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

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STATE OF WASHINGTON,

Respondent,

v.

BRENNAN PATRICK PENROSE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 18-1-00387-18

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether notations that were not removed from otherwise heavily redacted documents, which documents were necessary to the state's case, caused prejudice to Penrose's defense?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Brennan Patrick Penrose was charged by information filed in Kitsap County Superior Court with felony violation of a no contact order with a special allegation of domestic violence. CP 1-2.

Penrose did not stipulate to the priors that served to elevate the case to a felony. The state, needing to prove the elevating element with documentary evidence, moved in limine for the trial court to rule on the admissibility of the current no contact order and of historical court documents. CP 16-17. The defense raised the issue of redaction of those documents. RP, 5/7/18, 7. The trial court reserved ruling on the states motion. Id.

The trial court ruled that insofar as three of Penrose's prior convictions (one from whence came the current order and the two prior nco violations) need be proven as elements of the state's case, documents proving those facts are admissible. RP, 5/7/18, 12. The trial court was concerned about the term 'domestic violence' appearing on the historical

documents but again reserved ruling until the parties completed proposed redactions. RP, 5/7/18, 16.

The trial court and the parties engaged in extensive discussion of each of the state's proposed exhibits. 2RP 114-85. Agreed redactions and those ordered by the trial court resulted in the redacted documents found in the supplemental clerk's papers. CP 247-277. The basis of the present appeal is that in two respects, exhibits 2A and 6A, the parties and the trial court failed to redact information that Penrose argues was prejudicial.

The defense objected to the admission of exhibit 2A. CP 248-252. First, the defense argued that the police reports in their entirety should be excluded. 2RP 116, 117-18. Second, Penrose objected because the investigative report included the incident location. 2RP 118. Third, the defense objected to the scars, marks, and tattoos portion of the identification section of the police report, focusing particular concern on tattoos. 2RP 118.

The state conceded with regard to the tattoo reference and the trial court ordered that portion removed. 2RP 119. The state offered 2A, the defense iterated the above objections, the court ruled the exhibit was relevant, and 2A was admitted. 2RP 120. The exhibit includes a heading "Weapons" and below that heading states "Hands, Fists, Feet, Etc." CP 251. Although Penrose did not particularly object to that notation, as

noted he did object to the entire report on which the notation is found.

Exhibit 6A (CP 261-63) is a copy of a judgement and sentence from one of Penrose's prior court order violations. The defense objected to the word "felony" appearing in several places. 2RP 154. The trial court agreed and ordered the word removed. 2RP 154-55. The defense objected to the FBI number on the document on grounds of prejudice and foundation. 2RP 155-56. The trial court overruled. 2RP 156. 6A was offered and admitted over the noted objections. 2RP 158. The exhibit includes a heading "Special Allegations\*" under which appears the notation "DV." CP 261. Penrose did not specifically object to this notation.<sup>1</sup>

The jury returned a verdict of guilty. CP 47. The jury also returned an affirmative answer on the domestic violence special verdict. CP 48. Penrose's offender score, 10, produced a statutory maximum sentence of 60 months. CP 226. But the trial court gave him a downward departure of 30 months. CP 227. The trial court executed Findings of Fact and Conclusions of Law regarding the downward departure, finding the offense mitigated by the willing participation of the victim and Penrose's behavioral health problems. CP 239-40. The trial court ruled

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<sup>1</sup> It should be noted that Penrose did object to the same notation on another document, exhibit 7. Exhibit 7A was admitted at 2RP 181. Defense objection at 2RP 163. Later, 7A became 7B when the parties agreed to redact an alias from 7A and reoffer the exhibit

that the downward departure comports with the purposes of the Sentencing Reform Act. CP 240-41.

**B. FACTS<sup>2</sup>**

Bremerton police saw Penrose sitting on the front porch of Blaine Penrose's house.<sup>3</sup> 2RP 212. The two are brothers. 2RP 206. The officer had seen Penrose many times and immediately recognized him. 2RP 212-13. A computer check revealed that Penrose is the respondent on a no-contact order with his brother Blaine Penrose. 2RP 213. Having been there before, the officer knew that Blaine Penrose lived at the address at which he had seen Penrose sitting on the porch. 2RP 213-14.

The officer awaited additional officers and when they arrived they approached the house. 2RP 241-42. Penrose was gone from the front porch. 2RP 242. The officers knocked and for several minutes and got no response but during these minutes they observed someone peaking out the window. 2RP 243. Looking through an unobstructed portion of a window, officers saw Blaine Penrose asleep on the couch. 2RP 244.

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as 7B. 2RP 281-82.

<sup>2</sup> The VRP for trial are in three volumes and are referred to as 1RP, 2RP, 3RP. Other references will be by date of the transcript.

<sup>3</sup> The defendant, Brennan Penrose is referred herein as Penrose; his brother, the victim, is referred to as Blaine Penrose.

Eventually, Blaine Penrose awoke, answered the door, and allowed the police in. 2RP 244. Penrose was found in a bedroom. 2RP 244. Penrose was dressed and putting on his boots. Id. Officers asked Penrose his name and he replied “Justin.” 2RP 246.

At trial, a Bremerton Municipal Court clerk testified before the jury as to the contents of exhibit 2A. 2RP 264 (witness identified at 2RP 257). The clerk did not refer to the “Weapons: Hands, Fists, Feet, Etc” entry on exhibit 2A during her testimony.

A Kitsap County Superior Court clerk (3RP 294) testified before the jury about exhibit 6A. 3RP 301-307. In her testimony, the clerk never referred to the notation on 6A “Special Allegations\* SA.”

A jail sergeant testified as to the contents of exhibit 6A and made no reference to the unredacted notation. 3RP 334-336.

In the state’s closing argument, there was no mention of the complained of notations in either exhibit 2A or exhibit 6A. 3RP 390-405; 428-435 (rebuttal).

### III. ARGUMENT

#### A. THE TWO NOTATIONS LEFT ON OTHERWISE HEAVILY REDACTED DOCUMENTS THAT WERE NECESSARY TO PROVE AN ELEMENT WERE INNOCUOUS AND CAUSED NO PREJUDICE.

Penrose argues that failure to remove certain words from documents that were essential to the state's proof caused undue prejudice to his case. The unredacted notations had no probative value for either the defense or the state. Bereft of probative value the notations caused no prejudice.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). Discretion is abuse if manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. *Id.*, citing *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court's evidentiary ruling can be upheld on the grounds articulated by the trial court or on any other proper grounds that are supported by the record. *Id.*, citing *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Moreover, an evidentiary error warrants reversal "only where there is any reasonable possibility that the use of the inadmissible evidence was necessary to reach a guilty verdict." *Williams*, 137 Wn. App. at 747, citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

The present prosecution proceeded under RCW 26.50.110(1)(a) and (5). The first subsection defines a violation of court order and proscribes the penalty as a gross misdemeanor. Subsection (5) elevates the violation to a class C felony if “the offender has at least two previous convictions for violating the provisions of an order issued under this chapter.”

The jury was correctly instructed on the elements of the crime in the trial court’s instruction 10:

To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 9, 2018, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of the order;
- (3) That on or about said date, the defendant knowingly violated a provision of the order;
- (4) That the defendant had twice been previously convicted for violating the provisions of a court order; and
- (5) That the acts occurred in the State of Washington.

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 of these elements, then it will be your duty to return a verdict of not guilty.

CP 43; *See* WPIC-Criminal 36.51.02. In this proper instruction there is no occasion for the jury to consider whether the offense alleged is or is not domestic violence. The jury is told not to answer the domestic violence

special verdict unless it has found the defendant guilty. CP 48.

The state must prove beyond a reasonable doubt that Penrose was the same person who was issued the court order and that he is the person who committed the two prior violations. *State v. Huber*, 129 Wn. App. 499, 502-03, 119 P.3d 388 (2005). When a previous conviction must be proved by document, “[t]he State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt that the person named therein is the same person on trial.” *Huber*, 129 Wn. App. At 502. Further,

[b]ecause many people share identical names, the State must show by independent evidence that the person named in the document is the defendant in the present action. *Id.* This burden can be met by presenting booking photographs, booking fingerprints, eyewitness identifications, a certified copy of a driver's license, or other distinctive personal information.

*State v. Goggin*, 185 Wn. App. 59, 71, 339 P.3d 983 (2014) *review denied* 182 Wn.2d 1027 (2015), *citing Huber, supra*, at 502.

*Huber* involved an allegation of bail jumping. The issue was the sufficiency of the evidence of identification of Huber as the person who had jumped bail. The state offered copies of the information, a written court order that required Huber to appear, clerk’s minutes indicating a failure to appear on the date ordered, and a bench warrant issued for his arrest. 129 Wn. App. at 500-01. These documents fell short of proving beyond a reasonable doubt that Huber was the person named in the

documents. Id. at 502. Huber’s bail jump conviction was reversed and remanded for dismissal. Id. at 504.

It is the requirement that it be proved that Penrose was the person issued the court order prohibiting contact and is the person twice convicted of court order violation that the prosecutor in the present case proved with the documents admitted. Copies that went to the jury were heavily redacted to avoid prejudice. This is true of the two documents—exhibit 2A and exhibit 6A--complained of here.

Regarding exhibit 2A, Penrose complains that on the police report the words “hands, fists, feet, etc.” were improperly included. The entry on the police report has no meaning outside the context of that report. The word “weapon” refers to “something (such as a club, knife, or gun) used to injure, defeat, or destroy.” Merriam-Webster online dictionary, <https://www.merriam-webster.com/dictionary>. Hands, fists, and feet do not fit this definition. If anything, the entry advised the jury that, whatever else may have occurred, Penrose did not in fact use a weapon on the occasion.

The inclusion of the phrase had no probative value. ER 401, 403. No violent behavior was alleged or proven in the present case. Considering the purpose for which the report was admitted, identity of the defendant as the person with two priors, the phrase neither added nor

detracted from Penrose's case. The phrase was innocuous. The innocuous fact provides no support for the guilty verdict. Each of the above elements can be found without reference to a notation opining that hands or feet may have been used in a previous case.

Similarly, the inclusion of the notation "DV" in exhibit 6A could have caused no prejudice. First, the record does not disclose that the jury understood the notation "DV" in the context that it appears on the exhibit. Second, the state did not use that notation for any evidentiary purpose. The notation "DV" had no probative value. It is as innocuous as the other notation.

The two notations here complained of are simply irrelevant. Neither the state's nor the defendant's case were aided or damaged by the inclusion of the notations. This can be seen in that the evil ER 403 seeks to avoid is "unfair prejudice." *See State v. Haq*, 166 Wn. App. 221, 261, 268 P.3d 997 (2012) *review denied* 174 Wn.2d 1004 (2012). And, "[U]nfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury [and which creates] ... an undue tendency to suggest a decision on an improper basis...." *Haq*, 166 Wn. App. at 261 (alteration by the court), *citing State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). The innocuous notations in this case simply do not raise the specter of an emotional response by the jury.

Inclusion of such innocuous facts, even if erroneous, does not warrant reversal. On this nonconstitutional issue, the harmless error standard asks whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012); *see also State v. Williams*, 137 Wn. App. at 747, *citing State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), (“only where there is any reasonable possibility that the use of the of the inadmissible evidence was necessary to reach a guilty verdict.”).

Guilt in the case was established with no reference to the notations. Police saw Penrose at the home of and in the company of his brother, the protected person. Properly admitted documentation proved the fact of the present order and the facts of the two prior convictions. Had the two notations been blacked-out, the result would have been the same. If error, and not merely oversight, the inclusion of the notations caused no prejudice.

The two innocuous notations had no probative value. And it is the very innocuous character of the notations that shows that neither was the lack of probative value “substantially outweighed by the danger of unfair prejudice.” ER 403. If error, the inclusion of the notations caused no prejudice in light of the proof in the matter. This claim fails.

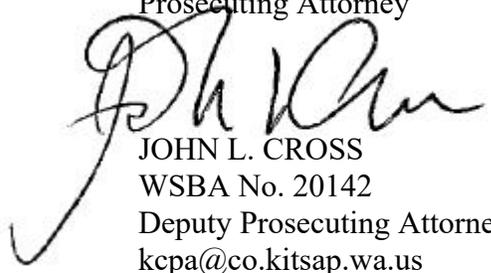
#### IV. CONCLUSION

For the foregoing reasons, Penrose's conviction and sentence should be affirmed.

DATED February 13, 2019.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", is written over the typed name and title of the Deputy Prosecuting Attorney. The signature is fluid and cursive, with a large initial "J" and "C".

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