SUPREME COURT NO.
98648-7

COA NO. 36497-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

HARRY LAMMON, JR.,
Petitioner.

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

Ferry County Cause No. 18-1-00046-7

The Honorable Patrick A. Monasmith , Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Harry Lammon, Jr., the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Harry Lammon, Jr. seeks review of the Court of Appeals unpublished opinion entered on May 12, 2020. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

> **ISSUE 1:** The constitutional prohibition on double jeopardy permits entry of only one conviction for each "unit of prosecution" of an offense committed. Did the trial court violate Mr. Lammon's constitutional rights by entering three convictions based on phone calls that he made within a span of ten minutes?

> **ISSUE 2:** Defense counsel provides ineffective assistance by failing to research and raise a valid defense, absent tactical justification. Did Mr. Lammon's attorney provide ineffective assistance of counsel by failing to challenge the constitutional validity of the predicate offenses for his client's felony charges (for violation of a no-contact order) based on the same grounds that counsel had raised regarding the instant charges when the same facts and law applied?

IV. STATEMENT OF THE CASE

Harry Lammon, Jr. admitted to calling his (now ex-) wife three times on the same day even though he was barred from doing so by a no-contact order. CP 40-41. He called her once at 6:36pm, once at 6:40pm, and again at 6:46pm and left voicemail messages. CP 40. Mr. Lammon called back the second and third times because his wife's voicemail recorder cut him off before he was done discussing the personal items that he needed to retrieve from her in order to do his work. CP 6; RP 53-55.

The total duration of the voicemail messages that Mr. Lammon left for his wife was 6 minutes and 33 seconds. CP 6. Based on that conduct, the state charged Mr. Lammon with three counts of felony violation of a no-contact order (VNCO). CP 1-4.

Mr. Lammon's charges were elevated to felonies because he had previously been convicted of two counts of misdemeanor VNCO. *See* CP 29-39. Those two predicate convictions were based on voicemail messages that Mr. Lammon allegedly left, on the same day, at 1:33 and 1:39pm. CP 37.

Mr. Lammon's defense attorney argued that double jeopardy only permitted a single charge based on the current instance of three phone calls over the course of a few minutes. RP 4-6. But defense counsel never

raised a constitutional challenge to the predicate offenses on that same ground. *See* RP *generally*; *See* CP *generally*.

The trial court rejected Mr. Lammon's double jeopardy argument and the case proceeded to a stipulated facts trial. *See* RP 24-28; CP 40-41. The court entered three felony VNCO convictions based on the phone calls made over the span of ten minutes. CP 47-48, 91.

Mr. Lammon timely appealed. CP 103. The Court of Appeals affirmed his convictions in an unpublished opinion. (See Appendix).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The trial court violated the constitutional prohibition against double jeopardy by entering three felony VNCO convictions based on phone calls that took place within ten minutes of each other. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The trial court in Mr. Lammon's case entered convictions for three counts of felony violation of a no-contact order (VNCO) because Mr. Lammon had made three phone calls to the protected party on the same day: one at 6:36pm, one at 6:40pm, and one at 4:46pm. CP 40. Mr. Lammon made the second and third phone calls because the voicemail recorder cut him off before he was done leaving his message. RP 9. The total duration of the messages he left was 6 minutes and 33 second. CP 6.

If Mr. Lammon had showed up at his wife's home and talked to her for 6 minutes and 33 second, or ten minutes -- or much longer -- the state would only have been able to charge him with one count of VNCO based on that interaction. The trial court violated the constitutional prohibition on double jeopardy by entering three convictions in Mr. Lammon's case for significantly less-threatening conduct.

The constitutional prohibition against double jeopardy precludes multiple convictions for a single offense. *State v. Morales*, 174 Wn. App. 370, 384-85, 298 P.3d 791 (2013); U.S. Const. Amends. V, XIV; art. I, § 9.

When addressing multiple counts of the same charge, the double jeopardy analysis turns on the "unit of prosecution." *Id.* To establish the unit of prosecution for an offense, the question is "what act or course of conduct the legislature has defined as the punishable act." *Id.* (*quoting State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)).

The unit of prosecution analysis looks first to the statute in question, then to the statutory history, and finally to the facts of a particular case. *Id.* If the statute is ambiguous regarding the unit of prosecution, the rule of lenity requires the ambiguity to be "resolved against turning a single transaction into multiple offenses." *Id.* at 385.

No published opinion has determined whether communications occurring on a single day – within a few minutes of each other -- constitute more than one unit of prosecution for violation of a no contact order (VNCO). The rule of lenity requires that Mr. Lammon be liable, at most, for one count of VNCO for three phone calls, which were made within ten minutes of one another. *Morales*, 174 Wn. App. at 385.

By contrast, violations occurring on separate days each comprise a distinct unit of prosecution. *See State v. Brown*, 159 Wn. App. 1, 12, 248 P.3d 518 (2010); *State v. Allen*, 150 Wn. App. 300, 314, 207 P.3d 483 (2009). In both *Brown* and *Allen* the prosecutor filed no more than one charge per day, even though there were hundreds of phone calls (and several personal contacts) in *Brown* and four separate emails in *Allen.* *Brown*, 159 Wn. App. at 6-7; *Allen*, 150 Wn. App. at 314.

The *Brown* and *Allen* courts held that double jeopardy permitted one conviction for each day on which the accused contacted the protected party. *Id.* Those decisions do not shed light on the circumstances of Mr. Lammon's case, in which three separate convictions were entered for conduct over the course of ten minutes.

Even so, Divisions I and II engaged in faulty logic during their statutory construction analysis in *Brown* and *Allen*. Both courts relied on the VNCO statute's use of the phrase "a violation" to hold that each

distinct "violation" qualifies as a separate unit of prosecution. *Brown*, 159 Wn. App. at 10-11; *Allen*, 150 Wn. App. at 313-14. But the *Brown* and *Allen* courts failed to conduct any analysis into the central question in the double jeopardy inquiry: what, exactly, *constitutes* "a violation." *See Id.*

This Court has held that use of the article "a" exhibits legislative intent for one unit of prosecution for each instance of possession of "a stolen access device." *State v. Ose*, 156 Wn.2d 140, 146, 124 P.3d 635 (2005).

The *Ose* Court relied on prior caselaw construing criminal statutes to permit one unit of prosecution for each instance of "a fire," "a minor," "a firearm or a deadly weapon," and "another person." *Id.* at 147-48 (*citing State v. Westling*, 145 Wn.2d 607, 611–12, 40 P.3d 669 (2002); *State v. Root,* 141 Wn.2d 701, 9 P.3d 214 (2000); *State v. DeSantiago,* 149 Wn.2d 402, 68 P.3d 1065 (2003); *State v. Graham*, 153 Wn.2d 400, 406 n. 2, 103 P.3d 1238 (2005), *as amended* (Feb. 1, 2005)).

But the terms "a stolen access device," "a fire," "a minor," "a firearm or a deadly weapon," and "another person" are not ambiguous according to their plain language, in unit-of-prosecution terms. The issue in Mr. Lammon's case is whether the term "a violation" in the VNCO statute is ambiguous.

The courts in *Brown* and *Allen* held that it did not violate double jeopardy to quantify each *day on which the accused contacted the protected party* as a separate unit of prosecution, even though the words "a day" to not appear in the VNCO statute. *See Brown*, 159 Wn. App. at 12; *Allen*, 150 Wn. App. at 314.

The Court of Appeals in Mr. Lammon's case, on the other hand, holds that *each phone call* constitutes a distinct unit of prosecution, even though the words "a phone call" do not appear in the VNCO statute. Appendix, pp. 3-4.

These contrary interpretations demonstrate the very ambiguity of which Mr. Lammon complains. Because the VNCO statute does not clarify what constitutes "a violation," *lenity* requires that it be construed in favor of only one unit of prosecution in Mr. Lammon's case. *Morales*, 174 Wn. App. at 385.

The Court of Appeals' choice to quantify the unit of prosecution as one phone call in Mr. Lammon's case is arbitrary. Using the same reasoning, the trial court could just have easily concluded that each minute of Mr. Lammon's voicemail messages constituted one unit of prosecution. Or each sentence. Or each word. Or each second.

Additionally, the Court of Appeals' approach would incentivize in-person violation of a no-contact order over less-intrusive forms of

communication. This is because a single occurrence of showing up at a protected party's home or workplace would only constitute a single violation, regardless of the number of statements made or how long the accused stayed there. If each individual phone call (even if made within minutes of each other) constitutes a separate unit of prosecution, someone who avoided in-person contact with the protected party (by calling on the phone) would be punished more harshly than an offender who engaged in conduct more likely to be threatening to the protected party (by going his/her home or workplace).

Appellate courts must avoid statutory interpretations leading to absurd results. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The Court of Appeals' construction of the VNCO statute in Mr. Lammon's case produces the absurd result of encouraging a person who intends to violate a no-contact order to contact the protected party in person, in order to avoid multiple charges for a single instance of communication.

At best, the VNCO statute is ambiguous as to whether Mr. Lammon's three phone calls -- made within ten minutes of one another – constitute more than one unit of prosecution. The rule of *lenity* requires construction in Mr. Lammon's favor. *Morales*, 174 Wn. App. at 385. The

Court of Appeals should have vacated two of Mr. Lammon's convictions. *Id.*

This significant question of constitutional law is of substantial public interest because it could affect innumerable cases charging violation of a no-contact order throughout the state. This Court should accept review. RAP 13.4(b)(3), (4).

B. Mr. Lammon's defense attorney provided ineffective assistance of counsel by failing to challenge the constitutional validity of his predicate convictions on double jeopardy grounds. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

Mr. Lammon's current offenses were elevated to felonies because he had two prior convictions for misdemeanor VNCO. CP 1-4, 47-48. But those prior convictions were based on two voicemail messages that Mr. Lammon allegedly left for a protected party at 1:33 and 1:39pm on the same day. *See* CP 37; Ex. P3, Supplemental CP.

Under the same legal theory raised by Mr. Lammon's defense attorney in relation to the current felony offenses, Mr. Lammon's predicate misdemeanor convictions were also entered in violation of double jeopardy. Because the constitutional validity of those predicate convictions was an element of Mr. Lammon's felony VNCO charge, timely raising that argument below would have required the state to prove

that validity beyond a reasonable doubt. *State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993).

But Mr. Lammon's attorney did not make that argument below. *See* RP *generally*. He raised no challenge to the underlying convictions during the stipulated facts trial. *See* RP 24-28. It was only after that trial, in a sentencing memorandum, that defense counsel argued that the predicate convictions should not elevate the current offenses to felonies because they constituted the same criminal conduct for sentencing purposes. *See* CP 24-39. Defense counsel did not challenge the *constitutional* validity of those prior convictions in his memorandum or during the hearing *See* CP 24-29; RP 40-63. Mr. Lammon's attorney provided ineffective assistance of counsel by waiving that argument.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that his/her attorney's mistakes affected the outcome of the proceedings. *Id.*

A defense attorney provides deficient performance by to "conduct appropriate investigations to determine what defenses were available." *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

In a prosecution for felony VNCO under RCW 26.50.110(5), proof of two valid predicate convictions for VNCO is an essential element of the crime. *State v. Robinson*, 8 Wn.App.2d 629, 635, 439 P.3d 710, 714 (2019). The state is required to prove the validity of those previous convictions beyond a reasonable doubt. *Id.* (*citing State v. Carmen*, 118 Wn. App. 655, 666, 77 P.3d 368 (2003)).

When an accused person challenges the constitutional validity of the alleged predicate offenses supporting a felony VNCO charge, the state must "prove beyond a reasonable doubt that the predicate conviction is constitutionally sound." *Id.* (*quoting Summers*, 120 Wn.2d at 812). The defense must raise a "colorable, fact-specific argument supporting the claim of constitutional error" in order to trigger the state's burden. *Id.*

The *Robinson* Court held that predicate convictions that were entered in violation of the constitutional prohibition on double jeopardy cannot support a later conviction for felony VNCO. *See Robinson*, 8 Wn.App.2d at 635.[1]

[1] The *Robinson* Court also held that the defendant in that case had not waived the right to challenge the constitutional validity of the predicate convictions by pleading guilty to them. *Robinson*, 76648-1-I, slip op. at *5. This is because "the court ha[s] no power to enter the

Here, Mr. Lammon's predicate offenses – in which the trial court entered two convictions based on voicemails left within a few minutes of each other – were entered in violation of double jeopardy under the same theory advanced by trial defense counsel in relation to the current offenses (and outlined above, in Section I). *See* CP 37; Ex. P3, Supplemental CP.

If Mr. Lammon's defense attorney had raised that argument below, the state would have been required to prove the constitutional validity of those predicate offenses beyond a reasonable doubt. *Robinson*, 8 Wn.App.2d at 635; *Carmen*, 118 Wn. App. at 666. The state would have been unable to meet that burden, given the facts of the underlying convictions. *See* CP 37; Ex. P3, Supplemental CP.

Mr. Lammon's attorney had no valid tactical reason for waiving challenge to the constitutional validity of the predicate offenses. A successful challenge would have downgraded his client's felony offenses to misdemeanors. Though the trial court had already rejected the same double jeopardy argument as related to Mr. Lammon's current charges, a timely challenge would have preserved the issue for appeal. Mr. Lammon's counsel attorney provided deficient performance. *Jones*, 183 Wn.2d at 339.

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conviction or impose the sentence" when doing so violates double jeopardy. *Id.* (*quoting U.S. v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989)).

Mr. Lammon was prejudiced by his attorney's deficient performance. As outlined above (in Section I), the constitutional prohibition on double jeopardy barred the entry of two convictions for two voicemails that occurred within minutes of each other. Timely raising that constitutional challenge to Mr. Lammon's predicate offenses would have downgraded his charges from felonies to misdemeanors. *See* RCW 26.50.110. There is a reasonable probability that counsel's error affected the outcome of Mr. Lammon's case. *Jones*, 183 Wn.2d at 339.

Mr. Lammon's defense attorney provided ineffective assistance of counsel by failing to challenge the constitutional validity of the predicate convictions on double jeopardy grounds. *Id.; Robinson*, 8 Wn.App.2d at 635; *Carmen*, 118 Wn. App. at 666. The Court of Appeals should have reversed Mr. Lammon's convictions. *Id.*

Again, this significant question of constitutional law is of substantial public interest. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State and Federal Constitutions. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted June 11, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Harry Lammon, Jr.
(at private mailing address)

and I sent an electronic copy to

Ferry County Prosecuting Attorney
kiburke@wapa-sep.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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

Signed at Seattle, Washington on June 11, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

FILED
MAY 12, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. HARRY WILLIAM LAMMON, JR., Appellant.	)))))))))	No. 36497-6-III UNPUBLISHED OPINION

PENNELL, C.J. — Harry William Lammon Jr. appeals his three convictions for violations of a no-contact order based on three calls to the protected party, his former wife. We affirm.

BACKGROUND

In 2012, Mr. Lammon pleaded guilty to domestic violence harassment after he threatened to kill his former wife and "bury her under a cactus in Yakima." Clerk's Papers at 73. The trial court entered a no-contact order (NCO) prohibiting Mr. Lammon from contacting his former wife. He violated that NCO twice on September 2, 2017, and subsequently pleaded guilty to two misdemeanor NCO violations. Mr. Lammon violated the NCO again one year later by calling his former wife three times on September 3, 2018,

between 6:36 p.m. and 6:46 p.m. The State charged Mr. Lammon with three counts of a NCO violation.

At trial on the 2018 incidents, Mr. Lammon's counsel moved "to consolidate the counts" against Mr. Lammon, "arguing [his three phone calls to his former wife were] a continuing course of conduct." Report of Proceedings (Oct. 29, 2018) at 3. Counsel contended the three convictions would implicate Mr. Lammon's rights against double jeopardy.[1] The court denied the motion. Mr. Lammon waived his right to a jury trial and the court found him guilty as charged based on stipulated facts.

At sentencing, the parties agreed Mr. Lammon's 2017 NCO violations constituted the same criminal conduct for purposes of calculating the offender score, but they disagreed as to whether the convictions qualified as separate predicate convictions for purposes of elevating the current offenses to class C felonies. *See* RCW 26.50.110(5) (NCO violation is elevated from a gross misdemeanor to a class C felony if the defendant has at least two prior convictions for NCO violations). After careful consideration, the trial court concluded the 2017 offenses were separate convictions. As a result, Mr. Lammon was convicted of three class C felonies.

Mr. Lammon appeals.

[1] U.S. CONST. amend V; WASH. CONST. art. I, § 9.

ANALYSIS

Mr. Lammon claims his three current NCO convictions violate double jeopardy. Our review is de novo. *State v. Womac,* 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

Mr. Lammon's double jeopardy argument turns on statutory interpretation. The specific question is what unit of prosecution is contemplated by the NCO violation statute. *See State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). "Double jeopardy protects a defendant from multiple convictions for committing just one unit of the crime." *State v. Brown*, 159 Wn. App. 1, 9, 248 P.3d 518 (2010).

The NCO statute criminalizes "a violation" of a restraining order. RCW 26.50.110(1)(a). This terminology unambiguously signals legislative intent to punish "each individual *instance* of criminal conduct." *Ose*, 156 Wn.2d at 147 (emphasis added). Multiple instances of criminal conduct can occur on the same day, in the same hour, or within the same minute. Timing is not controlling. Instead, the issue is severability. By the plain terms of the statute, so long as one instance of a NCO violation is separate from another, the unit of prosecution is met and double jeopardy does not prohibit multiple punishments.

Here, Mr. Lammon placed three phone calls to his former wife. Although the calls occurred in rapid succession, they were three separate acts. As such, each of the calls was

properly governed by a separate unit of prosecution. There was no double jeopardy violation.

Because we disagree with Mr. Lammon's double jeopardy analysis, his remaining claims (regarding the separate nature of his 2017 convictions and ineffective assistance of counsel) necessarily fail.

CONCLUSION

The judgment and sentence is affirmed.

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

Pennell, C.J.

WE CONCUR:

Korsmo, J.

Fearing, J.

LAW OFFICE OF SKYLAR BRETT

June 11, 2020 - 2:30 PM

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