IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TODD GEOFFREY WALTON, Appellant.	No. 39813-3-II UNPUBLISHED OPINION

Penoyar, C.J. — Todd Walton challenges his felony stalking (domestic violence) conviction,[1] arguing that insufficient evidence supports the conviction. He also claims that the trial court violated his due process rights by giving the jury a "to convict" instruction that did not inform the jury that all of the elements had to occur within the charging period. We affirm.

FACTS

Walton and Charmae Crandall began a tumultuous on-again, off-again relationship in 2004 or 2005. Their relationship unraveled over the course of 2009. Violent incidents led the police to arrest Walton twice over the first five months of the year, and he pleaded guilty to multiple charges arising from the incidents. The final incident occurred on May 9, 2009. The police arrested Walton the next day.

During his incarceration for the May incident, Walton wrote at least four letters to Crandall; she received three of them.[2] Crandall testified at trial that the first letter arrived around

[1] RCW 10.99.020; RCW 9A.46.110.

[2] Crandall testified that the post office or law enforcement apparently returned Walton's first attempt to write to her before it reached her because of the protective order. He defeated the order by writing to "Charlie Tevelde." 1 Report of Proceedings (RP) at 96. This was apparently a nickname given to Crandall by her father; she also used it as her MySpace address. Walton

June 11, 2009; the last letter bore a July 1, 2009 postmark. Crandall testified that receiving the letters caused her emotional trauma and that she responded to the letters to express her desire not to see or speak to Walton again. Two no-contact orders forbade Walton from communicating with Crandall at this time. Walton stipulated at trial to knowing that the orders prevented him from communicating with Crandall during this time period. When Vancouver police learned Walton had communicated with Crandall, they contacted her and she gave them the letters. The State charged Walton with felony stalking (domestic violence) and felony domestic violence court order violation.

During trial, Crandall testified about Walton's physical violence against her. During direct examination, she had the following exchange with the prosecutor:

> Q: After you received that last letter from the Defendant did you want him to leave you alone at that point in time?
> A: Yes.
> Q: Did you want any further contact from him at that point in time?
> A: No.
> Q: Okay. Were you in fear for your safety at that point in time?
> A Yes.
> Q: Okay. And why is that?
> A: Well, there were incidents prior to all this where we would be on the offs, and in the middle of the night I'd find him crawling through my window. There were points where he took him [sic] mom's car to come and see—
> [Defense Counsel]: Objection—
> A: —me when we were supposedly off.
> [Defense Counsel]: —Your Honor, that's not relevant.
> [The Court]: Overruled.
> A: And it'd be in the middle of the night and he'd pace my floor and tell me how much he loves me and all this stuff. And, you know, we had just made a pact that we weren't going to see each other for a month or—you know, because of my drinking problem or whatever, and—you know, so, yeah. And he would—he came one night with a screwdriver and said, well, if I couldn't get in, I was gonna get in.

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wrote to "Tevelde" in the care of Crandall.

1 Report of Proceedings (RP) at 110-11. However, during cross-examination, Crandall had the following exchange with Walton's defense counsel:

> Q: And again, you get these letters, why didn't you call the police?
> A: Uhm, I believe because he was incarcerated I didn't feel there was anything he could do further.
> Q: You weren't afraid because he was incarcerated?
> A: Yes.

1 RP at 141.

Crandall's testimony contained several other references to her fear, or lack thereof, of Walton. She testified that she feared him after the first time he assaulted her. She testified that during his incarceration for the January incident she constantly monitored when he would be released because she feared for her safety upon his release. She testified that she feared him after a violent incident at the end of April. Finally, she testified that she feared Walton would try to contact her again when released from prison for the May incident and that she was contemplating moving elsewhere in order to get away from him. Crandall testified that the letters demonstrated to her Walton's continuing efforts to exercise control over her life and his refusal to accept that their relationship had ended. However, during cross-examination, Crandall spoke again about Walton's January arrest. She testified that she forgave Walton for the incident during his incarceration and that she did not fear him following his release from prison in April. She feared Walton again when he struck her after his release. During cross-examination, Crandall explained her alternating feelings by testifying that she had periods when she feared Walton interspersed with periods without such fear.

The trial court instructed the jury, modeling its "to convict" instruction on the pattern instructions for felony stalking. 11 Washington Practice: Washington Pattern Jury Instructions:

Criminal 36.21.02, at 598-99 (3d ed. 2008) (WPIC); 11 WPIC 36.21.03, at 602-03. The first element of the "to convict" instruction included the charging period. During deliberations, the jury asked the trial court if the time period applied to each of the elements or just the first one. The trial court instructed the jurors to "[f]ollow the jury instructions." Clerk's Papers (CP) at 54. The jury convicted Walton of felony stalking.[3] He appeals.

ANALYSIS

I. Sufficiency of the Evidence

Walton contends that the evidence was insufficient to support his conviction. He argues that the State failed to prove that he placed Crandall in a subjective state of fear by sending her letters. We disagree.

When reviewing a claim of insufficient evidence, we must determine whether a rational fact finder could find that the State has proven all the elements of the crime beyond a reasonable doubt. *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010) (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). We evaluate all evidence in the light most favorable to the State. *Drum*, 168 Wn.2d at 34. The defendant thus admits the truth of all of the State's evidence and all inferences reasonably drawn from it. *Drum*, 168 Wn.2d at 35. Further, we "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[3] The jury also convicted Walton of felony domestic violence court order violation. On appeal, Walton only challenges his felony stalking (domestic violence) conviction.

Sufficient evidence supports Walton's conviction. We defer to the trier of fact's decision regarding Crandall's seemingly conflicting testimony about her fear of Walton. Crandall testified that when she received the third letter she was afraid of Walton; her testimony regarding the third letter and other incidents indicated that she feared he would harm her upon his release from prison. Despite her arguably contradictory testimony elsewhere in the record, viewed in the light most favorable to the State, this testimony supports a finding that Walton's letters placed Crandall in fear and provides sufficient evidence to affirm the conviction. Crandall's testimony that the letters indicated that Walton refused to accept her termination of their relationship and that she was considering moving to escape him provides further support for the jury's finding. We affirm Walton's conviction.

II. Jury Instructions

Walton also claims that the trial court violated his due process rights by issuing an incorrect jury instruction. He asserts that, under the law of the case doctrine, the State assumed the burden of proving the charging period for each element because it incorporated the charged period into the "to convict" instruction's first element. He argues that the failure to instruct the jury that the charging period applied to each element was tantamount to omitting an element from the jury instruction. He maintains that the instructional error prejudiced him, asserting that the jury would have acquitted him if it had been properly instructed on the application of the charging period to all the elements based on the jury's question to the trial court. We disagree.

We review claims involving "to convict" instructions de novo. *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). Due process requires the State to prove every essential element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.

Ed. 2d 368 (1970); *Fisher*, 165 Wn.2d at 753-54. "To convict" instructions that fail to include an essential element violate due process by freeing the State from the burden of proving the omitted element of the crime. *Fisher*, 165 Wn.2d at 753.

The charging period is not a statutory element of the crime of felony stalking. *See* RCW 9A.46.110. However, under the law of the case doctrine, "jury instructions not objected to become the law of the case." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The State assumes the burden to prove beyond a reasonable doubt any elements without a statutory basis added to the "to convict" instructions. *Hickman*, 135 Wn.2d at 102. A defendant may assign error to non-statutory elements added to the "to convict" instructions; this includes challenging the sufficiency of evidence proving the added element. *Hickman*, 135 Wn.2d at 102.

In *Hickman*, our Supreme Court illustrated how the law of the case doctrine functions. 135 Wn.2d 97. The State added an unnecessary venue element to the "to convict" instruction in its attempts to convict Hickman for insurance fraud. *Hickman*, 135 Wn.2d at 99. The to convict instruction therefore required the State to prove that (1) the defendant knowingly presented or caused to be presented a false insurance claim, (2) that the false claim involved more than $1,500, and (3) that the act occurred in Snohomish County. *Hickman*, 135 Wn.2d at 101. The court held that, even though the venue element had no statutory basis, the State bore the burden of proving it beyond a reasonable doubt because the "to convict" instruction included it. *Hickman*, 135 Wn.2d at 105.

Walton claims that, under the law of the case doctrine, the incorporation of the charging period, the days between June 10, 2009, and July 6, 2009, into the "to convict" instruction's first element made the charging period an essential component of the instruction's other elements. He

argues that the trial court improperly omitted this extra essential component from the instruction's other elements when it instructed the jury. However, Walton's case is distinguishable from other cases involving the law of the case doctrine, such as *Hickman*. In *Hickman*, the added element, the venue requirement, modified the other elements by requiring that the act of submitting a false claim occur in Snohomish County.

In contrast, the jury instruction here only set a time period for the first element: "on or between June 10, 2009 and July 6, 2009, [Walton] intentionally and repeatedly harassed Charmae Crandall." CP at 36. This instruction became the law of the case. The State did not incorporate a time period into the other elements of the instruction the way the venue element set a place for the other elements in *Hickman*. Instead, the instruction confined the incorporation of the time period to the first element. Walton cites no rationale or authority for the proposition that, under the law of the case doctrine, extra essential components incorporated into one element of the "to convict" instruction necessarily modify all the elements in the instruction. Because the instruction confined the incorporation of the charging period into the first element, the State only assumed the burden of proving the period for the first element. The trial court therefore did not omit an element from the instruction. No instructional error occurred.[4]

We affirm.

[4] Even if we accepted Walton's argument that the charging period must be read into each element, sufficient evidence exists in the record to affirm Walton's conviction. Walton argues, based on Crandall's testimony that she did not fear he could harm her at the time she received the third letter because he was incarcerated, that if the trial court instructed the jury that the charging period applied to the other elements, the jury would have acquitted him. She testified however, that the third letter caused her to fear him. A reasonable inference from the evidence in the record is that, while she did not fear that he could harm her at the time she received the letter, she did fear at the time that he would harm her when he got out of prison. We reject his challenge.

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

Penoyar, C.J.

We concur:

Hunt, J.

Worswick, J.