NO. 47628-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

VICTOR RUSSELL,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES **Page**

UNITED STATES CASES **Page**

REVISED CODE OF WASHINGTON **Page**

CONSTITUTIONAL PROVISIONS **Page**

COURT RULE **Page**

EVIDENCE RULE **Page**

A. ASSIGNMENTS OF ERROR

1. Appellant Victor Russell received ineffective assistance of counsel at his jury trial for felony violation of a no-contact order because counsel failed to move to bifurcate the trial.

2. The court erred in admitting two telephone conversations between police officers and a person purported to be the appellant.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The appellant was charged with six counts of felony violation of a no-contact order. The State alleged that Mr. Russell had two prior convictions for violating a no-contact order. Did Mr. Russell receive ineffective assistance of counsel where his attorney stipulated to the two prior qualifying convictions alleged by the State and did not move to bifurcate the trial, thereby needlessly allowing the jury to hear that Mr. Russell had previously violated no- contact orders on two occasions? Assignment of Error 1.

2. Did the court err in admitting the contents of two separate telephone conversations between police officers and a person purported to be the appellant where the State's evidence failed to properly identify the person on the telephone with police as the appellant? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural facts:

Victor Russell was charged in Thurston County Superior Court by second amended information with six counts count of felony violation of a post-conviction no-contact court order, pursuant to RCW 26.50.110(5) and RCW 10.99.050. Clerk's Papers (CP) 29-31. The State alleged that Mr. Russell had repeated contact with the protected party—former girlfriend Laurena Redford—with knowledge of the existence of a valid no-contact order issued pursuant to Chapter 10.99 RCW on October 31, 2013, preventing him from contacting her, and that he had at least two prior convictions for violation of a no-contact order. CP 29-31.

a. Second Amended Information:

The State alleged that Mr. Russell had the following contacts with Ms. Redford:

Count	**Date of Alleged Offense:**	**Domestic Violence Special Verdict Alleged:**
I	January 18, 2015	Yes
II	January 18, 2015	Yes
III	January 2, 2015	Yes
IV	December 28, 2014	Yes
V	December 25, 2014	Yes
VI	January 29, 2015	Yes

The State also alleged that the offenses were committed against a family member pursuant to RCW 10.99.020. CP 29-31.

b. CrR 3.5 hearing:

On April 6, 2015, the court heard Mr. Russell's CrR 3.5 suppression motion. RP (4/6/15) at 18-47. After hearing argument, the court ruled that Mr. Russell's statements to Thurston County Deputy Sheriff Randy Hovda and Lieutenant Bruce Brenna of the Tumwater Police Department were admissible.[1] The court entered the following Findings of Fact and Conclusions of Law on May 12, 2015:

Findings of Fact:

1. On January 20, 2015, Deputy Hovda contacted Laurena Redford regarding a violation of a no -contact order involving Ms. Redford's ex-boyfriend, Victor Russell. The violations involved several letters and e-mails Ms. Redford had received.

2. On January 21, 2015, Deputy Hovda called Mr. Russell at the phone number provided by Ms. Redford that was in the letters and e-mails she had received.

3. When Deputy Hovda called the phone number a male answered the phone and Deputy Hovda said, "Victor." The male responded "yes." Mr. Russell then stated he had his friend on the phone to help him take care of his dog because he needed someone to take care of his dog if he was going to jail. Deputy Hovda asked him if he needed to go to jail and stated he did not know. The phone then disconnected. The phone was not picked up when called back.

[1]Appellant contests admission of the alleged statements to law enforcement on the basis of identity in Section 1 of this brief.

4. On January 31, 2015, Deputy Hovda was informed that Centralia police had Mr. Russell in custody. Mr. Russell was transported by Centralia police department to the Grand Mound area to be transferred into Deputy Hovda's custody.

5. Deputy Hovda took custody of Mr. Russell at Grand Mound and placed him into custody for violation of a protection order. Deputy Hovda than read Mr. Russell his *Miranda* rights.

6. Mr. Russell agreed to speak with Deputy Hovda. He denied sending Ms. Redford letters or e-mails and then stated he was "pissed" at Laurena because he believes she is [—ing] Keven, who is her neighbor. Laurena also lied about wanting to marry him when he got out of prison, which is another reason he is mad at her.

7. On January 20, 2015, Lt. Brenna with the Tumwater police department met with Laurena Redford and her roommate William Nichols. They were reporting a no-contact order violation involving Victor Russell. The allegations were that Mr. Russell gave Mr. Nichols letters to give to Ms. Redford in the Walmart parking lot.

8. On January 21, 2015 Lt. Brenna called Victor Russell at the phone number provided to him by Ms. Redford. A man answered the phone and identified himself as Victor Russell. During the phone call Mr. Russell first denied being at Walmart then later admitted it. Mr. Russell stated he was broke and needed money and Ms. Redford owed him a lot of money and he needed it. He then said, "yeah, I know. I'm guilty. I need my money though.

Conclusions of Law

. . .

2. When Deputy Hovda called Mr. Russell on the telephone on January 21, 2015, Mr. Russell was not in custody and was not subject to interrogation, thus *Miranda* was not required.

3. The statements Mr. Russell made to Deputy Hovda on January 21, 2015 are admissible under CrRLJ 3.5, subject to other evidentiary rules.
4. There was probable cause for the arrest of Mr. Russell on January 31, 2015.
5. Mr. Russell was properly read Miranda warnings by Deputy Hovda on January 31, 2015.
6. Mr. Russell understood his rights and agreed to speak with Deputy Hovda on January 31, 2015.
7. The statements Mr. Russell made to Deputy Hovda on January 31, 2015 are admissible under CrRLJ, subject other evidentiary rules.
8. When Lt. Brenna called Mr. Russell on the telephone on January 21, 2015, Mr. Russell was not in custody and was not subject to interrogation, thus Miranda was not required.
9. The statements made to Lt. Brenna on January 21, 2015 were voluntary.
10. The statements Mr. Russell made to Lt. Brenna on January 21, 2015 are admissible under CrRLJ 3.5, subject to other evidentiary rules.

CP 132-134.

c. Trial, conviction, and sentencing:

The matter came on for jury trial on April 13, 14, and 15, 2015, the Honorable Carol Murphy presiding.

Although the Second Amended Information indicated that the State would rely on prior convictions for violating no-contact orders, restraining orders, or protection orders to prove the current alleged contact constituted a felony under RCW 26.50.110(5), Mr. Russell's attorney did not move to bifurcate the proceedings to exclude evidence of the two prior convictions until after the jury decided the underlying charge. 1Report of Proceedings (RP)

14-16.[2] The defense stipulated to the following statement regarding Mr. Russell's prior convictions, which the trial court read to the jury:

> You must accept as true that the person before the Court who has been identified in the charging document as defendant, Victor Daniel Russell, was convicted on October 31, 2013 of violation of the no-contact, protection or restraining order, domestic violence, in *State of Washington vs. Victor Russell* in Thurston County Superior Court cause number 13-1-00529-1.
>
> You must also accept as true that the person before the court who has been identified in the charging document as defendant Victor Daniel Russell was convicted on January 12, 2011 of violation of post-conviction no-contact order, domestic violence in *State of Washington vs. Victor Daniel Russell* in Thurston County Superior Court cause number 10-1-01556-0.
>
> This evidence has been admitted in this case for only a limited purpose. This evidence consists of the defendant's two prior convictions for violating a court order. This evidence may be considered by you only for the purpose of deciding whether the defendant has two prior convictions for violating a court order. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

1RP at 44-45.

The court dismissed Count VI upon the request of the defense. 2RP (5/15/15) at 221.

The jury found Mr. Russell guilty of four counts of violation of a no-contact order as charged in Counts 1, 3, 4, and 5. 2RP (5/15/15) at 129; CP

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[2]The record of proceedings is designated as follows: RP – January 22, 2015, February 2, 2015, March 4, 2015, March 11, 2015, March 26, 2015, March 30, 2015, April 6, 2015 (Suppression hearing); 1RP (jury trial); 2RP (jury trial); RP (May 21, 2015) (sentencing).

122, 123, 125. Mr. Russell was acquitted of Count 2. CP 127. The jury found by Special Verdict that Mr. Russell and Ms. Redford are members of the same family or household.[3] CP 124, 126, 128, 129, 130.

At sentencing, the State calculated an offender score of "11" for each count, resulting in a standard range of 60 months. RP (5/21/15) at 8-9. Mr. Russell asked the trial court to impose an exceptional sentence below the standard range. RP (5/21/15) at 11-14; CP 135-44. His defense counsel argued that Ms. Redford was a willing participant and that she engaged in "a pattern of coercion, control, or abuse," and that the multiple offense policy results in an excessive sentence, and therefore mitigating factors under RCW 9.94A.535(1)(a), (g) are applicable. RP (5/21/15) at 11; CP 135-44. Defense counsel argued that the court should sentence Mr. Russell to 12 months in jail in order to allow him to participate in a domestic violence offender program at the Thurston County Jail, thus allowing him to have access to treatment not available in the Department of Corrections. RP (5/21/15) at 12; CP 137-44.

The court sentenced Mr. Russell to a standard range sentence of 60 months for each of the remaining four counts, all to be served concurrently.

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[3]The jury initially marked "Yes" on the Special Verdict form pertaining to Count II, despite having acquitted him of the that count. The inconsistent verdict was crossed out and marked "N/A" by the jury, however, when the verdict forms were submitted to the court. CP 131.

RP (5/21/15) at 18; CP 156.

Timely notice of appeal was filed on May 22, 2015. CP 171. This appeal follows.

2. Trial testimony:

Laurena Redford began dating Victor Russell in 2011 and they lived together for approximately one year. 1RP at 46, 85, 115. The relationship ended after a year and Ms. Redford asked Mr. Russell to move out of their residence. 1RP at 115. In 2014 they briefly resumed their relationship but she did not allow Mr. Russell to move back into the house. 1RP at 87, 115. They broke up again in November, 2014. 1RP at 47.

Ms. Redford obtained a domestic violence no-contact order in Thurston County Superior Court on October 31, 2013, with an expiration date of October 31, 2018, prohibiting Mr. Russell from having contact with her. 1RP at 143. Exhibit 1.

The parties stipulated that Mr. Russell had been convicted of violating the no-contact order in 2011 and 2013. 1RP at 44. Before they resumed their relationship in 2014, Mr. Russell went to jail for violation of the protection order in which Ms. Redford was the protected party.

Ms. Redford testified that while shopping with her roommate William Nichols, on January 18, 2015, she received two notes from the appellant. Mr. Nichols said that when he returned to her car, which was parked at Walmart

in Tumwater, Washington, Mr. Russell was waiting for him. RP at 47, 49. Mr. Nichols had dropped Ms. Redford off at a nearby Costco store. Ms. Redford testified that when he picked her up that day at Costco, Mr. Russell gave Mr. Nichols two notes to give to her. 1RP at 50, 129. Mr. Nichols stated that when he returned to Ms. Redford's car, Mr. Russell was waiting by her car and gave him two notes and asked him to give the notes to Ms. Redford. 1RP at 130. He stated that he gave the notes to Ms. Redford when he picked her up from Costco where she was shopping. 1RP at 131. Exhibit 6.

On January 20, 2015, Ms. Redford and Mr. Nichols gave the two notes that Mr. Nichols said that he received from Mr. Russell to Lieutenant Bruce Brenna of the Tumwater Police Department. 1RP at 54, 137.

Over defense objection, Lieutenant Brenna testified that on January 21, 2015 he called a cell phone number provided by Ms. Redford, intending to talk to Mr. Russell. 1RP at 188. Defense counsel argued that the State did not establish the identity of the person who answered the call. 1RP at 154-55. The court ruled that there was sufficient corroborating evidence to permit the witness to testify regarding the conversation. 1RP at 158. Lieutenant Brenna testified that he called the number and a male voice answered and the speaker identified himself as Victor Russell. 1RP at 160.

The speaker first denied that he had been at Walmart, but later stated that he had been there and that he was broke and that Ms. Redford owed money to him and that he wanted to talk to her about it. 1RP at 160. When told that giving Mr. Nichols notes for Ms. Redford was a violation of the no-contact order, the speaker stated that he did not actually see Ms. Redford and that he merely put the notes on her car and said "hi" to Mr. Nichols. 1RP at 161. Lieutenant Brenna testified that the speaker also said "I know. I'm guilty. I need my money though." 1RP at 170.

Ms. Redford testified that she also received several e-mails from Mr. Russell, which she received on her phone through a g-mail account. 1RP at 54, 60-62. She stated that she printed the messages and provided them to police. 1RP at 54.

Thurston County Deputy Sheriff Randy Hovda stated that Ms. Redford gave him several printed e-mail messages on January 20, 2015 that appeared to be from Mr. Russell. 1RP at 176, 177, 187, 179. Exhibits 3, 4, and 5. The e-mails were dated December 25, 2014 (Exhibit 3), December 28, 2014 (Exhibit 4), and January 2, 2015 (Exhibit 5).

Again over defense objection, Deputy Hovda stated that he called a phone number contained in one of the e-mails received by Ms. Redford and that a male answered "yes" when the deputy said "Victor?" 1RP at 179.

Following *voir dire*, Deputy Hovda stated that the speaker said that he was talking with a friend on the phone in order to make arrangements for someone to care for his dog if he was going to jail. 1RP at 189.

Ms. Redford stated that she did not remember receiving an e-mail from Mr. Russell on December 25, but there was "a possibility" that she had. 1RP at 118. She stated that emails from Mr. Russell "came every day." 1RP at 119.

The defense rested without calling witnesses. 2RP at 223.

D. ARGUMENT

1. THE COURT ERRED IN ADMITTING THE TESTIMONY OF LT. BRENNA AND DEPUTY HOVDA REGARDING THEIR TELEPHONE CONVERSATIONS

The appellant objected to the testimony of Lt. Brenna and Deputy Hovda regarding their respective telephone conversations on the grounds the State failed to lay a proper foundation under ER 901(b)(6) for the admission of the testimony. 1RP at 143-59. Defense counsel argued that under ER 901(b)(6) the State was required to show that the officers either recognized Mr. Russell's voice, which neither could not do. 1RP at 148-52. The court ruled that the officers' testimony that the speaker answered to the name Victor Russell and had knowledge of the contents to the notes or email messages was sufficient evidence of identity and therefore was admissible. 1RP at 158.

The trial court should not have admitted Mr. Russell's alleged telephone statements to the police officers because they were not properly authenticated and the speaker was therefore not properly identified. Authentication of the speaker is required. *State v. Deaver,* 6 Wn.App. 216, 218, 491 P.2d 1363 (1971). Evidence of identity of a party to a telephone conversation may be either direct or circumstantial. *Deaver,* 6 Wn.App. at 219, 491 P.2d 1363 (quoting *Young v. Seattle Transfer Co.,* 33 Wash. 225, 230, 74 P. 375 (1903)). See also, *State v. Mahoney,* 80 Wn.App. 495, 909 P.2d 949 (1996); *State v. Danielson,* 37 Wn. App. 469, 472, 681 P.2d 260 (1984).

ER 901(b)(6) states that telephone conversations may be authenticated by evidence that a call was made to the number listed to a particular person at the time of the call, when the person answering the call identifies himself as the person called. Washington case law does not set forth separate rules for outgoing versus incoming calls when determining sufficiency of evidence for authentication. Our courts have determined that testimony that the person on the other end of the line has identified himself as the specific person called is, by itself, insufficient to authenticate the identity of the person called. *Passovoy v. Nordstrom, Inc.,* 52 Wn.App. 166, 171, 758 P.2d 524 (1988). However, telephone calls have frequently been authenticated when self-

identification is combined with virtually any circumstantial evidence. *Id.*

Authentication may be accomplished by circumstantial evidence that points to a person's identity as the particular person called, if the conversation reveals knowledge of facts that only the particular person would be likely to know. *State v. Deaver,* 6 Wn.App. 216, 219, 491 P.2d 1363 (1971).

In *Danielson*, police received a call from a person identifying himself as Danielson and the officer was allowed to testify about the details of telephone conversation. The *Danielson* court held that circumstantial evidence sufficiently established the identity of the caller as Danielson. Thus, the trial court properly admitted the officer's testimony regarding the substance of the call. The *Danielson* court outlined that the evidence that supported identification is that the caller identified himself as the defendant; the birth date given by the caller matched that of the defendant and was verified through Department of Licensing records and an existing field interview record; the address given by the caller matched the address for the defendant listed on the vehicle impound form; the caller stated that he was calling in response to a request by the passenger's father, who was named; and the caller stated that he did not stop because he had an outstanding warrant and did not want to go to jail. The investigating officer verified that there was indeed an outstanding warrant for the defendant. *Danielson,* 37 Wn. App at 472.

In this case, although the person the officers spoke to identified himself as either "Victor" or "Victor Russell," there was no evidence the telephone number they called was assigned to Mr. Russell by the telephone company and there was no evidence that the officers had spoken to Mr. Russell before, and therefore neither were able to recognize his voice. As such, Mr. Russell's self-identification, by itself, was insufficient to authenticate the phone conversation.

A non-constitutional error merits reversal if there is a reasonable probability that the error affected the jury's verdict. *State v. Floreck,* 111 Wn. App. 135, 140, 43 P.3d 1264 (2002). Here, although Lieutenant Brenna and Deputy Hovda testified that the person they called had knowledge of the contents of the notes and emails, the "self-identification" is far short of that presented in *Danielson*. Because there was a reasonable probability the court's erroneous admission of the officers' testimony affected the outcome of the trial, this Court should reverse the convictions.

2. MR. RUSSELL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

Where a prior conviction raises the base crime to a felony, the existence of the prior convictions is an element of the crime and not an aggravator.

RCW 26.50.110(5) provides:

> A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

The prior violations are therefore elements of the crime of felony violation of a no-contact order.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Garceau v. Woodford,* 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). A conviction based in part on propensity evidence is not the result of a fair trial. *Id.,* at 776, 777-778.

Washington courts have long recognized that prior convictions are inherently prejudicial, and increase the likelihood of erroneous conviction based on propensity. *State v. Hardy,* 133 Wn.2d 701, 946 P.2d 1175 (1997); *State v. Calegar,* 133 Wn.2d 718, 947 P.2d 235 (1997); *State v. Young,* 129 Wn. App. 468, 119 P.3d 870 (2005). The risk of unfair prejudice is especially great where the prior offense is similar to the charged offense. *Young,* at 475.

A trial court has broad discretion to control the order and manner of

trial, and may bifurcate a trial where necessary to avoid prejudice to the accused. *State v. Monschke,* 133 Wn. App. 313, 334-335, 135 P.3d 966 (2006).

However, a defendant does not have an absolute right to bifurcate the proceedings and waive jury trial on the element of the prior convictions alone. *State v. Roswell*, 165 Wn.2d 186, 197, 196 P.3d 705(2008). Nevertheless, when the statutory framework establishes a base crime with elevated penalties if certain facts are present, the trial court may bifurcate the trial. See *Roswell,* 165 Wn.2d at 197 (holding that the defendant had no right to keep his prior convictions for violation of a court order from the jury by presenting that evidence at a separate bench trial, but the court does the discretion to do so).

In spite of case law establishing Mr. Russell's right to stipulate to prior qualifying convictions when they constitute an element of the offense or seek a bifurcated trial, counsel did not move to limit the prior conviction evidence to the fact of *two* prior convictions by requesting bifurcation. As a result of counsel's failings, the jury heard the defense stipulation that Mr. Russell had two prior convictions for violating no-contact orders in the past. Reasonable counsel would have taken steps to better protect his client from such prejudicial propensity evidence.

Under the Sixth Amendment to the U.S. Constitution, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier,* 150 Wn. App. 619, 633, 208 P.3d 1221 (2009). "To establish ineffective assistance of counsel, the defendant must show that (1) counsel's, performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Turner,* 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient representation. *State v. McFarland,* 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Although apparently unreasonable decisions can be excused on tactical grounds, where the record shows an absence of conceivable legitimate trial tactics or theories explaining counsel's performance, such performance falls "below an objective standard of reasonableness" and is deficient. *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Hendrickson,* 129 Wn.2d 61,77-78, 917 P.2d 563 (1996). *State v. McNeal,* 145 Wn.2d 352, 362, 37 P.3d 280 (2002);

Deficient performance is not shown by matters that go to trial

strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson,* 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

Second, the defendant must show prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003), *citing Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient

conduct more likely than not altered the outcome in the case." *Id., citing Strickland,* 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the *Strickland* test has been met. *State v. Cienfuegos,* 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

Here, the State alleged that Mr. Russell had two prior convictions for violation of a no-contact order. A reasonable juror, hearing that a defendant had been convicted of two similar offenses, could not reasonably be expected to acquit on the majority of the charges. Accordingly, defense counsel should have moved to bifurcate the case, or otherwise to remove consideration of the prior convictions from the jury's consideration.

There is no conceivable legitimate trial strategy or tactic explaining counsel's performance and no reason to inform the jury during the guilt phase of the trial that he had previously been convicted of virtually identical offenses. Accordingly, defense counsel should have moved to bifurcate the trial and endeavored to remove the prior offenses from the jury's determination.

Mr. Russell was prejudiced by his attorney's failure to seek bifurcation of the trial and removal of highly prejudicial evidence from the jury's consideration. Courts have long recognized that prior convictions are inherently prejudicial, and increase the likelihood of erroneous conviction based on propensity. *State v. Hardy, supra.* The risk of unfair prejudice is

especially great where the prior offense is similar to the charged offense. *Id.*, at 475.

Here, the evidence was extremely prejudicial in that the convictions involved virtually identical offenses. Without the prior convictions, the jurors may have had a reasonable doubt that Mr. Russell knowingly violated the order. Accordingly, Mr. Russell's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution were violated. Therefore, his convictions must be reversed and the case remanded for a new trial.

E. CONCLUSION

For the foregoing reasons, Victor Russell respectfully requests that the court reverse his convictions.

DATED: October 23, 2015.

Respectfully submitted,
THE TILLER LAW FIRM

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 23, 2015, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid,

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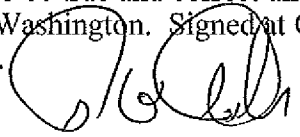
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 23, 2015.



PETER B. TILLER

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