

No. 45006-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LEO B. BUNKER, III,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Did the information for Counts IV and V contain all the essential elements of the crime charged, Violation of a Protection Order?
- B. Did the State present sufficient evidence to sustain Bunker's convictions for two counts of Rape in the Second Degree and two counts of Violation of a Protection Order?
- C. Did the trial court erroneously omit a unanimity instruction from Count IV?
- D. Did the trial court err when it imposed a community custody condition restricting Bunker's contact with minor children?
- E. Did the trial court erroneously admit 404(b) evidence regarding Bunker's prior assault on his ex-wife?

II. STATEMENT OF THE CASE

Lori Horsley and Bunker have known each other since high school. RP 342. Ms. Horsley and Bunker dated in high school but lost touch for about 25 years. RP 20, 342. In 2011 Bunker sent Ms. Horsley a friend request through Facebook and they began communicating again. RP 20-21.

In August 2011 Ms. Horsley and Peter Pederson ended their 12 year romantic relationship on good terms. RP 21, 184, 186-88. Ms. Horsley came down to the Lewis County area after the break up to be closer to her family. RP 22. Ms. Horsley had planned to

stay with a friend but her friend was out of state on vacation so Ms. Horsley ended up staying with Bunker. RP 23.

Ms. Horsley stayed with Bunker for approximately two weeks before she found a place of her own to live. RP 23. Ms. Horsley did not find anything about Bunker's behavior concerning when she and Bunker first met up again. RP 23. Ms. Horsley moved to her own place in Winlock and did not have plans for Bunker to move in with her. RP 24. Ms. Horsley told Bunker it was better if they lived apart and he agreed. RP 24. Despite this agreement Bunker moved into Ms. Horsley's new residence. RP 24.

After moving in together Bunker became more concerned about what Ms. Horsley was doing. RP 25. Bunker became aggressive, possessive, and more demanding of Ms. Horsley. RP 25. This behavior included being sexually aggressive. RP 25. Bunker would tell Ms. Horsley that she has "no say in anything that he wants to do to her." RP 25. Bunker would pin Ms. Horsley down while having sex, leaving bruises down sides of her body. RP 25. Ms. Horsley told Bunker she did not want to have sex with him, but Bunker made it clear that was not an option. RP 26.

Bunker also became very controlling of Ms. Horsley, dictating who she could speak to and see, including contact with

members of her own family. RP 27-28. According to Ms. Horsley, Bunker “[m]ade me feel isolated, made my [sic] feel unsure of myself, unsure of what to do. I didn’t - - I know I was acting different and I was afraid that my family would pick up on it and be concerned.” RP 28. Ms. Horsley was fearful of her family finding out because she was embarrassed of what was happening. RP 28.

Bunker would tell Ms. Horsley that she could not leave because she belonged to Bunker and if Ms. Horsley left him he would kill her. RP 29. Bunker told Ms. Horsley he would hang her from the rafters in the old barn. RP 29. Bunker also told Ms. Horsley, “I’m going to cut you and I’ll just keep cutting you and cutting you up until you pass out and then I’ll wake you up and start cutting you again. And if you pass out I will wake you up again.” RP 30. Bunker threatened to catch Ms. Horsley on fire, burn her down, put her out, light her on fire again, and once she died he would have sex with Ms. Horsley one more time and bury her up in the hills. RP 30. When Bunker made these threatening statements he was usually calm, they were not precipitated by a fight, and they were unprovoked. RP 30. Ms. Horsley believed Bunker would carry out his threats because he had previously assaulted his ex-wife and a man she was with. RP 38. The assaults were so vicious that the

ex-wife was hospitalized after being struck in the face, suffering broken bones, and the man was allegedly beaten so badly he was afraid of Bunker and refused to press charges. RP 38.

Bunker and Ms. Horsley got married on October 8, 2011. RP 45, 336. Ms. Horsley did not want to marry Bunker but felt she had no choice. RP 45. The only people who attended the wedding ceremony were Barbara and Amy Krahn,¹ who were friends of Bunker. RP 46-47, 370. The person who officiated the ceremony, Betty Schmeltzer, thought Bunker and Ms. Horsley looked like a happy, married couple. RP 335-37. Ms. Horsley invited her daughter, Kirby Lewellen, but Ms. Lewellen would not go because she did not approve of Bunker. RP 163, 171.

On October 11, 2011 Bunker had a court date in King County regarding a resentencing hearing. RP 372-74. Ms. Horsley attended the hearing with Bunker, believing he was going to be remanded into custody. RP 48, 373-74. Bunker was originally facing a 33 month prison sentence but was sentenced to only five and a half months of work release. RP 373. Bunker was allowed three weeks to report to work release. RP 374. Bunker's report date was November 1, 2011. RP 374.

¹ The Krahn's will be referenced to by their first names to avoid confusion, no disrespect intended.

After returning from court, Bunker wanted to lay down and take a nap and insisted Ms. Horsley lay down with him. RP 49-50. Once Bunker was asleep Ms. Horsley secretly called Mr. Pederson. RP 50. Ms. Horsley attempted to sneak back into bed with Bunker but she found him awake and agitated. RP 51. Ms. Horsley admitted to Bunker she had been on the phone with Mr. Pederson and Bunker became enraged, calling her a slut, whore, cheater, and a liar. RP 52. Ms. Horsley either fell or was shoved back onto the bed. RP 52. Ms. Horsley turned over, trying to get away, but Bunker got on top of her and pinned her, lying on her stomach, to the bed. RP 52-53. Bunker was yelling at Ms. Horsley and calling her names, telling Ms. Horsley he should just kill her, and then he bit her in the shoulder area and continued to bite her over and over again. RP 53. Ms. Horsley begged Bunker to stop but he refused telling her she deserved it. RP 53. Bunker grabbed around Ms. Horsley's throat and began to squeeze, she struggled to breath and felt like she was going to pass out. RP 54.

Bunker was stronger and approximately 70 pounds heavier than Ms. Horsley. RP 54-55. Bunker was laughing, the more Ms. Horsley would cry and beg him to stop, the more he would laugh. RP 56. Bunker put his knee into Ms. Horsley's back to hold her

down and commented, "Oh, look, you gave me a hard on." RP 56. Bunker held Ms. Horsley down and Ms. Horsley told him "No. Stop. I don't want to do this. And I'm hurt." RP 56. Bunker ripped Ms. Horsley's pants off. RP 56. Bunker climbed on top of Ms. Horsley and had penile vaginal intercourse with her. RP 58-59. Ms. Horsley told Bunker, "No. I don't want to do this. Stop. And you hurt me." and Bunker would just laugh and tell her she deserved it. RP 58. Bunker ejaculated inside of Ms. Horsley. RP 59.

Ms. Horsley did not report the rape because she was terrified. RP 59. She had massive bruising, marks around her neck, and the blood vessels in her eyes, there were little red spots in her eyes, and bite marks all over her shoulders, arms, back, lower back. RP 60. A couple of days after the rape, Ms. Lewellen came over and saw Ms. Horsley's bruises and asked what had happened. RP 60-61. Ms. Lewellen took photographs of the injuries but the photographs were accidentally lost when Ms. Lewellen got a new cell phone. RP 61, 176-77.

After October 11, 2011 Ms. Horsley and Bunker had sex almost every day. RP 73. Bunker would at times force Ms. Horsley to do things she did not want to do, such as oral sex. RP 73. She would ask Bunker to stop performing oral sex on her and he would

refuse to stop. RP 74-75. According to Ms. Horsley, Bunker was the one who initiated sex and it was always pretty forceful. RP 75.

Bunker began serving time on November 1, 2011. RP 83. On November 4, 2011 Ms. Horsley called the police to report the October 11, 2011 rape and Deputy McKnight responded. RP 83, 152-53. On November 7, 2011 Ms. Horsley spoke with Detective Adkisson from the Lewis County Sheriff's Office. RP 254-46. Also on November 7, 2011, Ms. Horsley petitioned for and was granted a Temporary Order of Protection, prohibiting Bunker from having contact with her. Ex. 14, 15.² Bunker was served a copy of the temporary order on November 8, 2011. RP 305-06. The temporary order allowed for Bunker to "retrieve his personal clothing and tools of the trade from the residence while a law enforcement officer is present." Ex. 15. The temporary order was in effect until the Order for Protection was entered on November 21, 2011. Ex. 15, 16. The Order for Protection allowed Bunker to have a third party retrieve his personal clothing and tools of the trade from the residence he had shared with Ms. Horsley. Ex. 16.

² The State will be filing a supplemental designation of Clerk's papers. The State will be designating exhibits 14 (petition for protection order), 15 (temporary order for protection), and 16 (order for protection).

While the temporary order was in place Barbara and Amy contacted Ms. Horsley numerous times on Bunker's behalf. RP 89. Ms. Horsley made arrangements to have Bunker's personal items picked up by Amy and Barbara. RP 89. Detective Adkisson had contact with Amy and Barbara on November 14, 2011 when he saw them leaving Ms. Horsley's property. RP 255. Ms. Horsley also received a letter from Bunker sometime after November 10, 2011. RP 141.

On December 20, 2011 the State charged Bunker by information with Counts I and II: Rape in the Second Degree, Count III: Harassment – Threat to Kill, and Counts IV and V: Violation of a Court Order. CP 1-5. The information was amended several times prior to trial. CP 12-23, 42-47, 124-29. The State also gave notice of aggravating factors for purpose of imposing an exceptional sentence. CP 9-10. The aggravating factors were also contained in the fifth amended information. CP 188-92. Bunker elected to have his case tried to a jury. See RP.

Bunker testified on his own behalf at trial. RP 341. Bunker explained that the plan was for Ms. Horsley to come down to Lewis County and live with him. RP 358. Bunker and Ms. Horsley began living together in mid August 2011 and Bunker believed everything

was going fine. RP 364. Bunker explained that it was not possible for him and Ms. Horsley to keep in constant communication while he was working because there was no phone service up in the mountains where he was driving a log truck. RP 362-65. Bunker testified he quit his job after having a dispute with his employer on September 26, 2011. RP 365.

According to Bunker he asked Ms. Horsley to marry him and she immediately said yes. RP 367. Bunker acknowledged Ms. Horsley did change her mind about getting married several times but stated she never expressed any reservations about getting married. RP 368-69.

Bunker testified that on October 11, 2011 Ms. Horsley and Bunker arrived home around 12:00 p.m. and Ms. Horsley was agitated. RP 374-75. Ms. Horsley informed Bunker she was going to go to her father's house in Longview and Bunker decided to go see his sister, Debra Tsugawa, in Battleground. RP 376, 410. Bunker stated he stayed at his sister's house overnight on October 11, 2011. RP 380-81. According to Bunker there was no physical altercation or assault on Ms. Horsley. RP 379. Bunker also denied having sex with Ms. Horsley on October 11, 2011. RP 379. Bunker testified that he has erectile dysfunction. RP 379.

Bunker stated he was aware Ms. Horsley was having phone contact with Mr. Pederson, then stated he did not know Ms. Horsley was talking to Mr. Pederson. RP 381-82. Bunker also denied threatening to kill Ms. Horsley. RP 385. Bunker admitted to saying he would hang Ms. Horsley from the rafters but insisted the comment was a joke. RP 383. Bunker testified his last communication with Ms. Horsley was on November 3, 2011, a text message stating she wanted a divorce. RP 388.

Bunker was convicted as charged, including the aggravating factors. CP 233-48. Bunker was sentenced to an exceptional sentence of 460 months in prison. CP 263-278. Bunker timely appeals his conviction. CP 281.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE INFORMATION WAS CONSTITUTIONALLY SUFFICIENT AS IT CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSE, VIOLATION OF A COURT ORDER, FOR COUNTS IV AND V.

Bunker first argues that the information in the present case was constitutionally insufficient (and that he thus received inadequate notice of the charge) because the information did not specify the exact statutory basis for the order of protection that was

alleged to have been violated. App.'s Br. at 8-11. This claim is without merit because the information contained all of the essential elements of the charged offense.

1. Standard Of Review.

This court reviews challenges regarding the sufficiency of a charging documents de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). The correct standard of review is determined by when the sufficiency challenge is made. *City of Bothell v. Kaiser*, 152 Wn. App. 466, 471, 217 P.3d 339 (2009). A charging document challenged for the first time on appeal is “liberally construed in favor of validity.” *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

2. Liberally Construed, The Fifth Amended Information Contained All The Essential Elements Of Violation Of A Protection Order.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a charging document must include all essential elements of a crime to inform a defendant of the charges against him and to allow preparation for the defense. *State v. Phillips*, 98 Wn. App. 936, 939, 991 P.2d 1195 (2000), *citing Kjorsvik*, 117 Wn.2d at 101–02. A charging document is constitutionally sufficient

if the information states each statutory element of the crime, even if it is vague as to some other matter significant to the defense. *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). “An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (citations and quotations omitted). The primary reasons for the essential elements rule is it requires the State to give notice of the nature of the crime the defendant is accused of committing and it allows a defendant to adequately prepare his or her case. *Zillyette*, 178 Wn.2d at 158-59 (citations and quotations omitted).

When a defendant challenges the sufficiency of a charging document, the standard of review depends on the timing of the challenge. *State v. Ralph*, 85 Wn. App. 82, 84, 930 P.2d 1235 (1997). If a defendant challenges the sufficiency of the information “at or before trial,” the court is to construe the information strictly. *Phillips*, 98 Wn. App. at 940, quoting *State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). Under this strict construction standard, if a defendant challenges the sufficiency of the information before the State rests and the information omits an essential element of the crime, the court must dismiss the case

“without prejudice to the State's ability to re-file the charges.”
Phillips, 98 Wn. App. at 940, *quoting Ralph*, 85 Wn. App. at 86.

If, however, a defendant moves to dismiss an allegedly insufficient charging document after a point when the State can no longer amend the information, such as when the State has rested its case, the court is to construe the information liberally in favor of validity. *Phillips*, 98 Wn. App. at 942–43. As this Court has noted, these differing standards illustrate the balance between giving defendants sufficient notice to prepare a defense and “discouraging defendants' ‘sandbagging,’ the potential practice of remaining silent in the face of a constitutionally defective charging document (in lieu of a timely challenge or request for a bill of particulars, which could result in the State's amending the information to cure the defect such that the trial could proceed).” *State v. Killiona-Garramone*, 166 Wn. App. 16, 23 n.7, 267 P.3d 426 (2011), *citing Kjorsvik*, 117 Wn.2d at 103; *Phillips*, 98 Wn. App. at 940 (*citing* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 442 n. 36 (1984)).

In the present case, Bunker did not challenge the sufficiency of the charging document below. See RP. Rather, Bunker has raised this issue for the first time on appeal. Because Bunker did

not object to the information's sufficiency below, this Court is to apply the liberal standard set forth in *Kjorsvik* and construe the information in favor of its validity. *Kiliona-Garramone*, 166 Wn. App. at 24; *Phillips*, 98 Wn. App. at 942–43. Under this liberal standard of review, the court must decide whether (1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, (2) whether the defendant can show that he or she was nonetheless actually prejudiced by the inartful or vague language that he alleges caused a lack of notice. *Phillips*, 98 Wn. App. at 940, *citing Kjorsvik*, 117 Wn.2d at 105–06. Although Bunker claims on appeal that “prejudice is presumed,” this claim is contrary to Washington law which clearly provides that prejudice is not presumed and that a defendant must make an actual showing of prejudice when the defendant had failed to object to the information below. See App.’s Br. at 8; *Kjorsvik*, 117 Wn.2d at 106–07; *Kiliona-Garramone*, 166 Wn. App. at 24; *Phillips*, 98 Wn. App. at 940.

RCW 26.50.110 provides that it is a crime to knowingly violate an order issued under chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, 74.34, or a valid foreign protection order as defined in RCW 26.52.020. The charging language in the present

case specifically cited RCW 26.50.110 and mirrored the language, but the information, for the sake of clarity, only named the protection order by name rather than by reference to the RCW chapter number. Thus the charging document alleged that the order at issue was a protection order issued pursuant to state law. CP 191-92. The charging document also specifically alleged that Bunker violated an order issued by the Lewis County Superior Court in *Lori L. Horsley vs. Leo B. Bunker, III*, cause number 11-2-01392-6.³

The information contained all the essential elements of the crimes charged. The specific statutory authority for the current court order (and the court orders underlying the previous convictions) is not an essential element of the crime of felony violation of court order. See, *State v Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005); *State v. Gray*, 134 Wn. App. 547, 138 P.3d 1123 (2006). This is because “[e]ssential elements’ include only those facts that must be proved beyond a reasonable doubt to convict the defendant of the

³ The State is unsure why appellate counsel is misquoting the actual information. See App.’s Br. at 10. There were six informations filed in this case and none of them alleged the protection order was issued by “Lewis County District Court.” See App.’s Br. at 10. Further, this case was tried on the Fifth Amended Information but appellate counsel cites to the Fourth Amended in her briefing when citing the alleged text of the information. The Fourth Amended Information had additional language in it that the Fifth Amended Information omitted (such as foreign protection order).

charged crime.” *Zillyette*, 178 Wn.2d at 158 (citations and quotations omitted).

Furthermore, this information was sufficient to apprise Bunker of the charge. A charging document, however, is constitutionally sufficient even if it is vague as to some other matter significant to the defense.⁴ *Holt*, 104 Wn.2d at 320. Washington courts distinguish between charging documents that are constitutionally deficient because of the State's failure to allege each essential element of the crime charged and charging documents that are factually vague as to some other significant matter. *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005). The State may correct a vague charging document with a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 686–87, 782 P.2d 552 (1989). Bunker failed to request a bill of particulars at trial, thus, he waived any vagueness challenge. *Leach*, 113 Wn.2d at 687.

Bunker is correct that the information did not specifically identify the statute the alleged violated order was issued pursuant to. However, the information specifically alleged that Bunker violated RCW 26.50.110 by knowingly violating a protection order

⁴ The State is not admitting the charging document is vague, but for the sake of argument is explaining why vagueness is not a fatal flaw in an information.

issued by the Lewis County Superior Court in cause number 11-2-01392-6. This charging language was sufficient to inform Bunker of the charge and included all of the essential elements. The record is clear that the order was issued pursuant to RCW 26.50. Ex. 14, 15, 16. The allegation contained within the information was that Bunker violated an order contrary RCW 26.50.110, which includes orders entered under RCW 26.50. CP 191-92; Ex. 15, 16. The charging language in no way left Bunker to guess at the crime he was alleged to have committed. The charging document expressly identified the actual order Bunker violated and it was therefore, unnecessary for the State to recite the qualifying statute.

Finally, even if this Court were to assume for the sake of the argument that there was some deficiency with the information, Bunker's claim must still fail because Bunker cannot show prejudice. As outlined above, the actual order for protection at issue was listed within the information. CP 191-92. The actual order of protection was issued out of the Lewis County Superior Court. Given this fact, Bunker cannot show any surprise or prejudice and his claim, therefore, must fail since a defendant who fails to challenge an information before trial must demonstrate prejudice in

order to prevail on a challenge to an information raised for the first time on appeal.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN BUNKER'S CONVICTIONS.

Bunker next argues that the State violated his constitutional rights by convicting him on insufficient evidence. App.'s Br. at 11-12. Bunker argues there was insufficient evidence to support his convictions for two counts of Rape in the Second Degree and two counts of Violation of an Order of Protection. App.'s Br. at 12-14. Bunker's argument fails because the State presented sufficient evidence to sustain the verdicts on all of his convictions.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. There Was Sufficient Evidence Presented To Sustain Bunker's Conviction.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397

U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

a. There was sufficient evidence presented to sustain Bunker's convictions for Counts IV and V, Violation of an Order of Protection.

To convict Bunker of two counts of a violation of a protection order the State was required to prove two distinct and separate acts that occurred on or about and between November 8, 2011 and November 14, 2011. Bunker's argument is that the State failed to prove any violations occurred, let alone two separate acts. App.'s Br. at 12-13. In order to prove a protection order violation the State must prove Bunker knew of the existence of the protection order and knowingly violated a provision contained within the order. WPIC 36.50.01; CP 218.

Bunker argues that the Krahn's were permitted to go to his former residence because the protection order allowed for a third party to retrieve his belongings. App. Br. at 12. It is curious to the State that Bunker fails to acknowledge that the temporary order of protection does not allow for a third party to retrieve Bunker's belongings. Ex. 15. The temporary order states, "[t]he respondent may take respondent's personal clothing and respondent's tools of the trade from the residence while a law enforcement officer is present." Ex. 15, no. 5, page 2. The order was signed on November

7, 2011. Ex. 15. Bunker was served on November 8, 2011. RP 306-07.

Ms. Horsley testified that she spoke to the Krahns after the temporary order of protection was entered and prior to November 21, 2011 when the order for protection was entered. RP 134; Ex. 15, 16. The Krahns contacted Ms. Horsley to retrieve Bunker's personal items. RP 92. Amy stated that Bunker called them wanting the women to contact Ms. Horsley to retrieve his belongings and they contacted Ms. Horsley sometime around the middle of November, possibly November 15, 2011. RP 237. According to Barbara, they had arranged with Ms. Horsley to come over to pick up Bunker's belongings and on one of the trips they ran into Detective Adkisson. RP 220-21. Detective Adkisson's interaction with the Krahns was on November 14, 2011 at Ms. Horsley's property. RP 239, 255. When stopped by Detective Adkisson the Krahns admitted to being at Ms. Horsley's house. RP 255. The Krahns actions, repeatedly calling Ms. Horsley and going to her residence to obtain Bunker's property, at the request of Bunker, are violations of the temporary order of protection. See Ex. 15.

Bunker also sent a letter to Ms. Horsley. RP 148. Bunker wrote and told Ms. Horsley she could keep his stuff. RP 141. Ms.

Horsley received the letter sometime after November 10, 2011. Also, when Bunker was initially incarcerated he called Ms. Horsley nonstop, wavering from being belligerent and abusive to apologizing and telling Ms. Horsley he loved her. RP 429-30.

There was sufficient evidence for any jury to find beyond a reasonable doubt two violations of the order of protection. The Krahn's contacted Ms. Horsley and went to her property to retrieve Bunker's belongings in violation of the order of protection. Ex. 15. Bunker also sent Ms. Horsley a letter and repeatedly called her after the order for protection was in place. The convictions should be affirmed.

b. There was sufficient evidence presented to sustain Bunkers convictions for Count II, Rape in the Second Degree.

Bunker does not argue that the State failed to present sufficient evidence to sustain a conviction for Count I, Rape in the Second Degree. Bunker does argue that the State did not present sufficient evidence to prove that on or about or between September 17, 2011 and November 1, 2011, on a day other than October 11, 2011, Bunker committed the crime of Rape in the Second Degree, as charged in Count II. App.'s Br. at 13-14; CP 189. Bunker's argument fails because the State presented sufficient evidence that

Bunker engaged in sexual intercourse with Ms. Horsley by forcible compulsion as charged in Count II. WPIC 41.01; CP 207.

Sexual intercourse is defined in the WPICs as follows:

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight, or any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex, or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

WPIC 45.01. "Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped." WPIC 45.03. Ms. Horsley testified that Bunker forced her to have sexual intercourse with him almost every day. RP 25-26. Bunker would tell Ms. Horsley she had no say and hold her down. RP 25. Bunker would grab Ms. Horsley so hard it left bruises. RP 25. Ms. Horsley would tell Bunker she did not want to have sexual intercourse but according to Bunker that was not an option. RP 25-26. Ms. Horsley also clarified that sexual intercourse was when Bunker put his penis inside of her body. Ms. Horsley also

testified that Bunker forced her to have oral sex despite her begging him to stop. RP 25-27, 73-75. Ms. Horsley clarified that oral sex was Bunker putting his mouth on her vagina. RP 27.

There was sufficient evidence for any jury to find beyond a reasonable doubt that Bunker committed Rape in the Second Degree, either by penile vaginal sex or oral sex. Bunker physically restrained Ms. Horsley while having sexual intercourse with her. This court should affirm Bunker's conviction for Count II.

C. THE STATE CONCEDES THAT THE FAILURE TO GIVE A UNANIMITY INSTRUCTION FOR COUNT IV WAS ERROR.

Bunker argues it was reversible error for the trial court to fail to give a unanimity instruction, commonly called a *Petrich*⁵ instruction, for Count IV. App.'s Br. 14-18. The State must reluctantly concede error. A unanimity instruction was given for Count V, which Count IV was almost identically charged, but the trial court failed to give the same instruction for Count IV. This appears to be an oversight, as the need for the instruction was discussed in open court. This Court should reverse Bunker's conviction for Count IV, Violation of a Court Order.

⁵ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

1. Standard Of Review.

Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012). Constitutional violations are reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

2. The Trial Court Failed To Give A Unanimity Instruction For Count IV, Which Was Required In This Case, Therefore, This Court Must Reverse As The Error Cannot Be Classified As Harmless Beyond A Reasonable Doubt.

Jury instructions are sufficient when they are not misleading, allow a party to argue their theory of the case, and, "when read as a whole, properly inform the trier of fact of the applicable law." *State v. Harris*, 164 Wn. App 377, 383, 263 P.3d 1276 (2011). Jury instructions are read in a commonsense manner and are sufficient if they properly inform the jury of the applicable law. *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). An appellate court will "review the instructions in the same manner as a reasonable juror." *State v. Hanna*, 123 Wn.2d 704,719,871 P.2d 135 (1994).

A criminal defendant has the right to have a jury unanimously agree on a verdict finding him or her guilty. *State v.*

Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (citations omitted). This right is guaranteed by the Washington State Constitution. Const. art. I, § 21. If the State presents evidence of multiple distinct acts, any of which could form the basis for the charge, the State must elect which acts it is relying upon for the conviction or the trial court must give a unanimity instruction. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). The unanimity instruction ensures the jury is unanimous in the act it finds the State proved beyond a reasonable doubt to convict the defendant. *Coleman*, 159 Wn.2d at 511-12. Therefore, the alleged error, a non-unanimous verdict, is of constitutional magnitude. To successfully raise the issue for the first time on appeal Bunker still must show that the error was manifest. *State v. Knutz*, 161 Wn. App. 395, 406-07, 253 P.3d 437 (2011).

Counts IV and V were almost identically charged by the State. CP 191-92. The only difference in the charging language was the requirement that Count V must occur later in time from what is charged in Count IV. CP 191-92. Both counts cover the dates on or about and between November 8, 2011 and November 14, 2011. CP 191-92. The trial court gave the following unanimity instruction:

For Count V – Violation of a Protection Order, the State alleges that the defendant committed acts violating the provision of a Protection Order on multiple occasions. To convict the defendant of Violation of a Protection Order as charged in Count V, one particular act of Violation of a Protection Order, separate and distinct from what is alleged and charged in Count IV, must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Violation of a Protection Order as alleged for Count V.

CP 231 (Instruction 22). Despite the trial court's comment that there needed to be a unanimity instruction for the two counts of Violation of a Court Order there was no instruction given in reference to Count IV. RP 463; CP 198-232. Bunker was prejudiced by the omission of the limiting instruction for Count IV.

While failure to give a unanimity instruction can be harmless beyond a reasonable doubt, the State cannot argue that here. To be harmless beyond a reasonable doubt the State must show, "no rational juror could have a reasonable doubt as to any of the incidents alleged." *Coleman*, 159 Wn.2d at 512. The State alleged a number of incidents, such as multiple phone calls from the Krahns, any one of which could have been sufficient for a conviction for Violation of a Protection Order. Therefore, the State respectfully concedes error in regards to Count IV.

D. THE STATE CONCEDES THAT THE COMMUNITY CUSTODY CONDITION RELATED TO MINOR CHILDREN WAS INCORRECTLY IMPOSED BY THE TRIAL COURT.

Bunker was convicted of Rape in the Second Degree. CP 233, 237. The facts have been discussed extensively above. At no time during this case has the State alleged that Bunker was sexually assaulting or victimizing minors. The State is allowed to impose community correction conditions that are crime-related prohibitions. RCW 9.94A.030; RCW 9.94A.703. The prohibition against having contact with minors is not a crime-related prohibition and was likely a scriveners' error from a pre-checked box on the judgment sentence. The State concedes that this must be changed and asks this Court to remand the case back to the trial court for the striking of that language from the judgment and sentence.

E. AFTER CONDUCTING AN ER 404(b) ANALYSIS, THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING BUNKER'S ASSAULT ON HIS EX-WIFE FOR THE PURPOSE OF SHOWING WHY MS. HORSLEY REASONABLY BELIEVED BUNKER WOULD CARRY OUT HIS THREATS.

Contrary to Bunker's argument, the trial court did not err in admitting the evidence that Bunker had assaulted his ex-wife. The court did the proper analysis and the ER 404(b) evidence was

permissible to show Ms. Horsley was placed in reasonable fear in regards to the Harassment – Threat to Kill charge.

1. Standard Of Review.

“[I]nterpretation of an evidentiary rule is a question of law” subject to de novo review. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Once it is determined the trial court correctly interpreted the rule, a determination regarding the admissibility of evidence by the trial court are reviewed under an abuse of discretion standard. *Gresham*, 173 Wn.2d at 419; *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). “A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

If the trial court’s evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Bourgeois*, 133 Wn.2d at 403 (citations omitted).

2. The Trial Court Properly Admitted The Evidence Regarding Bunker's Assault On His Ex-Wife.

A party may not admit evidence of other crimes, wrongs, or acts of a person to show action in conformity therewith. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). The purpose and scope of ER 404(b) is that it “governs the admissibility of evidence of other crimes or misconduct for purposes other than proof of general character.” 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, § 404:6, at 184 (2013-2014). Evidence of other crimes or misconduct is not admissible to demonstrate a defendant's propensity to commit the crime they are currently charged with. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). Evidence of other crimes, acts, or wrongs by a person may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. ER 404(b).

Prior to admitting ER 404(b) evidence a trial court must conduct a four part test. *Id.* at 81-82. The trial court must,

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Id. at 81-82. The reviewing court defers to the trial court regarding the admission of evidence. *Powell*, 166 Wn.2d at 81. This deference acknowledges that the trial court is best suited to determine a piece of evidence's prejudicial effect. *Id.*

Courts have held it is permissible to allow testimony regarding prior violent acts when the State must prove that the alleged victim's fear of the defendant was reasonable. *State v. Barragan*, 102 Wn. App. 754, 759-60, 9 P.3d 942 (2000); *State v. Ragin*, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999). *Barragan* and *Ragin* are both harassment cases and the courts held that the jury was entitled to hear the testimony, acknowledging it was prejudicial but stating it was necessary to prove an essential element of harassment. *Barragan*, 102 Wn. App. at 759-60; *Ragin*, 94 Wn. App. at 412.

The State sought to admit a number of different pieces of information through ER 404(b). CP 24-29, 66-69. The trial court conducted a hearing on the matter. 1MRP 7-29.⁶ The trial court excluded some of the evidence the State was requesting to introduce and allowed the State to introduce evidence of Bunker's

⁶ There are two volumes of proceedings that contain a number of different motion hearings (including pretrial motions). The State will cite the volume that contains 8/15/12, 9/5/12, 9/12/12, 10/30/12, 11/8/12, and 1/24/13 as 1MRP.

prior assault against his ex-wife. 1MRP 24-49; CP 114-16. The trial court held that the State would be allowed to produce evidence of Bunker's Assault in the Second Degree conviction only to show Ms. Horsley's state of mind. CP 115. The trial court held that the probative value outweighed the prejudicial effect on Bunker. CP 116. The trial court also gave a limiting instruction to the jury in regards to this evidence. CP 205.

The trial court did not err when it admitted the evidence of Bunker's prior assault against his ex-wife to show the reasonableness of Ms. Horsley's fear of Bunker and Ms. Horsley's state of mind in regards to the Harassment – Threat to Kill charge. This Court should affirm all counts except Count IV (as conceded above).

V. CONCLUSION

There was sufficient evidence to convict Bunker on all counts charged in the information and the charging document was not deficient in regards to Counts IV and V, Violation of a Court Order. The trial court properly admitted evidence of Bunker's prior assault against his ex-wife, with a limiting instruction, to show the victim's state of mind in regards to the Harassment – Threat to Kill charge. The State concedes that it was err to fail to give a

unanimity instruction for Count IV, Violation of a Court Order, and it was err to include any restriction on Bunker's contact with minor children in the community custody conditions. This Court should remand this case back to the trial court to deal with those two issues.

RESPECTFULLY submitted this 10th day of March, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'JLM', written over a horizontal line.

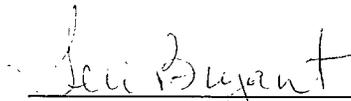
by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

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

STATE OF WASHINGTON, Respondent, vs. LEO B. BUNKER, III, Appellant.	No. 45006-2-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 10, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email addresses: LiseEllnerlaw@comcast.net.

DATED this 10th day of March, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

March 10, 2014 - 4:08 PM

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