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NO. 60248-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CIPRIANO B. NONOG,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. When an information is challenged for the first time on appeal, the reviewing court will liberally construe the information in favor of validity. An information is sufficient if (1) the necessary facts appear in any form in it, or by fair construction can be found in it, and (2) the defendant can show no prejudice by the allegedly inartful charging language. To prove interfering with domestic violence reporting, the State must prove that a person committed a crime of domestic violence, and that the person prevented or attempted to prevent the victim from (1) calling 911, (2) obtaining medical assistance, or (3) making a report to any law enforcement official. Here, for the charge of interfering with domestic violence reporting, count four of the Information provided the victim's name and the statutory reference for a domestic violence crime. This count also stated that it was based on the same conduct as another crime charged. Counts one and two of the Information were the underlying predicate domestic violence offenses committed on the same date. Did the Information sufficiently notify the defendant of the elements of the offense?

2. Although the definitional instruction for the crime of interfering with domestic violence reporting contained three

alternative means, the to-convict instruction contained only one alternative means. In closing argument, the State referred only to this alternative means. There is no dispute that the State provided substantial evidence to support a conviction based on the alternative means contained in the to-convict instruction. Does the defendant's challenge to the sufficiency of the evidence of this conviction fail?

3. Before a sentencing court includes a prior out-of-state conviction in an offender score, the State must prove that the conviction is legally or factually comparable to a Washington felony. The California crime of first-degree burglary is not legally comparable to the Washington crimes of burglary or residential burglary. At sentencing, the defendant did not challenge the comparability of his California conviction. The State apparently presented no documents to prove that the prior conviction was factually comparable to the Washington crime of burglary. Should this Court remand the matter for resentencing and permit the State to introduce evidence supporting the comparability of the California conviction?

4. Count one of the judgment and sentence indicates that the defendant was found guilty under a statutory alternative

that does not conform to the jury's verdict. Should the judgment and sentence be corrected?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Cipriano Nonog was charged by Amended Information with three counts of felony violation of a domestic violence court order, one count of residential burglary - domestic violence, and one count of interfering with domestic violence reporting. CP 10-12. Three charges arose from an incident on March 30, 2006 — residential burglary, interfering with domestic violence reporting, and one of the felony violation of a court order charges. CP 10-12. The other two felony violation charges arose from incidents that occurred on April 8 and April 16, 2006. CP 10-12.

After a jury trial, Nonog was convicted of the three charges arising from the March incident. CP 65-66, 68, 70-81. The jury was unable to reach a verdict on the felony violation charge arising

from the April 8th incident. CP 61; 6RP 3.¹ The jury found Nonog not guilty of the felony violation charge arising from the April 16th incident. CP 67. At sentencing, the court included in Nonog's offender score a prior California conviction for first-degree burglary. CP 70-78. For the two felony convictions, the court sentenced Nonog to concurrent, standard-range sentences of 17 months of confinement. CP 70-78. Nonog now appeals. CP 69.

2. SUBSTANTIVE FACTS

Nonog and Nanette Estandian have two children together. 2RP 3. As of March 30, 2006, Nonog and Estandian no longer were dating. 2RP 3-4. In fact, a domestic violence no-contact order prohibited Nonog from having any contact with Estandian. 2RP 4-5; Ex. 1.

On March 30, 2006, despite the no-contact order, Estandian and her boyfriend, Calvin Brown, came home to find Nonog inside Estandian's house. 2RP 3; 3RP 11, 41. Estandian asked Nonog what he was doing there, and then told him that she was going to

¹ The Verbatim Report of Proceedings consists of seven volumes, referred to in this brief as follows: 1RP (June 12, 2007); 2RP (June 13, 2007); 3RP (June 14, 2007); 4RP (June 18, 2007); 5RP (June 19, 2007); 6RP (June 20, 2007); and 7RP (June 29, 2007).

call 911. 3RP 13. Before she could call 911, Nonog ripped the telephone cord out of the wall. 3RP 13, 43. Nonog then grabbed Estandian by her wrist, but she managed to pull out her cell phone. 3RP 14, 43. Nonog grabbed the phone and hurled it against the wall, shattering it to pieces. 3RP 14-15, 43-44. Estandian finally was able to call 911 by using Brown's phone. 2RP 4; 3RP 15. Nonog tried to stop her, but Brown fended him off, telling him, "Look man, don't touch my phone, I'm serious." 3RP 51. Nonog responded, "What are you going to do, nigger?" then lunged at Brown. 3RP 46. Brown fought back to protect himself. 3RP 44-45. After the struggle, Nonog fled the scene. 3RP 15, 19, 46.

According to Estandian, only eight days later, on April 8, 2006, Nonog again violated the no-contact order. As Estandian pulled into her house's driveway, Nonog walked out of her house and approached her car. 3RP 21. Estandian locked herself in the car and called 911. Nonog left. 3RP 21. A police officer arrived at the scene quickly and saw a suspect who matched Nonog's description hiding by a nearby house. 3RP 100. The officer asked him to stop, but the suspect ran away. 3RP 102.

On April 16, 2006, Estandian called 911 to report that Nonog came to her house when she was there. 3RP 23-24, 76. A police

officer called Nonog that night. Nonog said that he was leaving for California and then hung up the phone. 3RP 78.

At the time of these offenses, Nonog already had been convicted at least twice of violating court orders prohibiting him from contacting Estandian. CP 27.

C. ARGUMENT

1. THE INFORMATION SUFFICIENTLY NOTIFIED NONOG OF ALL OF THE ELEMENTS OF INTERFERING WITH DOMESTIC VIOLENCE REPORTING.

Nonog argues for the first time on appeal that the Information did not sufficiently notify him of the essential elements of interfering with domestic violence reporting. His argument fails. The Information sufficiently contained the elements of the offense. Count four properly alleged that Nonog had committed a crime of domestic violence as defined by RCW 10.99.020. The count named the victim of the crime, Nanette Estandian. Lastly, the count provided the date of the domestic violence offense, and counts one and two informed Nonog of the specific domestic violence offenses committed on that date — felony violation of a court order and residential burglary. Based on a liberal and common sense construction of the Information, Nonog was notified of the charge's

elements. Thus, this Court should reject Nonog's claim and affirm his conviction.

a. Additional Procedural Facts

By Information and Amended Information, Nonog was charged with three domestic violence offenses that occurred on March 30, 2006. CP 1-3, 10-12. In counts one and two, Nonog was charged with domestic violence felony violation of a court order and residential burglary – domestic violence. CP 1-2, 10-11. In count four, Nonog was charged with interfering with domestic violence reporting. CP 1-2, 11-12. This count stated:

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.

CP 1-2, 11-12 (italics added).

Until this appeal, Nonog never raised any challenge to the Information's language.

- b. The Information Sufficiently Notified Nonog Of The Elements Of Interfering With Domestic Violence Reporting.

Under the "essential elements" rule, charging documents must include all of the essential elements of the crime charged. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The rule's primary goal is to give an accused notice of the nature of the crime that he must be prepared to defend against. State v. Tandecki, 153 Wn.2d 842, 846, 109 P.3d 398 (2005) (citing Kjorsvik, 117 Wn.2d at 101). "Words 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.

When an information is challenged for the first time on appeal, the reviewing court will liberally construe the information in favor of validity. Tandecki, 153 Wn.2d at 849. Applying this more liberal construction provides a defendant with the incentive to timely raise the challenge before the trial court. Kjorsvik, 117 Wn.2d at

103. Further, it discourages "sandbagging," where a defendant recognizes a defect in the information but foregoes raising it at trial because a challenge usually would result only in an amended charge. Kjorsvik, 117 Wn.2d at 103. As the Washington Supreme Court reasoned in State v. Majors, "[I]t would create an intolerable situation if defendants, after conviction, could defer their attacks upon indictments or informations until witnesses had disappeared, statutes of limitation had run, and those charged with the duty of prosecution had died, been replaced, or had lost interest in the cases." 94 Wn.2d 354, 358-59, 616 P.2d 1237 (1980); see also Kjorsvik, 117 Wn.2d at 105 (citing Majors, 94 Wn.2d at 358-59). Thus, when an information is not challenged until appeal, the appellate court considers the sufficiency of the information under a two-part test. First, the court considers whether the necessary facts appear in any form, or by fair construction can be found, in the information. And, if so, the court considers whether the defendant has shown that he was nonetheless actually prejudiced by the inartful language that caused a lack of notice. Kjorsvik, 117 Wn.2d at 105-06; Tandeckj, 153 Wn.2d at 849.

Here, the Information passes both prongs of the Kjorsvik test. First, when read liberally, the Information provided the

necessary facts to inform Nonog of the elements of interfering with domestic violence reporting. A person commits this offense when he commits a crime of domestic violence² and prevents or attempts to prevent the victim or a witness to that domestic violence crime from (1) calling a 911 emergency communication system, (2) obtaining medical assistance, or (3) making a report to any law enforcement official. RCW 9A.36.150(1). Commission of a crime of domestic violence is a necessary element of the offense. RCW 9A.36.150(2).

Count four of the Information tracked the language of the statute defining the crime of interfering with domestic violence reporting, RCW 9A.36.150(1). CP 11. Count four included the essential element of the commission of an underlying crime of domestic violence as defined in RCW 10.99.020. CP 11. And although count four did not specify the domestic violence crimes allegedly committed, it did specify the date of the offense (March 30, 2006) and state that the crime was of the "same or similar character and based on the same conduct as another crime charged herein." CP 11. Counts one and two, the violation of court

² As defined in RCW 10.99.020.

order and residential burglary charges, were the only other domestic violence offenses alleged to have been committed on March 30, 2006. CP 10-11. Therefore, when the entire Information is construed liberally and in a common sense manner, the Information provided the necessary facts to inform Nonog of the crime's elements.

Nonog's argument that the Information nonetheless was deficient does find support in State v. Clowes, 104 Wn. App. 935, 942, 18 P.3d 596 (2001). In Clowes, Division Two held that for the crime of interfering with domestic violence reporting, an information is deficient if the specific count for the offense does not provide the name of the victim and the nature of the underlying domestic violence crime. 104 Wn. App. at 942. Division Two held that these details could not be drawn from other parts of a multiple-count information. 104 Wn. App. at 942 (stating "we view count II in isolation"). In its reasoning, the court relied on its earlier decision in State v. Gill, which concluded, without any citation to authority, that Kjorsvik's liberal construction rule "provides no basis for the proposition that elements can be plucked out of one count in a charging document and dropped into another." State v. Gill, 103 Wn. App. 435, 442, 13 P.3d 646 (2000). Thus, in Clowes, the court

found that the interfering with domestic violence charge was flawed, even though the victim's identity and the nature of the domestic violence incident were set forth in another count of the information. Clowes, 104 Wn. App. at 942.

But Clowes's position was rejected by Division Three in State v. Laramie, 141 Wn. App. 332, 169 P.3d 859 (2007). In Laramie, the defendant was charged with interfering with domestic violence reporting. The count in the information did not specify the victim or the underlying domestic violence crime. 141 Wn.2d at 337. Nevertheless, Division Three held that the supporting facts not specified in the charged count could be fairly inferred from other language and other counts in the information. Laramie, 141 Wn.2d at 340. The court disagreed with Clowes's over-technical application of the essential elements rule, pointing out that nothing in Kjorsvik suggested that, in liberally construing the information, a reviewing court must limit its inquiry to the specific count at issue. Laramie, 141 Wn. App. at 339, 340 n.2. Rather, Kjorsvik stressed that words in a charging document are read as a whole. Laramie, 141 Wn. App. at 339 (citing Kjorsvik, 141 Wn. App. at 109). Further, in the context of multiple-count informations, the Washington Supreme Court repeatedly has applied the liberal

construction rule without any suggestion that its review of the charging document as a whole was limited to the one count at issue. Laramie, 141 Wn. App. 339 (citing State v. Davis, 119 Wn.2d 657, 661-64, 835 P.2d 1039 (1992); State v. Hopper, 118 Wn.2d 151, 156-57, 822 P.2d 775 (1992)).

In addition, the Laramie court reasoned that reading each count in isolation is "particularly artificial" for the crime of interfering with domestic violence reporting, when the alleged deficiency in the charge involves supporting facts rather than the charge's legal elements. Laramie, 141 Wn. App. at 339 (citing State v. Winings, 126 Wn. App. 75, 85, 107 P.3d 141 (2005)). "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." Laramie, 141 Wn. App. at 340 (citing Kjorsvik, 117 Wn.2d at 108-09). Thus, in Laramie, the court held that although the failure to allege specific facts in an information may render the information vague, it does not render it constitutionally defective. Laramie, 141 Wn. App. at 340 (citing State v. Leach, 113 Wn.2d 679, 686-67, 782 P.2d 552 (1989)). In such instances, the remedy is to demand a bill of particulars. If this is not done, the court should not entertain on

appeal a challenge to vague, imprecise, or inartful language.

Laramie, 141 Wn. App. at 340 (citing Leach, at 687).

Here, as in Laramie, this Court should employ the same commonsense construction of the Information. When the Information is read as a whole, and the words are construed in a common-sense manner, Nonog was given reasonable notice of the elements of interfering with domestic violence reporting. Count four notified him of the victim and date of the offense. CP 10-12. Counts one and two informed him of the domestic violence offenses committed on that date — felony violation of a court order and residential burglary. CP 10-12. Therefore, common sense dictates that the Information was not deficient. This Court should adopt the reasoning of Laramie and reject that of Clowes.

Lastly, under the second prong of the Kjorsvik test, Nonog cannot show, and has not even argued, that he was actually prejudiced by the alleged inartful drafting of the Information. Nonog does not contend that the Information hindered his ability to prepare an adequate defense or explain how his defense might have differed had the Information been drafted differently. See State v. Greathouse, 113 Wn. App. 889, 56 P.3d 569 (2002) (defendant's assertion of prejudice was unsupported because he did not explain

how his defense might have differed had Information been different). Because Nonog has not shown or even argued actual prejudice, his challenge to the Information fails and his conviction should be affirmed.

2. THIS COURT SHOULD AFFIRM NONOG'S CONVICTION FOR INTERFERING WITH DOMESTIC VIOLENCE REPORTING BECAUSE (1) THE TO-CONVICT INSTRUCTION CONTAINED ONLY ONE ALTERNATIVE MEANS OF COMMITTING THIS OFFENSE AND (2) SUBSTANTIAL EVIDENCE SUPPORTED THIS MEANS.

Nonog contends that his conviction of interfering with domestic violence reporting should be reversed because the State failed to prove each of the three alternative means by which he was charged with the offense. His claim should be rejected. Although the State did not present evidence on each of the charged alternative means, the to-convict instruction included only one alternative means — preventing or attempting to prevent the victim from calling 911. Therefore, the jury's guilty verdict undoubtedly was based upon this alternative means. Substantial evidence exists to support this means. Thus, this Court should affirm Nonog's conviction.

a. Additional Facts.

The jury was provided with an instruction defining interfering with domestic violence reporting. This instruction tracked the statute, RCW 9A.36.150(1)(b), and provided the following:

A person commits the crime of interfering with the reporting of domestic violence if the person commits a crime of domestic violence and prevents or attempts to prevent the victim 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.

Residential burglary - Domestic Violence and Domestic Violence Felony Violation of a Court Order are crimes of domestic violence when committed by one family or household member against another.

CP 53. Although the definitional instruction provided three alternative means of committing the crime, the to-convict instruction included only one alternative means — preventing or attempting to prevent the victim from calling 911. The to-convict instruction stated:

To convict the defendant of the crime of interference with the reporting of a domestic violence offense, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 30th of March, 2006 the defendant committed the crime of Domestic Violence Violation of a Court Order as charged in Count I, or

Residential Burglary - Domestic violence as charged in Count II, or both, against Nanette Estandian;

(2) That on that date the defendant was a family or household member of Nanette Estandian;

(3) That the defendant prevented or attempted to prevent Nanette Estandian from calling a 911 emergency communication system; and

(4) 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 as to Count IV.

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

CP 55 (emphasis added). In closing argument, the State referred to only the alternative means contained in the to-convict instruction — that Nonog prevented Estandian from calling 911. The State did not refer to the other two alternative means. 4RP 38. The jury found Nonog guilty of this count. CP 66.

- b. The Jury Was Instructed On Only One Alternative Means Of Committing Interfering With Domestic Violence Reporting, And The State Presented Substantial Evidence Of This Means.

Criminal defendants have the right to a unanimous jury verdict. Wash. Const. art. I, § 21. When a defendant is charged with an offense that can be committed by alternative means, the jury must be unanimous as to guilt for the crime charged, but is not required to be unanimous as to the means, so long as there is substantial evidence to support each means submitted to the jury. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

Substantial evidence exists if any rational trier of fact could find the crime's essential elements beyond a reasonable doubt. State v. Green, 94 Wn. App. 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The State assumes the burden of proving each alternative means included in its to-convict instruction. State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004); see also State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (State assumes the burden of proving additional elements of an offense when the added elements are included without objection in the to-convict instruction). But even where there is insufficient evidence to

support one or more of the alternative means, a conviction may still stand. State v. Bland, 71 Wn. App. 345, 358, 860 P.2d 1046 (1993), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007). A verdict will be upheld if (1) it was based on only one of the alternative means, and (2) substantial evidence supported that means. State v. Rivas, 97 Wn. App. 349, 354-55, 984 P.2d 432 (1999), overruled on other grounds by Smith, 159 Wn.2d at 787.

Here, the State charged Nonog with interfering with domestic violence reporting based on three alternative means. CP 10-12. These three means also were included in the offense's *definitional* instruction. CP 53. But the *to-convict* instruction included only one alternative means — preventing or attempting to prevent the victim from calling 911. CP 55. In addition, the to-convict instruction specifically advised the jury that it had a duty to acquit Nonog if it had a reasonable doubt as to any one “of *these* elements.” CP 55 (emphasis added). Moreover, in closing argument, the State referred only to the alternative means listed in the to-convict instruction. 4RP 38. The State did not argue that Nonog prevented Estandian from obtaining medical assistance or making a report to a law enforcement official. 4RP 38. Based on the language of the

to-convict instruction and the prosecutor's argument, the jury could have convicted Nonog only if the State provided sufficient evidence that Nonog prevented or attempted to prevent Estandian from calling 911. It could not have possibly convicted Nonog based on the other two charged alternative means.

Nonog concedes that the State presented substantial evidence of the alternative means listed in the to-convict instruction. See Appellant Brief, at 13, 17-18. Although Nonog argues that the State did not present evidence to support the means of preventing the victim from "obtaining medical assistance," he correctly acknowledges that there was substantial evidence that he prevented Estandian from calling 911. Nonog points out that Estandian testified that she told him she was going to call 911 and that, before she could make the call, he tore the phone line out of the wall. 3RP 13; Appellant Brief, at 17. Nonog also notes that Estandian testified that after she tried to call 911 on her cell phone, he grabbed her wrist and arm, then grabbed the phone and threw it against the wall. 3RP 14; Appellant Brief, at 17. Thus, Nonog's sufficiency challenge should be rejected.

Nevertheless, citing only to the definitional instruction, Nonog claims that the State was required to present substantial

evidence supporting all three alternative means. Appellant Brief, at 16; CP 53. This claim is without merit. Nonog does not even cite to the to-convict instruction, and he cites to no authority that a State always assumes the burden of proving elements contained in the definitional instruction but not contained in the to-convict instruction. Appellant Brief, at 13-18. In fact, case law suggests to the contrary. See State v. Smith, 159 Wn.2d 778, 785-88, 154 P.3d 873 (2007) (three definitions of "assault" are not alternative means that State must prove). Moreover, Nonog does not explain why any instructional error would not have been harmless.

There is no question that, based upon the evidence and the arguments presented, the jury rested its verdict on the one alternative means listed in the to-convict instruction. Moreover, the State presented substantial evidence to support this means. Therefore, Nonog's conviction should be affirmed.

3. BECAUSE THE STATE DID NOT SHOW THAT NONOG'S CALIFORNIA CONVICTION WAS COMPARABLE TO A WASHINGTON FELONY, THE TRIAL COURT ERRED IN INCLUDING THE CONVICTION IN NONOG'S OFFENDER SCORE.

Nonog contends that the State did not prove that his prior California conviction for first-degree burglary was comparable to a

Washington felony. Nonog is correct. Because Nonog challenges his offender score for the first time on appeal, this Court should remand for resentencing and permit the State to introduce evidence supporting the comparability of his California conviction.

a. Additional Procedural Facts

At Nonog's sentencing hearing, the court and the parties discussed the offender score calculation. The court asked if there was a scoring dispute regarding Nonog's California conviction for first-degree burglary, and then had the following exchange with the parties:

[DEFENSE COUNSEL]: Your Honor, I was speaking to [the prosecutor] about that. She tells me that she has obtained a copy of the criminal code for the California incident, and that it essentially is the same as the penal code here for residential burglary. Because it doesn't change the scoring, it doesn't change what he is looking at in terms of time. I'm willing to defer to the Court on this matter.

THE COURT: Okay. I will defer to counsel. If you look at it later and think that there is a potential issue, we could revisit it.

[PROSECUTOR]: And I will, as an officer of the Court, tell the Court that I have looked at the penal code from California, it does seem to overlap our residential burglary statute, and as such, I believe his prior residential burglary multiplies by two, which makes his score a four.

THE COURT: Okay.

7RP 2-3. Based on this representation, the court included the California conviction in Nonog's offender score. 7RP 6-7; CP 70-78.

- b. Because California's Burglary Statute Is Not Legally Comparable To Washington's, This Court Should Remand For Resentencing And Permit The State To Introduce Evidence Supporting The Comparability Of The California Conviction.

To properly calculate a defendant's offender score, the Sentencing Reform Act requires that sentencing courts determine a defendant's criminal history based on prior convictions. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). Prior out-of-state convictions must be classified according to the comparable Washington offense. Id. In determining whether an out-of-state conviction is comparable to a Washington felony, the sentencing court should first examine the elements of the two statutes. If the elements are substantially the same, the crimes are comparable and the inquiry ends. State v. Morely, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the elements are not substantially similar, the court "may look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would

have violated a comparable Washington statute." In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (citing Morely, 134 Wn.2d at 606). In the absence of the defendant's agreement to the inclusion of out-of-state convictions in the offender score, the State bears the burden of proving by a preponderance of the evidence both the existence and comparability of these convictions. Ross, 152 Wn.2d at 230.

When the sentencing court's offender score determination is challenged on appeal for insufficient evidence of prior convictions, the court's analysis of the issue depends on whether the defendant objected to the score at sentencing. If the State alleged the existence of the prior conviction at sentencing and the defense failed to "specifically object" before imposition of the sentence, the case is to be remanded for resentencing and the State permitted to introduce new evidence. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007) (citing State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002)).

Here, the defendant had a prior 1993 California conviction for first-degree burglary. CP 76. The California crime of first-degree burglary is not legally comparable to the Washington crime

of burglary.³ The conduct proscribed under the California burglary statute is broader than the Washington burglary and residential burglary statutes. In Washington, burglary or residential burglary requires unlawful entry or remaining. RCW 9A.52.020(1) (first-degree burglary); RCW 9A.52.030(1) (second-degree burglary); RCW 9A.52.025 (residential burglary). In California, however, first-degree burglary does not require unlawful entry or remaining.

California's general burglary statute states:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, . . . floating home, . . . railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, . . . any house car, . . . inhabited camper, . . . vehicle . . . when the doors are locked, aircraft . . . , or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459. Burglary in the first degree is defined as "[e]very burglary of an inhabited dwelling house, vessel . . . which is inhabited and designed for habitation, floating home, . . . or trailer coach, . . . or the inhabited portion of any other building." Cal.

Penal Code § 460. Thus, to be guilty of the California crime of first-degree burglary, a person need not enter or remain unlawfully, as

³ For purposes of this brief, neither the Washington nor California burglary statutes at issue have substantively changed since 1993.

long as he enters with intent to commit larceny or any felony. State v. Thomas, 135 Wn. App. 474, 486, 144 P.3d 1178 (2006).

Because California's crime of burglary is broader, the State needed to prove that the crime was factually comparable. See Thomas, 135 Wn. App. at 486.

At sentencing, Nonog did not challenge the comparability of the California burglary conviction. 7RP 2-10. The record does not show that the State presented any documents to prove that the prior conviction was factually comparable to the Washington crime of burglary. 7RP 2-10. Because Nonog did not object to the offender score, this Court should remand the matter for resentencing and permit the State to introduce evidence supporting the comparability of the California conviction.

4. THE STATUTORY REFERENCE IN COUNT ONE OF THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Nonog contends that the judgment and sentence for count one, the felony violation of a court order, contains an incorrect statutory reference to subsection (4) of RCW 26.50.110. See CP 70. The State agrees, and the judgment and sentence should be corrected accordingly.

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 a no-contact order's provisions.

Here, the jury was instructed that it could find Nonog guilty of count one only if it found that he had two prior convictions for violating a no-contact order. CP 44-45. The jury was not instructed on the assault alternative. CP 44-45. Thus, the judgment and sentence should be corrected to omit the statutory reference to subsection (4) of RCW 26.50.110.

D. CONCLUSION

For the foregoing reasons, this Court should affirm Nonog's conviction of interfering with domestic violence reporting. The case must be remanded for resentencing, however, to allow the State an opportunity to prove the factual comparability of the California burglary conviction. In addition, the judgment and sentence should

be corrected to omit the incorrect statutory reference to subsection
(4) of RCW 26.50.110.

DATED this 13th day of March, 2008.

Respectfully submitted,

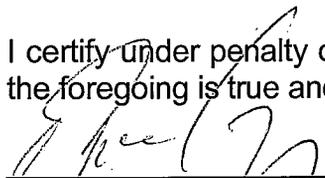
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. CIPRIANO NONOG, Cause No. 60248-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

03/13/2008

Date

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