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03467-4

NO. 63467-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HUBERT CHEVARA, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Was defense counsel ineffective for failing to object to alleged ER 404(b) evidence?
 - a. Was there a valid tactical reason for defense counsel not to object to this testimony?
 - b. Was counsel's performance deficient when the evidence would likely have been admitted pursuant to ER 404(b)?
 - c. Has appellant shown within "reasonable probabilities" that the outcome of the trial would have been different had the testimony been excluded?
2. Has the State correctly conceded that the interfering with reporting of domestic violence charge (count II), should be dismissed?
 - a. Was there a lack of substantial evidence to support one of the three alternative means of committing this crime as set forth in the "to convict" instruction?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Hubert Chevara Jr. was charged with felony violation of a no contact order (count I) and interfering with reporting of domestic violence (count II). CP 7-8. A jury found Chevara guilty as charged. CP 31-32. The jury returned a special verdict finding that count I was a crime of domestic violence. CP 33.

Chevara received a standard range sentence of nine months on count I. CP 39-45. On count II Chevara received a consecutive sentence of 12 months incarceration suspended on the condition that he serve 24 months of probation. CP 35-38. Chevara has filed a timely appeal. CP 46-57.

B. FACTUAL BACKGROUND.

Jacquelyn Willimon is forty-five years old. 2RP 48. She suffers from long-standing psychiatric disabilities, including post-traumatic stress syndrome, obsessive compulsive disorder, and borderline personality disorder. 2RP 49, 91-95; 3RP 110-14. From September 2004 to August 2006, Willimon lived in transitional housing provided by the Community Psychiatric Clinic, a residential

facility with an on-staff psychologist. 2RP 51-52. While there, she met Hubert Chevara, who lived in a separate unit, and they began dating. 2RP 52.

In August of 2006, Willimon moved into an apartment in West Seattle. 2RP 50. Chevara moved in with her at the same time. 2RP 53. Willimon asked Chevara to stay with her because "she loved him and wanted to protect him and wanted him near me." 2RP 53. Chevara had keys to the apartment and, although there were times the pair had separated, he had been living there consistently since 2006. 2RP 90.

Willimon considered Chevara to be her boyfriend. 2RP 54. However, by November 16, 2008, there were two no contact orders in place between Willimon and Chevara. 2RP 56-59; Ex. 10 & 11. Nevertheless, Willimon allowed Chevara to live with her because he had no place else to go. 2RP 57.

On November 15, 2008, Willimon asked Chevara to leave the apartment. 2RP 57-58. Willimon felt like there was "static in the apartment" that it was obvious that Chevara was stressed, and this made her stressed as well. Chevara was arguing with everything Willimon said and she felt scared. 2RP 57. Chevara refused to leave. 2RP 58.

On November 16, 2009, in the afternoon, Willimon drank two beers and took a nap. 2RP 58. When she woke up, she again asked Chevara to leave. 2RP 55-56. Willimon testified that she was feeling “frustrated and hurt and like I wanted him to just go away for a while until I was feeling safe again.” 2RP 56. Willimon suggested that Chevara go see a movie, visit his son, or go see friends. 2RP 58.

Chevara began to pack a backpack. While he packed Chevara was verbally abusing Willimon, calling her “crazy,” a “whore” and a “bitch.” 2RP 60. Chevara then began to take items that didn’t belong to him. 2RP 59. This included a cigarette roller that Willimon had purchased the day before. Willimon was concerned about losing the roller because she was on a tight budget. 2RP 59.

Willimon told Chevara she was going to call the police. 2RP 61. Willimon said: If you don’t stop doing that, I will call the police. Just – you know just go but don’t steal from me.” 2RP 59. Willimon opened her flip-style cell-phone. 2RP59; 3RP 128. In response, Chevara said he was going to call Willimon’s mother. This concerned Willimon because her father had recently passed away

and she believed that it would upset her mother if she was drawn into their “petty differences.” 2RP 61-62; 3RP 119-21.

Chevara was holding his cell-phone; Willimon was holding her cell-phone. 2RP 62. Chevara grabbed the hand in which Willimon was holding her cell phone and twisted her arm backward. 2RP 62; 3RP 121-22. He then took Willimon’s cell-phone and “twisted it into a pretzel.” 2RP 62, 64; 3RP 128. Chevara hit Willimon in the face with the cell-phone. 2RP 62, 65; 3RP 122-24. Chevara pushed Willimon into the bathroom and left the apartment. 2RP 63, 68-69; 3RP 124-25.

When Chevara pushed Willimon into the bathroom, her head hit the bathtub. 3RP 125-27. This alarmed Willimon because she had two previous head surgeries and she has a “nonorganic patch” that seals the skull on one side of her head. 2RP 70. Chevara was aware how fragile her skull was and the potential for life threatening problems if her head was injured.¹ 2RP 71. After Willimon’s head hit the tub, Chevara said, “Oh my God”, made a sound like a sob, and ran out the door. 2RP 69-70.

¹ Once, when the patch had fallen fluid started draining out of Willimon’s skull. She slowly became nonresponsive. Chevara had called her mother and arranged for Willimon to go to the hospital. Willimon believed his actions on that occasion had saved her life. 2RP 70-71. Willimon has had two stroke events resulting from blunt trauma to her head since her surgery. 2RP 71-72.

Willimon's cell-phone had been totally destroyed (it was now in two parts) by Chevara. 2RP 64, 129. Willimon went down the hall and knocked on the door of her neighbor, Tim Donohue. 2RP 16-17, 72-73. Donohue observed that Willimon was "quite upset, disheveled, [and] crying." 2RP 17, 73. Willimon was holding a broken cell-phone. 2RP 17-18. Donohue also observed that the left side of her face was red. 2RP 17, 23. Donohue let Willimon use his cell phone and she called 911. 2RP 18, 74-84.

Seattle Police Department Officers responded to the scene. Willimon told them that they might find Chevara at one of two nearby bus shelters. 3RP 115-16. Officers subsequently located Chevara hiding behind a bus shelter two to three blocks from Willimon's apartment. 2RP 34-36, 42-43; 3RP 162-63. Chevara was squeezed between the shelter and a six-foot high fence. 2RP 35. Initially Chevara did not come out from behind the bus shelter. 2RP 35-36. Eventually he did so and identified himself to the officers. 2RP 41.

Medics arrived to treat Willimon and she was taken by an ambulance to Harborview. 2RP 85-89; 3RP 176-85. The doctor who supervised her emergency room examination testified that Willimon reported being struck in the face, striking her head on the

bathtub, and receiving multiple blows from fists and feet. 3RP 142. There was a bruise on Willimon's face and the soft tissue injury on her head. 3RP 140-43.

The State introduced certified copies of two prior no-contact order prohibiting Chevara from having any contact with Willimon until May 6, 2010. 3RP 207; Ex. 10 & 11. Chevara stipulated that he had violated the orders on at least two prior occasions. 3RP 217; CP 9.

III. ARGUMENT

A. **DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ER 404(b) EVIDENCE.**

Chevara claims that his trial counsel was ineffective for failing to object when Willimon testified that Chevara had previously abused her and been in jail. This argument fails because his attorney's decision not to object to this evidence was clearly tactical: it tended to show that Willimon was angry at Chevara and thus provided a motive for her to fabricate her claims. Moreover, much of the testimony was likely admissible pursuant to ER 404(b). Finally, because the jury was necessarily informed that Chevara

had been involved in prior acts of domestic violence against Willimon, he is unable to show prejudice resulting from counsel's allegedly deficient performance.

1. Legal Standard: Ineffective Assistance Of Counsel.

To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both that defense counsel's representation was deficient and that the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The test for deficient representation is whether counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. Thomas, 109 Wn.2d. at 225. The prejudice prong of the test requires the defendant to show a "reasonable probability" that but for counsel's error, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

Competency of counsel is determined based upon a review of the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's

representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To overcome this presumption, the defendant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. McFarland, 127 Wn.2d at 336; State v. Summers, 107 Wn. App. 373, 382, 28 P.3d 780 (2001).

2. Legal Standard: ER 404(b) Evidence.

ER 404(b) prohibits the admission of prior bad acts to show a defendant likely committed the charged crime. But the evidence may be admissible if relevant and necessary to prove an essential element of the crime, as well as to show motive and intent. State v. White, 43 Wn. App. 580, 587, 718 P.2d 841 (1986). Admission of ER 404(b) evidence is reviewed for abuse of discretion.² State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

To admit evidence of prior bad acts, the court must: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be

² ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

3. There Were Legitimate Tactical Reasons For Counsel's Decision Not To Object To The Alleged ER 404(b) Evidence.

In the context of this case, defense counsel's decision not to object to the alleged ER 404(b) evidence was clearly tactical. Chevara was charged with violating a no-contact order and interfering with a 911 call. In responding to this charge, it was crucial for the defense to undermine Willimon's credibility in order to rebut her claim that Chevara had been living in the apartment and had assaulted her. The second charge also depended entirely on Willimon's credibility; whether the jury would believe her version of events concerning the assault and 911 call. It was thus an entirely legitimate trial tactic to allow the jury to see the full picture of the relationship between Chevara and Willimon and to invite the inference that Willimon was both angry at Chevara (and thus fabricated the interfering charge) and allowed him to be present in

her home (suggesting a jury nullification on the no contact order charge). It is clear that the defense strategy was to paint Willimon as crazy and mentally unstable and thus not to be believed.

That this was defense counsel's strategy can be seen from his comments during closing argument. Defense counsel's very first statement during closing was:

Ladies and gentleman of the jury, this case is exactly about Jacquelyn Willimon. This is not a he said, she said case. This isn't a case where there are two stories that are different and you get to decide which one you believe more. This is a case about Jacquelyn Willimon and is she trustworthy? Is she credible? Is she so credible and trustworthy that her words alone would convict a person?

3RP 256.

After a brief review of the relevant jury instructions, defense counsel immediately began his attack on Willimon by emphasizing her mental health issues:

So let's talk about Jacquelyn Willimon to begin with because it's her testimony. It's only her testimony. We know she has PTSD because she told us. We know she is bi-polar and we have some examples of her bipolarity. We also know she has obsessive compulsive disorder.

How does that manifest itself? Ms. Willimon says that she steals. She has committed thefts. And due to her illness, which is not her fault, due to her illness, even when she knows it's wrong she does it anyway.

She also, again, through no fault of her own, as a result of her illness, harms herself, cuts herself.

3RP 258-59.

Counsel then emphasized that Willimon “testified “about hearing voices in her head that compelled her to do things.” 3RP 259. Counsel suggested that when cross-examined about this Willimon had become overly defensive. 3RP 259. This was a transition to a main theme of the defense closing argument, namely that Willimon needed to be in control:

When I tried to go over step by step what she claimed happened, she didn't want to go over it again. She didn't want to describe to you in any detail what happened. She wanted to be in control and got very angry, very angry, and upset when she was repeatedly asked those questions. Keep this in mind, because of Ms. Willimon's condition, she wants to be in control.

3RP 260.

With this as a backdrop, and after asserting that there was no proof that Chevara actually lived in the apartment, defense counsel argued that Willimon's version of events was unbelievable, that Willimon was unable to state what items had been taken by Chevara because (in counsel's opinion) none had been taken, and that Willimon “cannot describe everything she wants you to believe.” 3RP 262-63.

This is followed by a lengthy argument that Willimon lied about her injuries and the explicit suggestion that Willimon's injuries were self-inflicted: ". . . I asked the doctor about that wound to her mouth. . . And he goes, "No. Nothing about that fat lip couldn't have been self-inflicted." 3RP 267. Defense counsel followed up with more argument concerning the credibility of Willimon's version of events. 3RP 267-73.

Eventually, defense counsel articulates his ultimate theory of the case – indeed it is the only theory that has any hope of exonerating Chevara – that Willimon had fabricated her testimony:

Defense doesn't have an alternate theory and it doesn't need to. But if you want to fish for an alternate theory perhaps Ms. Willimon, just perhaps, was upset that she had lost the person she loved, the person who took care of her, cooked for her, cleaned for her, shopped for her. Perhaps Ms. Willimon simply saw Mr. Chevara either at that bus stop or walking towards it and for whatever reason – and again, considering Ms. Willimon's mental state, she probably doesn't need a logical reason to do it. Simply picks up the phone and says she's been assaulted. . .

3RP 273.

Finally, defense counsel argued that Willimon was angry at Chevara and blamed him for her problems:

But respectfully, the defense counsel thinks it was only asking hard questions that Ms. Willimon did not

want to have to answer. And far from being forthcoming, she was defensive and constantly blamed somebody else, many, many times Mr. Chevara, for all of her woes.

3RP 275.

Given this defense strategy, a logical and appropriate tactic to take during Willimon's direct and cross-examination was to allow all of her testimony to be heard by the jury without interruption or objection. The obvious hope was that the jury would perceive Willimon as mentally unstable and that she would come across as angry, vindictive, defensive and ultimately not credible; all themes pursued by defense counsel during closing argument. Defense counsel's decision not to object to the "bad act" evidence must be evaluated in light of this strategic trial plan.

The testimony that Chevara now objects to may be broken down into two categories: (1) references to the fact that Chevara had previously been in jail (2RP 57, 60, 90), and (2) references to the fact that Chevara had previously assaulted or abused Willimon (2RP 57-58, 60, 61, 67, 70-71, 74, 86, 98, 115, 121). This information provides the motive that supports defense counsel's theory as articulated during closing.

As a practical matter, it is not enough for defense counsel to simply suggest that Willimon was “mentally ill” and thus fabricated her claims. A knowledgeable and experienced defense counsel understands that the jury must be given some reason for accepting this theory. That is, a motive must be given to explain why Willimon would act as defense counsel suggested. Willimon provided this motive herself when she made it clear that she was upset at Chevara for the prior abuse that he had inflicted on her.

Experienced attorneys understand that sometimes the very best thing you can do to undermine the credibility of a witness is simply to let them talk. Willimon, on her own initiative, repeatedly brought up the fact that Chevara had previously assaulted her and had been sent to jail for doing so. Willimon’s repeated emphasis on Chevara’s “bad acts” speaks volumes about her mental state and the anger she had against Chevara.

Finally, it is strongly presumed that counsel's representation was effective. The circumstances of this case demonstrate why this rule is appropriate. It would be ultimately unfair to allow defense counsel to pursue a course that encouraged the admission of evidence (or at least did not give the trial court an opportunity to exclude it) and then, when a guilty verdict is returned, to complain

about the tactical decision on appeal. Defense counsel could have objected to the introduction of this testimony below. The fact that he chose not to do so should not be grounds to reverse Chevara's conviction.

4. Trial Counsel Was Not Ineffective Because The Disputed Evidence Was Potentially Admissible Under ER E04(b).

The first prong of the Strickland test requires that Chevara establish that his trial attorney's performance was deficient. In the present case, Chevara cannot meet this burden because much of the disputed ER 404(b) evidence would have been admissible at trial.³ The testimony was admissible the offensive nature of Chevara's assault, which was an element of the assault prong of the no contact order violation. It would also have been admissible on the issue of Willimon's credibility in a domestic violence case.

The no-contact order charge required the State to prove, among other things, that the defendant knowingly violated the no

³ The State agrees that the three references to the fact that Chevara had been in jail would likely not have been admissible under this argument.

contact order and that his “conduct was an assault.” CP 20. The definition of assault stated: An assault is an intentional touching or striking of another person that is harmful or offensive.”

Introduction of Chevara’s prior assaultive behavior against Willimon was appropriate because it established that Chevara’s actions were harmful and offensive to Willimon. Introduction of ER 404(B) evidence to establish an element of the charged crime is proper. State v. Magers, 164 Wn.2d 174, 183, 189 P.3d 126 (2008) (“[E]vidence of Magers’s prior bad acts, including the acts leading to his arrest for domestic violence and that he had been in trouble for fighting, was properly admitted to demonstrate Ray’s “reasonable fear of bodily injury” an element of the charged crime).

Moreover, courts have historically admitted evidence of prior misconduct in domestic relationship crimes. In 1916, the Supreme Court declared “the rule is well settled that in cases of marital homicide the State has the right to prove ill treatment or quarrels with his wife on the trial of the husband for her murder.” State v. Spangler, 92 Wash. 636, 159 P. 810 (1916). In 1995, the Supreme Court reaffirmed this longstanding position in State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995).

In addition, courts have recognized the importance of admitting prior assaultive behavior in domestic violence cases so that the jury can evaluate the credibility of the victim with full knowledge of the dynamics of the relationship. State v. Grant, 83 Wn. App. 98, 106-08, 920 P.2d 609 (1996); State v. Wilson, 60 Wn. App. 887, 808 P.2d 754, rev. denied, 117 Wn.2d 1010 (1991).

Grant was convicted of second degree assault of his wife in May of 1994. In July he appeared at a house of a friend in which Ms. Grant was visiting. To avoid a scene, Ms. Grant stayed at the house for a period of time. When she tried to leave, an altercation ensued. Ms. Grant then permitted the defendant to accompany her. Grant, at 101. While Ms. Grant was driving, the defendant began to berate and assault her. Before jumping out of the car, the defendant warned Ms. Grant not to identify him to the police. Grant, at 102. Ms. Grant initially complied, but later identified the defendant as her attacker. Id. at 102.

This Court, in recognizing that for a variety of reasons victims of domestic violence may try to placate their abusers or minimize an incident, approved the admission of Grant's prior assault upon his wife so that the jury could properly evaluate her testimony to determine if the current assault actually occurred. Id. at 109. The

dynamics of a relationship in which violence may exist often leads to seemingly inconsistent conduct on the part of the victim. Id. at 109. These dynamics, this Court said, help explain otherwise seemingly inconsistent statements and actions of the victim. Id. at 109. This Court said that the jury, “was entitled to evaluate her [Ms. Grant] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on a victim.” Id. at 109.

Similarly, in Wilson, the Court of Appeals held that it was proper to admit the defendant’s physical abuse upon the 13-year-old victim of his rape charge, the sister of his girlfriend. Wilson, 60 Wn. App. at 890-91. The court held that the evidence was not offered to show that the defendant had a violent character or to show that he acted in conformity with that character. Rather, the court held it appropriate to admit the evidence to explain why the victim submitted to the sexual abuse, why she failed to report or escape it, and to rebut the implication that the molestation did not occur. Id. at 890.

This analysis has been endorsed by the Washington Supreme Court in State v. Magers, supra. The court in Magers stated:

We agree with the rationale set forth by the court in Grant, at least insofar as evidence of prior domestic violence is concerned. As Karl B. Tegland has

observed in his handbook on Washington evidence, “[i]n prosecutions for crimes of domestic violence, the courts have often admitted evidence of the defendant's prior acts of domestic violence on traditional theories.... *Recently, however, the courts have occasionally been persuaded to admit such evidence on less traditional theories, tied to the characteristics of domestic violence itself.*” 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE ch. 5, at 234 (2007-08). Tegland discussed the admission of such evidence in his evaluation of Grant:

[T]he defendant was charged with assaulting his wife[.] [T]he defendant's prior assaults against his wife were admissible on the theory that the evidence was “relevant and necessary to assess Ms. Grant's [the victim's] credibility as a witness and accordingly to prove that the charged assault actually occurred.” ... “*The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.*”

Id. at 234-35 (fourth alteration in original) (quoting Grant, 83 Wash.App. at 106, 108, 920 P.2d 609). We adopt this rationale and conclude that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.

State v. Magers, 164 Wn.2d at 185-186 (emphasis added).

Although the facts of Magers involved a recanting victim, the analysis is the same in the present case. Willimon's credibility was directly at issue in part because she had allowed Chevara to return to

the apartment despite the fact that there were two no-contact orders (that Willimon herself had obtained) prohibiting him from doing so. In these circumstances, just as in Magers, Grant, and Wilson, the “jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship.”

In sum, Chevara’s claim on appeal fails because it is likely that the ER 404(B) evidence might well have been admissible. The decision not to challenge the admissibility was thus not ineffective. This is particularly true given the general defense strategy – discussed above – of allowing Willimon to talk and to use her anger and frustration about Chevara’s prior assaultive behavior to support the suggestion that she fabricated her claims on this occasion.

5. Chevara Cannot Show Prejudice From The Admission Of The Disputed Evidence.

The prejudice prong of the Strickland test requires the defendant to show a “reasonable probability” that but for counsel’s error, the result of the trial would have been different. Chevara cannot do so under the facts of this case.

First, the prosecuting attorney never made any use of the testimony concerning Chevara’s alleged prior bad acts during

closing argument or at any other time during the trial. Indeed, the prosecutor never directly asked about these issues, which were simply volunteered by Willimon.

Second, given the nature of the charge of violating a no-contact order; this jury was necessarily aware of fact that Chevara was guilty of previous domestic violence offenses involving Willimon. The two prior no-contact orders were introduced without objection at trial. Ex. 10 & 11. These two orders were under different cause numbers. Both indicated that they were “post-conviction” orders. Both clearly indicated that Chevara was prohibited from coming within 500 feet of Willimon. Finally, both orders contained the following language:

Based on the certificate of probable cause and/or other documents contained in the case record, testimony, and the statements of counsel, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense. . .

Ex. 10 & 11. Clearly, the jury was aware that Chevara was convicted of prior acts of domestic violence involving Willimon. The fact that Willimon referenced these incidents was hardly new or surprising information to the jury.

Third, and finally, the evidence of guilt on the no-contact order count was clear. The existence of prior no-contact orders between Chevara and Willimon were undisputed. Ex. 10 and 11. The parties stipulated that Chevara had previously been convicted twice for violating the provisions of a no-contact order. CP 9. The only disputed issue was whether Chevara was present in Willimon's apartment. Willimon's testimony, the testimony of the neighbor (Tim Donohue), Willimon's 911 call, the testimony of the responding firefighters and medical personnel, and the fact that Chevara was found hiding a few blocks from Willimon's apartment establish this fact beyond a reasonable doubt. This conclusion is not altered by Willimon's testimony that Chevara had previously assaulted her and spent time in jail for doing so.

B. THE STATE CONCEDES THAT COUNT II SHOULD BE DISMISSED.

Jury instruction 14 set forth three alternative means of committing the crime of interference with reporting of domestic violence. These were that Chevara prevented or attempted to prevent Willimon from: (1) calling a 911 emergency communication

system, (2) obtaining medical assistance, or (3) making a report to any law enforcement officer.⁴ CP 27.

The State does not dispute that, when a single offense may be committed in more than one way, the jury must be unanimous as to guilt for the single crime charged. State v. Ortega Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When one or more of the alternative means is not supported by substantial evidence, the verdict may be affirmed only if the reviewing court can determine it was based on one and only one of the alternative means and that substantial evidence supported the verdict. State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007). Here, given the testimony presented at trial, it is impossible to determine which of the three means was relied upon by the jury. The State concedes that Count II must be reversed.⁵

⁴ The State does not necessarily agree that interfering with reporting of domestic violence is an alternative means crime. The State concedes, however, that given the language of the “to convict” instruction it assumed the burden of proving each of the three suggested means of committing the crime.

⁵ Having conceded that Count II must be reversed for this reason, the State does not address any of the other alleged errors as to Count II.

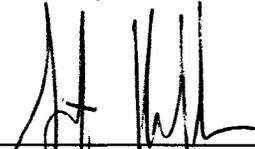
IV. CONCLUSION

For the reasons stated above, the State of Washington respectfully requests that Chevara's conviction on Count I, violation of a court order, be affirmed. The State concedes that Count II, interfering with reporting of domestic violence, should be dismissed on remand.

DATED this 23rd day of November, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

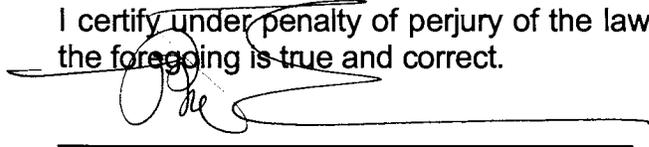
By: 

STEPHEN P. HOBBS, WSBA #18935
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HUBERT CHEVARA JR., Cause No. 63467-4-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

11-23-2009
Date

