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SEP 28 2009

King County Prosecutor
Appellate Unit

NO. 63467-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

HUBERT CHEVARA, JR.,

Appellant.

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

The Honorable Douglass A. North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for repeatedly failing to object to inadmissible, highly prejudicial evidence of appellant's prior bad acts.

2. Defense counsel was ineffective for failing to move for a mistrial after the bad acts evidence became so pervasive nothing short of a new trial could have ensured a fair adjudication.

3. Insufficient evidence supports the charge of interfering with domestic violence reporting.

4. The jury instructions relieved the State of its burden to prove each of the elements of the crime of interfering with domestic violence reporting beyond a reasonable doubt.

5. Defense counsel was ineffective for failing to object to the inadequate "to-convict" instruction for the interfering charge.

6. The court erred when it instructed the jury on statutory alternative means of interfering with domestic violence reporting that were unsupported by substantial evidence.

7. The special verdict form contains an impermissible comment on the evidence

8. The special verdict form improperly instructed jurors that an element of the interfering charge and the special verdict inquiry itself were established as a matter of law.

9. The information omitted an essential element of the crime of interfering with domestic violence reporting.¹

Issues Pertaining to Assignments of Error

1. On 14 occasions, defense counsel failed to object to prejudicial testimony by the complaining witness that (1) the appellant assaulted her in the past; (2) was previously incarcerated; and (3) fled from the police. There was no legitimate tactical reason for failing to object. Had counsel objected, the court would likely have sustained the objections and excluded the evidence. And there was a reasonable probability the admission of the testimony swayed the jury's verdict. Did ineffective assistance of counsel deny appellant a fair trial as to both charged counts?

2. A statutory element of interfering with domestic violence reporting (count 2) is commission of a crime of domestic violence. The

¹ The Supreme Court accepted review on this issue only in State v. Nonog, 145 Wn. App. 802, 187 P.3d 335 (2008), review granted, 165 Wn.2d 1027 (2009) (No. 82094-5). Oral argument has not been set. Chevara objects to staying his case pending resolution of Nonog because he raises other challenges to his count 2 conviction that this Court should resolve in his favor.

State charged appellant with interfering with reporting the violation of a court order. Yet the complaining witness testified that what prompted her to threaten to contact the police was her belief appellant was stealing from her. Was the evidence therefore insufficient to support appellant's conviction for interfering with domestic violence reporting?

3. The "to-convict" instruction for count 2 permitted the jury to find appellant guilty without first finding that he attempted to prevent a call to police that was designed to report the commission of a particular domestic violence crime, as required by statute. Did the trial court's instructions relieve the State of its burden to prove each of the elements of the crime beyond a reasonable doubt?

4. Was counsel ineffective for failing to object to the defective instruction?

5. Interfering with domestic violence reporting is an "alternative means crime." Where the court's "to-convict" instruction included three alternatives, where substantial evidence does not support each of the three alternatives, and where it is impossible to determine which means the jury selected, must appellant's conviction for interfering be reversed?

6. A special verdict form as to count 1 informed jurors the crime charged in count 1 was committed against a family or household

member, which was a disputed element of count 2. The court thus informed the jury an element of count 2 was satisfied as a matter of law, as was the special verdict inquiry. Did the court's special verdict form constitute an unconstitutional comment on the evidence and/or directed verdict?

7. An information charging the crime of interfering with domestic violence reporting must specify the underlying domestic violence crime. Did the information, which failed to list the purported domestic violence crime, omit an essential element of the interfering charge?

B. STATEMENT OF THE CASE²

1. Charge, Conviction, and Sentence.

The King County prosecutor charged appellant Hubert Chevara, Jr. with felony violation of a no-contact order³ – domestic violence (count 1) and interfering with domestic violence reporting (count 2). CP 1-4, 7-8.

² This brief refers to the verbatim report of proceedings as follows: 1RP – 3/2/09; 2RP – 3/3/09; 3RP – 3/4/09; and 4RP – 4/10/09.

³ Former RCW 26.50.110 (2007) states in part:

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony

A jury convicted Chevara as charged and answered “yes” to a special verdict form inquiring whether count 1 was “committed against a family or household member, a crime of domestic violence[.]” CP 31-33 (special verdict form attached to this brief as Appendix A).

Based on an offender score of zero, the court sentenced Chevara to a standard range sentence of nine months on count 1. CP 39-45. As to count 2, a gross misdemeanor, the court imposed a consecutive sentence of 12 months of incarceration, suspended on the condition Chevara serve 24 months of probation. CP 35-38.

2. Substantive Facts

Jacquelyn Willimon and Chevara began dating in 2004 while residents in psychiatric transitional housing. 2RP 52. When Willimon moved to an apartment at 9020 Delridge Avenue South in August 2006, Chevara moved in with her. 2RP 53.

Willimon received disability benefits for post-traumatic stress disorder (PTSD) and was also in treatment for obsessive-compulsive

(5) A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

disorder and borderline personality disorder. 2RP 49, 91-93; 3RP 110-14. Even after a court ordered Chevara to have no contact with Willimon, the two continued to live together because Willimon cared for Chevara. 2RP 56-57. Moreover, due to financial difficulties and family problems, Chevara had nowhere else to go. 2RP 56-57.

Nonetheless, Willimon asked Chevara to leave about four times between November 15 and 16, 2008. 2RP 58-59. According to Willimon, Chevara had been acting “stressed,” which in turn made Willimon feel “stressed,” and the two were arguing frequently. 2RP 57. Similar behavior by Chevara spelled trouble for Willimon in the past. 2RP 57-58. Willimon suggested Chevara go to a movie or visit friends. 2RP 58-59.

The afternoon of November 16, Willimon drank a few 24-ounce beers and took a nap. 2RP 58. When she awoke, she asked Chevara to leave. 2RP 58, 96. Chevara gathered some items into his backpack, including a cigarette roller Willimon bought a short time earlier. 2RP 59-60. This angered Willimon because she was on a tight budget. 2RP 59. She threatened to call the police and opened her flip-style cellular phone. 2RP 59; 3RP 128. She told Chevara, “If you don’t stop doing that, I will call the police. Just . . . go but don’t steal from me.” 2RP 59.

Chevara said he would call Willimon’s mother. 2RP 61. Willimon wanted to prevent this because her father had died shortly before

and Chevara's call might upset her mother. 2RP 61. Willimon placed her hand over Chevara's phone. 2RP 62-63. In one continuous motion, Chevara grabbed the hand in which Willimon held the phone, twisted the phone until it broke in two pieces, hit Willimon in the face, and pushed her to the ground. 2RP 63-69; 3RP 122-26, 128, 130-31. Willimon slid across the floor and struck her head on the bathtub. 2RP 68; 3RP 125. Chevara said "Oh my god" and ran out the door. 2RP 63, 69.

The blow to Willimon's face left a dark, painful bruise on her upper lip. 2RP 65. The tub left a bump on Willimon's head, which concerned her because she had two brain surgeries a year and a half earlier. 2RP 70.

Willimon discovered her phone was broken. 2RP 129. Despite being dizzy, Willimon eventually went to her neighbor's⁴ apartment and called 911. 2RP 15, 73-85; Exs. 3, 12. Police and fire department medical aid arrived shortly thereafter. 2RP 85-86.

The police officer who responded to Willimon's apartment testified Willimon appeared shaky, although she was not crying. 3RP 196-97. He noticed Willimon's upper lip was swollen and bleeding from a small cut. 3RP 196-97, 212. Willimon was subdued and withdrawn

⁴ The neighbor testified Willimon appeared disheveled and the left side of Willimon's face was red, but not swollen or bleeding. 2RP 18-19, 23.

until fire department personnel arrived to provide medical aid. 3RP 197. At that point, Willimon became very demonstrative and loudly complained that her back hurt. 3RP 201-02; see also 3RP 173-88 (testimony of fire department personnel).

After the officer's initial walkthrough of the apartment, Willimon positioned herself at the front door and entertained police and fire department personnel in the hallway. 3RP 197, 211, 215-16. The officer did not notice whether there was a male's clothing or other belongings in the apartment. 3RP 212.

Willimon suggested the police look for Chevara at one of two nearby bus stops because Chevara always went there when running from the police. 3RP 115-16. Willimon was eventually transported to Harborview. 2RP 85-86.

Dr. William Hurley supervised Willimon's emergency room examination. 3RP 135. Willimon reported being struck in the face, striking her head on the bathtub, and receiving multiple blows from fists and feet. 3RP 142. She had a fat lip but no discernable bump on her head and no other visible injuries. 3RP 143, 147-48. 3RP 147. On cross-examination, Dr. Hurley testified Willimon's injuries were consistent with self-infliction. 3RP 147-48.

Two Seattle police officers followed Willimon's advice and checked for Chevara at nearby bus stops. They found him standing in a narrow space between a bus shelter and a fence a few blocks from Willimon's apartment. 2RP 34-35, 42; 3RP 157-59. The officers shone a spotlight on Chevara, but he did not emerge until they told him, "You know we can see you." 2RP 39; 3RP 163-65. On cross-examination, one of the officers acknowledged it was illegal to smoke at Seattle bus stops and that he did not recall if Chevara was smoking when the officers shined the light on him. 3RP 170.

The State introduced two "post-conviction" no-contact orders that prohibited Chevara's contact with Willimon until May 6, 2010. Exs. 10, 11 (both attached as Appendix B); 3RP 207. The orders did not specify the underlying convictions. Chevara stipulated he violated court orders on two previous occasions. 3RP 217; CP 9.

C. ARGUMENT

1. DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE DENIED CHEVARA A FAIR TRIAL ON BOTH COUNTS WHEN COUNSEL FAILED TO OBJECT TO INADMISSIBLE, PREJUDICIAL EVIDENCE THAT CHEVARA PREVIOUSLY MISTREATED THE COMPLAINING WITNESS, WAS INCARCERATED, AND FLED FROM AUTHORITIES.

Chevara's counsel failed to object to numerous references to inadmissible prior bad acts. Counsel did not move before trial to preclude

the prejudicial testimony, or after trial move for a mistrial. CP 5-6; 1RP 3-7. Because the prejudicial evidence did not pertain to the defense theory, there was no tactical reason for failing to object. Counsel's failings constituted deficient performance.

Had counsel objected, the court was likely to exclude the evidence because it was pertinent only to the "forbidden inference" that Chevara had a propensity to commit the charged crimes. In addition, Willimon's fear was not an element of, nor pertinent to, either crime charged. Counsel's failure to object also resulted in prejudice to Chevara's right to a fair trial because it is reasonably probable the testimony swayed the jury's verdict against Chevara. This court should therefore reverse Chevara's convictions.

a. The Accused has a Constitutional Right to Effective Representation.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices him. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

More specifically, failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

b. Chevara's Counsel Stood Mute While the State Repeatedly Introduced Evidence of Prior Bad Acts.

Trial counsel failed to object to, and even elicited, testimony that Chevara assaulted Willimon during earlier incidents, spent time in jail, and fled from police. This testimony is set forth as follows:

(1) On direct examination, the prosecutor asked Willimon why she permitted Chevara to live with her despite a no-contact order. 2RP 56-57. Willimon testified she loved Chevara and he contributed financially. 2RP 57. She then stated “He actually contributed more after the last time he got out of jail. . . but then it went back to the same thing after a month or two.” 2RP 57.

(2) Willimon testified when she woke from her nap the afternoon of the 16th she felt “frustrated and hurt and like I just wanted him to go away for awhile until I was feeling safe again.” 2RP 56. The prosecutor asked why Willimon felt “frustrated and

hurt.” 2RP 57. Willimon testified that day and the previous one, “I couldn’t say anything right, basically. I . . . felt scared. I have been down this road with him enough times to know that when he starts getting all kinetic . . . and twitchy . . . that I’m in trouble.” 2RP 57-58.

(3) Willimon testified after Chevara agreed to leave, he verbally abused her as he packed his belongings. The prosecutor asked for specifics, and Willimon testified he called her, “crazy, a whore, bitch . . . just the basic batterer’s banter that I have put up with for a long time. . . .” 2RP 60.

(4) Willimon continued, “[W]hen he started taking things out of my apartment after I had bought him a whole new wardrobe after the last [sic] he got out of jail, I really got angry that he was still taking from me. . . .” 2RP 60.

(5) The prosecutor asked whether Willimon physically confronted Chevara regarding taking her cigarette roller. 2RP 61. Willimon answered, “I never . . . ever touched him because I got the crap beat out of me every time I did.” 2RP 61.

(6) Later, the prosecutor asked how Willimon’s lip injury affected her. 2RP 66. Willimon answered, “It hurt on two levels. It hurt on the physical level and every time I looked at it . . .

I used a lot of makeup to cover it because I was embarrassed that I had let this happen to me again.” 2RP 67.

(7) Willimon later testified she was concerned about hitting her head on the bathtub given her two brain surgeries. After providing the dates of the surgeries, Willimon testified, “[s]ince then [Chevara]’s been arrested three times for hitting me in the head.” 2RP 70.

(8) Shortly thereafter, the prosecutor asked, “What did it feel like when your head hit the bathtub?” Willimon answered, “It hurt. And I was like, ‘Here we go again.’ . . . I’m sorry. I’ve had two stroke events as a result of blunt force injury to my head since my surgeries, and I just didn’t think he would ever do that again . . . and I was wrong.” 2RP 70-71.

(9) The prosecutor asked if Willimon was crying when she asked her neighbor to use the phone and, if so, when she started crying. 2RP 73-74. Willimon responded, “About the time my head hit the tub. You know, I . . . didn’t see it coming until he turned towards me with his fist. I . . . guess I still thought that he would never do that again.” 2RP 74.

(10) The prosecutor asked whether, because of Willimon’s surgeries, there were medical warning signs she looked

for. Willimon testified she had stroke-related symptoms on a few occasions. “It’s only happened twice. But basically, I’ve have to stop and call the ambulance to come and pick me up twice since . . . I got punched in the head again.” 2RP 86.

(11) The prosecutor asked Willimon how often Chevara stayed at her apartment. Willimon testified, “For the past year, we were separated more than we were together . . . [as of November 2008] we hadn’t been separated since he got out of jail.” 2RP 90.

(12) On cross-examination, defense counsel asked Willimon whether she recalled telling a detective she had been fighting with Chevara “all day long.” 2RP 97. Willimon testified she was trying not to antagonize Chevara but was urging him to leave. Counsel asked, “You were trying to get him to leave?” Willimon replied,

I was trying to get him to leave for a couple of hours, whatever it was that was bothering him . . . obviously something was. I just wanted him to leave because I did not feel safe. Because in the past, when I have ignored these feelings, I’ve gotten my butt kicked. This is not the first time. This is not the first time he’s ever beat me up. 2RP 98.

(13) When trial resumed the following day, defense counsel asked whether Willimon was, as the police officer reported, calm and smoking a cigarette when police arrived. 3RP 114-15. Willimon stated she was calm because Chevara was gone and she was told police detained Chevara after she suggested they check at two different bus stops. 3RP 115. Counsel asked why Willimon told police to check those bus stops if she did not see him there. 3RP 115. Willimon stated, “Because there was two bus stops in our area that he always used to run from police.” 3RP 115.

(14) Defense counsel asked whether Willimon tried to take Chevara’s phone to prevent her from calling her mother. 3RP 121. Willimon answered, “No. I put my hand over . . . his phone. I don’t try to do anything that has to do with force with Mr. Chevara because I’ve suffered the consequences too many times.” 3RP 121.

c. The Prior Bad Acts were Inadmissible Under ER 404(b) Because They Supported Only “The Forbidden Inference.”

To support the admission of prior acts under ER 404(b), the proponent must show the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) has probative

value that outweighs its prejudicial effect. State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008).

Under ER 404(b), evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). However, such evidence may be admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

The list of “other purposes” for admitting evidence under ER 404(b) is not exclusive. State v. Kidd, 36 Wn. App. 503, 505, 674 P.2d 674 (1983). For example, prior acts of domestic violence involving the accused and the complaining witness are admissible to assist the jury in judging the credibility of a complaining witness, but only if the witness has recanted. State v. Grant, 83 Wn. App. 98, 100, 920 P.2d 609 (1996), cited with approval in Magers, 164 Wn.2d at 185-86. A complaining witness’s knowledge of prior acts of violence may also be relevant where fear is an element of the charge at issue. State v. Barragan, 102 Wn. App. 754, 759-60, 9 P.3d 942 (2000).

ER 404(b) must be read in conjunction with ER 402 and 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Relevant evidence is "evidence having any tendency to make the existence of any

fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401; Magers, 164 Wn.2d at 184. "Any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary." State v. Kelly, 102 Wn.2d 188, 204, 685 P.2d 564 (1984). Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009)

Evidence establishing an accused committed acts similar or identical to the one charged is especially prejudicial because it allows the jury to shift its focus from the merits of the charge and merely conclude that the accused acted in conformity with the character he demonstrated in the past. State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). This is the "forbidden inference" underlying ER 404(b). State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008) (citing Wade, 98 Wn. App. at 336).

- d. Because the Prior Acts were Inadmissible Under ER 404(b), the Trial Court Would Likely have Sustained Timely Objections.

An accused suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Counsel's deficient performance likely affected the outcome at trial. Had counsel objected, the court would have excluded the evidence under ER 404(b) because it was unfairly prejudicial propensity evidence. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), review denied, 116 Wn.2d 1020 (1991). It is unlikely the State could have identified a legitimate reason to admit the evidence. Willimon's testimony regarding prior abuse was inadmissible because she never recanted and because her fear of Chevara was not an element of either crime. Cf. Magers, 164 Wn.2d at 186 (recanting victim); Barragan, 102 Wn. App. at 759-60 (victim's fear an element of the crime).

A decision not to emphasize propensity evidence may be considered tactical. See, e.g., Barragan, 102 Wn. App. at 762 (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was deemed a tactical decision not to reemphasize damaging evidence). But at some point during the 14 instances of inadmissible testimony, the evidence spoke so loudly that any such "tactic" became unreasonable. Thus, had counsel at that point moved for a mistrial, the court would have been compelled to grant counsel's motion.

Trial courts must grant a mistrial where the evidence at issue may have affected a trial's outcome of the trial, thereby denying the defendant his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

Chevara satisfied these criteria. First, the irregularity was serious because it involved the repeated introduction of damaging propensity evidence. Second, none of the 14 instances were admissible and the testimony regarding Chevara's prior bad acts was not cumulative. Finally, given that the inadmissible evidence permeated Willimon's testimony – 14 instances in 75 pages – no curative instruction could have cured the irregularity.

e. This Court Should Reject Any Argument Counsel's Failure was Tactical.

To defeat a claim of ineffective assistance of counsel, "tactical" or "strategic" decisions by defense counsel must be reasonable and legitimate. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); Wiggins v. Smith, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); State v. Grier, 150 Wn. App. 619, 640, 208 P.3d 1221 (2009). The decision whether to object may be tactical. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

Chevara's defense theory was that Willimon's mental illness and medication altered her perception of reality and/or caused her to fabricate the present accusation. Willimon's ever-evolving account of the assault and her injuries, the possibility that Willimon's injuries were self-inflicted, and other factors supported this theory. 3RP 258-59, 268-69. But at no point did defense counsel argue Willimon's testimony alleging Chevara's prior beatings, incarcerations and flight from police supported the theory Willimon was detached from reality. Indeed, counsel did not use the evidence of Chevara's prior bad acts to in any way benefit his client's cause. Under the defense theory, therefore, there was no reason to admit evidence of prior assaults and other objectionable evidence. See Thomas,

109 Wn.2d at 228 (counsel's failure to take steps consistent with defense theory of the case deemed deficient).

f. The Evidence Likely Altered the Jury's Verdict as to Both Counts.

ER 404(b) "is intended to prevent application by jurors of the common assumption that 'since he did it once, he did it again.'" Bacotgarcia, 59 Wn. App. at 822. Here, there is no reason to believe the jury did not consider evidence of prior assaults against Willimon as evidence of Chevara's propensity to commit another assault or violate no-contact orders (count 1) or use violence to prevent Willimon from reporting a domestic violence crime (count 2). The jury is naturally inclined to treat evidence of other bad acts in this manner. Id.

In addition, the jury could easily infer Chevara's prior flight from police and incarceration were related to prior assaults. The fact Chevara was punished for such lent credence to Willimon's testimony about prior abuse, and thus to her testimony as to the charged crimes. See State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994) ("The state may not show defendant's prior trouble with the law . . . even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime") (quoting Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948)); cf. 5 Karl B. Tegland,

Washington. Practice. Evidence § 404.10, at 498 (5th ed. 2007) (evidence of prior felony convictions is generally inadmissible against a defendant because it is highly prejudicial and deemed too likely to lead the jury to conclude the defendant is guilty).

The evidence was not cumulative. While the jury was aware “post-conviction” no-contact orders prevented Chevara from contacting Willimon, the orders did not reveal what crime Chevara was convicted of committing. Exs. 10, 11; Appendix B. Because defense counsel's performance was both deficient and prejudicial, Chevara was denied his right to effective assistance, and this Court should reverse his count 1 and 2 convictions.

2. INSUFFICIENT EVIDENCE SUPPORTS THE CONVICTION FOR INTERFERING WITH DOMESTIC VIOLENCE REPORTING.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

When determining the elements of a statutorily defined crime, courts should strive to give effect to all statutory language. Smith, 155 Wn.2d at 502. To ensure citizens have adequate notice of the law, statutes defining crimes must be strictly construed according to their plain meaning. State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980).

Under RCW 9A.36.150(1), a person commits the crime of interfering with the reporting of domestic violence when he:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to *that* domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

(Emphasis added.) Moreover, RCW 9A.36.150(2) states, “Commission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence.”

A statutory element of interfering with domestic violence reporting is thus commission of a crime of domestic violence. State v. Nonog, 145 Wn. App. 802, 807, 187 P.3d 335 (2008), review granted, 165 Wn.2d 1027 (2009); State v. Clowes, 104 Wn. App. 935, 941-42, 18 P.3d 596 (2001). RCW 10.99.020 defines “domestic violence” as including, but not being limited to, 23 different crimes. RCW 10.99.020(3). The nature of

the underlying domestic violence crime is a necessary fact that must be included in the charging document. Nonog, 145 Wn.2d at 808-11.

Here, the information charged Chevara with interfering with domestic violence reporting based on Chevara having interfered with reporting the violation of a court order. CP 7-8 (amended information). The jury was instructed consistently with the charge. CP 27 (Instruction 14, attached as Appendix C). The evidence at trial, however, showed Willimon planned only to report that Chevara was stealing from her. Willimon did not testify she was going to complain that Chevara violated a court order. 2RP 59; 3RP 128.

The State, apparently not content with the evidence before the jury, sought to salvage its case by arguing the following:

[When Willimon asked Chevara] to leave just before six o'clock on . . . November [16], his response was . . . name calling, berating. But he eventually began to pack up his things. . . . And not only was he taking his things, he was taking [Willimon's things] as well. And at that point she had to put her foot down and said, "Listen. Leave my stuff. Take yours. Feel free. But don't take the things that belong to me." And he just kept on doing what he was doing.

And when she said she was going to call the police and report this violation and report was he was doing, [Chevara's] response was to go and tattle to [Willimon's] grieving . . . mother.

3RP 233-34 (emphasis added).

With this argument that Willimon was calling to report a “violation,” the State may have been attempting to draw a connection between Willimon’s phone call and the violation of a court order. But unfortunately for the State, closing argument is not evidence. State v. Ford, 137 Wn.2d 472, 483 n. 3, 973 P.2d 452 (1999).

There was thus insufficient evidence Chevara acted in attempt to prevent Willimon from reporting a violation of a court order. Smith, 155 Wn.2d 496, 502. The remedy, accordingly, is reversal and dismissal of the count 2 charge. Smith, 155 Wn.2d at 505.

3. THE COUNT 2 “TO-CONVICT” INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH OF THE ELEMENTS BEYOND A REASONABLE DOUBT, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DEFECTIVE INSTRUCTION.

Alternatively, the count 2 “to-convict” instruction relieved the State of its burden to prove each element of the crime beyond a reasonable doubt. Specifically, the instruction failed to inform the jury the victim’s or witness’s call to authorities must be related to the predicate domestic violence offense. Such an error may be raised for the first time on appeal. In any event, counsel rendered ineffective assistance by failing to object to an improper jury instruction.

a. The “To-Convict” Instruction was Constitutionally Inadequate

Failure to include every element of the crime in the “to-convict” instruction charged amounts to constitutional error that may be raised for the first time on appeal. Fisher, 165 Wn.2d at 753-54. This Court reviews de novo whether the jury instructions adequately state the applicable law. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006).

When read as a whole, jury instructions must fully inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The sufficiency standard for “to-convict” instructions is particularly stringent because these instructions are the yardstick by which the jury measures the evidence and determines guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

The “to-convict” instruction given to Chevara's jury read:

To convict [Chevara] of the crime of interference with the reporting of domestic offense as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 16, 2008, [Chevara] committed the crime of Violation of a Court Order against [Willimon];

(2) That on that date [Chevara] was a family or household member of [Willimon];

(3) That [Chevara] prevented or attempted to prevent [Willimon] from calling a 911 emergency communication system or obtaining medical assistance or making a report to any law enforcement officer; and

(4) That the prevention or attempted prevention occurred in the State of Washington.

CP 27 (Instruction 14); Appendix C.

RCW 9A.36.150(1), however, establishes the crime is committed only if the person commits a crime of domestic violence and prevents or attempts to prevent the victim or a witness to *that* crime from calling 911, obtaining medical assistance, or reporting the crime to law enforcement; see also CP 26 (Instruction 13, attached as Appendix D). Under the plain language of the statute, the call being prevented must relate to the particular domestic violence crime. Smith, 155 Wn.2d at 502. Any jury instruction purporting to list the elements of the offense must therefore inform the jurors of that relationship. Cf. State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005) (instruction informing the jury that in order to find accused “armed” for purposes of deadly weapon enhancement, it must find a relationship between the accused, the crime, and a deadly weapon found adequate, even though instruction did not use the word “nexus”).

Even if this Court were to consider the statute ambiguous on this point, the rule of lenity would require this Court to interpret the statute in favor of the accused, State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005), and the instructional requirement would be no different.

The court's instruction in Chevara's trial failed to inform jurors of the essential connection between the reason for the call and the particular domestic violence crime at issue. The instruction instead permitted the jury to find (1) a domestic violence crime occurred and (2) an attempt to prevent a call occurred, but not that the two were necessarily related. The statute, however, requires the State to draw such a connection. Although it appears the to-convict instruction tracks the pattern instruction,⁵ courts do not hesitate to find pattern instructions inadequate when they misstate the law. See, e.g., State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) (pattern accomplice liability instruction found to be erroneous). This Court should find the instruction constitutionally inadequate.

b. The State Cannot Demonstrate the Error Was Harmless.

“Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless.” State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). In Chevara's case, the State cannot demonstrate the instructional error was harmless. The State presented insufficient evidence Chevara acted in an attempt to prevent Willimon from reporting the violation of a court order, yet the instruction impermissibly permitted the jury to convict Chevara on insufficient

⁵ 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 36.57, at 652-53 (3rd ed. 2008).

evidence. State v. Kiehl, 128 Wn. App. 88, 113 P.3d 528 (2005), review denied, 156 Wn.2d 1013 (2006).

The result is the same even if this Court finds minimal evidence supported Chevara's count 2 conviction. In that event, it is likely a properly instructed jury would have adopted the interpretation supported by the weight of Willimon's testimony, which established the proposed phone call was prompted by Chevara's alleged theft and not by the pertinent crime of domestic violence.

c. Defense Counsel Was Ineffective for Failing to Object to the Inadequate "To-Convict" Instruction Proposed by the State.

Counsel's performance falls below an objective standard of reasonableness when he fails to object to an improper jury instruction. State v. Townsend, 142 Wn.2d 142, 147, 15 P.3d 145 (2001); Aho, 137 Wn.2d at 736. For example, in Townsend, defense counsel failed to object to an instruction informing the jury of the penalty for the charged crime. 142 Wn.2d at 842-43. The Washington Supreme Court held that considering the long-standing rule that no mention be made of sentencing in noncapital cases, counsel's failure to object to the instruction fell below the prevailing professional norms. Moreover, there was no possible advantage to be gained by defense counsel's omission. Id. at 847; see also Aho, 137 Wn.2d at 745-46 (counsel rendered ineffective assistance by

failing to object to an instruction that allowed Aho to be convicted under a statute which did not exist at the time of the charged crime).

Defense counsel's failure to object to the court's instruction 14, which omitted the statutory requirement that the call and the domestic violence crime be related, "fell below the prevailing professional norms." Townsend, 142 Wn.2d at 847. There was no tactical advantage to be gained by failing to object. As discussed above, the instruction permitted the jury to convict Chevara on insufficient evidence. Like the instruction in Townsend, instruction 14 increased the likelihood of the jury convicting Chevara. Id.

Reversal is automatic when counsel fails to object to an erroneous instruction unless the error "is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Id. at 848 (citations omitted). Chevara has demonstrated it is likely the erroneous instruction led to a guilty verdict, notwithstanding insufficient evidence.

4. SUBSTANTIAL EVIDENCE DID NOT SUPPORT EACH OF THE ALTERNATIVE MEANS OF INTERFERING WITH DOMESTIC VIOLENCE REPORTING ON WHICH THE COURT INSTRUCTED THE JURY.

Where a single offense may be committed in more than one way, the jury must be unanimous as to guilt for the single crime charged. State

v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Unanimity is not required as to the means by which the crime was committed provided substantial evidence supports each alternative means. State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976). But if one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if the reviewing court can determine it was based on only one of the alternative means and that substantial evidence supported it. State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007);⁶ State v. Allen, 127 Wn. App. 125, 132-35, 110 P.3d 849 (2005).

Similar to witness tampering, interfering with domestic violence reporting is an alternative means crime. Nonog, 145 Wn. App. at 813 (citing Fleming, 140 Wn. App. at 135-37). The means listed in RCW 9A.36.150(1)(b) are not merely descriptive or definitional of essential terms. This is so because the statute does not criminalize all acts that might appear to constitute interfering with the reporting of domestic violence; interference is thus culpable only when a victim or witness is trying to report the crime to a particular entity. Id.

⁶ The two purposes of the alternative means doctrine are to prevent jury confusion about what criminal conduct has to be proved beyond a reasonable doubt and to prevent the State from “charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict.” State v. Smith, 159 Wn.2d 778, 789, 154 P.3d 873 (2007).

Cipriano Nonog was convicted of interfering with domestic violence reporting and argued on appeal his conviction should be overturned because the jury was instructed on all three means of interfering with domestic violence reporting, but only one means was supported by substantial evidence. Nonog, 145 Wn. App. at 811. That case is instructive because it lists a number of factors leading this Court to conclude that it was obvious which means the jury relied on despite the lack of a verdict expressly stating upon which means the jury relied. Each of those factors point to the opposite conclusion in this case.

In Nonog, the jury heard evidence that the complaining witness tried to call 911 upon finding Nonog in her home in violation of a court order. Nonog then took her cell phone and threw it against the wall. There was no evidence Nonog tried to prevent her from obtaining medical assistance or making a report to police about that incident. Despite a definitional instruction listing all three means, the "to-convict" instruction limited consideration to just one means: that Nonog prevented or attempted to prevent the complaining witness from calling 911. In addition, the State's closing argument focused only on Nonog's efforts to prevent the complaining witness from calling 911. Id.

This Court rejected Nonog's claim, concluding there was no possibility the jury convicted him on one of the two unsupported means. Id. at 813.

Here, as in Nonog, the jury did not state which alternative it relied on. Ortega-Martinez, 124 Wn.2d at 707. But unlike in Nonog, it is impossible to determine which of the three alternatives the jury could have selected. The State presented evidence Willimon threatened to call the police because she believed Chevara intended to steal her cigarette roller. 2RP 59-60. Willimon *eventually* called 911 and reported being assaulted, and *eventually* obtained medical assistance. 2RP 73-86. The State argued in closing Willimon threatened to call the police to report a "violation," but this assumed facts not in evidence. 3RP 233-34. Unlike Nonog, moreover, the court's "to-convict" instruction listed all three means.

On this record, it is unclear which means the jury relied on. Reversal is therefore required. Fleming, 140 Wn. App. at 136-37.

5. THE SPECIAL VERDICT FORM CONTAINS AN IMPERMISSIBLE COMMENT ON THE EVIDENCE AND IMPROPERLY DIRECTS A VERDICT.

The special verdict form informed jurors the crime charged in count 1 was committed against a family or household member, which was a disputed element of count 2. Thus with respect to count 2, the trial court effectively directed a verdict as to "family or household member" element.

The special verdict form also directed jurors to return a “yes” finding as to the verdict itself. This was error. For this reason as well, this Court should reverse Chevara’s count 2 conviction. This Court should also reverse the special verdict.

a. Trial Courts Violate the Constitution when they Comment on the Evidence.

The Washington Constitution prohibits trial courts from commenting on the evidence. Const. art. 4, § 16;⁷ State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006). "The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses." State v. Crotts, 22 Wash. 245, 250, 60 P. 403 (1900)). Thus, it is error for a judge to instruct the jury that matters of fact have been established as a matter of law. Jackman, 156 Wn.2d at 743-44 (citing State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997))

A comment on the evidence is a constitutional violation that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); Becker, 132 Wn. 2d at 64. It is presumed prejudicial because it operates to deprive the defendant of a fair trial. The State bears the burden to show that no prejudice resulted. Jackman, 156 Wn.2d at 743. Reversal is required unless the record affirmatively

⁷ Article 4, § 16 provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

demonstrates no prejudice could have occurred. Levy, 156 Wn.2d at 725; State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974); see also Becker, 132 Wn.2d at 65 (whether State produced sufficient evidence on element commented upon is irrelevant); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (instruction requiring jury to “disregard” comments of court and counsel incapable of curing prejudice).

b. The Special Verdict Form Constituted a Comment on the Evidence Akin to Impermissible “To-Wit” Language and Erroneously Informed Jurors a Disputed Element of Count 2 and the Special Verdict Inquiry Were Established as a Matter of Law.

The special verdict form asked if “the crime as charged in Count 1 *committed against a family or household member*, [was] a crime of domestic violence[.]” CP 33 (emphasis added); Appendix A. A crime “committed against a family or household member” is a crime that qualifies for the “domestic violence” designation. RCW 10.99.020(5). In turn, the existence of a “domestic violence” crime was an element of count 2. Because the special verdict form for count 1 told the jury an element of count 2 and the special verdict question were established as a matter of law,⁸ it was tantamount to the “to-wit” language Washington courts have

⁸ The count 2 “to-convict” required the jury to find “[t]hat on [11/16/2008] the defendant was a family or household member of . . . Willimon. CP 27

repeatedly prohibited. See Black's Law Dictionary 1498 (7th ed. 1999) (“to wit” means “[t]hat is to say; namely”).

In Becker, a defendant was convicted of delivering cocaine. 132 Wn.2d 54. On appeal, he challenged special verdict form language instructing the jury on a school zone enhancement. The special verdict form read:

[Were] defendant[s] . . . within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program [YEP] School at the time of the commission of the crime?

Answer:
(Yes or No)

Id. at 64.

Becker argued the language following "to-wit" commented on the evidence by relieving the State of its burden to prove the enhancement beyond a reasonable doubt. Id. The Supreme Court agreed and reversed, noting that trial courts may not instruct juries that matters of fact have been established as a matter of law: The form literally instructed the jury that YEP was a school. Id. at 64-65.

Similar to-wit language was challenged in State v. Jones, 106 Wn. App. 40, 21 P.3d 1172 (2001). There, the lower court's “to convict”

(Instruction 14); cf. Instruction 15 (instructing jury that “family or household member” could include persons residing together “in the past.”

instruction set forth the following elements for second degree unlawful possession of a firearm:

(1) That on or about the 26th day of October, 1998, the defendant owned or had a firearm in his possession or under his control, *to wit*: a Dakota .45 caliber revolver;

(2) That the defendant had previously been convicted of a felony offense [;] and

(3) That the acts occurred in the state of Washington.

Id. at 42 (emphasis added).

This Court reversed Jones's conviction because the "to convict" instruction did not include the implied element of "knowing possession."

Id. at 43-45. But the Court also expressed concern with the "to wit" language contained in the "to convict" instruction:

[W]e need not reach Jones' argument that the "to convict" instruction could be read as directing a verdict on whether the Dakota .45 caliber revolver was a "firearm" as defined in the court's instructions. We note, however, that our courts have condemned similar instructions. Counsel would be well advised to avoid the use of "to wit" language in future "to convict" instructions.

Id. at 45 (citing Becker and other cases).

Jackman was charged with sexual exploitation of a minor and other crimes. Jackman, 156 Wn.2d at 744. The Supreme Court held the trial court's references to the alleged victims' birth dates in the instructions were comments on the evidence. Id. The Court reversed the conviction,

because the record did not affirmatively demonstrate no prejudice could have resulted. Id. at 745.

Here, in order to convict Chevara as charged in count 1, it was not necessary for the State to prove Chevara was a family or household member of Willimon. CP 20 (Instruction 8); State v. Hagler, 150 Wn. App. 196, 202, 208 P.3d 32 (2009).

But Chevara disputed whether he was a family or household member at least on the date in question. CP 27 (Instruction 14); CP 33 (special verdict form); 3RP 211-12 (police officer's testimony); 3RP 260-61 (closing argument). The special verdict form's language thus commented on the evidence and effectively informed the jury that a disputed element of count 2 was established as a matter of law as was the special verdict inquiry. Jackman, 156 Wn.2d at 743-44.

As in Jackman, the record does not demonstrate the absence of prejudice. Id. at 745. As a result, this Court should reverse Chevara's count 2 conviction and reverse the special verdict.

6. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF INTERFERING WITH DOMESTIC VIOLENCE REPORTING

A charging document must include all essential elements of a crime. U.S. Const. amend. 6; Const. art. I, § 22 (amend. 10);⁹ State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); State v. Gill, 103 Wn. App. 435, 441-42, 13 P.3d 646 (2000). An "essential element is one whose specification is necessary to establish the very illegality of the behavior[.]" State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). The information must include all essential elements whether founded in statute, common law, or the constitution. Johnson, 119 Wn.2d at 147; State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989).

Charging instruments that fail to set forth the essential elements of a crime in such a way that an accused is notified of both the illegal conduct and the crime with which he is charged are constitutionally defective and require dismissal. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). The remedy for an insufficient information is

⁹ U.S. Const. amend. 6 provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation" Const. art. I, § 22 provides, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation."

reversal and dismissal without prejudice. State v. Vangerpen, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995).

When a charging document is challenged for the first time on appeal, it is reviewed under a more liberal standard. Kjorsvik, 117 Wn.2d at 105. Under this standard, if the missing element cannot be fairly implied from the language in the information, the conviction will be reversed. Id. at 105-06.

An opinion by Division Two of this court holds that an information charging the crime of interfering with domestic violence reporting must, in order to define the crime sufficiently, specify the underlying domestic violence crime. Clowes, 104 Wn. App. at 942. This Court recently disagreed. Nonog, 145 Wn.2d at 808. In Nonog, the charging document did not specify the underlying domestic violence crime but was deemed adequate nonetheless because the specific crime could be “found elsewhere in the charging document by a fair and liberal construction.” Id.

In particular, the information alleged that the crime of interfering domestic violence reporting was (1) “a crime of the same or similar character and based on the same conduct as another crime charged herein . . . so closely connected . . . that it would be difficult to separate proof of one charge from proof of the other,” and (2) the information charged two domestic violence crimes occurring on the same date as the “interfering”

charge.”¹⁰ Id. This Court acknowledged, however, that on similar facts the Clowes court held it was impermissible to “fill voids in a defective count with facts located elsewhere in the information.” Clowes, 104 Wn. App. at 942.

This Court should reconsider its decision in Nonog and instead follow Clowes and dismiss count 2 without prejudice. Vangerpen, 125 Wn.2d at 792-93.

¹⁰ The facts in this case are nearly identical. Count 2 states:

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse [Chevara] of the crime of **Interfering with Domestic Violence Reporting**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That [Chevara] in King County Washington, on or about November 16, 2008, having committed a crime of domestic violence as defined by RCW 10.99.020, did intentionally prevent or attempt to prevent Jacquelyn Willimon, the victim of that crime, from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official;

Contrary to RCW 9A.36.150, and against the peace and dignity of the State of Washington.

CP 7-8.

In any event, the Supreme Court has accepted review of Nonog and will soon resolve the issue.

D. CONCLUSION

This Court should reverse Chevara's convictions because ineffective assistance of counsel denied him a fair trial on both charges. In addition, this Court should reverse and dismiss Chevara's count 2 conviction because insufficient evidence supports the charge. Alternatively, this Court should reverse and remand for a new trial on count 2, or reverse and dismiss the charges without prejudice. Finally, this Court should reverse the special verdict.

DATED this 28TH day of September, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

APPENDIX A

FILED
KING COUNTY, WASHINGTON

ORIGINAL

MAR 05 2009

SUPERIOR COURT CLERK
BY ANNIE JOHNSON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiffs,

v.

HUBERT A. CHEVARA, JR.,

Defendant.

No. 08-1-12270-7 SEA

SPECIAL VERDICT FORM

We, the jury, find the defendant HUBERT A. CHEVARA, JR. guilty as charged in Count I, now answer the following question:

Was the crime as charged in Count I committed against a family or household member, a crime of domestic violence?

Answer: YES (write in "yes" or "no")

Dated: March 5, 2009

Die C Scollard
PRESIDING JUROR

APPENDIX B



THE MUNICIPAL COURT OF THE CITY OF SEATTLE

CERTIFIED COPY

THE CITY OF SEATTLE,)
Plaintiff,)

v.)
Hubert A. Chevar, Jr.)
Defendant.)

DOB 7/30/58 SEX M RACE W)
)
)
)

CASE NUMBER: 503091

SPD INCIDENT NUMBER: 07-101821

DOMESTIC VIOLENCE NO-CONTACT ORDER (MISDEMEANOR)

- Pre-trial
- Post conviction
- Clerk's action required.

EXPIRATION DATE: 5-6-2010

1. Based upon the certificate of probable cause and/or other documents contained in the case record, testimony, and the statements of counsel, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to SMC 12A.06.130 and chapter 10.99 RCW. This order protects

(Name): Jacquelyn S. Williman (W/F) DOB: 5-24-63
DOB: _____

2. The court further finds that the defendant's relationship to a person protected by this order is: current or former spouse parent of a common child current or former cohabitant as intimate partner other family or household member as defined in SMC ^{12A}06.130 and RCW 10.99.

3. (Pretrial order) The court makes the following findings pursuant to RCW 9.41.800: the defendant used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; the defendant previously committed an offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040; or possession of a firearm or other dangerous weapon by the defendant presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

IT IS ORDERED THAT:

Defendant is PROHIBITED from:

- A. Causing or attempting to cause physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking the protected person(s).
- B. Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by defendant's lawyers with the protected person(s).
- C. Entering or knowingly coming within or knowingly remaining within 500 feet (distance) of the protected person(s)'s residence school workplace other: her person
 directly or indirectly, by text messages, instant messages, electronic mail, voice mail, Internet phone service, website communications or postings.
- D. (Pretrial RCW 9.41.800 findings made) Obtaining or possessing a firearm, other dangerous weapon or concealed pistol license.
- (Conviction of offense listed in RCW 9.41.040(2)) Obtaining, owning, possessing or controlling a firearm.

IT IS FURTHER ORDERED THAT:

(Pretrial Order) The defendant shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to:
Seattle Police Department/ or _____ [name/law enforcement agency].

Original-Court Yellow - Defendant Pink-Victim Gold-DVU

503041

WARNINGS TO THE DEFENDANT: Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

Willful violation of this order is punishable under RCW 26.50.110. Violation of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36 .011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if the defendant has at least 2 previous convictions for violating a protection order issued under Titles 10, 26 or 74.

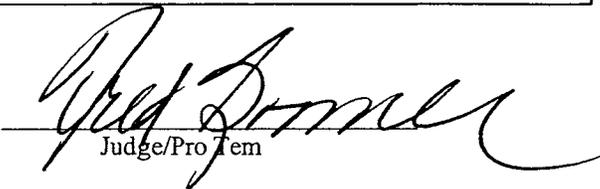
If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, the defendant may be subject to criminal prosecution in federal court under 18 U.S.C. § 2261, 2261A, or 2262.

In addition to the state and federal prohibitions against possessing a firearm upon conviction of a felony or a qualifying misdemeanor, upon the court issuing a no-contact order after a hearing at which the defendant had an opportunity to participate, the defendant, if a spouse or former spouse, a parent of a common child, or a current or former cohabitant as intimate partner of a person protected by this order, may not possess a firearm or ammunition for as long as the no-contact order is in effect. 18 U.S.C. § 922(g). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. § 925(a)(1). If the defendant is convicted of an offense of domestic violence, the defendant will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9); RCW 9.41.040.

YOU CAN BE ARRESTED EVEN IF THE PERSON OR PERSONS WHO OBTAINED THE ORDER INVITE OR ALLOW YOU TO VIOLATE THE ORDER'S PROHIBITIONS. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

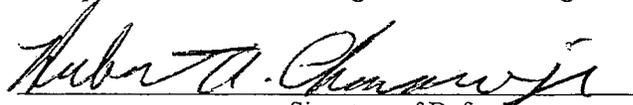
Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to: _____ County Sheriff's Office Police Department where the above-named protected person(s) lives, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

Dated this 6 day of 5 2008 
Judge/Pro Tem

Statement of Defendant

I have read the order. A copy of this order has been given to me and I agree to abide by the conditions set forth.


Signature of Defendant



CERTIFIED COPY

THE MUNICIPAL COURT OF THE CITY OF SEATTLE

THE CITY OF SEATTLE,)
Plaintiff,)

CASE NUMBER: 516242

v.)

SPD INCIDENT NUMBER: 07-503578

Hubert A. Chevarria)
Defendant.)

DOMESTIC VIOLENCE NO-CONTACT ORDER
(MISDEMEANOR)

DOB 7/30/58 SEX M RACE W)

- Pre-trial
- Post conviction
- Clerk's action required.

EXPIRATION DATE: 5-6-2010

1. Based upon the certificate of probable cause and/or other documents contained in the case record, testimony, and the statements of counsel, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to SMC 12A.06.130 and chapter 10.99 RCW. This order protects

(Name): Jacquelyn S. Williman (W/F) DOB: 5-24-63
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IT IS ORDERED THAT:

Defendant is PROHIBITED from:

- A. Causing or attempting to cause physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking the protected person(s).
- B. Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by defendant's lawyers with the protected person(s).
- C. Entering or knowingly coming within or knowingly remaining within 500 feet (distance) of the protected person(s)'s residence school workplace other: her person
No contact directly or indirectly, by text messages, instant messages, electronic mail, voice mail, internet phone service, website communications or postings.
- D. (Pretrial RCW 9.41.800 findings made) Obtaining or possessing a firearm, other dangerous weapon or concealed pistol license.
 (Conviction of offense listed in RCW 9.41.040(2)) Obtaining, owning, possessing or controlling a firearm.

IT IS FURTHER ORDERED THAT:

(Pretrial Order) The defendant shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to:
Seattle Police Department/ or _____ [name/law enforcement agency].

Original-Court Yellow - Defendant Pink-Victim Gold-DVU

516242

WARNINGS TO THE DEFENDANT: Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

Willful violation of this order is punishable under RCW 26.50.110. Violation of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36 .011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if the defendant has at least 2 previous convictions for violating a protection order issued under Titles 10, 26 or 74.

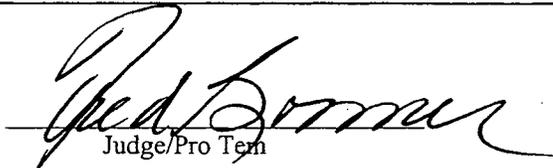
If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, the defendant may be subject to criminal prosecution in federal court under 18 U.S.C. § 2261, 2261A, or 2262.

In addition to the state and federal prohibitions against possessing a firearm upon conviction of a felony or a qualifying misdemeanor, upon the court issuing a no-contact order after a hearing at which the defendant had an opportunity to participate, the defendant, if a spouse or former spouse, a parent of a common child, or a current or former cohabitant as intimate partner of a person protected by this order, may not possess a firearm or ammunition for as long as the no-contact order is in effect. 18 U.S.C. § 922(g). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. § 925(a)(1). If the defendant is convicted of an offense of domestic violence, the defendant will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9); RCW 9.41.040.

YOU CAN BE ARRESTED EVEN IF THE PERSON OR PERSONS WHO OBTAINED THE ORDER INVITE OR ALLOW YOU TO VIOLATE THE ORDER'S PROHIBITIONS. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

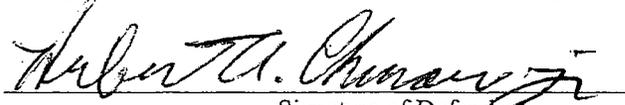
Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to: _____ County Sheriff's Office Police Department where the above-named protected person(s) lives, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

Dated this 6 day of 5 2008 
Judge/Pro Tem

Statement of Defendant

I have read the order. A copy of this order has been given to me and I agree to abide by the conditions set forth.



Signature of Defendant

APPENDIX C

INSTRUCTION NO. 14

To convict the defendant of the crime of interference with the reporting of a domestic violence offense as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 16, 2008, the defendant committed the crime of Violation of a Court Order against Jacquelyn Willimon as charged in Count I;
- (2) That on that date the defendant was a family or household member of Jacquelyn Willimon;
- (3) That the defendant prevented or attempted to prevent Jacquelyn Willimon from calling a 911 emergency communication system or obtaining medical assistance or making a report to any law enforcement officer; and
- (4) That the prevention or attempted prevention occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count II.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count II.

APPENDIX D

INSTRUCTION NO. 13

A person commits the crime of interfering with the reporting of domestic violence if the person commits a crime of domestic violence and prevents or attempts to prevent the victim or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

Violation of a Court Order is a crime of domestic violence when committed by one family or household member against another.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63467-4-I
)	
HUBERT CHEVARA, JR.)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF SEPTEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HUBERT CHEVARA, JR.
3848 35TH AVENUE W.
SEATTLE, WA 98199

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF SEPTEMBER, 2009.

x *Patrick Mayovsky*