IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27546-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
RONALD JAMES EDWARDS,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J.—Ronald Edwards challenges his Spokane county conviction for felony violation of a no-contact order, alleging that the trial court erred in admitting evidence of his past relationship with his ex-wife and in instructing the jury. He also argues that the charging document was defective. We conclude the trial court did not abuse its discretion in the challenged evidentiary rulings, Mr. Edwards was not harmed by the alleged instructional errors, and the charging document was not defective. We also reject Mr. Edwards's *pro se* contentions regarding a 2002 protection order. The conviction is affirmed.

FACTS

Ronald and Cindy Edwards were married from 1976 to 2002. The current case arose on May 22, 2008, when Cindy Edwards and David Oien reported to police that Mr. Edwards drove his Volkswagen past Ms. Edwards's house and parked there for several minutes in violation of a no-contact order. He departed before police arrived. Officers spotted the car at a nearby tavern and arrested Mr. Edwards inside the establishment.

He was charged with violating a domestic violence no-contact order issued as part of a 2007 conviction. It was alleged that Mr. Edwards twice had been convicted of violating prior no-contact orders. The first conviction occurred in 1997 after Mr. Edwards violated a no-contact order entered after Ms. Edwards had initiated dissolution proceedings. The dissolution action was later dismissed after the parties reconciled. Dissolution proceedings began again and were finalized in 2002.

The end of the marriage did not end Mr. Edwards's attempts to see Cindy Edwards. He was convicted of stalking her in 2003. He was convicted in 2007 of violating a no-contact order. He completed his sentence for that offense about six months before the current crime.

Prior to trial, the court heard a motion *in limine* concerning the State's efforts to use prior violations of earlier no-contact provisions to show the defendant's motive in

trying to contact the victim; it was his pattern of behavior. The trial court determined that only prior acts that showed violations of the no-contact provisions would be allowed, with the court excluding acts before the no-contact provisions were entered and acts of assault and witness tampering. The court entered a written order detailing which incidents could be considered at trial. Only about one-third of the State's proffered incidents were permitted.

Before Cindy Edwards testified, the court gave an oral limiting instruction to the jury, advising it that the prior incidents could only be considered "for the purposes of motive as it may pertain to the charges before you. You may not consider the evidence that will be proffered for any other purpose." Report of Proceedings (RP) 99. There was no objection to the instruction. No written instruction on the topic was included in the court's instructions to the jury.

Mr. Oien and Ms. Edwards testified about Mr. Edwards parking in their driveway on May 22, 2008. Ms. Edwards also testified concerning the various other incidents over the years in which Mr. Edwards, contrary to a court order, would attempt to contact her or make his presence known to her. The periods of time when he was in jail were about the only time he was not making efforts to see her.

Mr. Edwards testified in his own behalf and told jurors that he had not been by

Ms. Edwards's home that day. He was busy during the day and had loaned his car to his nephew, who returned the car to him at the tavern.

The court instructed the jury without objection from the parties. The jury convicted Mr. Edwards as charged. The court imposed a 60-month sentence. Mr. Edwards timely appealed to this court.

ANALYSIS

This appeal challenges the court's ER 404(b) ruling about the prior incidents, the adequacy of the limiting and elements instructions, and the sufficiency of the charging document. We will address those issues in the order stated.

ER 404(b)

Evidence of other bad acts can be admitted under ER 404(b) when a trial court identifies a significant reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The balancing of these interests must be conducted on the record. *Id.* at 832. The decision to admit or deny admission of ER 404(b) evidence is reviewed for abuse of discretion. *Id.* at 831. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In order to admit evidence of "other bad acts" under ER 404(b), the proponent of the evidence must first convince a trial court by a preponderance of the evidence that the "misconduct" actually occurred. *State v. Lough*, 125 Wn.2d 847, 853, 864, 889 P.2d 487 (1995). A trial court may conduct a hearing to take testimony, but is not required to do so. *State v. Kilgore*, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002). If the court determines that the misconduct occurred, the court then must identify the purpose for which the evidence is offered, determine whether the evidence is relevant to prove an element of the offense, and weigh the probative value of the evidence against its prejudicial effect. *Lough*, 125 Wn.2d at 853. The court may then admit the evidence subject to a limiting instruction telling the jury the proper uses of the evidence. *Id.* at 864.

The trial court followed these procedures in its assessment of the prior bad acts evidence. It conducted a pretrial hearing and determined which of the prior incidents were proven to have occurred. It then eliminated incidents that did not relate to violations of the no-contact provisions. It considered the prejudicial nature of the testimony and concluded that the probative value of the evidence outweighed its prejudicial impact. To further assuage the prejudice, the court directed the State to limit some of the admissible testimony to a summary form.

The record establishes that the trial court lived up to its responsibilities under ER 404(b) and gave careful consideration to the proffered evidence, admitting only the most probative incidents. Against this careful consideration, Mr. Edwards argues that it was "overkill" for the trial court to permit as much testimony as it did, particularly where the State admittedly had the right to admit the two prior convictions necessary to establish that the current offense constituted a felony.

We think the quantity of evidence admitted fell within the considered discretion of the trial judge. How much evidence was "too much" evidence is a question best adjudged by the trial judge who knows what testimony is expected and has the best feel for the potential impact of the evidence. Limiting the number of incidents might also have undercut the probative value of the testimony, since it would have (wrongly) suggested that Mr. Edwards had controlled his behavior in the past and would make the admitted evidence less likely to show motive.

The trial court's decision to allow the jury to see the complete picture of Mr. Edwards's efforts to see his former wife, notwithstanding court orders, was carefully considered after following proper procedures. We find no abuse of discretion.

Limiting Instruction

Mr. Edwards next argues that the limiting instruction used by the trial court was

inadequate. Because he did not object to the court's instruction and did not propose a proper instruction of his own, he has waived this argument.

Mr. Edwards contends that the limiting instruction here failed to advise jurors that in considering the other bad acts evidence for purposes of motive, they must not consider the evidence for propensity purposes. He relies upon *State v. Cook*, 131 Wn. App. 845, 129 P.3d 834 (2006). There the court found that an instruction which told the jury that it could consider the prior incidents for the purpose of assessing the credibility of the victim, but could not consider it for any other purpose, was inadequate protection against the jury considering it for propensity purposes. *Id.* at 853-854. Mr. Edwards appears to argue that a limiting instruction that tells the jury not to consider the evidence "for any other purpose" is inadequate per *Cook.*

We think that argument is based on an overly broad interpretation of *Cook.* There the court's analysis actually focused on the ambiguous nature of using prior bad acts for witness credibility purposes without properly tying the evidence to the particular conduct of the witness for which it would be admissible. In that circumstance, the limiting instruction did not adequately preclude the jury from using the evidence improperly. *Id.*

We need not decide the issue, however, for the more fundamental reason that Mr. Edwards did not challenge the oral limiting instruction. A party's failure to request a

limiting instruction waives the right to the instruction. *State v. Newbern*, 95 Wn. App. 277, 295-296, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999). We believe the same principle applies to an allegedly inadequate limiting instruction. Mr. Edwards did not propose an instruction of his own, nor did he challenge the instruction given the jury. We think his challenge here comes too late.

Mr. Edwards has waived his right to challenge the adequacy of the court's limiting instruction.

Elements Instruction

Mr. Edwards also challenges the court's elements instruction, arguing that it omitted the element of "knowledge." Under the circumstances of this case, any error in the elements instruction was harmless beyond a reasonable doubt.

No-contact orders entered as a result of a criminal conviction are governed by RCW 10.99.050(1). RCW 10.99.050(2)(a) provides: "Willful violation of a court order issued under this section is punishable under RCW 26.50.110." In turn, RCW 26.50.110(1)(a) states in relevant part:

> Whenever an order is granted under this chapter, chapter . . . 10.99, . . . and the respondent or person to be restrained knows of the order, a violation of any of the following restraint provisions . . . is a gross misdemeanor, except as provided in subsections (4) and (5) of this section.

The elements instruction in this case required the State to prove that the defendant

had knowledge of the no-contact order and violated the restraint provisions of the order. CP 26. Reading RCW 10.99.050(2)(a) in conjunction with RCW 26.50.110(1)(a), Mr. Edwards argues that the elements instruction was incorrect because it did not include the element that the violation was willful. He finds support in two prior Division Two cases, *State v. Sisemore*, 114 Wn. App. 75, 55 P.3d 1178 (2002), and *State v. Clowes*, 104 Wn. App. 935, 18 P.3d 596 (2001). *Clowes* reasoned that adding the willfulness element to RCW 26.50.110 was necessary in order to avoid the possibility of an accidental contact leading to a conviction. 104 Wn. App. at 944-945.

We need not decide if we agree with *Clowes* and *Sisemore* because the willful nature of the contact was not in issue in this case.[1] Omission of an element from a "to convict" instruction is harmless error if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 15, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999) (citing *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)); *State v. Thomas*, 150 Wn.2d 821, 840-841, 83 P.3d 970 (2004). That is the situation here. Ms. Edwards and Mr. Oien described a pattern of willful

[1] We note that the current 11 *Washington Practice*: *Washington Pattern Jury Instuctions: Criminal* 36.51, at 632 (3d ed. 2008) (WPIC) (replacing former WPIC 36.51 and former WPIC 36.53) does require proof that the defendant knowingly violated a provision of the order in addition to requiring proof that the defendant knew of the order. Respondent acknowledges that the jury was instructed here according to former WPIC 36.53. Br. of Resp't at 10.

contact that constituted a violation of the no-contact order: repeated driving around the house, parking in front of the house, and gesturing at the house. In contrast, Mr. Edwards claimed he was at a tavern and that his vehicle was in the hands of his nephew. In other words, identity, not willfulness, was the issue for the jury.

We are convinced that the absence of a willfulness element did not contribute to the verdict in this case. If there was error in the instruction, it was harmless beyond a reasonable doubt.

Charging Document

Mr. Edwards, continuing his argument that a willful violation is an element of the crime, also contends that the charging document erroneously failed to state a crime. Assuming for purposes of discussion that a willfulness allegation is required, we still find that the charging document was sufficient under the liberal standard of construction applied to post-trial challenges to charging documents.

A charging document must state the elements of the alleged crime in order to give the accused an understanding of the crime charged. "All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When challenged for the first time after a verdict

has been returned, courts will liberally construe the document to see if the necessary facts can be found. If not, the charge will be dismissed without prejudice. Even if the charge is stated, a defendant who shows prejudice from "inartful" pleading also receives a dismissal of charges without prejudice. *Id*. at 105-106.

Mr. Edwards did not challenge the charging document until this appeal. Thus, the liberal construction standard applies here. *Id.* The information filed in this case alleged:

> VIOLATION OF A DOMESTIC VIOLENCE NO CONTACT ORDER, committed as follows: That the defendant, RONALD JAMES EDWARDS, in the State of Washington, on or about May 22, 2008, with knowledge that the SUPERIOR Court had previously issued a DOMESTIC VIOLENCE NO CONTACT ORDER pursuant to STATE law in Cause No. 07-1-03167-8, did violate said order by violating the restraint provisions therein, and furthermore, the defendant has at least two prior convictions for violating the provisions of an order . . . ; contrary to RCW 26.50.110(1).

CP 1.

A person acts "willfully" when he or she "acts knowingly with respect to the material elements of the offense." RCW 9A.08.010(4). Thus, "knowledge" is a substitute for "willful." *Sisemore*, 114 Wn. App. at 78.

Liberally construed, we believe the information here conveys the concept of willfulness. Mr. Edwards was accused of knowing of the order, violating its restraint provisions, and of having violated similar orders twice before. These allegations suggest that Mr. Edwards acted "knowingly with respect to the material elements of an offense"

and satisfy the willfulness standard. Thus, even if willful violation of the no-contact order is an element of the offense, we believe this charging document contains enough facts to allege that element.

Pro Se Argument

Mr. Edwards has filed a *pro se* Statement of Additional Grounds (SAG) and several addenda to the document. His complaints seem directed at the validity of the no-contact order issued in the 2002 dissolution proceedings and a police search that was apparently conducted in relation to the stalking case against him.

The relevance of these arguments to this case, which charges him with violating a 2007 no-contact order, is unclear. What has long been clear, however, is that this court cannot consider a collateral challenge to a judgment in another matter. *E.g.*, *Bullock v. Bullock*, 131 Wash. 339, 342-343, 230 Pac. 130 (1924). Any challenge to prior judgments has to be timely brought in the court that rendered the judgment.[2] The judgments in the earlier matters are not before this court.

The SAG does not present grounds for overturning this case.

The judgment is affirmed.

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] With respect to criminal cases, the time limits of RCW 10.73.090 also apply.

2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.