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No. 52852-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GEORGE JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

A no-contact order prohibited George Jones from contacting Virginia Norris. Virginia Norris went to George Jones's house, got into an argument with him, and called 911 to report a violation of a no-contact order. Although she had arrived at the house with her friend in her friend's truck, and the friend was still there, Ms. Norris did not leave Mr. Jones's house. She was still there when police officers arrived, and Mr. Jones was arrested. According to an officer, Mr. Jones admitted having gotten a ride with Ms. Norris earlier that day. According to Mr. Jones, he never said this and was not with Ms. Norris until she appeared at his home uninvited.

The State charged Mr. Jones with violation of a no-contact order and he was convicted after a jury trial. This Court should reverse. Mr. Jones's constitutional right to a unanimous jury was violated and the trial court admitted testimony in violation of the Confrontation Clause and the rule against hearsay.

B. ASSIGNMENTS OF ERROR

1. Mr. Jones was deprived of the right to a unanimous jury verdict guaranteed by the Sixth Amendment and article I, sections 21 and 22.

2. The trial court violated Mr. Jones's right to confront the witnesses against him, guaranteed by the Sixth Amendment and article I, section 22.

3. The trial court admitted hearsay in violation of ER 801 and 802.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the State presents evidence of multiple acts, any one of which could form the basis of one count charged, either the prosecutor must tell the jury which act to rely on during its deliberations or the court must instruct the jury to agree on a specific criminal act. The failure to either elect or instruct violates a defendant's state and federal constitutional rights to a unanimous jury, and a new trial must be granted if a rational juror could have a reasonable doubt as to any one of the incidents alleged. Here, the State alleged Mr. Jones violated a no-contact order either by riding in a car with the protected party early in the day or by being with her in his home in the evening. The State did not elect which act it was relying on and the court did not instruct the jury that it had to unanimously agree as to which act was committed. Given that conflicting evidence was presented on both alleged acts, should this Court reverse the conviction and remand for a new trial?

2. The Confrontation Clause bars admission of testimonial statements of a witness who does not appear at trial. Statements are "testimonial" and subject to the Confrontation Clause if there was no ongoing emergency and the primary purpose of the statements was to establish events potentially relevant to later criminal prosecution. Ms.

Norris did not appear at trial, but, over Mr. Jones's objection, the trial court admitted statements Ms. Norris made to a dispatcher that there was a protection order violation and her statements to the responding police officer about Mr. Jones's whereabouts. There was no ongoing emergency as she was the one who had gone to Mr. Jones's house in her friend's truck, and could leave with that friend. Did the trial court violate Mr. Jones's constitutional right to confront the witnesses against him?

3. Hearsay, which is an out of court statement offered for its truth, is inadmissible unless an exception applies. Unless it is at issue in a particular case, an out of court statement is not admissible to explain why a police officer took certain actions. Over Mr. Jones's objections, the trial court permitted Deputy Hoover to testify that dispatch told him he needed to go to Mr. Jones's residence to address a protection order violation. Did the trial court violate the rule against hearsay?

D. STATEMENT OF THE CASE

George Jones lives at 18444 Guava Street Southwest in Rochester, Washington. RP 154, 167. Virginia Norris lives in Centralia. Ex. 4-b.

A no-contact order described Ms. Norris as a "protected person" and ordered Mr. Jones: "do not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means[.]" Ex. 1 at 1.

On September 15, 2016, Ms. Norris contacted Mr. Jones by going to his home in Rochester. She then called the police to report a violation of a protection order. RP 132-33.

Deputy Ryan Hoover went to Mr. Jones's house, and eventually found Virginia Norris in the driveway. RP 131-35. He asked her where Mr. Jones was, and she responded that he had left to go to Olympia. RP 140. But Deputy Hoover saw the car he'd been told belonged to Mr. Jones parked at the house, so he asked Ms. Norris which car Mr. Jones had taken to Olympia. RP 140. At that point, Ms. Norris lowered her voice and told him "he's actually under the house watching us." RP 140-41.

Mr. Jones crawled out from under the house and eventually spoke with Deputy Hoover. According to Deputy Hoover, Mr. Jones said Ms. Norris told him she had gone to the Lewis County courts earlier that day to get the no-contact order dropped, after which she gave him a ride to Centralia and dropped him off. RP 143-45. He eventually got a ride home with his roommate, Jonathan. RP 168, 173. Later that day, Ms. Norris came to his house and they got into an argument; she then called the police to report a no-contact order violation even though she was at his house. RP 145-46. She had not arrived at the house with him in his car, but had come later in a truck with a friend. RP 153-54.

The State nevertheless charged Mr. Jones with violation of a no-contact order. CP 29. At trial, Mr. Jones disputed Deputy Hoover's claim that Mr. Jones told him he had gotten a ride to Centralia with Ms. Norris. RP 188-89. He testified the first time he saw her was when she came to his home. RP 182.

Neither Virginia Norris nor the 911 dispatcher appeared at trial. Over Mr. Jones's Confrontation Clause and hearsay objections, Deputy Hoover testified about what the dispatcher and Ms. Norris told him. CP 18-28; RP 16-20, 108-16, 132-33, 140-41.

In closing argument, the prosecutor emphasized that Mr. Jones was guilty of violating a protection order because Ms. Norris came to his house and he knew she was there. RP 268 (closing argument); RP 289 (rebuttal closing argument). In rebuttal closing argument, the prosecutor also relied on the earlier alleged contact in the car. RP 284.

The jury found Mr. Jones guilty, and, after a bifurcated proceeding found he had been convicted of violating a no-contact order twice previously (raising the crime to a felony). CP 45-46, 52. The court sentenced Mr. Jones to 15 months in prison and 12 months of community custody. CP 62-72.

E. ARGUMENT

1. Mr. Jones was deprived of the right to a unanimous jury verdict guaranteed by the Sixth Amendment and article I, sections 21 and 22.

- a. Where a single count is charged but evidence of multiple acts is presented, the constitutional right to a unanimous jury requires that either the State elect one act or the court instruct the jury that it must unanimously agree on the specific act committed.

When the State presents evidence of multiple acts, any one of which could form the basis of one count charged, either the prosecutor must tell the jury which act to rely on during its deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). This rule does not apply to a “continuing course of conduct,” but if there is “evidence that the charged conduct occurred at different times and places[,]” either the prosecutor must make clear which incident it is relying on or the court must instruct the jury on the unanimity requirement. *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

If the prosecutor fails to elect an act and the court fails to instruct the jury that it must unanimously agree that a particular act occurred, some jurors may end up relying on one act or incident and some jurors may end up relying on another, “resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Kitchen*, 110 Wn.2d at 411.

Thus, “failure to follow one of these options is error, violative of a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” *Id.* at 409; Const. art. I, §§ 21, 22; U.S. Const. amend. VI.¹

The right to a unanimous verdict is a fundamental constitutional right that may be raised for the first time on appeal. *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995); RAP 2.5(a)(3).

- b. Here, the State presented evidence of two separate incidents but the prosecutor did not elect one of them and the court did not instruct the jury on the unanimity requirement.

Here, the State presented evidence of two separate alleged incidents, either of which could have formed the basis for the single count of violation of a no-contact order. However, the prosecutor did not elect one in closing argument and the court did not instruct the jury that it had to unanimously agree on the specific incident which constituted the violation.

Deputy Hoover testified that: (1) he encountered Mr. Jones and Ms. Norris at Mr. Jones’s home in the evening after being dispatched at 5:47 p.m., and (2) Mr. Jones said Ms. Norris had driven him to Centralia

¹ The unanimity instruction is often referred to as a “*Petrich* instruction,” based on *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

earlier that day. RP 131-45. Deputy Hoover testified that Ms. Norris did not stay with Mr. Jones in Centralia, but dropped him off. RP 145. It was later that day, in the early evening, that Ms. Norris went to Mr. Jones's house with another woman in a truck. RP 153. Thus, the evidence the State presented did not constitute a continuing course of conduct, but two separate incidents.

The prosecutor did not elect one of the incidents; she did not tell the jury which act it should rely on in deliberations. To the contrary, in closing argument the prosecutor discussed both the alleged violation in the car early in the day and the alleged violation in the house in the evening. RP 268, 284, 289. Moreover, the court did not provide a *Petrich* instruction; it did not instruct the jury that all 12 jurors had to unanimously agree that Mr. Jones violated the order by riding in a car with Ms. Norris early in the day or that he violated the order by being with her at his house in the evening. CP 31-44. Thus, Mr. Jones's constitutional right to a unanimous jury was violated. U.S. Const. amend. VI; Const. art. I, §§ 21, 22; *Kitchen*, 110 Wn.2d at 409.

c. The remedy is reversal of the conviction and remand for a new trial.

Because this error is constitutional, prejudice is presumed and is overcome “only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.” *Kitchen*, 110 Wn.2d at 411.

The presumption of prejudice may not be overcome here. As in *Kitchen*, “[t]here was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred.” *Id.* at 412.

As to the allegation that Mr. Jones got a ride from Ms. Norris early in the day, Mr. Jones testified and disputed that this occurred and denied that he told Deputy Hoover this occurred. RP 173, 188-89. Ms. Norris herself did not testify at all. And although the prosecutor mentioned this alleged contact in closing argument, she emphasized it less than the alleged contact at the home. RP 262-70, 283-89. Thus, a rational juror could have entertained a reasonable doubt that this incident occurred, and reversal is required. *Kitchen*, 110 Wn.2d at 412.

Reversal is required for the independent reason that a rational juror could also have entertained a reasonable doubt about the alleged violation at the house. It was undisputed that the house was *Mr. Jones’s* home and *not* Ms. Norris’s home. RP 154, 167; ex. 4-b. It was also undisputed that

Ms. Norris went to the home with another woman in a truck, not with Mr. Jones. RP 145, 153-54. Thus, a rational juror could have a doubt that Mr. Jones committed an unlawful act. *See State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002) (the defendant “must have intended the contact” and proof of this crime requires proof of “a purposeful act”); *State v. Clowes*, 104 Wn. App. 935, 944-45, 18 P.3d 596 (2001) (“not only must the defendant know of the no-contact order; he must also have intended the contact”); *State v. Johnson*, 2 Wash.App.2d 1026, *4 (2018)² (provision directing defendant to “not contact” protected party requires proof of “*action*,” i.e., that defendant “engaged in the volitional or purposeful act of contacting” the protected party).

In sum, because a rational juror could have a reasonable doubt as to one or both of the incidents alleged, the presumption of prejudice is not overcome, and reversal is required. This Court should reverse the conviction and remand for a new trial. *Kitchen*, 110 Wn.2d at 411-12.

² *Johnson* is unpublished. Mr. Jones cites it as persuasive authority pursuant to GR 14.1(a).

2. The trial court erred in admitting testimony in violation of the Confrontation Clause and the rule against hearsay.

- a. The court erred under the Confrontation Clause by admitting Ms. Norris's testimonial statements in her absence.

The federal and state constitutions guarantee defendants the right to be confronted with the witnesses against them. U.S. Const. amend. VI; Const. art. I, § 22; *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The Confrontation Clause “bars ‘admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). Statements are “testimonial” and subject to the Confrontation Clause if the circumstances objectively indicate there was no “ongoing emergency” at the time the statements were made and that the “primary purpose” of the exchange was to establish events potentially relevant to later criminal prosecution. *Davis*, 547 U.S. at 822.

Here, over Mr. Jones's objections, the court admitted multiple statements allegedly made by Virginia Norris, even though Ms. Norris did not appear for trial and Mr. Jones had not had a prior opportunity for

cross-examination. CP 18-28; RP 16-20, 108-16, 132-33, 140-41. Those statements were:

1. Deputy Hoover's testimony that dispatch told him (based on what Ms. Norris told them) that he needed to go to Mr. Jones's residence to address a protection order violation; RP 110, 132;
2. Deputy Hoover's testimony that Ms. Norris first told him Mr. Jones had left for Olympia, but then lowered her voice and said he was under the house watching them; RP 111-15, 140-41.

The trial court erred because, as defense counsel argued, these statements were testimonial.

Indeed, as to the statements to dispatch, the State *conceded* Ms. Norris's 911 call was not admissible if she failed to testify, because she very calmly reported an alleged violation of a no-contact order based on her presence at Mr. Jones's house. RP 9; CP 18-24. Yet, inexplicably, the court permitted Deputy Hoover to testify that dispatch told him there was a no-contact order violation even though dispatch was simply repeating the claim Ms. Norris made when she called 911.

Neither Ms. Norris nor the dispatcher appeared at trial. As the State properly conceded, there was no ongoing emergency; rather, Ms. Norris was simply reporting an alleged no-contact order violation. Objectively viewed, the primary purpose of her statement to dispatch was to establish events potentially relevant to later criminal prosecution. Thus,

the statement was testimonial and should not have been admitted given Ms. Norris's absence. *Davis*, 547 U.S. at 822.

The same is true about Ms. Norris's statements to Deputy Hoover regarding Mr. Jones's location. There was no ongoing emergency – Mr. Jones was *at his own home*, which he did not share with Ms. Norris. Ms. Norris had arrived at the house in a truck with a friend, and she could have left in the same truck, which was still there (as was the friend).

Alternatively, Deputy Hoover could have offered her a ride home. Her statements regarding his location simply served to support a prosecution for a violation of a no-contact order. They were testimonial, and should have been excluded given Ms. Norris's absence at trial.

Despite defense counsel's thorough briefing and argument on the Confrontation Clause, the trial court resolved the issue by relying on the hearsay rules. It ruled the statement from dispatch regarding the violation of a no-contact order was admissible because it was "not hearsay," RP 110, and ruled Ms. Norris's statements about Mr. Jones's location were admissible under the "present sense impression" exception to the rule against hearsay. RP 114-15. The court did so even though defense counsel explained, "before *Crawford* it may have been sufficient to say that these statements would come in under a hearsay exception. After *Crawford I* think the court has to do an additional analysis." RP 112-13. Counsel

explained, as he had in his pleadings, that the question for Confrontation Clause purposes is whether the statements are testimonial. RP 112-13. The court erred in admitting the statements and in doing so based on a hearsay analysis. *See Crawford*, 541 U.S. at 61 (“we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence”).

- b. The court erred under the rule against hearsay by admitting Deputy Hoover’s testimony that he was told to report to the house because of a protection order violation.

Deputy Hoover’s testimony that he was told he needed to go to the residence because it “was dispatched as a protection order violation” should have been excluded for the independent reason that its admission violated the rules of evidence – specifically, the rule against hearsay. RP 132. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible at trial unless an exception applies. ER 802.

The trial court ruled the statement from dispatch was “not hearsay” because it was “not offered to prove the truth of the matter asserted” but rather “to establish why Deputy Hoover acted the way he did.” RP 110.

This was error, because “why Deputy Hoover acted the way he did” was not an issue at trial.

As trial counsel noted, this Court’s decision in *Aaron* controls. *State v. Aaron*, 57 Wn. App. 277, 787 P.2d 949 (1990); CP 26. There, defense counsel moved to exclude testimony from the investigating officer that the defendant was seen with a jacket associated with a burglary. *Id.* at 279. The officer had received that information from dispatch, not through direct observation, and no witness who observed the defendant would testify to seeing him with the jacket. *Id.* The State claimed the statements would not be offered to prove the truth of the matter asserted but to show “why [the officer] acted as he did.” The trial court overruled the defense objection and allowed the testimony, but this Court reversed. *Id.* at 279-80. This Court explained, “the officer’s state of mind in reacting to the information he learned from dispatcher is not in issue” and therefore was “not relevant for another [non-hearsay] purpose.” *Id.* at 280. If testimony about historical facts were necessary, the officer could have simply testified he acted upon “information received.” *Id.* at 281. But the admission of hearsay was error. *Id.*

The same is true here. The trial court erred in admitting this damaging hearsay to show “why Deputy Hoover acted the way he did,” when this was not in issue. RP 110; *Aaron*, 57 Wn. App. at 280. If Deputy

Hoover for some reason really needed to explain his actions, he could have testified he acted upon information received. *Aaron*, 57 Wn. App. at 280. Instead, the court permitted him to testify that dispatch told him he needed to go to the residence to investigate a protection order violation. The statement's only relevance was for its truth: that Mr. Jones was violating a protection order. Its admission was improper.

c. The remedy is reversal of the conviction and remand for a new trial.

Confrontation clause violations are presumed prejudicial and a new trial must be granted unless the State proves beyond a reasonable doubt that the verdict would have been the same absent the error. *State v. Berniard*, 182 Wn. App. 106, 131, 327 P.3d 1290 (2014). Stated differently, this Court “will hold a confrontation clause violation harmless only where the untainted evidence overwhelmingly establishes no reasonable probability of a different outcome.” *Id.*

Evidentiary errors require reversal if, within reasonable probabilities, had the error not occurred the outcome of the trial would have been materially affected. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a

new trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

Under either standard, this Court should hold the improper admission of the above statements was prejudicial. In this case where the sole question was whether Mr. Jones had violated a protection order, Deputy Hoover was impermissibly allowed to testify he “needed to go to that residence” because “[i]t was dispatched as a protection order violation.” RP 132. Then, he was permitted to testify Ms. Norris told him Mr. Jones was under the house watching them, even though he and Ms. Norris were not supposed to be at the same location. RP 141. The other evidence did not “overwhelmingly establish no reasonable probability of a different outcome.” *Berniard*, 182 Wn. App. at 131. Instead it showed that Mr. Jones was simply at his own home, and Ms. Norris contacted him at his home, not the other way around. And Mr. Jones disputed having told Deputy Hoover that he got a ride from Ms. Norris earlier that day. Given this conflicting evidence, the error in admitting these statements was not harmless, and a new trial should be granted.

F. CONCLUSION

Mr. Jones respectfully asks this Court to reverse his conviction and remand for a new trial because his constitutional right to a unanimous jury was violated. In the alternative, a new trial should be granted because the

court admitted testimony in violation of the Confrontation Clause and the rule against hearsay.

Respectfully submitted this 18th day of July, 2019.

A handwritten signature in black ink, reading "Lila J. Silverstein" with a horizontal line extending to the right.

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Appellant.)	

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