Supreme Court No.: 90869-9
Court of Appeals No.: 70054-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW SMITH,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Matthew Smith requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Smith*, No. 70054-5-I, filed August 25, 2014. The Court of Appeals held that he could not raise an issue relating to the constitutionality of jury instructions for the first time on appeal because the instructions became the law of the case when they were not objected to below. This holding is in conflict with this Court's decisions. The Court should also grant review because the instructional issue relates to recent amendments to the Sentencing Reform Act (SRA) for "domestic violence" offenses, which will continue to be litigated and would benefit from a decision of this Court. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals held that Mr. Smith is barred from claiming a due process violation because the unobjected-to instructions became the law of case. But *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) and the cases upon which it is based hold that "a defendant may assign error to elements added under the law of the case doctrine." Should the Court grant review to rectify this conflict and

determine whether a defendant-appellant can challenge on appeal unobjected-to instructions that affect his constitutional rights? RAP 13.4(b)(1), (3) and (4).

2. Should the Court grant review to decide how the State can prove a crime of domestic violence pled under the recently amended SRA without unduly prejudicing the accused? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

Matthew Smith and his girlfriend, Cassandra Mitchell, were living separately due to a pretrial protective order that was entered on July 30, 2012. RP 26-28, 31-32. Because Ms. Mitchell was pregnant with Mr. Smith's child and had no other place to live, she stayed at his home and he lived with his mother. Exhibit 1 at 05:00-05:30; RP 26-27.[1]

On the night of October 3, Ms. Mitchell was drinking and giving her friend, Tashena Martin, a tattoo. RP 34-35, 140-41. Late in the evening, Ms. Martin fell asleep on a couch in Ms. Mitchell's living room. RP 145. Just after midnight, Ms. Mitchell called 9-1-1 and claimed Mr. Smith had come over and punched her twice. RP 32-33.

[1] The verbatim report of trial proceedings are contained in two consecutively-paginated volumes, referred to herein as "RP" followed by the page number. The separately-paginated transcript from the December 20, 2012 motion hearing is not referenced.

Ms. Mitchell was transported to the hospital where an emergency room doctor examined her and found no physical manifestations of the purported assault. RP 41-42, 70-75; *see* RP 134 (responding police officer saw no redness or bruising). While at the hospital, Ms. Mitchell signed a written statement that Mr. Smith had assaulted her. Exhibit 3; RP 43, 130-32.

The State charged Mr. Smith with violation of a court order under RCW 26.50.110(4), premised on the assault, and assault in the fourth degree (a gross misdemeanor) under RCW 9A.36.041(1). CP 4-5, 9-10. The information designated each offense as a domestic violence crime under RCW 9.94A.030, RCW 10.99.020 and RCW 26.50.110. CP 9-10; *see* RCW 9.94A.525(21) (additional points added to offender score for prior offenses where domestic violence designation had been pled and proved).

At and prior to trial, Ms. Mitchell denied that Mr. Smith had any contact with her and denied that he assaulted her. RP 33, 46-49, 53-54, 84. She testified she had fabricated the allegations because she was upset with Mr. Smith for not returning her calls or providing her with money. RP 33-37, 81-82, 84. The State impeached Ms. Mitchell with her written statement and a recording of the 9-1-1 call, both of which

also came in as substantive evidence. RP 38-40, 43-44, 53-54; Exhibits 1, 3. The State also admitted, over objection, photographs from an alleged prior assault by Mr. Smith, purportedly also to diminish Ms. Mitchell's credibility. RP 57-62, 76-79. Tashena Martin testified Mr. Smith was at Ms. Mitchell's home that night and she overheard a fight between Mr. Smith and Ms. Mitchell. RP 141, 145-46. She conceded she did not witness an assault. RP 148-52, 161.

The jury instructions included an additional "element" in the to-convict instructions: that this was a domestic violence crime. CP 25, 34. The term "domestic violence" was also peppered throughout the jury instructions and verdict form to describe the offenses. CP 25, 26, 28, 32, 34, 42. Mr. Smith was convicted as charged. CP 42, 49-59, 74-81.

After trial, the misdemeanor assault conviction was vacated to comply with the prohibition against double jeopardy; yet the fact of the jury verdict on that count remains on the amended judgment and sentence. CP 74, 76; RP 260-65, 290-97, 306-11. Mr. Smith appeals. CP 60.

D. ARGUMENT

1. The Court of Appeals opinion untenably holds that a defendant may not assign error on appeal to jury

instructions that infringe on his due process right to a fair trial.

This Court has consistently held that a defendant may challenge jury instructions not excepted to below for the first time on appeal if the error implicates a constitutional right. *State v. Hickman*, 135 Wn.2d 97, 101-03, 954 P.2d 900 (1998); *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995); *State v. O'Hara*, 167 Wn.2d 91, 100-01, 217 P.3d 756 (2009). An "exception to the rule that a jury instruction must be excepted to exists in the case of manifest error affecting a constitutional right." *Salas*, 127 Wn.2d at 182 (internal quotation marks omitted). "Constitutional errors are treated specially because they often result in serious injustice to the accused." *Id.*

The law of the case doctrine does not trump a defendant's ability to seek appellate review. The law of the case doctrine dictates that the State bears the burden of proving elements added to the charge in the jury instructions without objection. *Hickman*, 135 Wn.2d at 101-02. But "a defendant may assign error to elements added under the law of the case doctrine." *Id.* at 102.

This doctrine was equally clear ten years before *Hickman*, when this Court reviewed unobjected to instructions that were requested by the defense below. *State v. Ng*, 110 Wn.2d 32, 39-40, 750 P.2d 632

(1988). In *Ng*, the defendant requested the court instruct the jury on duress as a defense to the felony murder counts, and the court so instructed the jury. *Id.* at 35-36, 39. Recognizing that duress is not a lawful defense to felony murder, this Court nonetheless considered Mr. Ng's challenge to the language of the instructions on appeal because the State failed to challenge the applicability of duress, rendering the instructions as given the law of the case. *Id.* at 39. Where the State does not object to the instructions, "the instructions are the law of the case and we will consider [defendant's] arguments predicated on them." *Id.* at 40.

Relying on *Salas* and *Hickman*, the Court of Appeals denied Mr. Smith's challenge to instructions that added a prejudicial and pejorative element to the jury's consideration. Slip Op. at 5 (citing *Salas*, 127 Wn.2d at 182; *Hickman*, 135 Wn.2d at 102). The appellate court held the instructions could not be challenged because they "became the law of the case." Slip Op. at 5. This holding is at odds with this Court's precedent, and the Court of Appeals opinion provides no basis for this departure. The Court should grant review.

2. The Court should grant review to determine how the State's election to prove a crime of 'domestic violence' under the recent amendments to the SRA is balanced against a defendant's right a fair trial.

In 2010, the Legislature added a provision to the offender score calculation in the SRA, providing that crimes pled and proved as felony "domestic violence" offenses carry additional weight in sentencing on subsequent "domestic violence" offenses without specifying how such proof is to be accomplished. Courts and the parties throughout the State are now tasked with determining how the State can prove this designation. The Court should grant review to provide guidance.

In Mr. Smith's case, the State placed the "domestic violence" designation as an element in the to-convict instructions and peppered it throughout the court's instructions to the jury. "Domestic violence" is not an element of felony violation of a court order or assault in the fourth degree, the crimes with which Mr. Smith was charged. RCW 26.50.110(4); RCW 9A.36.041(1); WPIC 36.51.02; WPIC 35.26. Providing the jury with a domestic violence designation does not assist it in its task of deciding whether the State has proved the elements of the charges beyond a reasonable doubt. *State v. Hagler*, 150 Wn. App. 196, 202, 208 P.3d 32 (2009). There is "no reason to inform the jury of

such a designation" except to possibly increase punishment for a hypothetical future crime *Id.*

Under RCW 9.94A.525(21), domestic violence may be an element of a hypothetical future charge against Mr. Smith. That statute provides that additional points could be added to Mr. Smith's future offender score for the instant offenses if the State pled and proved the instant offenses as "domestic violence" crimes and the then-pending charge is a crime of domestic violence. RCW 9.94A.525(21). This provision relates to sentencing only of future crimes, and only if Mr. Smith is subsequently charged and convicted of a domestic violence offense.

Nonetheless, the trial court explicitly asked the jury to consider whether Mr. Smith is a perpetrator of domestic violence, calling it an "element" of the offenses. The to-convict instruction on violation of a court order provided:

> To-convict the defendant of the crime of Felony Violation of a Court Order (domestic violence), each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> . . .
>
> (5) That this was a domestic violence crime; and .
>
> . . .

CP 25. The to-convict instruction for assault similarly provided:

> To convict the defendant of the crime of assault in the fourth degree, (domestic violence) . . .
>
> (2) That his was a domestic violence crime . . . .

CP 34. These instructions not only required the jury to deliberate on domestic violence, but also included the term as a qualifier of the offense. That qualifier was included throughout the instructions and on the verdict form. CP 25, 26, 28, 32, 34, 42. The term "domestic violence crime" was defined for the jury in instruction 14:

> For purposes of this case, a "Domestic Violence Crime" includes any of the following crimes when committed by one family or household member against another:
>
> a) Assault in the Fourth Degree
>
> b) Violation of a Court Order

CP 32.[2]

Thus, although "domestic violence" was irrelevant to the jury's determination whether the State proved violation of a court order and assault beyond a reasonable doubt, the pejorative term was referenced in the instructions and verdict form at least ten times and the jury was commanded to deliberate on it as if it were an element. Domestic

[2] Instruction 15 defined "family or household members" and "dating relationship." CP 33.

violence is a "serious crime against society" that causes outrage. RCW 10.99.010; *State v. Cross*, 156 Wn.2d 580, 632, 132 P.3d 80 (2006) (declaring the public "is losing its tolerance for domestic violence"). Recognizing the prejudicial imprimatur associated with domestic violence, our Legislature authorizes independent proceedings when such a designation must be found. RCW 9.94A.537(4) (including domestic violence among limited number of aggravators for which court may conduct separate proceeding). The repeated use of this inflammatory, pejorative and entirely unnecessary designation prejudiced Mr. Smith and denied him a fair trial. Const. art. I, § 3; U.S. Const. amend. XIV; *O'Hara*, 167 Wn.2d at 103 (instructional errors may deny fair trial). Moreover, the court misstated the law by including it as an element of the offenses.

This Court should grant review to determine whether placing the domestic violence designation in the to-convict instructions and throughout prejudiced Mr. Smith's right to a fair trial. As Mr. Smith has argued, at least where the domestic violence designation has no effect on the instant punishment, this designation ought to be "proved" through a bifurcated instruction and ought to be stated in a statutorily accurate term such as "crime against family or household member."

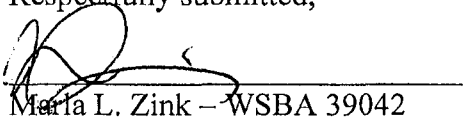
State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002) (proper to bifurcate instructions to require separate consideration of a prejudicial element); *State v. Monschke*, 133 Wn. App. 313, 334–35, 135 P.3d 966 (2006) (bifurcation necessary if unitary trial would significantly prejudice the defendant); *cf. Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (requiring acceptance of stipulation if defendant desires to sanitize evidence of prior conviction, which is an element of the offense).

F. CONCLUSION

The Court should grant review because guidance is needed on the proper method of proof on the "domestic violence" designation added to the SRA and codified at RCW 9.94A.525(21). Review is also warranted because the Court of Appeals contravened this Court's case law in holding constitutional defects in jury instructions cannot be addressed for the first time on appeal because the instruction, defect and all, becomes the law of the case.

DATED this 22nd day of September, 2014.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MATTHEW BLAIR SMITH, Appellant.	)	NO. 70054-5-I DIVISION ONE UNPUBLISHED OPINION FILED: August 25, 2014

LAU, J. — Matthew Smith appeals his conviction for felony violation of a no-contact order, charged as a domestic violence offense. He argues that he was denied a fair trial because the trial court erroneously instructed the jury that domestic violence is an element of the offense, the court's reasonable doubt instruction diluted the State's burden of proof, and prejudicial photographs were improperly admitted. Because Smith failed to show prejudicial error and overwhelming evidence supported Smith's conviction, we affirm. And because the parties agree that the judgment and sentence shows an assault conviction that was vacated on double jeopardy grounds, we remand with instructions to correct the judgment and sentence error.

FACTS

Matthew Smith and his girl friend, Cassandra Mitchell, were living separately due to a domestic violence no-contact order entered against Smith on July 30, 2012. Mitchell, who was pregnant with Smith's baby, was staying at his house while he lived elsewhere.

On the evening of October 3, 2012, Mitchell was giving her friend, Tashena Martin, a tattoo. Despite the no-contact order, Smith came over and they started drinking. Smith and Mitchell got into an argument. Smith and Mitchell went upstairs, and Martin fell asleep on the couch. Martin woke up to the sound of breaking glass. She heard Mitchell say, "He's hurting me" and "[H]e hit me." Report of Proceedings (Feb. 5 & 6, 2013) (RP) at 152. Martin did not see Smith hit Mitchell, but she heard "[t]wo things that sounded like a hit with like cursing, calling her names." RP at 152. Smith ran out the door. Just after midnight, Mitchell called 911 and reported that Smith had punched her in the stomach and head. Police arrived, and Mitchell was transported to the hospital by ambulance. Mitchell told the emergency room doctor that she had been hit in the stomach and head, and she complained of pain during the exam. At the hospital, Bellingham Police Officer Christopher Brown met with Mitchell, who hand wrote and signed a statement under penalty of perjury.

> Matthew came to the house he started drinking, after finishing a Bottle of liquor we got into a argument he said our baby wasn't his and hit me in the stomach when I turned around he also punched me in the back of my head he ran away because I told him I was calling the cops

Ex. 3.

Smith was charged by amended information with "FELONY VIOLATION OF A NO-CONTACT ORDER (DOMESTIC VIOLENCE), COUNT I AND ASSAULT IN THE

FOURTH DEGREE (DOMESTIC VIOLENCE) COUNT II."[1] The information further alleged that the offenses were "crime[s] of domestic violence, pursuant to RCW 9.94A.030 or; RCW 10.99.020 and RCW 26.50.010." At and prior to trial, Mitchell recanted her statements about Smith's assault.[2] She asserted that Smith never came to the house on October 3, 2012, and no assault occurred that evening or at any other time. She claimed that she fabricated the allegations because she wanted to take revenge on Smith for failing to return her telephone calls.

The State used Mitchell's written statement and a recording of the 911 call to impeach her credibility. Over Smith's objection, the trial court also admitted three photographs of Mitchell depicting shoulder injuries and one photograph showing a room with property damage and upended items in it. Police took these photographs on July 30, 2012, after Mitchell reported that Smith assaulted her.[3] She later denied this assault occurred. The trial court admitted the photographs for the limited purpose of helping the jury assess Mitchell's credibility on whether Smith violated the no-contact order when he assaulted her on October 3, 2012.

The jury found Smith guilty as charged, including the domestic violence allegation. Both to-convict instructions included as an element the domestic violence allegation. After trial, the trial court granted Smith's motion to dismiss the assault

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[1] The assault elevated the no-contact order violation from a misdemeanor to a felony offense.

[2] Although Martin wrote a letter that corroborated Mitchell's recantation, she testified at trial that the letter was false and that she wrote it because Mitchell told her to. Mitchell denied this.

[3] The Bellingham Municipal Court issued a domestic violence no-contact order on July 30, 2012, based on this assault allegation. Ex. 2. The present conviction is based on Smith's violation of this order.

conviction on violation of double jeopardy grounds. Smith appeals his felony violation of a no-contact order conviction.

ANALYSIS

To-Convict Instructions

Smith argues for the first time on appeal that his due process rights were violated and he was denied a fair trial because the to-convict instructions incorrectly required the jury to find domestic violence as an element of the offenses.[4] He contends that the repeated use of this "pejorative" and "inflammatory" term throughout the instructions prejudiced him and denied him a fair trial. We reject Smith's argument on several grounds.

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[4] Under RCW 9.94A.525(21), additional points are added to the offender score for prior offenses where a domestic violence allegation was pleaded and proven. Smith's briefing incorrectly cites to RCW 9.94A.535(21). The State pleaded the domestic violence allegation in order to increase Smith's sentence on any domestic violence offenses he may commit in the future. Smith does not dispute that the State must plead and prove that the charged offenses constitute domestic violence crimes for the purpose of RCW 9.94A.525(21)'s future offender score calculations.

> Mr. Smith recognizes that the statute requires the state to 'prove' the domestic violence designation in order to use it to increase punishment in a hypothetical future case. If the State seeks a jury finding on whether the offenses constitute a domestic violence crime for purposes of RCW 9.94A.535(21), that question can be posed in bifurcated instructions, decided after a verdict is returned on the underlying offense. State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002) (trial court did not abuse discretion by bifurcating instructions to require separate consideration of a prejudicial element); State v. Monschke, 133 Wn. App. 313, 34-35, 135 P.3d 966 (2006) (bifurcation necessary if unitary trial would significantly prejudice the defendant). Alternatively, although less desirable, the court could sanitize the designation by replacing the pejorative term 'domestic violence' crime with a statutorily accurate term such as 'crime against family or household member.' Cf. Old Chief v. United States, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (requiring acceptance of stipulation if defendant desires to sanitize evidence of prior conviction, which is an element of the offense).

Appellant's Br. at 9 n.2. Smith's bifurcation and sanitize approach to deal with the domestic violence allegation was never raised below.

First, Smith did not object to these instructions below. Jury instructions not objected to become the law of the case. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). The rule is well settled. "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instructions." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Here, there is no dispute that the domestic violence allegation is not a statutory element of the felony violation of a no-contact order and fourth degree assault offenses. The court included the domestic violence allegation in the to-convict instructions without objection. These to-convict instructions became the law of the case. The State pleaded and proved the additional domestic violence element.

Smith also fails to demonstrate that the claimed instructional error involves a manifest constitutional error that may be raised for the first time on appeal under RAP 2.5(a)(3).

> To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest and (2) the error is truly of constitutional dimension. Stated another way, the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant's] rights at trial.'

State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alterations in original) (citations omitted) (quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). "A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a 'plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case.'" State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting O'Hara, 167 Wn.2d at 99).

Here, Smith makes no showing that the domestic violence element implicates a constitutional interest. He asserts that his due process rights were violated and his trial was not fair because the trial court did not give bifurcated instructions or use less prejudicial language in the instructions, such as crime "against a family or household member."[5] Appellant's Reply Br. at 4; see supra note 4. However, "[i]nstructional errors do not automatically constitute manifest constitutional error." State v. Guzman Nunez, 160 Wn. App. 150, 163, 248 P.3d 103 (2011). In the context of limiting the possible prejudice stemming from evidence of prior convictions, the Washington Supreme Court has "specifically held that such bifurcation is constitutionally permissible but not required." State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008). Smith fails to establish that bifurcated instructions or use of less prejudicial language is constitutionally required here. For the reasons discussed above, we conclude it is not. Thus, the alleged error does not implicate a constitutional issue.

Smith also fails to show that the claimed instructional error is manifest. Essential to this determination is a plausible showing by Smith that the claimed error had practical and identifiable consequences at the trial. "In normal usage, "manifest" means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. 'Affecting' means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Smith's instructional error claim is not a manifest error affecting his constitutional rights. The alleged error here, viewed in the context of the whole trial, was not evident,

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[5] See supra note 2.

unmistakable, or indisputable. Smith failed to demonstrate "[s]ome reasonable showing of a likelihood of actual prejudice . . . ." Lynn, 67 Wn. App. at 346. It is this showing that makes a manifest error affecting a constitutional right. Lynn, 67 Wn. App. at 346.

The State pleaded the domestic violence allegation under RCW 9.94A.525 and was therefore required to prove it. Even without this added element, the State presented other evidence using the term "domestic violence" without objection from Smith. For example, the court admitted as an exhibit the domestic violence no-contact order entered against Smith on July 30, 2012. Ex. 2. The order stated:

> Based upon 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, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to Chapter 10.99 RCW.

Ex. 2. It also identifies Smith's relationship with Mitchell as a "[c]urrent or former cohabitant as intimate partner." Ex. 2. Officer Brown testified that he gave Mitchell "D.V. [domestic violence] assault risk questions" and a "D.V. pamphlet" as part of the standard protocol. RP at 133. There is no evidence indicating that the claimed error may have in fact affected Smith's constitutional rights.[6] The claimed error appears to be purely abstract and theoretical. Smith has failed to point to any practical consequences

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[6] Following oral argument and in response to questions regarding review under RAP 2.5(a)(3), Smith submitted a statement of additional authorities citing O'Hara and State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). O'Hara states, "[A]ppellate courts should determine on a case-by-case basis whether an unpreserved claim of error regarding a self-defense jury instruction constitutes a manifest constitutional error." O'Hara 167 Wn. App. at 101. Johnson states, "[F]ailure to define every element of the offense charged ... is an error of constitutional magnitude and nondirection which may be raised for the first time on appeal." Johnson, 100 Wn.2d at 623. Neither opinion changes our analysis in this case.

which resulted from the claimed error. In sum, Smith fails to establish manifest constitutional error.[7]

But even if we assume Smith established a manifest constitutional error, the error is harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that the error did not contribute to the verdict obtained. State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). From our review of the record evidence, we are persuaded beyond a reasonable doubt that the claimed error did not impact the verdict.

A crying and upset Mitchell called 911 minutes after the assault and reported that Smith hit her in the head and stomach and then left on foot. Mitchell gave 911 Smith's physical description and the clothing he wore. Police officers immediately recognized Smith from this description. Mitchell told 911 she had a no-contact order against Smith. Mitchell's friend Martin is heard on the 911 recording. Martin also told 911 that Smith came to the house drunk and punched Mitchell's head and stomach. Martin said that Mitchell had a no-contact order against Smith. At trial, Mitchell denied that Smith had been at the house and the assault. She admitted under direct examination that she told

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[7] Smith relies on State v. Hagler, 150 Wn. App. 196, 208 P.3d 32 (2009). Hagler is distinguishable. Hagler appealed convictions for promoting prostitution, identity theft, unlawful firearm possession, and assault. Over objection, the trial court told the jury about the domestic violence designation for two of the charges and included the designation in the jury instructions. Hagler, 150 Wn. App. at 199. On appeal Hagler argued the domestic violence designation is prejudicial and unnecessary. We held the designation unnecessary, nonprejudicial in some circumstances, and any error was harmless. Hagler, 150 Wn. App at 202-03. Here, unlike Hagler, Smith failed to object to the domestic violence designation in the jury instructions and evidence presented at trial; agreed the State was entitled to plead and prove domestic violence offenses under RCW 9.94A.525(21), and proposed and received a lesser included instruction containing the domestic violence designation. But as in Hagler, the claimed error here is harmless.

the paramedics Smith punched her on the head and stomach. Mitchell claimed she lied about Smith's July 30, 2012 assault.[8] She also testified at trial that she and Smith are engaged and planned to marry. Officers arrested Smith when his sister drove him back to the house within a short time after the assault.

The emergency room doctor testified that Mitchell stated that she was hit numerous times with a fist, mostly on the head and stomach, and she also complained of pain in those areas. The doctor specified that lack of bruising does not prove there was no assault, as bruising may appear up to 24 hours later. Officer Brown interviewed Mitchell at the hospital within two hours of the incident. He testified that Mitchell told him what happened. She provided a written statement to Officer Brown about the assault that was consistent with the 911 call, the doctor's testimony, and Officer Brown's testimony. Despite her initial denial about the assault, Martin testified that Smith came to the house drunk that night, she heard Smith and Mitchell fighting, Mitchell said Smith hit her on the head and stomach before he fled, and Mitchell convinced her to write a false letter denying an assault occurred. And when police arrested Smith later that night, his physical appearance and clothing fit the description that Martin gave to the

[8] The trial record also shows, in response to the State's rigorous cross-examination, Mitchell provided the jury with a questionable explanation as to why she "lied" about the July 2012 and October 2012 assaults. For example, as to the July 30, 2012 photographs showing Mitchell's injuries and damage to the home's interior, Mitchell explained that she lied when she claimed Smith injured her and caused the property damage. When the prosecutor asked, "[W]hy were the police able to obtain photographs of your injuries if he never actually assaulted you?" Mitchell replied, "Well, I had those [injuries] from before." When asked about the damaged property and the television "pushed over on its face," Mitchell replied, "Um, well, the TV had been like that for awhile." When asked, "So that's just the way the house normally looks?" Mitchell replied, "Yeah." RP at 79.

911 dispatcher. As noted above, the court admitted the domestic violence no-contact order. Smith's challenge to the to-convict instructions fails.[9]

Reasonable Doubt Instruction

Smith next argues for the first time on appeal that the trial court's reasonable doubt instruction, Washington Pattern Jury Instructions: Criminal (WPIC) 4.01, diluted the State's burden of proof and denied him a fair trial. The Washington Supreme Court has directed trial courts to use WPIC 4.01. State v. Bennett, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007). Smith claims that the "abiding belief in the truth" language encourages the jury to undertake an impermissible search for the truth. We disagree. State v. Fedorov, 181 Wn. App. 187, 324 P.3d 784 (2014), filed after the close of briefing, controls. There, we rejected identical claims about the reasonable doubt instruction made by Smith in this case. We held that WPIC 4.01 accurately states the law. Fedorov, 324 P.3d at 790.

Photographs

Smith next contends the trial court erred by admitting photographs of Mitchell's injuries and property damage taken by police on July 30, 2012. He argues that the

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[9] We also note that the invited error doctrine bars Smith's appeal on this issue. The invited error doctrine prohibits a party from challenging a jury instruction it proposed. State v. Gentry, 125 Wn.2d 570, 645, 888 P.2d 1105 (1995). "The doctrine applies even when the error is of constitutional magnitude." State v. McLoyd, 87 Wn. App. 66, 69, 939 P.2d 1255 (1997). Smith proposed a jury instruction on the lesser included offense of misdemeanor violation of a no-contact order. The proposed instruction contained domestic violence as an element of the crime. The trial court gave this instruction, along with other instructions proposed by the State that contained domestic violence as an element of the crime. Although inclusion of domestic violence as an element of the charged crimes apparently originated in the State's proposed instructions, Smith contributed to the error by requesting an additional instruction that contained the language he now challenges on appeal.

evidence was inadmissible because the court failed both to determine whether Smith actually assaulted Mitchell and to balance the prejudicial impact against its probative value.[10] The State acknowledges the trial court failed to explain its ER 404(b) balancing analysis on the record but asserts that any error was harmless. We agree.

> Before admitting evidence of other crimes, wrongs, or acts under ER 404(b)
>
> the trial 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 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). The trial court errs when it does not articulate its ER 404(b) balancing analysis on the record. State v. Bradford, 56 Wn. App. 464, 468, 783 P.2d 1133 (1989). However, "the error is harmless unless the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial." State v. Sublett, 156 Wn. App. 160, 196, 231 P.3d 231 (2010). "Evidentiary errors under ER 404(b) are not of constitutional magnitude." State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). "[I]n those cases where, from the record as a whole, the reviewing court can decide issues of admissibility without the aid of an articulated balancing process on the record, the court should do so." State v. Gogolin, 45 Wn. App. 640, 645, 727 P.2d 683 (1986).

First, a preponderance of the record evidence establishes that Bellingham Municipal Court issued a pretrial domestic violence no-contact order on July 30, 2012, preventing Smith from contacting Mitchell, quoted in part above. At trial, Mitchell denied

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[10] Smith specifically claims, "Mr. Smith was prejudiced by the admission of prior act evidence that was not established by a preponderance of the evidence, was irrelevant, and was highly prejudicial." Appellant's Br. at 14 (boldface omitted).

RP at 80.

Before the State's direct examination of Mitchell about the July 30, 2012 no-contact order, the court gave an additional oral limiting instruction.

> I'm going to permit the testimony to establish a context. But I will clarify for the jury that the charge involves conduct that allegedly occurred in early October and that's the crime that's charged here. So any information heard here about background is simply background information and not evidence of a crime that hasn't been charged and shouldn't be taken that way.

RP at 31. The court's instruction 18 about Mitchell's July 30, 2012 statements to police limited that evidence's relevance to her credibility:

> Certain evidence has been admitted in this case for only a limited purpose. The evidence regarding Ms. Mitchell's statements to police on July 30, 2012 must be considered by you only for the purpose of assessing credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 36. "A jury is presumed to follow instructions given." State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997). Smith points to nothing in the record indicating the jury disregarded the instruction.

Even if we assume trial court error in admitting the photographs, the record summarized above establishes Smith violated the no-contact order and assaulted Mitchell on the night of October 3, 2012. There is no reasonable probability that the outcome of the trial would have been affected. Any error in admitting the photographs was harmless. State v. Carleton, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996) (failure to weigh prejudice on the record harmless when the result would have been the same even if the trial court had not admitted the evidence).[11]

[11] Smith also argues that cumulative error denied him a fair trial and requires reversal of his conviction. "Absent prejudicial error, there can be no cumulative error

Vacated Assault Conviction

Although Smith's fourth degree assault conviction was vacated on double jeopardy grounds, it remains in his judgment and sentence. The parties agree that any references to the vacated assault conviction should be removed pursuant to State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010) ("To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction . . . ."). Accordingly, we remand to the trial court with instructions to remove all reference to the vacated assault conviction in the judgment and sentence.

CONCLUSION

We affirm Smith's conviction for felony violation of a no-contact order but remand to the sentencing court to correct the judgment and sentence consistent with this opinion.

WE CONCUR:

Cox, J.

Becker, J.

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that deprived the defendant of a fair trial." State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). Because no errors occurred, there is no cumulative error.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70054-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas, DPA
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Date: September 23, 2014