SUPREME COURT NO. 97581-7

NO. 77963-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES TURNER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Charles Turner was the appellant below.

B. COURT OF APPEALS DECISION

Turner requests review of the Court of Appeal's (Division One) decision in State v. Turner entered on August 5, 2019.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Where the State adds so-called surplus language in the information and thereby gives the defense notice the charge applies to a narrow and specific actus reus is it a due process violation to allow the jury to convicted based on a broader act than was identified in the information?

2. Did the jury instructions erroneously permit the jury to convict petitioner of burglarizing his own home without first finding there was a court order specifically restricting him from being present at that location?

3. To sustain a special verdict under the ground a defendant was armed with a deadly weapon, must the State prove a nexus between the defendant, the crime, and the weapon?

[1] The decision is attached as Appendix A.

D. GROUNDS FOR REVIEW

As explained below, review should be granted under RAP 13.4(b)(1). Division One's decision conflicts with this Court's prior ruling in State v. Oleson, 35 Wash.149, 155, 76 P. 686, 688 (1904) (holding that where the information includes so-called surplus language that identifies a specific actus reus, it is a due process violation to allow him to be convicted based on proof of a different act).

Additionally, review should be granted under RAP 13.4(b)(4). There is a substantial public interest in having this Court provide judicial guidance in identifying under what circumstances a person may be convicted of burglarizing the home he is currently occupying.

Finally, review should be granted under RAP 13.4(b)(1) because Division One's decision conflicts with State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007) (holding that before a person may be found to be armed with a deadly weapon, the State must prove there is a nexus between the defendant, the crime, and the weapon).

E. RELEVANT FACTS

Petitioner Charles Turner (Charles)[2] and his spouse Lisa Turner (Lisa) have been married over 32 years. RP 269. Theirs was a rocky marriage, and at the time incident in April of 2017, they were prohibited from having contact due to a prior domestic violence conviction against Charles. RP 226-27. Charles was prohibited from being within 300 feet of Lisa's residence. Ex. 26.

At the time of the incident, Charles was renting a room from Gary White. RP 238, 446. Charles and Lisa both were acquainted with Gary White. RP 459-60. Charles met him through his work as a carpenter, and Lisa had been White's roommate at one point. RP 459-60. White entertained hopes of having a romantic relationship with Lisa. RP 266.

During the evening of April 1 and the early morning of April 2, 2017, Lisa, Charles, and White were all present in White's apartment together; by the end of the evening, all three were injured and bleeding. RP 262, 264, 294, 453-54. Throughout the evening, Charles had a few drinks, White smoked marijuana, and

[2] Because there are two persons with the last name of Turner involved, petitioner will use their first names for clarity.

Lisa was at times "blackout drunk"[3] (with a blood alcohol level over three times the legal limit). RP 257, 298, 278, 447, 454. As to further details of what transpired in the apartment that evening and the residency in the apartment, White, Lisa, and Charles testified to different versions of events.

1. Charles' Account

Charles testified that Lisa had previously rented a room from White, but she moved out a few weeks prior to the incident, and he moved in. RP 458, 460. The apartment was no longer Lisa's residence when he moved in. RP 460. However, Lisa changed plans and wanted to return to White's apartment and force Charles to move out. RP 446, 462.

During the evening of April 1, 2017, Charles started to move out but could not continue because his truck had a flat tire. RP 446. From what White had told him, Charles did not expect Lisa to move back into the apartment until the next day. RP 463, 469. So, Charles returned to the apartment, had a few drinks, and fell asleep in his room. RP 447-48. He awoke to find Lisa had come into the apartment and was noisy and agitated. RP 448. Charles and Lisa argued about her being there that night. RP 448. He again tried to

[3] This is the term used by the prosecutor in closing argument to describe Lisa's state. RP 493.

get his truck moving but could not, so he returned to his bedroom and fell asleep alone. RP 448, 462, 481.

Shortly afterward, Charles was suddenly awakened by Lisa, who was in the living room screaming that someone was going to kill her. RP 449. He went to the living room and saw Lisa holding a knife in her hands swinging it around in front of her face. RP 449, 466. Charles, who was worried Lisa might hurt herself, approached Lisa with his hands up and tried to calm her. RP 450-51. Charles then protectively placed his had in front of Lisa's throat to protect her from the way she was swinging the knife, and then he took the knife away. RP 451. Charles did not see any injury to Lisa's neck as he took the knife away. RP 452.

After disarming Lisa, Charles turned away and was immediately struck very hard on the side of the head by White. RP 452. The knife Charles had taken from Lisa fell from his hand as he fell to the ground. RP 464. White continued to attack Charles while he was on the ground. RP 452. Charles suffered a significant head injury, a swollen eye, and a bloody nose. RP 452, 454. Charles blacked out for a bit. RP 453. When he gained consciousness, White was gone. RP 453.

Dazed, Charles tried to get out the front door, but for some reason he could not open it. RP 454. Charles was confused so he went to his room, took "a few hits" off a bottle of alcohol, and then returned to the front door. RP 454. This time the door opened, so he exited and wandered toward the parking lot across the street where he could sit under a canopy out of the rain. RP 454. Charles waited there until police located him. RP 344-45, 455.

2. White's Account

White testified that Charles paid him rent for a room, but he claimed Charles and Lisa shared the room. RP 238. White said that on April 1, 2017, he picked Lisa up from McDonalds at 8:00 in the evening and brought her back to the apartment. RP 257. He said that he watched a baseball game while Lisa went into a bedroom. RP 257. White then smoked marijuana and went to bed. RP 241, 257.

White claimed he was awakened by Lisa pounding and screaming at the door. RP 241. He got dressed and went out to the living room where he seated himself on a chair. RP 242. He said Lisa and Charles were yelling and continued to fight in front of him for ten minutes. RP 242-43. White claimed that at some point Charles went into the kitchen, got a knife, returned to the living

room, grabbed Lisa's hair, and then put the knife to her neck. RP 242, 245. During his direct examination, White suggested Lisa was cut at this time. RP 245. However, White later admitted he never saw a cut and he never saw Lisa bleeding. RP 261.

White struck Charles with a piece of wood on the side of the head, and Lisa left. RP 245-46. White and Charles wrestled on the ground until White grabbed the knife and left the house. RP 246, 250. Once outside, White held the doorknob and prevented Charles from leaving the apartment (even though White acknowledged Charles was not showing any signs of chasing after him). RP 255, 262. White went to a neighbor's porch and left the knife. RP 250. Eventually, White went back to the apartment, called 911, and was there when police arrived. RP 252.

3. Lisa's Account

Lisa testified that she was living with Charles at White's apartment. RP 270. Lisa said that on the day of the incident she was intoxicated. RP 272. She claimed she was with Charles the whole day and evening. RP 284. She said they had a fight that evening. RP 272. She claimed she was asking Charles to leave when he became angry, grabbed a knife, pulled her head back by her hair, and cut her throat. RP 276-77. Lisa also claimed she had

blood running down her face, and this is when White stood up and hit Charles with a log from the fireplace. RP 277.

Lisa testified she bolted from the apartment, knocked on neighbors' doors, and then ran up the street to Safeway. RP 277. After Lisa called 911, police responded. RP 216, 282.

Upon cross examination, Lisa admitted she had previously stated during an interview that she only remembered bits and pieces of what happened that night and was at times in an alcohol-related blackout. RP 286-87. She stated she did not even recall White picking her up from McDonalds. RP 287. She also admitted she had no recollection of making a 911 call just a few minutes after the incident or what she reported. RP 280, 282.

4. Charges and Convictions

The Snohomish County prosecutor charged Charles with two counts of second degree assault (one allegedly committed against Lisa and the other against White) and one count of felony violation of a no-contact order. CP 97-98. In an amended information, the prosecutor dropped the assault charge pertaining to White and instead added a charge of residential burglary. CP 80-81. For residential burglary, the prosecutor specifically charged that Charles "did enter or remain unlawfully in the dwelling of Lisa

Turner." CP 80. All charges carried with them deadly weapon enhancements. CP 84-86.

A jury acquitted Charles of the assault charge. CP 43. However, it found him guilty of the other two charges and the deadly weapon enhancements. CP 37, 38, 41, 42. Because the deadly weapon enhancements elevated the charges to strike offenses under 9.94A.030(33)(t), the trial court found Charles to be a persistent offender and sentenced him to life in prison. CP 7-20.

F. ARGUMENT IN SUPPORT OF REVIEW

I. REVIEW SHOULD BE GRANTED SO THIS COURT MAY CONFIRM WHETHER DUE PROCESS REQUIRES SO-CALLED SURPLUS LANGUAGE IN THE INFORMATION THAT IDENTIFIES A SPECIFIC ACTUS REUS BE PROVED BEYOND A REASONABLE DOUBT.

It is fundamental that "A person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." Jackson v. Virginia, 443 U.S. 307, 314, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); U.S. Const. amend. VI; Wash. Const. art. 1, § 3, 22. It is also fundamental that under both federal and state constitutions an accused person must be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense not charged. U.S. Const. amend. VI and XIV; Const. art. I

§ 21, 22; Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948); DeJonge v. Oregon, 299 U.S. 353, 362, 57 S. Ct. 255, 81 L. Ed. 278 (1937); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432, 434 (1988). To this end, the trial court has a duty to ensure the jury is instructed such that the defendant is convicted only of those criminal acts or means which were charged by the State in the information and of which he has been given notice. State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859 (2007).

The principal purpose of the information "is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defense." Gautt v. Lewis, 489 F.3d 993, 1002–03 (9th Cir. 2007). When the State adds language to the information as a means of identifying the specifically charged criminal act, it has given defendant notice that it will seek a conviction based only on that act. Oleson, 35 Wash at 155. The State cannot change this without proper notice, otherwise the defendant cannot be said to be "informed of the nature and cause of the accusation" so as to satisfy the constitution. Id.

The State charged White with the specific act of unlawfully entering and remaining in Lisa's dwelling. CP 80. The evidence

presented at trial raised a factual question of whether the apartment was indeed Lisa's dwelling at the time of the incident. RP 236-38, 270, 446, 458. The instructions did not inform the jury that in order to convict Charles of burglary it had to resolve this question and find beyond a reasonable doubt that the apartment was in fact Lisa's dwelling at the time of the incident. CP 60.

On appeal, Charles asserted he was denied due process when the jury was permitted to convict him of an uncharged crime where his conduct fell outside the specific criminal conduct charged. Brief of Appellant (BOA) at 11-16; Reply Brief of Appellant (RBOA) at 1-7. As Charles explained on appeal, the instructions wrongly permitted the jury to convict Charles even if jurors were not convinced beyond a reasonable doubt that Lisa resided at the residence where the alleged burglary took place. CP 60. Instead, the jury could have convicted based on the uncharged crime of burglarizing Gary White's dwelling or even Charles' own dwelling. Id. However, Charles was not notified that such acts could form the basis of the burglary charge. Hence, Charles' asserted on appeal that his right to due process was violated. Id.

Division One's holding to the contrary is predicated on a misapplication of this Court's decision in State v. Tvedt, 153 Wn.2d

705, 107 P.3d 728 (2005). Appendix A at 5. It cites Tvedt for the proposition that "surplus language in a charging document may be disregarded." Id. From this, it suggests that any "surplus" language in the information need not be proved to the jury as long as the general statutory elements are in the information. Id. at 5-6. However, Division One's reliance on Tvedt is misplaced because the information, evidence, and instructions in that case never left room for the jury to convict the defendant of an uncharged crime. Tvedt, 153 Wn.2d 718-19; see also, RBOA 3-4 (distinguishing Tvedt). Moreover, Division One completely ignored this Court's prior ruling in Oleson, which is applicable and mandates reversal. Appendix A at 5-7.

Although it is an older decision, Oleson is on point and has not been overruled. Frank Oleson was convicted of receiving a deposit at a bank of which he was cashier, knowing the bank to be insolvent. Id. at 152. The information specifically identified the charged act as accepting the deposit made by the Byron Grocery Company, a corporation. Id. 152–53. However, the evidence established the deposit the State was seeking a conviction on was made by Byron & Shumway, not Byron Grocery Company. Id.

On appeal, Oleson argued there was a "fatal variance" between the essential allegations of the information and the proof upon which he was convicted. Id. at 152. This Court agreed. Id. at 154-55. In reaching this conclusion, this Court explained that constitutional notice requires the State to prove the essential allegations of which the State has given notice. It explained that the State "evidently supposed that the name of the depositor was necessary to an identification of the deposit, and therefore alleged that the deposit was made by the Byron Grocery Company." Id. at 155. It noted the defendant understandably could rely on this in preparing his defense and had no notice to be prepared to defend against other acts. Id.

This Court explained that allowing the defendant to be convicted based upon proof that Oleson accepted a deposit by Byron & Shumway "would have the effect to mislead the accused, because he had a right to suppose that the state would attempt to prove the charge as made." Id. It concluded that allowing a conviction to stand based on a criminal act alleged other than that specified in the information would mean there is "no virtue in the constitutional provision that an accused person shall have a right to

know the nature and cause of the accusation against him." Id. It reversed. Id.

Just as in Oleson, the State charged Charles based on a specific criminal act that it identified in the information. CP 80. Just as in Oleson, Charles reasonably relied upon this and offered evidence that Lisa no longer resided at the location of the incident. RP 458, 460. Just as in Oleson, Charles challenged his conviction on appeal as unconstitutional because the conviction was based on an uncharged criminal act for which he had no notice. BOA at 11-16; RBOA at 1-7. Yet, Division One completely disregarded this Court's decision in Oleson. Appendix A at 5-7. In doing so, its holding ultimately conflicts with Oleson. Hence, Charles requests this court accept review under RAP 13.4(b)(1).

II. REVIEW SHOULD BE GRANTED BECAUSE THERE IS A SUBSTANTIAL PUBLIC INTEREST IN HAVING JUDICIAL CLARIFICATION REGARDING THE CIRCUMSTANCES UNDER WHICH A PERSON MAY BE CONVICTED OF BURGLARIZING THE HOME HE CURRENTLY OCCUPIES.

Burglary has two elements: (1) the accused enters or remains unlawfully in a dwelling with (2) an intent to commit a crime against a person or property therein. RCW 9A.52.025. The State's evidence must independently satisfy each element. State v.

Stinton, 121 Wn. App. 569, 573, 89 P.3d 717 (2004). A violation of a protection order provision may serve as the predicate crime for residential burglary in most circumstances. Id. at 577. However, the existence of such an order does not necessary establish whether an accused enters or remains unlawfully in a dwelling when the accused is currently occupying that dwelling. State v. Wilson, 136 Wn. App. 596, 608-12, 150 P.3d 144 (2007).

As shown above, the jury was presented with a conflicting testimony regarding whether Lisa was currently a resident at White's apartment. There was a protection order that prohibited Charles from being within 300 feet of Lisa's residence. Ex. 26. Thus, it was critical that the State prove Lisa was residing in the apartment at the time of the incident.

After considering whether a person can be charged with burglarizing his own home based on intent to violate a no-contact order, Division Two concluded the Legislature never intended to criminalize the entry or remaining in one's own dwelling as a burglary unless there is an order that specifically prohibits the defendant from entering that particular location. Wilson, 136 Wn. App. at 611–612. Under Wilson, if the defendant is subject to a no-contact order that prohibits him from contacting a person but the

order does not expressly prohibit the defendant from being at his own dwelling, he will not be found guilty of burglary for entering and remaining in his own home (although he will be subject to a charge for violating the no-contact order). Id. at 600-01, 606-07.

Under Wilson, if the jury believed Lisa was not residing in White's apartment at the time of the incident, Charles could not be convicted of burglary. See, BOA at 17-19 and RBOA at 7-8 (explaining this in further detail). Unfortunately, the jury was never instructed that it had to find the apartment was Lisa's dwelling before it could find Charles guilty of burglary. CP 60. Instead, the instructions permitted the jury to find Charles guilty of burglarizing his own home even if Lisa was not residing there. BOA at 17-19; RBOA 7-8. This is a problem under Wilson.

While Division One accepted Wilson's interpretation of the law and properly recognized the crucial question for the jury was whether Lisa resided the residence, it improperly engaged in appellate fact-finding as a means of getting past the instruction problem here. Appendix A at 7. Division One noted there was a conflict in the testimony regarding whether Lisa occupied the residence at the time of the incident. Id. However, it speculated that the jury must have believed Lisa lived at the residence

because it found Charles guilty. Citing Wilson (not an instruction), Division One suggests that Charles could not have been found guilty for occupying his own home as a matter of law. From this, it speculates the jury must have concluded that it was Lisa's home.

However, Division One's analysis is logically flawed. The jury was never instructed regarding the law as it pertained to finding one guilty of burglarizing his own home. Indeed, the instructions never informed the jury that Charles could not be found guilty if they believed he resided in the apartment and Lisa did not. Thus, contrary to Division's One's conclusion, the jury's conviction is not proof that it must have found Lisa was a resident at the time of the incident. Division One simply speculated as to the jury thought-process and ultimately engaged in improper appellate fact-finding.

In sum, Washington courts and parties in the criminal justice system need clarification as to what circumstances may give rise to a criminal conviction for burglarizing one's own home, what proof is required, and what instructions are necessary. There is a substantial public interest in having this court provide this guidance.

As such, this Court should grant review under RAP 13.4(b)(4).

III. REVIEW SHOULD BE GRANTED BECAUSE DIVISION ONE'S CONCLUSION AS TO THE VALIDITY OF THE DEADLY-WEAPON VERDICT CONFLICTS WITH THIS COURT'S DECISION IN BROWN.

The jury had to decide whether Charles was armed with a deadly weapon during the commission of the crimes. Not only was this finding crucial to establishing a sentencing enhancement, it was also determinative of whether Charles would be classified as a persistent offender. While the jury found Charles was armed, the jury was also misled by the prosecutor as to the State's burden to show a sufficient nexus between the crime and the weapon. Once the applicable law is correctly applied to this record, however, it is apparent that the evidence was insufficient to support the deadly weapon findings.

This Court has explained the mere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed. Brown, 162 Wn.2d at 422. A person is armed with a deadly weapon if the weapon is easily accessible, and there is a nexus between the defendant, the crime, and the weapon. Id. at 431. Actual possession of a weapon during an ongoing crime is not determinative. Id. at 432 (rejecting

the dissent's suggestion that actual possession alone is sufficient proof one is armed for purposes of the enhancement).

In determining the nexus, the factfinder must review the nature of the crime, the type of weapon, and the circumstances under which the weapon is found. Id. at 431. To show a nexus between the crime and the weapon, the circumstances must sufficiently demonstrate "the defendant's intent or willingness" to use the weapon to further the crime. Id. at 432-34.

In closing argument, the prosecutor suggested Charles' intent to assault Lisa with the knife showed a willingness and intent to use the knife in terms of the first two charges (assault and residential burglary). RP 504. As for the charge of violating a no contact order, the prosecutor argued that even if the jury believed Charles' version of the evidence, he admitted having the knife available for offensive or defense use for three seconds, and this was enough to establish a nexus. RP 504-05. Unfortunately, this statement is misleading as it tracks with the dissent's position in Brown, suggesting that actual possession of a weapon and the possibility that the weapon could have been used during the commission of a crime was enough. Yet, this position was explicitly considered and rejected by the Brown majority. 162 Wn.2d at 432.

Applying the holding in Brown to the facts here, it is evident there was insufficient evidence supporting the deadly weapon verdicts. The jury acquitted Charles of the assault charges, rejecting both White and Lisa's accounts that Charles cut Lisa with the knife or held the knife against her neck. Hence, the jury was left with Charles' account of his possession of the knife. Charles admitted he possessed the knife for a few moments. However, he testified that he was merely in possession of it after disarming Lisa in an effort to protect her from self-harm. He explained that he dropped the knife within seconds of disarming Lisa when White struck him with the log, and they went to the ground. RP 451-52, 464. Under these facts, there was insufficient evidence showing

Charles had the intent or willingness to use the knife as a means of furthering his contact with Lisa or as a means of remaining in the dwelling.

Under Brown, the trial court and Division One both erred when they upheld the weapons enhancements. Both failed to focus on the standard set forth in Brown. However, when this Court's decision in Brown is properly applied to this case, it is apparent there was insufficient evidence to support the deadly weapon enhancements. The evidence did not establish beyond a

reasonable doubt Charles' intent or willingness to use the knife to further the burglary or the no-contact violation. It was not enough that Charles had the knife in his hand at the time he had contact with Lisa or was remaining in the dwelling. The State had to prove more. Based on this record, the State failed to sufficiently prove a proper nexus between the weapon and the crime of violating the no contact order. Hence, under Brown, there was insufficient evidence establishing Charles was armed.

In sum, Division One's decision that there was sufficient evidence to prove a nexus between Charles, the knife, and the charged offenses conflicts with this Court's decision in Brown. Consequently, petitioner requests this Court grant review under RAP 13.4(b)(1).

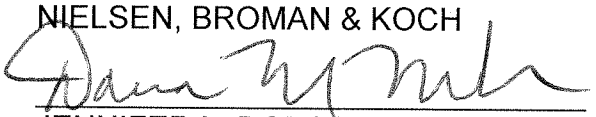
G. CONCLUSION

For the reasons stated above, petitioner respectfully asks this Court to grant review.

Dated this 26th day of August 2019.

Respectfully submitted

NIELSEN, BROMAN & KOCH



JENNIFER L. DOBSON, WSBA 30487
DANA M. NELSON, WSBA 28239
Office ID No. 91051

Attorneys for Appellant

FILED
8/5/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. CHARLES RANDALL TURNER, SR., Appellant.	)	No. 77963-0-I UNPUBLISHED OPINION FILED: August 5, 2019

VERELLEN, J. — Charles Turner, Sr. appeals his convictions for residential burglary with a deadly weapon and felony violation of a domestic violence no contact order with a deadly weapon. Turner contends the jury instructions allowed him to be convicted of an uncharged crime because of differences between the charging document and the jury instructions. But Turner fails to show the discrepancies added to the State's burden at trial or risked jury confusion.

He also takes issue with a jury instruction that he argues let him be convicted of committing residential burglary in his own home. But the jury instruction correctly stated the law, and Turner's factual argument relies on second guessing credibility determinations by the jury.

Turner contends absence of a unanimity instruction for an alternative means crime resulted in a nonunanimous conviction in violation of article I, section

22 of the Washington State Constitution. But this argument relies on case law disclaimed by our Supreme Court, and he fails to show the alternative means alleged lacked substantial evidence.

Turner also contests imposition of the deadly weapon sentencing enhancements because he contends the enhancement lacked substantial evidence. The record shows otherwise.

Finally, Turner argues and the State agrees that the court improperly imposed a criminal filing fee and a DNA[1] collection fee.

Therefore, we affirm Turner's conviction and remand so the invalid fees can be stricken.

FACTS

Since December 2011, a domestic violence no-contact order has prohibited Turner, Lisa Turner's[2] husband of over 30 years, from contacting her or coming within 300 feet of her person or residence.[3] Lisa lived in a two-bedroom apartment with Gary White.[4] Only White's name was on the lease, although both of them paid rent and had their own bedrooms.[5]

---

[1] Deoxyribonucleic acid.

[2] Because both Lisa and Charles share a last name, we refer to Lisa by her first name for clarity.

[3] Ex. 26; Report of Proceedings (RP) (Oct. 17, 2017) at 269.

[4] Id. at 236.

[5] Id. at 236-39.

Turner had already been convicted twice of violating a no-contact order[6] when, in November of 2016, he moved in with Lisa.[7] On April 2, 2017, Lisa and Turner had a loud, drunken argument that turned violent.[8] The night ended with both of them bleeding, with Turner getting arrested, and with both of them being treated at hospitals for their injuries.[9]

The State charged Turner with second degree assault of Lisa, with committing residential burglary by entering and remaining "unlawfully in the dwelling of Lisa Turner, located at 15326 40th Ave. W. #2, Lynnwood," and with violating a no-contact order.[10] Each charge carried the potential of a deadly weapon enhancement for use of a knife.[11]

The jury found Turner not guilty of assault.[12] It found him guilty of burglary and violating the no contact order, both while armed with a deadly weapon.[13] Because Turner's criminal history qualified him as a persistent offender under RCW 9.94A.570, the court sentenced him to lifetime confinement without the

---

[6] RP (Oct. 19, 2017) at 419.

[7] RP (Oct. 17, 2017) at 237.

[8] Id. at 241-43, 245.

[9] Id. at 277-78, 292-94, 306-07; RP (Oct. 19, 2017) at 454-55.

[10] Clerk's Papers (CP) at 84-85.

[11] Id.

[12] CP at 35-36.

[13] CP at 37-38, 41-42.

possibility of parole.[14] The court also imposed a criminal filing fee and a DNA collection fee.[15]

Turner appeals.[16]

ANALYSIS

Turner contends his conviction for residential burglary violated his due process rights. We review constitutional issues de novo.[17]

Turner argues the information failed to "give[ ] notice that he might be convicted of burglarizing . . . a particular residence (identified by address)."[18] But about one month before trial, the State filed an amended information accusing Turner of committing residential burglary:

> That the defendant, on or about the 2nd day of April, 2017, with intent to commit a crime against a person or property therein, did enter and remain unlawfully in the dwelling of Lisa Turner, located at 15326 40th Ave. W. #2, Lynnwood; proscribed by RCW 9A.52.025.[19]

Contrary to Turner's contention, the information clearly stated the address of the particular residence he was accused of burglarizing. Turner had notice.

---

[14] CP at 9, 11; RP (Dec. 28, 2017) at 17-18.

[15] CP at 13.

[16] We note Turner violated RAP 10.3(g) and RAP 10.4 by failing to identify and set out the jury instructions he alleges were erroneous. Because his procedural failing did not hinder the State's ability to identify the allegedly erroneous instructions and respond, Resp't's Br. at 7, 11, 14, we will consider his arguments only as to those instructions identified by the State. RAP 1.2(a), (c).

[17] State v. Armstrong, 188 Wn.2d 333, 339, 394 P.3d 373 (2017).

[18] Reply Br. at 4.

[19] CP at 84-85.

Turner argues that because the information charged him with remaining "in the dwelling of Lisa Turner" but the jury instructions did not so specify, the jury could have convicted him of the uncharged crime of burglarizing White's residence.[20] The State argues it had no burden to prove and the jury had no need to find that the dwelling was Lisa's because the phrase "of Lisa Turner" was surplus and nonessential.[21]

Article I, section 22 of the Washington State Constitution prohibits trying an accused for uncharged offenses.[22] Accordingly, an information "must state all the essential statutory and nonstatutory elements of the crimes charged."[23] But "surplus language in a charging document may be disregarded" at trial and left unproven unless the jury instructions repeated the surplus language.[24] Because the jury instructions do not repeat the allegedly surplus language,[25] the question is whether the phrase "of Lisa Turner" was required to correctly state the elements of residential burglary.

---

[20] See Appellant's Br. at 11, 15 ("The evidence presented at trial raised a factual question of whether the apartment [in the information] was indeed Lisa's dwelling at the time of the incident. The instructions did not inform the jury that in order to convict [Turner,] it had to resolve this question and find beyond a reasonable doubt that the apartment was in fact Lisa's dwelling at the time of the incident.").

[21] Resp't's Br. at 7-8.

[22] State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).

[23] State v. Tvedt, 153 Wn.2d 705, 718, 107 P.3d 728 (2005) (citing U.S. CONST. amend. 6; WASH. CONST. art. I, § 22; CrR 2.1(a)(1); State v. McCarty, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000)).

[24] Tvedt, 153 Wn.2d at 718.

[25] CP at 60.

Under RCW 9A.52.025(1), "[a] person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." A person "enters or remains unlawfully" when he "is not licensed, invited, or otherwise privileged to so enter or remain."[26] RCW 9A.52.025(1) does not require naming the owner of the dwelling allegedly burglarized. The information accurately identified the address of the dwelling in question, making the phrase "of Lisa Turner" superfluous. Thus, the phrase was mere surplus in the information and did not need to be proved at trial. Turner fails to show harm to his due process rights.

Turner contends the court improperly instructed the jury and let him be convicted of burglary for remaining in his own home.[27] We review jury instructions de novo for legal errors.[28]

Jury instruction 16 defined the phrase "enters or remains unlawfully" for purposes of residential burglary:

> A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.
>
> . . . .
>
> A person who is prohibited by court order from entering a premises cannot be licensed, invited, or otherwise privileged to so enter or remain on the premises by an occupant of the premises.[29]

---

[26] RCW 9A.52.010(2).

[27] Appellant's Br. at 16-19.

[28] State v. Dreewes, 192 Wn.2d 812, 819, 432 P.3d 795 (2019).

[29] CP at 62.

An accused person can be guilty of burglarizing his own property, including when the accused enters a property in violation of a no contact order.[30] Even if the person protected by the no contact order authorizes entry, that permission "cannot override a court order excluding a person from the residence."[31] The jury instruction properly stated the law.

Because the no-contact order here prohibits Turner from contacting Lisa and from coming within 300 feet of her residence,[32] Turner's argument turns on whether Lisa occupied the residence. Turner testified he rented a bedroom in the residence, and Lisa did not live there at the time.[33] Lisa and White both testified she occupied the residence and lived there before Turner, but she allowed Turner to move in with her despite the no-contact order.[34] Had the jury believed Turner's testimony, then he could not have been found guilty because his presence in his own home could not have been made unauthorized by Lisa showing up.[35] But

---

[30] State v. Sanchez, 166 Wn. App. 304, 308, 271 P.3d 264 (2012).

[31] Id. at 310. Turner relies on State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007), to argue an accused person subject to a no contact order cannot be guilty of violating that order and committing burglary when the protected person visits the accused at home. App. Br. at 16-17. But Wilson is only applicable where, unlike here, a no contact order prohibits contact only with the person and does not limit contact with a person's residence. Wilson, 136 Wn. App. at 612.

[32] Ex. 26.

[33] RP (Oct. 19, 2017) at 446, 447, 459.

[34] RP (Oct. 17, 2017) at 237-40, 270-72.

[35] See Wilson, 136 Wn. App. at 612 (holding "as a matter of law that Wilson could not have burglarized the 1123 East Park residen[ce] by entering and remaining unlawfully because it was his residence and neither a court order nor Sanders had lawfully excluded him from it.").

because the jury found Turner guilty of residential burglary, it must have weighed the conflicting testimony and found Lisa and White more credible than Turner.

"We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence."[36] Credibility determinations are not reviewable on appeal.[37] Thus, we decline to second guess the jury's necessary conclusion that Turner was in Lisa's residence.

Turner argues his right to a unanimous verdict was violated because the court did not give a unanimity instruction for the alternative means crime of violating a no contact order.[38] But this instruction, while generally preferable, is not always required.[39]

Article I, section 21 of our state constitution provides criminal defendants the right to a unanimous jury verdict. "But in alternative means cases, where substantial evidence supports both alternative means submitted to the jury, unanimity as to the means is not required."[40] Only when one of the means

---

[36] Id. at 604 (citing State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992)).

[37] Id. (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

[38] Appellant's Br. at 20. Felony violation of a no-contact order is an alternative means crime. See State v. Joseph, 3 Wn. App.2d 365, 369-70, 416 P.3d 738 (2018) (analyzing felony violation of a no-contact order as an alternative means crime).

[39] Armstrong, 188 Wn.2d at 344. Turner relies on State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014), to argue the right to a unanimous jury verdict extends to the means by which a crime was committed. Appellant's Br. at 20-21. But the Supreme Court expressly rejected both this argument and the statement in Owens used to support it. Armstrong, 188 Wn.2d at 342, 342 n.4.

[40] Armstrong, 188 Wn.2d at 340 (citing State v. Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87 (2015); State v. Ortega-Martinez, 124 Wn.2d 702, 705, 881 P.2d

charged to the jury lacks sufficient evidence is "a 'particularized expression' of jury unanimity required."[41]

The issue is whether substantial evidence supported both alternative means by which the jury could convict Turner for felony violation of a no contact order. Evidence is sufficient if it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt when viewed in a light most favorable to the State.[42] A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it.[43]

To convict Turner, the State had to prove that "(a) [Turner's] conduct was reckless and created a substantial risk of serious physical injury to another person or (b) [Turner] has twice been previously convicted for violating the provisions of a court order."[44]

The State proved alternative (b) because Turner stipulated to having been previously convicted twice for violating a court order.[45] And the State presented substantial evidence for alternative (a). White and Lisa both testified that Turner

---

231 (1994); State v. Whitney, 108 Wn.2d 506, 508, 739 P.2d 1150 (1987); State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982)).

[41] State v. Woodlyn, 188 Wn.2d 157, 165, 392 P.3d 1062 (2017).

[42] Armstrong, 188 Wn.2d at 341 (quoting Ortega-Martinez, 124 Wn.2d at 708).

[43] Wilson, 136 Wn. App. at 604 (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 99 (1980)).

[44] CP at 65. The State also had to prove that Turner was subject to a no contact order on April 2, 2017; that he knew of the existence of the order; that he knowingly violated the order on April 2, 2017; and that these events occurred in Washington. Id. Turner does not contest whether the State proved these.

[45] RP (Oct. 19, 2017) at 419.

pulled Lisa's head back and held a knife to her neck.[46] The police officers who investigated found blood on the knife Turner held to Lisa's neck.[47] Lisa testified she bled "a lot of blood" after Turner cut her with the knife.[48] The emergency room doctor who saw Lisa said she had a laceration just beneath the bottom corner of her left jaw and "had a fair amount of blood on her, particularly [her] neck and over the shirt."[49] He also testified the laceration Lisa received "absolutely" could be dangerous.[50] The emergency room worker who treated Lisa testified the wound required seven stitches to close.[51] Lisa also told the EMTs who responded to the 911 call that she had been "stabbed by her husband."[52] Based on this testimony, a rational juror could certainly infer that Turner acted recklessly and created a substantial risk of serious harm to Lisa.

Turner contends the jury rejected this evidence because it found him not guilty of second degree assault.[53] But the jury's rejection of second degree assault does not prove Turner acted safely or negate the evidence presented at trial. Conduct can be reckless and create a substantial risk of serious harm without constituting intentional second degree assault. Because substantial evidence viewed in a light most favorable to the State supports both alternative

---

[46] RP (Oct. 17, 2017) at 245, 277, 279.

[47] Id. at 197, 202, 236.

[48] Id. at 277.

[49] Id. at 294-95.

[50] Id. at 295.

[51] RP (Oct. 19, 2017) at 410-11, 418.

[52] Id. at 415.

means presented to the jury, Turner's right to a unanimous jury verdict was not violated.

Turner argues jury findings on the deadly weapon enhancement were unsupported because the evidence did not show a nexus between his crimes and the knife.[54]

A person is armed with a deadly weapon if it is easily accessible and ready for use.[55] But mere possession is insufficient because there must be a nexus between the defendant, the crime, and the weapon.[56] We analyze the nature of the crime, the type of weapon, and the circumstances to ascertain whether a nexus exists.[57] Where "the facts and circumstances support an inference of a connection . . . sufficient evidence exists."[58]

Here, Turner obtained the knife only because he knowingly violated the no contact order and remained in the residence without authorization.[59] And he held the knife up to Lisa's neck after she told him to leave.[60] This shows a nexus between Turner's crimes, the circumstances, and possession of the knife.

---

[53] Appellant's Br. at 26.

[54] Id. at 24, 27.

[55] State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007) (citing State v. Easterlin, 159 Wn.2d 203, 208-09, 149 P.3d 366, 370 (2006)).

[56] Id.

[57] Id. (citing State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002)).

[58] Easterlin, 159 Wn.2d at 210.

[59] Ex. 26; RP (Oct. 17, 2017) at 276-77.

[60] RP (Oct. 17, 2017) at 243, 276-77.

As a final matter, the State concedes both the criminal filing fee and DNA collection fee should be stricken.[61]

Therefore, we affirm Turner's conviction and remand so the invalid fees may be stricken.

WE CONCUR:

[61] Resp't's Br. at 18-19.

NIELSEN, BROMAN & KOCH P.L.L.C.

August 26, 2019 - 2:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77963-0
Appellate Court Case Title:	State of Washington, Respondent v. Charles Randall Turner, Sr., Appellant
Superior Court Case Number:	17-1-00830-8

The following documents have been uploaded:

- 779630_Motion_20190826135823D1454828_1382.pdf
  This File Contains:
  Motion 1 - Waive - Page Limitation
  The Original File Name was MFOP 77963-0-I.pdf
- 779630_Petition_for_Review_20190826135823D1454828_8039.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 77963-0-I.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- dobsonlaw@comcast.net
- sfine@snoco.org

Comments:

Copy mailed to : Charles Turner, Sr., 943247 Washington State Penitentiary 1313 Noirth 13th AVE Walla Walla, WA 99362-

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190826135823D1454828