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NO. 67415-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PELKEY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON, JUDGE

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**BRIEF OF RESPONDENT**

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A. ISSUES

1. A trial court's refusal to give a limiting instruction is harmless unless, within reasonable probabilities, the outcome of the trial would have been materially affected. Here, the trial court did not give a limiting instruction to vague stock language, that the State never referenced in closing, nor specifically elicited information about in direct examination. Would the outcome of the trial been materially affected if the trial court had issued a limiting instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Michael Pelkey was charged by information with Domestic Violence Felony Violation of a Court Order, an order protecting Destiny West, based on Pelkey having two prior convictions for violating court orders. CP 1-12. On May 10, 2011, the jury returned a verdict of guilty. CP 39. Pelkey faced a standard range sentence of 51 to 60 months. RP 145. At sentencing, the State presented Pelkey's two prior convictions for stalking Destiny West. RP 145-46. The trial court imposed a

standard range sentence of 51 months and Pelkey appealed.

CP 41-49, 50-51.

## 2. SUBSTANTIVE FACTS

On November 24, 2010, Officer John Clemmons, of the Auburn Police Department, was informed that Pelkey was at an apartment with West, in violation of a no-contact order. RP 65-68.

After receiving this information, Officer Clemmons confirmed the existence of the no-contact order and then drove to the apartment. RP 69-71. He approached the apartment and paused just outside the door. RP 71. Officer Clemmons put his ear closer to the door and heard a male voice and a female voice having a conversation. RP 71. At trial, Officer Clemmons was asked whether the voices sounded like people or a TV, and stated that it was "A male and female's voice. A conversation." RP 71. Officer Clemmons knocked on the door and West answered. RP 72. Based upon a conversation with West, Officer Clemmons believed that Pelkey was inside the apartment. RP 73. After obtaining permission to enter and search the apartment, Officer Clemmons and a second officer located Pelkey in the apartment and arrested him. RP 74-75. No one else was in the apartment. RP 74-75.

Pelkey stipulated at trial that he had two prior convictions for violating court orders. RP 57-59, 87-88. Exhibits 2 and 3 were certified copies of Pelkey and West's driver's licenses. RP 75-76, 76-77. Officer Clemmons positively identified Pelkey, and his driver's license, as the same man he arrested on November 24, 2010. RP 75-76. Officer Clemmons also identified the woman on West's driver's license as being the woman who answered the door on November 24, 2010. RP 76-77.

Exhibit 1 is the domestic violence no-contact order that was issued by the Auburn Municipal Court on October 1, 2010. Exhibit 1. The order specifically named Pelkey as the restrained person and West as the protected person. Exhibit 1, RP 78. The order specifically stated that Pelkey was prohibited from "coming near and from having any contact whatsoever..." with West. Exhibit 1, RP 80. The order specifically warned Pelkey that violation of the order was a crime, that he could be arrested even if he was invited to violate the order, and that he had the sole responsibility to avoid violating the order. Exhibit 1, RP 80-81. The order was issued in open court, in Pelkey's presence, and Pelkey signed the order indicating he received a copy. Exhibit 1.

Defense counsel requested limiting instructions concerning the two prior convictions and Exhibit 1, the no-contact order. RP 103-05. The trial court gave the proposed limiting instruction concerning the prior convictions, but declined to give a limiting instruction regarding Exhibit 1. RP 103-05, 115.

Defense counsel requested that language in the first paragraph of the no-contact order, Exhibit 1, be redacted:

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 chapter 10.99 RCW.

RP 60, Exhibit 1.

The State objected to the redaction arguing that other critical identifying information of the defendant would be removed if the language was redacted and that there was no way to redact the information without making it obvious to the jury. RP 61. The trial court declined to redact the language, but indicated that it was willing to consider giving a limiting instruction. RP 61-62.

Defense counsel proposed the following limiting instruction as to the no-contact order:

Evidence has been introduced in this case on the subject of a no contact order. You must not consider this evidence for any other purpose than determining whether the no contact order was valid.

RP 103-04.

The State objected to this limiting instruction and argued that it improperly implied that the State bore the burden of proving to the jury that the no-contact order was valid. RP 103-04. The trial court did not give the instruction. CP 18-34.

The challenged language in Exhibit 1 was not elicited or highlighted in testimony and the State never referred to that language in closing arguments.

C. ARGUMENT

1. THE OUTCOME OF THE TRIAL WOULD NOT HAVE BEEN MATERIALLY AFFECTED BY THE ISSUANCE OF A LIMITING INSTRUCTION.

Although Pelkey was likely entitled to a limiting instruction as to the no-contact order, the error was harmless because (1) the challenged stock language in the no-contact order did not unfairly prejudice Pelkey, and (2) the evidence was such that there is no reasonable probability that a limiting instruction would have materially affected the outcome of the trial.

If we assume that the stock language in paragraph one of the no-contact order is ER 404(b) evidence, then Pelkey was entitled to a limiting instruction. In the context of ER 404(b) limiting instructions the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction.<sup>1</sup> State v. Gresham, 173 Wn.2d 405, 425, 269 P.3d 207, 215 (2012). "Nonetheless, failure to give an ER 404(b) limiting instruction may be harmless. The error is harmless 'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" Id. (citations omitted).

When analyzing whether the outcome of the trial would have been materially affected, the courts have typically examined the nature of ER 404(b) evidence that was admitted, taking into particular account whether the evidence was prejudicial, and what other evidence was presented by the State. Gresham, 173 Wn.2d at 423 - 25; State v. Halstien, 122 Wn.2d 109, 125-27, 857 P.2d 270, 280 (1993) (noting that the prior acts were minimally prejudicial as they were not a "crime" or "wrong" and were arguably

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<sup>1</sup> Here, the limiting instruction proposed by defense counsel as to Exhibit 1 was erroneous given State v. Miller, 156 Wn.2d 23, 27-32, 123 P.2d 827 (2005).

not "misconduct"); State v. Smith, 106 Wn.2d 772, 780-81, 725 P.2d 951, 955 (1986) (holding that the outcome of the trial might reasonably have been affected because no one could identify the rapist and the testimony revealed that the three rapes could have been committed by two or more persons). Here, the error was harmless because (1) the stock language in the no-contact order did not unfairly prejudice Pelkey, and (2) the evidence was such that there is no reasonable probability that a limiting instruction would have materially affected the outcome of the trial.

- a. The Stock Language In Exhibit One Was Not Prejudicial, Given The Totality Of The Circumstances, And As Such The Outcome Of The Trial Would Not Have Been Affected By The Issuance Of A Limiting Instruction.

ER 404(b) expresses the traditional rule that prior misconduct is inadmissible to show propensity. ER 404(b); 5D Wash. Prac., Handbook Wash. Evid. ER 404(b) (2011-12 ed.). The classic example being that in a prosecution for assault, a defendant's prior assaultive behavior is inadmissible to show that the defendant was assaultive on the occasion in question. Id. The language that Pelkey objects to in paragraph one of the no-contact order only falls within the scope of ER 404(b) under the most

expansive view of the rule and was not used by the State as propensity evidence. Therefore, the risk of prejudice from it was quite small or nonexistent, particularly given the trial court's instructions to the jury.

The language in paragraph one of the no-contact order is stock language that presents a laundry list of all the possible reasons for which the court could have issued the order. The paragraph expressly uses "and/or" and "or" and "possible" to note this. For example, one part of the paragraph states: "...the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense..." This is highly generic language that is plainly a formulaic part of the order.

Moreover, the situations described in paragraph one of the no-contact order are inherent in the very existence of **every** no-contact order. It is not possible to have a no-contact order without a charge, arrest, or conviction for a domestic violence offense. RCW 10.99. The inference that something happened in the past to cause the issuance of the order is inherent and cannot be further sanitized.

Most importantly, the State did not argue the language at issue for propensity and did not draw any undue attention to the

language at any point in the case. In fact, neither the State nor defense specifically mentioned the objected to language in the presence of the jury. Therefore, Pelkey was not prejudiced by the vague stock language that was not mentioned or argued by any party in the presence of the jury.

Given the above, the only evidence presented at trial that did have a risk of prejudicing Pelkey or being used for propensity was Pelkey's prior convictions for violating court orders. However, the State did not make any propensity arguments regarding that evidence and the jury was given an appropriate limiting instruction by the trial court that prohibited the jury from using that evidence for any purpose but determining whether Pelkey had at least two prior convictions for violating court orders, an element of the offense.

Therefore, given the totality of the circumstances, Pelkey was not prejudiced by the language of paragraph one of the no-contact order and as such the outcome of the trial would not have been affected by the issuance of a limiting instruction.

b. The Evidence Was Overwhelming And A Limiting Instruction Would Not Have Affected The Outcome Of The Trial.

In this case, the testimony showed that on the date in question Pelkey and West were in an apartment together. RP 65-87. Officer Clemmons approached the apartment, leaned close to the door, and heard a male and a female voice having a conversation inside the apartment (not a TV). RP 71. Officer Clemmons knocked and West answered the door. RP 71. After talking with West, Officer Clemmons believed Pelkey was inside in violation of the no-contact order. RP 73-74. Officer Clemmons obtained permission to enter and located Pelkey in the apartment. RP 74-75. No contrary evidence was presented.

The defense conceded that the no-contact order was in place and went on to note in closing argument that the defense was only focusing on whether the State had proved a knowing violation. RP 126, 128.

Given the overwhelming evidence presented at trial, the issuance of a limiting instruction would not, within reasonable probabilities, have materially affected the outcome of the trial.

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Pelkey's conviction of Domestic Violence Felony Violation of a Court Order.

DATED this 11<sup>th</sup> day of May, 2012.

Respectfully submitted,

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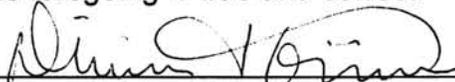
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Kock, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, <sup>and copy of Cert. of Service by mail</sup> in STATE V. PELKEY, Cause No. 67415-3-1, 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.

  
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Name Divina Tomasini  
Done in Kent, Washington

  
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Date