

61763-0

61763-0

NO. 61763-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH WHEATON,

Appellant.

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES

1. When the defendant removed three jurors via peremptory challenges, did the defendant cure any possible error by the trial court for refusing to remove these jurors for cause?

2. If the defendant failed to renew his pretrial severance motion at or before the close of evidence, has the defendant waived his right to challenge the denial of his severance motion on appeal?

3. Has the defendant failed to show that the trial court abused its discretion in denying his severance motion, when the evidence on all counts was strong, the defendant did not have conflicting defenses, the court instructed the jury to consider each count separately, each of the charged crimes would have been cross-admissible even if severance occurred, and multiple trials would have wasted substantial judicial resources?

4. Was any failure to sever counts harmless when the evidence against the defendant on all counts was based primarily on a witness with no reason to fabricate and each charge was corroborated by other witnesses and physical evidence?

5. Was the charge of felony harassment in the first amended information merely vague, and not deficient, when the charging language

stated all the essential elements of the crime, but failed to identify by name the person who the defendant specifically threatened?

B. FACTS

1. PROCEDURAL FACTS

By amended information, defendant Kenneth Wheaton was charged in King County Superior Court with three crimes:

(Count 1) Rape in the Second Degree — Domestic Violence (for a rape of Sarah Hughes that occurred on May 10, 2007);

(Count 2) Rape in the Second Degree — Domestic Violence (for a rape of Sarah Hughes that occurred between April 20, 2007 and May 9, 2007); and

(Count 3) Felony Harassment — Domestic Violence (for threatening Sarah Hughes on May 10, 2007 by asserting that he would kill John Conrad).

CP 33-34; 73-74.

The jury found Wheaton guilty on all counts. CP 103-05.

At sentencing, the trial court imposed an indeterminate sentence of 111 months to life on counts 1 and 2, to run concurrently, based on an offender score of 4. CP 144, 147. The court sentenced Wheaton to 12 months on count 3 to run concurrently to counts 1 and 2, based on an offender score of 2. CP 146. Wheaton appealed.

2. SUBSTANTIVE FACTS

Sandra Hughes and defendant Kenneth Wheaton dated for approximately seven years. 6RP 537.¹ During the relationship, Wheaton lived on and off with Hughes and her two children from a previous marriage, Alexis and Austin Porte. 6RP 538-39.

For the most part, Wheaton had a good relationship with Hughes and her children. 6RP 539. In early March 2007, however, Hughes decided to end the relationship with Wheaton and asked him to consider moving out of her home. 6RP 581. She did this because she felt that it was important for Wheaton to spend time with his son. 6RP 543.

Given the history and length of the relationship and the fact that Hughes's kids considered Wheaton like a father to them, Hughes continued to have a friendly relationship with Wheaton that included in person, telephone, and email contact. 6RP 545-46. Hughes was clear, however, that she no longer wanted a romantic relationship with Wheaton. 6RP 545.

Wheaton, however, wanted to stay in a relationship with Hughes. When he realized she did not, he became increasingly erratic and started showing up at Hughes's home late at night uninvited and unannounced.

¹ The verbatim report of proceedings are consecutively paginated in 15 volumes.

6RP 547. Wheaton became obsessed with the idea that Hughes was involved in a sexual relationship with Dr. John Conrad, one of the doctors with whom Hughes worked. Wheaton often confronted Hughes with his suspicions. 6RP 550. Although Hughes told him that she was not in a relationship with Dr. Conrad, Wheaton did not believe her, and talked to Alexis, Hughes's then 14-year-old daughter, about his suspicions. 11RP 1054-55. These conversations with Alexis became more regular and frequent up to the time of the charged incidents. 12RP 1107.

On April 20, 2007, Wheaton went to Hughes's home and demanded that Hughes return gifts that he had purchased for her. 6RP 547-48. Hughes returned a few of the items and gave Wheaton \$2,500 for the rest, hoping that he would leave her alone. 6RP 548-49. Around this same time, Wheaton also called Dr. Conrad and asked him whether he was sleeping with Hughes. 8RP 753. Wheaton threatened to hurt Dr. Conrad if Wheaton found out that he was having a relationship with Hughes. 8RP 753.

A few days later, on April 26, 2007, Wheaton called Hughes at 11:30 PM, after she was asleep. 6RP 568. Hughes told Wheaton that it sounded like he was calling from a car, but he claimed that he was at his home in Olympia, Washington. 6RP 570. Wheaton then called back a few minutes later, said that he was ten minutes from Hughes's home, and

told her that he wanted to come over to say “goodbye” one last time.

6RP 570. After that call, Hughes called Wheaton back and told him that he was scaring her. 6RP 571. Wheaton assured Hughes during that call that he would not hurt her. 6RP 571.

A short time later, Wheaton arrived and Hughes allowed him into her living room. 6RP 572. Once inside, Wheaton tried to go to the family room, but Hughes would not let him. 6RP 572. Wheaton then sat on the living room couch. 6RP 571. Hughes joined Wheaton on the couch and they started to talk about their relationship. 6RP 571. Wheaton again demanded to know if Hughes was seeing someone else. 6RP 571. Hughes responded that the relationship between her and Wheaton was over and that he needed to focus more on his own children. 6RP 573.

Wheaton then told Hughes that he was going to hurt her like she hurt him. 6RP 573. Wheaton then pushed Hughes back onto the armrest of the couch, pinned her down, removed her pants, and vaginally raped her despite her repeated physical and verbal protestations. 6RP 575-80. During the rape, Wheaton bit Hughes on the face, digitally penetrated her rectum, and told her that she deserved it. 6RP 575-89.

After Wheaton finished raping her, he asked her for a blanket so he could sleep on the couch, in response to which Hughes said, “absolutely not.” 6RP 588. Wheaton then got up in a fit of rage and slammed the

door on the way out of the house. 6RP 589. Hughes locked the door behind Wheaton, made sure all of the other doors and windows were locked, and then called Wheaton to make sure that he was really gone and to apologize. 6RP 589.²

Hughes did not call the police and did not report the rape to anyone else right away. 6RP 590. The following morning, however, Hughes called her sister, Janet Winje, with whom she is very close, and told her what had happened. 5RP 494-96. Winje also saw Hughes later that day and noticed a mark on Hughes's cheek that had not been there the day before. 5RP 497-98. Hughes also told a coworker, Tina Deschler, about the rape a few days later. 6RP 593; 9RP 863.

Two days later, Wheaton called Hughes and apologized to her for what happened and asked for forgiveness. 6RP 594. Hughes told the defendant that she would never forgive him for what he did to her. 6RP 594. Hughes told him that he could see the kids but that she did not want to see him. 6RP 595. Wheaton continued to call and write Hughes over the next several days and continued asking her if she was seeing someone else. 7RP 598.

² During testimony, Hughes said that she was not sure why she intended to apologize to Wheaton. 6RP 589.

On Saturday, May 6, 2007, Hughes allowed Wheaton to come to her home to bury the family cat who had recently died. 7RP 599. Hughes initially did not want to see Wheaton but, because her children were still very fond of him, she allowed him to come over for the burial. 7RP 599-600.

The following Monday, May 7, 2007, Hughes's then twelve-year-old son Austin stayed home sick from school. 7RP 598; 12RP 1177. Unbeknownst to Hughes, Wheaton came to the house and took Austin to work with him. 7RP 605. When Hughes found out, she was stunned and angry, as this was something Wheaton had never done before, nor was it something that Hughes authorized him to do. 7RP 605. Later that night, when she returned home from work, Hughes found flowers, cards, and candy from Wheaton; the cards were found underneath Hughes's pillow and in her underwear drawer, and the candy was underneath her pillow. 7RP 606. Hughes found this extremely disturbing. 7RP 606.

On May 10, 2007, the date of the second rape, Wheaton again showed up at Hughes's house to spend time with Alexis while Hughes was at work. 7RP 619; 11RP 1058-59. Wheaton told Alexis that he loved Hughes very much and that he wanted Hughes to admit that she was dating Dr. Conrad. 11RP 1060. Wheaton then started to cry. 11RP 1060. While returning from work, Hughes and Wheaton spoke on the phone and Wheaton

made a comment about her starting to take weekends off, which led Hughes to believe that Wheaton had been reading her emails, one email from Dr. Conrad in particular that she had just sent the night prior. 7RP 615. Hughes became concerned at this point and rushed home to make sure her daughter was safe. 7RP 613.

When she got home, Hughes found her daughter doing homework in the kitchen and Wheaton sitting on the couch nearby. 7RP 619. The flowers that Wheaton left for Hughes a few days earlier were strewn about the kitchen sink and the vase was knocked over on its side. 7RP 620. Wheaton told Hughes that he wanted to talk upstairs and asked where her phone was. 7RP 620-21. When Hughes refused to tell Wheaton where her phone was, he dialed her number with his phone and located it in her bag. 7RP 621. Wheaton then grabbed the phone and started going through it. 7RP 621. Wheaton told Hughes to go upstairs to her bedroom with him and Hughes, who did not want her daughter to see what was about to happen, complied. 7RP 621-22.

Once upstairs in the bedroom, Wheaton closed and locked the door and the windows and, with Hughes's cell phone still in hand, demanded that she tell him the truth about whether she was seeing someone else. 7RP 622-23. Wheaton then told Hughes something to the effect of, "you drug me through the mud and now I'm going to drag you through it." 7RP 623.

Hughes's dogs, which were also in the bedroom, began to bark, so Wheaton took Hughes into the master bathroom and closed and locked the door.

7RP 624. Hughes was terrified. 7RP 633. Hughes asked Wheaton several times for her phone, but Wheaton refused. Wheaton then started dialing numbers in her phone. 7RP 625-26.

Wheaton then became physically aggressive toward Hughes and forced her onto the bathroom floor on her back. 7RP 635-36. Wheaton held Hughes down and forcefully removed her clothing. 7RP 135. Hughes resisted but to no avail. 7RP 636. At one point, Wheaton flipped Hughes over onto her hands and knees and pushed her face down hard onto the linoleum floor. 7RP 636-37. Wheaton then vaginally raped Hughes. 7RP 642. During the rape, Wheaton randomly dialed numbers on Hughes's cell phone and placed the phone near her vaginal area so the person(s) called could hear what he was doing to her. 7RP 637. Wheaton told Hughes that he was going to hurt her and that everyone was going to know about it. 7RP 637. Wheaton also told her that he knew that she was having sexual intercourse with Dr. Conrad, and that he was going to do it to her one last time. 7RP 639. Hughes had no idea whether the calls went through to anyone. 7RP 645.

When Wheaton finished raping her, he got up and told her, "I know what I'm going to do, I'm going to kill [Dr. Conrad,] that's what I'm going to

do." 7RP 642. Hughes was terrified and believed that Wheaton was going to act on his threat. 7RP 646.

Alexis, who was downstairs during the rape, heard her mother screaming and cupboards banging upstairs. 11RP 1055. She went upstairs and saw Wheaton exit the bathroom with his face bright red as if he "wanted to kill somebody." 11RP 1069. Alexis had never seen him like that before. 11RP 1069. Wheaton then told Alexis that Hughes was a slut and that she has been "fucking with Dr. Conrad." 11RP 1070.

Wheaton then walked out of the bedroom with Hughes's cell phone. 7RP 648. Hughes cleaned herself up and followed Wheaton in an effort to get her phone. 7RP 648. Once downstairs, Wheaton locked himself in the downstairs bathroom. Wheaton then called and left a message for Dr. Conrad. 7RP 649. Hughes could hear Wheaton during the call refer to her as a whore and a slut. 7RP 649. Wheaton then came out of the bathroom and commanded Hughes to tell her daughter three things: that she lied to Alexis, that she has been sleeping with Dr. Conrad, and that she is a slut. 7RP 651. Out of fear, desperation, and a desire to get Wheaton to leave, Hughes told her daughter what Wheaton wanted to say. 7RP 652. Alexis ran to her room screaming and crying. 7RP 652. Wheaton returned the cell phone to Hughes and left. 7RP 652.

Wheaton called a short while later and demanded to speak with Austin, who was not yet home at this point. 7RP 654. Wheaton called several more times that evening, but Hughes did not answer. 7RP 654. Hughes then called the clinic where Dr. Conrad works to warn him about Wheaton's threats, but she was initially unable to get in touch with him. 7RP 655. Hughes eventually spoke with Dr. Conrad and told him that she had been raped, and that Wheaton had threatened his life. 7RP 656. Dr. Conrad instructed Hughes to call the police. 7RP 655.

Dr. Conrad then called Wheaton and asked him why he had raped Hughes. 8RP 760. Wheaton responded that "she deserved it"; she "deserved everything she got." 8RP 761.

In the meantime, Wheaton placed some phone calls to Hughes's family members. Wheaton first called Hughes's sister, Janet Winje, and told her that Hughes had gone off the deep end and needed to be talked to. 5RP 498-99. Wheaton also called Hughes's elderly mother, Doreen Hughes, and told her that Hughes was losing it and had been sleeping with Dr. Conrad. 9RP 876. Both Winje and Doreen Hughes then called Hughes to find out what was going on. 7RP 657; 9RP 877.

Not long after that, Winje, Dr. Conrad, and King County Sheriff's Deputies Pedersen and Cross arrived at Hughes's house. 7RP 658. The deputies spoke briefly with Hughes, Alexis, and Dr. Conrad about what

happened. 7RP 659. Deputy Cross then collected the clothes that Hughes had been wearing during the incident and photographed the residence.

7RP 660. A few hours later, Hughes went to Harborview Medical Center where she underwent a sexual assault examination. 7RP 665. During the examination, the Sexual Assault Nurse Examiner located and photographed bruising and abrasions on Hughes's arms, legs, and back. 10RP 971-75.

The nurse examiner also observed injury to Hughes's vaginal area, injuries which were consistent with Hughes's description of what occurred.

9RP 978.

King County Sheriff's Detective Belinda Ferguson later retrieved and recorded two voicemail messages left by Wheaton on May 10, 2007, after the rape — one message for Dr. Conrad and one message for Sandra Hughes. The message left by Wheaton on Dr. Conrad's voicemail stated:

This is Ken. You talked to me the other night. Um, yeah, I was Sandra's boyfriend until you started fuckin' her so I hope you guys are happy together. And anytime you wanna know the real truth about her give me a holler. Why don't you ask her about her, uh, couple of abortions? Why don't you ask her how she fuckin' lies and cheats? She's a worthless fuckin' piece 'a shit and I hope you guys are happy together. An, uh, why don't you guys look for yourselves on Craigslist?

Ex. 49; 10RP 912-13.

The message to Hughes is as follows:

I hope you got what you wanted. I didn't deserve to be treated this way and your kids don't either. And you don't

either is the problem. You're not lookin' at big picture at what you're doin' to yourself and your kids. It's okay that you don't wanna be with me 'cause you don't even lie to them about what you're doin'. And you don't need to be totally consumed in the guy and fuck (inaudible) lie about it. I'm really sorry for what you've done to me. And you know . . . can't . . . you know, I can't say it enough. I've said too many times that it doesn't fuckin' make any sense that I'm so much in love with you and you fuckin' treat me like this.

Ex. 50; 10RP 914-15.

Forensic testing revealed semen on Hughes's perineal/vulvar, endocervical/vaginal, and anal swabs. 11RP 16-18. Further testing revealed Wheaton's DNA on the vaginal swab. 12RP 1221.

At trial, the defense called Jeffrey Biel, Wheaton's step-brother, who testified that Dr. Conrad called Wheaton on the evening of May 10th after the rape and threatened to "kick [Wheaton's] ass." 12RP 1161-62. Wheaton also testified in his own defense. Wheaton said that he had sexual intercourse with Hughes on the dates of the alleged rapes, but that the intercourse was consensual. 12RP 1180, 1194. Wheaton denied telling Hughes that he would kill Dr. Conrad, denied seeing Alexis when he exited the bathroom on May 10th, and denied ordering Hughes what to tell Alexis on May 10th. 12RP 1180, 1194-95, 1197-98; 13RP 1252. Wheaton also said that he did not notice the substantial bruises on Hughes's body after the incident on May 10th, but that he did not "roll her over and give her an examination." 13RP 1248.

The State will provide additional facts as they relate to each argument.

C. ARGUMENT

1. WHEATON HAS FAILED TO SHOW THAT HE WAS DEPRIVED OF AN IMPARTIAL JURY.

Wheaton tries to convince this Court that his convictions should be reversed because the trial court abused its discretion by denying Wheaton's cause challenges on jurors 15, 23, and 37. This argument fails. Even if the trial court abused its discretion (which it did not), Wheaton removed these jurors from the jury panel, which cured any error.

a. Relevant Facts

During jury selection, the prospective jurors each filled out a juror questionnaire and, based on the responses, some of them were questioned individually outside the presence of the other jurors. After this individual questioning, several jurors were removed for cause. See, e.g., 2RP 224-31 (juror 88 removed for cause); 3RP 210 (juror 14); 3RP 272-75 (juror 28); 3RP 309-12 (juror 48).

The parties also questioned jurors 15, 23, and 37 individually. These three jurors said that they had experiences involving sexual assault

and/or domestic violence. 3RP 241-49 (juror 15, sexual assault victim roughly 40 years prior); 3RP 278-83 (juror 23, sexual assault victim as a child); 3RP 295-300 (juror 37, daughter sexually assaulted). After additional questioning, however, each of these jurors essentially indicated that they believed that Wheaton was innocent until proven guilty. 3RP 245-46 (juror 15 asserting that she could hear the evidence and that she did not know whether the defendant was guilty); 3RP 277 (juror 23 stating that she could presume that the defendant's innocent and that the State would have to prove its case); 3RP 297-98 (juror 37, stating that he believed that a defendant was innocent until proven guilty).³ Based on these responses, and the jurors' demeanor, the court denied Wheaton's cause challenge to jurors 15, 23, and 37. 3RP 248-49, 283; 4RP 330.⁴

In using his seven peremptory challenges, Wheaton struck jurors 15, 23, and 37. 5RP 474-77. At no time did Wheaton argue that any juror *actually impaneled* was biased or unfit to serve on the jury.

³ Later in the voir dire process, juror 23 specifically stated that she believed in the presumption of innocence. 4RP 383.

⁴ The court refused to remove juror 15 because although the court found that she was uncomfortable talking about her experiences, the court did not hear her "voice breaking like [defense] counsel described it." 3RP 249. The court refused to remove juror number 37 based partly on her "demeanor." 4RP 330.

b. The Removal Of Jurors 15, 23, And 37 Cured Any Alleged Error.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee every criminal defendant “the right to a fair and impartial jury.” State v. Brett, 126 Wash.2d 136, 157, 892 P.2d 29 (1995). To ensure that right, a juror will be excused for cause if his or her views would “prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.” State v. Hughes, 106 Wash.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). Further, RCW 4.44.170 and 4.44.190 allow a party to dismiss a biased juror for cause.

This court reviews a trial court's decision whether to excuse a potential juror for cause for an abuse of discretion. State v. Fire, 145 Wash.2d 152, 158, 34 P.3d 1218 (2001). A trial abuses its discretion when its decision is manifestly unreasonable, exercised for untenable reasons, or when it rests on untenable grounds. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006).

Even if the trial court abuses its discretion in denying a challenge for cause, a defendant's use of a peremptory challenge to remove the

challenged juror *cures that error* absent a showing that a biased juror *actually sat on the jury*:

[I]f a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.

Fire, 145 Wn.2d at 165; State v. Roberts, 142 Wn.2d 471, 517, 14 P.3d 713, 739 (2000) (“It is well established that an erroneous denial of a challenge for cause may be cured when the challenged juror is removed by peremptory.”). Put another way, a defendant’s rights “are not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause.” United States v. Martinez-Salazar, 528 U.S. 304, 317, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000).⁵ To the contrary, a defendant is deprived of the right to a fair and impartial jury *only if* a biased juror sat on the panel that ultimately convicted him. Fire, 145 Wn.2d at 159; Roberts, 142 Wn.2d at 517.

⁵ If a defendant believes that a juror should have been excused for cause, he has two choices: he may remove the juror via a peremptory challenge or “he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.” Fire, 145 Wn.2d at 158.

Here, Wheaton used three peremptory challenges to remove jurors 15, 23, and 37. Wheaton does not allege that any biased juror was impaneled on the jury that convicted him.⁶ Following Fire and Roberts, Wheaton has failed to show prejudice from any trial court error, and his argument fails.⁷

Further, the trial court properly exercised its discretion by declining to remove these three jurors. Although the jurors indicated that

⁶ During individual questioning of the jurors, the court denied Wheaton's motions to remove jurors 13, 15, 23, and 30 for cause. 3RP 240-41, 247-49, 283, 293-95. After the individual questioning, Wheaton renewed his motion to exclude these four jurors as well as jurors 37 and 56. 4RP 329. The court excluded jurors 13 and 30. 4RP 331; 5RP 461. Wheaton then used his peremptory challenges to remove jurors 15, 23, and 37. 5RP 475-78. Juror 56 never made it onto the panel. 5RP 478 (juror 40 was the final juror on the panel).

After the verdict, during oral arguments on the defense motion to dismiss, Wheaton argued that juror 1 remained on the panel and was biased because his spouse had been a sexual assault victim. 15RP 1391-92. This was incorrect. Juror 1 was removed from the panel. 4RP 332-33. The person in seat # 1 was juror 24, who indicated that his wife had been sexually assaulted by her former husband in another country and that the former husband was found not guilty after a trial. 5RP 375. Juror 24, however, indicated that he "put aside his feelings" about the incident, and Wheaton did not challenge juror 24 for cause or argue in his appeal that juror 24 was biased. 5RP 430.

⁷ Wheaton cites to Miles v. F.E.R.M. Enters., Inc., 29 Wn. App. 61, 64, 627 P.2d 564 (1981), for the proposition that "if a juror should have been excused for cause, but was not, the remedy is reversal." This Court's decision, which was issued roughly three decades ago, is not good law in light of Fire and Roberts. Further, this holding in Miles was dicta because the Miles court held that the trial court did not abuse its discretion by failing to remove the juror for cause. See Dean v. Group Health Co-op of Puget Sound, 62 Wn. App. 829, 836, 816 P.2d 757 (1991) ("Although the court in Miles indicated that it was prejudicial in itself to fail to remove a juror for cause when that juror should have been excused, that language is clearly dicta.").

they had sexual assault and/or domestic violence experiences, they each indicated that they could presume the defendant innocent, and that they would require the State to prove its case. Further, the trial court stated that the jurors' body language indicated that they could be fair, and this observation is entitled to deference. See State v. Yates, 161 Wn.2d 714, 743, 168 P.3d 359 (2007) ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.") (quoting Uttecht v. Brown, 551 U.S. 1, 127 S. Ct. 2218, 2224, 167 L. Ed. 2d 1014 (2007)). Under these facts, Wheaton has failed to show that the trial court abused its discretion.

2. THE TRIAL COURT PROPERLY DENIED WHEATON'S PRETRIAL MOTION TO SEVER COUNT 1 FROM COUNTS 2 AND 3.

Wheaton argues that the trial court abused its discretion by failing to sever counts 2 and 3 from count 1. For three reasons, this argument fails. First, since Wheaton did not renew his motion to sever during trial, he has waived his right to raise it here. Second, the trial court did not abuse its discretion in denying the motion to sever. Third, even if the trial court erred by not severing the charges, any error was harmless.

a. Relevant Facts

During pretrial hearings, Wheaton moved to sever the counts into the following two trials:

Trial 1: Count 1 (rape on May 10th, 2007).

Trial 2: Count 2 (rape between April 26th and May 9th) and Count 3 (felony harassment on May 10, 2007).

CP 52-55. After receiving written briefs and hearing argument, the court denied the severance motion. 2RP 150. Wheaton did not renew this motion again during or after trial.

b. Summary Of The Law

A trial court may join two or more offenses for trial when each is “of the same or similar character, even if not part of a single scheme or plan.” CrR 4.3(a); State v. Herzog, 73 Wn. App. 34, 51, 867 P.2d 648 (1994). A trial court must sever such offenses, however, when “severance will promote a fair determination of guilt or innocence of each offense.” CrR 4.4(b); Herzog, 73 Wn. App. at 51. In deciding whether to grant severance, a court will consider: (1) the strength of the State’s evidence on each count, (2) the clarity of defenses raised for each count, (3) the court’s instructions to the jury to consider each count separately, (4) the admissibility of evidence of the other crimes even if they had not been

joined; and (5) the strong concern for judicial economy. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). The defendant has “the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.” State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

The decision to grant or deny a motion to sever lies within the sound discretion of the trial judge and will not be overturned on appeal unless the court has exercised a manifest abuse of discretion. State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992). Even if a trial court abused its discretion in not severing counts, this Court will not reverse if the error is harmless. State v. Watkins, 53 Wn. App. 264, 273, 766 P.2d 484 (1999). Further, under CrR 4.4(a)(2), if a motion to sever is not renewed before or at the close of all the evidence, a defendant waives his right to challenge the denial of his severance motion on appeal. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998); State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987).

c. Wheaton Waived His Right To Challenge The Denial Of His Pretrial Severance Motion.

Wheaton moved to sever his charges before trial, but failed to renew the motion at or before the close of trial. Accordingly, he waived

his right to challenge this issue on appeal. CrR 4.4(a)(2); Bryant, 89 Wn. App. at 864; Henderson, 48 Wn. App. at 551.

d. The Denial Of Severance Was Not An Abuse Of Discretion.

The trial court properly exercised its discretion in denying the motion to sever count 1 from counts 2 and 3. Indeed, the five severance factors strongly counsel against severance.

First, the evidence supporting each charge is overwhelming. Hughes, a woman without any motive to fabricate, explained how Wheaton committed all three crimes. Each count is further corroborated by strong evidence, such as a confession (count 1), physical injuries (count 2), and Wheaton's demeanor (count 3).

And no one count is particularly stronger than the other. All of the direct evidence supporting the charges in this case is based primarily on the testimony of Hughes, the only direct eyewitness to the specific acts alleged in each count. For this reason, this was not a case where a strong count would encourage the jury to return a guilty verdict on a weaker count.

Second, none of the defenses of the three counts conflicted with one another. This was not a case where Wheaton claimed self-defense or

diminished capacity defense on one particular count, but not others. To the contrary, Wheaton asserted general denial for every single charge. CP 8. Given the facts in this case, there is nothing inconsistent or inherently confusing in the presentation of these defenses, and the jury could be reasonably expected to have compartmentalized the evidence as to each count.

Third, the court instructed the jury to consider each crime separately, and this Court should presume that jurors follow these instructions. CP 86. This presumption is especially strong here, considering that the case only involved three charges, and the allegations were not particularly complex or confusing. Accordingly, there is nothing particular to this case to suggest that the trier of fact would be unable to decide each charge separately. See Bythrow, 114 Wn.2d at 723 (holding that when a joined trial involves uncomplicated counts, it is assumed that a jury instructed to decide each count separately can do so).

Fourth, the evidence for each charged crime was cross-admissible under ER 404(b). For example, in a separate trial for the May 10 rape (count 1), the State would have admitted evidence of previous rape (count 2) committed against Hughes on her couch to show Wheaton's intent for the May 10th rape and to rebut his theory that the sexual intercourse on the 10th was consensual. Put simply, if Hughes was raped

by Wheaton prior to May 10th, it would have been incredibly unlikely that she would have consented to sex with him on the 10th. Accordingly, to assess the reasonableness of the claim that consensual sex took place, the jury would need to hear evidence about the circumstances of Hughes's and Wheaton's relationship in the days and weeks leading up to May 10, 2007, which includes the first rape from two weeks earlier.

And the evidence relating to the felony harassment — which occurred immediately after the May 10th rape — also would have been cross-admissible. This evidence would show Wheaton's state of mind during the May 10th rape, his intent to forcibly obtain sex, and would have rebutted Wheaton's claim that the intercourse that day in the bathroom was consensual.

Further, in Wheaton's second proposed trial (counts 2 and 3, previous rape on the couch and felony harassment), the State would have admitted evidence of the May 10th rape (count 1). The evidence of the May 10th rape would have been admitted to show Hughes's reasonable fear that Wheaton would carry out his threat against Dr. Conrad. Further, the evidence of the May 10th rape would have shown that Wheaton was extremely jealous of Dr. Conrad, and which would have shown his intent for the prior rape.

Fifth, separate trials would have been an enormous waste of judicial resources. If the court had provided two separate trials, as Wheaton suggests, many of the same witnesses would have had to appear for multiple trials to present the *same evidence*. Hughes would have had to testify in both trials. Since Winje talked to Hughes after both rapes, she would have testified in both trials to corroborate the rapes and Hughes's reasonable fear. Alexis would have had to testify in both trials, as she could corroborate facts implicating Wheaton in all three crimes. And Dr. Conrad would have had to testify in both trials to explain Wheaton's threat to hurt Conrad if he was in a relationship with Hughes (evidence of all three charges) and to explain Wheaton's confession/admission to him on the evening of the 10th (evidence of the May 10 rape).

Further, much of the same evidence would have been presented if the court ordered two trials, including evidence of the charged crimes (see supra at pgs. 23-24), the relationship between Wheaton and Hughes, Wheaton's changing demeanor during the spring of 2007, and Hughes's demeanor during these months, and after the rapes. See State v. York, 50 Wn. App. 446, 453, 749 P.2d 683 (1988) (affirming trial court's decision not to sever counts because the same evidence "would otherwise have to be admitted at separate trials"). Considering all the factors, Wheaton has failed to show that a single trial was so manifestly prejudicial that it

outweighed the significant resources that would have been wasted had multiple trials occurred.

On appeal, Wheaton does not argue that judicial economy outweighed the prejudice to him, or even that the trial court erred in its decision to deny his severance motion. Instead, taking a single quote from State v. DeVincentis, a case involving an ER 404(b) analysis, Wheaton's *sole* argument is that this Court should reverse because the trial court never conducted an ER 403 balancing on the record to determine if the evidence of the other crimes would have been cross-admissible had the three charges been severed into two trials. See State v. DeVincentis, 150 Wn.2d 11, 25, 74 P.3d 119 (2003) (“[W]e concluded that the evidence was improperly admitted because the trial court did not adequately balance probative value against prejudicial effects.”).

For several reasons, this argument has no merit. *First*, Wheaton misunderstands the law. When deciding whether evidence is admissible under ER 404(b), the trial court must find that the probative value of the prior bad act outweighs its prejudicial value. State v. Guzman, 119 Wn. App. 176, 182, 79 P.3d 990 (2003). A trial court errs when it fails to balance the probative and prejudicial value *on the record*. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). But failure to weigh the evidence on the record *is harmless* “when the record is sufficient for the

reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence.” State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996).

Here, the record is more than sufficient to show that if the trial court would have weighed the probative and prejudicial value on the record, the trial court still would have concluded that the other crimes would have been cross-admissible if two trials occurred. If the May 10th rape was tried separately, the probative value of the evidence relating to the felony harassment and previous rape on the living room couch would have been crucial to show Wheaton’s intent on the 10th and to rebut Wheaton’s claim that the intercourse on the 10th was consensual. See supra, at pgs. 23-24. By similar reasoning, in Wheaton’s second proposed trial, the evidence of the May 10th rape would have been important to show Hughes’s reasonable fear, and to rebut his claim that the first rape was consensual. See supra, at pgs. 23-24.

To the contrary, the prejudice of joining the three charged offenses in one trial would have been minimal. The State did not join nonviolent crimes with violent ones, where the risk is that the jury will be so swayed by Wheaton’s violence that they reflexively convict on a less serious offense. Rather, in this case, Wheaton is charged with similar offenses

against the same victim with the same alleged motive: that Wheaton was angry at, jealous of, and obsessed with Hughes. And Wheaton's defenses are all the same: general denial.

Accordingly, the record shows that evidence of each crime would have been admissible under ER 404(b), and, thus any error by the trial court of not balancing the probative and prejudicial value *on the record* was harmless error.

Second, the requirement that a court puts its balancing on the record applies to an ER 404(b) analysis, *not* a motion to sever. The State knows of no case — and the defense certainly has failed to cite one — where a court reversed a trial court's denial of a *severance* motion because the trial court did not put the ER 404(b) balancing analysis of cross-admissibility on the record.

Third, even *if* evidence of the other charged crimes would not have been admissible in two separate trials, this does not mean that severance would have been required. To the contrary, “[e]ven where the evidence of one count would not be admissible in a separate trial of the other count,” the “proposition that severance is required in every case is erroneous.” Bythrow, 114 Wn.2d at 720. This is primarily because “[s]everance questions involve considerations of the judicial economy gained when cases can be tried together; these considerations are not present in a pure

404(b) case.” State v. Gataliski, 40 Wn. App. 601, 609 n.6, 699 P.2d 804 (1985); see also Kalakosky, 121 Wn.2d at 538 (affirming trial court’s refusal to sever five rape counts even though rape counts would not have been cross-admissible had there been separate trials). Here, Wheaton has failed to show that, even if the other crimes were not cross-admissible, that a joint trial would be “so manifestly prejudicial as to outweigh the concern for judicial economy,” and his argument fails. Bythrow, 114 Wn.2d at 718.

e. Failure To Sever Was Harmless.

An erroneous ruling on a motion to sever will not result in reversal if, “within reasonable probabilities, the outcome of the trial would not have been different had the charges been severed.” State v. Hernandez, 58 Wn. App. 793, 800-01, 794 P.2d 1327 (Wn. App. 1990). In this case, any failure not to sever was clearly harmless. Hughes provided vivid details of the rapes and harassment by Wheaton, and the defense was never able to identify any reason why Hughes would fabricate these allegations. To the contrary, according to the testimony, Hughes loved Wheaton, Wheaton was good to her family, and this entire incident had put pressure on her family and her relationship with Dr. Conrad.

Further, the evidence of each count had substantial corroboration. As to the first rape on the living room couch, Hughes told her sister, Winje, and Tina Deschler soon after the incident that Wheaton engaged in non-consensual sex with her. Further, several witnesses described a mark on Hughes's cheek, which was not present before, and which was consistent with her description of being bitten by Wheaton as he forcibly raped her.

As to the May 10th rape, Hughes had physical injuries consistent with a rape, Dr. Conrad testified that Wheaton admitted that he raped Hughes because "she deserved it," and Alexis confirmed that Wheaton went out of the bathroom looking as if he wanted to kill someone.

And, finally, regarding the felony harassment, Hughes's testimony is consistent with Wheaton's conduct after the alleged rape (called Dr. Conrad in a rage), Alexis's description of his demeanor after he exited the bathroom, and Dr. Conrad's testimony that Wheaton had previously called him and threatened to hurt him.

For these reasons, even if these counts were severed, Wheaton clearly would have still been found guilty on all charges. Accordingly, any error on the motion to sever was harmless, and this Court should reject this argument and affirm.

3. The State Properly Charged The Elements Of Felony Harassment.

Wheaton argues that the trial court should have dismissed the felony harassment count after the State rested because the first amended information did not properly charge the crime of felony harassment. Specifically, Wheaton asserts that the first amended information was deficient because it did not specify whether Wheaton threatened Hughes or Conrad by threatening to kill Conrad. This argument fails. The first amended information stated all the essential elements of felony harassment; accordingly, to the extent that this information failed to *specify* the target of Wheaton's threat, this merely means that the information was vague, not constitutionally deficient, a problem remedied by a bill of particulars.

a. Relevant Facts

On the day of trial, the State amended the information to charge Wheaton with an additional count of Rape in the Second Degree — Domestic Violence (count 2) and Felony Harassment — Domestic Violence (count 3). CP 33-34. On count 3, the State's theory was that Wheaton *threatened Hughes* by threatening to kill Dr. Conrad, and that Hughes was in reasonable fear that Wheaton was going to act on his

threat. For the felony harassment charge, the first amended information said:

That the defendant, Kenneth Lamonte Wheaton, in King County, Washington, on or about May 10, 2007, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to John Conrad, by threatening to kill John Conrad, and the words or conduct did place Sandra Hughes in reasonable fear that the threat would be carried out.

CP 34.

The defense objected to the amendment, claiming that it lacked notice of the new charges. 1RP 6-9. The court allowed the amendment after learning about the significant notice that the State provided the defense. 1RP 6-9. Further, the defense conceded that it believed that the basis of the felony harassment charge was that Wheaton threatened to kill Dr. Conrad, communicated that threat to Hughes, which put Hughes in reasonable fear that the threat would be carried out. 1RP 5.

After the State rested, the defense moved to dismiss the felony harassment count, arguing that the amended information was defective because it did not state the essential elements of felony harassment because it did not identify who Wheaton allegedly threatened. 12RP 1127-31. The defense further indicated that the information would have stated a crime if the State had inserted the phrase that Wheaton *had threatened Sandra Hughes* by threatening to kill John Conrad, and this

threat put Sandra Hughes in reasonable fear. 12RP 1151. The State, in an abundance of caution, then moved to amend the information to insert the words suggested by the defense. 12RP 1152. The court allowed the State to amend the information, and refused to dismiss count 3. 12RP 1154-56.

The language of the felony harassment charge in the second amended information stated:

That the defendant, Kenneth Lamonte Wheaton, in King County, Washington, on or about May 10, 2007, knowingly and without lawful authority, *did threaten Sandra Hughes by* threatening to cause bodily injury immediately or in the future to John Conrad, by threatening to kill John Conrad, and the words or conduct did place Sandra Hughes in reasonable fear that the threat would be carried out.

CP 73-74 (emphasis added).

After the trial, the defense, for the same reasons, moved again for dismissal on the felony harassment charge. CP 19-110. The court denied the motion. CP 142.

b. Summary Of The Law

If an information omits an essential element of the charged crime, then it is constitutionally deficient, and the conviction must be reversed without prejudice. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). On the other hand, a charging document that states the statutory elements of a crime, but is vague as to some other significant matter, is

considered merely vague. State v. Leach, 113 Wn.2d 679, 686-87, 782 P.2d 552 (1989). A vague charging document may be corrected by a bill of particulars if requested. Id. at 687. A defendant may not challenge a charging document for “vagueness” on appeal if no bill of particulars was requested at trial. Id.

After resting, the State cannot amend the information to add a missing element of the charged offense. State v. Vangerpen, 125 Wn.2d 782, 788-89, 888 P.2d 1177 (1995). The State, however, can amend the information for a technical defect or for an amendment that does not affect the substance of the charged offense. Leach, 113 Wash.2d at 696 (“Technical defects not affecting the substance of the charged offense do not prejudice the defendant and thus do not require dismissal.”).⁸

RCW 9A.46.020, defines the crime of Harassment:

A person is guilty of harassment if:

- (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person . . .;

⁸ If the State amends the information after the State rests, but prior to verdict, the courts are split as to whether to construe the information strictly or liberally to determine if it contains all the elements of the charged offense. Compare State v. Chaten, 84 Wn. App. 85, 86, 925 P.2d 631 (Div. 1 1996) (strict review), with State v. Phillips, 98 Wn. App. 936, 942-43, 991 P.2d 1195 (2000) (Div. 2 2000) (liberal review). Under either standard, the State, in this case, properly charged the elements for felony harassment.

- (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

The person is guilty of a felony if the defendant threatens to kill the person he intends to harm. RCW 9A.46.020(2)(b).

To state a harassment claim, “the harassment statute requires that the person threatened learn of the threat and be placed in reasonable fear that the threat will be carried out.” State v. Kiehl 128 Wn. App. 88, 93, 113 P.3d 528 (2005). For example, if someone says that he is going to kill the mayor and a bystander hears this and reasonably believes it, a harassment has not occurred because the person threatened — the mayor — has not learned of the threat or been placed in reasonable fear.

The harassment statute, however, does contemplate that the “person threatened” may not be the same as the person whom the defendant threatens to harm. State v. J.M., 144 Wn.2d 472, 488, 28 P.3d 720 (2001). For example, if someone threatens a mother that he intends to kill her infant child, a harassment has occurred if the mother reasonably believes that the person will act on his threat, even though the infant child obviously never learned of the threat. Id. at 488. This is because the target of the threat — the mother — learned of the threat and was placed in reasonable fear.

c. The First Amended Information Was Merely Vague, Not Deficient.

In this case, the State amended the information after resting.

Wheaton does not challenge the second amended information as deficient.

If the original information, however, did not state all the essential elements of felony harassment, the State could *not* have cured that error by amending after resting. Vangerpen, 125 Wn.2d at 788-89. If the original information did contain all the essential elements, a clarifying amendment would have been proper. The question then is whether the original information stated all the essential elements. The answer is “yes.”

The charge of felony harassment in the first amended information contained all the essential elements of the crime. This charge alleged that Wheaton, on May 10, 2007, knowingly and without lawful authority, threatened to kill Conrad, and that this threat placed Sandra Hughes in reasonable fear that the threat would be carried out. CP 34. These allegations virtually mirror the harassment statute. RCW 9A.46.020.

Wheaton appears to argue that the first amended information was deficient because it did not specify that Wheaton was threatening *Hughes* when Wheaton said that he was going to kill Dr. Conrad. But the exact name of the person whom Wheaton threatened is a factual matter not an

essential element of felony harassment, and Wheaton has failed to provide any authority suggesting otherwise.

This Court's decision in State v. Winings, 126 Wn. App. 802, 810, 187 P.3d 335 (2008), is directly on point. There, the defendant was charged with Assault in the Second Degree, and the information stated, "In the County of Clallam, State of Washington, on or about the 24th day of March, 2003, the Defendant did assault another with a deadly weapon; in violation of RCW 9A.36.021, a Class B felony." Id. at 81. On appeal, Winings argued that the information was deficient because it failed to identify the victim, the weapon used, or what made the weapon deadly.

This Court disagreed, holding that the information listed both the essential elements and the facts supporting those elements, including the fact that Winings assaulted another with a deadly weapon, that the actions constituted a class B felony, and that the crime occurred on March 24, 2003 in Clallam County. Winings, 126 Wn. App. at 85-86. This Court concluded that the information was vague, but *not* constitutionally deficient. Id. And since the information was merely vague, and the defendant had failed to ask for a bill of particulars during trial, he waived his right to challenge the information on appeal. Id. at 86.

The same reasoning applies here. Where the information in Winings was not deficient despite not including the name of the victim or

a description of the weapon used, the information here is also not deficient despite not specifying who Wheaton threatened when he said he was going to kill Dr. Conrad. The first amended information was simply vague, and Wheaton had the right to request a bill of particulars as to whom was the target of Wheaton's threat when he said he was going to kill Dr. Conrad. Since Wheaton did not request a bill of particulars, he waived his right to challenge the first amended information here.

On this argument, Wheaton relies on two cases, Vangerpen, 125 Wn.2d at 788-79, and Kiehl, 128 Wn. App. at 93, but neither assist him. In Vangerpen, the court held that if the information omits an essential element of the crime, then the State, after it rests, cannot amend the information to add the missing element. But here, the felony harassment charge in the first amended information did *not* omit an essential element. And since the first amended information was not defective, clarifying who Wheaton threatened in a second amended information did not violate any of Wheaton's rights.

Wheaton's reliance on Kiehl is also misplaced. There, the defendant told his mental health counselor that he was going to kill the judge overseeing his case, causing the counselor to reasonably fear that the defendant would act on his threat. Kiehl, 128 Wn. App. at 90. The target of the threat, however, was the judge, not the mental health counselor who

heard the threat and had the reasonable fear. The court concluded that the target of the threat, or the person threatened, had to reasonably fear that the defendant was going to act on the threat to kill. Since the jury instructions did not require the person threatened — the judge — to have reasonable fear that the defendant would act on his threat to kill, the jury instructions were erroneous and prejudicial.

In this case, however, the person threatened (Hughes) was the *same person* who reasonably feared Wheaton's threat (Hughes). The State produced evidence showing that the target of the threat to kill Conrad was Hughes, and that she (the person threatened) reasonably feared that Wheaton would carry out his threat to kill Dr. Conrad. Since the person threatened (Hughes) was the same as the person who reasonably feared that the threat would be carried out, Kiehl supports the State, not the defense.

Wheaton may also argue that since the first amended information alleged that he threatened to kill Conrad, Conrad is the "person threatened," not Hughes. This argument, however, would fail. The mere fact that the first amended information alleges that Wheaton threatened to kill Conrad this does not mean that Conrad was the "person threatened" as

that phrase is used in the statute.⁹ The harassment statute requires that a defendant threaten bodily injury to *either* “the person threatened” or “to any other person.” RCW 9A.46.020(2)(a) (emphasis added). In this case, the first amended information was vague as to whether Conrad was the “person threatened” or Hughes was the “person threatened” and Conrad was “any other person.” If Wheaton was confused on this point, he should have asked for a bill of particulars.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Wheaton’s three convictions.

DATED this 6th day of July, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

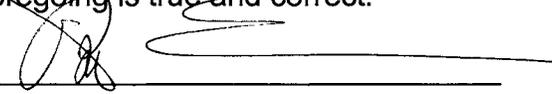
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⁹ Similarly, where an information alleges that a defendant threatens to kill a mother’s infant child, this does not mean that the infant child is the “person threatened.” Rather, the infant child is often “any other person” and the mother is the “person threatened.”

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 Robert Quillian, the attorney for the appellant, at 2633-A Parkmont Lane SW, Olympia, WA 98502, containing a copy of the BRIEF OF RESPONDENT, in STATE V. KENNETH WHEATON, Cause No. 61763-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

07-06-2009

Date

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