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A. APPELLANT’S ASSIGNMENT OF ERROR

1. The trial court erred when it entered a judgment notwithstanding the jury verdict of guilty on Count I charging the defendant with Burglary in the First Degree Domestic Violence.
2. The trial court erred when it found the Assault in Violation of the No-Contact Order Domestic Violence the same criminal conduct as the Harassment-Threat to Kill Domestic Violence.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in concluding that the defendant could not have committed Burglary in the First Degree Domestic Violence because he had a right to be at 1123 Park Avenue despite a no-contact order stating that he was to have no contact with Charlene Sanders when the no-contact order did not specifically state that the defendant was not to be within a certain distance of or at 1123 Park Avenue? (Assignment of Error No. 1).

2. Did the trial court err in concluding that the assault in violation of the no-contact order domestic violence and the harassment-threat to kill domestic violence were the same criminal conduct even though the defendant's objective criminal intent of the two crimes was not the same?

(Assignment of Error No. 2).

C. STATEMENT OF THE CASE

Procedural Facts

The defendant was charged by Information filed on August 24, 2005 with Burglary in the First Degree Domestic Violence in Count I, Assault in Violation of a Protection Order, Restraining Order or No-Contact Order Domestic Violence in Count II, and Harassment-Threat to Kill Domestic Violence in Count III all occurring on August 23, 2005. CP 3.

Trial commenced on October 31, 2005. The jury returned a verdict of guilty on all three counts on November 3, 2005. CP 35-39. On November 3, 2005 the defendant moved for a judgment notwithstanding the verdict on Count I, Burglary in the First Degree Domestic Violence. CP 42, RP 11 (11-03-2005). On November 9, 2005 the trial court dismissed the Burglary in the First Degree Domestic Violence

notwithstanding the jury verdict of November 3, 2005. CP 43, RP 17 (11-09-2005). Sentencing was scheduled for December 2, 2005. CP 43, RP 18 (11-09-2005). On December 2, 2005 the sentencing was continued to December 16, 2005. CP 46, RP 9 (12-02-2005). On December 16, 2005 the trial court, over the State's objection held that the assault in violation of the protection order, restraining order, no-contact order domestic violence and the harassment-threat to kill domestic violence constituted the same criminal conduct. CP 47, RP 12 (12-16-2005). Signing of the judgment and sentence was set over to January 6, 2006. (RP 23 (12-16-2005). On January 6, 2006, the judgment and sentence was signed and the State filed a notice of appeal. CP 49, 55, RP 13 (01-06-2006).

Substantive Facts

On April 6, 2005 a no-contact order prohibiting the defendant from having any contact with Charlene J. Sanders at 1123 E. Park Ave, Port Angeles, Washington was signed by the District Court Judge; the defendant signed the order acknowledging that he received it and understood it. CP 40-1. On April 29, 2005 an amended order prohibiting contact was signed adding Charlene Sanders daughter, Margaret. CP40-1. The boxes prohibiting contact in person; and/or by telephone; and/or through any intermediary in any way except through an attorney of record,

a law enforcement officer, or an officer of the court were checked. CP 40-1. The box prohibiting the defendant from going within a certain distance of Ms. Sander's residence, workplace, school/day care was not checked. CP-40-1. However, Ms. Sanders address was listed on the order prohibiting contact. CP 40-1. The April 2005 order prohibiting contact provided the basis for the charges in the instant case.

On August 23, 2005 police officers responded to 1123 East Park Avenue to investigate an incident. RP 27 (11-01-2005). Sgt.Peninger was on the scene when Corporal Viada arrived. RP 26. (11-01-2005). Corporal Viada took photographs of the scene at 1123 East Park Avenue depicting the damage to the door and door jamb. CP 40 2-8, RP 28-32 (11-01-2005). Later in the day officers from the Port Angeles Police Department located the defendant in an apartment complex, inside an apartment, hiding under a bed. RP 37. (11-01-2005). The defendant was arrested and taken to the Port Angeles Police Department where he gave a tape recorded statement to Detective Ensor. RP 38-39. (11-01-2005).

At trial Charlene Sanders testified that the defendant had not been living at the residence at 1123 Park Avenue East for the past couple of months although he had been staying there off and on and that she had invited him to stay at the Park Avenue residence. RP 45, 49 (11-01-2005). However on cross-examination, Ms. Sanders said from about May

until August 23, 2005, the defendant had his cars, his clothes, and all his personal belongings at the 1123 Park Avenue residence. RP 72-73 (11-01-2005). Ms. Sanders testified that the defendant was prohibited from having contact with her and her daughter in person, by telephone, through an intermediary, in any way except an attorney, police officer, or officer of the court. RP 47 (11-01-2005). Ms. Sanders testified that the signature on the second page of the order prohibiting contact did not look like the defendant's signature but she was sure the defendant knew about the no contact order. RP 48-49 (11-01-2005).

Ms. Sanders testified that the defendant was at the Park Avenue residence on August 22, 2005 around 11:00 p.m., that they argued about a cell phone and him not wanting to talk to his family about his dad dying, that he left the Park Avenue residence, and that he took the house phone with him. RP 50, 51 (11-01-2005). Ms. Sanders testified that the defendant returned to the house around 2:30 a.m. on August 23, 2005, that she was sleeping, that he came through the kitchen door, that she knew he would be back, that he was yelling, mad and angry, calling her names, that she didn't know what he was talking about, that he kicked her in the leg, lower stomach, top part of the thigh, that the defendant had grabbed her and pulled her out of the bed by her leg and hair, that she started to fight back, that she grabbed her cell phone when the defendant pulled her out of

the bed, that she called 9-1-1, that when she called 9-1-1, the defendant went outside for a second, was telling someone to leave because she was calling the cops, that the defendant came back into the house, that when the defendant came back into the house he was yelling at her, and that he had picked up a 10 to 12 inch piece of pointed wood resembling a stake off the floor. RP 53-55, 57-61, 85 (11-01-2005). Ms. Sanders identified the piece of wood that the defendant had in his hand on August 23, 2005 from State's exhibit number 4. RP 61 (11-01-2005). Ms. Sanders, contrary to her statement to the police, testified that the defendant held the piece of wood with the sharp end down, that he held it at shoulder height, that when the defendant had that sharp piece of wood in his hand he was angry, mad, and yelling, and that he said he was going to kill her. RP 63-64, 70, 80, 97 (11-01-2005). Ms. Sanders testified that she didn't know for sure that the defendant would carry out that threat to kill her but that she was panic stricken and afraid, that she went into the bathroom, slammed the door and called 9-1-1. RP 64 (11-01-2005). Via State's exhibits 2 through 8 Ms Sanders testified that the kitchen door was damaged and busted and that the defendant had keys to the Park Avenue residence. RP 68-71 (11-01-2005).

On cross examination Ms. Sanders testified that the defendant and she had signed a rental agreement for the 1123 Park Avenue residence.

Ms. Sanders testified that the defendant picked up the piece of wood from the floor as he was running back into the house but he did not stab at her with it. RP 79 (11-01-2005).

Ms. Sanders testified that the defendant kicked at her either while she was on the phone with 9-1-1 or before. RP 98 (11-01-2005). Ms. Sanders testified that the door was not broken before 2:30 in the morning on August 23, 2005. RP 99-100 (11-01-2005).

Detective Ensor testified that based on information obtained from Ms. Sanders, the Port Angeles Police Department located the defendant's car and eventually the defendant at an apartment complex located at 2301 W. 18th Street in Port Angeles, Washington. RP 114-115 (11-01-2005). Detective Ensor conducted a tape recorded interview with the defendant at the Port Angeles Police Department at 3:02 p.m. on August 23, 2005. RP 117-118 (11-01-2005). The defendant told Detective Ensor that he had been living at 1123 Park Avenue since November or December of 2004 and that he was aware that he was not to have any contact with Charlene Sanders. RP 118 (11-01-2005). The defendant told Detective Ensor that late in the evening on August 22, 2005 when he returned to the residence at 1123 Park Avenue after being gone he and Ms. Sanders got into an argument about some damaged cell phones that the defendant found in the shed and that he was really hot about what was going on. RP 126-127

(11-01-2005). The defendant told Detective Ensor that no one was getting anywhere as far as who was responsible for the damage to the cell phones, that Ms. Sanders was flying off the handle and that she was mad. RP 128-129 (11-01-2005). The defendant told Detective Ensor that he and Ms. Sanders were making derogatory comments to each other. RP 129 (11-01-2005). The defendant told Detective Ensor that Ms. Sanders went into the residence, and that she slammed and locked the door. RP 130 (11-01-2005). The defendant told Detective Ensor that Ms. Sanders came out of the residence, made more comments to him, that what she said made him even madder and he left but later returned to the residence. RP 131 (11-01-2005). The Defendant told Detective Ensor that when he returned to the residence, he nudged the door open with his shoulder and went into the residence. RP 131, 132 (11-01-2005). The defendant told Detective Ensor that after he nudged the door open there was a confrontation in the kitchen between him and Ms. Sanders, that Ms. Sanders was backing up and away from him and landed on the bed in the master bedroom, that he did pick up a piece of the splintered door from the floor but only because it was blocking the door from opening all the way, that he held onto it for a few seconds and then put it on kitchen countertop. RP 133-134, 138 (11-01-2005). The defendant told Detective Ensor that while he had that piece of wood in his hand, he was yelling a lot of

derogatory terms to Ms. Sanders. RP 134 (11-01-2005). The defendant told Detective Ensor that while they were in the bedroom, Ms. Sanders was attempting to kick and hit at him and he was blocking her kicks and punches at him; the defendant denied ever pushing or hitting Ms. Sanders. RP 140 (11-01-2005). The defendant said Ms. Sanders had made contact with him a couple of times but he was able to swoosh the contact off. RP 140 (11-01-2005). The defendant denied accidentally punching or hitting Ms. Sanders. RP 140 (11-01-2005). The defendant told Detective Ensor that he left 1123 Park Avenue around 2 or 3 in the morning but agreed that it could have been sometime around midnight. RP 143-144 (11-01-2005). The defendant told Detective Ensor that he went to Jason's from 1123 Park Avenue, was there for a couple of hours and then went to Ish's house to sleep, arriving at Ish's house about 2 or 3-ish. RP 145-146 (11-01-2005). The Defendant told Detective Ensor that he had keys to get into the residence and that they were in his car, which was just outside the residence with the engine running. RP 147 (11-01-2005).

On November 3, 2005, the jury returned a verdict of guilty on Count I, Burglary in the First Degree- Domestic Violence, Count II, Assault in Violation of the No-Contact Order- Domestic Violence, and Count III, Felony Harassment-Threat to Kill-Domestic Violence. RP 7-8 (11-03-2005).

D. ARGUMENT

1. Burglary in the First Degree

RCW 9A. 52.020 states:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

In *State v. Jacobs*, 101 Wn.App. 80, 2 P.3d 974 (2000), the defendant appealed his felony conviction for violating a domestic violence no-contact order. Several domestic violence no-contact orders were issued prohibiting Jacobs from having contact with James Russell; no residence was listed in the no-contact order. *St. v. Jacobs*, 101 Wn.App. at 82. Jacobs was arrested for violation of a no-contact order domestic violence after being found in Russell's residence. *St. v. Jacobs*, 101 Wn.App. at 84. The Court of Appeals, Division II, held that because Jacobs was at Russell's residence and because Jacobs admitted to having contact with Russell, Jacobs was not lawfully at the residence despite Russell's invitation to Jacobs to come to the residence.

Although *Jacobs, supra*, is a search seizure case, the analogy to the instant case is compelling. There was no provision in the no-contact

order in Jacobs prohibiting Jacobs from being at a certain residence or within a specified distance from a certain residence. Similarly, there is no such provision in the instant case. However, in the instant case the 1123 Park Avenue address is listed in the no-contact order. Jacobs was invited by Russell to come to his residence. Similarly, the defendant in the instant case was invited by Ms. Sanders to stay at the 1123 Park Avenue residence. Jacobs knew he was not supposed to have contact with Russell. Similarly, the defendant in the instant case knew he was not supposed to have contact with Ms. Sanders. Jacobs was unlawfully at Russell's residence despite Russell's invitation. Similarly, the defendant, in the instant case was unlawfully at the 1123 Park Ave. residence despite Ms. Sander's invitation. Not only was the defendant, in the instant case, unlawfully at the Park Avenue residence, he entered and remained unlawfully to assault and harass Ms. Sanders.

In *State v. Stinton*, 121 Wn.App, 569, 574, 89 P.3d 717 (2004), the court stated that a person can violate a protection order by "knowingly" violating **one or more** of it's provisions that expressly protect the victim from future domestic violence by the defendant. (emphasis added). The court went on to say that, "The violation of a protection order is a crime of domestic violence and harassment." In

applying a common sense interpretation, the court stated that violation of a protection order is “a crime against a person.”

Direct personal contact with Ms. Sanders inside the residence is a violation that is totally separate from a violation of a provision prohibiting coming to or entering or being within a specified distance of a residence. The no-contact order does not have to prohibit the defendant from coming to or entering or being within a specified distance of a residence; entering that residence and having contact with Ms. Sanders inside that residence is a direct violation of the no-contact order and suffices to establish a burglary because the defendant entered with the objective intent to commit a crime therein. See *Stinton*, 121 Wn.App. at 573.

RCW 26.50.110 states in pertinent part:

(1) Whenever an order is granted under this chapter . . . and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, **or** of a provision excluding the person from a residence, workplace, school, or day care, **or** of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, . . . (Emphasis added).

In the instant case, the defendant knew of the no-contact order and intended to violate its provision restraining him from making harassing contact with Ms. Sanders. When the defendant entered the house, by breaking down the door, on August 23, 2005 he intended to have contact

with Ms. Sanders. Once the contact occurred, the defendant remained unlawfully thus fulfilling the “remaining unlawfully” element of Burglary in the First Degree.

While the defendant perpetrated his assault on Ms. Sanders, she screamed at the defendant telling him to leave her alone, to get away from her, and to stop kicking her. Any invitation he had to enter the house was, at that time, revoked. Not only did the defendant break down the door with the intent of having harassing contact with Ms. Sanders, he left the house to tell his buddies to leave because the cops had been called, and re-entered the house to continue the harassing contact. Clearly, he “remained unlawfully and, upon re-entry, entered unlawfully.

The court may specifically tailor a protection order to the petitioner’s circumstances by including multiple provisions forbidding the respondent from a variety of misconduct toward the petitioner. RCW 26.50.060; *Spence v. Kaminski*, 103 Wn.App. 325, 331, 12 P.3d 1030 (2000). Thus, the respondent may violate a protection order by disobeying one **or** several of multiple provisions. (Emphasis added). See RCW 26.50.110(1) listing, in the disjunctive, the ways a protection order can be violated.

State v. Stinton, 121 Wn.App. at 575.

In *Stinton*, the protection order prohibited the respondent from harassing contact with the petitioner and excluded him from the residence.

In the instant case, the defendant was prohibited from having contact with Ms. Sanders in person; and/or by telephone; and/or through any intermediary, **in any way** except through an attorney of record, a law enforcement officer, or an officer of the court. (emphasis added). It is a matter of common sense that if the defendant cannot have contact in any way with Ms. Sanders, he cannot have contact with her at her residence, whether his name is on the rental agreement or not. Prohibited contact means prohibited contact.

By challenging the sufficiency of evidence to support the element of “enters or remains unlawfully” in the first degree burglary prosecution, the defendant admits the truth of the State’s evidence and all reasonable inferences therefrom. *State v. Salinas*, 119 Wn.2d 192, 201 829 P.2d 1068 (1992). When reviewing evidence for sufficiency, the test is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 W.2d 216, 221, 616 P.2d 628 (1980). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). “In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the

State's case." *State v. Dejarlais*, 88 Wn.2d 297, 305, 944 P.2d 1110 (1997), *affirmed*, 136 Wn.2d 939, 969 P.2d 90 (1998).

a. Unlawful Entry

To establish unlawful entry, the State must introduce evidence that the entrant was "not then licensed, invited, or otherwise privileged to so enter or remain." *State v. Schneider*, 36 Wn.App. 237, 241, 673 P.2d 200 (1983).

In *Schneider*, the entrant claimed that she did not unlawfully enter her estranged husband's residence because the house was community property and she had an proprietary interest in it. The court disagreed stating that the burglary statute was designed to protect the dweller; the question is one of occupancy and not ownership. *State v. Schneider*, 36 Wn.App. at 241. The *Schneider* court considered one of several factors to determine that the entry was unlawful: one being the method of entry, i.e., breaking the door latch and said that was inconsistent with permissive entry. *Id.*

In the instant case, the defendant "nudged" the door splintering the door jam; that is inconsistent with permissive entry. The defendant knew there was a valid no-contact order against him and he subjectively knew he was entering Ms. Sander's residence unlawfully. Even if Ms. Sanders had invited the defendant to her home prior to or on August 23, 2005 he

exceeded the invitation's limit when he went to the bedroom, assaulted her, dragged her into the kitchen while she was screaming at him to get away from her, to leave her alone, and to stop kicking her. Ms. Sanders did not invite the defendant into her home to assault her; rather, she was providing a place for him to stay albeit in direct contradiction to a no-contact order.

“The test, for purposes of determining in whom the ownership of the premises should be laid in an indictment for burglary, is not the title, but the occupancy or possession at the time the offense was committed.” *State v. Klein*, 195 Wash. 335, 342, 80 P.2d 825 (1938).

In the instant case, Ms. Sanders was in possession of and occupying the residence the defendant unlawfully entered and unlawfully remained within with intent to commit a crime against Ms. Sanders, i.e. make contact with her for the sole purpose of assaulting her. The defendant's unlawful entry and unlawful remaining are evidenced by the fact that he left his car running outside the residence. The defendant was not planning on staying at that residence any longer than it took to assault and threaten to kill Ms. Sanders; he fled and hid when she called the police.

Washington courts have adopted a case-by-case approach in determining whether a limitation on or revocation of a privilege to be on

the premises may be inferred from the circumstances of the case. *State v. Miller*, 90 Wn.App. 720, 727, 954 P.2d 925 (1988).

The instant case is fact driven. The fact that Ms. Sanders allowed the defendant to be in the home is irrelevant; there was a no-contact order in effect. Each and every time the defendant entered the home, he was in violation of the no-contact order unless he could be in the home and avoid contact with Ms. Sanders. As long as the defendant remained in the home and had contact with Ms. Sanders, he continued to violate the no-contact order. The defendant could not be in that very small house without having contact with Ms. Sanders. Assuming the defendant did have a license to enter the home, he could do so only if he did not have contact with Ms. Sanders. If the defendant entered the home and contact with Ms. Sanders was unavoidable, he was in violation of the no-contact order. The no-contact order created a safety zone around Ms. Sanders. However, it was Ms. Sanders, not the zone that was being protected. See *State v. Spencer*, 128 Wn.App. 132-137-8, 114 P.3d 1222 (2005). Violating the no-contact order exhibits extraordinary disregard for the law.

b. Unlawful Remaining

The unlawful remaining concept is intended primarily for situations in which the initial entry to a building is lawful, but the defendant either exceeds the scope of the license or privilege to enter, or

the license is impliedly or expressly terminated; unlawful remaining can occur when entry is unlawful as well. *State v. Allen*, 127 Wn.App. 125, 133, 110 P.3d 849 (2005).

In the instant case, the initial entry into the house was not lawful because the defendant could not enter the house without having contact with Ms. Sanders. A victim cannot waive a domestic violence protection order by consent. *State v. Dejarlais*, 88 Wn.App. 297, 299, 944 P.2d 1110 (1997), **affirmed** at 136 Wn.2d 939, 969 P.2d 90 (1998). Furthermore, when Ms. Sanders screamed at the defendant telling him to leave her alone, to get away from her, and to stop kicking her, any possible invitation or privilege the defendant might have had to enter that home was expressly terminated. The defendant not only entered unlawfully, he remained unlawfully.

The no-contact order prohibited the defendant from having any contact with Ms. Sanders. Even if Ms. Sanders consented to earlier contacts or to the defendant's presence in her home, those invitations and repeated acquiescence to the defendant's presence constituted neither a blanket consent nor waiver of the order's terms. The defendant's assault of Ms. Sanders on August 23, 2005 was not consensual, which was clearly evidenced when she screamed at the defendant telling him to get away from her, to leave her alone, and to stop kicking her. Telling the

defendant to get away from her and leave her alone was sufficient to terminate the invitation; Ms. Sanders did not have to tell the defendant to leave in any words other than those she used.

Although Ms. Sanders gave the defendant permission to be in the home, she did not have the authority to allow him to violate the terms of the no-contact order. Even with Ms. Sander's permission, the defendant was barred by law from being there; the no-contact order prohibited him from having **any** contact with her. Thus, the defendant unlawfully entered the home and unlawfully remained in the home. Furthermore, the defendant exceeded any license or invitation to enter the home when he entered with the sole intent of assault Ms. Sanders. Likewise, any license or invitation was revoked by her resistance to his assault. In addition, the defendant subjectively knew he was entering what he called his own home unlawfully.

c. Legislative Intent and Public Policy

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and

practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

RCW 10.99.010

Finding – 1991 c 301: “The legislature finds that:

The collective costs to the community for domestic violence include the systematic destruction of individuals and their families, lost lives, lost productivity, and increased health care, criminal justice, and social service costs.

Children growing up in violent homes are deeply affected by the violence as it happens and could be the next generation of batterers and victims.

...

Given the lethal nature of domestic violence and its effect on all within its range, the community has a vested interest in the methods used to stop and prevent future violence. ...”

Washington Laws, 1991, Ch. 301, §1

RCW 10.99.040 states in pertinent part:

(2)(a) Because of the likelihood of repeated violence directed at those who have been victims of domestic violence in the past, when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having **any** contact with the victim. The jurisdiction authorizing the release shall determine whether that person should be prohibited from having **any** contact with the victim. If there is no outstanding restraining or protective order prohibiting that person from having contact with the victim, the court authorizing release may issue, by telephone, a no-contact order prohibiting the person charged or arrested from having contact with the victim **or** from knowingly coming within, **or** knowingly remaining within, a specified distance of a location. (Emphasis added).

(c) The no-contact order shall also be issued in writing as soon as possible.

Identifying a crime as a domestic violence crime does not itself alter the elements of the underlying offense; rather it signals the court that the law is to be equitably and **vigorously** enforced. *State v. Goodman*, 108 Wn.App. 355, 30 P.3d 516, *review denied*, 145 Wn.2d 1036, 43 P.3d 20 (2001). (emphasis added.)

An important purpose of the residential burglary and protection order statutes is to protect one's personal safety and prevent violence in the sanctity of the home. RCW 9A.52.025(1); 26.50.060(1)(a)(b). Sanctions against residential burglaries provide heightened protection for

crimes committed inside a home. *State v. Stinton*, 121 Wn.App. at 577.

The Domestic Violence Protection Act authorizes the issuance of protection orders to restrain a person from committing domestic violence, from entering a home or workplace, and from contacting another person.

Id. “According to the Legislature, ‘domestic violence, including violations of protective orders’ is expressly a public, as well as private, problem.”

Id. citing *State v. Dejarlais*, 136 Wn.2d 939, 944, 969 P.2d 90 (1998).

The legislative intent in passing domestic violence laws is to reduce the occurrence of domestic violence. Laws of 1992, ch. 111, §. 1. The laws effectuate this intent through attempting to give a domestic violence victim the full protection of the laws. Toward that end, a court order is issued in the hope that this will reduce the abuser’s power over the victim. The rule suggested by *Dejarlais*, would not serve that purpose because a victim of domestic violence would be left legally defenseless after soliciting the presence of or having consensual contact with her abuser.

Indeed, the statute itself demonstrates that the Legislature did not intend to allow only the victim to enforce the protection order. For example: a peace officer shall arrest based upon probable cause of violation, RCW 26.50.110(2); a peace officer may initiate a show cause hearing, former RCW 26.50.110(5) (1992); and a court hearing is required to modify the terms of a domestic violence protection order, RCW 26.50.130.

Legislative intent and public policy dictates that reconciliation and consent should not void a domestic violence protection order.

State v. Dejarlais, 88 Wn.App.297, 302-303, 944 P.2d

1110 (1997).

Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more.

State v. Dejarlais, 88 Wn.App. at 304 citing Laws of 1992, ch. 111, § 1;

State v. Dejarlais, 136 Wn.2d at 944, citing Laws of 1992, ch. 111, § 1.

A domestic violence no-contact order is not vitiated by reconciliation between the abuser and his victim or by the victim's consent to the contact. The defendant both unlawfully entered and unlawfully remained in the home at 1223 E. Park Ave., Port Angeles, Washington on August 23, 2005.

Based on the persuasiveness of the evidence, witness credibility, and conflicting testimony, a rational trier of fact could and did find beyond a reasonable doubt that the defendant unlawfully entered the 1123 Park Avenue residence by breaking down a locked door. At the very least the trier of fact did find that even if Ms. Sanders invited the defendant to enter

the residence, the defendant remained unlawfully because he was prohibited from having contact with Ms. Sanders and his sole purpose in entering was to assault her and threatened to kill her.

2. Same Criminal Conduct

RCW 9.94A.589(1)(a) defines same criminal conduct.

Same criminal conduct means two or more crimes that require the *same criminal intent*, are committed at the same time and place, and involve the same victim. (Emphasis added).

Offenses encompassing the same criminal conduct count as one crime. Same criminal conduct means two or more crimes that require the *same criminal intent*, are committed at the same time and place, and involve the same victim. (Emphasis added).

State v. Ehli 115 Wn.App. 556, 560, 62 P.3d 929 (2003)

Multiple assaults perpetrated against the same victims do not constitute the same criminal conduct for sentencing purposes if the defendant commits the offenses in a sequential manner with time between each offense, as opposed to simultaneously or continuously, thereby allowing the defendant to form a new criminal intent before each assault.

PRP of Rangel, 99 Wn.App. 596, 600, 996 P.2d 620 (2000)

“Same criminal conduct” is narrowly construed to disallow most assertions of same criminal conduct. *State v. Flake*, 76 Wn.App. 174, 180, 883 P.2d 341 (1994).

In *State v. Price*, 103 Wn.App. 845, 856, 14 P.3d 841 (2000), the court said:

All three requirements must be satisfied for a finding of same criminal conduct. Citing *State v. Porter*, Wn.2d 177, 181, 942 P.2d 974 (1997). See *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The State does not dispute that the assault and the harassment involved the same victim, and that the place where the assault and harassment occurred were the same. The assault and harassment were sequential in nature but the intent of each crime was different.

An appellate court will reverse a sentencing court's determination of "same criminal conduct" only if it finds a clear abuse of discretion of misapplication of the law. *State v. Haddock*, 140 Wn.2d 103, 110, 3 P.3d 733 (2000). The Supreme Court has specifically rejected a requirement that the offenses occur simultaneous in order to be the same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997).

In determining the same criminal intent, the court must objectively view each underlying statute and determine whether the required intents are the same or different for each crime. *State v. Hernandez*, 95 Wn.App. 480, 484, 976 P.2d 165 (1999). If the required intents are the same, the

court then objectively views the facts usable at sentencing to determine whether a defendant's intent was the same or different with respect to each crime. *Hernandez*, 95 Wn.App. at 484. When dealing with sequentially committed crimes, this inquiry can be resolved in part by determining whether one crime furthered the other. *Vike*, 125 Wn.2d at 411-12. Even crimes with the same intent will not be considered the "same criminal conduct" if they were committed for different purposes. *Haddock*, 141 Wn.2d at 113. This objective test considers how closely related the crimes are, whether the nature of the criminal objective changed between crimes, and whether one crime furthered the other. *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Whether two or more crimes require the same objective criminal intent can be measured by determining whether one crime furthered another. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Same criminal conduct intent does not mean mens rea, it means the offender's objective criminal purpose in committing the crime. *In re Holmes*, 69 Wn.App. 282, 290, 848 P.2d 754 (1993).

The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively change from one crime to the next? *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). In the instant case, the defendant was able to form a new criminal intent after the assault and before his second criminal act (harassment) because his crimes

were sequential, not simultaneous or continuous. Each crime was separate and distinct.

The first criminal episode ended with the assault. The defendant had time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act (harassment). The defendant in fact went outside the house to tell his friends that the victim was calling the cops and to get out of there. Clearly the defendant was angry because the victim had the gall to call the police. He went back inside, picked up a piece of sharp wood from the broken door jamb and threatened to kill the victim while she was on the phone with the police. The defendant was able to form a new criminal intent before his second criminal act (harassment) because his crimes were sequential, not simultaneous or continuous. See *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1997).

In the instant case, the defendant went into the house and intentionally assaulted Ms. Sanders. He then went outside to tell his friends to leave because she was calling the cops. He then picked up a piece of wood from the shattered door jamb, went back into the house and threatened to kill Ms. Sanders. The defendant had a choice when he went outside after he assaulted Ms. Sanders: he could have jumped into his car as the engine was running, or he could go back into the house and

threatened to kill Ms. Sanders. The defendant chose the latter. He was not done with Ms. Sanders after the assault. Given the fact that he had time to make a choice to cease his criminal activity and leave, he also had time to form the mental state required to commit the harassment. The assault and the harassment were committed for different purposes: the defendant's objective intent in assaulting Ms. Sanders was to harm Ms. Sanders; the defendant's objective intent in committing the harassment was to threaten, frighten and place Ms. Sanders in reasonable fear that he would kill her. The defendant's actions were sequential, he had sufficient time to form two different objective intents. The assault and the harassment were not the same criminal conduct but rather separate and distinct crimes.

In the instant case, the assault and harassment were accompanied by separate objective intents. The defendant completed the assault against Ms. Sanders before commencing the harassment; the defendant did not threaten to kill Ms. Sanders until after the assault was completed. The crimes were sequential and each act was complete in itself and did not depend upon the other or further the other. Each act was a denigration of the Ms. Sanders' integrity and a further danger to Ms. Sanders.

In the instant case the trial court abused its discretion and misapplied the law in finding that the assault (intent to inflict bodily harm)

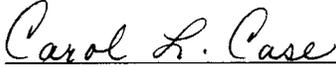
and the harassment (intent to threaten and frighten) were the same criminal conduct. The objective intent of the assault was accomplished before the harassment was perpetrated. Furthermore, the assault did not further the harassment and the harassment did not further the assault.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to reverse the trial court's arrest of judgment, reinstate the jury's verdict on the Burglary in the First Degree Domestic Violence and reverse the trial court's finding that the Assault in Violation of the No Contact Order Domestic Violence and the Harassment Threat to Kill Domestic Violence encompassed the same criminal conduct and remand for resentencing.

DATED this 15th day of March, 2006 at Port Angeles,
Washington.

Respectfully submitted,



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