No. 42895-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Aaron Thomas,**

Appellant.

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Kitsap County Superior Court Cause No. 11-1-00585-1

The Honorable Judge Anna M. Laurie

# Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

**BACKLUND & MISTRY**
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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## ARGUMENT

### I. THE INFORMATION WAS DEFICIENT.

Where an Information is deficient, prejudice is presumed: "If the necessary elements are not found or fairly implied...we presume prejudice and reverse without reaching the question of prejudice." State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2000). Respondent's contrary argument reflects a misunderstanding of the rule. See Brief of Respondent, p. 10, 13-14.

The showing of prejudice to which Respondent refers comes into play only if "the necessary elements appear in any form" or if they can be found "by fair construction" in the Information. Id. In such circumstances, reversal is not required unless the "inartful language" used in the charging document causes prejudice to the accused person. Id.

Mr. Thomas alleges that the Information is deficient; he argues that the elements do not appear "in any form," and cannot be found "by fair construction." Id. If his argument proves correct, he need not show prejudice. Id.

Respondent erroneously suggests that the affidavit of probable cause supplies the missing element. Brief of Respondent, p. 11. An affidavit of probable cause cannot fill a gap in the Information; the

elements must appear in the charging document itself. State v. Hopper, 58 Wash.App. 210, 213, 792 P.2d 171 (1990), reversed on other grounds, 118 Wash.2d 151, 822 P.2d 775 (1992); see also State v. Nonog, 169 Wash.2d 220, 228, 237 P.3d 250 (2010) (noting that "the specific count at issue must charge all of the elements of the crime," but that the rest of the Information may be considered when evaluating that particular count).

The right to complete notice of the accusation is guaranteed by the state and federal constitutions. U.S. Const. Amend. VI; Wash. Const. Article I, Section 22. Where an essential element is omitted from a charging document, no crime is charged.

To obtain a conviction for violating RCW 26.50.110, the prosecution must allege and prove the existence of a specific kind of court order prohibiting contact. Not just any such order will do; for example, RCW 10.14.040 (captioned "Protection order – Petition") creates "an action known as a petition for an order for protection in cases of unlawful harassment," yet such orders cannot be charged under RCW 26.50.110. See also RCW 10.14.170.

In this case, the Information recited a generic list of orders—"a foreign protection order, protection order, restraining order, no contact order, or vulnerable adult order..."—but did not specifically identify the authority under which the order had been issued. CP 1-8. This language

is insufficient to charge a violation of RCW 26.50.110, because it fails to specify the authority under which the order was issued, and leaves open the possibility that the accused person violated a protection order issued under chapter 10.14 RCW. To effectively charge a violation of that statute, the charging document must specify the authority under which the order was issued (and it must be one of the provisions listed in the statute).

The Information was deficient, prejudice is conclusively presumed, the convictions must be reversed, and the charges dismissed without prejudice. McCarty, at 425.

## II. THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION.

Respondent is correct that a copy of the No Contact Order was entered into evidence as Exhibit 22. Brief of Respondent, pp. 15-16. Accordingly, Mr. Thomas presents no additional argument.

## III. MR. THOMAS'S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S "TO CONVICT" INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF EACH CRIME CHARGED.

Mr. Thomas rests on the argument set forth in the Appellant's Opening Brief.

## IV. THE TRIAL JUDGE ERRONEOUSLY ADMITTED EVIDENCE OF MR. THOMAS'S PRIOR MISCONDUCT IN VIOLATION OF ER 403 AND ER 404(B).

The rationale for admitting evidence of prior assaults in relationships characterized by domestic violence is that such relationships cause people to act in ways that may be difficult for the average juror to understand. See State v. Magers, 164 Wash.2d 174, 184-86, 189 P.3d 126 (2008); State v. Grant, 83 Wash.App. 98, 920 P.2d 609 (1996); State v. Ciskie, 110 Wash.2d 263, 273-80, 751 P.2d 1165 (1988). When accompanied by expert testimony, evidence of a history of domestic violence can thus help explain delayed reporting, recanted testimony (and/or minimization), and a victim's decision to stay with her abuser.

But the record here is devoid of any evidence that equates a single prior assault with the kind of power and control issues that characterize domestic violence relationships. Thus the rationale established in the foregoing authorities is not applicable to this case.[1]

Nor did the prosecution introduce expert testimony relating the psychological effects of a single assault in a short term relationship to the

[1] Even the Baker case, relied on by Respondent, involved a relationship characterized by a "history of domestic violence." Brief of Respondent, p. 26 (citing State v. Baker, 162 Wash.App. 468, 259 P.3d 270, review denied, 173 Wash.2d 1004, 268 P.3d 942 (2011)). In Baker, the defendant assaulted his girlfriend by strangling her; this occurred four times during the course of a year. Baker, at 470. (The prosecution charged him with two of the incidents, and introduced two under exceptions to ER 404(b)).

kinds of effects (i.e. "learned helplessness") that have been documented in ongoing domestic violence relationships. Cf. Grant, at 105-110. In the absence of such testimony, the evidence should have been excluded.

## V. MR. THOMAS'S CONVICTIONS WERE BASED IN PART ON PROPENSITY EVIDENCE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Respondent fails to address Mr. Thomas's propensity/due process argument. Respondent's silence on this point may be treated as a concession. See In re Pullman, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, Mr. Thomas presents no additional argument.

## VI. MR. THOMAS WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

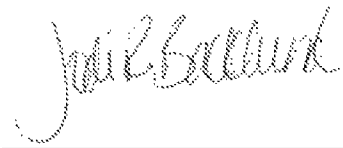
Mr. Thomas rests on the argument set forth in Appellant's Opening Brief.

## CONCLUSION

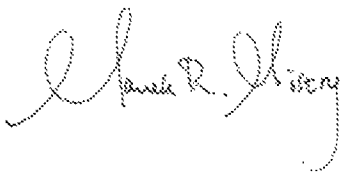
For the foregoing reasons, the convictions must be reversed and the charges dismissed without prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on December 14, 2012,

**BACKLUND AND MISTRY**



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

# CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Aaron Thomas, DOC #329952
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

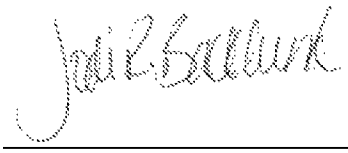
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 14, 2012.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

# BACKLUND & MISTRY

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