Supreme Court No. 98863-3
(Court of Appeals No. 52852-5-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GEORGE JONES,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

This Court should grant review to determine whether a defendant may be convicted of violating a no-contact order for not leaving his own home when the protected party – who does not live with the defendant – goes to *his* home.

A no-contact order prohibited George Jones from contacting Virginia Norris. Virginia Norris went to George Jones's house, got into an argument with him, and called 911 to report a violation of a no-contact order. Although her ride was still there, Ms. Norris did not leave Mr. Jones's house. Police arrived and arrested Mr. Jones. According to an officer, Mr. Jones admitted having been with Ms. Norris earlier that day. According to Mr. Jones, he never said this and was not with Ms. Norris until she appeared at his home uninvited.

The State charged Mr. Jones with violation of a no-contact order and he was convicted after a jury trial. On appeal, Mr. Jones argued his right to a unanimous jury was violated by the failure to instruct the jury it had to agree on which act constituted the violation. Contrary to the record, the Court of Appeals found the State elected the contact in the home rather than the alleged contact earlier in the day. But the act the Court of Appeals relied on cannot legally support the conviction because people have a right to exist in their own homes. This Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

George Jones, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Jones,* No. 52852-5-II (filed July 8, 2020), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. May a defendant be convicted of violating a no-contact order for not leaving his own home when a protected party arrives? RAP 13.4(b)(3), (4).

2. A defendant has a constitutional right to a unanimous jury. Thus, when the State files one charge but presents evidence of multiple acts, either the prosecutor must tell the jury which act to rely on during its deliberations or the court must instruct the jury to agree on a specific criminal act. The Court of Appeals found the State "elected" the contact at the home, but the prosecutor twice mentioned the earlier alleged contact during closing argument. Was Mr. Jones deprived of his constitutional right to a unanimous jury? RAP 13.4(b)(3).

3. The Confrontation Clause bars admission of testimonial statements of a witness who does not appear at trial. Statements are "testimonial" and subject to the Confrontation Clause if there was no ongoing emergency and the primary purpose of the statements was to establish events potentially relevant to later criminal prosecution. Ms.

Norris did not appear at trial, but, over Mr. Jones's objection, the trial court admitted statements Ms. Norris made to a dispatcher that there was a protection order violation and her statements to the responding police officer about Mr. Jones's whereabouts. There was no ongoing emergency because she was the one who had gone to Mr. Jones's house in her friend's truck, and could leave with that friend. Did the trial court violate Mr. Jones's constitutional right to confront the witnesses against him? RAP 13.4(b)(3).

4. Hearsay, which is an out of court statement offered for its truth, is inadmissible unless an exception applies. Unless it is at issue in a particular case, an out of court statement is not admissible to explain why a police officer took certain actions. Over Mr. Jones's objections, the trial court permitted Deputy Hoover to testify that dispatch told him he needed to go to Mr. Jones's residence to address a protection order violation. Did the trial court violate the rule against hearsay? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

George Jones lives at 18444 Guava Street Southwest in Rochester, Washington. RP 154, 167. Virginia Norris lives in Centralia. Ex. 4-b.

A no-contact order described Ms. Norris as a "protected person" and ordered Mr. Jones: "do not contact the protected person, directly,

indirectly, in person or through others, by phone, mail, or electronic means[.]" Ex. 1 at 1.

On September 15, 2016, Ms. Norris contacted Mr. Jones by going to his home in Rochester. She then called the police to report a violation of a protection order. RP 132-33.

Deputy Ryan Hoover went to Mr. Jones's house, and eventually found Virginia Norris in the driveway. RP 131-35. He asked her where Mr. Jones was, and she responded that he had left to go to Olympia. RP 140. But Deputy Hoover saw the car he'd been told belonged to Mr. Jones parked at the house, so he asked Ms. Norris which car Mr. Jones had taken to Olympia. RP 140. At that point, Ms. Norris lowered her voice and told him "he's actually under the house watching us." RP 140-41.

Mr. Jones crawled out from under the house and eventually spoke with Deputy Hoover. According to Deputy Hoover, Mr. Jones said Ms. Norris told him she had gone to the Lewis County court earlier that day to get the no-contact order dropped, after which she gave him a ride to Centralia and dropped him off. RP 143-45. He eventually got a ride home with his roommate, Jonathan. RP 168, 173. Later that day, Ms. Norris came to his house and they got into an argument; she then called the police to report a no-contact order violation even though she was at his house. RP

145-46. She had not arrived at the house with him, but had come later in a truck with a friend. RP 153-54.

The State nevertheless charged Mr. Jones with violation of a no-contact order. CP 29. At trial, Mr. Jones disputed Deputy Hoover's claim that Mr. Jones told him he had gotten a ride to Centralia with Ms. Norris. RP 188-89. He testified the first time he saw her was when she came to his home. RP 182.

Neither Virginia Norris nor the 911 dispatcher appeared at trial. Over Mr. Jones's Confrontation Clause and hearsay objections, Deputy Hoover testified about what the dispatcher and Ms. Norris told him. CP 18-28; RP 16-20, 108-16, 132-33, 140-41.

In closing argument, the prosecutor emphasized that Mr. Jones was guilty of violating a protection order because Ms. Norris came to his house and he knew she was there. RP 268 (closing argument); RP 289 (rebuttal closing argument). But the prosecutor also twice relied on the earlier alleged contact in the car. RP 267 (closing argument); RP 284 (rebuttal closing argument). The jury found Mr. Jones guilty.

On appeal, Mr. Jones argued he was entitled to a new trial because (1) his constitutional right to a unanimous jury was violated when the State presented two separate alleged bases for conviction but the jury was not told it had to be unanimous as to either; (2) his constitutional right to

confront the witnesses against him was violated when the trial court admitted Ms. Norris's testimonial statements in her absence; and (3) the admission of those statements also violated the rule against hearsay.

The Court of Appeals affirmed. It found the State elected the contact in the home as the basis for conviction, despite transcripts to the contrary and despite the dubious validity of a conviction based on merely existing in one's home. Op. at 4-5. It ruled Ms. Norris's statements were not testimonial because the primary purpose was to respond to an "ongoing emergency," even though Ms. Norris was at *Mr. Jones's* home and could have left. Op. at 7-8. The court did not mention the hearsay argument.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals endorsed a conviction for violation of a no-contact order based on Mr. Jones's failure to leave his own home when the protected party, who did not live there, went to his house.

This Court should grant review because this case presents a matter of substantial public interest and a significant constitutional problem: The Court of Appeals endorsed convicting a person of violating a no-contact order for simply being in his own home and not leaving when a protected party arrives.

Mr. Jones could not raise a sufficiency challenge in the Court of Appeals because the State *also* relied on an alleged act that *would be* a valid basis for conviction if the jury had unanimously agreed it occurred. But the Court of Appeals rejected the unanimity argument by claiming the State relied *solely* on the contact in Mr. Jones's home. This conclusion is contrary to the record, but it also raises serious statutory and constitutional concerns. Taking the Court of Appeals at its word, Mr. Jones was convicted of violating a no-contact order because Ms. Norris went to his house and he did not leave his own home.

RCW 10.99.050(2)(a) prohibits "willful" violation of a no-contact order. The offense has "three essential elements: the willful contact with another; the prohibition of such contact by a valid no-contact order; and the defendant's knowledge of the no-contact order." *State v. Clowes*, 104 Wash. App. 935, 943–44, 18 P.3d 596 (2001), *disapproved of on other grounds by State v. Nonog*, 169 Wn.2d 220, 237 P.3d 250 (2010). In other words, the State must prove "a purposeful act" and the defendant "must have intended the contact[.]" *State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002); *see also State v. Johnson*, 2 Wash.App.2d 1026, *4 (2018)[1] (provision directing defendant to "not contact" protected party

[1] *Johnson* is unpublished. Mr. Jones cites it as persuasive authority pursuant to GR 14.1(a).

requires proof of "*action*," i.e., that defendant "engaged in the volitional or purposeful act of contacting" the protected party).

The above statutory construction holdings are consistent with the constitutional rule that "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing[.]" *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir.), *cert. denied sub nom. City of Boise, Idaho v. Martin*, 140 S. Ct. 674, 205 L. Ed. 2d 438 (2019) (prohibiting prosecution of individuals for sleeping outside when such individuals have no other home or available shelter); U.S. Const. amends. VIII, XIV. Indeed, even if the statute at issue did not have the "willful" element, it would still require proof of some act. "Fundamental to our notion of an ordered society is that people are punished only for their own conduct. … We punish people for what they do, not for what others do to them." *State v. Eaton*, 168 Wn.2d 476, 481–82, 229 P.3d 704 (2010).

The Court of Appeals' holding is contrary to these statutory and constitutional rules, and raises an issue of substantial public concern. This Court should grant review. RAP 13.4(b)(3), (4).

2. Mr. Jones was deprived of the right to a unanimous jury verdict guaranteed by the Sixth Amendment and article I, sections 21 and 22.

The Court of Appeals was also wrong as a matter of fact, because the prosecutor did not elect the contact in Mr. Jones's home. Rather, the State presented evidence and argument that Mr. Jones was also with Ms. Norris earlier in the day. But the jury was not told it had to agree unanimously on which contact formed the basis for the conviction. This failure violated Mr. Jones's constitutional right to a unanimous jury verdict.

a. Where a single count is charged but evidence of multiple acts is presented, the constitutional right to a unanimous jury requires that either the State elect one act or the court instruct the jury that it must unanimously agree on the specific act committed.

When the State presents evidence of multiple acts, any one of which could form the basis of one count charged, either the prosecutor must tell the jury which act to rely on during its deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). This rule does not apply to a "continuing course of conduct," but if there is "evidence that the charged conduct occurred at different times and places[,]" either the prosecutor must make clear which incident it is relying on or the court must instruct

the jury on the unanimity requirement. *State v. Brown,* 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

If the prosecutor fails to elect an act and the court fails to instruct the jury that it must unanimously agree that a particular act occurred, some jurors may end up relying on one act or incident and some jurors may end up relying on another, "resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Kitchen,* 110 Wn.2d at 411. Thus, "failure to follow one of these options is error, violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial." *Id.* at 409; Const. art. I, §§ 21, 22; U.S. Const. amend. VI.[2]

b. Here, the State presented evidence of two separate incidents but the prosecutor did not elect one of them and the court did not instruct the jury on the unanimity requirement.

Here, the State presented evidence of two separate alleged incidents, either of which could have formed the basis for the single count of violation of a no-contact order. However, the prosecutor did not elect one in closing argument and the court did not instruct the jury that it had to unanimously agree on the specific incident which constituted the violation.

[2] The unanimity instruction is often referred to as a "*Petrich* instruction," based on *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

Deputy Hoover testified that: (1) he encountered Mr. Jones and Ms. Norris at Mr. Jones's home in the evening after being dispatched at 5:47 p.m., and (2) Mr. Jones said Ms. Norris had driven him to Centralia earlier that day. RP 131-45. Deputy Hoover testified that Ms. Norris did not stay with Mr. Jones in Centralia, but dropped him off. RP 145. It was later that day, in the early evening, that Ms. Norris went to Mr. Jones's house with another woman in a truck. RP 153. Thus, the evidence the State presented did not constitute a continuing course of conduct, but two separate incidents.

Contrary to the Court of Appeals' opinion, the prosecutor did not elect one of the incidents; she did not tell the jury which act it should rely on in deliberations. Instead, in closing argument the prosecutor discussed both the alleged violation in the car early in the day and the alleged violation in the house in the evening. RP 267, 268, 284, 289. Moreover, the court did not provide a *Petrich* instruction; it did not instruct the jury that all 12 jurors had to unanimously agree that Mr. Jones violated the order by riding in a car with Ms. Norris early in the day or that he violated the order by being with her at his house in the evening. CP 31-44. Thus, Mr. Jones's constitutional right to a unanimous jury was violated. U.S. Const. amend. VI; Const. art. I, §§ 21, 22; *Kitchen*, 110 Wn.2d at 409.

Because the right to jury unanimity is an important constitutional guarantee and because this issue is intertwined with the first issue raised above, this Court should grant review. RAP 13.4(b)(3).

3. The trial court erred in admitting testimony in violation of the Confrontation Clause and the rule against hearsay.

a. The court erred under the Confrontation Clause by admitting Ms. Norris's testimonial statements in her absence.

The federal and state constitutions guarantee defendants the right to be confronted with the witnesses against them. U.S. Const. amend. VI; Const. art. I, § 22; *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The Confrontation Clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). Statements are "testimonial" and subject to the Confrontation Clause if the circumstances objectively indicate there was no "ongoing emergency" at the time the statements were made and that the "primary purpose" of the exchange was to establish events potentially relevant to later criminal prosecution. *Davis*, 547 U.S. at 822.

Here, over Mr. Jones's objections, the court admitted multiple statements allegedly made by Virginia Norris, even though Ms. Norris did not appear for trial and Mr. Jones had not had a prior opportunity for cross-examination. CP 18-28; RP 16-20, 108-16, 132-33, 140-41. Those statements were:

1. Deputy Hoover's testimony that dispatch told him (based on what Ms. Norris told them) that he needed to go to Mr. Jones's residence to address a protection order violation; RP 110, 132;

2. Deputy Hoover's testimony that Ms. Norris first told him Mr. Jones had left for Olympia, but then lowered her voice and said he was under the house watching them; RP 111-15, 140-41.

The trial court erred because, as defense counsel argued, these statements were testimonial.

Indeed, as to the statements to dispatch, the State *conceded* Ms. Norris's 911 call was not admissible if she failed to testify, because she very calmly reported an alleged violation of a no-contact order based on her presence at Mr. Jones's house. RP 9; CP 18-24. Yet, inexplicably, the court permitted Deputy Hoover to testify that dispatch told him there was a no-contact order violation even though dispatch was simply repeating the claim Ms. Norris made when she called 911.

Neither Ms. Norris nor the dispatcher appeared at trial. As the State properly conceded, there was no ongoing emergency; rather, Ms.

Norris was simply reporting an alleged no-contact order violation. Objectively viewed, the primary purpose of her statement to dispatch was to establish events potentially relevant to later criminal prosecution. Thus, the statement was testimonial and should not have been admitted given Ms. Norris's absence. *Davis*, 547 U.S. at 822.

The same is true about Ms. Norris's statements to Deputy Hoover regarding Mr. Jones's location. Contrary to the Court of Appeals' conclusion, there was no ongoing emergency – Mr. Jones was *at his own home*, which he did not share with Ms. Norris. Ms. Norris had arrived at the house in a truck with a friend, and she could have left in the same truck, which was still there (as was the friend). Alternatively, Deputy Hoover could have offered her a ride home. Her statements regarding his location simply served to support a prosecution for a violation of a no-contact order. They were testimonial, and should have been excluded given Ms. Norris's absence at trial.

Despite defense counsel's thorough briefing and argument on the Confrontation Clause, the trial court resolved the issue by relying on the hearsay rules. It ruled the statement from dispatch regarding the violation of a no-contact order was admissible because it was "not hearsay," RP 110, and ruled Ms. Norris's statements about Mr. Jones's location were admissible under the "present sense impression" exception to the rule

against hearsay. RP 114-15. The court did so even though defense counsel explained, "before *Crawford* it may have been sufficient to say that these statements would come in under a hearsay exception. After *Crawford* I think the court has to do an additional analysis." RP 112-13. Counsel explained, as he had in his pleadings, that the question for Confrontation Clause purposes is whether the statements are testimonial. RP 112-13. The court erred in admitting the statements and in doing so based on a hearsay analysis. *See Crawford*, 541 U.S. at 61 ("we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence"). For this reason, too, this Court should grant review under RAP 13.4(b)(3).

b. <u>The court erred under the rule against hearsay by admitting Deputy Hoover's testimony that he was told to report to the house because of a protection order violation</u>.

Deputy Hoover's testimony that he was told he needed to go to the residence because it "was dispatched as a protection order violation" should have been excluded for the independent reason that its admission violated the rules of evidence – specifically, the rule against hearsay. RP 132. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of

the matter asserted. ER 801(c). Hearsay is inadmissible at trial unless an exception applies. ER 802.

The trial court ruled the statement from dispatch was "not hearsay" because it was "not offered to prove the truth of the matter asserted" but rather "to establish why Deputy Hoover acted the way he did." RP 110. This was error, because "why Deputy Hoover acted the way he did" was not an issue at trial.

As trial counsel noted, *State v. Aaron* should have resolved the issue. 57 Wn. App. 277, 787 P.2d 949 (1990); CP 26. There, defense counsel moved to exclude testimony from the investigating officer that the defendant was seen with a jacket associated with a burglary. *Id.* at 279. The officer had received that information from dispatch, not through direct observation, and no witness who observed the defendant would testify to seeing him with the jacket. *Id.* The State claimed the statements would not be offered to prove the truth of the matter asserted but to show "why [the officer] acted as he did." The trial court overruled the defense objection and allowed the testimony, but the appellate court reversed. *Id.* at 279-80. The court explained, "the officer's state of mind in reacting to the information he learned from dispatcher is not in issue" and therefore was "not relevant for another [non-hearsay] purpose." *Id.* at 280. If testimony about historical facts were necessary, the officer could have simply

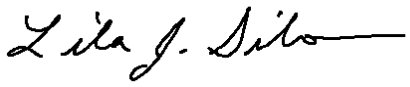
testified he acted upon "information received." *Id.* at 281. But the admission of hearsay was error. *Id.*

The same is true here. The trial court erred in admitting this damaging hearsay to show "why Deputy Hoover acted the way he did," when this was not in issue. RP 110; *Aaron*, 57 Wn. App. at 280. If Deputy Hoover for some reason needed to explain his actions, he could have testified he acted upon information received. *Aaron*, 57 Wn. App. at 280. Instead, the court permitted him to testify that dispatch told him he needed to go to the residence to investigate a protection order violation. The statement's only relevance was for its truth: that Mr. Jones was violating a protection order. Its admission was improper, and the Court of Appeals erred in failing to address the issue at all.

F. CONCLUSION

A person has a right to exist in his own home. But the Court of Appeals endorsed a conviction for violation of a no-contact order on the basis that the protected party, who lived somewhere else, went to Mr. Jones's home. This holding raises serious statutory and constitutional concerns, and this Court should grant review.

Respectfully submitted this 7th day of August, 2020.



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APPENDIX A

Filed
Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GEORGE FREDERICK JONES, Appellant.	No. 52852-5-II UNPUBLISHED OPINION

MELNICK, J. — A jury convicted George Jones of violating a no-contact order, a felony. Jones argues that the trial court violated his right to a unanimous jury verdict by failing to issue a unanimity instruction and it violated his right to confrontation by admitting testimonial statements from a witness who did not appear at trial. We affirm.

FACTS

On March 2, 2016, the Lewis County Superior Court issued a no-contact order prohibiting Jones from contacting VN.

On September 15, VN visited Jones's home in Rochester. After arriving, VN and Jones had an argument. VN called 911 to report a no-contact order violation. Thurston County Deputy Ryan Hoover responded. Dispatch informed Hoover that, per information provided by VN, he was being dispatched for a "protection order violation" and looking for VN and Jones. 1 Report of Proceedings (RP) at 132.

Upon his arrival, Hoover made contact with VN, who appeared "[s]omewhat apprehensive" and "a little bit scared to start to talk" to him. 1 RP at 140. When Hoover inquired as to Jones's location, VN stated that "he had probably left to Olympia." 1 RP at 140. When Hoover pointed out that Jones's car was still at his home, and asked what vehicle Jones had taken, VN "lowered her voice," "appeared nervous," and told Hoover "he's actually under the house watching us." 1 RP at 140-41. Deputies found Jones near the home's crawl space.

Hoover then spoke with Jones, who admitted to knowing about the no-contact order. According to Hoover, Jones further stated he and VN had been in the same vehicle earlier that day, and VN had told him that the no-contact order had been dropped. He had doubts that the order had been dropped. Jones also told Hoover that he had been under the house when Hoover arrived, but had panicked when he saw Hoover. Jones also described the situation with VN as he "caused a little bit of a ruckus and things hit the fan [with VN]." 1 RP at 146.

The case proceeded to trial. Jones disputed Hoover's claim that Jones told him he had ridden in a car with VN earlier that day, and testified that he had not seen VN that day until she came to his home. When he saw VN on his property, he told her to leave, and she began to yell at him. He admitted "there was a ruckus back and forth," and that he did not leave the property because he believed the police were on the way. 1 RP at 179. Jones also testified that VN followed him around the house as he attempted to get away from her.

VN, out of state at the time of trial, did not testify. Through a motion in limine, Jones sought to exclude all statements made by VN from evidence. The court ruled that certain statements by VN did not violate the hearsay rule, and admitted her statements as set forth above. It did not rule if the statements violated the confrontation clause. Hoover testified both as to what he had been told by the dispatcher and by VN.

In its opening statement, the State told the jury the evidence it expected to admit in support of the no-contact order violation:

> [Hoover] was dispatched to a call arising out of an address in Rochester belonging to Mr. Jones. And you'll hear that [VN] was at the residence and Mr. Jones was at the residence. And you'll hear—and you'll see the no-contact order that's—that was in place at that time, and you'll see that Mr. Jones having any contact direct or otherwise with [VN] is prohibit[ed] by that order.

1 RP at 129.

In closing argument, the State focused on Jones's knowledge that a no-contact order existed and that he should not have been at his home with VN present. In rebuttal closing, the State briefly mentioned Jones's alleged contact with VN earlier that day. The State argued, "Deputy Hoover said that Mr. Jones said that he'd been with [VN] earlier in the day, when he came home he caused a ruckus with [VN], that things hit the fan, and he admitted that he panicked when law enforcement was coming." 2 RP at 284.

The jury found Jones guilty of violating a no-contact order. Then, in a bifurcated proceeding, it found that he had two previous convictions for violations of a no-contact order, which made the present crime a felony. Jones appeals.

ANALYSIS

I. UNANIMITY JURY INSTRUCTION

As an initial matter, Jones did not ask the trial court to provide a unanimity jury instruction or object to the trial court's failure to do so. We generally do not review objections to jury instructions raised for the first time on appeal unless the party claiming the error can prove an exception to that rule, such as a manifest error affecting a constitutional right. RAP 2.5(a)(3).

To show a manifest error affecting a constitutional right under RAP 2.5(a)(3), we utilize a two-part test: "'(1) [h]as the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?'" *State v. Grott*, 195 Wn.2d 256, 267, 458 P.3d 750 (2020) (quoting *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015)).

The failure to provide a unanimity instruction, if one is required, is a constitutional error. *State v. Locke*, 175 Wn. App. 779, 802, 307 P.3d 771 (2013). We review the requirement for a unanimity instruction de novo. *See State v. Furseth*, 156 Wn. App. 516, 520, 233 P.3d 902 (2010); *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

Jones argues that the court violated his right to a unanimous verdict by failing to provide the jury with a unanimity instruction. He argues that a unanimity instruction was required because the State alleged multiple acts that could have constituted a violation of the order prohibiting his contact with VN. We disagree with Jones.

Criminal defendants in Washington have a constitutional right to a unanimous jury verdict. WASH. CONST. art. I, § 21; *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). If the State has presented evidence of multiple acts that could support a conviction on a single charged count, the jury must unanimously agree on which act constituted the crime. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), *abrogated on other grounds*, *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). If the State does not elect which act it is relying on to support the charge, the trial court must instruct the jury that all jurors must agree that the State proved a specific criminal act beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411; *see also State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). "Multiple acts tend to be shown

by evidence of acts that occur at different times, in different places, or against different victims." *Locke*, 175 Wn. App. at 802.

Here, in support of his argument that the State presented evidence of multiple acts, Jones relies on Hoover's testimony that Jones had told him that VN had driven Jones in her vehicle earlier that day, as well as the State's mention of Jones and VN seeing each other earlier that day during rebuttal closing argument. However, a review of the record supports the State's contention that it relied on a single act. The State consistently focused on VN's presence at Jones's home and that Jones had knowledge of her presence. The State's opening statement focused solely on VN's presence at Jones's home. The State's closing argument, prior to rebuttal, focused solely on VN's presence at Jones's home. Hoover did mention that Jones told him that he had also spent time with VN earlier that day, but the State did not rely on that information.

Accordingly, we conclude that the State did not present evidence of multiple acts that could support a conviction on a single charge, and that the trial court did not err by not giving a unanimity instruction. Because there is no constitutional error, Jones has not shown that he is entitled to review under RAP 2.5(a)(3).

II. CONFRONTATION CLAUSE

Jones argues that the trial court's admission of multiple statements made by VN to others violated the confrontation clause when VN did not appear and testify at trial. We disagree.

The confrontation clause forbids admission of testimonial statements from a witness who does not appear at trial, unless the witness is unavailable to testify, and the defendant had a prior opportunity to cross-examine the witness. U.S. CONST. amend VI; WASH. CONST. art. I, § 22; *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). We review confrontation clause challenges de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

In the context of statements made to law enforcement, statements are nontestimonial when the primary purpose of the interaction is to enable police to meet an ongoing emergency. *State v. Koslowski*, 166 Wn.2d 409, 418, 209 P.3d 479 (2009) (citing *Davis*, 547 U.S. at 827). Statements are testimonial when there is no ongoing emergency, and the primary purpose of the interaction "is to establish or prove past events potentially relevant to later criminal prosecution." *Koslowski*, 166 Wn.2d at 418 (quoting *Davis,* 547 U.S. at 827).

In determining if a statement made to law enforcement is testimonial, we consider four factors.

> (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (footnotes omitted).

In *Koslowski*, the victim called 911 to report a robbery. 166 Wn.2d at 414. When the police arrived, the upset victim began showing the officer ties that had been used on her as temporary handcuffs and where she had been forced to lay on the floor. She explained what had happened. *Koslowski*, 166 Wn.2d at 414. The court determined that the victim's statements were testimonial, because the victim was speaking about an incident that had already occurred, was no

longer in danger or dealing with a present emergency, and there was no evidence that the aggressor was still in the vicinity. *Koslowski*, 166 Wn.2d at 422-429.

Here, Jones challenges two sets of statements, those made by VN to police dispatch, as relayed to Hoover, and those VN made directly to Hoover.

A. VN's Statements to Police Dispatch, as Relayed to Hoover[1]

Hoover testified that, on the date in question, dispatch sent him to Jones's home for a "protection order violation," to look for VN and Jones. 1 RP at 132. Hoover knew that VN had provided that information to dispatch.

Applying the first factor, VN described events as they took place and required police assistance. Applying the second factor, VN, a protected party, was in the presence of the person violating the protection order. A reasonable person would believe that the presence of someone in violation of a no-contact order presents a danger to the protected party. Applying the third factor, Hoover testified that he knew the location of the incident, and that it involved a no-contact order. He also knew the names of the two people named in the no-contact order. Those statements are objectively necessary for Hoover to respond to the emergency. Applying the fourth factor, the record provides little evidence, other than that there was "an argument" and "ruckus" between Jones and VN. It is reasonably assumed that a protected party being in the presence of a restrained party is neither tranquil nor safe.

Accordingly, we conclude that VN's statements during her 911 call to police dispatch, as relayed to Hoover, were nontestimonial. Their primary purpose was to enable police to respond to an ongoing emergency.

[1] As mentioned above, the trial court ruled that these statements were not being offered for the truth of the matter. The trial court did not instruct the jury as to what purpose it could use the statements, and the parties did not request such an instruction.

B. VN's Statements Directly to Hoover

Jones also challenges the admission of statements VN made directly to Hoover after he had arrived at Jones's home. When Hoover asked VN about Jones's location, VN told him "that he had probably left to Olympia." 1 RP at 140. When Hoover pointed to Jones's car and asked what vehicle he had left in, VN told Hoover "he's actually under the house watching us." 1 RP at 141. Hoover noted that VN initially appeared "apprehensive" and "seemed a little bit scared to start to talk to me." 1 RP at 140. When Hoover asked what vehicle Jones had left in, she "lowered her voice" and appeared "nervous." 1 RP at 140-41.

Applying the first factor, VN described events as they occurred and while the protection order violation was still happening. She required police assistance. Applying the second factor, VN was in the presence of a restrained party in a no-contact agreement. She was actively seeking assistance from police. A reasonable person would believe that the presence of someone in violation of a no-contact order presents a danger to the protected party. Applying the third factor, VN replied to a question by Hoover regarding Jones's present location. The fact that VN's first response was an obvious lie, combined with her nervousness and apprehension, only intensified Hoover's need to ascertain Jones's location and resolve the emergency. As to the fourth factor, the interaction occurred as law enforcement searched for Jones. The environment was neither tranquil nor safe.

Accordingly, we conclude VN's statements to Hoover were nontestimonial. Because the trial court did not err in admitting VN's statements, Jones's confrontation clause argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Lee, C.J.

Glasgow, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 52852-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Joseph Jackson
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Thurston County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 7, 2020
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