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NO. 82094-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CIPRIANO NONOG,

Appellant.

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STATE OF WASHINGTON
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BY RONALD R. CARPENTER

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the defendant waived his challenge to the charging language for the crime of interfering with the reporting of domestic violence because he never requested a bill of particulars.

2. Whether an information charging the crime of interfering with the reporting of domestic violence, challenged for the first time on appeal, is constitutionally sufficient when all statutory elements are set forth and the underlying domestic violence crimes are also charged in the same information.

B. STATEMENT OF THE CASE

On June 6, 2003, the King County Superior Court issued a no contact order prohibiting Cipriano Nonog from having any contact with Nanette Estandian. 2RP 4-5; Ex. 1.¹ Before the events in this case, Nonog had already been convicted twice of violating no contact orders. CP 27.

On March 30, 2006, Estandian and a friend returned home to discover Nonog inside. 3RP 10-12. Before Estandian could call

¹ The Verbatim Report of Proceedings consists of seven volumes, referred to 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).

the police, Nonog ripped the telephone cord out of the wall. 3RP 13, 43. When Estandian then tried to use her cell phone, Nonog grabbed it and hurled it against the wall, shattering it to pieces. 3RP 14-15, 43-44. Estandian used her friend's cell phone to call the police, while her friend prevented Nonog from approaching her. 3RP 15, 44. Nonog then fled the scene. 3RP 18-19, 30, 45.

Based upon these events, the State charged Nonog with three crimes. CP 10-12. In Counts I and II, the State charged Nonog with domestic violence felony violation of a court order and residential burglary – domestic violence. CP 10-11. In Count IV, the State charged Nonog with interfering with the reporting of domestic violence.² CP 11-12.

The case went to trial in June of 2007. The jury was instructed that to convict Nonog of interfering with the reporting of domestic violence, it had to find that Nonog committed either the felony violation of a court order charged in Count I or residential burglary charged in Count II. CP 55. The jury found Nonog guilty of all three charges. CP 65-66, 68, 70-81.

² The State also charged Nonog with two additional counts of felony violation of a court order based upon incidents that occurred on April 8 and April 16, 2006. CP 10-12.

For the first time on appeal, Nonog claimed that the charging language for the crime of interfering with the reporting of domestic violence was fatally defective because it did not identify the underlying domestic violence crime. The Court of Appeals rejected this claim, holding 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." State v. Nonog, 145 Wn. App. 802, 805, 187 P.3d 335 (2008), rev. granted, 203 P.3d 379 (2009). The court cited with approval a recent Division III opinion addressing this same issue: State v. Laramie, 141 Wn. App. 332, 169 P.3d 859 (2007).

Nonog petitioned for review, citing the conflict between the divisions of the Court of Appeals on the charging language issue.³ He noted that the courts in Nonog and Laramie expressly disagreed with a Division II opinion, State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001). In Clowes, the court held that the charging language for the crime of interfering with domestic violence

³ Nonog expressly did not seek review on several other issues that he raised at the Court of Appeals. Petition for Review at 3 n.3.

reporting is constitutionally deficient unless it expressly identifies the underlying domestic violence crime. 104 Wn. App. at 942.

C. ARGUMENT

1. THE COURT OF APPEALS PROPERLY REJECTED NONOG'S CHALLENGE TO THE INFORMATION.

The information in this case alleged all essential elements of the crime of interfering with the reporting of domestic violence. It alleged that Nonog committed a crime of domestic violence and intentionally prevented or attempted to prevent Estandian from calling the police. This charging language tracked the statutory language for the crime, and there are no additional implied elements. Nonog's true complaint is not that an element was missing, but that the charging language was vague because it did not identify the underlying crime of domestic violence. However, when all essential elements are alleged and the claim is that one element is vague, the challenge on appeal is waived if the defendant did not request a bill of particulars. Here, if Nonog was uncertain about the underlying domestic violence crime, he should have requested a bill of particulars. Because he did not, he waived his challenge to the information.

Even if the information was missing an essential element and Nonog's challenge was not waived, his claim fails because a fair, commonsense reading of the information informed Nonog of the underlying crimes of domestic violence. In addition to charging the crime of interfering with the reporting of domestic violence, the same information also charged Nonog with two crimes of domestic violence occurring on the same date: domestic violence felony violation of a court order and residential burglary – domestic violence. There can be no question that Nonog had notice of the underlying crimes of domestic violence supporting the interfering charge. This Court should affirm the Court of Appeals and reject Nonog's belated challenge to the information.

- a. Nonog Waived His Challenge To The Information Because He Did Not Request A Bill Of Particulars.

The State must inform the defendant of the nature and cause of the accusation against him. U.S. Const. amend. VI; Washington Const. art. I, § 22 (amend.10). In enforcing these constitutional notice provisions, this Court has avoided technical rules and tailored its jurisprudence toward the precise evil which they were designed to prevent-- charging documents which

prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice. State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993).

To be constitutionally adequate, all essential elements of the crime must be included in the charging document. State v. Tandecki, 153 Wn.2d 842, 846, 109 P.3d 398 (2005). "An element is 'essential' if its 'specification is necessary to establish the very illegality of the behavior.'" State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The purpose of the essential elements rule is to provide the accused with a meaningful opportunity to prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991).

When addressing a challenge to a charging document on appeal, the court distinguishes between a charging document that fails to allege the essential elements of the crime and a charging document that is merely unclear as to the acts upon which the charged crime is based. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989); State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). When the information contains all elements of the charged crime, but is vague, "the charge is not subject to dismissal unless

the prosecuting officials refuse to comply with an order calling for greater particularity." Leach, 113 Wn.2d at 687; State v. Bonds, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982). A defendant may not challenge a charging document for "vagueness" on appeal if he did not request a bill of particulars at trial. Leach, 113 Wn.2d at 687.

Accordingly, when considering a challenge to a charging document, the appellate court must first determine whether an essential element is missing or whether the true claim of error is that the charging language is vague. For example, in State v. Plano, 67 Wn. App. 674, 679-80, 838 P.2d 1145 (1992), the Court of Appeals rejected the defendant's argument that the name of the alleged victim was an essential element of assault in the fourth degree and held that the defendant waived his challenge by not seeking a bill of particulars. Similarly, in State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005), the defendant claimed that the information charging second-degree assault was constitutionally defective because it failed to identify the victim and the weapon used. The court concluded that, although the information might be vague, the defendant waived the issue on appeal by failing to request a bill of particulars. 126 Wn. App. at 85-86.

In this case, the statute sets forth the essential elements of the crime of interfering with the reporting of domestic violence:

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 charging language for Count IV repeated the statutory language, providing:

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO BAHIT NONOG of the crime of **Interfering with Domestic Violence Reporting...**

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 11-12.

The information included all essential elements of the crime, including the element that Nonog "committed a crime of domestic violence as defined by RCW 10.99.020." Nonog's complaint that the charging language did not identify the underlying domestic violence crime is, in fact, a claim that the information was vague with respect to the acts that form the basis for a particular element. As the Court of Appeals noted, "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." Nonog, 145 Wn. App. at 807.⁴ Because Nonog's true claim of error is that the charging language was vague as to the specific underlying

⁴ The Court of Appeals applied the test from Kjorsvik as suggested by both parties' briefing. Nonog, 145 Wn. App. at 806-11. However, as noted above, a review of this Court's prior decisions indicates that this analysis was not necessary. When all essential elements are alleged and the claim is that one element is vague, the challenge on appeal is waived if the defendant did not request a bill of particulars. Leach, 113 Wn.2d at 686-87.

crime of domestic violence, he waived his challenge due to his failure to request a bill of particulars.

In his petition for review, Nonog argues that the identity of the underlying crime of domestic violence is an essential element of interfering with the reporting of domestic violence and cites cases involving the crimes of felony murder and bail jumping. Petition for Review at 8-9. Neither is an apt comparison. With respect to felony murder, the identity of the underlying felony is critical in order to determine the crime charged. First-degree felony murder is limited to nine delineated underlying felonies, and all remaining felonies support only second degree felony murder. RCW 9A.32.030(1)(c); RCW 9A.32.050(1)(b). Unlike the term "crime of domestic violence," there is no term that summarizes the different felonies that can support first-degree or second-degree murder. Accordingly, unless the underlying felony is identified, a defendant cannot know whether he is properly charged with first-degree or second-degree murder.

Similarly, with respect to the crime of bail jumping, in State v. Ibsen, 98 Wn. App. 214, 217-18, 989 P.2d 1184 (1999), the Court of Appeals first held that the identity of the underlying crime is an element, explaining that the penalty for bail jumping depends upon

the classification of the underlying crime.⁵ See RCW 9A.76.170(3). Consistent with this logic, in State v. Spiers, 119 Wn. App. 85, 90-91, 79 P.3d 30 (2003), the Court of Appeals held that an information that charged bail jumping but did not identify the specific underlying crime was sufficient because it did identify the classification of that crime.⁶

In contrast with felony murder and bail jumping, the identity of the underlying domestic violence crime does not affect the degree of the crime or the penalty to be imposed for the crime of interfering with the reporting of domestic violence. The logic behind the felony murder and bail jumping cases does not support imposing an additional element for interfering with the reporting of domestic violence. A defendant who is uncertain as to the underlying crime of domestic violence has an obvious and easy remedy; he can seek a bill of particulars. CrR 2.1(c). Here, Nonog

⁵ Prior to Ibsen, the appellate courts had not held that the identity of the underlying crime was an element of bail jumping. See State v. Hilt, 99 Wn.2d 452, 453, 662 P.2d 52 (1983) (listing elements of bail jumping); State v. Primrose, 32 Wn. App. 1, 3, 645 P.2d 714 (1982) (same).

⁶ In State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007), this Court rejected the defendant's argument that the charging language for bail jumping must identify the underlying crime and that crime's classification. The Court cited Spiers, where the identity of the underlying crime was not identified, with approval. 162 Wn.2d at 185.

never requested a bill of particulars because the identity of the underlying domestic crimes was obvious from a review of the information. This Court should hold that the specific underlying crime of domestic violence is not an essential element of the crime of interfering with the reporting of domestic violence.

b. The Information Informed Nonog Of The Identity Of The Underlying Domestic Violence Crimes.

Even if Nonog has not waived his challenge to the charging language, his claim fails because, under a liberal reading of the information, he had notice of the underlying domestic violence crimes.

When a defendant challenges the sufficiency of the information for the first time on appeal, the court liberally construes the document in favor of its validity. Kjorsvik, 117 Wn.2d at 105. "Thus, we need only determine if the necessary facts appear *in any form* in the charging document." State v. Williams, 162 Wn.2d 177, 185, 170 P.3d 30 (2007) (emphasis in original). The two-part test is: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless

actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06.

The goal of notice is met where a fair, commonsense construction of the charging document "would reasonably apprise an accused of the elements of the crime charged." 117 Wn.2d at 109. This liberal construction is to prevent "sandbagging" by removing an incentive to refrain from challenging a defective information before or during trial, when a successful objection would result only in an amendment to the information. 117 Wn.2d at 103. While the Courts of Appeals are split on the issue of whether the appellate court may examine the language of other charges in the information when applying the Kjorsvik test, this Court has previously held that it is appropriate to do so.

In State v. Valdobinos, 122 Wn.2d 270, 858 P.2d 199 (1993), defendant Garibay was charged with three crimes: delivery of a controlled substance, possession of a controlled substance with intent to deliver, and conspiracy to deliver a controlled substance. The State failed to include the "guilty knowledge" element for the crime of delivery of a controlled substance. 122 Wn.2d at 285.

This Court rejected the challenge to the information by looking to the charging language in the other counts. In discussing Kjorsvik, this Court noted that "we examined *all* the language in the information." 122 Wn.2d at 286 (emphasis in original). The Court then explained:

Applying this approach to the various counts in this case mandates a similar result. The information charged Garibay not only with delivery of a controlled substance, but also with conspiracy to deliver a controlled substance and intent to deliver a controlled substance, and alleged facts to that effect. It is inconceivable that Garibay would not have been on notice that he was accused of knowing the substance in question was cocaine. Therefore, reading the information as a whole and in a commonsense manner, the failure to include "guilty knowledge" in count 1 does not render the information constitutionally inadequate.

122 Wn.2d at 286.

Consistent with this Court's approach in Valdobinos, in State v. Laramie, 141 Wn. App. 332, 169 P.3d 859 (2007), Division III rejected a challenge, identical to Nonog's, to an information charging interfering with the reporting of domestic violence. The court explained:

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....

[R]eading 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. 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 339-40 (internal citation and footnote omitted).

Here, viewing the information as a whole, there can be no question that Nonog was on notice of the underlying domestic violence crimes. The information charged him with two other domestic violence crimes occurring on the same day: felony violation of a domestic violence court order and residential burglary - domestic violence. In addition, in the count charging interfering with the reporting of domestic violence, the State expressly alleged that the crime had occurred at the same time and place as another crime charged in the information. CP 11. Reading the information as a whole and in a commonsense manner, Nonog had notice of the underlying crimes of domestic violence.

The contrary case on this issue, State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001), contains little discussion and simply cites State v. Gill, 103 Wn. App. 435, 442, 13 P.3d 646 (2000), for

the proposition that "we will not fill voids in a defective count with facts located elsewhere in the information." Clowes, 104 Wn. App. at 942. Yet the circumstances in Gill were quite different from those in this case and Clowes. Gill was charged with one count of "harassment" and one count of "harassment (domestic violence)." The "harassment" count erroneously omitted the elements that Gill acted "knowingly" and "without lawful authority." The State argued that because these elements were properly included in the "harassment (domestic violence)" count, Gill had proper notice of the elements of the challenged count. The Court of Appeals rejected this argument, holding that there is "no basis for the proposition that elements can be plucked out of one count in a charging document and dropped into another." Gill, 103 Wn. App. at 442.

Gill involved elements missing in their entirety. Given that the titles of the harassment counts were slightly different, a fair, commonsense reading of the entire information did not apprise the defendant that the elements missing from one count could be found in another count. Instead, one might reasonably assume that the missing elements were intentionally left out.

Nonog also cites to State v. Unosawa, 29 Wn.2d 578, 188 P.2d 104 (1948), a pre-Kjorsvik opinion, where the court also refused to import an element from one count into another count that was missing the element. However, in that case, the court acknowledged that when all statutory elements have been alleged, as in Nonog's case, it is appropriate to examine the entire charging document in considering the challenge to the charging document.

It could be contended that, in this case, we should adopt the 'common understanding' rule. That rule is to the effect that an information will be considered sufficient, if a person of common understanding can, from the allegations of the information, know the exact nature of the charge against him. We have no quarrel with that rule, *provided, the information itself charges a crime....* Before applying the common understanding rule, we must first determine whether or not the information charges all of the statutory elements of the particular crime involved. Upon being satisfied as to this fact, we can then, and not until then, look to the information as a whole, and determine whether a man of common understanding can know the exact nature of the charges against him.

29 Wn.2d at 589 (emphasis in original).

The State would prevail in Nonog's case applying the Court's approach in Unosawa. The charging language for the crime of interfering with the reporting of domestic violence is not missing a statutory element. Rather, Nonog's complaint is that the charging language was too broadly worded because it used the statutory

term that he had "committed a crime of domestic violence as defined by RCW 10.99.020," rather than identify the particular crime. Under Unosawa, because all statutory elements were alleged, the court can look to "the information as a whole" and determine whether a person of common understanding would understand the nature of the charges.

The refusal of the Clowes court to examine the entire information is precisely the type of overly technical rule that this Court has previously avoided, and is inconsistent with this Court's approach in Valdobinos. In light of the purpose of the constitutional notice provisions, the appropriate focus should be on whether the charging document, read as a whole, provided notice of the essential elements of the crime charged and allowed the defendant to prepare a defense.

Not surprisingly, courts in other jurisdictions also approve of examining the entire information or indictment when a defendant claims to have insufficient notice of an underlying crime that acts as an element of another charged crime. For example, the federal crime of engaging in a continuing criminal enterprise ("CCE") requires the defendant to engage in a "series of violations" of federal law. 21 U.S.C. § 848. Several federal courts have rejected

challenges to indictments where the CCE count does not list the specific predicate offenses when those offenses are alleged in other counts of the indictment.⁷ Similarly, state courts also look to language in other counts when considering a challenge to a multi-count information or indictment.⁸

This Court should adopt the reasonable and commonsense approach of the courts in Nonog and Laramie. When an element of a crime is the commission of another underlying crime, the court can examine the entire information to determine whether the defendant received adequate notice of the identity of the underlying crime.

Finally, with respect to the second part of the Kjorsvik test, Nonog has never claimed that he was actually prejudiced by any inartful language in the information. There is no question that he

⁷ United States v. Soto-Beniquez, 356 F.3d 1, 26 (1st Cir. 2004); United States v. Staggs, 881 F.2d 1527, 1530-31 (10th Cir. 1989); United States v. Moya-Gomez, 860 F.2d 706, 752 (7th Cir. 1988); United States v. Becton, 751 F.2d 250, 256-57 (8th Cir. 1984).

⁸ See People v. Williams, 984 P.2d 56, 64-65 (Colo. 1999) (failure of information to specify underlying crime supporting trespass charge was not reversible given that the underlying crimes were also charged in the information); People v. Hall, 96 Ill.2d 315, 320, 450 N.E.2d 309, 311 (1982) (rejecting challenge to "armed violence" count because underlying crime was also charged in indictment); State v. Frazier, 73 Ohio St.3d 323, 652 N.E.2d 1000, 1009 (1995) (rejecting challenge to indictment for failure to specify the felony intended in the aggravated burglary charge because the other counts apprised the defendant of the felony).

had actual notice of the underlying crimes of domestic violence.

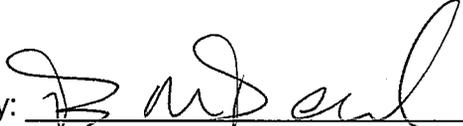
D. CONCLUSION

For all the foregoing reasons, Nonog's conviction for interfering with the reporting of domestic violence should be affirmed.

DATED this 10th day of April, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
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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 petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. CIPRIANO NONOG, Cause No. 82094-5, in the Supreme Court, 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.

W Brame

Name

Done in Seattle, Washington

9/10/09

Date