

FILED
SUPREME COURT
STATE OF WASHINGTON
7/10/2024 12:29 PM
BY ERIN L. LENNON
CLERK

S. Ct. No.
COA No. 39131-1-III

Case #: 1032455

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK EARL KIEFFER,

Petitioner.

PETITION FOR REVIEW

Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....	1
B. COURT OF APPEALS DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW.....	1
D. STATEMENT OF THE CASE.....	1
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	7
F. CONCLUSION.....	10

TABLE OF AUTHORITIES

Table of Cases

<i>State v. Borrero</i> , 147 Wn.2d 353, 58 P.3d 245 (2002).....	7, 10
<i>State v. Clowes</i> , 104 Wn. App. 935, 18 P.3d 596 (2001), <i>disapproved on other grounds</i> , <i>State v.</i> <i>Nonog</i> , 169 Wn.2d 220, 237 P.3d 250 (2010).....	10
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	8
<i>State v. Leach</i> , 113 Wn.2d 679, 782 P.2d 552 (1989).....	7

Rule

RAP 13.4(b)(2).....	7, 10
---------------------	-------

A. IDENTITY OF PETITIONER

Mark Earl Kieffer asks this Court to accept review of the Court of Appeals opinion in Part B.

B. COURT OF APPEALS DECISION

The unpublished Court of Appeals opinion which Mr. Kieffer wants reviewed was filed May 18, 2024. A copy of the opinion is attached as Appendix A. His motion for reconsideration was denied on June 11, 2024. A copy of the order denying the motion for reconsideration is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Was the amended information charging Mr. Kieffer with 7 counts of violation of a no contact order insufficient, so the charges must be dismissed?

2. Should Mr. Kieffer be resentenced since these 7 counts must be dismissed?

D. STATEMENT OF THE CASE

Mr. Kieffer was charged by amended information

with count I: harassment occurring October 7, 2021, count II: violation of a no contact order occurring November 28, 2021; count III: violation of a no contact order occurring December 12, 2021; count IV: violation of a no contact order occurring December 15, 2021; count V: residential burglary occurring December 25, 2021, count VI: violation of a no contact order occurring December 30, 2021; count VII: violation of a no contact order occurring December 31, 2021; count VIII: violation of a no contact order occurring January 1, 2022; count IX: residential burglary occurring January 4, 2022; count X: residential burglary occurring January 9, 2022; and count XI: violation of a no contact order occurring January 28, 2022. (CP 143). The case proceeded to jury trial.

Mark and Shalena Kieffer married on January 4, 2003. (Trial VRP 71). They have three children, Avianna, Octavia, and Zionna. (*Id.*). On October 7, 2021, Ms. Kieffer and the children were home at 8709 E. Broadway

in Spokane Valley, Washington. (*Id.* at 72). Mr. Kieffer was not living at the house at the time as he had left the family at the end of January 2016. (*Id.* at 74). The last time he had spent the night at their Broadway home was in August 2016. (*Id.*). There was no parenting plan with the children. (*Id.* at 83).

Mr. Kieffer sent text messages to Ms. Kieffer, who had not heard from him for a long time. (Trial VRP 72-73). He texted he was coming over. (*Id.* at 75). Mr. Kieffer showed up at the home. He was yelling and trying to get the inside door open. (*Id.* at 77). The home had a porch door to the sunroom and an inside door to the living area. (*Id.* at 75). Ms. Kieffer called 911. (*Id.* at 77-78). He broke open the porch door that had three locks and tried to open the inside door. (*Id.* at 77). The chain on top of the inside door kept it from opening all the way. Mr. Kieffer had his foot in the door and his arm in between.

(*Id.* at 82). The sunroom was enclosed. (*Id.* at 85).

There was damage to the door itself. (*Id.* at 86-97).

Deputy Sheriff Elijah Jones arrived at the Broadway home on October 7, 2021. (Trial VRP 129-30). He encountered Mr. Kieffer and made the decision to arrest him. (*Id.* at 130).

A no contact order was entered October 8, 2021, prohibiting Mr. Kieffer from contacting his wife and their home. (Trial VRP 98-100; CP 10). On November 28, 2021, Ms. Kieffer received a text from him on her cell phone saying his phone had been hacked and called, but it was not him. (Trial VRP 104). Ms. Kieffer received texts from Mr. Kieffer on December 12 and 15, 2021, saying he loved and missed her and asked for forgiveness. (*Id.* at 104-05). The texts of November 28, December 12, and December 15, 2021, were received by Ms. Kieffer at her home. (*Id.* at 107). She testified that on December 12, 2021, she also received a voicemail

from him. (*Id.* at 109).

On December 30, 2021, Ms. Kieffer got a text from Mr. Kieffer asking if she would like him to come and shovel the snow. (Trial VRP 114-15). On December 21, 2021, Ms. Kieffer got a text from him expressing his love for her. (*Id.* at 115). On January 1, 2022, she received a text from him wishing her a happy new year. (*Id.* at 115-16). On January 28, 2022, Ms. Kieffer received a number of missed calls from Mr. Kieffer's cell phone number. (*Id.* at 120-22).

Ms. Kieffer testified that on January 9, 2022, Mr. Kieffer had broken the front porch door again and banged on the living room door, yelling. (Trial VRP 117). He was on the front porch. (*Id.* at 119).

The defense presented no witnesses. (Trial VRP 150, 156). There were no objections or exceptions to the court's jury instructions. (*Id.* at 157). The jury found Mr. Kieffer not guilty of count 9: residential burglary on

January 9, 2022, and it was hung on count V: residential burglary on December 25, 2021. The jury found him guilty of count I: harassment and counts II, III, IV, VII, VIII, and XI: violations of a no contact order. (Trial VRP 210, 212-15; CP 271-281). It also returned special verdicts finding Mr. Kieffer and Ms. Kieffer were intimate partners. (CP 282-83). The State dismissed Count V: residential burglary. (Trial VRP 226; CP 306).

Mr. Kieffer was sentenced with an offender score of 8 to 61.5 months for the residential burglary and 364 days on the harassment and 7 counts of violation of a no contact order. (CP 305). Mr. Kieffer did not sign off on the understanding of his criminal history, which showed no prior felonies. (CP 303). The court did not state why the misdemeanors were counted in his offender score. It also imposed a \$500 victim penalty assessment. Mr. Kieffer appealed. (CP 325).

The Court of Appeals affirmed his convictions, but

reversed the victim penalty assessment. (App. A, Op. at 6). Mr. Kieffer filed a motion for reconsideration, which was denied. (App. B).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is warranted under RAP 13.4(b)(2) as the Court of Appeals' decision conflicts with other published decisions of the Court of Appeals.

Criminal defendants have a right to be fully informed of the nature of accusations against them, so they may prepare an adequate defense. *State v. Leach*, 113 Wn.2d 679, 695, 782 P.2d 552 (1989). The "essential elements" rule requires that a charging document allege facts supporting every element of the offense as well as adequately identifying the crime charged. *Id.* at 689. The omission of an essential element in the information violates the defendant's due process right to be informed of the charges. *State v. Borrero*, 147 Wn.2d 353, 360, 58

P.3d 245 (2002).

When a charging document is not challenged until after the verdict, it must be more liberally construed in favor of validity than one challenged before or during trial.

State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

The amended information did not identify the protected person:

Count II: VIOLATION OF A NO CONTACT ORDER, committed as follows: That the defendant, MARK EARL KIEFFER, in the State of Washington, on or about November 28, 2021, with knowledge that the Superior Court had previously issued a NO CONTACT ORDER pursuant to Chapters 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, in *STATE v. MARK KIEFFER*, Cause No. 21-1-02489-32, did violate said order by knowingly violating 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, contrary to RCW 26.50.110, and furthermore, the defendant did commit the above crime against an intimate partner, as defined by RCW 26.50.010(7) and 9A.36.041(3)(a). (CP 143).

This same language was used in all the counts charging violation of a no contact order, *i.e.*, counts II, III, IV, VI, VII, VII, and XI, with the exception of the dates on which the offenses were alleged to have been committed. (CP 143-45). These counts of violation of a no contact order neither alleged when the no contact order was entered nor the identity of the protected person. The amended information also did not attach the no contact order at issue or incorporate it by reference. Rather, the charging document only stated the case name and number and the dates on which the offenses were alleged to have been committed. (CP 143-45).

When there is no reference to the identity of the protected person, the information lacks an essential element. There is no reference identifying Shalena Kieffer. The amended information charging 7 counts of violation of a no contact order lacked this essential element of the crime and the convictions for those counts

must be reversed. *State v. Clowes*, 104 Wn. App. 935, 942, 18 P.3d 596 (2001), *disapproved on other grounds*, *State v. Nonog*, 169 Wn.2d 220, 237 P.3d 250 (2010).

The Court of Appeals cited *Clowes* for the proposition that the identity of the victim was not an essential element of the crime. To the contrary, *Clowes* stated the victim's identity was an essential element. 104 Wn. App. at 42. The Court of Appeals' opinion conflicts with *Clowes*, thus warranting review under RAP 13.4(b)(2).

If the violation of a no contact order counts are dismissed, there must be a resentencing. The counts alleging violation of a no contact order should be dismissed for reasons stated above. *Clowes, supra*. If they are, Mr. Kieffer should be resentenced accordingly as his offender score will change from 8 to 0.

F. CONCLUSION

Based on the foregoing facts and authorities, Mr.

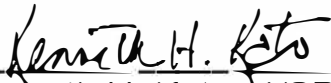
Kieffer respectfully asks this Court to grant his petition for review.

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17, I certify that this document contains 1708 words.

DATED this 10th day of July, 2024.

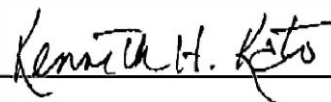
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on July 10, 2024, I served a copy of the petition for review by USPS on Mark Kieffer, # 434123, PO Box 2049, Airway Heights, WA 99001, and through the eFiling portal on the Spokane County Prosecutor's Office.



APPENDIX A

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

STATE OF WASHINGTON,)	No. 39131-1-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
MARK EARL KIEFFER,)	
)	
Appellant.)	

LAWRENCE-BERREY, C.J. — Mark Kieffer appeals after a jury convicted him of one count of residential burglary, one count of harassment, and seven counts of violation of a no contact order—all alleged to have been committed against an intimate partner. Mr. Kieffer challenges the sufficiency of the information, the calculation of his offender score, and the \$500 victim penalty assessment. We disagree with his first two challenges, but agree with his third.

In addition, Mr. Kieffer raises approximately 150 contentions in his statement of additional grounds for review. We decline to address those challenges because most are insufficiently argued, and we do not want to prejudice his ability to raise one or more possibly valid claims later, in a personal restraint petition.

FACTS

In 2021, a trial court imposed a no contact order against Mark Kieffer prohibiting him from contacting his estranged wife, Shalena Kieffer. The order arose out of Mr.

Kieffer's attempt to break into Ms. Kieffer's home while Ms. Kieffer and the couple's children were present. With Ms. Kieffer and the Kieffer children sheltered in their house, Mr. Kieffer had broken through the door to the home's screened porch and attempted to break through the door into the living room. While attempting this, Mr. Kieffer had threatened to kill Ms. Kieffer.

Despite the no contact order, Mr. Kieffer in the ensuing months attempted on nine occasions to contact Ms. Kieffer, whether in person or over the phone. On one occasion, Mr. Kieffer again broke into the home. As a result—and as a result of the original violent encounter—the State charged Mr. Kieffer by amended information with the following:

- Harassment (one count, with an intimate partner allegation)
- Violation of a no contact order (seven counts, with intimate partner allegations)
- Residential burglary (three counts, with intimate partner allegations)

See Clerk's Papers at 143-45. As to the seven no contact order violations, the charging information stated (1) the dates of the offenses, (2) the statutes under which the State intended to charge Mr. Kieffer, (3) the cause number under which the trial court had imposed the no contact order, (4) the allegation that Mr. Kieffer, in the state of Washington, had violated provisions of the order knowingly, and (5) the allegation that Ms. Kieffer was Mr. Kieffer's intimate partner. Mr. Kieffer did not object to the charging information.

After several continuances, the State tried Mr. Kieffer. The jury convicted Mr. Kieffer on all counts, except two residential burglary counts, and found that Ms. Kieffer was Mr. Kieffer's intimate partner. The trial court calculated Mr. Kieffer's offender score on his residential burglary conviction as an 8, and sentenced him to a standard range sentence of 61.5 months of confinement. The trial court also imposed a \$500 victim penalty assessment fee, despite finding Mr. Kieffer indigent.

Mr. Kieffer timely appeals his judgment and sentence.

ANALYSIS

SUFFICIENCY OF INFORMATION

For the first time on review, Mr. Kieffer argues the State's amended information was constitutionally deficient because it did not identify the party the no contact order protected. Because the information passed constitutional muster without stating this information, we disagree.

Standard of review

An information is constitutionally sufficient where it alleges all essential elements of a charged offense. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). A defendant challenging an information for the first time on appeal must show both that the information was deficient and that the deficiency resulted in prejudice. *Id.*

Sufficiency

Mr. Kieffer argues the information charging him with violations of a no contact order was deficient where it failed to state the name of the person protected by the violated order.¹ However, the name of the person protected by an order is not an essential element of the offense of violating that order. *State v. Clowes*, 104 Wn. App. 935, 944, 18 P.3d 596 (2001). Instead, the essential elements of that offense are (1) willful contact with another where (2) a valid no contact order prohibits such contact and (3) the defendant is aware of the order. *Id.* Additionally, for jurisdictional reasons, the offense must have occurred in Washington.

Here, the information alleged knowing² contact in Washington with a party protected by a no contact order, and further alleged Mr. Kieffer's knowledge of that order. Accordingly, the information was sufficient.

OFFENDER SCORE

Mr. Kieffer argues the trial court erred in calculating his offender score because his harassment conviction and his no contact order convictions all are misdemeanors and

¹ Mr. Kieffer also alleges the information was deficient where it failed to identify predicate felony convictions for the purposes of calculating an offender score. However, because the offender score the trial court calculated did not depend on predicate felony convictions, we need not address this contention.

² RCW 9A.08.010(4) provides: "A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears."

thus do not add to his offender score. Because the trial court properly counted these misdemeanor convictions as repetitive domestic violence offenses when calculating his offender score for his residential burglary conviction, we disagree.

Standard of review

Because offender score calculations amount to statutory interpretation, this court reviews a trial court's offender score calculation de novo. *State v. Moeurn*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010).

Offender score calculation

Where a defendant's present conviction is for a felony domestic violence offense, each adult prior conviction for a repetitive domestic violence offense counts against the defendant's offender score, provided the prior offenses were pleaded and proved after August 1, 2011. Former RCW 9.94A.525(21)(d) (2017). Where a trial court sentences a defendant for multiple current offenses, each qualifying concurrent offense counts toward the offender score for every offense as if the concurrent offense were prior. RCW 9.94A.589(1)(a).

Here, one of Mr. Kieffer's current convictions is for residential burglary-domestic violence (DV), which is a felony domestic violence offense. RCW 10.99.020(4)(xxi). Accordingly, he falls within the statutory parameters outlined above. Because violation of a no contact order-DV and harassment-DV qualify as repetitive domestic violence

offenses even where they are misdemeanors, Mr. Kieffer's convictions on those eight charges count as points on his offender score. RCW 9.94A.030(42)(a)(ii), (iv). For these reasons, the trial court properly calculated Mr. Kieffer's offender score as an 8.

VICTIM PENALTY ASSESSMENT

Mr. Kieffer contends the \$500 victim penalty assessment must be struck because of a change in law and because the trial court found he was indigent. We agree.

In 2023, the legislature amended RCW 7.68.035 to prohibit the imposition of victim penalty assessments where the defendant is indigent. LAWS OF 2023, ch. 449, § 1 (effective July 1, 2023). Because a "newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet final," and because Mr. Kieffer is indigent, the victim penalty assessment in this case is improper. *State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018).

ADDITIONAL GROUNDS FOR REVIEW

On direct review, a criminal defendant may file a pro se statement of additional grounds for review (SAG) to identify and discuss matters they believe have not been adequately addressed by appellate counsel. RAP 10.10(a). Although references to the record and citations to authorities are not required, a court will not consider grounds that do not inform the court of the nature and occurrence of alleged errors. RAP 10.10(c). Similarly, passing treatment of an issue or lack of reasoned argument are insufficient to

merit judicial consideration. *Joy v. Dep't of Lab. & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012).

In a 51-page SAG, Mr. Kieffer raises approximately 150 contentions. Many are opinions rather than legal arguments, some relate to the length of delay before trial, and some relate to trial counsel's performance. Due to the sheer number of contentions, the vast majority are insufficiently analyzed to merit consideration.³ Also, were we to resolve a few of the poorly argued issues against Mr. Kieffer here, on direct review, he likely would be precluded from having them later reviewed in a personal restraint petition (PRP). *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999)

³ By way of example, we quote the following paragraphs:

Another reason I violated the [no contact order] was because after my wife and prosecutor, it was made clear that I never threatened anyone

. . . I believe he did me dirty, honestly. I believe my wife became a professional victim, so she could feel good about divorcing me and getting everything, including no visitation with my children.

I feel I was not properly represented, or true justice would have prevailed, and I would have been found not guilty on all counts, in my opinion.

I honestly wonder how all crimes have a DV attachment when there was never evidence. I don't feel this was the intent of the law for this to be used as multiple points like this.

I was never offered a first-time felony sentence, which I believe the Judge should have done as well. They attach seven misdemeanors (DV) convictions to be 7 of the 8 points? It really doesn't seem fair to me.

SAG at 10-11.

No. 39131-1-III
State v. Kieffer


("In PRPs, we ordinarily will not review issues previously raised and resolved on direct review."). For these reasons, we decline to address the issues Mr. Kieffer raises in his SAG.


Affirmed, but remanded to strike the VPA.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Lawrence-Berrey, C.J.

WE CONCUR:


Pennell, J.


Cooney, J.

APPENDIX B

FILED
JUNE 11, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**

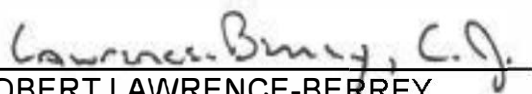
STATE OF WASHINGTON,)	No. 39131-1-III
)	
Respondent,)	
)	
v.)	ORDER DENYING
)	MOTION FOR
MARK EARL KIEFFER,)	RECONSIDERATION
)	
Appellant.)	

The court has considered appellant's motion for reconsideration of this court's opinion dated May 14, 2024. The amended information charged Mark Kieffer with three counts of residential burglary, one count of harassment, and seven counts of *gross misdemeanor* violation of a no-contact order. Because the State did not allege felony violation of a no-contact order, there was no need for the State to allege two prior predicate convictions.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

PANEL: Judges Lawrence-Berrey, Pennell, and Cooney

FOR THE COURT:



ROBERT LAWRENCE-BERREY
CHIEF JUDGE

July 10, 2024 - 12:29 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: State of Washington v. Mark Earl Kieffer (391311)

The following documents have been uploaded:

- PRV_Petition_for_Review_20240710122828SC842963_7743.pdf
This File Contains:
Petition for Review
The Original File Name was mekieffer prv 391311.pdf

A copy of the uploaded files will be sent to:

- alundgren@spokanecounty.org
- gverhoef@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Kenneth Kato - Email: khkato@comcast.net
Address:
1020 N WASHINGTON ST
SPOKANE, WA, 99201-2237
Phone: 509-220-2237

Note: The Filing Id is 20240710122828SC842963