

Supreme Court No. 82094-5
Court of Appeals No. 60248-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
APR 18 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
CIPRIANO B. NONOG,
Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2009 APR 10 P 3:36
BY RONALD R. CARPENTER
CLERK

MAUREEN M. CYR
Attorney for Petitioner

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

ORIGINAL
FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ISSUES PRESENTED..... 2

C. STATEMENT OF THE CASE 3

D. ARGUMENT 5

THE INFORMATION WAS CONSTITUTIONALLY DEFECTIVE
BECAUSE IT OMITTED AN ESSENTIAL ELEMENT OF THE
CRIME 5

1. An information is constitutionally sufficient only if it sets forth
every essential element of the crime 5

2. Where commission of an underlying offense is an element of
the crime, the information is constitutionally sufficient only if
it specifies the particular underlying offense, even when
challenged for the first time on appeal..... 7

a. Where commission of an underlying offense is an
element of the crime, the particular underlying offense
must be specified in the information..... 8

b. Where commission of an underlying offense is an
essential element of the crime, the State may not merely
cite to the underlying statute allegedly violated..... 11

3. The separate allegations of several distinct "domestic
violence" crimes stated in other counts of the information did
not cure the constitutional defect in count IV 14

E. CONCLUSION..... 20

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. 1, § 22..... 5

U.S. Const. amend. 14..... 5

U.S. Const. amend. 6..... 5

Washington Supreme Court

City of Auburn v. Brooke, 119 Wn.2d 623, 836 P.2d 212 (1992)... 13

State v. Anderson, 10 Wn.2d 167, 116 P.2d 346 (1941)..... 9

State v. Fillpot, 51 Wash. 223, 98 P. 659 (1908)..... 9

State v. Hopper, 118 Wn.2d 151, 822 P.2d 775 (1992) 7, 19

State v. Jeske, 87 Wn.2d 760, 558 P.2d 162 (1976)..... 12

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86
(1991)..... 6, 7, 11, 12, 19, 20

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989) .. 6, 11, 12, 19

State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992) 7

State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987) 7

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008)..... 6, 7

State v. Royse, 66 Wn.2d 552, 403 P.2d 838 (1965)..... 12

State v. Taylor, 140 Wn.2d 229, 996 P.2d 571 (2000) 5

State v. Taylor, 47 Wn.2d 213, 287 P.2d 298 (1955) 15, 16, 20

State v. Unosawa, 29 Wn.2d 578, 188 P.2d 104 (1948)

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995)..... 6, 7

State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007)..... 9

Washington Court of Appeals

State v. Bryant, 65 Wn. App. 428, 828 P.2d 1121 (1992) 9

State v. Gill, 103 Wn. App. 435, 13 P.3d 646 (2000)..... 14

State v. Green, 101 Wn. App. 885, 6 P.3d 53 (2000)..... 13

State v. Johnstone, 96 Wn. App. 839, 982 P.2d 119 (1999) 12

State v. Medlock, 86 Wn. App. 89, 935 P.2d 693 (1997) 9

State v. Nonog, 145 Wn. App. 802, 187 P.3d 335 (2008)4, 8, 10, 14

State v. Pope, 100 Wn. App. 624, 999 P.2d 51 (2000) 9

State v. Ryan, 192 Wash. 160, 73 P.2d 735 (1937)..... 9

Statutes

Former RCW 9.05.070 13

RCW 10.99.020..... 3, 8, 13

RCW 9A.36.150 1, 8, 9

RCW 9A.52.020(1)..... 10

RCW 9A.52.025(1)..... 10

RCW 9A.52.030(1)..... 10

Rules

CrR 2.1(a)(1)..... 15

Other Jurisdictions

<u>Browning v. State</u> , 165 N.E. 566 (Ohio 1929)	18
<u>Davis v. State</u> , 371 So.2d 721 (Fla. App. 1979)	18
<u>McClintock v. United States</u> , 60 F.2d 839 (10th Cir. 1932)	17
<u>People v. Brinson</u> , 739 P.2d 897 (Colo. App. 1987).....	17
<u>People v. Hall</u> , 96 Ill.2d 315, 450 N.E.2d 309 (Ill. 1982).....	19
<u>Perry v. State</u> , 8 S.E.2d 425 (Ga. App. 1940)	18
<u>Smith v. State</u> , 571 S.W.2d 917 (Tex. Crim. App. 1978).....	18
<u>State v. Green</u> , 376 A.2d 424 (Del. Super. 1977).....	18
<u>State v. Johnson</u> , 722 P.2d 1266 (Or. App. 1985).....	18
<u>State v. Rector</u> , 155 S.E. 385 (S.C. 1930), <u>overruled on other grounds by Evans v. State</u> , 611 S.E.2d 510 (S.C. 2005).....	18
<u>State v. Vaughan</u> , 117 S.E. 127 (W.Va. 1923)	18
<u>State v. White</u> , 266 P. 415 (Idaho 1928)	18
<u>State v. Wilson</u> , 337 S.E.2d 470 (N.C. 1985)	18
<u>United States v. Gordon</u> , 253 F.2d 177 (7th Cir. 1958)	17
<u>United States v. Huff</u> , 512 F.2d 66 (5th Cir. 1975)	17
<u>United States v. Knowles</u> , 29 F.3d 947 (5th Cir. 1994)	17
<u>United States v. Miller</u> , 774 F.2d 883 (8th Cir. 1985)	17
<u>United States v. Rodriguez-Gonzales</u> , 358 F.3d 1156 (9th Cir: 2004)	16
<u>United States v. Smith</u> , 44 F.3d 1259 (4th Cir. 1995).....	16

Usary v. State, 112 S.W.2d 7 (Tenn. 1937)..... 18

Walker v. United States, 176 F.2d 796 (9th Cir. 1949)..... 16

Other Authorities

5 Wayne R. LaFave, et al., Criminal Procedure § 19.3(a) (3rd ed. 2007) 11

A. SUMMARY OF APPEAL

Cipriano Nonog was charged and convicted of the crime of interfering with domestic violence reporting, which contains the statutory element that the defendant "[c]ommit[ed] a crime of domestic violence, as defined in RCW 10.99.020." RCW 9A.36.150(1)(a). It is well established that where the commission of an underlying offense is an element of a crime, the State must specify in the information the particular underlying offense. Simply citing to the underlying statute allegedly violated does not provide the defendant adequate notice and is not sufficient to satisfy due process. Because the information here merely alleged Mr. Nonog "committed a crime of domestic violence as defined by RCW 10.99.020," and did not specify the particular underlying domestic violence crime, it is constitutionally deficient.

Moreover, the constitutional deficiency is not cured simply because other counts of the multiple-count information separately alleged Mr. Nonog committed several distinct "domestic violence" crimes. The rule is long-standing and well established that each count of a multiple-count information must stand on its own and contain every element of the charged crime, unless allegations from the other counts are expressly incorporated. This is an integral

component of the essential elements rule and therefore applies even when the information is challenged for the first time on appeal.

B. ISSUES PRESENTED

1. The rule is well established that where commission of an underlying offense is an element of a crime, the State must specify in the information the particular underlying offense and may not simply cite to the statute allegedly violated. Where the information merely alleged Mr. Nonog "committed a crime of domestic violence as defined by RCW 10.99.020," and did not specify the underlying offense, does it violate the essential elements rule?

2. The rule is long-standing and well established that each count of a multiple-count information must stand on its own and contain every essential element of the charged crime, unless allegations from other counts are expressly and definitely incorporated. Is the omission of an element from count IV cured by separate allegations in other counts, where those allegations were not expressly incorporated into count IV?

C. STATEMENT OF THE CASE

The State charged¹ Mr. Nonog with three counts of "Domestic Violence Felony Violation of a Court Order" (counts I, III, and V); one count of "Residential Burglary - Domestic Violence" (count II), and one count of "Interfering with Domestic Violence Reporting" (count IV). CP 10-12. The crimes charged in counts I, II, and IV allegedly occurred on March 30, 2006; those in count III on April 8; and those in count V on April 16. CP 10-12. After a jury trial, Mr. Nonog was convicted of counts I, II, and IV and acquitted of count V, and the jury was unable to reach a verdict as to count III. CP 65, 66, 68, 70, 79-81.

Mr. Nonog appealed, arguing the information was constitutionally defective, as count IV did not set forth all the essential elements of the crime of interfering with domestic violence reporting. Specifically, the information alleged Mr. Nonog

having committed a crime of domestic violence as defined by RCW 10.99.020, did intentionally prevent or attempt to prevent Nanette Estandian, the victim of that crime, from calling a 911 emergency system, obtaining medical assistance, or making a report to any law enforcement official.

¹ A copy of the information is attached as an appendix.

Appendix. Relying on Division Two's decision in State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001), Mr. Nonog argued that, because the information did not specify the particular underlying crime of domestic violence he allegedly committed, it was constitutionally defective.

In its decision affirming the conviction, Division One expressly disagreed with Division Two in Clowes and held the particular underlying crime of domestic violence is not an essential element of the crime of interfering with domestic violence reporting, but is merely a "supporting fact." State v. Nonog, 145 Wn. App. 802, 811, 187 P.3d 335 (2008). Further, the court held that, because Mr. Nonog challenged the information for the first time on appeal, the court could look to other counts of the information to supply the missing fact. Id. at 809-11. This Court granted review.

D. ARGUMENT

THE INFORMATION WAS CONSTITUTIONALLY DEFECTIVE BECAUSE IT OMITTED AN ESSENTIAL ELEMENT OF THE CRIME

1. An information is constitutionally sufficient only if it sets forth every essential element of the crime. It is a fundamental principle of criminal procedure, embodied in the state² and federal³ constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusations before the State may prosecute and convict him of a crime. The judicially approved means of ensuring constitutionally adequate notice is to require a charging document set forth the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This "essential elements rule" has long been settled law in Washington and is constitutionally mandated. State v.

² Article 1, section 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof."

³ The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation." In addition, the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995)).

All essential elements of the crime must be included in the information so as to apprise the accused of the charges and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense.

State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Every material element of the charge, along with all essential supporting facts, must be set forth with clarity. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 97.

The constitutional requirement that the information contain every essential element of the crime is not relaxed simply because the challenge is raised for the first time on appeal. But for post-verdict challenges, the charging document will be construed liberally and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. Nonetheless, an information cannot be upheld, regardless of when the challenge is raised, if it does not contain all the essential elements, as "the most liberal possible reading cannot cure it." State v. Hopper, 118

Wn.2d 151, 157, 822 P.2d 775 (1992). In other words, the strict standard of review set forth in Kjorsvik "merely states the proper method of interpretation;" it does not alter the long-standing constitutional requirement that the information set forth every essential element of the crime. Id.

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. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. If so, the remedy is reversal and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93.

2. Where commission of an underlying offense is an element of the crime, the information is constitutionally sufficient only if it specifies the particular underlying offense, even when challenged for the first time on appeal. The Court of Appeals recognized that "commission of a crime of domestic violence as

defined by RCW 10.99.020" is a statutory element of the crime of interfering with domestic violence reporting, but held the particular underlying crime allegedly committed need not be set forth in the information because it is merely a "supporting fact." Nonog, 145 Wn. App. at 811. To the contrary, this Court's decisions consistently recognize that where commission of an underlying offense is an element of a crime, the particular underlying offense must be specified in the information, even when the information is construed liberally on appeal. Further, due process precludes the State from merely citing to the underlying statute allegedly violated, particularly in a case such as this, where the statute encompasses several different possible crimes. Thus, because the information did not specify the particular underlying crime Mr. Nonog allegedly committed, it is constitutionally defective.

a. Where commission of an underlying offense is an element of the crime, the particular underlying offense must be specified in the information. As the Court of Appeals recognized, "commi[sion of] a crime of domestic violence, as defined in RCW 10.99.020" is a statutory element of the crime of interfering with domestic violence reporting. RCW 9A.36.150(1)(a). The Legislature made clear its intent that the State plead and prove the

defendant committed a particular underlying domestic violence crime when it stated, "[c]ommission 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." RCW 9A.36.150(2).

It is well-settled that where commission of an underlying offense is an element of the crime charged, the underlying offense must be specified in the information. For the crime of felony murder, for instance, Washington courts consistently recognize the name of the underlying felony must be set forth in the information, even though each element of the underlying felony need not be alleged. State v. Medlock, 86 Wn. App. 89, 101, 935 P.2d 693 (1997); State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121 (1992); State v. Anderson, 10 Wn.2d 167, 180, 116 P.2d 346 (1941); State v. Ryan, 192 Wash. 160, 164-65, 73 P.2d 735 (1937); State v. Fillpot, 51 Wash. 223, 228, 98 P. 659 (1908).

Similarly, for the crime of bail jumping, the particular underlying crime the defendant was held for, charged with, or convicted of, is an element of the crime that must be charged. State v. Williams, 162 Wn.2d 177, 185, 170 P.3d 30 (2007) (citing State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000)).

Finally, for the crime of second degree assault based on the intent to commit an underlying felony, the specific felony the defendant intended to commit must be set forth in the information. State v. Royse, 66 Wn.2d 552, 555, 403 P.2d 838 (1965).

The crime of burglary is the exception that proves the rule. Where burglary is alleged, the information need not specify the crime the accused intended to commit inside the burglarized premises, but only because that is not a fact the State must prove to sustain the conviction. State v. Bergeron, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985); RCW 9A.52.020(1);.025(1);.030(1).

The crime of interfering with domestic violence reporting is like the crimes of felony murder, bail jumping, and second degree assault based on the intent to commit an underlying felony, and unlike the crime of burglary, in that the statute requires the State to prove a specific underlying crime. Thus, the State must name the particular underlying crime in the information.

In this case, the Court of Appeals viewed the particular underlying crime of domestic violence as merely a "supporting fact" rather than an essential element and thus, any omission of the fact might render the information vague but not constitutionally defective. Nonog, 145 Wn. App. at 810. But unlike other factual

allegations, the allegation that an accused committed an underlying crime entails conduct that is contrary to law. Courts generally draw a distinction between underlying conduct that amounts to a violation of law, and other acts that are simply evidence of an element of the crime charged. 5 Wayne R. LaFare, et al., Criminal Procedure § 19.3(a), at 261-62 (3rd ed. 2007). Allegations of conduct contrary to law are generally characterized as essential elements, because they represent a further refinement of the State's legal theory and do not simply provide further factual detail. Id. Thus, characterizing the particular underlying domestic violence offense allegedly committed as an essential element that must be set forth in the information, rather than merely a "supporting fact" whose omission has no constitutional ramifications, is consistent with this Court's decisions as discussed above and with the general practice in other jurisdictions.

b. Where commission of an underlying offense is an essential element of the crime charged, the State may not merely cite to the underlying statute allegedly violated. This Court has plainly and repeatedly reiterated that it is sufficient to charge in the language of a statute *only if* the statute defines the offense with certainty. Kjorsvik, 117 Wn.2d at 98-99; Leach, 113 Wn.2d at 686,

689. The question is whether the information "state[s] the acts constituting the offense in ordinary and concise language, not the name of the offense, but the statement of the acts constituting the offense." Leach, 113 Wn.2d at 689 (quoting Royse, 66 Wn.2d at 557). In other words, the information must "*allege facts supporting every element of the offense*," which is not the same as stating or listing every statutory element. Id. at 689.

The due process requirement that the information specify the acts constituting the crime charged in ordinary and concise language, precludes the State from simply including a statutory citation in place of an essential element. "This court has stated that defendants should not have to search for the rules or regulations they are accused of violating." Kjorsvik, 117 Wn.2d at 101 (citing State v. Jeske, 87 Wn.2d 760, 765, 558 P.2d 162 (1976)). Thus, where commission of an underlying offense is an essential element of the crime charged, the State may not merely cite to the underlying statute allegedly violated but must specify the particular underlying offense.

For example, in State v. Johnstone, 96 Wn. App. 839, 982 P.2d 119 (1999), the charged crime was intentional interference with owner's control, which required proof that the defendant

unlawfully took or retained, or attempted to take or retain, property used in "any enterprise described in RCW 9.05.060." Former RCW 9.05.070. Johnstone held the information must specify the nature of the enterprise alleged and could not simply refer to the numerical code section defining the term "enterprise." Id. at 845-46. That is because the defendant should not have "the burden of locating the relevant code . . . and determining the elements of the offense from the proper code section," which is "an unfair burden to place on an accused." Id. at 845 (quoting City of Auburn v. Brooke, 119 Wn.2d 623, 634-35, 836 P.2d 212 (1992)).

Similarly, in State v. Green, 101 Wn. App. 885, 6 P.3d 53 (2000), the Court of Appeals reversed a conviction for bail jumping where the information merely set forth the cause number of the underlying crime but did not specify the crime.

The statutory language stated in the information in this case did not define the offense with certainty, as the reference to "a crime of domestic violence as defined by RCW 10.99.020" did not provide notice of the particular domestic violence crime involved. To the contrary, RCW 10.99.020(5) is a non-exclusive list of 23 specific crimes, any one of which can amount to a crime of "domestic violence" if it is "committed by one family or household

member against another." Thus, a mere reference to that statute in the information was insufficient to apprise Mr. Nonog of the particular domestic violence crime he allegedly committed.

3. The separate allegations of several distinct "domestic violence" crimes stated in other counts of the information did not cure the constitutional defect in count IV. The Court of Appeals recognized the long-standing rule that each count of an information must stand alone and contain every essential element of the crime charged in that count. Nonog, 145 Wn. App. at 811; see also Clowes, 104 Wn. App. at 942; State v. Gill, 103 Wn. App. 435, 442, 13 P.3d 646 (2000). Yet the court evaded that rule in this case by characterizing the particular underlying domestic violence offense as a "supporting fact" rather than an essential element. Nonog, 145 Wn. App. at 811. Thus, the court concluded, because count IV did not omit an essential element, the court could look to the other counts of the information to supply any factual details missing from count IV. Id.

But as discussed, the particular underlying domestic violence crime allegedly committed is an essential element of the crime of interfering with domestic violence reporting and not merely a "supporting fact." This Court has never held that allegations from

other counts of a multiple-count information may be imported to supply an essential element missing from any one count. To the contrary, the traditional rule that every count must be sufficient in itself is an integral component of the essential elements rule that this Court has consistently followed and should apply in this case.

As stated, the rule is well-established in Washington that each count of a multiple-count information must stand on its own and contain every element of the charged crime, unless allegations from other counts are expressly incorporated. State v. Taylor, 47 Wn.2d 213, 215, 287 P.2d 298 (1955); State v. Unosawa, 29 Wn.2d 578, 587-89, 188 P.2d 104 (1948); CrR 2.1(a)(1). As this Court stated many years ago: "where several counts are employed in the indictment to describe the same transaction in different ways, each count should charge accused as if he had committed a distinct offense, the counts being regarded as separate indictments." Unosawa, 29 Wn.2d at 587 (citation omitted). The charges contained in one count may, by reference, be incorporated in a subsequent count, but such reference must be explicit, definite and specific, so that the matter referred to is clearly and accurately incorporated in the referring count. Id. at 588; CrR 2.1(a)(1). The implication of this qualification is that permitting the State to rely on

allegations in other counts that are *not* expressly incorporated presents too great a risk for confusion.

This rule "is a salutary one for the accused" and "places no undue burden upon the state." Taylor, 47 Wn.2d at 214-15. If one count does not, standing alone, charge an offense, that conviction must be reversed, regardless of whether the accused received actual notice of the charge. Id.

Moreover, the weight of authority from other jurisdictions is consistent with the rule in Washington—that each count of a multiple-count information must contain all essential elements of the crime, unless allegations from other counts are expressly incorporated. The Ninth Circuit recently explained: "The Supreme Court and the Ninth Circuit have long held that 'each count in an indictment . . . is regarded as if it were a separate indictment' and 'must be sufficient in itself.' Further, each count 'must stand or fall on its own allegations without reference to other counts not expressly incorporated by reference.'" United States v. Rodriguez-Gonzales, 358 F.3d 1156, 1158 (9th Cir. 2004) (citations omitted); see also United States v. Smith, 44 F.3d 1259, 1265 (4th Cir. 1995) (noting well-established rule that "each count of an indictment must stand on its own;" upholding indictment because each count

contained every essential element); United States v. Knowles, 29 F.3d 947, 952 (5th Cir. 1994) (because allegations from other counts not expressly incorporated, omission of element from count at issue rendered it fatally defective); United States v. Gordon, 253 F.2d 177, 180 (7th Cir. 1958) (referring to the requirement as the "universal rule"); United States v. Miller, 774 F.2d 883, 885 (8th Cir. 1985) (it is well-settled that "each count of an indictment 'must stand on its own, and cannot depend for its validity on the allegations of any other count not specifically incorporated") (citations omitted); McClintock v. United States, 60 F.2d 839, 841 (10th Cir. 1932).

Courts apply this traditional requirement even when construing an indictment liberally on appeal. See, e.g., United States v. Huff, 512 F.2d 66, 69 (5th Cir. 1975) ("even a liberal construction [of the essential elements rule] does not dispense with the requirement that an indictment or each count thereof allege all the essential elements of an offense").

State courts are generally in agreement. See People v. Brinson, 739 P.2d 897, 899 (Colo. App. 1987) ("Each count of an information must be considered independently of any other count and must, itself, allege all of the material elements of the crime

charged, so that each count charges a distinct and separate offense"); State v. Green, 376 A.2d 424, 429 (Del. Super. 1977) ("Each count is considered as if it were a separate indictment and must be sufficient without reference to other counts unless they are incorporated by reference"); Davis v. State, 371 So.2d 721, 722 (Fla. App. 1979) ("allegations of each count must be separately considered and not by reference to the other"); Perry v. State, 8 S.E.2d 425, 427 (Ga. App. 1940) ("Each count must be considered as if it there were no other count"); State v. White, 266 P. 415, 417 (Idaho 1928) (same); State v. Wilson, 337 S.E.2d 470, 476 (N.C. 1985) (same); Browning v. State, 165 N.E. 566, 569 (Ohio 1929) (same); State v. Johnson, 722 P.2d 1266, 1268 (Or. App. 1985) (same); State v. Rector, 155 S.E. 385, 386 (S.C. 1930) (same), overruled on other grounds by Evans v. State, 611 S.E.2d 510 (S.C. 2005); Usary v. State, 112 S.W.2d 7, 8 (Tenn. 1937) (same); Smith v. State, 571 S.W.2d 917, 919 (Tex. Crim. App. 1978) (distinguishing between elements of crime, which must be contained within specific count, and "defects in form," which may be supplied by reference to other parts of indictment); State v. Vaughan, 117 S.E. 127, 128 (W.Va. 1923) (incorporation by reference "must be so full and distinct, as in effect to incorporate

the matter going before with that in the count in which it is made"); but see People v. Hall, 96 Ill.2d 315, 320-21, 450 N.E.2d 309, 320 (Ill. 1982) ("elements missing from one count of a multiple-count indictment or information may be supplied by another count").

This Court has repeatedly held that constitutional due process requires adhering to the essential elements rule as traditionally applied, regardless of when the challenge is raised. E.g., Leach, 113 Wn.2d at 687-88 (reaffirming essential elements rule as stated in Unosawa); Hopper, 118 Wn.2d at 157 ("[t]he application of the strict standard of review does not upset this line of cases [beginning with Unosawa]"). When the challenge is first raised on appeal, the question is whether the language used fairly implies any element that is not explicitly stated. Kjorsvik, 117 Wn.2d at 109. But the information must nonetheless satisfy the traditional requirement that it contain every essential element; otherwise it is fatally defective.

As discussed, the rule that each count in a multiple-count information must separately contain every element of the crime charged in that count, unless allegations from other counts are expressly incorporated, is an integral part of the essential elements rule as traditionally applied and consistently followed by this Court.

In addition to satisfying the requirements of due process, the rule "is a salutary one for the accused" and "places no undue burden upon the state." Taylor, 47 Wn.2d at 214-15. It ensures that the language used in the information will "reasonably apprise an accused of the elements of the crime charged." Kjorsvik, 117 Wn.2d at 109. This Court should therefore reaffirm its commitment to the rule in this case.

E. CONCLUSION

Because the information omitted an essential element of the crime of interfering with domestic violence reporting, that conviction must be reversed and the charge dismissed without prejudice.

Respectfully submitted this 10th day of April, 2009.



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

APPENDIX

FILED
06 MAY -3 PM 3:49
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

1
2
3
4
5
6
7
8
9
10
11

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)
Plaintiff,)
v.) No. 06-1-04071-2 KNT
CIPRIANO BAHIT NONOG) AMENDED INFORMATION
Defendant.)

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse CIPRIANO BAHIT NONOG of the crime of Domestic Violence Felony Violation of a Court Order, committed as follows:

That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or about March 30, 2006, did know of and willfully violate the terms of a court order issued on June 6, 2003 by the Superior Court of Washington, pursuant to RCW chapters 10.99, 26.50, 26.09, 26.10, 26.26, 74.34, and/or a valid foreign protection order as defined in RCW 26.52.070, for the protection of Nanette Estandian, by intentionally assaulting the said Nanette Estandian, or at the time of the above violation did have at least two prior convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26, 74.34 or a valid foreign protection order as defined in RCW 26.52.020;

Contrary to RCW 26.50.110(1), (4) and (5), and against the peace and dignity of the State of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO BAHIT NONOG of the crime of Residential Burglary - Domestic Violence, a crime of the same or similar character and based on the same conduct as another crime charged herein, which

AMENDED INFORMATION - 1

Norm Maleng,
Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

5

1 crimes were part of a common scheme or plan and which crimes were so closely connected in
2 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:

3 That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or
4 about March 30, 2006, did enter and remain unlawfully in the dwelling of Nanette Estandian,
located at 5205 Northeast 4th Place, Renton, in said county and state, with intent to commit a
5 crime against a person or property therein;

6 Contrary to RCW 9A.52.025, and against the peace and dignity of the State of
Washington.

7 COUNT III

8 And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO
9 BAHIT NONOG of the crime of **Domestic Violence Felony Violation of a Court Order**, a
crime of the same or similar character and based on the same conduct as another crime charged
10 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
11 charge from proof of the other, committed as follows:

12 That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or
about April 8, 2006, did know of and willfully violate the terms of a court order issued on June 6,
2003 by the Superior Court of Washington, pursuant to RCW chapters 10.99, 26.50, 26.09,
13 26.10, 26.26, 74.34, and/or a valid foreign protection order as defined in RCW 26.52.070, for the
protection of Nanette Estandian, by intentionally assaulting the said Nanette Estandian, or at the
14 time of the above violation did have at least two prior convictions for violating the provisions of
an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26, 74.34 or a valid foreign
15 protection order as defined in RCW 26.52.020;

16 Contrary to RCW 26.50.110(1), (4) and (5), and against the peace and dignity of the State
of Washington.

17 COUNT IV

18 And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO
19 BAHIT NONOG 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
20 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
21 proof of the other, committed as follows:

22 That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or
about March 30, 2006, having committed a crime of domestic violence as defined by RCW
23 10.99.020, did intentionally prevent or attempt to prevent Nanette Estandian, the victim of that

Norm Maleng,
Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

1 crime, from calling a 911 emergency communication system, obtaining medical assistance, or
2 making a report to any law enforcement official;

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

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
COUNT V

5 And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse CIPRIANO
6 BAHIT NONOG of the crime of Domestic Violence Felony Violation of a Court Order, based
7 on a series of acts connected together with another crime charged herein, committed as follows:

8 That the defendant CIPRIANO BAHIT NONOG in King County, Washington on or
9 about April 16, 2006, did know of and willfully violate the terms of a court order issued on June
10 6, 2003 by the King County Superior Court pursuant to RCW chapter 10.99 and RCW chapter
11 26.50, for the protection of Nanette Estandian, and at the time of the violation having at least two
12 prior convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50,
13 26.09, 26.10, 26.26 or 74.34, or under a valid foreign protection order as defined in RCW
14 26.52.020;

15 Contrary to RCW 26.50.110(1), (5), and against the peace and dignity of the State of
16 Washington.

17
18
19
20
21
22
23
NORM MALENG
Prosecuting Attorney

By: 
Julie E. Kline, WSBA #35461
Deputy Prosecuting Attorney

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 CIPRIANO NONOG,)
)
 Petitioner.)

FILED
APR 14 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
NO. 82094-3

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> BRIAN MCDONALD KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> _____
<input checked="" type="checkbox"/> CIPRIANO NONOG 12234 46 TH AVE S TUKWILA, WA 98178	<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF APRIL, 2009.

X _____ 

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