

82094-5

FILED
SEP 10 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. _____
COA No. 60248-9-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CIPRIANO B. NONOG,

Appellant.

FILED
CLERK OF SUPREME COURT
STATE OF WASHINGTON
2008 AUG 13 PM 4:52

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER/DECISION BELOW..... 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED..... 4

THE COURT OF APPEALS' PUBLISHED DECISION
EXPRESSLY DEPARTS FROM DIVISION TWO'S DECISION
IN STATE V. CLOWES, REQUIRING THIS COURT GRANT
REVIEW IN ORDER TO RESOLVE THE CONFLICT 4

1. The particular underlying crime of domestic violence is an
essential element of the crime of interfering with domestic
violence reporting that must be set forth in the information .. 5

2. Each count of a multiple-count information must contain
every element of the crime charged in that count..... 10

E. CONCLUSION..... 18

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. 1, § 22.....	6
U.S. Const. amend. 14.....	6
U.S. Const. amend. 6.....	6

Washington Supreme Court

<u>City of Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992)...	10
<u>State v. Brunn</u> , 145 Wash. 435, 260 P. 990 (1927).....	13
<u>State v. Fillpot</u> , 51 Wash. 223, 98 P. 659 (1908).....	8
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992)	12, 17
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991)....	7, 11, 12, 16
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989).....	7, 16
<u>State v. Markle</u> , 118 Wn.2d 424, 823 P.2d 1101 (1992)	12
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987)	12
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008)	6
<u>State v. Royse</u> , 66 Wn.2d 552, 403 P.2d 838 (1965)	7, 8
<u>State v. Ryan</u> , 192 Wash. 160, 73 P.2d 735 (1937)	8
<u>State v. Taylor</u> , 140 Wn.2d 229, 996 P.2d 571 (2000)	6, 11, 13
<u>State v. Taylor</u> , 47 Wn.2d 213, 287 P.2d 298 (1955)	13
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	6, 12
<u>State v. Williams</u> , 162 Wn.2d 177, 170 P.3d 30 (2007)	9

Washington Court of Appeals

<u>State v. Bryant</u> , 65 Wn. App. 428, 828 P.2d 1121 (1992)	8
<u>State v. Clowes</u> , 104 Wn. App. 935, 18 P.3d 596 (2001) ..	1, 3, 4, 18
<u>State v. Green</u> , 101 Wn. App. 885, 6 P.3d 53 (2000)	10, 15
<u>State v. Johnstone</u> , 96 Wn. App. 839, 982 P.2d 119 (1999)	9
<u>State v. Laramie</u> , 141 Wn. App. 332, 169 P.3d 859 (2007)	4
<u>State v. Medlock</u> , 86 Wn. App. 89, 935 P.2d 693 (1997)	8
<u>State v. Pope</u> , 100 Wn. App. 624, 999 P.2d 51 (2000)	9

United States Supreme Court

<u>Dunn v. United States</u> , 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932)	14
---	----

Statutes

Former RCW 9.05.070	9
Laws of 1999, ch. 191, § 4	9
RCW 9A.36.150	8
RCW 9A.76.170	8
RCW 10.37.060	13
RCW 10.99.020	3, 7, 10

Other Jurisdictions

<u>Asgill v. United States</u> , 60 F.2d 780 (4th Cir. 1932)	15
<u>Browning v. State</u> , 165 N.E. 566 (Ohio 1929)	16

<u>Davis v. State</u> , 371 So.2d 721 (Fla. App. 1979)	15
<u>Davis v. United States</u> , 357 F.2d 438 (5th Cir. 1966)	15
<u>McClintock v. United States</u> , 60 F.2d 839 (10th Cir. 1932)	15
<u>People v. Brinson</u> , 739 P.2d 897 (Colo. App. 1987)	15
<u>People v. Hall</u> , 96 Ill.2d 315, 450 N.E.2d 309 (Ill. 1982)	16
<u>Perry v. State</u> , 8 S.E.2d 425 (Ga. App. 1940)	16
<u>Smith v. State</u> , 571 S.W.2d 917 (Tex. Crim. App. 1978)	16
<u>State v. Green</u> , 376 A.2d 424 (Del. Super. 1977)	15
<u>State v. Johnson</u> , 722 P.2d 1266 (Or. App. 1985)	16
<u>State v. Rector</u> , 155 S.E. 385 (S.C. 1930)	16
<u>State v. Vaughan</u> , 117 S.E. 127 (W.Va. 1923)	16
<u>State v. White</u> , 266 P. 415 (Idaho 1928)	16
<u>State v. Wilson</u> , 337 S.E.2d 470 (N.C. 1985)	16
<u>United States v. Gordon</u> , 253 F.2d 177 (7th Cir. 1958)	15
<u>United States v. Miller</u> , 774 F.2d 883 (8th Cir. 1985)	15
<u>United States v. Rodriguez-Gonzales</u> , 358 F.3d 1156 (9th Cir. 2004)	14
<u>Usary v. State</u> , 112 S.W.2d 7 (Tenn. 1937)	16
<u>Walker v. United States</u> , 176 F.2d 796 (9th Cir. 1949)	14

Rules

CrR 2.1(a)(1)	13, 14
RAP 13.4	1

A. IDENTITY OF PETITIONER/DECISION BELOW

Cipriano B. Nonog requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Nonog, No. 60248-9-1, filed July 14, 2008. A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. In order to prove the crime of interfering with domestic violence reporting, the State must prove the defendant committed an underlying crime of domestic violence. In State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001), Division Two held the particular underlying crime of domestic violence is an element of the crime of interfering with domestic violence reporting that must be set forth in the information. In its published decision in Mr. Nonog's case, Division One expressly disagreed with Division Two and held the particular underlying crime of domestic violence is not an element but merely a "supporting fact." Should this Court grant review to resolve this conflict between divisions of the Court of Appeals?

2. In Clowes, Division Two held that each count of a multiple-count information must contain every element of the crime charged in that count. Even where the information is challenged for the first time on appeal, it is constitutionally defective if each count

does not contain every element of the crime. In this case, Division One expressly disagreed with Division Two and held that where the challenge is raised for the first time on appeal, the reviewing court may look to other counts of the information to supply any missing elements. Should this Court grant review to resolve this conflict between divisions of the Court of Appeals?

C. STATEMENT OF THE CASE

The State charged¹ Mr. Nonog with one count of domestic violence felony violation of a court order (Count I); one count of residential burglary - domestic violence (Count II); and one count of interfering with domestic violence reporting (Count IV), all arising from an incident that occurred on March 30, 2006.² CP 10-12. After a jury trial, Mr. Nonog was convicted of all three counts. CP 65, 66, 68, 70, 79-81.

Mr. Nonog appealed, arguing the information was constitutionally defective, as Count IV did not set forth all the

¹ A copy of the information is attached as Appendix B.

² The State also charged Mr. Nonog with two additional counts of domestic violence felony violation of a court order (Counts III and V), arising from incidents on April 8 and April 16, 2006. *Id.* The jury was unable to reach a verdict regarding Count III and acquitted Mr. Nonog of Count V. CP 61, 67.

essential elements of the crime of interfering with domestic violence reporting.³ Specifically, the information alleged Mr. Nonog

having committed a crime of domestic violence as defined by RCW 10.99.020, did intentionally prevent or attempt to prevent Nanette Estandian, the victim of that crime, from calling a 911 emergency system, obtaining medical assistance, or making a report to any law enforcement official.

Appendix B. Relying on Division Two's decision in State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001), Mr. Nonog argued that, because the information did not specify the particular underlying crime of domestic violence allegedly committed, it was constitutionally defective.

In a published decision, Division One expressly disagreed with Division Two in Clowes and held the particular underlying crime of domestic violence is not an essential element of the crime of interfering with domestic violence reporting, but is merely a "supporting fact." Slip Op. at 4, 8. Further, the court held that, because Mr. Nonog challenged the information for the first time on

³ Mr. Nonog also argued that: (1) the conviction for interfering with domestic violence reporting must be reversed, as the jury was instructed on all three statutory means of committing the crime but the State presented substantial evidence of only one means; and (2) he must be resentenced, as the State did not prove his prior California conviction for first degree burglary was comparable to a Washington felony. The Court of Appeals disagreed with the first argument but agreed with the second and remanded the case for resentencing. Neither of those decisions is at issue in this petition.

appeal, the court could look to other counts of the information to supply the missing fact. Slip Op. at 5-7.

The facts as further set out in Mr. Nonog's pleadings are incorporated by this reference.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS' PUBLISHED DECISION EXPRESSLY DEPARTS FROM DIVISION TWO'S DECISION IN STATE V. CLOWES, REQUIRING THIS COURT GRANT REVIEW IN ORDER TO RESOLVE THE CONFLICT

In its published decision, Division One expressly rejected Division Two's reasoning and holding in State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001).⁴ Slip Op. at 6-8. In Clowes, Division Two had held that the particular underlying crime of domestic violence was an essential element of the crime of interfering with domestic violence reporting that must be set forth in the information. 104 Wn. App. at 942. Further, the Clowes court held that even where the information is challenged for the first time on appeal, the reviewing court may not "pluck" elements from one count of a multiple-count information and drop them into another in order to save the information from constitutional infirmity. Id. This

⁴ Division One therefore aligned itself with Division Three, which had earlier rejected the holding and reasoning of Clowes in State v. Laramie, 141 Wn. App. 332, 169 P.3d 859 (2007).

express conflict between published decisions of separate divisions of the Court of Appeals requires this Court grant review in order to resolve the conflict. RAP 13.4(b)(2).

1. The particular underlying crime of domestic violence is an essential element of the crime of interfering with domestic violence reporting that must be set forth in the information. Division One acknowledged that Count IV of the information in this case does not specify the particular underlying domestic violence crime allegedly committed. Slip Op. at 4. Nonetheless, the court held the information was constitutionally sufficient, because the specific underlying crime of domestic violence is not an "element" of the crime of interfering with domestic violence reporting. Slip Op. at 4-5, 8.

An examination of the statute and this Court's decisions shows that, contrary to Division One's conclusion, the underlying crime of domestic violence is an "element" of the crime of interfering with domestic violence reporting and is therefore subject to the essential elements rule.

It is a fundamental principle of criminal procedure, embodied in the state⁵ and federal⁶ constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusations before the State may prosecute and convict him of a crime. The judicially approved means for ensuring constitutionally adequate notice is to require charging documents set forth the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This “essential elements rule” has long been settled law in Washington and is based on the federal and state constitutions and court rule. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). This Court recently reaffirmed its adherence to the essential elements rule. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).

All essential elements of the crime must be included in the information so as to apprise the accused of the charges and allow him to prepare a defense, and so that he may plead the judgment

⁵ Article 1, section 22 of the Washington Constitution guarantees that “In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof.”

⁶ The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation.” In addition, the Fourteenth Amendment

as a bar to any subsequent prosecution for the same offense.

State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must state *all* essential elements of the crime, both statutory and non-statutory. Kjorsvik, 117 Wn.2d at 102. It is well-settled that the State may not rely solely on the language of the statute, but must specify in ordinary and concise language the defendant's conduct that is alleged to have constituted the crime. Kjorsvik, 117 Wn.2d at 98-99; Leach, 113 Wn.2d at 686, 689; State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

An examination of the statute plainly shows that commission of an underlying crime of domestic violence is an essential element of the crime of interfering with domestic violence reporting. A person is guilty of the crime if he "[c]ommits a crime of domestic violence, as defined in RCW 10.99.020" and "[p]revents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official." RCW 9A.36.150(1). The statute unambiguously states,

provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

"[c]ommission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence." RCW 9A.36.150(2).

It is well-settled that where commission of an underlying crime is an element of the crime charged, the underlying crime must be specified in the information. In Royse, for example, this Court held that for the crime of second degree assault based on the intent to commit an underlying felony, the specific felony the defendant intended to commit must be set forth in the information. 66 Wn.2d at 555.

Similarly, where the crime charged is felony murder, the information must specify the particular underlying felony. State v. Medlock, 86 Wn. App. 89, 101, 935 P.2d 693 (1997); State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121 (1992); State v. Anderson, 10 Wn.2d 167, 180, 116 P.2d 346 (1941); State v. Ryan, 192 Wash. 160, 164-65, 73 P.2d 735 (1937); State v. Fillpot, 51 Wash. 223, 228, 98 P. 659 (1908).

Finally, for the crime of bail jumping, the State must allege the specific underlying crime the defendant was held for, charged with, or convicted of. RCW 9A.76.170; State v. Williams, 162

Wn.2d 177, 185, 170 P.3d 30 (2007) (citing State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000)).

Moreover, the requirement that the information specify the acts constituting the crime charged in ordinary and concise language, precludes the State from simply including a statutory citation in place of an essential element. In State v. Johnstone, 96 Wn. App. 839, 982 P.2d 119 (1999), for instance, the charged crime was intentional interference with owner's control, which required proof that the defendant unlawfully took or retained, or attempted to take or retain, property used in "any enterprise described in RCW 9.05.060," with intent to supplant, nullify or impair the owner's management or control of that enterprise. Former RCW 9.05.070.⁷ Johnstone held the information must specify the nature of the enterprise alleged and could not simply refer to the numerical code section defining the term "enterprise." Id. at 845-46. That is because the defendant should not have "the burden of locating the relevant code . . . and determining the elements of the offense from the proper code section," which is "an unfair burden to place on an accused." Id. at 845 (quoting City of

⁷ The crime was repealed in 1999. Laws of 1999, ch. 191, § 4 (effective July 25, 1999).

Auburn v. Brooke, 119 Wn.2d 623, 634-35, 836 P.2d 212 (1992));
cf. State v. Green, 101 Wn. App. 885, 6 P.3d 53 (2000), rev.
denied, 142 Wn.2d 1018, 16 P.3d 1266 (2001) (reversing
conviction for bail jumping where information set forth cause
number of underlying crime but did not specify crime).

In sum, the Court of Appeals was incorrect in concluding that
the particular underlying crime of domestic violence is not an
element of the crime of interfering with domestic violence reporting.
Like all other elements, therefore, it is subject to the essential
elements rule and must be set forth in the information in plain and
concise terms.

Because the information alleged only that Mr. Nonog
"committed a crime of domestic violence as defined by RCW
10.99.020," and did not specify the particular domestic violence
crime, it is constitutionally deficient. The remedy is reversal and
dismissal of the charges without prejudice to the State's ability to
re-file charges. Vangerpen, 125 Wn.2d at 792-93.

2. Each count of a multiple-count information must contain
every element of the crime charged in that count. The Court of
Appeals concluded that, when a challenge to the information is
raised for the first time on appeal, the reviewing court may look to

other counts of a multiple-count information to supply necessary facts missing from the charge at issue. Slip Op. at 5-7.

This conclusion by Division One is not consistent with this Court's case law applying the essential elements rule. To the contrary, as discussed below, the rule is well-settled and long-standing that each count of a multiple-count information must be sufficient in itself and must contain every element of the crime charged. This Court has never held this standard does *not* apply simply because the appellant has challenged the information for the first time on appeal.

When a defendant challenges the sufficiency of a charging document, the standard of review on appeal depends on whether the defendant first raised the challenge before or after the verdict. Taylor, 140 Wn.2d at 237. Where the challenge is brought prior to verdict, the charging language is strictly construed. Id. Where the challenge is raised for the first time on appeal, however, the charging document is construed liberally and is sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105.

If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must

presume prejudice. McCarty, 140 Wn.2d at 425. This Court has repeatedly insisted that a charging document is constitutionally adequate only if all essential elements of a crime are included, regardless of whether the accused received actual notice of the charge. Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

The requirement that the information contain every element of the crime does not change simply because an information is challenged for the first time on appeal. An information cannot be upheld, regardless of when the challenge is raised, if it does not contain all the elements, as “the most liberal possible reading cannot cure it.” State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992). This is a long-standing requirement in Washington, as the strict standard of review set forth in Kjorsvik “merely states the proper method of interpretation; it does not alter the requirements for sufficiency.” Id.

It is also well-established in Washington that each count of a multiple-count charging document must stand on its own and be construed as a separate count. State v. Unosawa, 29 Wn.2d 578, 587-89, 188 P.2d 104 (1948); State v. Taylor, 47 Wn.2d 213, 215,

287 P.2d 298 (1955). RCW 10.37.060⁸ permits the State to join in the same information multiple counts that arise out of the same or related acts or transactions. State v. Brunn, 145 Wash. 435, 436-37, 260 P. 990 (1927). Before the statute was enacted, in 1925, an information could charge only one crime. Unosawa, 29 Wn.2d at 587; Brunn, 145 Wash. at 436. But although joining multiple counts in a single information is now permitted, “[t]he law still requires the charge to be direct and certain as to each act or transaction.” Unosawa, 29 Wn.2d at 587. In other words, “separate offenses must be stated in separate counts,” and if one count does not, standing alone, charge an offense, that conviction must be reversed. Taylor, 47 Wn.2d at 215.

The only exception to this rule is where allegations from one count are expressly incorporated into another count. Unosawa, 29 Wn.2d at 587; CrR 2.1(a)(1). Such reference must be explicit,

⁸ RCW 10.37.060 provides:

When there are several charges against any person, or persons, for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments or informations the whole may be joined in one indictment, or information, in separate counts; and, if two or more indictments are found, or two or more informations filed, in such cases, the court may order such indictments or informations to be consolidated.

definite and specific, so that the matter referred to is clearly and accurately incorporated in the referring count. Unosawa, 129 Wn.2d at 588; CrR 2.1(a)(1).

The weight of authority from other jurisdictions is consistent with the rule in Washington -- each count of a multiple-count information must contain all essential elements of the crime, unless allegations from other counts are expressly incorporated. In United States v. Rodriguez-Gonzales, for instance, the Ninth Circuit recently explained: "The Supreme Court and the Ninth Circuit have long held that 'each count in an indictment . . . is regarded as if it were a separate indictment' and 'must be sufficient in itself.' Further, each count 'must stand or fall on its own allegations without reference to other counts not expressly incorporated by reference.'" 358 F.3d 1156, 1158 (9th Cir. 2004) (citing Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932), overruled on other grounds by Sealton v. United States, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948); Walker v. United States, 176 F.2d 796, 798 (9th Cir. 1949)). Further, "[m]any of this court's sister circuits have cited this long-standing rule requiring specificity with approval. We now re-affirm this long-standing rule's validity." Id. at 1158 (citing Davis v. United States, 357 F.2d 438,

440 (5th Cir. 1966); United States v. Gordon, 253 F.2d 177, 180 (7th Cir. 1958) (referring to the requirement as the 'universal rule'); McClintock v. United States, 60 F.2d 839, 841 (10th Cir. 1932)); see also United States v. Miller, 774 F.2d 883, 885 (8th Cir. 1985) (it is well-settled that "each count of an indictment 'must stand on its own, and cannot depend for its validity on the allegations of any other count not specifically incorporated") (citations omitted); Asgill v. United States, 60 F.2d 780, 783 (4th Cir. 1932) ("each count shall be treated as charging a separate offense," unless there is clear and specific incorporation by reference).

State courts are generally in agreement. See People v. Brinson, 739 P.2d 897, 899 (Colo. App. 1987) ("Each count of an information must be considered independently of any other count and must, itself, allege all of the material elements of the crime charged, so that each count charges a distinct and separate offense"); State v. Green, 376 A.2d 424, 429 (Del. Super. 1977) ("Each count is considered as if it were a separate indictment and must be sufficient without reference to other counts unless they are incorporated by reference"); Davis v. State, 371 So.2d 721, 722 (Fla. App. 1979) ("allegations of each count must be separately considered and not by reference to the other"); Perry v. State, 8

S.E.2d 425, 427 (Ga. App. 1940) ("Each count must be considered as if it there were no other count"); State v. White, 266 P. 415, 417 (Idaho 1928) (same); State v. Wilson, 337 S.E.2d 470, 476 (N.C. 1985) (same); Browning v. State, 165 N.E. 566, 569 (Ohio 1929) (same); State v. Johnson, 722 P.2d 1266, 1268 (Or. App. 1985) (same); State v. Rector, 155 S.E. 385, 386 (S.C. 1930) (same), overruled on other grounds by Evans v. State, 611 S.E.2d 510 (S.C. 2005); Usary v. State, 112 S.W.2d 7, 8 (Tenn. 1937) (same); Smith v. State, 571 S.W.2d 917, 919 (Tex. Crim. App. 1978) (distinguishing between elements of crime, which must be contained within specific count, and "defects in form," which may be supplied by reference to other parts of indictment); State v. Vaughan, 117 S.E. 127, 128 (W.Va. 1923) (incorporation by reference "must be so full and distinct, as in effect to incorporate the matter going before with that in the count in which it is made"); but see People v. Hall, 96 Ill.2d 315, 320-21, 450 N.E.2d 309, 320 (Ill. 1982) ("elements missing from one count of a multiple-count indictment or information may be supplied by another count").

Finally, in Leach, Kjorsvik and subsequent cases, this Court indicated it intends to adhere to the essential elements rule as traditionally applied in Washington. In Leach, for instance, the

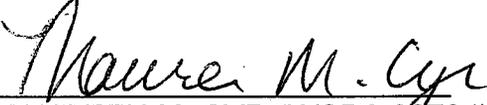
Court expressly reaffirmed Unosawa's holding that an information must contain every element of the crime. Leach, 113 Wn.2d at 687-88 (citing Unosawa, 29 Wn.2d at 589). As discussed above, Unosawa expressly held an element missing from one count of a multiple-count information may not be supplied by the other counts. Unosawa, 20 Wn.2d at 587, 589. Thus, Leach implicitly reaffirmed this rule from Unosawa. Similarly, in Hopper, the Court again cited Unosawa with approval. Hopper, 118 Wn.2d at 157 (citing Unosawa, 29 Wn.2d at 589). Hopper made clear "[t]he application of the strict standard of review [from Kjorsvik] does not upset this line of cases." Hopper, 118 Wn.2d at 157.

In sum, each count of a multiple-count information must be complete in itself and separately construed. This standard does not change simply because the information is challenged for the first time on appeal. As discussed above, Count IV of the information in this case does not contain every element of the crime. That constitutional deficiency cannot be cured by looking to other counts of the information to supply the missing element.

E. CONCLUSION

Because the Court of Appeals' published opinion expressly conflicts with Division Two's opinion in Clowes, 104 Wn. App. 935, this Court should grant review.

Respectfully submitted this 13th day of August 2008.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RECEIVED

JUL 14 2008

Washington Appellate Project

STATE OF WASHINGTON,)	NO. 60248-9-I
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
CIPRIANO BAHIT NONOG ,)	
)	
Appellant.)	FILED: July 14, 2008

BECKER, J. — An information that alleges the crime of interfering with the reporting of domestic violence must specify the underlying crime of domestic violence. We hold that an information that is challenged for the first time on appeal sufficiently defines the charge of interfering if the count alleging the crime contains all the statutory elements and makes clear that the underlying crime of domestic violence is delineated elsewhere in the information.

A domestic violence no-contact order prohibited appellant Cipriano Nonog from having any contact with his ex-girlfriend, Nanette Estandian. On March 30, 2006, Estandian came home with a friend and found Nonog inside. She attempted to call 911 from her cell phone. Nonog grabbed her cell phone from her and threw it against a wall. Estandian was finally able to call 911 using her friend's cell phone.

A week later, Estandian saw Nonog walk out of her house as she was pulling into her driveway. Estandian locked herself in her car and called 911. A week after that, Estandian called 911 to report that Nonog had again entered her house without permission while she was home.

The State charged Nonog with five counts relating to these three encounters. A jury convicted him only on the three counts relating to the March 30, 2006 incident. Count 1 was felony violation of a domestic violence protection order. Count 2 was residential burglary—domestic violence. Count 4 was interfering with domestic violence reporting. Nonog appeals.

SUFFICIENCY OF INFORMATION

Nonog challenges the sufficiency of the information as to Count 4. For an information to be constitutionally adequate, all essential elements of the crime must be included in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). Because Nonog has challenged the information for the first time on appeal, it will be liberally construed in favor of validity using the two-prong test of

Kjorsvik. The primary question is whether the necessary facts appear in any form, or by fair construction can be found, in the charging document however inartfully it may be worded. If so, the information will be held sufficient unless the defendant suffered actual prejudice as a result of the inartful charging language. Kjorsvik, 117 Wn.2d at 105-06.

In addition to adequately identifying the crime charged, the charging document must allege facts supporting every element of the offense. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). "This is not quite the same" as a requirement to state every statutory element of the crime charged. Leach, 113 Wn.2d at 688. The charge must be defined sufficiently to apprise an accused with reasonable certainty of the nature of the accusation against that person, "to the end that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." Leach, 113 Wn.2d at 688. Merely reciting the statutory elements of the crime charged may not be adequate unless the statute defines the offense with certainty. Kjorsvik, 117 Wn.2d at 98; Leach, 113 Wn.2d at 688.

A necessary statutory element of interfering with domestic violence reporting is commission of a crime of domestic violence:

- (1) A person commits the crime of interfering with the reporting of domestic violence if the person:
 - (a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and
 - (b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911

emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

(2) Commission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence.

RCW 9A.36.150.

A crime of domestic violence is one defined in RCW 10.99.020. This statute presently defines "domestic violence" as including, but not being limited to, 23 different crimes. RCW 10.99.020(3). An opinion by Division Two of this court holds that an information charging the crime of interfering with domestic violence reporting must, in order to define the crime sufficiently, specify the underlying domestic violence crime and the identity of the victim. State v. Clowes, 104 Wn. App. 935, 942, 18 P.3d 596 (2001). It is important to keep in mind that the particular underlying domestic violence crime and the identity of the victim are neither statutory nor implied elements of the crime of interfering with domestic violence reporting. Rather, they are facts that must be alleged to support the elements of the crime.

In this case, Count 4 recites the statutory elements and identifies the victim, but it does not specify the underlying domestic violence crime. Nonog contends his conviction on this count must be reversed because the information is deficient under Clowes.

The State does not dispute that the nature of the underlying domestic violence crime is a necessary fact that must be included in the information, but responds that it can be found elsewhere in the charging document by a fair and

liberal construction. Count 1 and Count 2 alleged domestic violence crimes—felony violation of a protection order, and residential burglary—both occurring on the same day as the facts alleged in Count 4. And Count 4 alleged that the crime of domestic violence reporting was “a crime of the same or similar character and based on the same conduct as another crime charged herein . . . so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other.”¹ The crimes of domestic violence alleged in Count 1 and 2 were the only crimes charged in the information that would fit this description because they occurred on the same date as Count 4.

Clowes states that it is impermissible to “fill voids in a defective count with facts located elsewhere in the information.” Clowes, 104 Wn. App. at 942. In

¹ Count 4, in its entirety, states:

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO BAHIT NONOG of the crime of **Interfering with Domestic Violence Reporting**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or about March 30, 2006, having committed a crime of domestic violence as defined by RCW 10.99.020, did intentionally prevent or attempt to prevent Nanette Estandian, the victim of that crime, from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official;

Contrary to RCW 9A.36.150, and against the peace and dignity of the State of Washington.

Clerk's Papers at 11-12 (emphasis added).

Clowes, Count 2 of the information charged the crime of interfering with reporting of domestic violence. Clowes, 104 Wn. App. at 941. It did not specify the underlying domestic violence crime or the identity of the victim. The State argued that these details could be found by reading Count 2 in conjunction with Count 1, which alleged that the defendant had assaulted a named victim and thereby committed a felony violation of a no-contact order. Both crimes were alleged to have occurred on the same day. The court determined, however, that it was required to view Count 2 "in isolation." The court found that Count 2 was deficient and dismissed the conviction on that count without prejudice. Clowes, 104 Wn. App. at 942.

We disagree with Clowes, as did Division Three in State v. Laramie, 141 Wn. App. 332, 169 P.3d 859 (2007). To say that each count must be viewed in total isolation states the law too broadly. We agree with the analysis in Laramie.

Count 4 of the information in Laramie charged the crime of interfering with domestic violence reporting. Laramie, 141 Wn. App. at 337. It contained all statutory elements, but it did not specify the name of the victim or the nature of the underlying domestic violence crime. The court nevertheless found the crime charged was sufficiently defined by considering Count 4 in conjunction with the rest of the information:

We cannot agree with the reasoning in Clowes. We find nothing in Kjorsvik to suggest that in giving a liberal construction to an information, a reviewing court must limit its inquiry to the specific count at issue. Though Kjorsvik involved a single-count information, the court emphasized that "[w]ords in a charging document are read as a whole, construed according to common sense, and include facts which are

necessarily implied.” Kjorsvik, 117 Wn.2d at 109 (citing United States v. Buckley, 689 F.2d 893, 899 (9th Cir.1982)). The court subsequently applied the liberal construction rule in the context of multiple-count indictments, without any suggestion that its review of the *charging document as a whole* was limited to the count at issue. See [State v. Davis, 119 Wn.2d [657,] 661-64, [835 P.2d 1039 (1991)]; State v. Hopper, 118 Wn.2d 151, 156-57, 822 P.2d 775 (1992).

Moreover, reading each count in isolation seems particularly artificial when, as here, the alleged deficiency in the charge concerns supporting facts rather than legal elements of the charge. See State v. Winings, 126 Wn. App. 75, 85, 107 P.3d 141 (2005) (distinguishing between deficient and merely vague charges, and noting the information need not describe facts with great specificity). It is one thing to pluck elements such as intent or knowledge from unrelated counts, but when multiple counts arise out of the same or related facts, a commonsense construction should prevail. Kjorsvik, 117 Wn.2d at 108-09. The failure to allege specific facts in an information may render the charging document vague, but it is not constitutionally defective. State v. Leach, 113 Wn.2d 679, 686-87, 782 P.2d 552 (1989).

Laramie, 141 Wn. App. at 339-40. In Laramie, the supporting facts not specified in Count 4 could be “fairly inferred from other language within the charging document, giving the information a liberal, sensible construction as required under Kjorsvik.”

Laramie, 141 Wn. App. at 340. The identity of the victim was unambiguous, and the assaults upon her were sufficiently described. Accordingly, the court concluded that the information, “while not a model of clarity,” satisfied the first prong of the Kjorsvik analysis. Laramie, 141 Wn. App. at 340.

As stated by Division Three, the application of the essential elements rule in Clowes was “over-technical.” Laramie, 141 Wn. App. at 340, n.2. Clowes relied on State v. Gill, 103 Wn. App. 435, 13 P.3d 646 (2000), but gave Gill a broader reading than necessary. In Gill, a count of harassment against one person failed to allege

that the threat in question was made “knowingly” and “without lawful authority.” Gill, 103 Wn. App. at 441. The State argued that the deficiency could be cured by resort to another count in the same information that used the words “knowingly” and “without lawful authority” in alleging a different threat against a different person. The court understandably refused the State’s invitation to “pull missing elements from one count and insert them into another.” Gill, 103 Wn. App. at 442.

The analysis in Gill is entirely correct and consistent with a long line of cases holding that each count in itself must charge a crime. See, e.g., State v. Unosawa, 29 Wn.2d 578, 587-89, 188 P.2d 104 (1948). Once the court is satisfied that the particular count in question does charge “all of the statutory elements of the particular crime involved,” then the court may look to the information as a whole to determine whether a person of common understanding can read it and “know the exact nature of the charge against him.” Unosawa, 29 Wn.2d at 589 (where a count charging manslaughter failed to allege the statutory element of intent to use certain instruments to produce a miscarriage, it was inadequate even though a separate count charging abortion alleged such intent).

Unlike in Gill and Unosawa, here the count at issue did, in itself, charge all the statutory elements of the crime of interfering with domestic violence reporting. As in Laramie, the alleged deficiency in the charge concerns supporting facts rather than statutory elements. A person of common understanding would know, by reading

Counts 1 and 2, which domestic violence crimes Estandian was trying to report when Nonog allegedly interfered with her.

Nonog has not argued that he was actually prejudiced by any inartfulness in the charging language. We reject Nonog's challenge to the sufficiency of the information.

ALTERNATIVE MEANS

Nonog also claims his conviction for interfering with domestic violence reporting must be reversed on the ground that it is a crime that can be committed by three distinct statutory means, and the jury was instructed on all three means but only one of them was supported by substantial evidence.

Where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

Typically, an alternative means statute will state a single offense, using subsections to set forth more than one means by which the offense may be committed. State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Our courts have resisted efforts to interpret statutory definitions as creating additional means, or means within a means, of committing an offense. See Smith, 159 Wn.2d at 785-86 and cases cited therein. Merely because a definition statute states methods of

committing a crime in the disjunctive does not mean that the definition creates alternative means of committing the crime. State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999). The State suggests that the three ways in which a victim or witness might try to report a crime of domestic violence are simply definitional and that the crime itself may be committed by only one means, i.e., by preventing (or attempting to prevent) the victim or witness from making a report.

A person commits the crime of interfering with the reporting of domestic violence if the person:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

RCW 9A.36.150(1).

The variations in RCW 9A.36.150(1) are in the conduct of the would-be reporter rather than in the conduct of the interferer, but they are not merely descriptive or definitional of essential terms. The variations are themselves essential terms. The statute is structured similarly to RCW 9A.72.120, the statute that defines the crime of tampering with a witness. Tampering may be committed by inducing a witness to testify falsely, to be absent from official proceedings, or to withhold information from a law enforcement agency. RCW 9A.72.120. Witness tampering is regarded as an alternative means crime. State v. Fleming, 140 Wn. App. 132, 135-

37, 170 P.3d 50 (2007). Interfering with reporting of a crime of domestic violence must similarly be regarded as an alternative means crime because the statute does not criminalize all acts that might appear to constitute interfering with the reporting of domestic violence. Interference is culpable only when a victim or witness is trying to report the crime to a particular entity.

The jury heard evidence that when Estandian tried to call 911 upon finding Nonog illegally present in her home on March 30, 2006, he took her cell phone and threw it against the wall. There was no evidence that he tried to prevent her from obtaining medical assistance or making a report to law enforcement about that incident. The “to-convict” instruction limited consideration to just one means: “That the defendant prevented or attempted to prevent Nanette Estandian from calling a 911 emergency communication system.” As well, the State’s closing argument focused only on Nonog’s efforts to prevent Estandian from calling 911. The State did not invite the jury to consider whether he also prevented her from reporting the domestic violence crimes in the two other ways contemplated by the statute. So, even though the jury received an instruction defining the crime in the language of the statute including all three means, only one means was presented to the jury. For that means there was sufficient evidence. See Fleming, 140 Wn. App. at 136-37. Accordingly, we conclude there was no possibility the jury convicted on a means that was unsupported by the evidence.

OTHER ISSUES

Without objection, the trial court included in Nonog's offender score a prior California conviction for first degree burglary. On appeal, Nonog points out that California's burglary statute is not legally comparable to Washington's. See State v. Thomas, 135 Wn. App. 474, 486, 144 P.3d 1178 (2006). The parties agree that the case should be remanded for re-sentencing so a factual comparability analysis can be conducted. Remand is the appropriate remedy where, as here, the out-of-state crime is not legally comparable and trial counsel fails to object. State v. Thiefault, 160 Wn.2d 409, 417, 158 P.3d 580 (2007).

The judgment and sentence for Count 1, felony violation of a court order, inaccurately states that Nonog was found guilty of the crime under RCW 26.50.110(1), (4) and (5). Under RCW 26.50.110(4), a person commits felony violation of a court order if he violates the order by committing an assault. Under RCW 26.50.110(5), a person commits felony violation of a court order if he violates a court order and has at least two previous convictions for violating the provisions of a no-contact order. The State charged Nonog with violating both subdivisions, but the jury was not instructed on the assault alternative. The parties agree that the judgment and sentence should be corrected to omit the statutory reference to subsection (4).

The conviction is affirmed. The case is remanded for re-sentencing and to correct the judgment and sentence.

WE CONCUR:

Cox, J.

Becker, J.
Gunn

APPENDIX B

1 crimes were part of a common scheme or plan and which crimes were so closely connected in
2 respect to time, place and occasion that it would be difficult to separate proof of one charge from
proof of the other, committed as follows:

3 That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or
4 about March 30, 2006, did enter and remain unlawfully in the dwelling of Nanette Estandian,
located at 5205 Northeast 4th Place, Renton, in said county and state, with intent to commit a
5 crime against a person or property therein;

6 Contrary to RCW 9A.52.025, and against the peace and dignity of the State of
Washington.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO
BAHIT NONOG of the crime of **Domestic Violence Felony Violation of a Court Order**, a
crime of the same or similar character and based on the same conduct as another crime charged
herein, which crimes were part of a common scheme or plan and which crimes were so closely
connected in respect to time, place and occasion that it would be difficult to separate proof of one
charge from proof of the other, committed as follows:

That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or
about April 8, 2006, did know of and willfully violate the terms of a court order issued on June 6,
2003 by the Superior Court of Washington, pursuant to RCW chapters 10.99, 26.50, 26.09,
26.10, 26.26, 74.34, and/or a valid foreign protection order as defined in RCW 26.52.070, for the
protection of Nanette Estandian, by intentionally assaulting the said Nanette Estandian, or at the
time of the above violation did have at least two prior convictions for violating the provisions of
an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26, 74.34 or a valid foreign
protection order as defined in RCW 26.52.020;

Contrary to RCW 26.50.110(1), (4) and (5), and against the peace and dignity of the State
of Washington.

COUNT IV

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO
BAHIT NONOG of the crime of **Interfering with Domestic Violence Reporting**, a crime of the
same or similar character and based on the same conduct as another crime charged herein, which
crimes were part of a common scheme or plan and which crimes were so closely connected in
respect to time, place and occasion that it would be difficult to separate proof of one charge from
proof of the other, committed as follows:

That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or
about March 30, 2006, having committed a crime of domestic violence as defined by RCW
10.99.020, did intentionally prevent or attempt to prevent Nanette Estandian, the victim of that

Norm Maleng,
Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

1 crime, from calling a 911 emergency communication system, obtaining medical assistance, or
2 making a report to any law enforcement official;

3 Contrary to RCW 9A.36.150, and against the peace and dignity of the State of
4 Washington.

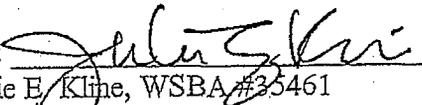
5 **COUNT V**

6 And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO
7 BAHIT NONOG of the crime of **Domestic Violence Felony Violation of a Court Order**, based
8 on a series of acts connected together with another crime charged herein, committed as follows:

9 That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or
10 about April 16, 2006, did know of and willfully violate the terms of a court order issued on June
11 6, 2003 by the King County Superior Court pursuant to RCW chapter 10.99 and RCW chapter
12 26.50, for the protection of Nanette Estandian, and at the time of the violation having at least two
13 prior convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50,
14 26.09, 26.10, 26.26 or 74.34, or under a valid foreign protection order as defined in RCW
15 26.52.020;

16 Contrary to RCW 26.50.110(1), (5), and against the peace and dignity of the State of
17 Washington.

18 **NORM MALENG**
19 Prosecuting Attorney

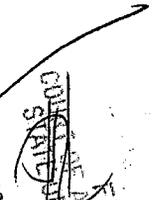
20 By: 
21 Julie E. Kline, WSBA #35461
22 Deputy Prosecuting Attorney
23

DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Petition for Review** filed under **Court of Appeals No. 60248-9-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for respondent: **William Doyle - King County Prosecuting Attorney**, **appellant** and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 13, 2008


FILED
APPEALS DIV. #1
COURT OF APPEALS
STATE OF WASHINGTON
2008 AUG 13 PM 4:52