2013 IL App (1st) 090818-U

FIFTH DIVISION
Filed June 14, 2013
Modified upon Denial of Rehearing August 9, 2013

No. 1-09-0818

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County
Plaintiff-Appellee,	)	
	)	Nos. 06 CR 12793
v.	)	06 CR 12794
	)	
JOSEPH COSTA,	)	Honorable
	)	Diane Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 Held: Defendant's convictions and sentence for aggravated battery to a peace officer, aggravated stalking and violation of an order of protection are affirmed. Mittimus corrected.

¶ 2 Following a jury trial, defendant Joseph Costa was found guilty of aggravated battery to a peace officer, aggravated stalking and violation of an order of protection. The court sentenced him to 13 years' imprisonment. Defendant appeals, arguing (1) the trial court erred in entering a conviction for aggravated stalking on count I of indictment 06 CR 12974 when the jury was instructed only on count II; (2) his right to a

unanimous jury verdict was violated; (3) his conviction for violating an order of protection violated the one-act, one-crime doctrine; and (4) the court improperly failed to limit the State's use of other crimes evidence. We affirm the trial court and correct the mittimus.

¶ 3 Background

¶ 4 Defendant is not challenging the sufficiency of the evidence in this case. Therefore, we will discuss only those facts relevant to this appeal.

¶ 5 Pamela obtained an order of protection against defendant, her then-husband, on February 16, 2006 (the OP). The OP prohibited defendant from harassing Pamela, interfering with her personal liberty, stalking her and entering or remaining at her condominium and office buildings. He was ordered to stay away from Pamela and to have no contact with her "by any means."

¶ 6 Chicago Police Officer Hill served defendant with the OP at 9:00 p.m. on February 16, 2006, and escorted him from the condominium building in which he and Pamela lived. Pamela subsequently filed for divorce. Over the next several months, defendant phoned Pamela, drove by her office and her residence, tried to follow her into her condominium building and parked across from her office building. During the relevant period, for her own protection, Pamela hired private bodyguards. Brian Tedeschi, a Chicago police officer who has since been promoted to detective, worked as one of her bodyguards while off-duty from the police department.

¶ 7 In May 2006, in case number 06 CR 12793, the State charged defendant by

indictment with aggravated battery of a peace officer (720 ILCS 5/12-4(b)(18) (West 2006)) for knowingly and intentionally striking Detective Tedeschi with a car on April 19, 2006.[1] It also charged defendant with violation of an order of protection (720 ILCS 5/12–30(a)(1) (West 2006) (subsequently renumbered and amended as 720 ILCS 5/12–3.4(a)(1) (West 2010))) for driving by Pamela's place of business on April 19, 2006, in violation of the OP.

¶ 8 By separate indictment, in case number 06 CR 12794, the State charged defendant with two counts of aggravated stalking (720 ILCS 5/12-7.4(a)(1), (3) (West 2006)) and two counts of violation of an order of protection (720 ILCS 5/12–30(a)(1) (West 2006) (subsequently renumbered and amended as 720 ILCS 5/12–3.4(a)(1) (West 2010))).[2] In count I, it charged that defendant committed aggravated stalking when, on February 20, 2006, he followed Pamela and placed her under surveillance when he entered her condominium building and followed her into the elevator; on February 22, 2006, he parked his car outside her building and followed her; and, in conjunction with those acts, on February 15, 2006, he caused her bodily harm by grabbing and twisting her arm. In count II, the State charged that defendant committed aggravated stalking when, on February 20, 2006, he followed Pamela and placed her under surveillance when he entered her condominium building and followed her into the

[1] The State charged defendant with two counts of aggravated battery but *nolle prossed* one of the counts.

[2] The State charged defendant with four counts of violation of an order of protection but *nolle prossed* two of the counts.

elevator; on February 22, 2006, he parked his car outside her building and followed her; and, in conjunction with those acts, he violated an order of protection.

¶ 9 In count IV, the State charged defendant with violating an order of protection by driving past Pamela's residence on April 13, 2006. In count V, it charged defendant with violating an order of protection by following Pamela and attempting to enter her condominium building on April 17, 2007.

¶ 10 Defendant was released on bond. When he failed to appear in court on November 15, 2006, the court entered bond forfeiture warrants. It continued the cases until December 18, 2006, on which date the State informed the court that defendant was in custody in Hawaii and would be extradited back to Illinois. Defendant had been arrested in Hawaii on the warrants by United States marshals on December 12, 2006.

¶ 11 The State then charged defendant by indictments 07 CR 1771, 07 CR 1772, 07 CR 1773 and 07 CR 19864 with two counts of violating bail, aggravated false impersonation of a peace officer, harassing a witness, intimidating a witness and violating an OP. It charged that defendant had called Detective Tedeschi from Hawaii on October 16, 2006, pretending to be a Chicago police detective and had attempted to intimidate Tedeschi. It also charged that Joseph had telephoned Pamela from Hawaii on December 8, 2006, and told her that she was under constant surveillance and that, between October and December 2006, he had made 1,500 telephone calls to Pamela. Defendant was found guilty under these four indictments in September 2008 and sentenced to a total of 17 years' imprisonment.

¶ 12 The court granted the State's motion to join the two indictments at bar, case numbers 06 CR 12793 and 06 CR 12794. Over defendant's objection, the court also granted the State's motion to admit as other crimes evidence the calls defendant had made to Detective Tedeschi and Pamela from Hawaii during October to December 2006 in order to show defendant's intent and lack of mistake.

¶ 13 Defendant's jury trial began in February 2009. Pamela's father, two police officers and another of Pamela's bodyguards testified regarding the occurrences underlying both indictments. Pamela and Detective Tedeschi testified regarding the occurrences underlying both indictments and regarding defendant's phone calls to them from Hawaii. During Pamela's testimony, she told the jury that she received hundreds of telephone calls after November 2006. Although most of the calls were "private," she received one phone call from telephone number 808-688-6446. The jury heard clips from defendant's December 8, 2006, phone call to Pamela. Peter Gose, a representative of a Hawaiian cellular phone company, testified regarding the number of phone calls made from the 808 phone number, to which phone numbers the calls were made and the duration of the calls. Detective Jim Sherlock testified regarding defendant's apprehension by U.S. marshals in Hawaii on a fugitive warrant and finding a mobile phone with the 808 phone number in defendant's possession. Defendant called no witnesses.

¶ 14 The jury received six general verdict forms: one "guilty" form and one "not guilty" form for each of the offenses of aggravated battery on a peace officer, violation of an

order of protection and aggravated stalking. The jury found defendant guilty of all three offenses. The court sentenced defendant to consecutive prison terms of five years for aggravated battery of a peace officer (count II of 06 CR 12793), three years for violating an OP (count III of 06 CR 12793) and five years for aggravated stalking (count I of 06-CR-12794), for a total of 13 years' imprisonment.[3] The court then ordered that defendant serve his sentences consecutively to the sentences imposed under indictments 07 CR 1771, 07 CR 1772, 07 CR 0773 and 07 CR 19864, resulting in a combined total of 30 years' imprisonment. The court denied defendant's posttrial motion on March 10, 2009. Defendant timely filed his notice of appeal on March 17, 2009.

¶ 15 Analysis

¶ 16 Defendant argues (1) the trial court erred in entering a conviction for aggravated stalking on count I of indictment 06 CR 12974 when the jury was instructed only on count II; (2) his right to a unanimous jury verdict was violated because the jury's general verdicts made it impossible to determine on which offenses the jury had based his convictions for violation of an order of protection and aggravated stalking; (3) his conviction for violating an order of protection violated the one-act, one-crime doctrine because his conviction for aggravated stalking was predicated on his violation of an order of protection; and (4) the court's failure to limit the State's use of other crimes

[3] The State *nolle prossed* remaining counts II, IV and V of indictment 06 CR 12794.

evidence caused the trial to degenerate into an impermissible mini-trial on other crimes evidence.

¶ 17 1. Mittimus

¶ 18 Defendant argues that the trial court erred in entering a conviction for aggravated stalking on count I of indictment 06 CR 12974 when the jury was instructed only on count II of the indictment. The State concedes that defendant's conviction for aggravated stalking was proper under count II and not under count I. The record bears this out. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to amend the mittimus to reflect that defendant's conviction for aggravated stalking is under count II of indictment 06 CR 12974 rather than under count I.

¶ 19 2. Right to a Unanimous Jury Verdict

¶ 20 Defendant argues that his convictions for aggravated stalking and violation of an order of protection should be reversed because his constitutional rights to a unanimous jury verdict and to be convicted based on specific illegal conduct were violated. At trial, defendant was charged with three counts of violating an order of protection and two counts of aggravated stalking.[4] The jury returned general guilty verdicts on both the violation of an order of protection and the aggravated stalking predicated on a violation of an order of protection offenses. The jury had received a single set of verdict forms

[4] A person commits the crime of aggravated stalking when he commits the crime of stalking and either "(1) causes bodily harm to the victim; (2) confines or restrains the victim; or (3) violates *** an order of protection ***." 720 ILCS 5/12-7.4(a) (West 2010).

for each of the two offenses, under which it could return a general verdict of "guilty" or "not guilty" for aggravated stalking and for violation of an order of protection. It had not received specific verdict forms for each count of those offenses.

¶ 21 Defendant asserts that the jury instructions invited the jury to base a guilty verdict on a number of separate offenses that occurred on different dates and the jury's general verdicts made it impossible to determine on which specific offenses the jury had based his convictions for violating of an order of protection and aggravated stalking. He asserts that the general verdicts make it possible that the jurors did not unanimously agree on which specific offense formed the basis for his conviction for violation of an order of protection, which also underlies the aggravated stalking conviction.

¶ 22 Defendant concedes that he failed to object to the verdict forms at the instruction conference but asserts the issue is not forfeited for appellate review because substantial defects involving jury instructions rise to the level of plain error. This assertion is the entirety of his argument regarding plain error. The plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the

evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 23 Under both prongs of the plain-error doctrine, the defendant bears the burden of persuasion. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). If the defendant fails to sustain his burden, we must honor the procedural default. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Defendant's single sentence reference to plain error is clearly insufficient to support his burden to establish plain error. However, given that the alleged error involves his substantial right to be convicted by a unanimous jury, we will address the merits of the argument. *People v. Diaz*, 244 Ill. App. 3d 268, 270-71 (1993).

¶ 24 It is well-settled that " 'the jury need only be unanimous with respect to the ultimate question of defendant's guilt or innocence of the crime charged, and unanimity is not required concerning alternate ways in which the crime can be committed.' " *People v. Rand*, 291 Ill. App. 3d 431, 440 (1997) (quoting *People v. Travis*, 170 Ill. App. 3d 873, 890 (1988)); see also *People v. Diaz*, 244 Ill. App. 3d 268, 271-74 (1993); *People v. Griffin*, 247 Ill. App. 3d 1, 13 (1993). "[A] jury can properly return a single general verdict of guilty based on instructions which provide in the disjunctive alternative methods of committing a single crime, so long as those alternatives are not so divergent as to be constitutionally infirm," *i.e.*, only so long as the alternatives are not in fact separate offenses. *Griffin*, 247 Ill. App. 3d at 13 (1993) (citing *Shad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 (1991)); *Rand*, 291 Ill. App. 3d at 440.

¶ 25 The jury received the following instruction regarding the violation of an order of

protection charges:

"To sustain the charge of violation of an order of protection, the State must prove the following propositions:

First: That the defendant drove to Pamela Costa's place of business;

or

That the defendant drove past the residence [of] Pamela Costa;

or

That the defendant followed Pamela Costa; and

Second: That an order of protection prohibited the defendant from committing those acts;

and

Third: That the order of protection was in effect at the time the defendant committed those acts; and

Fourth: That at the time the defendant committed those acts, he had been served notice of the contents of an order of protection or otherwise had actual knowledge of the contents of the order.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty."

The report of proceedings shows that the jury heard ample testimony from Pamela, her father who had moved in with her, her private security guard Detective Tedeschi, a

second private security guard and two police officers showing that the OP was valid, defendant knew its contents and he had variously driven to Pamela's place of business, driven past her residence and followed her.

¶ 26 The jury received the following instruction regarding the offenses of stalking and aggravated stalking:

"To sustain the charge of aggravated stalking, the State must first prove that the defendant committed the offense of stalking. To sustain the charge of stalking, the State must prove the following propositions:

First: That the defendant on at least two separate occasions knowingly followed or placed Pamela Costa under surveillance; and

Second: That the defendant at any time knowingly placed Pamela Costa in reasonable apprehension of immediate or future bodily harm.

***

If you find from your consideration of all of the evidence that each one of these propositions has been proved beyond a reasonable doubt, then you have concluded that the defendant committed the offense of stalking. You should now go on with your deliberations to decide whether the defendant is guilty of aggravated stalking.

To sustain the charge of aggravated stalking, the State must prove the following additional proposition:

Third: That, in conjunction with committing the offense of stalking, the

defendant knowingly violated an order of protection prohibiting the interference with personal liberty of Pamela Costa."

The report of proceedings shows the jury heard ample testimony on which it could base a finding that defendant had twice knowingly followed or placed Pamela under surveillance, that he had knowingly placed her in reasonable apprehension of bodily harm and, as noted above, violated the OP.

¶ 27 Citing *People v. Scott*, 243 Ill. App. 3d 167 (1993), defendant asserts that his conviction for violation of an order of protection should be reversed because the jury instructions for violation of an order of protection listed three completely separate offenses or transactions and invited the jurors to pick from any of the three to convict, without coming to a unanimous agreement on which offense the entire jury was resting its decision. He asserts the instructions for aggravated stalking similarly invited the jurors to pick from any act that violated the OP, each of which was a separate offense, and this conviction should also be reversed.

¶ 28 In *Scott*, the defendant was charged with three counts of delivering controlled substances to "three undercover police officers in three unconnected transactions." *Scott*, 243 Ill. App. 3d at 168. The State tendered an instruction providing the jury with six verdict forms, one "guilty" and one "not guilty" form for each of the three counts. The trial court modified the instruction *sua sponte* to require only two verdict forms, one "guilty" and one "not guilty." *Scott*, 243 Ill. App. 3d at 168. The jury found defendant guilty of one count of delivery of a controlled substance.

¶ 29 The appellate court reversed and remanded, finding that defendant's constitutional right to a unanimous jury verdict was violated when the court provided verdict forms for only one of the three counts. *Scott*, 243 Ill. App. 3d at 169. The court held:

> "Each count of the indictment separately charged defendant with delivering PCP to a different undercover officer. By submitting verdict forms to the jury for only one count of delivery of a controlled substance, the trial court engendered the possibility of a unanimous guilty verdict only in the sense that all twelve jurors believed that defendant was guilty of one, but possibly not the same, delivery count." *Scott*, 243 Ill. App. 3d at 169.

¶ 30 The court stated that four jurors might believe the defendant delivered a controlled substance to one officer, four other jurors might believe the defendant delivered a controlled substance to a second officer and the last four jurors might believe the defendant delivered a controlled substance to a third officer. *Scott*, 243 Ill. App. 3d at 169. It held that

> "[t]his scenario, which is plausible given the facts of this case, permits a unanimous guilty verdict to have been rendered without all twelve jurors agreeing that defendant delivered a controlled substance to a particular recipient as set forth in each count of the indictment. We, therefore, conclude that because defendant was denied the right to a unanimous verdict by a twelve-person jury as guaranteed by the Illinois constitution, defendant's conviction is reversed and

the case is remanded for a new trial." *Scott*, 243 Ill. App. 3d at 169-70.

¶ 31 In *Scott*, the three counts at issue were clearly separate offenses: three deliveries of a controlled substance to three different police officers in three separate transactions. Unlike in *Scott*, the counts at issue here are not separate transactions. Instead, they are separate counts of a single offense that arose from a continuous course of conduct, from a series of connected acts. The statute setting forth the offense of violation of an order of protection applicable at the time of defendant's offense provides that a person commits the crime of violation of an order of protection if:

> "(1) He or she commits an act which was prohibited by a court *or* fails to commit an act which was ordered by a court in violation of:
>
> (i) a remedy in a valid order of protection
>
> * * *
>
> "(2) Such violation occurs after the offender has been served notice of the contents of the order *** or otherwise has acquired actual knowledge of the contents of the order." (Emphasis added.) 720 ILCS 5/12–30(a)(1) (West 2006) (subsequently renumbered and amended as 720 ILCS 5/12–3.4(a)(1) (West 2010)).

¶ 32 In the statute, the legislature established two alternate ways in which a defendant can be found guilty of the offense: he can (1) commit an act prohibited by a court in a valid order of protection or (2) fail to commit an act ordered by a court in a

valid of order of protection. The instructions show that the State chose to pursue a guilty finding under only the first alternative, instructing the jury that "a person commits violation of an order of protection when *** he commits an act which was prohibited by a court in an order of protection."

¶ 33 Defendant was charged with three counts of knowingly violating the valid order of protection by committing an act prohibited by the OP. One count charged that he drove to Pamela's place of business. Another count charged that he drove past her residence. A third count charged that he followed her. These three counts involved the same defendant, the same victim, the same order of protection and the same offense: committing an act prohibited by the OP. The jury was instructed that it should find defendant guilty of the offense if it found that the State proved beyond a reasonable doubt that defendant committed any of these three acts and those acts were prohibited by the court in the OP.

¶ 34 The three prohibited acts, driving past Pamela's residence, driving past her office and following her, standing alone, are not separate offenses. The criminal offense occurs only when any of these acts is committed when the additional element that the act is prohibited by an OP is present. These acts, which occurred as a series of related events, are merely alternative methods of committing the crime of violation of an OP. The three bases for a guilty finding presented to the jury consisted of three separate actions by defendant, each presented as evidence that defendant committed an act prohibited by the court in the OP. The three bases do not present three separate

offenses, only three ways in which defendant committed the same offense.

¶ 35 The case at bar is analogous to *People v. Diaz*, 244 Ill. App. 3d 268 (1993), and *People v. Reynolds*, 294 Ill. App. 3d 58 (1997). In both *Diaz* and *Reynolds*, as in the case at bar, the defendant had been charged with multiple counts of the same offense, the jury had received an instruction which joined the multiple counts and had found the defendant guilty on a general verdict form.

¶ 36 In *Diaz*, the defendant was charged with and convicted of aggravated battery. The jury had received an instruction that, in order to sustain the aggravated battery charge, the State had to prove the defendant "intentionally and knowingly caused great bodily harm to [the victim]" or that he "intentionally and knowingly caused bodily harm to [the victim] and used a deadly weapon." *Diaz*, 244 Ill. App. 3d at 270. The two counts of aggravated battery were based on the same underlying conduct in which the defendant had dragged the victim to his apartment, beaten her, threatened her with a knife, torn off her clothes and had refused to let her leave his apartment for two days. The jury had received alternative general verdict forms for aggravated battery, one finding the defendant guilty and the other finding him not guilty.

¶ 37 The defendant asserted that his right to conviction by a unanimous jury was violated because the instruction permitted the jury to return a general guilty verdict of aggravated battery even though one or more of the jurors disagreed as to which alternative course of conduct the defendant had committed. *Diaz*, 244 Ill. App. 3d at 270. The court rejected this argument. It stated that the two aggravated battery

alternatives contained in the issue instruction "cannot reasonably be viewed as the types of combinations" condemned in *Shad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 (1991) as potentially violative of a defendant's constitutional rights. *Diaz*, 244 Ill. App. 3d at 273. *Shad* had recognized "due process limitations on a 'State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course [of conduct] or state [of mind] actually occurred.' " *Diaz*, 244 Ill. App. 3d at 272 (quoting *Shad*, 111 S.Ct. at 2497).

¶ 38 The court distinguished *Scott*, noting that in *Scott* the defendant's crimes were predicated on three different sales transaction whereas in *Diaz*, "the conduct giving rise to the aggravated battery issue instruction arose from one transaction or series of connected acts." *Diaz*, 244 Ill. App. 3d at 273. The court noted: "[C]onfidence in our holding exists pursuant to a well established principle applicable to general jury verdicts: 'It is well established that where the jury renders a general verdict, it is presumed to be based on any good charge to which the proof is applicable.' " *Diaz*, 244 Ill. App. 3d at 273 (quoting *People v. Tanner*, 142 Ill. App. 3d 165, 170 (1986). See also *People v. Kulpa*, 102 Ill. App. 3d 571 (1981) (court rejected defendant's argument that jury should have received separate instructions and verdict forms for each of three aggravated battery counts where the instruction given joined all three counts, all of which arose from the same transaction).

¶ 39 In *Reynolds*, the defendant was charged with three counts of criminal sexual

assault, three counts of aggravated sexual abuse, three counts of child pornography and four counts of obstruction of justice. *Reynolds*, 294 Ill. App. 3d at 60. The counts were based on the defendant's year-long sexual relationship with the victim, a minor, and on his false statements to police and prosecutors regarding that relationship. The jury was given general verdict forms - one "guilty" and one "not guilty" - for each of the four offenses. It found the defendant guilty of all four offenses.

¶ 40 The defendant asserted that he was denied his constitutional rights because the jury received general verdict forms for each crime. The court rejected this argument, holding that "[w]hen several counts are charged, a general verdict form is sufficient when the various counts state the same transaction." *Reynolds*, 294 Ill. App. 3d at 69. The defendant had argued that, with regard to the criminal sexual assault and aggravated sexual assault conviction, the jury should have been given separate verdict forms for each type of sexual penetration and for each of three identifiable " 'episodes' " of sexual interaction. The court disagreed, finding that the jury was not required to receive separate verdict forms on the specific types of penetration or the specific incidents of sexual interaction because the State had proceeded on a theory that defendant engaged in a continuous course of conduct in violation of the applicable statutes. *Reynolds*, 294 Ill. App. 3d at 70. The court found that, although the defendant asserted there were at least three episodes of unlawful conduct, the testimony at trial established an ongoing sexual relationship between the defendant and the victim. The court, therefore, found the general verdict form proper. *Reynolds*, 294

Ill. App. 3d at 71. The court found similarly with regard to the obstruction of justice counts, finding that the testimony showed that defendant's assorted infractions were "part of a continuous course of conduct to thwart a single prosecution." *Reynolds*, 294 Ill. App. 3d at 71. It held that the evidence supported obstruction of justice counts as part of the same transaction and the general verdict form was proper. *Reynolds*, 294 Ill. App. 3d at 71.

¶ 41 Similarly here, the general verdict forms received by the jury for the aggravated stalking and violation of an order of protection offenses were proper because the multiple acts/counts underlying each offense charged were all part of the same continuous course of conduct. The testimony at trial established that defendant's driving by Pamela's home and office, his parking outside her home and office, his following her into her condominium building and his attempts to speak with her all occurred within a short period of time and all were designed to have the same effect: to frighten or intimidate Pamela. Indeed, the State argued to the jury that defendant's actions were all "part of an ongoing pattern of harassment that started on the morning that [Pamela] decided to get an order of protection" and the "point of the pattern" was "to scare the living hell out of her." It asked "[w]hy else would you engage in this kind of behavior?" It is clear that the various counts underlying the violation of a protection order offense and the aggravated stalking offense were not separate offenses but rather part of a continuous course of conduct by defendant. Accordingly, following *Diaz* and *Reynolds*, the general verdict forms were proper.

¶ 42 Specifically with regard to defendant's argument concerning the general verdict on aggravated stalking, his argument has been rejected in *People v. Rand*, 291 Ill. App. 431 (1997). In *Rand*, the defendant was charged with and convicted of stalking. The jury had received an instruction that, in order to sustain the charge of stalking, the State had to prove that "the defendant on at least two separate occasions knowingly followed or placed [the victim] under surveillance; and *** placed [the victim] in reasonable apprehension of immediate and future bodily harm." *Rand*, 291 Ill. App. 3d at 439. The defendant asserted that this instruction deprived him of his constitutional right to a unanimous verdict because the jury might have returned a general guilty verdict even though they had not unanimously agreed on which two dates, of the four dates charged in the indictment, the defendant had followed or surveilled the victim. *Rand*, 291 Ill. App. 3d at 439. Noting that the complained-of jury instructions tracked the language of the stalking statute, the court found no error as the instructions did not provide alternatives so divergent that they were in fact separate offenses such that they violated *Schad*, 501 U.S. 624 (1991). *Rand*, 291 Ill. App. 3d at 440.

¶ 43 Defendant cites *People v. Holmes*, 241 Ill. 2d 509 (2011), for assorted propositions, including the suggestion that the OP violations are separate offenses and the jury must unanimously agree that at least one of those offenses occurred to convict defendant of violation of an OP.

¶ 44 In *Holmes*, the defendant was charged with two counts of aggravated unlawful use of a weapon. The two counts set forth different aggravating factors. Count I

charged that the defendant had carried an "uncased, loaded, and immediately accessible" firearm in his vehicle in violation of section 24-1.6(a)(1)(3)(A) of the aggravated unlawful use of a weapon statute. *Holmes*, 241 Ill. 2d at 512; 720 ILCS 5/24-1.6(a)(1)(3(A) (West 2004). Count II charged that he had carried a firearm in his vehicle and "had not been issued a currently valid Firearm Owner's Identification Card [FOID card]" in violation of 24-1.6(a)(1)(3)(C) of the same statute. *Holmes*, 241 Ill. 2d at 512; 720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2004).

¶ 45 The jury was given a single verdict form listing both counts against the defendant. It returned a general verdict finding the defendant guilty of aggravated unlawful use of a weapon. The appellate court affirmed but the supreme court reversed, finding the State failed to prove that the weapon was uncased as required in count I and the trial court erred in refusing to allow the defendant to prove that he had a valid Indiana FOID card, which would have substituted for the Illinois FOID card requirement asserted in count II. *Holmes*, 241 Ill. 2d at 519, 522.

¶ 46 The State then requested that, if the defendant's conviction for aggravated unlawful use of a weapon could not stand, the court enter judgment on the lesser-included offense of unlawful use of a weapon. The State asserted that the evidence established beyond a reasonable doubt that the gun found in the defendant's vehicle was immediately accessible and loaded, in violation of section 24-1(a)(4) of the unlawful use of a weapon statute. The supreme court rejected this argument, holding that,

> "[b]ecause the jury returned a general verdict, we cannot say that the jury

> unanimously concluded, as alleged in count I, that the gun was loaded and that it was immediately accessible. The jury may have based its verdict on a unanimous determination that defendant lacked a FOID card, the aggravating factor alleged in count II, or the verdict may have been based on some members agreeing with count I and some with count II." *Holmes*, 241 Ill. 2d at 523-24.

¶ 47 We find *Holmes* distinguishable. *Holmes* discussed the issue of general verdict forms solely in the context of determining whether the defendant could be convicted of a lesser included offense of one of the two counts included in that general verdict. The supreme court found that, as the general verdict form precluded it from knowing whether the jury found defendant guilty of count I as opposed to count II, it could not impose a conviction on the offenses included in count I. The question at bar does not concern the issue of imposing a conviction for a lesser included offense after a general verdict. Accordingly, *Holmes* is distinguishable.

¶ 48 The court did not err in giving the jury the general verdict forms. Accordingly, defendant was not denied his constitutional rights to a unanimous jury verdict and to be convicted based on specific illegal conduct.

¶ 49 3. One-Act, One-Crime Doctrine

¶ 50 Defendant next argues that his conviction for violating an order of protection must be vacated because, in violation of the one-act, one-crime doctrine, the jury might have found him guilty of violating an order of protection based on the same violation it used to find him guilty of aggravated stalking predicated on a violation of the order of

protection. Defendant did not preserve this issue for review but asserts it is reviewable under the plain error doctrine. We agree. "[F]orfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 51 In *People v. King*, 66 Ill. 2d 551 (1977), our supreme court explained the one-act, one-crime doctrine as follows:

> "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *King*, 66 Ill. 2d at 566.

¶ 52 Following *King*, the one-act, one-crime doctrine requires the following two-step analysis:

> "First, the court must determine whether the defendant's conduct involved

> multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

¶ 53 Defendant does not contest that his conduct concerned multiple acts. Accordingly, we are concerned solely with the second step of the *King* analysis and whether violation of an order of protection is a lesser-included offense of aggravated stalking. See *Miller*, 238 Ill. 2d at 165.

¶ 54 There are "three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the 'abstract elements' approach; (2) the 'charging instrument' approach; and (3) the 'factual' or 'evidence' adduced at trial approach." *Miller*, 238 Ill. 2d at 166 (citing *Novak*, 163 Ill. 2d at 106). Defendant argues that the charging instrument approach should be applied. However, this approach is used to determine whether an *uncharged* offense is a lesser included offense. *Miller*, 238 Ill. 2d at 173. Defendant was charged and convicted of both aggravated stalking and violation of an order of protection. Where, as here, the defendant was convicted of multiple *charged* offenses, we apply the abstract elements approach to determine whether one charged offense is a lesser-included offense of another. *Miller*, 238 Ill. 2d at 173. Whether one charge is a lesser included offense of another is a legal question that we review *de novo*. *People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 8 (citing

People v. Nunez, 236 Ill. 2d 488, 493 (2010)).

¶ 55 "Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Miller*, 238 Ill. 2d at 166. This approach is "the strictest approach in the sense that it is formulaic and rigid, and considers 'solely theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Miller*, 238 Ill. 2d at 166 (quoting *Novak*, 163 Ill. 2d at 106). As the court explained in *People v. Bouchee*, 2011 IL App (2d) 090542, "[a]lthough the abstract elements approach does consider 'the statutory elements of the *charged* offenses' (emphasis added) (*Miller*, 238 Ill. 2d at 175), it considers the charged offenses in the statutory abstract, not in terms of how they are framed in a particular charging instrument." *Bouchee*, 2011 IL App (2d) 090542, ¶ 11.

¶ 56 In *Bouchee*, the court affirmed a jury verdict finding the defendant guilty of home invasion and criminal sexual assault. *Bouchee*, 2011 IL App (2d) 090542, ¶ 1. The evidence showed that the defendant had forced his way into the victim's home and forcibly had sex with her. The indictment had charged the defendant with home invasion in that he had entered the victim's dwelling, knowing she was present and, while in the dwelling, committed a criminal sexual assault against the victim by putting his penis in her vagina. It had also charged him with criminal sexual assault in that he,

by use of force, placed his penis in the victim's vagina. Defendant asserted on appeal that his conviction for criminal sexual assault should be vacated because, as charged, criminal sexual assault was a lesser included offense of home invasion. *Bouchee*, 2011 IL App (2d) 090542, ¶ 1.

¶ 57 Citing *Miller*, the court applied the abstract elements approach to the question before it: "whether a *charged* offense is a lesser included offense of another *charged* offense." (Emphasis in original.) *Bouchee*, 2011 IL App (2d) 090542, ¶ 8 (citing *Miller*, 238 Ill. 2d at 173). It found that, under this approach, criminal sexual assault was not a lesser included offense of home invasion because it was possible to commit home invasion without necessarily committing criminal sexual assault. *Bouchee*, 2011 IL App (2d) 090542, ¶ 10 (citing 720 ILCS 5/12-11(a)(5) (West 2006) (a person can commit home invasion by entering and then personally discharging a firearm that proximately causes, *inter alia*, a death)). The court further held that, "even if we may consider only the statutory subsection under which defendant was charged, it is possible, even under that subsection, to commit home invasion without necessarily committing criminal sexual assault." *Bouchee*, 2011 IL App (2d) 090542, ¶ 10 (citing 720 ILCS 5/12-11(a)(6) (West 2006) (a person can commit home invasion by entering and committing, *inter alia*, criminal sexual abuse)). *Bouchee*, 2011 IL App (2d) 090542, ¶ 10. For those reasons, the court held that criminal sexual assault was not a lesser included offense of home invasion under the abstract elements approach. *Bouchee*, 2011 IL App (2d) 090542, ¶ 10.

¶ 58 Here, looking strictly at the statutory elements for aggravated stalking and violation of an order of protection applicable at the time of the offense, we find it is entirely possible to commit the greater offense of aggravated stalking without committing violation of an order of protection. There are six alternative ways in which one can commit the offense of aggravated stalking:

> (1) commit stalking and cause bodily harm to the victim (720 ILCS 5/12-7.4(a)(1) (West 2006)); or
>
> (2)-(3) commit stalking and confine or restrain the victim (720 ILCS 5/12-7.4(a)(2) (West 2006)); or
>
> (4) - (6) commit stalking and violate a temporary restraining order, an order of protection, or an injunction prohibiting the behavior described in subsection (b)(1) of Section 214 of the Illinois Domestic Violence Act of 1986 (720 ILCS 5/12-7.4(a)(3) (West 2006)).

¶ 59 Clearly, it is possible to commit aggravated stalking without necessarily committing violation of an order of protection. Further, as in *Bouchee*, even if we considered only the statutory subsection under which defendant was charged, section 5/12-7.4(a)(3), this section alone provides three alternative forms of conduct for committing aggravated stalking, only one of which requires violation of an order of protection. 720 ILCS 5/12-7.4(a)(3) (West 2010). It is not "impossible to commit the greater offense without necessarily committing the lesser offense." *Miller*, 238 Ill. 2d at 166. Therefore, under the abstract elements approach, violation of an order of

protection is not a lesser included offense of aggravated stalking.

¶ 60 4. Other Crimes Evidence

¶ 61 Defendant argues that the trial court erred in allowing the State to present other crimes evidence in such excessive and repetitive detail that his trial degenerated into "an impermissible mini-trial on other crimes evidence."

¶ 62 "Generally, evidence of other crimes is inadmissible if relevant merely to establish the defendant's propensity to commit crime." *People v. McKibbins*, 96 Ill. 2d 176, 182 (1983). "Such evidence overpersuades the jury, which might convict the defendant only because it feels he or she is a bad person deserving punishment" (*People v. Lindgren*, 79 Ill. 2d 129, 137 (1980)) or based "solely upon the belief that he is a person of bad character and thus likely to have committed the crime charged" (*People v. Nunley*, 271 Ill. App. 3d 427, 431 (1995)). Nevertheless, evidence of other crimes is admissible when it "is relevant to prove *modus operandi*, intent, identity, motive, or absence of mistake." *McKibbins*, 96 Ill. 2d at 182. It "is admissible if it is relevant for any purpose other than to show the propensity to commit crime." *McKibbins*, 96 Ill. 2d at 182.

¶ 63 Even if other crimes evidence is relevant for a permissible purpose, the trial court must exclude this evidence if its prejudicial effect substantially outweighs its probative value. *Illgen*, 145 Ill. 2d at 365. "[P]rejudice means an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror." (Internal quotation marks omitted.) *People v. Lewis*, 165 Ill. 2d

305, 329 (1995).

¶ 64 Other crimes evidence must not become a focal point of the trial. *People v. Richee*, 355 Ill. App. 3d 43, 58 (2005). The trial court must "prevent a 'mini-trial' of a collateral offense" by carefully limiting "the details of the other crimes to what is necessary to 'illuminate the issue for which the other crime was introduced.' " *Richee*, 355 Ill. App. 3d at 58 (quoting *Nunley*, 271 Ill. App. 3d at 432). When unfair prejudice is excessive, a limiting instruction will not save the admissibility of the evidence. *People v. Chromik*, 408 Ill. App. 3d 1028, 1042 (2011) (citing *Nunley*, 271 Ill. App. 3d at 433). The admissibility of other crimes evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *People v. Robinson*, 167 Ill. 2d 53, 63 (1995).

¶ 65 The State had sought admission of evidence regarding the phone calls that formed the basis for defendant's September 2008 convictions for aggravated false impersonation of a peace officer, harassment of a witness, intimidation of a witness and violation of an order of protection. It specifically sought admission of the October 16, 2006, phone call to Detective Tedeschi in which defendant pretended to be a detective and attempted to intimidate Detective Tedeschi; the December 8, 2006, phone call to Pamela in which he told her that she was under constant surveillance; and the more than 1,500 phone calls he had made to Pamela between November 2, 2006, and December 12, 2006. The State asserted this evidence of defendant's other crimes against Pamela and Detective Tedeschi was "relevant to the issue of defendant's state

of mind, motive and intent," lack of mistake, defendant's hostility toward Pamela and his ongoing pattern of stalking and harassment of Pamela. The court found the evidence went to defendant's intent and to prove that "these events were not mistakes or misunderstandings." It indicated that it had weighed the probative value versus the prejudicial effect of the evidence and granted the State's motion.

¶ 66 At trial, the State first referred to the other crimes evidence in its opening statement. The State told the jury about a phone call Detective Tedeschi received at 1:00 a.m. on October 16, 2006, from a person who claimed to be a police detective but who Detective Tedeschi recognized to be defendant. It then told the jury:

> "The defendant on the next day then left Chicago driving across country and eventually worked his way to Hawaii fleeing the jurisdiction, fleeing these charges. Once the defendant got to Hawaii, then the phone calls, more harassment of his ex-wife [Pamela] continued or resumed. Phone calls, you will see by the records, records of hundreds and hundreds of phone calls. The defendant called her office, he called her home, he called her cell, he called her at all hours of the day and night, call after call after call after call. She wasn't answering, she wasn't picking up. Police were looking for him, and then eventually she did pick up one of her calls, and that call was recorded, and you will hear portions of that, and you will hear what he was saying to her about the kind of surveillance that he claimed to have her under. You will hear what he said to her when she asked where he was.

> And once you've heard all of the evidence and you've seen all of the evidence, you will recognize what he is, he's guilty of aggravated stalking, and he is guilty of aggravated battery of a police officer, and he's guilty of violating an order of protection that his wife got against him on February 16, 2006."

¶ 67 In defense counsel's opening statement, he did not address specific evidence but told the jury that, starting in February 2006, there was "a whole variety of animosity *** acrimony between these two parties." He told the jury that the criminal case at bar was more akin to a divorce case and asked the jury to keep an open mind until it had received all of the evidence and been instructed by the court.

¶ 68 Eight witnesses then testified. The jury heard other crimes evidence from four of the witnesses: Pamela, Detective Tedeschi, Detective Sherlock and Peter Gose. Pamela was the first witness to testify. Prior to her testimony, the court instructed the jury as follows:

> "*** [E]vidence will be received that the defendant has been involved in offenses other than those charged in the indictment. This evidence you will receive on the issue of the defendant's intent and motive and may be considered by you only for that limited purpose. It is for you to consider whether the defendant was involved in those incidents, and, if so, what weight [is] to be given to the evidence on the issue of intent and motive."

¶ 69 Pamela first testified regarding obtaining the OP, defendant's conduct in violation of the OP and her move to a new condominium. She testified that her new home was

held in a trust rather than her own name and none of the utilities were in her name. She told the jury that her movers used an unmarked truck and unmarked boxes "and made sure that no one would know where I was moving." Pamela then testified that, after she moved in November 2006, she began to receive from 50 to 100 phone calls a day, "and one day I could get [500]." Pamela testified that the phone calls went to her cell phone number 312-446-7714, her Ohio Street office number 312-506-0200, her Fulton Street office number 312-491-0200 and her Ohio Street private office number 312-506-0240. Most of the phone calls were "private" number-blocked calls but on one occasion she received a call from number 808-688-6446. Pamela testified that she knew that a warrant had been issued for defendant so she gave the phone number to Jim Sherlock, a detective working with the U.S. Marshals.

¶ 70 Pamela testified that, on December 8, 2006, she received another phone call from the 808 number. She stated that the phone calls were "getting out of control" and impacting her employees so she picked up the call and tape-recorded it to "prove it was him calling because they were private calls." Pamela testified that defendant was the caller and told her during the call that he had her under surveillance and knew where she lived. She said defendant told her that her new address was "501 Clinton, Unit 1902," but she denied that she lived there. Pamela stated that she had made every effort to keep her whereabouts unknown but she been getting "pages" stating "501" and "1902." She did not understand the significance of the pages until after her conversation with defendant but then understood the pages referred to her new

address.

¶ 71 During Pamela's testimony, the State played five clips of her recorded conversation with defendant for the jury.[5] Transcripts of the recording clips show the jury heard defendant heard telling Pamela that he has "a private investigator that calls you and pings your phone so he knows your location. Then they follow you." He told her "you have no idea how much surveillance we have. We know you moved into Kinzie Park [the 501 Clinton address] on September 26. *** Unit 1902." When Pamela denied living in Kinzie Park, defendant told her "we have someone following you periodically" and "[t]hey follow you, Pam, you don't get it."

¶ 72 In second clip, the jury heard Pamela ask defendant where he was. Defendant replied that he was safe and that he ran his phone call through a router so he did not know "where it's at *** what's coming up on the caller ID." In a third clip, the jury heard Pamela telling defendant he was trying to ruin her, "calling all my co-workers or having somebody do it." Defendant then asked Pamela why she filed an order of protection against him. He stated "I've never done anything other than that mirror incident, that I called you into the bathroom and, and you ran away and I grabbed you by the arm and

[5] The court admitted a compact disk with the entire 45 minute phone conversation between defendant and Pamela into evidence. It sent transcripts of four of the recorded clips back to the jury and informed the jury the entire recording was available. It does not appear the jury heard the entire recording. The jury also received a transcript of a clip in which defendant told Pamela he had "filed a petition with the United States Supreme Court on police corruption over this whole thing and these officers." He told her "chances are these guys are gonna lose their jobs." Although the jury received a transcript of this clip, it apparently was not played to the jury during trial.

you know I didn't mean to hurt you." In a fourth clip, the jury heard Pamela tell defendant: "You dragged me into the bathroom by my arms and you made me read some crap on the, on the mirror." Defendant responded:

> "And that just goes to show you. And you know what, I'm not interested. And you know what, you have your things I have mine. And you know what, whatever it is it is. I just want to know how you want to proceed to move on with our lives as healthy as we possibly can. I don't deserve what these policemen are doing. You know I was just visiting Allen and they lied and said I tried to get into my home. You know I was there picking up a check for $72,000. Okay, Pam, this is out of hand and I, and I want it to stop, please. For the health of your -- my, my mother told me your father doesn't look well. My mother doesn't look well. Police are shaking me down at my mother's (inaudible)."

There is no transcript of the fifth clip.

¶ 73 On cross-examination, Pamela testified that she had no evidence that defendant "was the one that was calling [her] and hanging up." She, therefore, had "been trying to tape [the telephone calls] for a quite a while and get him on tape so I could show that he kept continuing to call." She stated she had answered "hundreds of private calls where I would just hit the ["on"] button and there was nobody ever there."

¶ 74 Peter Gose testified that he was an employee of MOBI PCS, a cellular telephone provider in Hawaii. He told the jury that, pursuant to a subpoena in "cases of the People of the State of Illinois versus Joseph Costa," he produced call detail records for

the cellular telephone with phone number 808-688-6446 for the period between September 2006 and December 2006. The records showed the phone was activated on September 23, 2006, by Robyn Hankin in Hawaii. Gose testified that, between November 1, 2006, and December 12, 2006, the phone dialed phone number 312-491-0200 [Pamela's Fulton Street office] 43 times; 312-506-0240 [Pamela's direct line at her Ohio Street office] 215 times; and 312-446-7714 [Pamela's cell phone] 1,570 times. In addition, the call detail record shows the phone dialed number 312-506-0200 [Pamela's Ohio Street office] 80 times in the same period. Gose stated that, in "all but two or three instances," the caller used the "star 67" feature to block the calling telephone number from appearing on recipient's "caller ID."

¶ 75 Detective Tedeschi testified regarding his private security work for Pamela, defendant's violations of the OP and defendant's attempt to run him over with a car. He then testified regarding a phone call he received at 1:12 a.m. on October 16, 2006. Prior to his testimony, the court gave the jury essentially the same limiting instruction that it had given before Pamela's testimony, telling the jury to consider the evidence on the issue of defendant's motive and intent and only for that limited purpose.

¶ 76 Detective Tedeschi testified that the phone call came to his private cell phone as he was driving home at the end of his shift at the Area 5 detective division. The caller's number came up as "private" on his caller ID. Tedeschi answered the call. A male voice identified the caller as "Detective -- blah, blah, blah -- from Area 3." The name was mumbled and garbled and Tedeschi could not understand it, even after he asked

the caller to repeat it. The caller told Tedeschi he was calling in regard to defendant "in regards to a vandalism case." Tedeschi testified that use of the word "vandalism" struck him as odd because the police department did not use the word. Tedeschi stated that, at some point, he recognized defendant's voice. In the course of working Pamela's security detail, he had listened to voice messages left by defendant so that he would be able to recognize his voice.

¶ 77 Detective Tedeschi testified that defendant told him that there was a videotape of the incident in which defendant hit Tedeschi with his car. As far as Tedeschi knew, there was no videotape of the incident. He asked to see the recording but the caller changed the subject. The caller then told Tedeschi that defendant was "a personal friend of Mayor Daley" and the incident would be a black eye for the police department and for Tedeschi's career. Tedeschi stated that, at some point, he started changing his driving pattern, making left and right turns into streets and checking his rearview mirror to determine whether he was being followed. He was concerned because defendant had called him on his personal cell phone number and had "had a few past incidences with different people on [Pamela's security] detail." Tedeschi asked the caller to phone him on a "PAX line," a secure phone line running between police districts. The caller did not respond and the conversation ended.

¶ 78 Detective Jim Sherlock testified that he was a Chicago police detective assigned to the U.S. marshal's fugitive task force. In November 2006, he received a request from the state's attorneys office to locate defendant. He was assisting in an investigation

relating to the phone call defendant made to Detective Tedeschi on October 16, 2006. During the course of that investigation, Sherlock sought to locate defendant. He determined that defendant was free on bond in the two cases at bar. Defendant had failed to appear in court on November 15, 2006, and the court had issued warrants for his arrest.

¶ 79 Detective Sherlock testified that he did not know where defendant was at the time and only knew "his criminal background." Sherlock testified that he met with Pamela and started following her to and from work, to lunch and dinner and to her parents house, both for her safety and to "see if we could locate the offender." Around December 2, 206, Pamela gave him an 808-688-6446 phone number that she had received on her cell phone. Sherlock testified that he gave the number to the U.S. marshal investigators and they took the case "from there." On December 10, 2006, he learned that the investigation was moving to Hawaii because the phone might be located there. On December 12, 2006, he learned from the U.S. marshals in Hawaii that they had apprehended defendant in Hawaii on the warrants issued in the cases at bar and that he had on his person a telephone with the 808 phone number. Defendant was subsequently brought back to Chicago.

¶ 80 In closing argument, the State pointed the jury to Gose's testimony and the phone records which showed "all of [defendant's] calls" to "all of" Pamela's different numbers. The State told the jury:

"*** but wait until you get to *** that 312-446-7714 number, her personal cell

phone. And look at the 1,500 plus phone calls that he made to her. If that isn't a stalking, an aggravated stalking right there, this sure shows you what is going on in his mind. You can absolutely consider these phone calls for what they are.

But you don't have to stop there because in this case, we have got something else. You actually have the defendant's own words. His own words, his voice. And what does he tell you?

[A recording was played.]

We have people that follow you. We have investigators that ping your phone. Those are his words. Those are the things that he did. That's his bizarre world where he gets to do what he wants to do. It is his choice. He did those things because he chose to do them.

In a little bit, you get to make a choice. And the only choice you can make is to find him guilty of every single charge."

¶ 81 Defense counsel then made his closing argument, telling the jury:

¶ 82 "But as to the period from *** the end of April 2006 until [the end of] December -- and that includes, ladies and gentlemen, the conversation that Detective Tedeschi claims he had with [defendant] in October and that includes all of the telephone calls that they are trying to stick him with ***, as to that world, there is no charges in front of you. That evidence didn't come before you because it is part of the charge.

It is not part of the charge. It is not part of the indictment. That evidence

came before you because in their mind, it dirties up [defendant]. In their mind, it shows that [defendant] had the intent to do something. They are not offering it to you because it is true. They are offering it to you because they say that it shows motive and intent.

*** There is no contention or suggestion that [defendant] should be convicted of any crime."

¶ 83 Counsel then discussed the period before February 2006, telling the jury that, on February 6, 2006, Pamela and defendant had bought a second home in Michigan together. He argued:

"That's not a family that's having problems. That's not someone who is fearful. That's not someone who, as she suggested to you, is on shaky grounds. They had a luxury apartment *** [and lived] a relatively uneventful life.

Pam acknowledges that there where no instances where she sought -- where she filed police reports, where she complained to the police, even called the police. She certainly didn't seek an order of protection during that period of time.

So ***, when you look at that information, which is essentially undeveloped, ***, what you are left with is two normal people who are getting along with each other, leading normal lives, and all of a sudden, ladies and gentlemen, it falls off the track and they become bitter enemies right out of the blue in February 2006. There is no explanation about why. You are just told that

it happened. And I guess you are supposed to assume that [defendant[was to blame for it.

Overreaction is what comes to my mind, ladies and gentlemen. There was no battery. There are no guns. There was no entry into the home after the order of protection was entered. There were no threatening messages, not a single message, not a single recorded message that you heard prior to December 2006.

And *** that message that you hear here, I suggest to you was an invited message. It was a message where Pam *** does not demonstrate any fear. Pam does not demonstrate any intimidation. There are no threats in the message, there is no evidence here that drugs ***[,] *** that alcohol was involved. So Pam gets an order of protection."

¶ 84 Counsel told the jury that there was no documentary or witness support for Pamela's assertion that she had received 500 phone calls in the period where defendant allegedly violated the order of protection. Counsel told the jury that Pamela had hired bodyguards almost immediately after she obtained the order of protection and that she and her father started "dealing with the police on a daily regular basis," more than 36 times in the year-and-a-half until the divorce was final. Counsel then argued that Pamela had paid $41,000 "to buy the Chicago Police Department" to send off-duty officers to guard her and "presumably advance her interests." Counsel asserted that one of Pamela's interests was that she was getting a divorce and wanted to do as well

as she could in the divorce.

¶ 85 Counsel then addressed the "the 2,020 calls that were allegedly made by [defendant] from Hawaii." Counsel told the jury that defendant was in Hawaii, he was staying with Robyn Hankin and the phone was Hankin's. He argued there was insufficient evidence to show that defendant made the calls and questioned, if there were more than 2,000 calls and an additional 500 made earlier, why Pamela was able to provide only a recording of one call.

¶ 86 Counsel argued that the order of protection did not provide that defendant could not be across the street from Pamela's home or office or that he could not drive by her house. He asserted that defendant went to the parties' condominium to talk to Pamela about the divorce. Counsel continued:

> "Here, they are, they are so close to each other, that at the beginning of the month they buy a house in Michigan together. And three weeks later, they -- she has got bodyguards. She's got orders of protection, and she's filed a lawsuit. She has filed a divorce action.
>
> * * *
>
> *** [Defendant] is all of a sudden so intolerable that they have to move in. They have to get bodyguards. They spend $41,000. And there is no allegation during that period that [defendant] entered the family home. The only claim is that he drove by. The only claim is that he stopped and tried to talk to her in the elevator. He asked her to talk with him. He had a divorce going. I respectfully

suggest to you that that's not unreasonable for him to try to talk to her.

*** It is not unreasonable to think that asking somebody if you can talk to them about your divorce is wrong or a violation of the order of protection."

¶ 87 Turning to the tape recording, counsel told the jury:

"I don't think that you hear anything in that conversation about somebody who is intimidating. I don't think you hear anything that is cause for emotional distress. *** This is a tape she wanted. She voluntarily stayed on the phone for 45 minutes talking to [defendant]. These are two people who had failed at love and who were engaged in extensive negotiations to get out of their marriage.

*** It sounds to me like she is making a long, calculated effort to *** record a long exchange between her and [defendant] because she had no basis -- she had no proof of any kind. She didn't have any records.

*** She didn't have any witnesses. *** [S]o she tapes this and she accuses him in this tape of making the calls and he denies it."

¶ 88 In rebuttal, the State told the jury that the evidence that defendant made the October 2006 call to Detective Tedeschi, the December 2006 call to Pamela and the "1,900" other calls to Pamela in November and December 2006 was only presented for the jury "to consider insofar as it reflects on his motive, on what he was doing." The State told the jury: "it is part of the ongoing pattern of activity that continued after he committed the crimes that you are supposed to make a decision on." It told the jury:

"*** [y]ou can see the times. You can see the durations. The majority of

them, there is no duration because they are just call after call after call. You will see 20, 30, 50 calls in an hour. Constantly, nonstop, to her cell, to her office, to everywhere. ***

What is that but part of this ongoing pattern of harassment that started on the morning she decided to go and get the order of protection? What's the point of these ongoing phone calls? Because at this point he is in Hawaii, so it is a little bit harder for him to just pop up outside the house or pop up outside the office. What's the point of that except to continue the pattern of harassment?

*** [Y]ou have heard from the clip from the tape *** -- you have no idea how much surveillance we have on you. We are pinging your phone and they are following you. -- What's the point of that if it is not to continue the pattern? What's the point of the pattern *** but, quite frankly, to just simply scare the living hell out of her? Isn't that the whole point? Why else would you engage in this kind of behavior? Is it because you are simply looking to wrap up a divorce?

*** [Defendant] wasn't interested in wrapping this up. He was interested in scaring her. He was interested because [defendant], if nothing else, is not someone who is going to deal with life on anyone else's terms.

He is told he has to stay away. He is told he can't have contact. Those words mean nothing, He is going to do what he wants to do when he wants to do them and how he wants to do them.

* * *

> [Defendant], while he might want to live life on his terms, by his own rules, nothing that's going to change -- or happen today is going to change that. You are not going to make him get it. *** Your job *** is to tell him, yeah you did it. You were stalking your wife. You battered Brain Tedeschi, and you violated that order of protection. Your job is to tell him he is guilty."

¶ 89 At the close of trial, the court gave the jury its instructions, including the same limiting instruction it had issued prior to Pamela's testimony and prior to Detective Tedeschi's testimony regarding the October 2006 phone call:

> "Evidence has been received that the defendant has been involved in offense other than those charged in the indictment.
>
> This evidence has been received on the issue of the defendant's intent and motive and may be considered by you only for that limited purpose.
>
> It is for you to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issues of intent and motive."

¶ 90 Defendant does not dispute that some of the other crimes evidence might be relevant and probative. Instead, he argues that the court abused its discretion in failing to limit the State's use of the other crimes evidence. Defendant asserts that the State's repeated and excessively detailed presentation of other crimes evidence was prejudicial and violated his rights to a fair trial and unbiased jury. He argues presentation of this evidence subjected him to an impermissible mini-trial on the uncharged events that

confused the jury, overloaded them with improper propensity evidence and served no purpose other than to inflame the jury.

¶ 91 Defendant's theory of the case was that he had not violated the OP or stalked Pamela because the OP did not prohibit him from driving by or being across the street from Pamela's office or home. He argued that, as would any reasonable person, defendant had just wanted to talk to Pamela about the divorce and that Pamela's obtaining the OP and private security were an "overreaction" without any basis in defendant's behavior. The State asserts that the other crimes evidence was properly admitted to show that the charged offenses were not mistakes or misunderstandings driven solely by the heightened emotions of the divorce as defendant theorized. Looking at the totality of the evidence presented, we find the court did not abuse its discretion in allowing the State to present the other crimes evidence.

¶ 92 As defendant points out, of the eight witnesses who testified at trial, four testified regarding the other crimes evidence: Pamela, Gose, Detective Tedeschi, and Detective Sherlock. Notwithstanding defendant's argument to the contrary, this amount of evidence was not "overkill." Beyond stating that the number of calls were getting out hand and starting to impact the efficiency of her staff, Pamela's testimony did not unnecessarily belabor the number of calls or their impact. She told the jury about the number of phone calls she had received and that most of the calls were hang-ups and had the caller's number blocked. She identified one of those phone numbers as 808-688-6446 and testified regarding her conversation with defendant in December 2006

when he called her from that number.

¶ 93 Gose and Detective Sherlock's testimony was not an unnecessary repetition of Pamela's testimony. Instead, it served to show that the 2,000 phone calls made to Pamela's assorted phone numbers came from a cell phone with the 808 number, that most of the calls were of short duration and made using the number blocking feature, and that a cell phone with the 808 number was found in defendant's possession when he was arrested in Hawaii. The call detail reports provided the necessary documentary support for Gose's testimony.

¶ 94 The recorded clips heard during Pamela's testimony were not unnecessarily "excessive detail." The clips served to show that defendant made one of the many calls Pamela was receiving, that he was in hiding and that he still had Pamela under surveillance, more than five months after the charged conduct occurred. It was not "overkill" to play the recordings and send the transcripts back to the jury because the clips were short, defendant's voice was distorted and hard to understand and Pamela's testimony regarding the content of the clips was very brief. Indeed, for the most part, Pamela testimony did not reiterate what the jury heard on the clips. The State played these clips to show that defendant had an ongoing pattern of stalking and harassing her. The clips were highly probative of the State's assertion that it was defendant's intent to commit the offenses at bar and his conduct was not a result of mistake or misunderstanding.

¶ 95 Detective Tedeschi's testimony regarding the 1:00 a.m. phone call to his

personal cell phone was necessary detail to show that the incident underlying the aggravated battery charge, in which defendant had attempted to run him over with his car, had happened as he had testified earlier. Defendant's theory in this regard was that Tedeschi had overstepped his bounds as a security guard when he approached defendant in order to arrest him for violating the OP when defendant parked across the street from Pamela's office. He also argued that Tedeschi had exaggerated the incident. Tedeschi's testimony regarding the phone call was relevant to show that defendant was aware of the criminality of his conduct. Tedeschi's testimony was detailed, but not excessively so. His testimony was the only testimony regarding this call and the detail he provided was necessary to explain how Tedeschi knew defendant was the caller.

¶ 96 Presentation of the other crimes evidence did not transform defendant's trial into a mini-trial on this uncharged conduct. This evidence was not the focal point of the trial. The court instructed the jury three times regarding the limited purpose for which the evidence was being presented. The State reiterated the instruction in its closing argument. The jury clearly knew why it was hearing this evidence. The State hammered home the meaning of the other crimes evidence in closing argument, telling the jury that defendant made "call after call after call *** [c]onstantly, nonstop, to her cell, to her office, to everywhere." But it did so only in the context of the purpose for which the evidence was presented, telling the jury "it is part of the ongoing pattern of activity that continued after he committed the crimes that you are supposed to make a

decision on." It asked the jury "[w]hat is that but part of this ongoing pattern of harassment that started on the morning she decided to go an get the order of protection?" The entirety of the State argument shows that it consistently told the jury that the sole point of the other crimes evidence was to show that defendant did not mistakenly stalk Pamela, violate the OP or run his car at Detective Tedeschi and that he had done so purposefully and with intent, as shown by his continued pattern of such behavior even five months after he committed the charged offenses.

¶ 97 Overall, the cumulative effect of other crimes evidence was not inflammatory, excessively detailed or repetitive or presented to show defendant's propensity to commit a crime. It would not lead the jury to convict defendant because he was a bad person deserving of punishment. The jury did not hear that defendant was convicted on four separate charges for the calls he made from Hawaii. Instead, it only heard the details of his conduct underlying those convictions that were relevant to rebut defendant's theory of the case. It heard the details necessary to rebut his assertions that Pamela was overreacting, that defendant had not stalked or harassed her in violation of the OP, that he reasonably "just wanted to talk" to her and that Detective Tedeschi had exaggerated the incident in which defendant tried to run him over.

¶ 98 The trial court's determination that the prejudicial effect of the other crimes evidence did not outweigh its probative value was entirely reasonable. The court did not abuse its discretion in allowing the State to present the other crimes evidence or in failing to limit that evidence.

¶ 99 Conclusion

¶ 100 For the reasons stated above, we affirm the decision of trial court. We order the clerk of the circuit court to amend the mittimus to reflect that defendant's conviction for aggravated stalking is under count II of indictment 06 CR 12974 rather than under count I.

¶ 101 Affirmed; mittimus amended.