

70147-9

70147-9

NO. 70147-9-I

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

STATE OF WASHINGTON,  
Respondent,  
v.  
MARK CURTIS HUDSON,  
Appellant.

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

The Honorable Kim Prochnau, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. This Court must reverse these convictions for violation of due process because the State impeached Mr. Hudson with evidence of a prior witness tampering conviction, which this Court later reversed and dismissed for insufficient evidence. U.S. Const., amend. 14; Const. art. I, § 3.

2. Appellant assigns error to the court's instruction for the jury to disregard the fact that the prior conviction was on appeal.

3. The trial court violated appellant's constitutional right to a jury trial by failing to instruct the jury it must be unanimous on one particular act for each count when the State presented evidence of more than one act.

4. The trial court violated due process by instructing the jury on means of violating the court order that are not a crime under the statute.

5. The trial court violated due process by instructing the jury that it could convict Mr. Hudson of residential burglary if it found beyond a reasonable doubt that he intended to commit the crime of violating a no-contact order inside the

residence when he knew there was no person inside the residence.

6. There was insufficient evidence as a matter of law to support the conviction of residential burglary, Count VI.

7. There was insufficient evidence of the corpus delicti for the enhancement to the attempt to elude.

8. Appellant assigns error to Instruction No. 22, CP 75, quoted in full below.

9. Appellant assigns error to the trial court's response to the jury inquiry, CP 111-12, quoted in full below.

10. Appellant was denied effective assistance of counsel when his counsel did not object to the court's erroneous instructions or response to the jury inquiry.

Issues Pertaining to Assignments of Error

1. May the State impeach the defendant's testimony with a witness tampering conviction, when the State later conceded error on appeal and this Court reversed and dismissed the conviction because the evidence was legally insufficient to support it?

2. Is a defendant entitled to inform the jury the prior conviction is pending on appeal?

3. Where the State presented evidence of physical contact, phone contact, text messaging, and physically coming within 1,000 feet of the protected party and her workplace, all at different times of day, any of which would violate the court order, does the Constitution require the court to instruct the jury to be unanimous as to which act it found? U.S. Const., amends. 6, 14; Const., art. I, §§ 21, 22.

4. RCW 26.50.110 makes it a crime to violate specified restraint provisions of a court order. Where the court order contained provisions beyond those specified in the statute, and the jury instructions required conviction for violating **any** provision of the order, did the instructions permit the jury to convict on actions that were not a crime under the statute?

5. Must appellant's burglary conviction be reversed if the court's instructions permitted the jury to convict based on violating the no-contact order as the crime intended "against a person or property therein" when there was no person therein?

6. May a person commit theft of community property he owns jointly with another?

7. Where violation of the no-contact order cannot provide "the crime against a person or property therein" intended, and a person cannot be deemed to steal community property, was there sufficient evidence to support the conviction of residential burglary?

8. Was there sufficient evidence of the corpus delicti to support a finding of the enhancement for attempting to elude, i.e., that the defendant endangered someone other than himself and the pursuing officer, where the only evidence that another person was in the car was a statement from the defendant?

9. Was counsel's performance deficient and prejudicial when he failed to object to the court's erroneous instructions, permitting his client to be convicted on theories for which there was insufficient evidence?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

a. Background

Mark Hudson and Rebecca Hudson were married for 13 years. They have three children. During the last two years of their marriage, they began arguing over money. RP(1/7)<sup>1</sup> 41-48.

Their arguments led to an assault charge against Mr. Hudson in 2010. Ms. Hudson did not appear at trial and the case was dismissed. RP(1/7) 54. The State recharged the assault in 2011, adding charges of tampering with a witness and violating a no-contact order. Ms. Hudson appeared for trial, but testified falsely, to the extent of saying she was not Rebecca Hudson but Rebecca Brooks, she was not married to Mr. Hudson, and her children were not his. RP(1/7) 55-56, 137.

Mr. Hudson was convicted of tampering with a witness and violating a no-contact order. State v. Mark Curtis Hudson, King County Superior Court No. 11-1-01286-3 KNT. Upon sentencing, the court entered a Domestic Violence No-Contact Order. It

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<sup>1</sup> Please see App. D for a list of the RPs cited in this brief.

identified the protected person as Rebecca Ann Brooks aka Hudson. It provided:

2. **Defendant**
  - A. shall not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, or keep under surveillance the protected person.
  - B. shall not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers.
  - C. shall not knowingly enter, remain, or come within \_\_\_\_\_ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: person of [sic].

Ex. 15.<sup>2</sup> The Order did not specify an address of residence or workplace.

b. Charges and State's Evidence

i. May 29

Ms. Hudson testified that on May 29, 2012, she and Mr. Hudson were living together. RP(1/7) 73-75. This contact was charged as Count III, misdemeanor violation of a court order, RCW 26.50.110(1). CP 37-41.

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<sup>2</sup> Exs. 15 and 16 are attached as App. C.

ii. June 17

Ms. Hudson testified that on June 17, 2012, Mr. Hudson phoned her and told her to pick him up at the airport, which she did. The State charged these two acts as Count IV, misdemeanor violation of a court order, RCW 26.50.110(1). CP 39.

Ms. Hudson said later that day, Mr. Hudson got on top of her on the bed, put his knees on her shoulders, and struck her on the head. RP(1/7) 74-83, 96-106. The State charged Count I, domestic violence felony violation of a court order, for these acts., RCW 26.50.110(1), (4). CP 37-38.

iii. June 19

On June 19, 2012, Officer Jones went to 5611 S. Bangor to check on Ms. Hudson. A man who said his name was Mark answered the door. He said Rebecca was not there. Officer Jones identified Mark Hudson as the man he saw. RPT(1/3) 22-35.

Later that day Officer Jones believed he saw Mr. Hudson driving his car up the street that Ms. Hudson was walking down. RPT(1/3) 41-44.

Officer Jones turned and signaled with lights and siren for the car to stop. The car sped away, traveled in the lane for oncoming traffic, and ran

a stop sign to turn onto an arterial. The officer lost it. RPT(1/3) 43-52. These facts became Count II, attempting to elude. CP 38.

The car had tinted windows. Neither Officer Jones nor Ms. Hudson could see anyone else in the car. RPT(1/3) 48-52; RP(1/7) 143-44. Ms. Hudson testified and told the officer that Mr. Hudson told her on the phone that their three-year-old daughter was in the car. RPT(1/3) 73, 77-80; RP(1/7) 106-10. The State charged this fact as an enhancement to Count II:

that during the commission of that crime, one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the defendant.

CP 38, citing RCW 9.94A.533(11) and RCW 9.94A.834.<sup>3</sup>

Ms. Hudson testified that while she spoke with the police, Mr. Hudson phoned her cell phone eight times, but she didn't answer. RP(1/7) 114-16.

After talking to the police, Ms. Hudson called Mr. Hudson to come pick her up. She also arranged for him to pick her up when she got off work that night at Highline Medical Center. Police arrested

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<sup>3</sup> Statutes are quoted in full in App. B.

Mr. Hudson sitting in his car at the main entrance of Highline Medical Center. Ms. Hudson testified he had texted her that he was there to pick her up. RP(1/7) 11-36; 116-21.

The contacts of this day were charged as Count V, misdemeanor violation of a court order, RCW 26.50.110(1). CP 40.

iv. August 14

The court entered a pretrial Domestic Violence No-Contact Order in this matter on July 3, 2012. Ex. 16. It contained the same provisions as Ex. 15.<sup>4</sup>

On August 14, 2012, police watched via a surveillance camera as Mr. Hudson came out of the residence at 5611 S. Bangor St. An officer arrested him not far from the home. He said he believed he could be at the residence so long as Ms. Hudson was not there; he had called his 13-year-old daughter before coming over to be certain that Ms. Hudson would not be there. He possessed a few items taken from Ms. Hudson's home, which she

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<sup>4</sup> The only difference, not relevant here: Ex. 16 did not prohibit coming within 1,000 feet of Ms. Hudson's person.

testified he did not have permission to take. RP(1/7) 130-32, 153-69; RP(1/8) 6-10.

From these acts, the State charged Count VI, residential burglary, RCW 9A.52.025; and Count VII, misdemeanor violation of a court order, RCW 26.50.110(1). CP 40-41.

c. Other Evidence

The State presented cell phone "mapping" based on the cell phone number Ms. Hudson said was Mr. Hudson's, which coincided with the car that eluded Officer Jones. RP(1/10) 35-55, 78-95.

Rebecca Hudson testified that Mr. Hudson monitored her emails and phone calls and seemed to track where she went. RP(1/7) 69-70. At the time of trial, they were getting a divorce. She admitted she recently withdrew funds from a 401(k) account, falsely claiming an emergency; and she fabricated a document that she was being evicted to get the funds. RP(1/7) 140.

d. Defense Evidence

Mr. Hudson testified on his own behalf. He denied any contact with Ms. Hudson on June 17, the day he got out of jail. He testified he had rented the house at 5611 Bangor for his own residence, not

for Ms. Hudson; she lived on Lakeridge Dr. He denied being the person in the residence or eluding the police on June 19. He provided footage from surveillance cameras at his parents' home where he was then living, showing him there at the relevant times on June 17 and 19. He testified the cell phone used for the "mapping" was his nephew's cell phone; he had several cell phones for which he paid the bill, but the number Ms. Hudson said was his was registered as his nephew's phone. Although he was at Highline Medical Center June 19, it was with another friend for another purpose, not to pick up Ms. Hudson. RP(1/8) 112-22, 125-63; Ex. 33.

2. PROCEDURAL FACTS

a. Use of Prior Conviction

Over defense objection, the court ruled in limine that the State could admit Mr. Hudson's prior witness tampering conviction as a crime of dishonesty to impeach him. RP(9/27) 82-83; CP 29. Mr. Hudson acknowledged the conviction when he testified. RP(1/8) 115. The prosecutor referred to it again on cross-examination. RP(1/9) 82.

On redirect, Mr. Hudson testified the witness tampering conviction was on appeal. The court

granted the State's motion to strike and instructed the jury to disregard that comment. RP(1/9) 115-16.

Det. Johnson later testified he was a witness in the prior case of "tampering with Rebecca." RP(1/10) 101.

b. Jury Instructions

The court gave a limiting instruction:

You may consider evidence that the defendant has been convicted of a crime or has engaged in prior bad acts only in deciding what weight or credibility to give to the defendant's testimony, or to evaluate Rebecca Hudson's state of mind and for no other purpose.

CP 58.

The court instructed the jury it must convict if it found a violation of any provision of either order. Except for date, it used the same language for Counts V and VII:

To convict the defendant of the crime of violation of a court order as charged in Count V [VII], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 19, 2012, [August 14, 2012] there existed a no-contact order applicable to the defendant;

(2) That the defendant knew of the existence of this order;

(3) That on or about said date, the defendant knowingly **violated a provision of this order**; and

(4) That the defendant's act occurred in the State of Washington.

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

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

CP 73, 79 (emphasis added).

The court did not give a jury unanimity instruction. CP 50-92.

The court instructed the jury on Count VI:

No. 22

To convict the defendant of the crime of residential burglary as charged in Count VI, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 14, 2012, the defendant unlawfully entered or remained unlawfully in a dwelling;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

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

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

CP 75. The instructions did not define "crime against a person or property therein." CP 50-92.

During deliberations, the jury sent the court the following question:

On Count 6, point (2), does violation of no-contact order qualify as "unlawful entrance" for purpose of burglary?  
(And does violation of no-contact order qualify as intent to commit crime?)

CP 111. With no objection from either counsel, the court responded: "Please review your jury instructions." CP 112; RPJQ(1/14) at 8-9.

The jury convicted Mr. Hudson of Counts II and V, attempting to elude a police officer and misdemeanor violating a court order for June 19, 2012; and Counts VI and VII, residential burglary and misdemeanor violating a court order on August 14, 2012. CP 94, 97-99. The jury acquitted of Count III and did not reach verdicts on Counts I and IV, which the State dismissed at sentencing. CP 93, 95-96; RP(3/22) 69.

Defense counsel did not propose any instructions. He did not take exception to any instructions, so long as the instructions were "standard WPICs." RP(1/2) 351-52; RP(1/10) 106-12, 155-63. He only "requested" a limiting instruction

for the prior offense after the prosecutor suggested it. RP(1/10) 112-18.

c. Sentencing

The court sentenced Mr. Hudson to serve a total of 33 months, plus consecutive sentences of 364 days suspended on each of Counts V and VII. This sentence was based on an offender score of 3, including the prior witness tampering conviction.<sup>5</sup> It imposed a concurrent sentence of 26 months on Count II, which included 12 months for the enhancement of endangering another. Both felony sentences also included aggravating factors not relevant here.

d. After Judgment

This Court reversed and dismissed Mr. Hudson's witness tampering conviction for insufficient evidence. The State conceded the error on appeal. State v. Hudson, Court of Appeals No. 68807-3-I (Slip Op., 1/21/2014) (attached as App. A, at 5).

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<sup>5</sup> Mr. Hudson is scheduled for a new sentencing hearing in light of this Court's reversal of his witness tampering conviction.

C. ARGUMENT

1. THE CONVICTIONS MUST BE REVERSED BECAUSE THE COURT PERMITTED THE STATE TO IMPEACH APPELLANT WITH A PRIOR CONVICTION THAT WAS CONSTITUTIONALLY INVALID FOR INSUFFICIENT EVIDENCE.

ER 609 permits the court to admit evidence of a prior conviction to attack a witness's credibility. The rule specifically provides such evidence is not admissible if the conviction has been the subject of "a pardon, annulment, or other equivalent procedure based on a finding of innocence." ER 609(c). It further provides:

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

ER 609(e). But this rule of evidence cannot prevail over the Constitution.

In Loper v. Beto, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972), the United States Supreme Court held the Due Process Clause of the Fourteenth Amendment precludes the State from impeaching a defendant with a constitutionally void conviction obtained without counsel.

[W]e fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such

convictions just as much when used to impeach as when used as direct proof of guilt.

Loper, 405 U.S. at 483. In Loper, the prior conviction had not been overturned on appeal, but the State could not prove the conviction was obtained with counsel or a valid waiver of counsel.

This Court held Loper applied with equal force to convictions that were constitutionally void because of insufficient evidence. In State v. White, 31 Wn. App. 655, 644 P.2d 693 (1982), Mr. White was convicted of perjury at one trial; then the perjury conviction was admitted at a second trial, after which he was convicted of theft. Appeals from both cases were consolidated. This Court reversed and dismissed the perjury conviction for insufficient evidence; and it reversed the theft conviction because the perjury conviction had been used to impeach Mr. White at trial.

White's perjury conviction has been reversed because of insufficiency of the evidence, a constitutional defect of the highest magnitude. White has the right, under the due process clause of the Fourteenth Amendment, to be convicted only on evidence sufficient beyond a reasonable doubt. ... Violation of this right subverts the fact-finding process, and a conviction obtained on insufficient evidence should have no probative value

whatsoever for purposes of impeachment in a subsequent trial for another offense.

White, 31 Wn. App. at 666.<sup>6</sup>

In State v. Murray, 86 Wn.2d 165, 543 P.2d 332 (1975), the Court distinguished Loper. Mr. Murray was impeached with a conviction later overturned for a violation of the Fourth Amendment protection against unreasonable search and seizure. The Court affirmed, concluding the exclusionary rule did not make the prior conviction unreliable, as did a Sixth Amendment violation of the right to counsel. Compare: State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974) (conviction reversed where court held pretrial that State could impeach defendant with prior convictions that had been reversed and dismissed on appeal).

Here, Mr. Hudson's conviction for witness tampering was reversed and dismissed for insufficient evidence. The State conceded the error on appeal. This Court accepted the concession. See Appendix A. A conviction cannot

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<sup>6</sup> This issue was presented below in the pretrial hearing. It also can be raised for the first time on appeal as a manifest error involving a constitutional right. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

be more constitutionally void and unreliable. The reversal and dismissal is a procedure "based on a finding of innocence." ER 609(c).

The court compounded the error by sustaining the State's objection to Mr. Hudson telling the jury the conviction was on appeal, and instructing the jury to disregard that comment. See ER 609(e).

The error was not harmless. Mr. Hudson testified to all the counts on which he was convicted. The jury clearly did not accept all the State's evidence. It acquitted him of one count and was unable to reach a verdict on two more. The use of this prior conviction likely led to guilty verdicts on the four counts. See State v. Mathes, 22 Wn. App. 33, 587 P.2d 609 (1978) (error of impeaching with invalid prior conviction prejudicial even where court instructed jury to disregard it).

As it did in White, this Court should reverse these convictions.

2. THE COURT'S INSTRUCTIONS FOR VIOLATING A NO-CONTACT ORDER PERMITTED THE JURY TO CONVICT APPELLANT FOR ACTIONS THAT ARE NOT A CRIME.

a. RCW 26.50.110 Only Criminalizes Violations of Specified Provisions.

The State charged Mr. Hudson on Counts V and VII for violating RCW 26.50.110, which provides:

**RCW 26.50.110. Violation of order -- Penalties**

(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 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.

(Emphases added.) This statute thus makes it a crime to violate only the specified provisions of a court order.<sup>7</sup>

The Washington Pattern Instructions confirm this interpretation of the statute. They list each of the specified restraint provisions in brackets, to be used as applicable. 11 Wash. Prac., Pattern Instr. Crim. WPIC 36.50 and 36.51 (3d Ed.). The Committee noted:

RCW Chapter 26.50 permits a court issuing a domestic violence protection order to address a broad range of subjects. However, RCW 26.50.110(1) makes it a crime to violate only certain types of provisions ... .

WPIC 36.51, Comment, listing (i)-(v) of the statute.<sup>8</sup>

In interpreting a statute, this court looks first to its plain language. If the plain language of the statute is unambiguous, then this court's inquiry is

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<sup>7</sup> This case did not involve a foreign protection order or any provision regarding pets or children, so only paragraphs (i)-(iii) apply in this case.

<sup>8</sup> A previous version of this statute made it a crime to violate "the restraint provisions" of a protection order. Former RCW 26.50.110 (2006). The Legislature amended the statute effective July 22, 2007, to its current form. See State v. Bunker, 169 Wn.2d 571, 576-77 & n.2, 238 P.3d 487 (2010); Laws of 2007, Ch. 173, § 2.

at an end. The statute is to be enforced in accordance with its plain meaning.

State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citations omitted).

When statutory language is unambiguous, we look only to that language to determine the legislative intent without considering outside sources.

State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

b. The Jury Instructions Permitted Conviction for Actions That Are Not a Crime.

In this case, the court orders both had an additional provision not included in this statute:

Defendant ... shall not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, **or keep under surveillance the protected person.**

Ex. 15 and Ex. 16 (emphasis added). Ex. 15 also prohibited coming within 1,000 feet of the "person of" Ms. Hudson -- not "a location." RCW 26.50.110(1)(a)(iii).

Because these provisions are not included in RCW 26.50.110, violation of these provisions are not a crime.

Nonetheless, the court's instructions in this case required the jury to return a verdict of

guilty if it found "defendant knowingly violated a **provision**" of an applicable no-contact order. CP 73, 79. The instructions did not limit the jury to the statute's provisions.

A similar constitutional instructional error required reversal in State v. Roberts, 142 Wn.2d 471, 509-13, 14 P.3d 713 (2000). The statute for accomplice liability requires general knowledge of "the crime" the principal intends to commit. RCW 9A.08.020. The court instructed the jury it could find the defendant an accomplice if he knew the principal intended to commit "a crime." Thus the jury instructions

improperly allowed the jury to convict Roberts of murder if he had general knowledge of any crime, and not only the crime charged.

Id. at 509. Cf. Jacques v. Sharp, 83 Wn. App. 532, 922 P.2d 145 (1996) (no probable cause to arrest for violating protection order where specific provision violated was not a crime under RCW 26.50.110).

Here the instruction allowed the jury to convict Mr. Hudson if it found he violated the provision prohibiting him from keeping his wife under surveillance. Such a violation is not a

crime under RCW 26.50.110(1). Thus, as in Roberts, the instruction was constitutionally overbroad.

The error is not harmless. Ms. Hudson testified that Mr. Hudson monitored her emails and phone calls and seemed to track where she went -- as if he were keeping her under surveillance. The State's evidence for Count V was that Mr. Hudson drove within 1,000 feet of Ms. Hudson walking along the street. Under these instructions, the jury could have convicted him of these counts for actions that were not in fact a crime.

This error is a violation of due process. U.S. Const., amend. 14;<sup>9</sup> Const., art. I, § 3. It requires this Court to reverse the convictions on Counts V and VII.

3. THE COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL BY FAILING TO INSTRUCT THE JURY IT MUST BE UNANIMOUS ON ONE PARTICULAR ACT FOR COUNT V.

The constitutional right to a jury trial requires the jury to be unanimous as to the specific act the defendant committed for each crime. U.S. Constitution, amends. 6, 14;

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<sup>9</sup> All cited Constitutional provisions are quoted in full in Appendix B.

Constitution, art. I, §§ 21, 22; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Stephens, 93 Wn.2d 186, 607 P.2d 034 (1980).<sup>10</sup>

To convict a criminal defendant, a unanimous jury must conclude that the criminal act charged has been committed. In cases where several acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. In such "multiple acts" cases, Washington law applies the "either or" rule:

either the State [must] elect the particular criminal act upon which it will rely for conviction, or...the trial court [must] instruct the jury that all of them must agree that the same underlying criminal act has been proven beyond a reasonable doubt.

State v. Hayes, 81 Wn. App. 425, 430-31, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996) (emphasis added; citations omitted); State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991).

In this case, the State presented evidence of multiple acts that could have violated the court order on June 19, Count V: being in Ms. Hudson's residence in the morning, driving within 1,000 feet

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<sup>10</sup> This constitutional issue may be raised for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 891-92 n.4, 214 P.3d 907 (2009).

of Ms. Hudson on the street, talking with Ms. Hudson on the phone, phoning her repeatedly when she did not answer, texting her later that evening, and being within 1,000 feet of her workplace. The prosecutor told the jury Mr. Hudson violated these orders "in numerous ways: by calling her, by showing up at the house unannounced, by entering the house unannounced, by showing up at her job." RPOS(1/3) 9.

Each of these alleged actions was separate and distinct in time. Some were corroborated by police officers; some depended solely on Ms. Hudson's testimony; the defense evidence contradicted key aspects of the allegations.

It was constitutional error for the court not to instruct the jury it must be unanimous as to the act it found proven beyond a reasonable doubt for this count. Petrich, supra. This Court should reverse Count V.

4. THE CONVICTION FOR RESIDENTIAL BURGLARY MUST BE REVERSED BECAUSE THE COURT'S INSTRUCTIONS AND ITS ANSWER TO THE JURY'S INQUIRY PERMITTED THE JURY TO FIND VIOLATING THE NO-CONTACT ORDER WAS THE INTENDED "CRIME AGAINST A PERSON OR PROPERTY THEREIN."

a. Elements of Residential Burglary

The State charged Mr. Hudson with residential burglary and misdemeanor violation of a court order, Counts VI and VII, both alleged to have occurred on August 14, 2012. CP 37-41.

**RCW 9A.52.025. Residential burglary**

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

The crime thus requires two distinct elements:

(1) intent to commit a crime against a person or property therein, and (2) entering or remaining unlawfully in a dwelling.

The court order that the defendant not enter, remain, or come within 1,000 feet of Ms. Hudson's residence, made the entry "unlawful." But the jury also asked whether violating the no-contact order could be the "intent to commit a crime" for burglary. The correct answer to this question was "no."

Under the facts of this case, when the defendant knew there was no person inside the dwelling, intending to violate the no-contact order could not also be the "crime against a person or property therein."

Failing to give this answer permitted the jury to convict Mr. Hudson under an invalid legal theory, violating due process. U.S. Const., amend. 14; Const., art. I, § 3.

The Legislature recognizes domestic violence is "a serious **crime against society.**" RCW 10.99.010 (emphasis added). Thus the protected party does not have the authority to negate the restraint provisions of a court order. State v. Dejarlais, 136 Wn.2d 939, 969 P.2d 90 (1998). But entering an empty home in violation of the no-contact order was not a **crime against a person or property therein.**

- b. Violating the No Contact Order Is Not a Crime Against a Person Therein When No Person is Therein.

The burglary statutes do not define a "crime against a person or property therein."

A plain and ordinary definition of the phrase "crime against a person" is "any offense involving

unlawful injury or threat to the person or physical autonomy of another." State v. Barnett, 139 Wn.2d 462, 469, 987 P.2d 626 (1999); quoted with approval in State v. Snedden, 149 Wn.2d 914, 920, 73 P.3d 995 (2003).

In Barnett, the defendant burglarized an unoccupied business at night while armed with a deadly weapon. He was convicted of first degree burglary. The issue was whether this crime was a "crime against a person" for purposes of a sentencing statute requiring community placement after a prison sentence for any "crime against a person." The Supreme Court held it was not.

In Snedden, the State charged the defendant with second degree burglary for entering a library after being warned he would be trespassing, and exposing himself to and masturbating in front of women he found in isolated locations of the building. The trial court dismissed the burglary charges, reasoning that a crime against a person implies physical injury, but indecent exposure falls under a "crime against morality and indecency." The Supreme Court reversed.

The facts of this case illustrate well why the crime of indecent exposure

is "a crime against a person." Mr. Snedden targeted female students in remote areas of the Foley Library. He created a commotion to catch the students' attention, went behind a nearby bookshelf and removed books to provide a clear view between himself and his victims, exposed himself, and masturbated in their presence. Throughout the encounters, he maintained eye contact with his victims. Mr. Snedden's victims reported feeling upset, violated, scared, uncomfortable and fearful for their safety. Mr. Snedden's culpable actions were deliberate, calculated and aimed specifically toward his victims.

Snedden, 149 Wn.2d at 919-20.

Violating a domestic violence no-contact order can be an intended "crime against a person" **when the person is present within the premises**. Thus in State v. Stinton, 121 Wn. App. 569, 89 P.3d 717 (2004), the court reversed a trial court's dismissal of a burglary charge where the defendant broke into his girlfriend's home after she ordered him out and harassed her inside.

Stinton's protection order contained two provisions prohibiting separate and distinct conduct toward McNeill. And the evidence of Stinton's harassing and threatening McNeill was separate and distinct from the evidence supporting his unlawful entry.

Id. at 575. See also State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007) (dismissal of burglary charge affirmed; no-contact order did not prohibit

defendant from being in own residence he shared with girlfriend, although assaulting her inside was sufficient to be a crime against a person therein); State v. Sanchez, 166 Wn. App. 304, 271 P.3d 264 (2012) (burglary dismissal reversed where order excluded defendant from ex-wife's residence and place of work; her permission to enter could not override the court's order, rape and assault inside were sufficient crime against person for burglary); State v. Kilponen, 47 Wn. App. 912, 737 P.2d 1024, review denied, 109 Wn.2d 1019 (1987) (conviction for first degree burglary affirmed where defendant broke into wife's home in violation of restraining order, was armed with a deadly weapon, and admitted he intended to tie her up to watch while he committed suicide; when he didn't find her there, he waited for her to return); State v. Spencer, 128 Wn. App. 132, 114 P.3d 1222 (2005) (residential burglary conviction affirmed where defendant had contact with protected party in residence).

The evidence was undisputed that Mr. Hudson entered the residence when he knew no one else was there. Thus there was no evidence he intended a crime against a person therein.

c. Violating a No-Contact Order Is Not A Crime Against Property Therein.

Unlawful entry without the intent to commit a crime against a person or property therein is itself the lesser included crime of criminal trespass. RCW 9A.52.070; State v. Allen, 101 Wn.2d 355, 678 P.2d 798 (1984). Thus it cannot be the "crime against property therein" intended for a burglary. There was no other separate and distinct violation of the court order intended inside the residence to support a burglary charge.

d. Conclusion

Since there was no evidence to support a separate and distinct violation of the no contact order intended inside the home, the court erred when it did not tell the jury the answer to its inquiry was "no." By referring it back to the instructions already given, which did not exclude this possibility, the court's instructions permitted the jury to convict Mr. Hudson of residential burglary on a legal theory for which there was insufficient evidence. This error violates due process. U.S. Const., amend. 14; Const., art. I, § 3. It requires this Court to reverse the conviction on Count VI.

5. THERE WAS INSUFFICIENT EVIDENCE AS A  
MATTER OF LAW TO SUPPORT THE CONVICTION  
FOR RESIDENTIAL BURGLARY.

A challenge to the sufficiency of the evidence requires this Court to review whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

If violating a no-contact order could not be the "crime against a person or property therein" intended for burglary, as shown above, the evidence at trial was insufficient to support the conviction. While the State argued Mr. Hudson committed theft in the residence, the only evidence was that items he removed were community property owned jointly by Mr. and Ms. Hudson.

Washington is a community property state. Both spouses in a marriage have undivided half interests in community property. Lyon v. Lyon, 100 Wn.2d 409, 413, 670 P.2d 272 (1983).

Common law supplements Washington penal statutes. RCW 9A.04.060. The general rule at common law was that one co-owner could not steal from another, since each co-owner is legally entitled to possession. Thus in State v. Birch, 36 Wn. App. 405, 675 P.2d 246 (1984), the court held one partner could not steal property from another partner because it was not "property of another" under the then-current theft statute. Only in response to Birch did the Legislature amend the theft statute to include theft of partnership property by one partner. See Laws of 1986, ch. 257, § 2. The Legislature, however, never amended the theft statute regarding community property.

Theft is distinct from malicious mischief -- damage and destruction of property deprives the co-owner of his or her share. State v. Coria, 146 Wn.2d 631, 48 P.3d 980 (2002). Furthermore, the Legislature expressed its intent to include malicious mischief as a crime of domestic violence in RCW 10.99.020(5)(l), (m), (n). It did not include theft in that long list of crimes.

Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a

statute implies the exclusion of the other.

State v. Delgado, 148 Wn.2d at 729.

The Legislature did not provide that one spouse could steal community property from the other. The evidence was insufficient to show that Mr. Hudson removed anything other than community property from the residence, which is not theft. Thus there was insufficient evidence of intent to commit a crime against a person or property therein, and so insufficient evidence of burglary. This conviction should be reversed and dismissed.

6. THERE WAS INSUFFICIENT EVIDENCE OF THE CORPUS DELICTI TO SUPPORT THE ENHANCEMENT OF THE ELUDING CONVICTION.

The corpus delicti doctrine generally is a principle that tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession. ... The purpose of the rule is to ensure that other evidence supports the defendant's statement and satisfies the elements of the crime. Where no other evidence exists to support the confession, a conviction cannot be supported solely by a confession. The purpose of the corpus delicti rule is to prevent defendants from being unjustly convicted based on confessions alone.

State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

Notably, we are among a minority of courts that has declined to adopt a more relaxed rule used by federal courts. . . . Under the federal rule, the State need only present independent evidence sufficient to establish that the incriminating statement is trustworthy. . . . Under the Washington rule, however, the evidence must independently corroborate, or confirm, a defendant's incriminating statement.

In addition to corroborating a defendant's incriminating statement, the independent evidence "must be consistent with guilt and inconsistent with a[] hypothesis of innocence." . . . If the independent evidence supports "reasonable and logical inferences of both criminal agency and noncriminal cause," it is insufficient to corroborate a defendant's admission of guilt.

State v. Brockob, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006); State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

In this case, the only evidence that the Hudsons' three-year-old daughter was in the car at the time of the eluding was Ms. Hudson repeating that Mr. Hudson told her so. Neither she nor the officer saw anyone else in the car. Under Washington's corpus delicti rule, this Court should vacate this enhancement.

7. COUNSEL WAS INEFFECTIVE FOR FAILING TO EXCEPT TO THE IMPROPER JURY INSTRUCTIONS.

The errors discussed above are all manifest errors involving a constitutional right. RAP

2.5(a)(3). Thus appellant properly raises them for the first on appeal, although his attorney did not except to them below.

However, to the extent these issues cannot be raised for the first time on appeal, this Court should address them anyway because the failure to object was ineffective assistance of counsel.

The right to counsel, and to effective assistance of counsel, goes to the very integrity of the fact-finding process. Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); United States Constitution, amends. 6, 14. Denial of the assistance of counsel constitutes a per se violation of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Under Strickland, we first determine whether counsel's representation 'fell below an objective standard of reasonableness.' Then we ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'

Hinton v. Alabama, 571 U.S. \_\_\_\_ (No. 13-6440, 2/24/2014), quoting Padilla v. Kentucky, 559 U.S. 356, 366, 130 S. Ct. 1473, 176 L. Ed. 2d 204 (2010).

If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review. If failure to object to instructions was ineffective assistance of counsel, it is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kyлло, 166 Wn.2d 856, 861-62, 215 P.3d 177 (2009).

Where defense counsel permits instructions that allow the jury to apply an incorrect legal standard for the case, his performance is deficient. Kyлло, 166 Wn.2d at 865.

Here defense counsel did not take exception to any instructions. He repeatedly said to the court he had no objection to any of the "standard WPICs." Nonetheless, the instructions for Counts V and VII were not from the WPICs. Instead, they permitted the jury to convict based on violations of the court order that are not a crime.

Counsel did not object to the court referring the jury back to the instructions when it asked whether violating a no contact order could be the crime intended for burglary -- when the legally correct answer under the facts of this case was

"no." Nor did he argue to the jury or ask for instructions on community property to exclude theft as the intended crime.

Failing to research or apply relevant law was deficient performance here because it fell "below an objective standard of reasonableness based on consideration of all the circumstances."

Kyllo, 166 Wn.2d at 868-69.

Nor could these failures have been legitimate trial strategy or tactics. There can be no

strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law [and] eased the State of its proper burden of proof  
... .

Id., citing State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007). See also State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004) (court could not conceive of any reason why defense counsel would propose defective instructions).

Allowing the erroneous instructions was prejudicial. They permitted the jury to convict on insufficient evidence of burglary and on an invalid legal basis for violating the court order. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.

For this reason combined with the issues raised above, this Court should reverse appellant's convictions.

D. CONCLUSION

Because there was insufficient evidence to support the residential burglary conviction, Count VI, this Court should reverse and dismiss that count.

Because it was prejudicial constitutional error to permit the State to impeach the defendant with a prior conviction that was void for insufficient evidence, this Court should reverse all four counts of conviction.

Because the instructions permitted the jury to convict appellant on Counts V and VII based on acts that were not crimes, this Court should reverse those two counts.

Because the trial court failed to instruct the jury it must be unanimous on a single act of the multiple incidents alleged to support Count V, this Court should reverse that count.

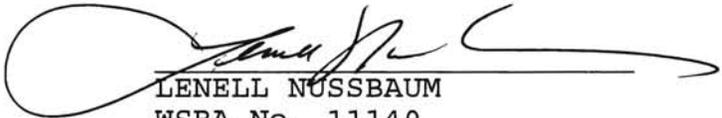
Because the erroneous answer to the jury inquiry permitted the jury to convict of residential burglary based on an invalid crime

intended therein, this Court should reverse Count VI.

Because there was no evidence independent of the defendant's own statement that his three-year-old daughter was in the car when he committed the attempt to elude, this Court should vacate the sentencing enhancement on Count II.

DATED this 17<sup>th</sup> day of March, 2014.

Respectfully submitted,



LENELL NUSSBAUM  
WSBA No. 11140  
Attorney for Mr. Hudson

**APPENDIX A**

State v. Hudson, Court of Appeals No. 68807-3-I  
(Slip Opinion, 1/21/2014)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 JAN 21 PM 1:32

STATE OF WASHINGTON,	)	
	)	No. 68807-3-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
MARK CURTIS HUDSON,	)	
	)	
Appellant.	)	FILED: January 21, 2014

APPELWICK, J. — Hudson appeals his convictions for witness tampering and violation of a court order. He argues that there is insufficient evidence to support his witness tampering conviction. The State agrees and concedes error, so we accordingly reverse and dismiss that conviction. Hudson also alleges prosecutorial misconduct and argues that a detective improperly testified to the identity of the victim in a voice recording. We affirm Hudson’s conviction for violation of a court order.

FACTS

This appeal arises from Mark Hudson's alleged assault of Rebecca Hudson.<sup>1</sup> On September 16, 2010, police responded to a 911 call in South Seattle. Rebecca met them at the front door. She was crying and upset, and her thumb was bleeding. She told the officers that her husband, Mark Hudson, had cut her hand and left shortly after. Paramedics also responded and examined Rebecca's injuries. Rebecca told the treating paramedic that her husband had choked her and cut her with a knife. One of

<sup>1</sup> We refer to Rebecca by her first name to avoid any confusion. She identified herself as Rebecca Hudson to the responding officers and paramedics. However, at trial, Rebecca testified that her name was Rebecca Brooks, and that she had never gone by the name Rebecca Hudson.

the officers wrote down Rebecca's statement detailing the incident, which he had Rebecca read and sign.

The next day, Detective Christopher Johnson began investigating the case. He called Rebecca that day, spoke to her on the phone twice, and took an eight to nine minute voice-recorded statement from her. Johnson then referred the case to the King County Prosecuting Attorney's Office.

The State charged Hudson with felony assault and felony harassment. The State also entered a no-contact order prohibiting Hudson from contacting Rebecca.

From jail, Hudson made eleven telephone calls to a woman and successfully reached her four times. They discussed using Hudson's computer for a chat program, car repairs, bills to be paid, Hudson's medications, and their relationship.<sup>2</sup> In the last call, made on November 2, 2010, Hudson asked the woman whether a prosecutor had been assigned to his case yet. He instructed the woman to tell the prosecutor that she had relocated to Texas. He then said, "once it goes out I'm thinking I should get out either tomorrow or the, or the day after." Hudson told the woman not to answer calls from numbers she did not recognize, and not to reply to any e-mails. The woman agreed. Each of these calls was made from the jail unit where Hudson was housed to Rebecca's phone number at the time.

On December 17, 2010, the trial court dismissed Hudson's charges without prejudice, because Rebecca was unavailable to testify as a witness.

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<sup>2</sup> For instance, the woman said, "Mark you, you don't wanna be fair. . . . You don't wanna be married, you don't wanna be in a marriage you wanna be by yourself. . . . You wanna sneak around and do stuff I don't like that. I really don't like that."

On April 3, 2012, the State charged Hudson by amended information with tampering with a witness – domestic violence (count I), domestic violence misdemeanor violation of a court order (count II), and second degree assault – domestic violence (count III). The witness tampering and violation of a court order charges arose from the four phone calls—particularly the November 2nd call—that Hudson made from jail.

At trial, the State played the four recorded jail calls for the jury. Rebecca denied receiving any jail calls from Hudson, so the identity of the woman in the November 2nd phone call was a contested issue at trial. Detective Johnson testified that he investigated Hudson's jail calls. Johnson explained that he reviewed the recorded jail calls, the recording of Rebecca's 911 call, and the recorded statement he took from her while investigating the alleged assault. Over objection, Johnson testified that he concluded it was Rebecca's voice on the jail calls. He noted that the number he used to call Rebecca during his investigation was the same number Hudson called from jail. And, the content of the calls indicated to him that Hudson spoke with Rebecca from jail.

Rebecca testified at trial that her name was Rebecca Brooks, not Rebecca Hudson. She claimed that she and Hudson were just friends and they had never been married. She testified that on the night of September 16, 2010, she had a fight with John Jackson, her boyfriend at the time. She said that she angrily hit the television and cut her thumb on the broken screen. She claimed that she did not read, sign, or initial the statement the officer wrote at the scene, explaining that she lied to the responding officers that night.

Rebecca testified that she was born in Texas. Her family, including her twin sister, lives there. She explained that, in the fall of 2010, she went to Texas to look for a

job, but returned when she could not find one. On November 4, 2010, Rebecca sent an e-mail to the prosecutor's office saying that she had relocated to Texas. She used the e-mail address "rebecca.ann.hudson@gmail.com" and signed it as "Rebecca Hudson." Rebecca later said that she lied about her name and made up the e-mail address. The e-mail was not admitted into evidence. However, the prosecutor argued in closing that "Rebecca followed [Hudson's] advice" to relocate to Texas. Then, in rebuttal, the prosecutor specifically mentioned the e-mail: "she sent that E-mail to the prosecutor that she relocated to Texas." Hudson did not object to these comments.

The jury was unable to reach a verdict on the assault charge, so the trial court dismissed that count with prejudice. The jury found Hudson guilty of witness tampering and violation of a court order. The trial court sentenced Hudson to 30 days on each count, to run concurrently.

Hudson appeals both his felony conviction for witness tampering and his misdemeanor conviction for violation of a court order.

#### DISCUSSION

Hudson makes three arguments on appeal. First, he argues that there is insufficient evidence to support his conviction for witness tampering. Second, he contends that the trial court erred in permitting Detective Johnson to testify to the identity of the woman's voice on the jail calls, because he had no expertise in voice identification, no personal knowledge of the woman's voice, and no greater ability to identify it than the jury did. Third, Hudson argues that the prosecutor's unobjected-to

reference to evidence outside the record amounts to flagrant and ill-intentioned prosecutorial misconduct.<sup>3</sup>

I. Insufficient Evidence for Witness Tampering

Hudson argues that there is insufficient evidence as a matter of law to support his conviction for tampering with a witness. The jury instructions stated that, to convict for witness tampering, the defendant must have “attempted to induce a person to, without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding.” (Emphasis added.) Hudson argues that the State failed to prove that the potential witness, Rebecca, was “without right or privilege” to absent herself from the proceedings, because she never received a subpoena and was therefore not required to appear in court. The State agrees and concedes that there is insufficient evidence to support the conviction. We accept the State’s concession. Accordingly, we reverse and dismiss Hudson’s conviction for tampering with a witness. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

II. Detective’s Lay Testimony About Voice Identification

Hudson argues that the trial court erred by allowing Detective Johnson to identify Rebecca’s voice in the recorded jail calls. Hudson asserts that Johnson had only a single phone conversation with Rebecca and no expertise in voice identification. Therefore, he argues, the jury had the same ability as Detective Johnson to compare

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<sup>3</sup> Hudson points out that his convictions were designated as domestic violence convictions, so the State had to prove that Rebecca was a member of his family or household. RCW 10.99.020(5). Hudson does not concede that the State proved this. However, he assigns no error to this issue and devotes no argument in his opening brief to whether the State proved the domestic violence designations. We therefore need not consider it. RAP 10.3(a)(4), (a)(6).

the recorded voices. Hudson contends that admitting this testimony violated his right to a jury trial under the federal and state constitutions.

Though Hudson characterizes this issue as a constitutional one, subject to de novo review, we review a trial court's decision to admit lay opinion testimony for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992); see also State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007) (noting that such testimony may have constitutional implications, but the standard of review is abuse of discretion). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. State v. George, 150 Wn. App. 110, 117, 206 P. 3d 697 (2009).

A witness must testify based on personal knowledge. ER 602. A lay witness may give opinion testimony if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or determination of a fact in issue. ER 701. A witness may not offer opinion testimony regarding the defendant's guilt, either by a direct statement or by inference. George, 150 Wn. App. at 117. However, testimony is not objectionable simply because it embraces an ultimate issue the trier of fact must decide. Id.

Opinion testimony identifying individuals in surveillance photographs or voice recordings runs the risk of invading the province of the jury and unfairly prejudicing the defendant. See id. at 118. But, a lay witness may give opinion testimony as to the identity of a person, as long as there is some basis for concluding that the witness is more likely to correctly identify the individual from the recording than is the jury. See id.; see also State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994). aff'd and remanded by State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996).

In Hardy, officers testified to the identities of defendants shown in videos of drug transactions. 76 Wn. App. at 189. The officers had known the defendants for several years, so they were more likely than the jury to correctly identify the defendants. Id. at 191-92. In George, by contrast, a detective reviewed a surveillance video and identified the defendants based only on their build, the way they moved, what they were wearing, how they compared to each other and others involved, and speaking with them on the day of the crime. 150 Wn. App. at 119. The detective's contacts fell short of the extensive contacts in Hardy and did not support a finding that the detective knew enough about the defendants to identify them in the video. Id. The jury was also able to view the surveillance video and 67 still frame images from the video. Id. at 115.

Here, Detective Johnson's testimony about Rebecca's identity was rationally based on his personal knowledge and perceptions. He spoke to Rebecca twice on the phone during his initial investigation and took a recorded statement from her. He reviewed this recording, along with Rebecca's 911 call and Hudson's jail calls while investigating the case. This gave Johnson a greater ability to identify Rebecca's voice than the jury. Unlike George, Johnson also based his conclusion on his personal knowledge of Rebecca's phone number. He used the same number to reach her during his investigation that Hudson used to contact her from jail. The content of the jail calls also indicated to him that Rebecca was the recipient.

Furthermore, Detective Johnson had special knowledge of Rebecca's voice that was helpful to the jury in determining her identity in Hudson's jail calls. Rebecca admitted to calling the police the night of the alleged assault, but the 911 recording was not admitted into evidence. Because the jury could not listen to the 911 call, Johnson's

testimony was helpful in linking Rebecca's voice to Hudson's jail calls. Likewise, Rebecca admitted to giving Johnson a recorded statement and admitted that the voice on that recording sounded like her. However, only brief portions of the recording were played for the jury to impeach Rebecca's testimony. The recording was not admitted into evidence, so the jury could not listen to it during deliberations. Detective Johnson, on the other hand, was able to listen to the recorded statement repeatedly. This makes Johnson's testimony distinguishable from George, because Johnson had unique knowledge of Rebecca's voice that made him more likely to correctly identify her.

We hold that the trial court did not abuse its discretion in allowing Detective Johnson to testify that he believed Rebecca's voice was the one in Hudson's jail calls.

### III. Prosecutorial Misconduct

Hudson argues that the State committed prosecutorial misconduct by referring to evidence not admitted at trial. Specifically, he objects to the prosecutor's reference to Rebecca's e-mail stating that she relocated to Texas, implying that Rebecca followed Hudson's advice to move to Texas. The e-mail was not admitted into evidence. Hudson argues that this misconduct requires us to reverse his witness tampering conviction. The State admits that the prosecutor improperly referred to the e-mail, but points out that Hudson failed to object to the comment.

Prosecutorial misconduct is grounds for reversal if the prosecutor's conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). We review a prosecutor's conduct in the full trial context, including the evidence presented, the total argument, the issues in the case, and the jury instructions. Id. Referring to evidence outside the record is improper. State v. Fisher, 165 Wn.2d 727,

No. 68807-3-1/9

747, 202 P.3d 937 (2009). However, a defendant suffers prejudice only when there is a substantial likelihood that the prosecutor's conduct affected the jury's verdict. Monday, 171 Wn.2d at 675. Absent a timely objection, reversal is required only if the conduct is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative jury instruction. State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008).

This issue is now moot as to Hudson's witness tampering conviction, because we reverse and dismiss that conviction for insufficient evidence. Therefore, the prosecutor's reference to Rebecca's e-mail could not have prejudiced the outcome of the trial on that charge.

Hudson does not argue that the alleged prosecutorial misconduct requires reversal of his conviction for violation of a court order. We nevertheless consider this issue, because the e-mail could conceivably help connect Rebecca to Hudson's jail calls.

Examining the record as a whole, however, we conclude that no prejudice resulted from the prosecutor's improper reference to Rebecca's e-mail. Detective Johnson properly testified that he believed Rebecca to be the recipient of Hudson's jail calls. All the calls Hudson made from jail were to Rebecca's phone number at the time, further establishing her identity. Rebecca testified that she attempted to find a job in Texas, which linked the content of the November 2nd call to her. The jury also had the opportunity to weigh Rebecca's credibility when she testified that she did not speak to Hudson in jail. We defer to the jury's assessment of witness credibility. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated on other grounds by

No. 68807-3-I/10

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We hold that the prosecutor's passing reference to Rebecca's e-mail did not cause any enduring prejudice, given the ample evidence that Hudson called Rebecca from jail, violating the no-contact order.

We affirm Hudson's conviction for violation of a court order. We reverse and dismiss his conviction for tampering with a witness.

Appelwick, J.

WE CONCUR:

Beach, C. J.

Spencer, J.

**APPENDIX B**

**CONSTITUTIONAL PROVISIONS AND STATUTES**

Constitution, art. 1, § 3

"No person shall be deprived of life, liberty, or property, without due process of law."

Constitution, art. I, § 21

"The right of trial by jury shall remain inviolate ... ."

Constitution, art. I, § 22

"In criminal prosecutions the accused shall have the right to appear and defend in person, and by counsel, ... [and] to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed ... ."

United States Constitution, amend. 6

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to have the Assistance of Counsel for his defence."

United States Constitution, amend. 14, § 1

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

**RCW 9.94A.834. Special allegation--  
Endangerment by eluding a police vehicle--  
-Procedures**

(1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

(2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

RCW 9.94A.533(11) provides:

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

**9A.04.060. Common law to supplement statute**

The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense.

**9A.08.020. Liability for conduct of another--  
Complicity [in relevant part]**

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or

(b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He or she is an accomplice of another person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity. ....

**10.99.020. Definitions** [in relevant part]

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

...  
(5) "Domestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:

- ...  
(l) Malicious mischief in the first degree (RCW 9A.48.070);  
(m) Malicious mischief in the second degree (RCW 9A.48.080);  
(n) Malicious mischief in the third degree (RCW 9A.48.090); ... .

APPENDIX C

Ex. 15      Domestic      Violence      No-Contact      Order,  
                 4/27/12

Ex. 16      Domestic      Violence      No-Contact      Order,  
                 7/3/12

**CERTIFIED  
COPY**

**FILED**  
KING COUNTY, WASHINGTON

APR 27 2012

SUPERIOR COURT CLERK  
**BY: PAMELA ANZAI**  
DEPUTY

**ISSUED**

Superior Court of Washington  
for the County of King

No. 11-1-01286-3 ANT

State of Washington  
Plaintiff

Pre-Trial  Post Conviction  
 Replacement Order (paragraph 10)

vs. Mark Curtis Hudson  
Defendant (First, Middle, Last Name)

**Domestic Violence No-Contact Order**

(clj=NOCON, Superior cts =ORNC)  
Clerk's action required: Para 9

**No-Contact Order**

**1. Protected Person's Identifiers:**

Rebecca Ann Brooks  
Name (First, Middle, Last) aka Hudson  
12/4/1972 F B  
DOB Gender Race

If a minor, use initials  
instead of name, and  
complete a Law  
Enforcement Information  
Sheet (LEIS).

**Defendant's Identifiers:**

Date of Birth	
<u>7/27/1971</u>	
Gender	Race
<u>M</u>	<u>B</u>

**2. Defendant:**

- A. shall not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, or keep under surveillance the protected person.
- B. shall not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers.
- C. shall not knowingly enter, remain, or come within \_\_\_\_\_ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: person of.
- D. other: \_\_\_\_\_

**3. Firearms and Weapons, Defendant:**

- shall not obtain or possess a firearm, other dangerous weapon or concealed pistol license. (Pre-Trial, RCW 9.41.800. See findings in paragraph 7, below.)
- shall not obtain, own, possess or control a firearm. (Post Conviction or Pre-Trial, RCW 9.41.040.)
- shall **immediately surrender** all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to the following law enforcement agency: \_\_\_\_\_ (Pre-Trial Order, RCW 9.41.800.)

**4. This no-contact order expires on:** April 27, 2017 Five years from today if no date is entered.

**Warning: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST; ANY ASSAULT, DRIVE-BY SHOOTING, OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY. You can be arrested even if the person protected by this order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid violating the order's provisions. Only the court can change the order. (Additional warnings on page 2 of this order.)**

**Findings of Fact**

- 5. Based upon the record both written and oral, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and the court issues this Domestic Violence No-Contact Order under chapter 10.99 RCW to prevent possible recurrence of violence.
- 6. The court further finds that the defendant's relationship to a person protected by this order is an  Intimate partner (former/current spouse; parent of common child; former/current dating; or former/current cohabitants) or  Other family member as defined by Ch. 10.99 RCW: \_\_\_\_\_.
- 7.  (Pretrial Order) For crimes not defined as a serious offense, the court makes the following mandatory findings pursuant to RCW 9.41.800:  The defendant used, displayed, or threatened to use a firearm or other dangerous weapon in a felony.  The defendant is ineligible to possess a firearm due to a prior conviction pursuant to RCW 9.41.040; or  Possession of a firearm or other dangerous weapon by the defendant presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

**Additional Warnings to Defendant.** This order does not modify or terminate any order entered in any other case. The defendant is still required to comply with other orders.

Willful violation of this order is punishable under RCW 26.50.110. State and federal firearm restrictions apply. 18 U.S.C. § 922(g)(8)(9); RCW 9.41.040.

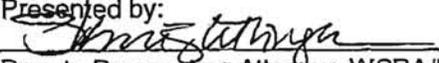
Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

**Additional Orders**

- 8.  Civil standby: The appropriate law enforcement agency shall, at a reasonable time and for a reasonable duration, assist the defendant in obtaining personal belongings located at: \_\_\_\_\_.
- 9. The clerk of the court shall forward a copy of this order on or before the next judicial day to: King #10-233877  County Sheriff's Office  Police Department where the case is filed, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.
- 10.  This order replaces all prior no-contact orders protecting the same person issued under this cause number.

Dated: April 27, 2012  in open court with the defendant present.

  
\_\_\_\_\_  
Judge/ Pro Tem/Court Commissioner

Presented by:   
Deputy Prosecuting Attorney, WSBA# 40954

I acknowledge receipt of this order:  
refused DATE: \_\_\_\_\_  
(Signature of Defendant)

I am a certified or registered interpreter or found by the court to be qualified to interpret in the \_\_\_\_\_ language, which the defendant understands. I translated this order for the defendant from English into that language.

Signed at (city) \_\_\_\_\_, (state) \_\_\_\_\_, on (date) \_\_\_\_\_.  
Interpreter: \_\_\_\_\_ print name: \_\_\_\_\_

**CERTIFIED COPY**  
The filing party of attorney  
Mark C Hudson  
Clerk with the  
Law Enforcement Info Sheet.

**FILED**  
KING COUNTY, WASHINGTON

JUL 03 2012

SUPERIOR COURT CLERK

**ISSUED**

Superior Court of Washington  
for the County of King

No. 12-1-04083-1 SEA

State of Washington  
Plaintiff  
vs. Mark C Hudson  
Defendant (First, Middle, Last Name)

Pre-Trial  Post Conviction  
 Replacement Order (paragraph 10)

**Domestic Violence No-Contact Order**  
(clj=NOCON, Superior cts =ORNC)  
Clerk's action required: Para 9

**No-Contact Order**

1. Protected Person's Identifiers:  
Rebecca A. Hudson  
aka Rebecca Brooks  
Name (First, Middle, Last)  
12/14/72 W F  
DOB Gender Race

If a minor, use initials  
instead of name, and  
complete a Law  
Enforcement Information  
Sheet (LEIS).

Defendant's Identifiers:

Date of Birth	
7/27/71	
Gender	Race
M	W

2. Defendant:
- A. shall not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, or keep under surveillance the protected person.
  - B. shall not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers.
  - C. shall not knowingly enter, remain, or come within \_\_\_\_\_ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: \_\_\_\_\_.
  - D. other: \_\_\_\_\_

3. Firearms and Weapons, Defendant:
- shall not obtain or possess a firearm, other dangerous weapon or concealed pistol license. (Pre-Trial, RCW 9.41.800. See findings in paragraph 7, below.)
  - shall not obtain, own, possess or control a firearm. (Post Conviction or Pre-Trial, RCW 9.41.040.)
  - shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to the following law enforcement agency: \_\_\_\_\_ (Pre-Trial Order, RCW 9.41.800.)

4. This no-contact order expires on: \_\_\_\_\_ Five years from today if no date is entered.

**Warning: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST; ANY ASSAULT, DRIVE-BY SHOOTING, OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY. You can be arrested even if the person protected by this order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid violating the order's provisions. Only the court can change the order. (Additional warnings on page 2 of this order.)**

Findings of Fact

- 5. Based upon the record both written and oral, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and the court issues this Domestic Violence No-Contact Order under chapter 10.99 RCW to prevent possible recurrence of violence.
- 6. The court further finds that the defendant's relationship to a person protected by this order is an  Intimate partner (former/current spouse; parent of common child; former/current dating; or former/current cohabitants) or  Other family member as defined by Ch. 10.99 RCW: \_\_\_\_\_.
- 7.  (Pretrial Order) For crimes not defined as a serious offense, the court makes the following mandatory findings pursuant to RCW 9.41.800:  The defendant used, displayed, or threatened to use a firearm or other dangerous weapon in a felony.  The defendant is ineligible to possess a firearm due to a prior conviction pursuant to RCW 9.41.040; or  Possession of a firearm or other dangerous weapon by the defendant presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

**Additional Warnings to Defendant:** This order does not modify or terminate any order entered in any other case. The defendant is still required to comply with other orders.

Willful violation of this order is punishable under RCW 26.50.110. State and federal firearm restrictions apply. 18 U.S.C. § 922(g)(8)(9); RCW 9.41.040.

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

Additional Orders

- 8.  Civil standby: The appropriate law enforcement agency shall, at a reasonable time and for a reasonable duration, assist the defendant in obtaining personal belongings located at: \_\_\_\_\_
- 9. The clerk of the court shall forward a copy of this order on or before the next judicial day to: Seattle 12-191759  County Sheriff's Office  Police Department where the case is filed, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.
- 10.  This order replaces all prior no-contact orders protecting the same person issued under this cause number.

Dated: 3 July 2012  in open court with the defendant present.

Ronald K. [Signature]  
Judge/ Pro Tem/Court Commissioner

Presented by: [Signature]  
Deputy Prosecuting Attorney, WSBA# 3322

I acknowledge receipt of this order:  
[Signature] DATE: 7-3-12  
(Signature of Defendant)

I am a certified or registered interpreter or found by the court to be qualified to interpret in the \_\_\_\_\_ language, which the defendant understands. I translated this order for the defendant from English into that language.

Signed at (city) \_\_\_\_\_, (state) \_\_\_\_\_, on (date) \_\_\_\_\_.  
Interpreter: \_\_\_\_\_ print name: \_\_\_\_\_

APPENDIX D

INDEX TO REPORT OF PROCEEDINGS CITED IN BRIEF

<u>Citation</u>	<u>Date</u>	<u>Court Reporter</u>	<u>Judge</u>
RP(9/27)	9/27/13	Tom Marshman	Armstrong
		These pretrial proceedings are contained in "Volume #1 of 2" prepared by Mr. Marshman, at pages 38-112.	
RP(1/2)	1/2/13	Tom Marshman	Prochnau
		These pretrial proceedings are contained in "Volume #2 of 2" prepared by Mr. Marshman, at pages 336-54.	
		(Mr. Marshman prepared a separate volume, "Volume #2A of 2" with the same date, of jury selection, not referred to in this brief.)	
RPT(1/3)	1/3/13	Dana Lee Butler	Prochnau
RPOS(1/3)	1/3/13	Dana Lee Butler	Prochnau
		Ms. Butler prepared three separately paginated volumes with the same date.	
		"RPT" refers to the trial testimony, pages 1-96.	
		"RPOS" refers to the opening statements, pages 1-15.	
		(The third volume is jury selection, not referred to in this brief.)	
RP(1/7)	1/7/13	Dana Lee Butler	Prochnau
RP(1/8)	1/8/13	Dana Lee Butler	Prochnau
RP(1/9)	1/9/13	Dana Lee Butler	Prochnau
RP(1/10)	1/10/13	Dana Lee Butler	Prochnau

APPENDIX D (cont'd)

INDEX TO REPORT OF PROCEEDINGS CITED IN BRIEF

Citation    Date            Court Reporter            Judge

RPJQ(1/14) 1/14/13    Michelle Vitrano            Prochnau

This separate report of proceedings was prepared by court reporter Michelle Vitrano, addressing solely two jury questions, page 1-11. It is distinct from another volume dated 1/14/13 prepared by Dana Lee Butler.

RP(3/22) 3/22/13    Tom Marshman            Prochnau

These sentencing proceedings are contained in "Volume #2 of 2" prepared by Mr. Marshman, at pages 355-97.

DECLARATION OF SERVICE

I declare on this date I filed an original and a copy of the Brief of Appellant, postage prepaid, addressed as follows:

Mr. Richard Johnson, Clerk  
Court of Appeals, Division I  
One Union Square  
600 University  
Seattle, WA 98101

And caused a copy of this document to be served on the following entities by depositing them in the United States Mail Service, postage prepaid, address as follows:

King County Prosecutor's Office  
Appellate Unit  
W-554, King County Courthouse  
516 Third Ave.  
Seattle, WA 98104

Mr. Mark C. Hudson  
993430, N-A40L  
P.O. Box 2049  
Airway Heights, WA 99001

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

3/17/2014. SEATTLE, WA  
Date and Place

Alex Fast  
ALEXANDRA FAST