

NO. 44580-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SOKHA SUONG,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	6
D. ARGUMENT	
I. THE TRIAL COURT’S REFUSAL TO SEVER PROTECTION ORDER VIOLATIONS THE DEFENDANT ALLEGEDLY COMMITTED IN JAIL AFTER HIS ARREST FOR KIDNAPING, BURGLARY AND ASSAULT DENIED THE DEFENDANT A FAIR TRIAL	13
II. THE TRIAL COURT ABUSED ITS DISCRETION UNDER ER 615 WHEN IT EXCLUDED A PERSON FROM TRIAL BECAUSE HE WAS A POTENTIAL REBUTTAL WITNESS	25
III. THE DEFENDANT’S CONVICTIONS FOR VIOLATION OF A PROTECTION ORDER SHOULD BE VACATED BECAUSE THE “TO CONVICT” INSTRUCTIONS FAILED TO INCLUDE ALL OF THE ESSENTIAL ELEMENTS OF THE OFFENSES	27
E. CONCLUSION	32

F. APPENDIX

1. Washington Constitution, Article 1, § 3 33

2. United States Constitution, Fourteenth Amendment 33

3. ER 615 33

4. RCW 26.50.110(1) 34

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Bruton v. United States</i> , 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968)	13
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	27

State Cases

<i>State v. Acosta</i> , 123 Wn.App. 424, 98 P.3d 503 (2004)	21, 22
<i>State v. Arthur</i> , 126 Wn.App. 243, 108 P.3d 169 (2005) (reversed on other grounds <i>State v. Miller</i> , 156 Wn.2d 23, 123 P.3d 827 (2005))	29
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	27
<i>State v. Baldwin</i> , 109 Wn.App. 516, 37 P.3d 1220 (2001)	20
<i>State v. Cotten</i> , 75 Wn.App. 669, 879 P.2d 971 (1994)	14
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	31
<i>State v. Escalona</i> , 49 Wn.App. 251, 742 P.2d 190 (1987)	22-24
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991)	13
<i>State v. Kendrick</i> , 47 Wn.App. 620, 736 P.2d 1079 (1987)	20
<i>State v. Khanteechit</i> , 101 Wn.App. 137, 5 P.3d 727 (2000)	25
<i>State v. Lormor</i> , 172 Wn.2d 85, 257 P.3d 624 (2011)	25, 26
<i>State v. Mitchell</i> , 117 Wn.2d 521, 817 P.2d 898 (1991)	13
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	21

<i>State v. Pogue</i> , 104 Wn.App. 981, 17 P.3d 1272 (2001)	18, 19, 24
<i>State v. Salas</i> , 74 Wn.App. 400, 873 P.2d 578 (1994)	27
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	27
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	13

Constitutional Provisions

United States Constitution, Fourteenth Amendment	13
Washington Constitution, Article 1, § 3	13, 24

Statutes and Court Rules

ER 403	20, 21
ER 404	17, 23
ER 615	25, 26
RCW 10.99	30
RCW 26.50.110	28, 29

Other Authorities

5 Karl B. Tegland, <i>Washington Practice, Evidence</i> § 114 (3d ed. 1989)	17
M. Graham, <i>Federal Evidence</i> § 403.1 (2d ed. 1986)	20

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's refusal to sever protection order violations the defendant allegedly committed in jail after his arrest on kidnaping, burglary and assault charges denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. The trial court abused its discretion under ER 615 when it excluded a person from the courtroom because he was a possible rebuttal witness for the defense.

3. The failure of the "to convict" instructions to allege each and every element of the protection order charges violated the defendant's right to force the state to prove each and every element beyond a reasonable doubt under Washington Constitution, Article 1, § 3, and United States Constitution, Fourth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment if it refuses to grant a defense request to sever charges arising out of conduct the defendant allegedly committed while in jail on his original charges when the admission of that evidence was not relevant in the trial on the original charges and when that evidence was prejudicial to the point it denied the defendant a fair trial on the original charges?

2. Does the trial court's action excluding a possible rebuttal witness from the entire trial under ER 615 constitute an abuse of discretion?

3. Does a "to convict" instruction for violation of a protection order violate a defendant's right to force the state to prove each and every element of the crime charged beyond a reasonable doubt under Washington Constitution, Article 1, § 3, and United States Constitution, Fourth Amendment if it fails to require that the state prove that the underlying protection order was issued under RCW 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34?

STATEMENT OF THE CASE

Factual History

Just before midnight on the evening of Sunday, August 13, 2012, 26-year-old Jasmine Bogle went to the residence at 2604 SE Blairmont in Vancouver to begin her graveyard shift as an LPN taking care of two disabled adults. RP 126-127¹. Ms Bogle had returned that day from a four day rafting trip with friends. RP 146-148. About 15 minutes after she arrived at the house the care provider for the swing shift left the residence and Ms Bogle began her normal routine. RP 148. At the time the two residents were asleep. RP 184

A few minutes after her co-worker left, Ms Bogle heard someone knock at the front door. RP 148-152. In fact, it was the defendant. *Id.* She had met him the previous February through a mutual friend and they had been involved in a romantic relationship together until a few weeks previous when she told him she did not want to see him anymore. RP 122-126, 135-136. The defendant asked if he could “hang out” with her and she told him that he could not and that he would have to leave. RP 148-152. He then began crying and asked for a kiss and a hug. *Id.* She refused the former but did give him a hug, telling him he that would have to leave and not return. *Id.*

¹The record on appeal includes five volumes of continuously numbered verbatim reports referred to herein as “RP [page#].”

The defendant left. *Id.* After he did Ms Bogle called her mother and told her what had happened. RP 155.

A little while later Ms. Bogle went out to the garage to open the door and try to get some fresh air into the house. RP 155-159. As she did she was startled to see the defendant standing in the driveway. *Id.* When she saw him she said, "I told you to leave, why are you still here?" RP 155-157. She again ordered him to leave, which he did. *Id.* As the defendant walked away Ms Bogle closed the garage door and again called her mother to tell her what had happened. RP 159.

A little while later Ms Bogle again heard someone knocking at the front door. RP 160-162. As she approached she saw through the window that it was the defendant. *Id.* She opened the door to tell him to leave. *Id.* However, when she opened the door he forced his way into the house and grabbed her around the neck from behind with his arm, cutting off her breath. *Id.* He then dragged her back into the kitchen and started opening drawers with his free hand. RP 167. According to Ms Bogle the defendant eventually found a pair of scissors, held it up against her throat and said "Bitch, if you don't do exactly what I fucking tell you to do, I'm going to fucking stab you." *Id.* During the initial part of the incident Ms Bogle had attempted to resist. RP 161-162. However once they got into the kitchen and the defendant threatened her with the scissors she began to talk to him to try to calm him

down. RP 173-174. Eventually he did calm down and drop the scissors on the floor. *Id.* Ms Bogle was eventually able to get the defendant to leave by telling him that she would meet him at her parents house after her shift and that she would not tell anyone about what had happened that night. 176-179.

Once the defendant left Ms Bogle locked the door, called her parents and told them what had happened. RP 180. According to both of her parents Ms Bogle was hysterical during this third conversation with them. RP 312-314, 553-557. Ms Bogle's father immediately called the police, after which he and his wife got into their car and drove to Ms Bogle's location. RP 558-560. In fact, the police had already arrived and were taking a statement and gathering evidence. RP 316-318. During her statement Ms Bogle failed to tell the police about seeing the defendant when she opened the garage door. RP 237-238. In addition, when the police couldn't find the scissors Ms Bogle told them that she had put them back into the drawer. RP 245. Indeed, the only thing the police saw that was disturbed in the entire house was the carpet just inside the front door. RP 162. Ms Bogle later stated that after the incident she did not see any injuries on herself and her hair was not messed up. RP 118-119.

About an hour after the police arrived they left the scene. RP 316-318. Ms Bogle's mother remained in the house with her and Mr. Bogle began searching the neighborhood for the defendant. RP 319-320. Although

the police had been unable to locate him, Mr. Bogle did spot him returning to the house, at which point Mr. Bogle physically restrained the defendant and had his wife call the police. RP 560-566. They returned within a few minutes of the call, arrested the defendant, and took him to the Clark County Jail where he remained until trial some seven months later. *Id.*

The defendant appeared in court the day after his arrest, at which time the prosecutor personally served him with a pretrial no contact order the court signed prohibiting him from having contact with Ms Bogle. RP 397-401; Trial Exhibit No. 5. Later that month the defendant acknowledged service of an Order of Protection issued in *Bogle v. Suong*, Clark County No. 12-2-06477-0. Trial Exhibit No. 4. This order also prohibited the defendant from having any contact with Ms Bogle. *Id.* In spite of these two orders the defendant called Ms Bogle or sent her letters or post cards on ten different occasions between August 23, 2012 and October 11, 2012. RP 211-220. The state later conceded that each one of these communications was romantic in nature and was in no way an attempt to influence her testimony or communicate a threat. RP 53-56.

Procedural History

By information filed August 16, 2012, the Clark County Prosecutor charged the defendant Sokha Suong with one count each of first degree kidnaping, first degree burglary, second degree assault and felony harassment,

all allegedly committed on August 14, 2012. CP 1-3. The state further claimed that the defendant committed each offense while armed with a deadly weapon (scissors) and that each crime constituted a domestic violence offense. *Id.* On December 20, 2012, a little more than four months later, the Clark County Prosecutor filed an Amended Information adding 10 counts of Violation of a Protection Order, alleging that the defendant had contact with Jasmine Bogle by phone, letter or postcard on 10 separate occasions between August 23, 2012, and October 11, 2012, while he was an inmate at the Clark County Jail. CP 25-29.

The defense later filed a motion to sever these new misdemeanor offenses, arguing that they involved separate witnesses, separate issues and that a joint trial would allow the state to introduce irrelevant evidence on the original charges that was so manifestly prejudicial as to outweigh the concern for judicial economy. CP 46-43; RP 49-53. The defense later filed a supplemental motion to sever. CP 59-62. At the hearing on the defendant's motion to sever the court enquired of the state whether or not it was claiming that any of the contacts or communications constituting the alleged no contact order violations involved threats or acknowledgments of wrongdoing. RP 53-56. The state acknowledged that it was making no such claim and that the contacts were all non-threatening and romantic in nature. *Id.* Although the trial court found that both sets of charges involved fundamentally different

conduct and separate witnesses, and that the conduct constituting the protection order violations had little relevance to the original charges, the court none the less denied the motion to sever. 57-61.

On February 11, 2013, the parties appeared for trial and the defendant unsuccessfully renewed the motion to sever. CP 65-66. The parties then proceeded with voir dire, choosing a jury of 12 with one alternate. CP 78; 87-92. Following the prosecutor's opening statements, the court determined that one of the jurors who had actually been stricken had returned to the courtroom and been sworn in as part of the panel and that the juror who had actually been chosen in that place had left the courthouse following voir dire. RP 78, 95, 100-107. At that point the court gave the defense the option of (1) having the alternate juror replace the juror who had been improperly included in the panel, or (2) moving and receiving a mistrial. RP 100-107. The defendant then moved for a mistrial, which the court granted, instructing the parties to return the next day to begin voir dire with a new venire. *Id.*

The next day the parties again appeared, at which time the defense moved for dismissal arguing double jeopardy based upon the previous day's mistrial. RP 108-112. The court denied the motion, as well as a third motion by the defense to sever the no contact order charges. *Id.* The parties then proceeded with voir dire and opening statements. RP 112-113. During direct testimony of its first witness Jasmine Bogle, the state moved that the court

exclude the defendant's investigator, a Mr. Morrow, from the courtroom as he was a defense witness and the court had previously ordered the exclusion of witnesses. RP 143. The prosecutor stated the following in his oral motion to exclude Mr. Morrow from the courtroom:

MR. HAYES: I do see the Defense investigator present in the courtroom, Mr. Morrow, who I do believe is a potential Defense witness from speaking with Counsel, even though it hasn't been listed on any witness list. I think he has to be excluded if he's going to be called, potentially, in the Defense's case. I think the response from the Defense will be that, well, he would just be offered as a rebuttal witness, but every witness they call is a rebuttal to something the State has put on, and I think they have to play by the same rules the State does. If he – chance they're going to testify, they can't be in court, listening to the other testimony.

RP 142-143.

The defense responded that it had not endorsed Mr. Morrow as a witness, that he was assisting the defense in the presentation of its case just as the chief investigating officer sitting next to the prosecutor was, and that at most the defense might call him solely in rebuttal. RP 143. The defense attorney's exact words were as follows:

MR. BYRD: He hasn't been excluded in any of the proceedings I've been in, Your Honor. He's my investigator. He was present during the interview process. He's not anticipated to be a witness, although, contrary to what Counsel claims I asserted to him, the nature of rebuttal is just that. I don't know if any rebuttal will be necessary in this proceeding.

RP 143.

At this point the defense and judge engaged in a colloquy as to

whether or not the defense investigator was functioning as “a person whose presence . . . was reasonably necessary to the presentation of [the defendant’s] cause,” as was the chief investigating officer who was sitting next to the prosecutor. CP 143-144. The defense argued that he was, however the court disagreed. *Id.* The following is the colloquy on this issue:

JUDGE LEWIS: Well, let’s take a look, here.

(Prosecutor appears to pour water for the witness.)

WITNESS: Thank you.

JUDGE LEWIS: Alright. Well, he wasn’t listed as a witness, so – but if you think you might call him, under 615, he would be allowed to be in only if his presence was shown by you to be reasonably necessary to the presentation of your case, and I haven’t heard that, so if you think you might call him as a witness, he’ll need to step out.

MR. BYRD: Well, his – his presence, as indicated, he does assist with the proceeding as far as getting relevant pages of transcripts, etcetera, in anticipation of cross-examination.

JUDGE LEWIS: I still don’t see why he would need to be present in the courtroom. He’s not sitting up here assisting you as a – as an officer or someone might be. That’s the reason they’re allowed to come in. If an officer just sits in the back and watches, I wouldn’t allow the Prosecutor to do that either. So, you haven’t made the necessary showing to show that he shouldn’t be excluded, so if you might call him as a witness, then he needs to step out. If you don’t have any plans to call him as a witness, you won’t be calling him as a witness, then he can stay in. Previously, I asked you whether he might be a potential witness because I wanted to ask the jurors about him, and you said he wasn’t going to be. But if you think he might be, then he needs to step out.

RP 143-144.

Based upon this ruling the court ordered Mr. Morrow out of the courtroom. RP 145.

During the trial the state called fifteen separate witnesses two of whom the state later recalled. RP 121-572. They testified to the facts contained in the preceding factual history. *See* Factual History. The state then rested its case and the defense moved for dismissal of all of the felony charges. RP 579. The court granted that motion as to the kidnaping charge. RP 579-585. The court then granted the state's request to instruct the jury on the lesser included offense of unlawful imprisonment over the defendant's objection. RP 588-589. At this point the defense rested without calling any witnesses and the court instructed the jury. RP 605, 606-640; CP 98-143.

The court's "to convict" instructions on the protection order violation charges were identical except as to the date of occurrence and the count number. CP 127-136. They state as follows:

To convict the defendant of the crime of Violation of a Court Order as charged in Count [#], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about [date], 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 the said date, the defendant knowingly violated a restraint provision of the order prohibiting contact with a protected party; and

(4) That the defendant's act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 127-137.

Following argument by counsel the jury retired for deliberations, which ran for the remainder of that day and then resumed the next day. RP 640-678, 684-689. Eventually the jury returned with verdicts of "guilty" on each charged count. CP 145-163. However, the jury returned the state's deadly weapon claims as unproven and special verdicts that the defendant had committed this assault by strangulation and not by threat with the scissors. *Id.* The jury also returned a special verdicts finding that all of the crimes were domestic violence offenses. *Id.*

The court later sentenced the defendant within the standard range on the felonies and 364 days on each misdemeanor. RP 199-212. The court ordered that the felony sentences run concurrently with each other, that the misdemeanor sentences run concurrently to each other, but that the misdemeanor sentences run consecutive to the felony sentences. RP 199-212, 213-218. The defendant thereafter filed timely notice of appeal. CP 221-222.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO SEVER PROTECTION ORDER VIOLATIONS THE DEFENDANT ALLEGEDLY COMMITTED IN JAIL AFTER HIS ARREST FOR KIDNAPING, BURGLARY AND ASSAULT DENIED THE DEFENDANT A FAIR TRIAL.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of the right to a fair trial, a defendant charged with a crime is entitled to a severance of counts if the joinder of the counts is “so manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991) (failure to grant severance held harmless beyond a reasonable doubt).

In determining whether or not the trial court's refusal to grant a severance of counts denied the defendant the right to a fair trial, the court considers the following factors:

Factors that tend to mitigate any prejudice from a joinder of counts

include: (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime. These same factors are applied by reviewing courts to determine if a trial court's denial of a severance motion was unduly prejudicial.

State v. Cotten, 75 Wn.App. 669, 687, 879 P.2d 971 (1994) (citations omitted).

As the court instructs in *State v. Cotton*, the first factor to consider when evaluating the trial court's refusal to sever counts is "the strength of the state's evidence on each count." In this case, the state's evidence was much stronger on the misdemeanor no contact order violation counts than it was on the original felony charges arising out of the initial incident from which the defendant was arrested. By contrast, the evidence on the original charges was equivocal and relied almost exclusively upon Ms Bogle's claims of what had happened. Indeed, as the following points out, the physical evidence and Ms Bogle's actions were in many ways contradictory.

First, although Ms Bogle claimed that she was the victim of a violent physical attack by the defendant she testified that she didn't see any injuries on herself that evening. In fact she admitted that her hair was not even messed up. Second, although she claimed at trial that there had been three separate contacts with the defendant that evening she only told the police about two of them. Third, although she described a violent attack starting at

the front door and continuing into the kitchen, the only physical evidence of it was a mused up carpet inside the front door. Fourth, although Ms Bogle claimed the defendant rummaged though the kitchen drawers until he found a pair of scissors and then threatened her with them before he dropped them to the floor, she for some reason later picked them up and put them back in the drawer before the police arrived. Thus, in this case, the refusal to sever allowed the state to bolster the relative weakness of the original charges with the stronger though irrelevant evidence of the subsequent no contact order violations.

The second factor is the clarity of defense on each set of counts. In this case, the defense on the felony charges was that they simply didn't occur. By contrast, there was little defense to the no contact order charges other than attempting to point out errors in the admission of the state's documentary evidence. In fact there was little defense to the misdemeanor no contact order charges. Thus, by failing to sever the counts in this case, the court made it difficult for the jury to independently review the evidence from the two different sets of offenses charged.

The third factor is “ the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately.” In this case the trial court gave the following instruction on this point:

INSTRUCTION NO. 4

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 104.

The deficiency in this instruction lies in its failure to instruct the jury that the evidence associated with the second set of events (the no contact order violations) was not evidence to be used in determining whether or not the state had met its burden on four felony charges. The instruction fails to tell the jury which evidence was associated with a specific group of counts and what evidence was not associated with a specific group of counts. Thus, the jury was free to use the evidence from those charges occurring after the defendant was in jail as evidence of bad intent for the counts arising from the initial incident. Thus, Instruction No. 4 falls short in attempting to get the jury to parse out which evidence it could consider in the separate groups of offenses charged.

The fourth factor this court should consider in determining the issue of severance of counts is “the admissibility of the evidence of the other crime.” As concerns this fourth factor, it should be noted that none of the evidence concerning the no contact order violations would have been independently admissible in a trial on the original felony charges because it would have been evidence admitted solely for the purpose of proving the

defendant's propensity to commit crimes.

It is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a "criminal type," and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of a mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

Similarly, Tegland goes on to note that "the courts are reluctant to allow the State to prove the commission of a crime by evidence that the

defendant was associated with persons or organizations known for illegal activities.” 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court’s permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state’s request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: “It’s true that you have had cocaine in your possession in the past, isn’t it?” The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant’s unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn’t know the cocaine was in the car. Thus, the

prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weigh the prejudicial effect of that evidence under ER 403.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or

reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER

403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) also explains why evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have

influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." See *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." See *State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, review denied, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on

this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, “[e]ach case must rest upon its own facts,” [*State v. Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State’s case and the logical relevance of the statement, leads to the conclusion that the court’s instruction could not cure the prejudicial effect of [the alleged victim’s] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona’s motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arose in the minds of the jury in the case at bar when the court denied the defendant’s motion to sever counts and allowed the state to present evidence from two separate groups of offenses whose only connection was the same complaining witness when those two sets of events occurred at disparate times. Thus, under the fourth criteria set out in *Cotton*, the trial court’s refusal to grant the motion to sever denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

II. THE TRIAL COURT ABUSED ITS DISCRETION UNDER ER 615 WHEN IT EXCLUDED A PERSON FROM TRIAL BECAUSE HE WAS A POTENTIAL REBUTTAL WITNESS.

Under ER 615 a court has discretion to exclude certain persons from a trial proceeding. This rule states:

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615.

The decision whether or not to exclude a person under this rule lies within the sound discretion of the trial court as it does with the implementation of other rules of evidence and will not be disturbed absent a showing of an abuse of that discretion. *State v. Lormor*, 172 Wn.2d 85, 257 P.3d 624 (2011). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, supra. Thus, a court abuses its discretion if it categorically refuses to consider an alternative allowed under a court rule or the law. *State v. Khanteechit*, 101 Wn.App. 137, 5 P.3d 727 (2000) (categorical refusal to consider a sentencing alternative available under the law and the facts constitutes an abuse of discretion).

For example, in *State v. Lormor, supra*, the trial court excluded the defendant's four-year-old terminally ill daughter from the courtroom because she was on a respirator and was making a number of sounds that one would expect from a four-year-old. The defense then appealed, arguing in part that the trial court abused its discretion in excluding her from the courtroom under ER 615. However, the Washington Supreme Court disagreed, holding as follows:

Under an abuse of discretion standard, the record establishes the basis for the removal of Lormor's daughter and was not an abuse of discretion. The trial court judge discussed the removal on the record and gave his reasons for doing so. The girl's ventilator was loud, which could understandably interrupt court proceedings. Moreover, Lormor's daughter was making other noises, which, while entirely appropriate for her age and likely necessary to her well-being, the trial court judge felt would be distracting during trial. The record is adequate for review and nothing suggests it was manifestly unreasonable to exclude this young child.

State v. Lormor, 172 Wn.2d at 629-630,

In the case at bar the trial court abused its discretion when it excluded the defendant's investigator for two reasons. First, the defense had not endorsed the investigator as a witness in the case. The second reason was that the defendant's attorney had made a sufficient showing under ER 615(3) that he utilized his investigator to reasonably help in the presentation of his case in the same manner that the state used its chief investigating officer. Thus the trial court abused its discretion when it excluded the defendant's

investigator from attending the trial.

III. THE DEFENDANT'S CONVICTIONS FOR VIOLATION OF A PROTECTION ORDER SHOULD BE VACATED BECAUSE THE "TO CONVICT" INSTRUCTIONS FAILED TO INCLUDE ALL OF THE ESSENTIAL ELEMENTS OF THE OFFENSES CHARGED.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and the United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Under this rule, the court must correctly instruct the jury on all of the elements of the offense charged. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). The failure to so instruct the jury constitutes constitutional error that may be raised for the first time on appeal. *Id.*

For example, in *State v. Salas*, 74 Wn.App. 400, 873 P.2d 578 (1994), the defendant was charged with vehicular homicide under an information alleging all three possible alternatives for committing that offense. At the end of the trial, the court, without objection from the defense, instructed the jury that to convict, the state had to prove that (1) the defendant drove while intoxicated, and (2) that the defendant's driving caused the death of another person. The court's instruction did not include the judicially created element

that intoxication be a proximate cause of accident that caused the death.

Following deliberation, the jury returned a verdict of guilty, and the defendant appealed, arguing that the court's instructions to the jury violated his right to due process because it did not require that the state prove all the elements of the offense charged. The state replied that the defendant's failure to object to the erroneous instruction precluded the argument on appeal. However, the Court of Appeals rejected the state's argument, holding that (1) the court had failed to instruct on the judicially created causation element, and (2) the defense could raise the objection for the first time on appeal because it was an error of constitutional magnitude. Thus, the court reversed the conviction and remanded for a new trial.

In the case at bar, the state charged the defendant with violation of a no contact order under RCW 26.50.110(1)(a). This statute states:

(1)(a) Whenever an order is granted under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(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).

As this statute clarifies, in order to sustain a verdict of guilty the state has the burden of proving that the defendant violated one of the specific types of protection orders. The decision in *State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005) (reversed on other grounds *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005)), illustrates this point.

In *Arthur* the defendant was convicted of violation of a no contact order under RCW 26.50.110(1) with two prior convictions of RCW 26.50.110 being the facts that elevated the offense to a felony under RCW 26.50.110(5). The defendant then appealed, arguing that the state had failed to present substantial evidence that the two prior convictions were for violations of no contact orders of the types listed in RCW 26.50.110. The Court of Appeals agreed and reversed, finding that both the current offense as well as the prior offenses must be for violations of a no contact order entered under the types of orders listed in RCW 26.50.110.

In the case at bar the information alleges that the defendant violated a no contact order issued under RCW 10.99 or 26.50. However, the “to convict” instruction did not require that the state prove that the no contact order violated had been issued under RCW 10.99, RCW 26.50 or any one of the other listed types. The “to convict” instruction stated:

To convict the defendant of the crime of Violation of a Court Order as charged in Count [#], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about [date], 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 the said date, the defendant knowingly violated a restraint provision of the order prohibiting contact with a protected party; and

(4) That the defendant’s act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 127-137.

By failing to instruct the jury that the state had the burden of proving that the order allegedly violated was issued under RCW 10.99 or 26.50, the court relieved the state of the burden of proving one of the essential elements

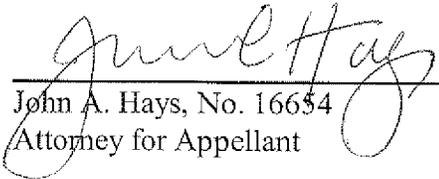
of the crime charged. As an error of constitutional magnitude this court is compelled to reverse and grant a new trial unless the state can meet the burden of proving the error harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). In this case the error was not harmless beyond a reasonable doubt because Exhibits 4 and 5, which purport to be the applicable no contact orders, fail to state the authority under which they were issued. In addition, the state failed to present any other evidence to answer this question. Thus the error was not harmless beyond a reasonable doubt and the defendant is entitled to a new trial.

CONCLUSION

For the reasons set out herein this court should reverse all of the defendant's convictions and remand for a new trial.

DATED this 24th day of October, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ER 615

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

RCW 26.50.110(1)

(1)(a) Whenever an order is granted under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(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.

(b) Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

State of Washington,		No. 44580-8-II
	Respondent,	
vs.		AFFIRMATION OF OF SERVICE
Sokha Suong,		
	Appellant.	

Donna Baker states the following under penalty of perjury under the laws of Washington State. On October 24, 2013, I personally e-filed and/or placed in the United States Mail the following document with postage paid to the indicated parties:

1. Brief of Respondent

Mr. Sokha Suong-DOC#364436
COYOTE RIDGE CORR. CENTER
EB-48
P.O. Box 769
Connell, WA. 99326

Tony Golik
Prosecuting Attorney
1200 Franklin Street
Vancouver, WA. 98666

Dated this 24th day of October, 2013, at Longview, Washington.



Donna Baker
Legal Assistant

HAYS LAW OFFICE

October 24, 2013 - 9:46 AM

Transmittal Letter

Document Uploaded: 445808-Appellant's Brief.pdf

Case Name: State vs Sokha Suong

Court of Appeals Case Number: 44580-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Cathy E Russell - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

prosecutor@clark.wa.gov
donnabaker@qwestoffice.net