70704-3

70704-3

NO. 70704-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAMIAN WILHELM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN A. RIETSCHEL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence of prior acts of domestic violence is admissible to assist the jury in evaluating the credibility of a domestic violence victim by making the jury aware of the dynamics of the relationship and its effect on the victim. When asked at the scene who caused her injuries in this case, the victim responded alternately that she had fallen down, that she had been in a fight with her girlfriend, and finally that she loved the defendant and did not want to get him in trouble. At trial, she claimed she did not remember what happened during the assault. Moreover, she failed to call the police. In light of the victim's inconsistent statements and conduct, did the trial court properly exercise its discretion in admitting evidence of one of the defendant's recent domestic violence assault convictions under ER 404(b)?

2. To prevail on an ineffective assistance of counsel claim, the defendant must show both deficient performance and resulting prejudice. Defense counsel crafted a limiting instruction that stated that defendant's prior act of domestic violence could only be used to evaluate the credibility of the alleged victim and explain the inconsistencies in her testimony. Does Wilhelm fail to establish

that this was a comment on the evidence and thus deficient performance? If not, has Wilhelm failed to demonstrate prejudice?

3. In a charge of felony violation of a court order, a defendant has no right to bifurcated proceedings where the presentation of evidence regarding different elements is split into multiple trials. Here, the trial court denied the defendant's motion to hold separate jury trials on the current violation and the prior convictions because no current caselaw supports this procedure. Did the court abuse its discretion in denying the defendant's motion simply because no case outright forbids such a procedure?

4. In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's comments were improper and that there is a substantial likelihood that the misconduct affected the verdict. The challenged comment was in direct response to defendant's questions about whether someone could hypothetically have recalled the court order in question, when no evidence supported that inference; the comment did not shift the burden of proof. Has Wilhelm failed to establish that the prosecutor's comment was improper and had a substantial likelihood of affecting the verdict?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Damian Wilhelm was charged by information with felony violation of a court order and assault in the third degree (domestic violence). CP 16-17. The State alleged that on March 11, 2013, the defendant, having twice been convicted of violating a court order against Leah Hensel, assaulted her in a store. CP 1-6. Trial began July 9, 2013. 2RP 5.[1] The jury found Wilhelm guilty of felony violation of a court order and acquitted him of assault in the third degree, convicting him instead of the lesser included crime of assault in the fourth degree (domestic violence). CP 25-28. The court imposed a standard range sentence of 36 months on the felony count, with 364 days suspended on the misdemeanor count to run concurrently. CP 63, 69.

2. SUBSTANTIVE FACTS

a. History Of Relationship.

Leah Hensel began dating defendant Wilhelm in 2011. 5RP 139. She had met both him and her close friend, Heather Wilmore, in high school. 5RP 118-19. At the time of the charged

[1] The verbatim report of proceedings consists of six non-consecutively numbered volumes, which will be referred to as follows: 1RP (May 7, 2013); 2RP (July 8, 2013); 3RP (July 9, 2013); 4RP (July 10, 2013); 5RP (July 11, 2013); 6RP (July 15, 2013).

incident, Hensel had known Wilhelm for a total of eight to nine years. 5RP 119. During their two and a half years together as a romantic couple, she became "extremely close" to him. 5RP 140.

During their relationship, Wilhelm was convicted four times of domestic violence offenses against Hensel. CP 84-85. In 2012, he was convicted in King County District Court of assault in the fourth degree (domestic violence) for an incident occurring on September 9, 2011. 5RP 139; CP 77, 84. On that date, police responded to several third-party 911 calls and discovered that Wilhelm had grabbed Hensel by the wrist, twisted it, and thrown her to the ground multiple times, leaving her with red marks. CP 84.

On March 28, 2012, Wilhelm was again convicted of assault in the fourth degree (domestic violence) for an incident occurring on March 8, 2012. CP 77, 84-85. During that incident, police again responded to assist Hensel after a store clerk saw a cut on her face and another third party saw Wilhelm standing over Hensel with his foot on her head and a laceration over her eye. CP 84-85. She was crying when police arrived and denied any altercation with Wilhelm. CP 85. Hensel did not call 911 during either of these assaults and was uncooperative with police. 3RP 50-51; CP 84-85.

As a result of these assault convictions, King County District Court issued two separate no contact orders prohibiting Wilhelm from contacting Hensel. Ex. 14, 15. Wilhelm signed in open court acknowledging receipt of these orders. 6RP 63-64. Despite this, Wilhelm was convicted twice in 2012 for violating these no contact orders. Ex. 16, 17; 6RP 56.

b. Summary Of Charged Event.

In the late evening of March 10, 2013, Hensel and Wilhelm were at Wilmore's condominium, where they had been living together. 5RP 61. At the time, Wilmore was temporarily living elsewhere and allowing Hensel to use the condo. Id. The two women, who both described their friendship as "extremely/really close," had planned to go out that night with Wilhelm to a bar in Renton. 5RP 58-59, 63, 118, 121. There, they met a man named Damian Keitt.[2] 5RP 64; CP 85. Wilmore, Hensel and Wilhelm all drank alcohol. 5RP 64-67, 120-22. Wilmore described the entire group as intoxicated, although she was not certain how much the others had imbibed. 5RP 64, 72.

At some point, Wilhelm appeared upset and walked off; Hensel followed him. 5RP 66-67. In the early morning hours of

[2] Because neither Wilmore nor Hensel could remember Keitt's last name, they referred to him throughout the trial as "the other Damian."

March 11, the group headed home in Wilmore's car with Keitt driving. 5RP 73. They missed the exit for Wilmore's condo and ended up stopping at a QFC grocery store in Issaquah so that Wilhelm and Hensel could get food. 5RP 73. Wilmore and Keitt stayed in the car but after some time passed, they went inside to investigate why it was taking so long. 5RP 76.

Wilmore testified that after finding Hensel and Wilhelm inside, she later heard Wilhelm yelling angrily at Hensel in one of the aisles, calling her "a slut and dirt and whore and ho." 5RP 77, 79. As she headed toward the aisle to assist her friend, Wilmore heard Hensel crying and saying, "Stop." 5RP 79. She then saw Hensel on her knees in an aisle, crying, as Wilhelm stood in front of her throwing boxed food and cans at her. 5RP 81. Wilmore saw some of the items strike Hensel. 5RP 104-06. Wilmore told Wilhelm to stop and physically tried to block the items from hitting Hensel, one of which ended up cutting her own knuckle. 5RP 81.

Despite the women's pleas, Wilhelm would not stop. 5RP 83. At that point, Wilmore testified that Keitt came up behind Wilhelm and physically wrestled him to the ground to keep him from assaulting Hensel. 5RP 83. Wilhelm then fled. 5RP 85. Wilmore saw a gash on Hensel's forehead, but did not see when during the

assault it happened. 5RP 85, 108. When Issaquah Police Sergeant Jeffrey arrived, he found Wilmore visibly shaking and very upset. 6RP 34. Wilmore told Jeffrey that she had found Hensel on the floor being hit in the head with a can of goods from the store. 6RP 35.

Although Wilmore was initially hesitant to give a written statement to police for fear of upsetting Hensel, who did not want to cooperate, she provided one by telephone later that day to Issaquah Police Officer Scott Geiszler and again reiterated that a can or box had struck Hensel. 5RP 88, 18-19. Wilmore openly acknowledged being intoxicated that evening, and said that she was still "uncertain about certain things" that occurred that night. However, she confirmed that she had never wavered in her memory of seeing Wilhelm hurling things at her friend, because of the exceptional nature of the act and the deep impression it left on her: "I'm not normally around stuff like that . . . that's not the normal thing for me to see, and it was kind of crazy." 5RP 88, 109.

Employee Gary Morrison was working the night shift at the Issaquah QFC during the incident. 5RP 7-9. He testified that Wilhelm "definitely" appeared to have been drinking when he initially approached Morrison and asked to buy alcohol, having

slurred speech and bloodshot eyes. 5RP 10, 22. A short while later, Morrison heard a commotion in Aisle 13 and went to investigate; he saw Hensel on her knees crying, her head down, not saying much, while Wilhelm stood in front of her yelling at her and calling her "dirt." 5RP 13-14. Morrison stepped away to call for help and then heard a crash and went back to see Keitt wrestling with Wilhelm, "trying to subdue [Wilhelm] and pull him down . . . trying to keep him from fighting." 5RP 17. Keitt was yelling at Wilhelm that "[you] shouldn't hit a girl." 5RP 19.

Morrison testified to seeing Hensel with a cut on her forehead, and that after Wilhelm fled, she appeared "nervous," "upset," "anxious" and "wondering what she should do." 5RP 20-21; Ex. 3, 4. Morrison's supervisor called 911. 5RP 18. Although the whole group appeared to have been drinking, the others did not appear to have been drinking as much as Wilhelm. 5RP 22. Even Wilhelm, however, did not appear unable to walk or hold himself steady, but "just seemed out of control." 5RP 23. Morrison admitted he was feeling a rush of adrenaline from the incident, an unusual event at that hour in the store, and did not remember picking up cans or boxes from Aisle 13, only bread and

sushi and dressing; he did not inventory what he found on the ground. 5RP 38, 50, 54-55.

The store's video surveillance system had captured the incident on tape, which was played to the jury. 5RP 23-25; Ex. 2. The camera, stationed near the store exits and checkout area, showed the parties at the front, then Keitt and then Morrison running to assist Hensel. Ex. 2. It did not cover the part of Aisle 13 where the assault occurred. Ex. 2. At 3:15 a.m. and 14 seconds into the video (displayed as 3:15:14), Wilhelm, Hensel, Wilmore and Keitt are all seen near the front of the store.[3] 5RP 34; Ex. 2.

At the scene, officers found Hensel wandering in the QFC parking lot. Officer Geiszler observed her yelling outside, visibly upset, crying and "hysterical." 6RP 10-13. Sergeant Johnson testified to seeing her walking around the lot "calling out the name 'Damian.'" 6RP 31-32. Issaquah Officer Dustin Huberdeau made first contact with Hensel as she walked through the parking lot, noting the blood on her forehead, the laceration and her broken fingernail. 5RP 161, 163. When asked what happened, she initially told him that she had fallen down, then changed stories and said

[3] Morrison, Wilmore and Hensel all confirmed the identities of the parties involved. 5RP 34, 89-94, 134. Wilmore identified herself as the woman wearing the bright coral shirt. 5RP 89. Keitt is African-American. 5RP 16.

that she had gotten cut during a fight with her friend Heather. 5RP 164, 183. Hensel added that she did not want Wilhelm to get into trouble because she knew he wasn't supposed to be with her. 5RP 182. When Huberdeau asked her about the men's wallet she was holding in her hand, she initially refused to give it to him, then handed him the identification inside, revealing that it belonged to Wilhelm. 5RP 165.

Geiszler later tried to obtain a statement from an uncooperative Hensel at the scene, offering her referrals to domestic violence agencies and telling her that it was wrong for someone to assault her. 6RP 16. In response, Hensel did not deny that Wilhelm had assaulted her, replying only that she loved Wilhelm and did not want him to get in trouble. 6RP 16. Both Geiszler and Huberdeau observed that Hensel appeared intoxicated. 5RP 163; 6RP 14.

After looking at Wilhelm's picture identification, Huberdeau and Johnson headed over to a nearby suspicious persons call for someone matching Wilhelm's description. 5RP 168; 6RP 36. Johnson found Wilhelm walking down West Sammamish Road near Lake Sammamish State Park and told him to stop; instead, Wilhelm looked directly at Johnson, then ran off the road down a

steep embankment covered with blackberry bushes, where officers found him hiding face down in a creek along a culvert. 5RP 171-74; 6RP 38-42. After being ordered several times to come out and then advised of his rights, Wilhelm denied being at the QFC or knowing Hensel, although he finally admitted they had dated in the past. 5RP 174, 177-78; 6RP 43.

Prior to trial, Hensel wrote a victim impact statement to the prosecutor's office, expressing her love for Wilhelm and stating that she could not picture life without him, that she did not want him in jail, and that she believed there was nothing wrong with their relationship. 5RP 131-39. Nowhere in the statement did she state that the incident did not happen, nor claim any memory loss as to what happened. 5RP 131-32.

At trial, Hensel acknowledged and continued to adopt the statements in her victim impact letter, testifying that she still loved Wilhelm, that she still could not picture life without him, and that she hoped for a future with him where "we can get back together . . . I just want him to get better." 5RP 119-20, 132. When asked what her goal was regarding the case, she replied: "I want him to get in as less [sic] trouble as possible." 5RP 120. Hensel was visibly distressed when she began her testimony, such that she had to be

instructed to take a deep breath immediately after taking the stand, and testifying almost immediately that she was "uncomfortable" being there. 5RP 117.

Hensel then testified that she remembered spending time with Wilhelm at the condo on March 10, hanging out at the bar with Wilhelm, Wilmore and Keitt into the early morning hours of March 11, and going inside QFC with Wilhelm to get cigarettes and food. 5RP 121-23. She then claimed that she remembered nothing further about what happened inside the store until after the moment that Wilhelm fled the store, because she had "blacked out." 5RP 124-25, 127. Her memory returned, essentially, only once the period of time encompassing the assault had passed. Id.

Hensel acknowledged she had claimed no such lack of memory in her victim impact statement. 5RP 131. She also testified that both she and Wilhelm knew he was violating the no contact order, which was why she had been uncomfortable about talking to the police, stating that she felt "horrible" that he was found by the police that night. 5RP 126. When confronted with the video of the incident, Hensel was able to identify all the parties and even explain that they were buying sushi in one particular frame

(the same sushi that ended up on the floor in Aisle 13 later). 5RP 135.

Hensel also acknowledged that Wilhelm was convicted of assaulting her in September 2011 soon after they first started dating, but that she had forgiven him and had still wanted to continue their relationship. 5RP 139-40. She also admitted being uncooperative with police during that incident because she didn't want Wilhelm to get in trouble. 5RP 141-42. During cross-examination, Hensel readily agreed when Wilhelm's attorney suggested to her that the injury could have come from her falling, as she had told Huberdeau. 5RP 146, 183. Hensel initially claimed that she did not remember what she told police that night, but then admitted that she had never asserted a lack of memory about what happened in the store with them, the account she was now offering at trial. 5RP 150. She added, "I'm pretty sure they just asked me for a statement and I refused." 5RP 150.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING ONE OF WILHELM'S PRIOR DOMESTIC VIOLENCE CONVICTIONS.

Wilhelm argues that evidence of one of his recent prior domestic violence convictions against Hensel should not have been

admitted. He contends her testimony in the present trial was not internally inconsistent nor did it contradict what she had told police, so her credibility was not at issue. This argument should be rejected. Hensel's comments to police were indeed inconsistent with her testimony at trial; furthermore, prior misconduct may be admitted in a domestic violence case to allow the jury to more fully evaluate a victim's credibility in light of her inconsistent statements *or conduct*.

a. Pretrial Rulings.

Before trial, the State moved, over Wilhelm's objection, to admit his recent convictions for assaulting Hensel in September 2011 and March 2012. 3RP 49-59; CP 94-98. Because Hensel intended to contradict her earlier statements that her injuries arose from a fall and/or a fight with Wilmore, and to instead testify that she did not remember those few minutes, the State submitted that the jury was entitled to know about the prior assaults, and most importantly, her reaction to those assaults (minimization, denial and reconciliation with Wilhelm), in order to properly assess her credibility and understand the context of the relationship. CP 94-98; 3RP 49-53. The State also argued that her inconsistent words *and conduct* merited admission of this evidence: specifically,

her consensual contact with Wilhelm despite knowledge of the no contact order and her failure to call 911 while following Wilhelm out to the parking lot: "This is something that requires some detail to the jury about the context of this relationship over the last two-and-a-half years." CP 94-98; 3RP 49-52, 57-59.

The trial court ruled that the State could introduce only the September 2011 assault, finding that it was necessary to assess Hensel's credibility and elucidate her state of mind. CP 76-78. The purpose was to address Hensel's conflicting testimony and to help assess her "inconsistent acts" and "behavior, including why she did not report the assault to the police herself, why she invited contact with the defendant despite no contact orders, and why she was reluctant to cooperate with police or the prosecution." CP 77; 3RP 62. Although finding that both the probative value and prejudicial effect were "high" for each assault conviction, out of concern for any potential propensity issue, the court denied admission of the March 2012 assault. 3RP 64-65.

The court also conditioned admission of the September 2011 assault on Hensel's inconsistent testimony at trial, ruling that the State could not admit the prior conviction if Hensel "comes to court and says exactly what she told police on the night in question and

doesn't testify in conflict with it, [because] then there's no conflicting testimony." 3RP 62-63.

b. The Prior Bad Act Was Properly Admitted.

Although evidence of prior bad acts is generally inadmissible to prove the character of a person in order to show conformity therewith, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake of accident. ER 404(b); State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). To admit evidence of prior bad acts, the trial court must: (1) find by a preponderance of the evidence that the acts occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is related to that purpose, and (4) balance the probative value of the evidence against the prejudicial effect. State v. Kilgore, 147 Wn.2d 288, 292, 5 P.3d 974 (2002).

An appellate court reviews the interpretation of an evidentiary rule de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, the trial court's decision to admit or exclude evidence under a correctly interpreted rule is reviewed for an abuse of discretion. Id. Discretion is abused only where no

reasonable person would take the position adopted by the trial court. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

Over the last 18 years, this Court and the Washington State Supreme Court have recognized that one of the proper purposes for admitting prior bad acts includes domestic violence cases where the evidence can assist the jury to evaluate the credibility of the victim and explain seemingly inconsistent statements *or conduct.*[4] State v. Magers, 164 Wn.2d 175, 186, 190 P.3d 126 (2008); State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996); State v. Baker, 162 Wn. App. 468, 470-71, 259 P.3d 270 (2011).

State v. Grant was the first Washington case to explore this purpose for admitting ER 404(b) evidence.[5] Grant's wife testified that while violating a no contact order, Grant assaulted her in the car while their child sat in his lap. Grant, 83 Wn. App. at 101. After bystanders called the police, Grant told his wife not to identify him and he threatened her. Id. at 102. She initially complied but identified him after he was removed from her presence. Id. During the trial for felony violation of a court order, the court allowed

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[4] The Washington supreme court is currently reviewing the application of ER 404(b) in a similar context in State v. Gunderson, No. 89297-1 (argued May 1, 2014).

[5] As noted by this Court in Grant, many foreign jurisdictions had already recognized similar and broader rules. Grant, 83 Wn. App. at 109 n.7.

evidence of his unreported history of domestic violence and the assault conviction giving rise to the court order. Id. at 104.

This Court held that evidence of Grant's prior assaults was properly admitted under ER 404(b) "because it was relevant and necessary to assess Ms. Grant's credibility as a witness and accordingly to prove that the charged assault actually occurred." Id. at 106. In doing so, the court cited the admission of similar evidence in a different case where a victim had delayed report of a statutory rape, explaining that without evidence of the prior bad acts, a jury might unfairly conclude that the failure to report was a basis to doubt the victim's credibility. Id. at 105-06.

Because this Court reasoned that a jury might question a domestic violence victim's credibility based on her seemingly anomalous behavior, it therefore stated multiple times that the introduction of such evidence was helpful to explain both a victim's inconsistent words *and* acts: "The history of domestic violence and expert testimony explaining Ms. Grant's otherwise seemingly inconsistent statements *and conduct* could properly have been admitted under ER 404(b), at the very least for the purpose . . . of explaining Ms. Grant's inconsistent statements *and conduct*." Id. at 109 (emphasis added); see also id. at 106. This purpose applied in

Grant, where the victim had been with her abuser in spite of a no-contact order, initially lied to the police, and minimized the degree of violence in a letter to Grant's lawyer. Id. at 108.

Division Two of the Court of Appeals later agreed that a victim's inconsistent conduct can become legitimate grounds for prior bad acts evidence under ER 404(b). State v. Cook, 131 Wn. App. 845, 852, 129 P.3d 834 (2006) (holding that such evidence was properly admitted "in order to assess the state of mind of an individual whose *acts* are inconsistent with a report of abuse") (emphasis added). Cook, however, rejected Division One's broader formulation of the exception that focused on the victim's credibility, holding that such evidence is necessary only to address a victim's state of mind at the time of the inconsistent act. State v. Cook, 131 Wn. App. 845, 851, 129 P.3d 834 (2006).

The supreme court considered these two versions of the ER 404(b) exception in State v. Magers and decided that the Grant rationale was correct. 164 Wn.2d at 186. After Magers was arrested for assaulting his girlfriend of several years, Carissa Ray, a court entered a no-contact order. Id. at 178. Still, Magers and Ray were together at their residence about a month later, when he held Ray against her will and threatened to cut off her head with a

sword. Id. at 179. Ray called her parents to report what was occurring, and they called the police. Id. When responding officers asked Ray at the front door if Magers was present, she initially lied and said no. Id. When the officer asked her to step outside, however, Ray conceded that Magers was inside, expressed terror that he would discover she had disclosed his presence, and reported to officers the assaults and threats that had been occurring. Id.

Shortly after Magers was charged, Ray sent two letters to the prosecutor's office recanting her allegations of assaults and unlawful imprisonment. Id. At trial, contrary to the responding police officers' testimony, Ray denied that Magers had assaulted or unlawfully imprisoned her on the date of the crime. Id. at 180. She also admitted asking Magers to come over that day despite the no contact order, acknowledged that the order had been imposed as the result of an earlier assault against her, and that he had previously been in jail for fighting with others. Id.

The supreme court rejected the narrower grounds for admission under Cook, and embraced the language and rationale of Grant: "The jury was entitled to evaluate [the victim's] 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 186 (citing Grant, 83 Wn. App. at 108). Evidence of the prior bad acts "was relevant to enable the jury to assess the credibility of Ray, who gave conflicting statements about Magers's conduct." Id. at 186.

This Court most recently applied this reasoning in a domestic violence case where the defendant strangled his victim, Jennifer Ingram, on four separate occasions. State v. Baker, 162 Wn. App. at 471-72. The State charged the two later counts of strangulation, with the trial court admitting the first two incidents under ER 404(b). Id. Ingram testified that the defendant had strangled her on all four occasions, only one of which she had reported to the police. Id. at 470-72. This Court rejected Baker's argument that Grant and Magers only apply if the victim recants; it instead held that "evidence of Baker's prior assaults on Ingram was properly admitted to help the jury's assessment of Ingram's credibility," insofar as she had failed to contact police even after being strangled on multiple occasions because of her fear, embarrassment, love for Baker, and hope that the situation would improve. Id. at 475.

Here, given Hensel's inconsistent words and conduct, the trial court properly exercised its discretion in admitting one of Wilhelm's recent assault convictions against her for the purpose of assisting the jury in evaluating her credibility. Hensel's testimony and behavior might have affected how the jury evaluated the charged incident: she had willingly been in Wilhelm's presence on the date in question despite knowing of the no contact order; she had not called the police after the alleged assault but rather followed Wilhelm out of the store, crying out his name for him to return; she had been uncooperative with police at the scene and claimed various excuses for her injuries, declaring her love for Wilhelm; and she testified in a manner that seemed designed to admit to the court order violation but avoid a conviction for assault. 5RP 18, 120, 123-25, 164, 182-83; 6RP 10-12, 16, 31-32.

Wilhelm contends that evidence of the prior conviction was "pure propensity evidence" because there was no inconsistency in Hensel's testimony, either internally or with her statements to police. App. Br. 10, 16. This is incorrect. Hensel's testimony was both internally inconsistent and contradictory to what she told police. Upon the officers' arrival, Hensel told them alternately that her injuries were caused by a fall, and by Wilmore during a fight.

5RP 164, 183. When confronted by Officers Geiszler and Huberdeau about why she wouldn't provide a statement, she responded that she loved Wilhelm and didn't want him to get in trouble. 5RP 182; 6RP 16. These statements in and of themselves are internally inconsistent.

They also directly contradict Hensel's later testimony on the stand. Instead of stating that she had been injured in a fall or during a fight with Wilmore, she now claimed that she did not remember the assault at all. 5RP 123-25. She was able to testify as to what happened immediately before and immediately after the assault, but asserted that her memory of the incriminating event itself was no longer intact, and that she had somehow "blacked out" for those select moments. Id. Furthermore, when pressed on the stand, she admitted that she was "pretty sure the police asked me for a statement and I refused," which also directly conflicts with her account to police that she had fallen or sustained a cut on her head during a fight with Wilmore. 5RP 150.

Hensel's trial testimony was also inconsistent with her pretrial victim impact statement, in which she neither mentioned a lack of memory nor made any attempt to deny that the incident had happened. 6RP 131. Instead, at trial, Hensel reiterated the one

refrain she had made since the very inception of the case: that she deeply loved Wilhelm, could not imagine life without him, felt there was nothing wrong with their relationship, and hoped they would soon be able to be together again. 5RP 120, 131-21, 140. She also testified that despite claimed memory loss surrounding the attack, she "wanted him to get in as less [sic] trouble as possible" and "just want[ed] him to get better," a telling statement that is both internally inconsistent with her own account of not remembering the assault and that contradicts the alternate excuses she gave to police that night. 5RP 120. If she could not remember what happened, there was no basis for her to believe that Wilhelm needed to "get better."

Still, Wilhelm argues that because Hensel stated at trial that she did not remember the assault, and claimed at some points that she did not remember what she said to police, there was nothing "inconsistent" about her testimony. This is incorrect on two points. First, a professed lack of memory does not automatically render one immune to a charge of inconsistency. This Court has stated that "[i]nconsistency is to be determined, not by individual words and phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are

they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?" State v. Dickensen, 48 Wn. App. 457, 467, 740 P.2d 312 (1987).

A court may exercise some discretion in determining whether a witness' lack of memory seems feigned and not genuine. See e.g. United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1999) ("A claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements when the witness does not deny that the previous statements were in fact made."). Here, the trial court was in the best position to observe Hensel's testimony and determine whether her claim of memory loss was real or fabricated. The circumstances of her arguably strategic memory loss support the latter conclusion. Her claim that she did not remember what she told the police did not harmonize with her later admission that she was "pretty sure" they asked her for a statement and she refused, and her ability to explain what she had bought in the store did not correspond with her alleged "blackout." 5RP 135, 150.

Secondly, Wilhelm's argument ignores the fact that, even though Hensel claimed that she could not remember the assault, she still presented a picture of inconsistent conduct to the jury.

Hensel testified to consensually contacting Wilhelm and failing to notify or cooperate with authorities. Like the victim in Magers, Hensel also sent a letter to the prosecutor's office opposing the charges. 5RP 131-39. These acts alone presented the issue of inconsistency to the jury. Jurors would likely have wondered why Hensel continued contact with Wilhelm despite court orders, and why she failed to call the police despite an obvious attack witnessed by others.

Jurors also would have wondered why she repeatedly asserted throughout the trial how much she loved Wilhelm despite testimony from multiple eyewitnesses that he had stood over her, calling her "dirt" and hurling items at her on the ground. By allowing the jury to hear how Hensel had reacted to Wilhelm's first assault in the very beginning of their relationship in September 2011, and how she had forgiven him, the court better equipped the jury with tools to evaluate Hensel's motives and her credibility, and to give context to the couple's relationship.

Finally, the court properly weighed the probative value of the prior incident against its prejudicial value. In an abundance of caution, the court exercised its discretion in favor of Wilhelm by denying the State's motion to admit both assault convictions

against Hensel and allowing only evidence of the September 2011 incident. Wilhelm contends that the State had no evidentiary need to introduce the September 2011 assault because Hensel's knowledge of the no contact orders presented a sufficient alternative "motive [for her] to 'forget' what happened." App. Br. 16. This argument collapses because Wilhelm does not explain how Hensel's knowledge of the order would cause her to lie about the assault at trial; Hensel testified openly about both her knowledge of the no contact order and her alleged blackout regarding the attack.

The prior conviction was properly admitted, and this Court should affirm Wilhelm's convictions for assault and felony violation of a court order.

c. Any Error Was Harmless.

Even if the court abused its discretion in admitting the prior conviction, any error was harmless.

"It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for nonconstitutional error." State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). A nonconstitutional error is harmless if there is no reasonable probability that the outcome of the trial would have

been materially affected had the error not occurred. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Here, the evidence against Wilhelm was overwhelming. There was a videotape of Wilhelm standing next to Hensel at the QFC, in direct violation of the no contact order. Hensel, Heather Wilmore, and employee Gary Morrison all identified themselves in the videotape and testified that Wilhelm was with Hensel that night. Hensel admitted that both she and Wilhelm knew about the no contact orders, both of which Wilhelm had signed in open court. There was an eyewitness to the assault: Wilmore testified consistently throughout the case that she saw Wilhelm hurl objects at Hensel, calling her "dirt" as Hensel cried on the ground. Despite attempts to discredit Wilmore and her own admission of intoxication, Wilmore testified that the assault itself left an indelible impression on her because of its shocking nature. She also sustained a cut on her finger after wading into the fray and getting struck by one of the objects.

Wilmore's observations were also supported by Morrison, who heard Wilhelm screaming at Hensel and then saw him standing in front of her as she cried on the ground. Morrison also heard Keitt yelling at Wilhelm that "you shouldn't hit a girl" right

before Keitt was seen wrestling Wilhelm to the ground. Wilhelm himself revealed consciousness of guilt when he ran from the store when police were called, and then ultimately fled down a steep embankment covered with blackberry bushes, hiding face down in a culvert despite repeated commands to come out.

Moreover, the trial court limited the potential impact of the prior bad act by restricting the evidence to only the fact of conviction, the date, and its effect on Hensel. The jury was thus shielded from the facts of the prior assault, and was encouraged to focus its attention on Hensel and the relevant issue of her reaction.

Error was harmless, and the court should deny Wilhelm's request to reverse his convictions.

2. WILHELM CANNOT MEET HIS BURDEN OF ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL.

Wilhelm next claims that his counsel erred in proposing a limiting instruction that restricted evidence of his prior assault conviction to "assessing the credibility of Leah Hensel and explaining the inconsistencies in her testimony." He argues that the instruction was a comment on the evidence. This argument should be rejected. Wilhelm can neither establish deficient performance nor prejudice.

a. Relevant Facts.

Defense counsel crafted the following written limiting instruction for the evidence admitted under ER 404(b):

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consist [sic] of a prior assault conviction of Mr. Wilhelm and may be considered by you only for the purpose of assessing the credibility of Leah Hensel and *explaining the inconsistencies in her testimony*. You may not consider it for any other purpose. You may not consider it to determine if an assault occurred in this case. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 19, 38 (emphasis added). Wilhelm objects only to the italicized portion of the above instruction.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that his attorney's conduct fell below an objective standard of reasonableness, and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id. Courts strongly

presume that counsel has provided effective representation and they are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689.

b. Counsel's Performance Was Not Deficient Because The Instruction Was Not A Comment On The Evidence.

Article IV, section 16 of the Washington State Constitution prohibits a judge from making comments that convey to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). Thus, a court may not instruct the jury that matters of fact have been established as a matter of law. State v. Hartzell, 156 Wn. App. 918, 938, 237 P.3d 928 (2010). A jury instruction as a judicial comment on the evidence is reviewed de novo, in the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

In evaluating whether a trial court's words or actions amount to a comment on the evidence, the appellate courts look at the facts and circumstances of the particular case. Jacobsen, 78 Wn.2d at 495. A trial court must strike a balance between the obligation to give a satisfactory limiting instruction and the obligation to refrain from commenting on the evidence. Hartzell, 156 Wn. App. at

940-41. The fact that a limiting instruction could have been worded differently to more clearly avoid any issue of comment on the evidence does not necessarily mean that the wording used was improper. Id. at 939-40.

Jury instructions are read in a common-sense manner and are sufficient if they permit each party to argue his theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. State v. Clark, 143 Wn.2d 731, 771, 24 P.3d 1006 (2001). An appellate court will "review the instructions in the same manner as a reasonable juror." State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994).

When the limiting instruction here is viewed as a whole, in context and through the eyes of a reasonable juror, the term "inconsistencies in her testimony" does not necessarily convey the court's personal opinion of Hensel's credibility nor imply that she is not credible. In the clause immediately preceding the phrase at issue, the instruction tells jurors that they may use the evidence for the purpose of "assessing the credibility of Leah Hensel." This instructs them that they are charged with evaluating the still-open question of Hensel's credibility, a directive repeated in Instruction No. 1: "You are the sole judges of the credibility of each witness.

You are also the sole judges of the value or weight to be given to the testimony of each witness." CP 33.

One must also examine the structure of the limiting instruction as a whole. The admonition does not tell the jury that the evidence is included for the purpose of "assessing the credibility of Leah Hensel "*by*" explaining the inconsistencies in her testimony. Instead, it separates the two clauses by the word "and" and thus indicates that they are two separate permitted purposes.

The cases to which Wilhelm cites where instructional defects merited reversal all involved faulty instructions that misstated the elements of the crime in the to-convict portion or misrepresented the burden of proof -- serious defects that clearly undermined a reviewing court's confidence in obtaining the same verdict absent their inclusion. State v. Kyllo, 166 Wn.2d 856, 871, 215 P.3d 177 (2009) (arguing and offering an instruction erroneously stating the perceived level of harm required for self-defense); In re Wilson, 169 Wn. App. 379, 279 P.3d 990 (2012) (misstating the requirements of accomplice liability). Furthermore, only one of these involved a comment on the evidence. State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997) (instruction answered the jury's ultimate question about whether a building constituted a school and thereby "relieved

the State of its burden to prove all elements of the sentence enhancement statute").

Here, the allegedly offending words are very subtle and do not constitute an element of the crime nor misstate the law. They do not constitute a comment on the evidence.

c. Wilhelm Has Not Demonstrated Prejudice.

Even if this Court finds that the phrase constitutes a comment on the evidence and thus deficient performance, Wilhelm cannot show that he was prejudiced. To prevail on an ineffective assistance claim, a defendant must show a reasonable probability that "but for counsel's errors, the result of the trial would have been different."[6] Hendrickson, 129 Wn.2d at 78. A mere showing that an error by counsel had some conceivable effect on the outcome is insufficient. Strickland, 466 U.S. at 693.

Here, Wilhelm cannot establish that the wording in the instruction prejudiced him because Hensel's testimony *was,* in fact, patently inconsistent. No reasonable juror could maintain that Hensel's shifting accounts of what happened – from falling, to

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[6] Because Wilhelm's attorney requested the instruction, he cannot claim error due to the invited error doctrine. Therefore, he is ineligible for the standard of prejudice normally applied to judicial comments on the evidence, which presumes prejudice "unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted." Hartzell, 156 Wn. App. at 937.

getting in a fight with Wilmore, to not remembering at all – constituted anything *but* inconsistent testimony. Hensel claimed to not remember talking to police but then testified that she was "pretty sure" she had refused to give them a statement. She stated she could not remember what happened inside the store but recalled details such as what they were buying. Even without the word "inconsistency" in the limiting instruction, it is inconceivable that the jurors would not have come to that same conclusion on their own.

Defense counsel emphasized Hensel's inconsistencies throughout his closing statement, as part of an overarching theme attacking the reliability of the State's two main witnesses. 6RP 122-39. His initial remarks focused on how the State did not even believe in Hensel's credibility and the weakness this revealed in its case: "[T]hey don't even believe anything that's coming out of her mouth." 6RP 123. He next criticized Wilmore's inconsistencies and emphasized how employee Morrison "was the only one who was there that wasn't drunk, who . . . doesn't have his testimony shrouded in bits that he can remember and bits he can't remember." 6RP 123-26. He then acknowledged what was plainly apparent to all in the courtroom: "We all know that Ms. Hensel is

somewhat not a credible witness. You can use that assault to assess her credibility but she's just not a very credible witness [anyway]." 6RP 131.

In his remarks, counsel seized upon Hensel's original claim of falling down as the more plausible cause of her injury, belying Wilhelm's argument on appeal that Hensel's testimony at trial about "forgetting" was somehow consistent and beneficial to him, and that calling it "inconsistent" thus prejudiced him. App. Br. 23; 6RP 138-39. Counsel's remarks demonstrate a belief that Hensel's claim of memory loss, in light of its painfully contrived nature and her openly stated bias, was actually not helpful and falling down was a more rational defense theory.

Any potential prejudice was also cured by the court's instruction taken verbatim from WPIC 1.02: "It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely." CP 34.

Finally, as noted above, the volume of proof against Wilhelm, even without of the single instance of ER 404(b)

evidence was overwhelming. It therefore logically follows that Wilhelm cannot establish that, but for the inclusion of the term "inconsistencies in her testimony" in the limiting instruction, which by its very terms instructed the jury *not* to use the ER 404(b) evidence as propensity evidence against Wilhelm, the jury's verdict would have been different.

Because of the overwhelming strength of the State's case, and the fact that Hensel's testimony was patently inconsistent, Wilhelm's claim of prejudice thus fails.

3. THE COURT DID NOT ABUSE ITS DISCRETION BY DENYING WILHELM'S MOTION TO BIFURCATE THE TRIAL.

Wilhelm next argues that the trial court abused its discretion when it denied his motion to bifurcate the proceedings and require the State to present evidence of his prior convictions in a separate trial. He contends that the trial court based its decision on a misunderstanding of the law. This is incorrect. Defendants have no right to bifurcated trials and the trial court reflected a proper understanding of the law when it denied his motion.

a. Pretrial Ruling.

The court denied Wilhelm's motion to bifurcate the proceedings and require presentation of the evidence of his two

prior convictions for violation of a court order in a separate trial. 3RP 49. The State argued that bifurcation of elements has been "considered inappropriate because it's not an aggravator . . . that can tack on to the potential punishment of the defendant . . . It is an element of the crime so it should not be bifurcated." 3RP 48. The court agreed, stating that it believed "the case law is against that position at this point in time." 5RP 49.

b. The Court Properly Denied Wilhelm's Motion To Bifurcate.

Wilhelm contends that the trial court based its ruling on an erroneous belief that caselaw forbids the type of bifurcation he requested, and therefore abdicated the exercise of any discretion entirely. The sole support for his argument rests on a single fragment of one sentence in the trial court's ruling. This reliance is misplaced. In saying that "the caselaw is against that position at this time," the trial court was not stating that the law categorically prohibits the requested procedure. As shown below, the court was accurately reflecting the absence of a single case endorsing Wilhelm's position and the appellate courts' general disfavor of bifurcation in this context thus far.

Courts have established that in cases where prior convictions raise the base crime to a felony, the existence of those prior convictions is an element of the crime, not an aggravator; a defendant therefore has no right to bifurcate the proceedings and waive jury trial on the element of the priors alone. State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008). In Roswell, the court held that the defendant had no right to shield the jury from evidence of his prior convictions for violation of a court order, and to instead present that evidence at a separate bench trial. Id.

The furthest the courts have gone in terms of accommodating a defendant's request for bifurcation in a charge of felony violation of a court order is to allow bifurcated to-convict instructions. State v. Oster, 147 Wn.2d 141, 143, 52 P.3d 26 (2002). However, while holding that this procedure did not violate constitutional provisions, the court did not enthusiastically endorse this practice. If anything, the court evinced a limited acquiescence to a narrow exception regarding instructional bifurcation, first emphasizing the general rule that a 'to convict' instruction that "purports to be a complete statement of the law and yet omits an element *creates a constitutional error requiring reversal*":

> We adhere to our previous holdings that a purportedly complete "to convict" instruction must contain all of the elements of the crime. However, we conclude it was not error to instruct the jury separately and by special verdict form on prior criminal history.

Oster, 147 Wn.2d at 143 (citations omitted) (emphasis added).

It is critical to note that nothing in Oster holds that due process *requires* instructional bifurcation, much less bifurcated proceedings, only that instructional bifurcation may be allowed as a narrow exception to the rule of unitary to-convict instructions. Indeed, in Oster there was no question of bifurcating the actual proceedings or presentation of the evidence, only that of the verdict forms presented to the jury regarding the base crime and the priors. In its later ruling in Roswell, the court cautioned:

> We did not . . . hold [in Oster] that the defendant had a right to bifurcated jury instructions. We have specifically held that such bifurcation is constitutionally permissible but not required. And we certainly did not suggest that defendants have a right to waive their right to a trial by jury on certain elements so as to prevent the jury from hearing prejudicial evidence. *Courts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue.*

Roswell, 165 Wn.2d at 197 (emphasis added).

More recently in State v. Bache, the furthest this Court went regarding bifurcation was to suggest that "the element of . . .

predicate crimes may be more properly addressed through a special verdict form." 146 Wn. App. 897, 906, 193 P.3d 198 (2008). Nowhere in Bache did this Court endorse or suggest bifurcation of the trial itself, but only emphasized that despite the prejudice claimed by the defendant, "the State must nonetheless prove these predicate crimes beyond a reasonable doubt." Id.

There is, in fact, no case to which Wilhelm can cite that actually authorizes or endorses the bifurcation of the proceedings for charges such as the one at issue, or holds that a defendant's right to a fair trial forbids a trial court from conducting unified proceedings. The greatest accommodation made in terms of sanitizing prior convictions for a similar crime, unlawful possession of a firearm, has been to allow defendants to stipulate to their status as felonies and keep the potentially inflammatory nature of the crime itself from the jury. Roswell, 165 Wn.2d at 195 ("the [United States Supreme] Court in Old Chief did not hold that a jury must be completely shielded from any reference to the prior offense, only that when a defendant stipulates to a prior conviction the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction").

Given the lack of any caselaw endorsing or even suggesting the procedure requested by Wilhelm here, and the obvious tenor of restraint shown by the courts regarding bifurcating jury instructions, much less the proceedings itself, it was not a misstatement of the law for the court to base its denial on a lack of preference for bifurcated proceedings. The trial court did not say that caselaw forbids the practice, simply that it was "against" it. This Court should not read into that single phrase a belief in a total mandate against bifurcation. There was no abuse of discretion.

Should this Court find the trial court misstated the law, the remedy should not be reversal. Although there is arguably no caselaw expressly forbidding the use of the procedure that Wilhelm requests, neither is there any caselaw on point that allows or encourages it. Therefore, Wilhelm cannot establish that had the trial court elaborated (perhaps more artfully) that there is no caselaw currently endorsing bifurcated trials, that it would have exercised its discretion any differently.

This Court should reject Wilhelm's claim that the trial court abdicated its discretion.

4. WILHELM FAILS TO MEET HIS BURDEN TO SHOW THAT THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT.

Finally, Wilhelm contends that the prosecutor committed reversible misconduct in closing remarks by responding to his earlier questions of a witness regarding the possibility that the orders had been recalled. This argument is meritless. Because the prosecutor was merely responding to the hypothesis posed by Wilhelm when she stated that the jury had seen no evidence of any attempt to recall the orders, the conduct was not improper, nor was it prejudicial.

To establish prosecutorial misconduct, Wilhelm must show "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting Magers, 164 Wn.2d at 191). Prejudice is established only when "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." Id. at 442-43.

It is well-established that "[i]t is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory." State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997); see also State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314

(1990) (in response to defense counsel's characterization of victim as a "liar," it was not misconduct for prosecutor to point out that the defendant could not come up with a single reason why the victim would lie); State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990) ("When the defendant attempts to establish his theory of the case, the prosecutor is entitled to attack the adequacy of the proof, pointing out weaknesses and inconsistencies, including the lack of testimony which would be integral to the defendant's theory."). Furthermore, "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Here, one of the defense theories in attacking the State's case was that the defendant lacked knowledge regarding the no contact order. Specifically, counsel questioned Issaquah Detective Brian Horn extensively about whether Horn knew personally whether Wilhelm had been served. 6RP 58-62. Counsel's questions, in an attempt to cast doubt on Wilhelm's knowledge of the order, pointedly implied that the order could have been recalled:

> Q. And, detective, quite often the – the protected parties in no contact orders come to court and ask for it to be recalled; is that fair enough?

A. That is, yes.
Q. And sometimes those recall orders, if there is one, takes a little while --
MS. KIM: Your Honor, I would object to speculation at this point about what might happen in other cases. If there's something specific about this case he wants to ask about, I would not object.
THE COURT: Response?
MR. GONZALES: Yeah. The question I'm just trying to pull up from the detective that it is possible that Mr. Wilhelm didn't know that the no contact order was in place because routinely these orders are recalled --

6RP 60.

Given Wilhelm's obvious attempt to establish a theory that the order could have been rescinded on the date of the crime and thus no longer valid, the prosecutor was well within the bounds of propriety by stating during closing remarks that no evidence existed to support that theory. This is especially true in light of counsel's failure to question Hensel on this point, since his inference during Horn's testimony was that Hensel was the party who could potentially have recalled the order.[7]

[7] Given Hensel's unambiguous testimony that both she and Wilhelm knew of the continued existence of the court order, counsel's failure to cross-examine on this issue was understandable.

Moreover, although defense counsel objected to the prosecutor's comment regarding his theory of potential recall, he in fact advanced that very theory in his own closing remarks: "[The] detective assumed that Mr. Wilhelm knew that no contact order was in place because that's procedure . . . he didn't talk to Damian Wilhelm, he didn't talk to anybody else about his no contact order." 6RP 136-37. The incorporation of an alleged offending remark into defense counsel's own argument "weakens the contention it denied [defendant] a fair trial." Russell, 125 Wn.2d at 89. Finally, because of the overwhelming evidence of Wilhelm's knowledge of the order, including Hensel's testimony regarding his awareness of it, his signature acknowledging receipt in open court, and Horn's verification of its validity, Wilhelm cannot establish that a substantial likelihood that this single remark affected the jury's verdict.

Wilhelm fails to meet his burden in establishing prosecutorial misconduct. This Court should affirm his conviction for felony violation of a court order.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Wilhelm's convictions.

DATED this 21 day of July, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to RICHARD LECHICH, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DAMIAN WILHELM, Cause No. 70704-3-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

07-21-14
Date

Done in Seattle, Washington