

No. 71818-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREA LYNN LISTER,

Appellant.

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

APPELLANT'S OPENING BRIEF

RECEIVED
2011 MAR 2 AM 9:33

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
[Handwritten signature]

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT..... 7

1. The information omitted an essential element of felony stalking by failing to specify which protective order Ms. Lister allegedly violated..... 7

a. In order to satisfy article I, section 22 of the Washington Constitution, the information must contain all essential elements of the charged crime..... 7

b. An essential element of the crime of felony stalking that must be included in the charging document is the specific protective order the accused allegedly violated..... 9

c. The information is constitutionally deficient because it omitted the essential element of the specific protective order Ms. Lister allegedly violated 12

2. Ms. Lister’s constitutional right to jury unanimity was violated because the jury was not instructed it must agree on the particular protective order she violated or her particular conduct that violated the order..... 13

a. In Washington, a criminal defendant has a constitutional right to a unanimous jury verdict as to the particular criminal act committed..... 13

b. Prejudicial constitutional error occurred because the jury was not instructed it must unanimously agree as to the particular protective order Ms. Lister violated..... 16

i.	Ms. Lister had a constitutional right to a unanimous jury verdict as to which protective order she violated	16
ii.	The error in failing to provide a unanimity instruction was not harmless beyond a reasonable doubt.....	19
c.	<i>Prejudicial constitutional error occurred because the jury was not instructed it must be unanimous as to the particular acts Ms. Lister committed that constituted violation of a protective order</i>	22
i.	Ms. Lister had a constitutional right to a unanimous jury verdict as to which of her actions violated a protective order.....	22
ii.	The failure to provide a unanimity instruction was not harmless beyond a reasonable doubt	23
3.	A double jeopardy violation occurred because the trial court did not merge the conviction for violation of a protection order into the conviction for felony stalking	25
E.	<u>CONCLUSION</u>	29

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 9	26
Const. art. I, § 22	7, 14
U.S. Const. amend V	26
U.S. Const. amend VI.....	14

Washington Cases

<u>City of Bothell v. Kaiser</u> , 152 Wn. App. 466, 217 P.3d 339 (2009).....	10, 11, 13, 17
<u>City of Seattle v. Termain</u> , 124 Wn. App. 798, 103 P.3d 209 (2004).....	10, 11, 13, 17
<u>In re Pers. Restraint of Strandy</u> , 171 Wn.2d 817, 256 P.3d 1159 (2011).....	29
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005)	26
<u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	14, 23
<u>State v. Johnson</u> , __ Wn. App. __, 342 P.3d 338 (2015)	10, 23, 28
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	13, 15, 19, 22, 23, 24, 25
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991)	8
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989).....	8
<u>State v. Moavenzadeh</u> , 135 Wn.2d 359, 956 P.2d 1097 (1998).....	8
<u>State v. Moultrie</u> , 143 Wn. App. 387, 177 P.3d 776 (2008).....	15

<u>State v. Parmelee</u> , 108 Wn. App. 702, 32 P.3d 1029 (2001)....	10, 27, 29
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	14, 19, 23
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008)	10
<u>State v. Vladovic</u> , 99 Wn.2d 413, 662 P.2d 852 (1983).....	26

United States Supreme Court Cases

<u>Albernaz v. United States</u> , 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).....	26
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	15

Statutes

RCW 26.50.110	10, 16, 19, 27
RCW 26.50.110(1)	16, 19
RCW 9A.46.110	6, 9, 10, 16, 22, 27
RCW 9A.46.110(5)(a)	9
RCW 9A.46.110(5)(b)(ii).....	6, 9, 10, 16, 22, 27

Court Rules

RAP 2.5(a)(3)	15
---------------------	----

A. ASSIGNMENTS OF ERROR

1. Andrea Lister's constitutional right to notice was violated because the information omitted an essential element of felony stalking.

2. Ms. Lister's constitutional right to jury unanimity was violated because the jury was not instructed it must agree on the particular protective order she violated or her particular conduct that violated the order.

3. Ms. Lister's constitutional right to be free from double jeopardy was violated because the court did not merge the conviction for violation of a no-contact order into the conviction for felony stalking.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A charging document is constitutionally deficient if it does not include all essential elements of the crime. An essential element of the crime of felony stalking based on the violation of a protective order is the specific order the accused allegedly violated. Is the information charging felony stalking constitutionally deficient where it omits the essential element of the specific protective order Ms. Lister allegedly violated?

2. To safeguard a defendant's constitutional right to a unanimous jury verdict, when the State presents evidence of multiple acts, any one of which could be the basis of the charge, either the jury must be instructed to agree on the particular act, or the State must elect the act it is relying upon. Here, the State charged felony stalking based on the violation of a protective order and presented evidence of multiple protective orders and multiple acts that could form the basis of the charge. Was Ms. Lister's constitutional right to jury unanimity violated where the jury was not instructed it must unanimously agree as to the particular protective order or criminal acts, and the State did not elect the particular order or criminal acts it was relying upon?

3. When the State charges both felony stalking based on violation of a protective order, and misdemeanor violation of the same protective order, the conviction for violation of a protective order merges into the conviction for felony stalking. Was Ms. Lister's constitutional right to be free from double jeopardy violated where the trial court did not merge the conviction for violation of a protective order into the conviction for felony stalking, where it is possible the jury relied upon the same protective order violation to find Ms. Lister guilty of both charges?

C. STATEMENT OF THE CASE

Andrea Lister and Daniel Wiseman had a romantic relationship. Beginning in 2008, Ms. Lister would come to Mr. Wiseman's appliance store in West Seattle two or three times a week to pick up cardboard boxes for recycling. 3/27/14RP 41-43; 3/31/14RP 130-31. The couple gradually became friends and then started dating. 3/27/14RP 43; 3/31/14RP 134-36. In time, they became sexually intimate. 3/27/14RP 45-47; 3/31/14RP 147.

Mr. Wiseman promised Ms. Lister that their relationship would be exclusive and that he would not sleep with anyone else. 3/31/14RP 146. Eventually, though, Ms. Lister found out that Mr. Wiseman was in fact seeing other women. 3/31/14RP 162; 4/01/14RP 148.

One of the women Mr. Wiseman was dating was Shirley Honey, who lived in his condominium building in West Seattle. 3/27/14RP 41, 59, 73. On August 23, 2011, Mr. Wiseman returned to Seattle from an out-of-town convention and met Ms. Honey at the airport. 3/27/14RP 78-79. The two drove back to the condominium building in separate cars. 3/27/14RP 79.

Ms. Lister was waiting for Mr. Wiseman to come home, sitting outside the building in her yellow Jeep. 3/31/14RP 169. When she

saw him and Ms. Honey arrive home together, she concluded they must be having an affair and he had lied about it. 3/31/14RP 176-78. Her heart was broken because he had promised not to cheat on her. 3/31/14RP 179.

Ms. Lister entered the lobby of the building and confronted Ms. Honey, who had just stepped into the elevator. 3/31/14RP 182. Ms. Lister asked Ms. Honey if she was sleeping with Mr. Wiseman, but Ms. Honey would not talk to her. 3/31/14RP 185. Ms. Lister and Ms. Honey reached for the elevator button at the same time and their hands touched. 3/31/14RP 188. Ms. Lister did not strike Ms. Honey. 3/31/14RP 188.

Meanwhile, Mr. Wiseman entered the lobby. He stepped on Ms. Lister's ankle and grabbed her by the arm, yanking her out of the elevator. 3/27/14RP 83; 3/31/14RP 192. Ms. Lister slapped him so that he would let go of her arm and she could get away. 3/31/14RP 192. Mr. Wiseman said she slapped him four times. 3/27/14RP 84-85. Ms. Lister yelled at him, asking if he had slept with Ms. Honey and taken her with him on his business trip. 3/27/14RP 82; 3/31/14RP 194. Ms. Lister and Mr. Wiseman tussled and then Ms. Lister left the building and sat in her Jeep. 3/31/14RP 194, 203.

Mr. Wiseman called 911 on his cell phone. 3/27/14RP 82; 3/31/14RP 194. The police arrived. 3/27/14RP 86. Neither Mr. Wiseman nor Ms. Honey was injured. 3/26/14RP 30, 33, 36. The officers contacted Ms. Lister in her Jeep and arrested her. 3/26/14RP 31-35.

After that date, several different no-contact orders were issued over the next two years, in both King County Superior Court and Seattle Municipal Court. Exhibit 6-10, 22-24. The no-contact orders prohibited Ms. Lister from contacting Mr. Wiseman and from coming near his residence or workplace. Id.

Mr. Wiseman said Ms. Lister violated the terms of the no-contact orders several times over the next two years. He said she called him repeatedly on his cell phone and at his workplace. 3/27/14RP 18-21, 101-02, 133-34, 138; 3/31/14RP 85. She sent him a few letters. 3/27/14RP 127-28, 143-44; Exhibit 16-18. She visited him in the hospital when he stayed there overnight for a medical procedure. 3/27/14RP 130. She visited him at his store and would not leave when asked to do so. 3/27/14RP 134-35. She followed him in his car with her Jeep. 3/27/14RP 132. One time, she approached him and a friend

of his outside his friend's building in West Seattle when Mr. Wiseman went there to pick her up for dinner. 3/27/14RP 139.

Ms. Lister was charged on July 18, 2013, with one count of felony stalking. CP 1-2. Although stalking is generally a gross misdemeanor, it may be elevated to a felony if the State charges and proves "the stalking violates any protective order protecting the person being stalked." RCW 9A.46.110(5)(b)(ii). Here, the State alleged "the stalking violates any protective order protecting Daniel Calvin Wiseman." CP 1. The charging period for the stalking charge was November 10, 2011, to June 1, 2013. CP 1.

The State also charged Ms. Lister with one count of fourth degree assault against Mr. Wiseman, and one count of fourth degree assault against Shirley Honey, arising from the incident that occurred on August 23, 2011. CP 1-2. Finally, the State charged Ms. Lister with one count of misdemeanor violation of a court order, alleging that between September 10 and October 13, 2011, she violated the terms of a no-contact order issued by the Seattle Municipal Court on August 25, 2011. CP 2.

At trial, the jury was not instructed that, in relation to the felony stalking charge, it must unanimously agree as to which no-contact order

Ms. Lister violated, or which incidents amounted to a violation of a no-contact order. See CP 197.

The jury found Ms. Lister guilty as charged of felony stalking; guilty as charged of fourth degree assault against Mr. Wiseman but not guilty of fourth degree assault against Ms. Honey; and guilty as charged of misdemeanor violation of a court order. CP 150-53.

Additional facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. The information omitted an essential element of felony stalking by failing to specify which protective order Ms. Lister allegedly violated

a. In order to satisfy article I, section 22 of the Washington Constitution, the information must contain all essential elements of the charged crime

It is a fundamental rule of criminal procedure that a charging document must include all essential elements of the crime, both statutory and non-statutory. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Const. art. I, § 22.¹ The information must also allege the particular facts supporting every element of the offense.

¹ Article I, section 22 of the Washington Constitution provides that “[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him.”

State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The primary purpose of the “essential elements” rule is to provide the accused with proper notice of the crime so that she can prepare an adequate defense. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991).

A defendant may challenge a constitutionally defective charging document for the first time on appeal. Id. at 102. When an information is challenged for the first time on appeal, it is construed liberally to determine whether the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Id. at 105. “If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.” State v. Moavenzadeh, 135 Wn.2d 359, 362-63, 956 P.2d 1097 (1998) (internal quotation marks and citation omitted).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge.

Vangerpen, 125 Wn.2d at 790.

- b. *An essential element of the crime of felony stalking that must be included in the charging document is the specific protective order the accused allegedly violated*

Ms. Lister was charged with one count of felony stalking under RCW 9A.46.110(5)(b)(ii).² CP 1. Ordinarily the crime of stalking is a gross misdemeanor. RCW 9A.46.110(5)(a). A person who stalks another is guilty of a class B felony if “the stalking violates any protective order protecting the person being stalked.” RCW 9A.46.110(5)(b)(ii).

² The statutory elements of the crime of stalking are as follows:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person. . . .

RCW 9A.46.110.

When proof of a particular fact elevates a crime from a gross misdemeanor to a felony, that fact is an “essential element” that must be proved to a jury beyond a reasonable doubt. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Thus, when the State charges felony stalking under RCW 9A.46.110(5)(b)(ii), an essential element of the crime is that the defendant “violate[d] any protective order protecting the person being stalked.”

To satisfy its burden of proving this essential element, the State must prove beyond a reasonable doubt that on at least two separate occasions, the defendant harassed or followed the victim in a manner that violated a protective order. State v. Johnson, __ Wn. App. __, 342 P.3d 338, 346 (2015).

Violation of a protection order is itself a crime defined elsewhere in the criminal code. State v. Parmelee, 108 Wn. App. 702, 710-11, 32 P.3d 1029 (2001); see RCW 26.50.110. When the State charges the crime of violation of a protection order, the specific order alleged to have been violated is an essential element that must be included in the charging document. City of Bothell v. Kaiser, 152 Wn. App. 466, 475-76, 217 P.3d 339 (2009); City of Seattle v. Termain, 124 Wn. App. 798, 804-05, 103 P.3d 209 (2004). That is because “the

culpable act necessary to establish the violation of a no-contact order is determined by the scope of the predicate order.” Termain, 124 Wn. App. at 804. Thus, “[t]he no-contact order is essential to prosecute the violation of the order. A conviction cannot be obtained without producing the order as it will identify the protected person or location and any allowance for contact or the expiration date.” Id.

If the charging document does not identify the order alleged to have been violated, or does not include other sufficient facts to apprise the defendant of her actions deemed to be in violation of the order, the charging document is constitutionally deficient. Kaiser, 152 Wn. App. at 475-76; Termain, 124 Wn. App. at 805.

Applying those principles to this case, it is apparent that when the State charges the crime of felony stalking based on the predicate crime of violation of a protective order, the charging document must specify the particular order allegedly violated. Kaiser, 152 Wn. App. at 475-76; Termain, 124 Wn. App. at 804-05. As in a case of simple violation of a protective order, the culpable act necessary to establish that the charged crime of felony stalking has occurred is determined by the scope of the underlying protective order allegedly violated. See Termain, 124 Wn. App. at 804. Thus, the charging document must

identify the order, or include other sufficient facts to apprise the defendant of her actions deemed to be in violation of the order. See Kaiser, 152 Wn. App. at 475-76; Termain, 124 Wn. App. at 805.

- c. *The information is constitutionally deficient because it omitted the essential element of the specific protective order Ms. Lister allegedly violated*

The information charging felony stalking alleged:

That the defendant ANDREA L. LISTER in King County, Washington, between or about November 10, 2011 and June 1, 2013, did, without lawful authority, intentionally and repeatedly harass or follow Daniel Calvin Wiseman; and Daniel Calvin Wiseman was reasonably placed in fear that the defendant intended to injure Daniel Calvin Wiseman, or another person or property of Daniel Calvin Wiseman, or property of another person; and the defendant either (i) intended to frighten, intimidate, or harass Daniel Calvin Wiseman, or (ii) knew or reasonably should have known that he was afraid, intimidated, or harassed even if the defendant did not intend to place Daniel Calvin Wiseman in fear or intimidate or harass Daniel Calvin Wiseman; and *the stalking violates any protective order protecting Daniel Calvin Wiseman*

CP 1 (emphasis added).

It is apparent from the face of the document that the State did not allege the essential element of the protective order Ms. Lister supposedly violated, nor did it allege sufficient facts to apprise her of her actions deemed to be in violation of the order. The information is

therefore constitutionally deficient because it did not adequately inform Ms. Lister of the nature of the charge. See Kaiser, 152 Wn. App. at 475-76; Termain, 124 Wn. App. at 805.

If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the Court must presume prejudice. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93. Because an essential element is missing from the information, Ms. Lister's conviction for felony stalking must be reversed and the charge dismissed without prejudice.

2. Ms. Lister's constitutional right to jury unanimity was violated because the jury was not instructed it must agree on the particular protective order she violated or her particular conduct that violated the order

a. In Washington, a criminal defendant has a constitutional right to a unanimous jury verdict as to the particular criminal act committed

In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the prosecution presents evidence of

several acts that could form the basis of the charge, either the State must tell the jury which act to rely upon in its deliberations, or the court must instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). Failure to follow one of these options is “violative of a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” Kitchen, 110 Wn.2d at 409; Const. art. I, § 22; U.S. Const. amend VI. “The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Kitchen, 110 Wn.2d at 411.

The Petrich rule applies in cases where the State presents evidence of “several distinct acts” and does not apply where the evidence indicates a “continuing course of conduct.” State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Id. For example, “where the evidence involves conduct at different times and places, then the evidence tends to show ‘several distinct acts.’” Id.

When a unanimity instruction is required but the trial court failed to provide it, the jury verdict will be affirmed only if the error was “harmless beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 409 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The error is presumed prejudicial and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each alleged act established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. If there was conflicting testimony as to any of the alleged acts, or a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred, the conviction must be reversed. Id. at 412.

Failure to provide a unanimity instruction when required is a manifest constitutional error that may be raised for the first time on appeal. State v. Moultrie, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3).

- b. *Prejudicial constitutional error occurred because the jury was not instructed it must unanimously agree as to the particular protective order Ms. Lister violated*
 - i. Ms. Lister had a constitutional right to a unanimous jury verdict as to which protective order she violated

To prove the crime of felony stalking, the State was required to prove beyond a reasonable doubt that the alleged stalking “violated a protective order protecting Daniel Calvin Wiseman.” CP 197; RCW 9A.46.110(5)(b)(ii). To prove that Ms. Lister violated a protective order, the State was required to prove beyond a reasonable doubt that: (1) the order was granted pursuant to one of several qualifying statutory provisions; (2) Ms. Lister knew of the order; and (3) she violated a restraint provision of the order. RCW 26.50.110(1).³

³ RCW 26.50.110(1) sets forth the elements of the crime of violation of a protective order:

(1)(a) Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10. 99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;

(ii) A provision excluding the person from a

As discussed above, proof of the specific protective order Ms. Lister allegedly violated was an essential element of the crime that the State was required to prove beyond a reasonable doubt. See Kaiser, 152 Wn. App. at 475-76; Termain, 124 Wn. App. at 804-05. The State could not prove Ms. Lister violated a protective order without identifying the specific order because “the culpable act necessary to establish the violation of a no-contact order is determined by the scope of the predicate order.” Termain, 124 Wn. App. at 804. “A conviction cannot be obtained without producing the order as it will identify the protected person or location and any allowance for contact or the expiration date.” Id.

Here, the State presented evidence of *several* different protective orders that could have formed the basis of the charge. Exhibit 6-10, 22-24. The jury was instructed that, in order to convict

residence, workplace, school, or day care;

(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;

(iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or

(v) A provision of a foreign protection order specifically indicating that a violation will be a crime. . . .

Ms. Lister, it must unanimously agree that she “violated a protective order protecting Daniel Calvin Wiseman.” CP 197. But the jury was not instructed it must unanimously agree as to *which* of the several alleged protective orders Ms. Lister violated. Instead, the jury was specifically instructed it could rely upon *any* of the alleged protective orders in reaching its verdict for the stalking charge.⁴

Compounding the unanimity problem, the State did not elect which of the several alleged protective orders it was relying upon. To the contrary, in closing argument, the deputy prosecutor specifically informed the jury it could rely upon *any* of the no-contact orders that were admitted into evidence. 4/02/14RP 34. The deputy prosecutor stated, “Ms. Lister’s action in this case violated *a number of protection orders.*” 4/02/14RP 34 (emphasis added).

⁴ The court instructed the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of court orders other than the court order issued by the Seattle Municipal Court on August 25, 2011. *This evidence may be considered by you only for the purpose of evaluating the State’s charge of stalking, as charged in Count I.* You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 195 (emphasis added).

Because the jury was not instructed it must agree that the same underlying protective order was violated, and the prosecutor did not elect which order it was relying upon, Ms. Lister's constitutional right to jury unanimity was violated. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570.

- ii. The error in failing to provide a unanimity instruction was not harmless beyond a reasonable doubt

The error is presumed prejudicial and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each alleged protective order was violated. See Kitchen, 110 Wn.2d at 411. If there was conflicting testimony as to whether any of the alleged orders supported the charge, or if a rational juror could have entertained reasonable doubt as to whether one or more of them was actually violated, the conviction must be reversed. Id. at 412.

A rational juror could have easily doubted whether Ms. Lister violated some of the protective orders admitted into evidence. First, to prove Ms. Lister violated a protective order, the State was required to prove beyond a reasonable doubt that she had actual knowledge of the order. RCW 26.50.110(1). Ms. Lister testified that she was never served with the protective order issued in King County Superior Court

on April 19, 2012, which was admitted as Exhibit 10. 4/0114RP 112. She was not present in court when the order was entered and she did not sign the order. See Exhibit 10. Consistent with Ms. Lister's testimony, there is no evidence that she received actual notice of the order until August 12, 2012, when she appeared in court and obtained an order terminating the protective order. Exhibit 11.

Second, there was either no evidence, or only conflicting evidence, that the restraint provisions of at least some of the orders were actually violated. For example, the first temporary order for protection was issued in King County Superior Court on August 24, 2011, and was effective until September 7, 2011. Exhibit 6. Ms. Lister was in jail following the August 23, 2011, incident for six or seven days. 4/01/14RP 16. Mr. Wiseman testified she called him from jail and asked him to bail her out and that he did so. 3/27/14RP 100-01. But Ms. Lister testified Mr. Wiseman did *not* bail her out on that occasion. 4/01/14RP 17. She admitted she had contact with Mr. Wiseman by telephone sometime after the incident, but she could not say what day that was. 4/01/14RP 18. Thus, there was no proof beyond a reasonable doubt that Ms. Lister violated a restraint provision of that first protective order during the time it was in effect.

The first temporary order for protection was reissued in King County Superior Court three times, with a final Order for Protection entered April 19, 2012. See Exhibit 7-10. One of the temporary orders was in effect from February 8, 2012, until April 19, 2012. Exhibit 9. The State did not present uncontroverted evidence that Ms. Lister violated any restraint provision of that order during that timeframe. Ms. Lister admitted having an Easter basket delivered to Mr. Wiseman's daughter in April 2012, but testified she believed her actions did not violate the protective order. 4/01/14RP 131. Indeed, the protective order forbade Ms. Lister from coming within 500 feet of Mr. Wiseman's daughter's residence, but did not prohibit her from having something delivered to the daughter's residence by a third party. Exhibit 6, 9. Likewise, Mr. Wiseman testified Ms. Lister came into the appliance store one day in April 2012, and called him several times during spring 2012, but he did not say whether that was before April 19, the date the temporary protective order expired. 3/27/14RP 133, 137. No other evidence was presented to show Ms. Lister violated that protective order while it was in effect.

Similarly, a temporary order for protection was issued in King County Superior Court, under a separate cause number, on May 6,

2013, which was effective until August 26, 2013. Exhibit 13. But no evidence was presented to show Ms. Lister violated any restraint provision of that order during that timeframe.

In sum, because there is either no evidence, or only conflicting evidence, to prove that Ms. Lister violated at least some of the protective orders entered into evidence, the error in failing to instruct the jury it must unanimously agree as to which order was violated is not harmless beyond a reasonable doubt. The felony harassment conviction must be reversed. Kitchen, 110 Wn.2d at 411-12.

c. Prejudicial constitutional error occurred because the jury was not instructed it must be unanimous as to the particular acts Ms. Lister committed that constituted violation of a protective order

i. Ms. Lister had a constitutional right to a unanimous jury verdict as to which of her actions violated a protective order

As stated, to prove the crime of felony stalking, the State was required to prove beyond a reasonable doubt that Ms. Lister “violated a protective order protecting Daniel Calvin Wiseman.” CP 197; RCW 9A.46.110(5)(b)(ii). To satisfy its burden of proof, the State was required to prove beyond a reasonable doubt that “on at least two separate occasions,” Ms. Lister harassed or followed Mr. Wiseman in

violation of a protection order. Johnson, 342 P.3d at 346. Because the crime requires proof of multiple “distinct acts,” the Petrich rule applies. See Handran, 113 Wn.2d at 17.

The jury was instructed that, in order to convict Ms. Lister of felony stalking, it must find beyond a reasonable doubt that she “violated a protective order protecting Daniel Calvin Wiseman.” CP 197. But the jury was not instructed it must be unanimous as to which of Ms. Lister’s alleged acts amounted to a violation of a protective order. Moreover, the State did not elect the specific acts it was relying upon to prove felony stalking.

Because the jury was not instructed it must unanimously agree as to which acts violated a protective order, and because the prosecutor did not elect the acts it was relying upon, Ms. Lister’s constitutional right to jury unanimity was violated. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570.

- ii. The failure to provide a unanimity instruction was not harmless beyond a reasonable doubt

The constitutional error in failing to provide a unanimity instruction was not harmless beyond a reasonable doubt because there was either no evidence, or only conflicting evidence, that some of Ms.

Lister's alleged actions actually violated a protective order. See Kitchen, 110 Wn.2d at 411-12.

For example, during closing argument, the prosecutor told the jury that, in considering the charge of felony stalking, it could rely upon the incident in 2012 when Ms. Lister had an Easter basket delivered to Mr. Wiseman's daughter's residence. 4/02/14RP 29. Ms. Lister admitted having an Easter basket delivered to Mr. Wiseman's daughter. 4/01/14RP 131. But although a protective order prohibited Ms. Lister from coming within 500 feet of Mr. Wiseman's daughter's residence, it did not prohibit her from having something delivered to the daughter's residence *by a third party*. See Exhibit 6, 9. Thus, the State did not present uncontroverted proof that the incident actually violated a protective order.

Similarly, the prosecutor argued the jury could rely upon the evidence that Ms. Lister tried to call Mr. Wiseman several times from jail. 4/02/14RP 30. A jail phone record system custodian testified that several calls were made to Mr. Wiseman's telephone number from jail, using Ms. Lister's unique code number, between November 22, 2012, and May 11, 2013. 3/31/14RP 73; Exhibit 19. Ms. Lister admitted she was in jail from November 22, 2012, through April 6, 2013. 4/01/14RP

56. She also admitted she had tried to call Mr. Wiseman from jail. 4/01/14RP 57. But Ms. Lister testified that some or none of those calls actually went through. 4/01/14RP 61, 144. Also, another jail inmate had borrowed her code number and must have made some of those calls. 4/01/14RP 62. Ms. Lister had encouraged the other inmate to call Mr. Wiseman because Ms. Lister thought he could help the inmate contact someone the woman was trying to reach. 4/01/14RP 63. Moreover, several of the calls were associated with another inmate's code number. 3/31/14RP 86, 92; Exhibit 19. Thus, the State did not present uncontroverted proof that each of the jail calls violated a protective order.

Because there is either no evidence, or only conflicting evidence, to prove that some of Ms. Lister's alleged actions violated a protective order, the error in failing to provide a unanimity instruction is not harmless beyond a reasonable doubt. The felony harassment conviction must be reversed. Kitchen, 110 Wn.2d at 411-12.

3. A double jeopardy violation occurred because the trial court did not merge the conviction for violation of a protection order into the conviction for felony stalking

State and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. State v.

Vladovic, 99 Wn.2d 413, 422, 662 P.2d 852 (1983); Albernaz v. United States, 450 U.S. 333, 343-44, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981); Const. art. I, § 9; U.S. Const. amend V. A court entering multiple convictions for the same offense violates double jeopardy. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005). The Legislature has the power to define offenses and thus whether two offenses are separate offenses hinges upon whether the Legislature intended them to be separate. See Id. at 771-72.

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the Legislature, the Court presumes the Legislature intended to punish both offenses through a greater sentence for the greater crime. Id. at 772-73. The two offenses will merge unless the facts of the individual case show “there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” Id. at 778-89 (internal quotation marks and citation omitted). When two offenses merge, entering separate convictions for each violates the double jeopardy prohibition. Id. at 780.

It is already established that, when the State charges both felony stalking based on the allegation that the stalking violated a protective order, and misdemeanor violation of the same protective order, the conviction for violation of a protective order merges into the conviction for felony stalking. Parmelee, 108 Wn. App. at 710-11. Violation of a protective order is itself a crime defined elsewhere in the criminal code. Id.; see RCW 26.50.110. It is also an essential element of the crime of felony stalking under RCW 9A.46.110(5)(b)(ii) and elevates the crime of stalking from a gross misdemeanor to a felony. Parmelee, 108 Wn. App. at 710-11. Therefore, under the merger doctrine, the State may not obtain separate convictions for both felony stalking and misdemeanor violation of a protective order when it relies upon the same protective order to prove both crimes. Id.

Here, the State charged both felony stalking based on violation of a protective order, and misdemeanor violation of a protective order. CP 1-2. The jury was instructed that, to convict Ms. Lister of the crime of misdemeanor violation of a protective order, it must find she violated the provisions of a no-contact order that was in effect between September 10 and October 13, 2011. CP 214. In closing argument, the deputy prosecutor informed the jury that the charge was based on a no-

contact order that was issued in Seattle Municipal Court on August 25, 2011. 4/02/14RP 40; Exhibit 22. The prosecutor stated Ms. Lister violated the order when she sent a letter to Mr. Wiseman on October 13, 2011. 4/02/14RP 40.

To prove felony stalking, the State was required to prove that “on at least two separate occasions,” Ms. Lister harassed or followed Mr. Wiseman in violation of a protective order. Johnson, 342 P.3d at 346. Several protective orders were entered into evidence but the jury was not instructed as to *which* protective order it should rely upon to reach a verdict for the felony stalking charge. See CP 197. In closing argument, the deputy prosecutor stated the jury could rely upon any of the protection orders entered into evidence. 4/02/14RP 34. The court similarly instructed the jury that it could rely upon any of the alleged protective orders in reaching its verdict for the stalking charge. CP 195. Thus, the record does not show that the jury did *not* rely upon the protective order issued in Seattle Municipal Court on August 25, 2011, which was the basis of the misdemeanor violation of a protective order charge, to find Ms. Lister also guilty of felony stalking.

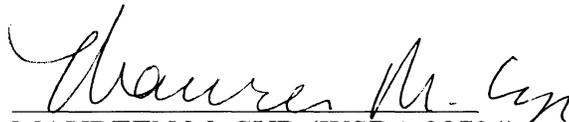
The conviction for misdemeanor violation of a protective order merges into the conviction for felony stalking because the jury might

have relied upon the same protective order to find Ms. Lister guilty of both crimes. See Parmelee, 108 Wn. App. at 710-11. Therefore, the conviction for misdemeanor violation of a protective order must be vacated. See In re Pers. Restraint of Strandy, 171 Wn.2d 817, 820, 256 P.3d 1159 (2011) (when two convictions violate the Double Jeopardy Clause, the remedy is to vacate the conviction for the lesser offense).

E. CONCLUSION

Ms. Lister's constitutional right to notice was violated because the State did not include all essential elements of felony stalking in the information, requiring the conviction be reversed and the charge dismissed without prejudice. The conviction for felony stalking must be reversed for the additional reason that Ms. Lister's constitutional right to jury unanimity was violated. Finally, Ms. Lister was convicted twice for the same offense, requiring that the conviction for misdemeanor violation of a protective order be vacated.

Respectfully submitted this 27th day of February, 2015.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71818-5-I
v.)	
)	
ANDREA LISTER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] ANDREA LISTER (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF FEBRUARY, 2015.

X _____


Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710