2d 403 (1997). Instructional error is harmless if the jury verdict would have been the same absent the error, or if the element at issue is supported by uncontroverted evidence. Brown, 147 Wn.2d at 341 (citing Neder, 527 U.S. at 18-19). Reversal is unwarranted when the jury, as instructed, necessarily found

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<sup>4</sup> Hudson references the comments to Washington Pattern Jury Instruction – Criminal (“WPIC”) 36.51 as support for his argument that RCW 26.50.110(1) criminalizes only certain types of no-contact order violations. The State’s position is that all of the provisions listed on Hudson’s no-contact order are included in RCW 26.50.110(1)(a)’s list of violations that subject a defendant to criminal punishment. While the State concedes that, for clarity’s sake, the better practice would be to follow the direction of WPIC 36.51 and include the specific provision(s) at issue, the instructions given here were not erroneous.

<sup>5</sup> Hudson does not argue otherwise; he merely contends that any error here was not harmless under the facts of the case. Brf. of App. at 24.

facts that establish guilt beyond a reasonable doubt on every essential element. Jackson, 87 Wn. App. at 814.

As outlined below in section C. 4, the basis for the no-contact order violation charged in count five was Hudson's act of coming to Rebecca's workplace at Highline Medical Center on June 19, 2012.<sup>6</sup> 11RP 9-10. The evidence was undisputed that Hudson was parked in front of the hospital where Rebecca worked while Rebecca was inside. 7RP 16-18, 30-32, 120-21. Under these circumstances, the jury could not have determined that Hudson kept Rebecca "under surveillance" or knowingly came within 1,000 feet of her "person" without also knowingly coming within 1,000 feet of her workplace.

Similarly, the violation of the no-contact order charged in count seven was based on Hudson's entering Rebecca's residence on August 24, 2012; there was no evidence that Hudson committed any other act that violated the order on that date. CP 41, 79. The evidence for this count was in the form of video footage of Hudson entering and leaving Rebecca's residence, and his arrest nearby. Ex. 25, 26; 7RP 158-60, 168-69. The jury could not have concluded that Hudson violated the order on August 24, 2012 by keeping Rebecca "under surveillance," or by

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<sup>6</sup> Hudson claims, without citation to the record, that, "The State's evidence for Count V was that Mr. Hudson drove within 1,000 feet of Ms. Hudson walking along the street." Brf. of App. at 24. As demonstrated below, in Sec. C. 4, this is inaccurate.

coming within 1000 feet of her “person,” without also concluding that he came within 1000 feet of her residence, as that was the location of the charged court order violation.

Because the jury, as instructed, necessarily found facts that establish guilt beyond a reasonable doubt as to every essential element, any error in the to-convict instructions was harmless beyond a reasonable doubt. Jackson, 87 Wn. App. at 814.

4. HUDSON’S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS PROTECTED BECAUSE THE STATE ELECTED IN CLOSING WHICH ACT SUPPORTED COUNT FIVE.

Hudson argues that, because the State presented evidence of multiple acts that could have constituted a violation of the no-contact order on June 19, it was error for the court not to instruct the jury that it must be unanimous as to which act had been proven by the State. However, the court is only required to provide such an instruction in the absence of a clear election by the State. During closing argument, the prosecutor specifically told the jury that count five was premised on Hudson’s act of going to Rebecca’s workplace to pick her up on the night of June 19, 2012. No unanimity instruction was required.

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crimes charged in the information have been

committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When there is evidence and testimony of multiple acts, any one of which could form the basis of a charged count, either the State must tell the jury which act to rely on in its deliberations, or the court must instruct the jury to agree unanimously on a specific criminal act. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

This “either/or” rule was originally outlined in State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Prior to Petrich, the State was required to make an election. State v. Workman, 66 Wn. 292, 294-95, 110 P. 751 (1911). Petrich recognized that there are situations in which an election by the State is impractical, and approved of the court providing an instruction in the alternative. State v. Brown, 55 Wn. App. 738, 746, 780 P.2d 880 (1989) (citing Petrich, 101 Wn.2d at 572). It is now well settled that the requirement of jury unanimity is met by either the State’s election or an instruction by the court. Kitchen, 110 Wn.2d at 409; Coleman, 159 Wn.2d at 511; State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008).

Hudson is correct that the State presented evidence of multiple acts that could have constituted the crime of violation of a no-contact order on June 19, 2012. See 6RP 25-28 (Hudson in Rebecca’s residence during the morning); 6RP 54 (Hudson speaking to Rebecca on the telephone when

Officer Jones approached her); 6RP 61 (Hudson called Rebecca's phone while Officer Jones took a statement from her); 7RP 117 (Hudson drove Rebecca to a motel that afternoon); 7RP 118 (Hudson drove Rebecca to work that evening); and 7RP 120 (Hudson went to Rebecca's work to pick her up late that night). However, during closing argument, the State specifically told the jury what evidence to rely on for count five:

Count five, violation of a court order. This occurs on June 19, 2012, when Mark goes up to Rebecca's hospital where she works, again, in violation of the no-contact order, goes to pick her up from work that night after they had their communique [sic].

11RP 9-10. From these remarks, it was made abundantly clear to the jury that the State relied on Hudson's act of going to the hospital to pick Rebecca up from work to prove the no-contact order violation charged in count five. Because the State clearly elected a specific act during closing argument, Hudson's constitutional right to a unanimous jury verdict was protected. The court did not err when it did not provide a unanimity instruction to the jury.

5. UNLAWFULLY ENTERING OR REMAINING IN A DWELLING WITH THE INTENT TO COMMIT A VIOLATION OF A NO-CONTACT ORDER INSIDE CONSTITUTES RESIDENTIAL BURGLARY, REGARDLESS OF WHETHER THE PROTECTED PARTY IS PRESENT.

Hudson argues that the court improperly instructed the jury in such a manner that it could convict Hudson under an invalid legal theory.

Specifically, Hudson argues that unlawful entry or remaining in a dwelling with the intent to violate a no-contact order is not sufficient to prove residential burglary, unless the defendant knows that the protected party is actually inside the dwelling at the time. Hudson's argument must be rejected. Violation of a no-contact order is a crime against a person, and a defendant need only enter or remain with the intent to commit that crime in order to be convicted of residential burglary; the protected party's actual presence in the dwelling (or the defendant's knowledge of it) is not required.

A person commits residential burglary when he enters or remains unlawfully in a dwelling with the intent to commit a crime against a person or property in that dwelling. RCW 9A.52.025(1). Hudson concedes that the existence of the no-contact order rendered his entry into Rebecca's residence (and implicitly, his remaining therein) unlawful. Brf. of App. at 27. However, he contends that "when [he] knew there was

no person inside the dwelling, intending to violate the no-contact order could not also be the ‘crime against a person or property therein.’” Brf. of App. at 28. His argument erroneously assumes that only violations of no-contact orders that include actual face-to-face contact with the protected party constitute “crimes against persons.” Furthermore, residential burglary requires merely the intent to commit a crime inside the dwelling, not the actual commission of a crime therein. The jury was properly instructed in this case.

A defendant may violate a no-contact order in a number of different ways. RCW 26.50.110; see e.g., Spencer, 128 Wn. App. at 138 (court entering a no-contact order can tailor its provisions to the individual circumstances presented, by including multiple provisions prohibiting a variety of misconduct toward the protected party); see also Ex. 15 (containing multiple prohibitions on different types of contact with Rebecca). Regardless of the manner in which the violation occurs, a violation of a no-contact order is a crime against a person: “The core purpose of the law is to protect an individual from domestic abuse. Although a zone of safety is created around an individual, it is the person that is being protected, not the zone.” Spencer, 128 Wn. App. at 137. See also State v. Dejarlais, 88 Wn. App. 297, 302, 944 P.2d 1110 (1997) (observing that the legislative intent of domestic violence laws is to reduce

domestic abuse, and protection orders are issued to reduce the abuser's power over the victim). Each provision of a no-contact order is intended to give effect to its "core purpose," which is the protection of the victim. Spencer, 128 Wn. App. at 137-38. Thus, the violation of a no-contact order is a crime against a person, regardless of the manner in which it is committed.

Hudson essentially argues that where a no-contact order violation does not include direct contact with the protected party, it is a crime against "society," not a "person or property" for purposes of residential burglary. Brf. of App. at 28. He is wrong. The burglary statutes do not define what constitutes a crime "against a person or property therein." Thus, reviewing courts have applied a common sense analysis, broadly construing the requirement in light of the purposes underlying the burglary statutes themselves. See State v. Stinton, 121 Wn. App. 569, 574, 89 P.3d 717 (2004) (violation of a protection order protects the petitioner from future domestic violence, and is thus a "crime against a person" for purposes of residential burglary statute); Spencer, 128 Wn. App. at 140 (burglary statutes guarantee that any violation of a no-contact order within a dwelling can be punished as a burglary); State v. Snedden, 149 Wn.2d 914, 919, 73 P.3d 995 (2003) (indecent exposure constitutes a "crime

against a person” for purposes of burglary, despite its absence from the Sentencing Reform Act’s (SRA) list of crimes against persons<sup>7</sup>).

Hudson’s argument, that a violation of a no-contact order is not a “crime against a person or property therein” unless the defendant has actual contact with the protected party inside the dwelling, must be rejected.<sup>8</sup> Construing the “person or property” element in the manner that Hudson advocates would defeat the clear purpose of the burglary statutes “to prohibit and punish conduct creating a risk of or actual harm to persons and property within a building.” State v. Wentz, 149 Wn.2d 342, 356, 68 P.3d 282 (2003) (Madsen, J., concurring).

Additionally, residential burglary requires only the intent to commit a crime inside the dwelling, not the actual commission of such crime. RCW 9A.52.025(1). And there is no requirement that the person against whom the crime is intended be present in the dwelling. See State

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<sup>7</sup> Notably, felony Domestic Violence Court Order Violations are included in the SRA’s list of “Crimes Against Persons,” regardless of the prong under which they are charged and proved (assault or having two or more prior convictions) or which provision of the no-contact order was violated. RCW 9.94A.411; RCW 26.50.110(4), (5).

<sup>8</sup> Hudson cites to Snedden, supra, to support his argument that violation of a no-contact order is not a “crime against a person therein” when the protected party is not present in the dwelling. In Snedden, the court concluded that indecent exposure was a crime against a person for burglary purposes, noting that “Snedden’s victims reported feeling upset, violated, scared, uncomfortable and fearful for their safety. Mr. Snedden’s culpable actions were deliberate, calculated and aimed specifically toward his victims.” 149 Wn.2d at 919-20. An abuser’s act of entering the victim’s home in violation of a court order, whether the victim is present or not, would unquestionably leave the victim feeling “upset, violated, scared, uncomfortable and fearful for their safety.” It is difficult to perceive that such an act would not be “deliberate, calculated and aimed specifically toward” the protected person.

v. Kilponen, 47 Wn. App. 912, 737 P.2d 1024 (1987) (defendant properly convicted of burglary when he entered his estranged wife's home with the intention of tying her up, despite the fact that she was not home when he entered). Under Hudson's argument, a residential burglary charge would be impermissible where the defendant unlawfully entered the protected party's residence with the intention of leaving a harassing and threatening note, simply because he knew the protected party would not be home at the time. Clearly, that is not the state of the law. Hudson's claim—that the intent to violate a no-contact order inside a residence is not sufficient to prove residential burglary unless the defendant knows that the protected party is actually inside the dwelling at the time—must be rejected.

6. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL JURY TO FIND THAT HUDSON COMMITTED RESIDENTIAL BURGLARY.

Building on his previous argument, Hudson claims that the evidence was insufficient to support the conclusion that he had the intent to commit a crime inside Rebecca's residence. This argument must also be rejected.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216,

220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court reverses for insufficient evidence only when no rational trier of fact could conclude that the State proved the elements of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). It is strictly within the province of the jury to resolve conflicts in the testimony, and to evaluate the credibility of witnesses and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Hudson argues that the State was required to prove that he intended to commit a "separate and distinct" violation of the no-contact order inside Rebecca's house, apart from his act of entering the residence in violation of the order. This argument has been rejected. In Spencer, the defendant claimed that once he entered the prohibited zone (1,000 feet of the protected party's residence), the crime of violation of a no-contact order was complete, and there was thus insufficient evidence of the requisite intent to commit that same crime upon entering the home. 128 Wn. App. at 137. This Court rejected Spencer's argument, and

concluded that violation of a no-contact order is a continuing offense: “Once a defendant enters the prohibited zone, the crime begins but is not complete—it continues. As long as the defendant remains within the prohibited zone, he continues to violate the no-contact order.” Spencer, 128 Wn. App. at 137-38.

Furthermore, as noted above, burglary requires proof only of the intent to commit a crime—not the actual commission of a crime. Thus, the evidence was sufficient if a rational jury could find that Hudson intended any crime inside the residence, including violation of a no-contact order.<sup>9</sup> Here, after entering unlawfully, Hudson remained unlawfully in Rebecca’s home for over two hours, from approximately 3:48 in the afternoon to approximately 6:08 in the evening. Ex. 26. Things were “out of place” when he left. 7RP 131. Hudson was arrested almost immediately upon leaving the residence. 7RP 168-69; 8RP 8-9. Discovered on his person were several items taken from the home, that belonged to Rebecca, and that she had not given Hudson permission to take. 7RP 130-32; 8RP 6-10; 10RP 142. Although Hudson told Detective Johnson that Rebecca was not home, and claimed that he had only gone to the house to retrieve some tools, he was at the residence for over two

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<sup>9</sup> The specific crime intended to be committed inside the premises is not an element of the crime of burglary, and need not be included in the information or jury instructions. State v. Bergeron, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985).

hours, and he did not have any tools with him when he left. Ex. 26; 8RP 7-9, 20-21.

From this evidence, a rational jury could have easily inferred that Hudson intended to commit a no-contact order violation or theft<sup>10</sup> inside the residence. His violation of the no-contact order was not complete upon entering Rebecca's home, but continued while inside. Moreover, a rational inference from the evidence is that Hudson was waiting for Rebecca to return. Sufficient evidence existed that Hudson entered the residence with intent to commit a crime against a person or property therein. His conviction for residential burglary should be affirmed.

7. HUDSON HAS FAILED TO ESTABLISH THAT THE ENDANGERMENT ENHANCEMENT FOR THE ELUDING CHARGE MUST BE VACATED.

Claiming an alleged violation of the corpus delicti rule, Hudson contends that the endangerment penalty enhancement for the eluding charge must be vacated. He is wrong for several reasons. First, Hudson failed to object to the admission of his statements below, and has therefore

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<sup>10</sup> Hudson also argues that the State presented insufficient evidence that he took "anything other than community property" from the residence, and that one cannot commit theft of community property. Brf. of App. at 34-36. However, there was no evidence that the property Hudson took was community property. The mere fact that Hudson and Rebecca were married does not suggest that all of their property was community-owned. The only evidence before the jury relating to the property Hudson took from the home was that it belonged to Rebecca and that she did not give Hudson permission to take it. 7RP 130-32; 8RP 6-10; 10RP 142. From this, a rational fact-finder could infer that Hudson intended to commit theft inside the residence.

waived the right to raise this argument for the first time on appeal.

Second, the corpus delicti rule does not apply to statements made prior to or during the commission of a crime, and the record is unclear whether Hudson made the statements at issue after the crime was completed, as opposed to while it was still in progress. Finally, assuming this Court decides to reach the merits of his argument, and assuming the rule applies to his statements, the State presented sufficient evidence to establish the corpus delicti of the endangerment enhancement.

- a. Hudson Has Waived The Right To Present A Corpus Delicti Challenge Because He Failed To Object Below.

The corpus delicti doctrine is a judicially created rule of evidence setting forth the standard for laying a proper foundation to admit a defendant's confession into evidence. State v. C.D.W., 76 Wn. App. 761, 763, 887 P.2d 911 (1995). It requires that "the body of the crime" be established before the defendant's admissions may be considered. State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). Some independent, corroborating evidence of the crime is required for the defendant's

statements to be admissible.<sup>11</sup> State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006).

Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a). The failure to comply with the corpus delicti rule is a non-constitutional error, and to preserve the issue for appeal, a proper objection below is required. C.D.W., 76 Wn. App. at 764. At trial, Hudson did not object to the admission of his statements on corpus delicti (or any other) grounds. 6RP 110. Thus, he has waived the right to present this claim on appeal, and this Court should refuse to consider it.

b. Hudson Has Failed To Establish That The Corpus Delicti Rule Applies To His Statements.

The corpus delicti rule's requirement of corroborating evidence does not apply to incriminating statements made prior to or during the course of an offense. State v. Dyson, 91 Wn. App. 761, 763–64, 959 P.2d 1138 (1998); State v. Pietrzak, 110 Wn. App. 670, 682, 41 P.3d 1240, rev. denied, 147 Wn.2d 1013, 56 P.3d 566 (2002). Hudson has failed to

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<sup>11</sup> Hudson's argument applies the corpus delicti rule to a penalty enhancement, not a crime. The State could find no Washington case addressing the propriety of such application. However, it seems likely that the rule would apply in this context. Requiring the State to prove corpus delicti protects defendants from being convicted and punished on the basis of statements alone, which may be unreliable because they were misreported, misconstrued, elicited by coercion, based upon mistaken perceptions, or falsely given. Aten, 130 Wn.2d at 656-57 (citations omitted). These concerns appear equally implicated in the context of the penalty enhancement here.

establish he made the statements at issue after the crime of eluding was completed, and not while it was still ongoing.

Here, the endangerment enhancement was premised on Hudson's act of eluding Officer Jones with his three-year-old daughter in the car. 11RP 27-28. Officer Jones testified that as he approached Rebecca on the side of the road, he observed Hudson pass them in the BMW, and then accelerate away at a high speed when Officer Jones turned to follow him. 6RP 44, 51-52. Officer Jones lost Hudson after a short period of time, after which he returned to Rebecca's location. 6RP 50-51. Rebecca was still standing on the side of the road when Officer Jones returned. 6RP 51. She was on the phone. 6RP 53. Rebecca testified that prior to Officer Jones returning to her location Hudson called her and stated, "Did you see that? Did you see what happened?" 7RP 110. Rebecca asked Hudson, "Do you have [our daughter] in the car?" and Hudson responded, "Of course." Id. From this evidence, it is unclear that Hudson's statements, were made after the completion of the eluding, and not while he was still driving in a manner that placed his daughter at risk of harm. Hudson has not shown that the corpus delicti rule should apply to his statements.

c. The State Presented Sufficient Corroborating Evidence To Establish Corpus Delicti.

Finally, even assuming that the Court finds that the corpus delicti rule applies to Hudson's statements, and assuming that this Court decides to reach the merits of Hudson's claim, the State presented sufficient independent evidence to establish the corpus delicti for the endangerment enhancement.

To establish corpus delicti, the State need not produce independent evidence to prove every element of the crime. State v. Hummel, 165 Wn. App. 749, 765-66, 266 P.3d 269 (2012). Rather, the evidence need only support a logical and reasonable deduction that a crime occurred. Aten, 130 Wn.2d at 656. The independent evidence necessary to establish corpus delicti may be direct or circumstantial, and need not rise to the level of a preponderance of the evidence. Hummel, 165 Wn. App. at 758-59 (citing Aten, 130 Wn.2d at 656). In assessing whether there is sufficient evidence of the corpus delicti independent of a defendant's statements, the court assumes the truth of the State's evidence and draws all reasonable inferences in the light most favorable to the State. Aten, 130 Wn.2d at 658.

Immediately prior to the eluding, Officer Jones knocked on the door to the Bangor Street residence, and Hudson answered the door.

6RP 25-28. While speaking to Hudson, Officer Jones observed a little girl standing behind Hudson in the hallway of the house. 6RP 27-28. Hudson told Officer Jones that Rebecca was not home, and that he had not seen her. 6RP 26. No one else appeared to be home. 6RP 27-28. Officer Jones left, but returned soon thereafter. 6RP 40, 42. When he returned, Hudson's BMW was no longer in the driveway. 6RP 42. There was no response to Officer Jones's knock on the door. 6RP 42-43. And then, minutes later, Hudson successfully eluded Officer Jones by running a stop sign and driving into oncoming traffic. 6RP 42-44, 48-50.

Based on the fact that Officer Jones observed a small child with Hudson shortly before the eluding, and given that no one else appeared to be home or caring for the child, sufficient corroborating evidence supports the logical and reasonable deduction that Hudson's daughter was with him in the car when he eluded Officer Jones. Hudson's statements were corroborated by sufficient independent evidence.

8. HUDSON'S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE JURY INSTRUCTIONS, FAILING TO OBJECT TO THE COURT'S RESPONSE TO A JURY INQUIRY, OR FAILING TO REQUEST AN INSTRUCTION REGARDING COMMUNITY PROPERTY.

Based on the alleged instructional errors raised above, Hudson argues that his counsel rendered ineffective assistance of counsel. He

argues that his trial counsel should have objected to the “to convict” instructions for residential burglary and violation of a court order. He also argues that his attorney was deficient for not objecting to the court referring the jury back to its instructions when it inquired about the no-contact order as the predicate crime for residential burglary (CP 111-12). Finally, Hudson claims that his attorney was ineffective because he did not “ask for instructions on community property to exclude theft as the intended crime.” Brf. of App. at 39. Because Hudson fails to establish either deficient performance or prejudice, his arguments should all be rejected.

An ineffective assistance of counsel analysis begins with the strong presumption that counsel’s representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). For Hudson to overcome this strong presumption, he must prove by a preponderance (1) that his trial counsel’s performance was so deficient that it fell outside the wide range of objectively reasonable behavior based on consideration of all the circumstances of the case, and (2) that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel’s objectively unreasonable representation, the results of trial would have been different. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668,

689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Conduct that can be characterized as legitimate strategy is not deficient. Grier, 171 Wn.2d at 33. The presumption of reasonableness can be overcome only by showing that there is no conceivable legitimate tactical reason for counsel's conduct. Id.

As demonstrated above in sections C. 2 and C. 3, the jury instructions at issue were properly given. Because he has failed to establish any error, Hudson has necessarily failed to establish that his trial counsel rendered deficient performance for not objecting to the instructions. And even if he could establish deficient performance, Hudson must still demonstrate that there is a reasonable probability that, but for his counsel's failure to object, the results of trial would have been different. Because, as shown, any error in the instructions was harmless beyond a reasonable doubt, Hudson has necessarily failed to establish prejudice, i.e., that there is a reasonable probability that the verdicts would have been different.

Moreover, Hudson has failed to establish ineffective assistance based on his counsel's failure to request instructions relating to community property and theft. When a claim of ineffective assistance is premised on counsel's failure to request a particular jury instruction, the defendant must show that he was entitled to the instruction, that his

counsel was deficient for failing to request it, and that the failure to request it caused prejudice. State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012). There was no evidence presented at trial that the property Hudson removed from Rebecca's residence was community-owned. As such, Hudson was not entitled to any instructions regarding community property. Counsel was not deficient for failing to request an instruction that was not supported by the evidence.

**D. CONCLUSION**

For all of the above reasons, the State respectfully requests this Court to affirm Hudson's convictions.

DATED this 16<sup>th</sup> day of June, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County 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 Lenell Nussbaum, the attorney for the appellant, at Market Place One, Suite 330, 2003 Western Avenue, Seattle, WA 98121, containing a copy of the BRIEF OF RESPONDENT, in STATE V. MARK CURTIS HUDSON, Cause No. 70147-9 -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.

Dated this 16 day of June, 2014



Name  
Done in Seattle, Washington

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