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King County Prosecutor
Appellate Unit

NO. 62717-1-I

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

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FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BARNHILL,

Appellant.

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

The Honorable Deborah D. Fleck and Brian Gain, Judges.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Substantive Facts</u>	3
2. <u>Facts Related to the Defense Motion to Proceed <i>Pro Se</i></u>	9
C. <u>ARGUMENT</u>	10
1. BARNHILL WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL BY THE TRIAL COURT’S INADEQUATE COLLOQUY UPON THE MOTION TO PROCEED PRO SE.	10
a. <u>Barnhill Handled the Investigation Poorly or Not at all.</u>	15
b. <u>Barnhill had Great Difficulty with Voir Dire and Largely Waived his Right to it</u>	16
c. <u>Barnhill’s Cross-Examination was Poorly Handled or else Abandoned Entirely.</u>	17
d. <u>Barnhill Dmonstrated Misapprehension of Nearly Every Legal Argument before him, and Continued to not Understand such Arguments even After Correction by the Court.</u>	18
2. THE EVIDENCE IS INSUFFICIENT TO CONVICT BARNHILL OF COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES, AS CHARGED IN COUNT I.....	20
3. THE EVIDENCE IS INSUFFICIENT TO CONVICT SMASAL OF WITNESS TAMPERING AS CHARGED IN COUNTS III, IV, V, VI, AND VII.	23

TABLE OF CONTENTS (CONT'D)

	Page
a. <u>The State’s Exhibit 3, 4, and 8 are Fundamentally Flawed and Cannot Support Conviction on Counts IV, V, VI, or VII</u>	23
b. <u>In Those Tracks/Counts Where the State has Olyn Proven That Barnhill Tried to Get H.R.T. to Recant His Attorney, the Elements of the Crime are nor Proven Beyond a Resonable Doubt</u>	28
c. <u>The Appropriate Remedy Is Dismissal</u>	31
4. THE COURT SHOULD NOT HAVE FOUND BARNHILL’S TEXAS JUVENILE ADJUDICATIONS FOR “BURGLARY OF A HABITATION” COMPARABLE TO “RESIDENTIAL BURGLARIES” UNDER WASHINGTON LAW.....	31
D. <u>CONCLUSION</u>	36

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>City of Bellevue v. Acrey</u> 103 Wn.2d 203, 691 P.2d 957 (1984).....	11
<u>In re Personal Restraint of Lavery</u> 154 Wn.2d 249, 111 P.3d 837 (2005).....	32
<u>State v. Bergstrom</u> 162 Wn.2d 87, 169 P.3d 816 (2007).....	31
<u>State v. Chavis</u> 31 Wn. App. 784, 644 P.2d 1202 (1982).....	11
<u>State v. DeVries</u> 149 Wn.2d 842, 72 P.3d 748 (2003).....	21
<u>State v. DeWeese</u> 117 Wn.2d 369, 816 P.2d 1 (1991).....	10, 11, 20
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	29, 32, 34
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	20, 22, 31
<u>State v. Hosier</u> 157 Wn.2d 1, 133 P.3d 936 (2006).....	21, 22
<u>State v. Larkins</u> 147 Wn. App. 858, 199 P.3d 441 (2008).....	31, 32
<u>State v. Morley</u> 134 Wn.2d 588, 952 P.2d 167 (1998).....	32
<u>State v. Silva</u> 108 Wn.App. 536, 31 P.3d 729 (2001).....	11, 14, 15, 20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Williamson</u> 131 Wn. App. 1, 86 P.2d 1221 (2004).....	30
 <u>FEDERAL CASES</u>	
<u>Brewer v. Williams</u> 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).....	11
<u>Faretta v. California</u> 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).....	10
<u>Franks v. Delaware</u> 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).....	19
<u>United States v. Arit</u> 41 F.3d 516 (9 th Cir. 1994)	20
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9.68A.090	21, 22
RCW 9.94A.525	31, 32
RCW 9A.52.025	33, 35
RCW 9A.52.090	35
RCW 9A.52.100	35
RCW 9A.72.120	28, 29, 30
U.S. Const., Amend. 6, 14	10
V.T.C.A. Penal Code §30.01	35
V.T.C.A. Penal Code §30.02	34, 35
Wash. Const. art. I, § 22 (amend.10)	10

A. ASSIGNMENTS OF ERROR

1. Appellant was unconstitutionally deprived of his right to counsel.
2. The evidence is insufficient to convict appellant of communication with a minor for immoral purposes (CMIP), as charged in Count I.
3. The evidence is insufficient to convict appellant of witness tampering, as charged in Counts IV, V, VI, and VII.
4. The trial court erred by classifying four juvenile convictions from Texas for “burglary of a habitation” as the equivalent of residential burglaries under Washington state law.

Issues Pertaining to Assignments of Error

1. When appellant moved to be permitted to proceed pro se, the trial court did not review the severity of the charges or their possible sentence, nor did it significantly discuss appellant’s knowledge of the law, all required under federal and Washington law to show a “knowing, voluntary, and intelligent” waiver of counsel. Did the trial court thereby deny appellant his constitutional right to the assistance of counsel?
2. Count I, a CMIP count, was based upon a letter sent by the appellant to his minor “girlfriend.” The letter, however, was intercepted

by the minor's parents and was never received or read by the minor. In this circumstance, did the State fail to prove a "communication" occurred?

3. The evidence for all five of the witness tampering charges came from recordings made of telephone calls by the appellant to the minor from the King County Jail. The first of these calls was well-identified in terms of date and content, but the other four were referred to in a contradictory manner that made the dates, times, and number of relevant calls impossible to determine. Does such ambiguous evidence fail to sustain multiple convictions for witness tampering?

Moreover, in some of these calls, the defendant did not ask the minor to change her testimony, but only to recant her story with his attorney. Where the relevant law requires proof of "attempting to induce a person to testify falsely," has the State failed to prove an effort to induce false "testimony?"

4. "Burglary of a habitation" in Texas can be committed by burglarizing a vehicle, including a car or boat. The definition of residential burglary in Washington explicitly precludes a finding of guilt based upon entry into a vehicle. Where the documents presented by the State did not state whether the appellant's burglaries were of an actual building or a vehicle, did the trial court err by accepting the State's

argument that the Texas convictions for “burglary of a habitation” were “residential burglaries” under Washington law?

B. STATEMENT OF THE CASE

1. Substantive Facts

On the evening of Friday, January 26, 2007, H.R.T. (d.o.b. 6/18/93) was skating at a skating rink in Auburn. 13RP 87-88; 14RP 14, 17-18, 45.¹ There she saw the defendant, Christopher Barnhill, “hanging out” with a friend of hers named Aaron. 14RP 17-18, 45. H.R.T. thought Barnhill was “cute,” and she went over and asked his name. 14RP 18-20, 47. According to H.R.T., she and Barnhill immediately “clicked.” 14RP 18, 62.

H.R.T. and Barnhill talked for much of the next three hours, between bouts of H.R.T. skating. 14RP 20, 22-23. At some point, Barnhill asked how old H.R.T. was, and she replied that she was thirteen. 14RP 20, 47. Barnhill was “kind of freaked out.” 14RP 20, 47. He told H.R.T. he was twenty, and explained he had significant doubts about

¹ There are nineteen volumes of the Verbatim Report of Proceedings, cited as follows: 1RP – 12/21/2007; 2RP – 12/28/2007; 3RP – 1/11/2008; 4RP – 1/16/2008; 5RP – 1/18/2008; 6RP – 2/8/2008 (transcript 1 of 2); 7RP – 2/8/2008 (transcript 2 of 2); 8RP – 3/28/2008; 9RP – 4/4/2008; 10RP – 6/13/2008; 11RP – 8/14/2008; 12RP – 8/20/2008; 13RP – 8/21/2008; 14RP – 8/25/2008; 15RP 8/26/2008 (transcript 1 of 2); 16RP – 8/26/2008 (transcript 2 of 2); 17RP – 8/27/2008; 18RP – 11/14/2008 (sentencing, first hearing); and 19RP 12/2/2008 (sentencing, second hearing).

whether they should pursue a relationship given their age differences.

14RP 20, 47, 71-72.

H.R.T., who had many older friends, told Barnhill that she didn't think age mattered. 14RP 20, 23, 48. She already had a "gut feeling" her and Barnhill's relationship would be a good one. 14RP 21. Barnhill continued to express doubts, but the two of them exchanged phone numbers. 14RP 48, 71-72. Eventually, H.R.T.'s mother arrived at the rink to pick her up. 14RP 24. H.R.T. gave Barnhill a hug and a quick kiss on the lips as she left the rink. 14RP 24.

Barnhill and H.R.T. spoke by phone the next day, Saturday. 14RP 23-25, 48-49, 72. Sometime later that week, H.R.T. invited Barnhill to visit her at her home. 14RP 25, 49. H.R.T. lived in a tri-level house, and her bedroom window was easily accessible by standing on the top of the garage. 13RP 83; 14RP 27. At trial, H.R.T. noted she sometimes used the window to get into or out of her own room. 14RP 27. H.R.T. gave Barnhill instructions on how to get into her window, and he "snuck over." 14RP 25, 27-28, 50.

That night, H.R.T. and Barnhill talked and listened to music in her bedroom until the early morning hours. 14RP 25, 30-31, 50, 56. On the witness stand, H.R.T. would deny that she and Barnhill had sex that night, although in at least one statement to police she reported they did. 14RP

30-31, 84.² H.R.T. testified that she and Barnhill had a mutual agreement that night to not have sex because of her age; Barnhill wanted her to be older or for them to be married first. 14RP 56.

Barnhill visited H.R.T. many times over the next few weeks. 14RP 33, 51, 72. During this time, they frequently discussed having a relationship that was based on love rather than on physical attraction or lust. 14RP 56-57, 73. Barnhill gave H.R.T. many small, romantic gifts, such as flowers and a stuffed animal on which H.R.T. promptly pierced the ear. 14RP 25-26, 62-63. At one point, H.R.T. painted Barnhill's fingernails black, "the only nail polish color I own." 14RP 29. H.R.T. testified she felt very comfortable and safe around Barnhill. 14RP 29-30. During the visits, Barnhill often slept in H.R.T.'s bed, but the two would place a blanket or sheet in between their lower halves. 14RP 52, 61.

One time, H.R.T.'s father saw Barnhill standing on the garage roof talking to H.R.T. and a friend of hers through H.R.T.'s bedroom window. 13RP 81-82; 14RP 64-66, 75-76. H.R.T.'s father chased Barnhill, but did not catch up to him, and could not recognize him at trial from this brief

² H.R.T. recanted and/or changed the number of times she and Barnhill had sexual intercourse on several occasions. 14RP 53-55, 61-62. She initially reported five times, and later reported fifteen. 14RP 117. On other occasions outside court, in an effort to protect Barnhill, she told police, prosecutors, and Barnhill's then-attorney that she never had sex with him. 14RP 31-32, 75, 84. During trial, H.R.T. testified firmly that she had sex with Barnhill two or three times. 14RP 32, 84-85.

encounter.³ 13RP 82-83; 14RP 64-66, 75-76. H.R.T. and Barnhill discussed running away together, but decided against it because Barnhill wanted H.R.T. to finish school. 14RP 57.

On or around February 17, 2007, Barnhill left the State and went to Ohio. 14RP 41.⁴ Barnhill and H.R.T. stayed in contact by mail. 13RP 99; 14RP 40. H.R.T.'s father became suspicious about H.R.T.'s interest in picking up the mail before anyone else, and he installed a lock on their mailbox. 13RP 66, 88-89.

Sometime in mid-April, H.R.T.'s mother found three letters from Barnhill to her daughter in the mailbox. 13RP 66, 71, 89; 14RP 38. She gave the letters to H.R.T.'s father, who opened them. 13RP 66-67, 89. H.R.T.'s mother and father became very concerned by discussion in the letters about H.R.T. and Barnhill running away together and statements

³ The relationship between H.R.T. and her parents had apparently been good previously, but it was strained during this time. 13RP 64, 75, 87, 94. At trial, H.R.T.'s parents ascribed this to her relationship with Barnhill. 13RP 64, 75, 87-88. At sentencing, however, H.R.T.'s father noted that his problems with his daughter might have partially stemmed from the fact that both parents were involved in recovery programs at the time. 19RP 46.

⁴ A few of the State's documents indicate that Barnhill was arrested in Ohio for allegedly attempting to meet a teenager he had met online in order to have sexual relations with her. See, e.g., CP 18. The State agreed not to introduce evidence of such activities at trial, however, and Barnhill's activities and arrest in Ohio never came to the attention of the jury, nor were they elucidated in court paperwork. 10RP 77, 82.

such as, “Yes, I remember the first time we made love.” 13RP 66-67, 91-93, 98-99. H.R.T.’s father eventually gave the letters to the police. 13RP 69-71, 74, 89-90; 14RP 102.

Barnhill returned to Washington in May and visited H.R.T. a few times before being arrested by police three days after his return. 14RP 57.⁵ Upon arrest, a sexual assault protection order was put into place prohibiting Barnhill from contacting H.R.T. 14RP 115-16.

H.R.T. obtained a pre-paid cell phone so that Barnhill could call her from the King County Jail. 14RP 42. Barnhill repeatedly did so, and on several occasions he asked her to call his attorney and explain that she and Barnhill never had sex. 14RP 12, 41-44, 76, 77; Exhibit 3, 4, 8. Barnhill also suggested H.R.T. could absent herself from his trial. 15RP 27-28; Exhibit 3, 4. These calls, like all phone calls from the King County Jail, were recorded. 14RP 5, 8, 43. Excerpts from the recordings were played at trial. 14RP 76-78, 118; Exhibit 3, 4, 8.

By the time of trial, the King County Prosecutor had amended the information twice, and Barnhill was charged with two misdemeanor counts of communication with a minor for immoral purposes (CMIP); two misdemeanor counts of violation of a sexual assault protection order

⁵ After his arrest, Barnhill gave a statement to police where he acknowledged having a relationship with H.R.T., but he did not admit to having sex with her. 14RP 108-110.

(SAPO); one count of rape of a child in the second degree (child rape 2); and five counts of witness tampering. CP 169-73. Barnhill chose to represent himself at his jury trial, which was held August 14 to August 27, 2008, before the Honorable Deborah D. Fleck. CP 9. See generally 11RP-17RP.

During trial, H.R.T. continued to profess her love for Barnhill. 14RP 30, 33. She testified that she and Barnhill had consensual sex “two or three times,” although she was impeached by previous statements that they had sex more often. 14RP 33-35, 37, 84-85. She also admitted that outside of court she had recanted entirely on several occasions in an effort to protect Barnhill. 14RP 33, 75.

H.R.T. told Barnhill from the stand that she would always be there for him, and she exhorted him to stay strong. 14RP 79-80. The jury found Barnhill guilty of all ten counts. CP 209-18; 17RP 3-4.

The State asserted in its Supplemental Presentence Memorandum that Barnhill’s offender score was properly a seven, five from the current offenses and two from four juvenile burglaries from Texas, which the State asserted were the equivalent of residential burglaries. Supp. CP ___ (Sub. No. 175, 11/13/08). The State appended the Order of Adjudication and Judgment [sic] from the Texas juvenile court to its presentence memorandum. Supp. CP ___ (Sub. No. 175 (Appendix B thereto)),

11/13/08). At sentencing, Barnhill objected to the use of the juvenile burglaries as part of his offender score, arguing that the burglaries should be treated in Washington as criminal trespasses combined with theft in the third degrees, as what he stole in the process was worth less than \$50. 19RP 30-33. The court rejected Barnhill's argument and stated that it was satisfied that "with respect to the out-of-state convictions...the position of the State is correct..." 19RP 33.

Based upon an offender score of seven, the court sentenced Barnhill to a standard-range, indeterminate sentence of 175 months to life on the child rape charge, and lesser sentences on the other counts, to be served concurrently. CP 223-24, 234-35; 19RP 50-52. Barnhill appeals. CP 187.

2. Facts Related to the Defense Motion to Proceed *Pro Se*

Barnhill first requested to proceed pro se on December 21, 2007, before the Honorable Brain Gain. 1RP.⁶ Judge Gain asked a few brief questions about Barnhill's education and reasons for going pro se, but made no strong effort to undertake a formal colloquy, only telling Barnhill that going pro se might not be a good idea given the seriousness of the

⁶ This transcript for the December 21st hearing was recently ordered, but not yet received, so exact pin cites are unavailable. Appellate counsel has, however, listened to the tape from the hearing, which is about four minutes in length. The questions asked at the December 21st hearing are nearly identical to those asked a week later on December 28th.

charges. 1RP. Judge Gain set the motion over to allow Barnhill to speak further with his attorney. CP 8; 1RP.

On December 28, 2007, Barnhill again moved to proceed pro se. 2RP 3-8. This time, Judge Gain granted the request. CP 9; 2RP 8. The colloquy performed by the court on this date is reproduced in full below in section C.1.

C. ARGUMENT

1. BARNHILL WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL BY THE TRIAL COURT'S INADEQUATE COLLOQUY UPON THE MOTION TO PROCEED PRO SE.

Both the Washington and federal constitutions guarantee a criminal defendant the right to assistance of counsel. Wash. Const. art. I, § 22 (amend.10); U.S. Const., Amend. 6, 14. A defendant also, however, has a right to self-representation both under state and federal law. Wash. Const. art. I, § 22 (amend.10); Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Because of the tension between these two rights, a defendant wishing to proceed pro se must make an unequivocal request to proceed without counsel, and the trial court must ensure that the waiver of counsel is “knowing, voluntary, and intelligent.” State v. DeWeese, 117 Wn.2d 369, 376-78, 816 P.2d 1 (1991). Self-representation is a grave undertaking, one not to be encouraged, and courts should

indulge in every reasonable presumption against waiver. DeWeese, 117 Wn.2d at 379; State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982); Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

A trial court must assume the responsibility for assuring that decisions regarding self-representation are made with at least minimal knowledge of what is demanded in pro se representation. City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The favored way of making this finding is via a colloquy on the record which demonstrates that the defendant understood the risks of self-representation. Acrey, 103 Wn.2d at 211.

Although there is no specific formula for the colloquy, it should, at minimum, inform the defendant of:

- 1) the nature and classification of charges,
- 2) the maximum penalty upon conviction, and
- 3) the existence of technical and procedural rules which would bind the defendant at trial.

DeWeese, 117 Wn.2d at 378; Acrey, 103 Wn.2d at 211; State v. Silva, 108 Wn.App. 536, 541, 31 P.3d 729 (2001). Without this critical information, a defendant cannot make a knowledgeable waiver of his constitutional right to counsel. Silva, 108 Wn.App. at 541.

The entire colloquy of December 28, 2007, appears below:

COURT: Mr. Barnhill, tell me why you want to represent yourself.

BARNHILL: Um, I just feel I'd rather be more – more in representing in my defense and sitting first chair versus second chair, due to the fact that it's my case and the seriousness of it. I don't want to put my – my life in someone else's hands when the seriousness of this is going on.

COURT: Mr. Barnhill, tell me about your educational background.

BARNHILL: I have a GED. I spent almost – I spent – I've only been out two months going on – since I was 15 years old, and I've done a lot of studying, especially in the past six months. I've got a couple legal books from other – that belong to other people that I've been borrowing, court rules, rules on evidence, and couple other that I've been studying on, reading through, and studying the Washington version of everything, since I was raised in Texas, but –

COURT: Have you ever been through a trial at any time?

BARNHILL: No, I haven't. Every – every case I've ever done, it's pretty much been a plea bargain.

COURT: You understand that if I let you go pro se, first of all, the court rules and all the rules of evidence apply to you, just as they do if you were represented by an attorney?

BARNHILL: Yes, sir.

COURT: Okay. And that you would do all the talking to the jury?

BARNHILL: Yes.

COURT: Okay. And you'd be held to the same standards as an attorney?

BARNHILL: Yes, sir.

COURT: And that your standby counsel, if you have standby counsel, is limited in the participation?

BARNHILL: Yes, sir, that's what I was requesting. I was requesting for Jennifer Atwood to maintain as my standby counsel.

COURT: Okay. You understand that she can give you advice, but you're stuck with your own –

BARNHILL: Yes, sir.

COURT: -- performance at trial?

BARNHILL: I fully understand that, yes, sir.

COURT: And you fully understand that it would – there is a request for a continuance if I grant that motion?

BARNHILL: Yes, sir. And I agree to that continuance.

COURT: I'm going to grant Mr. Barnhill's – I'm satisfied he's given this a lot of thought, this motion to go pro se.

2RP 6-8.

The above colloquy is inadequate on several grounds, the most glaring of which is the complete lack of discussion of the nature and

classification of the charges or the possible penalties – standard-range or maximum – Barnhill faced. Contrast Silva, 108 Wn. App. at 541-42. In Silva, the defendant was permitted to represent himself in a criminal trial. 108 Wn. App. at 538. He had, unlike Barnhill, completed a trial with the assistance of counsel, and moreover had also completed pro se trials in both Oregon and Washington before returning to Washington for the trial on the instant matter. Id. at 538, 540-41. During the trial at issue, Silva displayed “exceptional skill” during pretrial motions, examination of witnesses, and argument. Id. at 541. He left the reviewing court with an impression of “intelligence, ability, and industry.” Id.

Nonetheless, this Court reversed Silva’s conviction because the court below failed to advise Silva of the maximum possible penalties for the crimes with which he was charged, even though he had been advised of the standard range, and had, in fact, been sentenced within that range. 108 Wn. App. at 541-42. The Court wrote: “[E]ven the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision.” Id. at 541. Without the critical information of the maximum penalties, this Court held Silva had not made a knowledgeable waiver of his right to counsel. Id. at 541-42.

Here, Barnhill was not given even the information Silva was given in his case. 2RP 6-8. During the colloquy, Barnhill was told neither the

maximum penalties for his charged crimes, nor the standard ranges. Id. The nature and classification of the charges was also not discussed. Id. Barnhill moreover had not had the breadth of experience Silva had, and so had not been exposed to the complexity of the job he was requesting. Compare Silva, 108 Wn. App. at 538, 540-41.

Finally, the record does not, as it did in Silva, demonstrate that Barnhill was an especially skilled litigator. Barnhill attempted at least twice to have standby counsel complete the job of actual counsel – once to have standby counsel make objections for him, and once, after a couple of very awkward exchanges with the jury pool during voir dire, to have standby counsel complete voir dire for him. 11RP 14-16; 12RP 45-46, 77, 124-26. And although Barnhill successfully made a few pretrial motions, other portions of his trial were handled poorly, such as his investigation, voir dire, cross-examination of witnesses, and understanding of the legal arguments available to him. Each of these arenas is reviewed briefly in greater detail below.

a. Barnhill Handled the Investigation Poorly or Not at all.

Initially, Barnhill successfully petitioned the court for a face-to-face interview of H.R.T. before trial. 5RP 11-15. However, after his repeated violations of the protection order, the court revoked that

opportunity upon the State's motion to reconsider. CP 73-85. After efforts to re-obtain the court's permission to interview H.R.T. himself failed, Barnhill then waived his rights to interview any of the State's witnesses before trial, either in person or through his standby counsel or investigator. CP 142-44 (motion to reconsider interview of alleged victim); Supp. CP __ (Sub. no. 128, Order on Omnibus Hearing; on page three, a notation reads "Defendant does not wish to interview State's witnesses."). It does not, in short, appear that Barnhill performed any investigation at all, and all of the investigation he even attempted was apparently premised upon his desire to see H.R.T. again.

b. Barnhill had Great Difficulty with Voir Dire and Largely Waived his Right to it.

During preliminary questioning, Barnhill attempted to question potential jurors twice. 12RP 45-46, 77. Shortly after these awkward exchanges, he asked if his standby counsel could take over for purposes of voir dire. 12RP 124-26. That request was denied, and although jury pool questioning covered, in total, some 125 pages of transcript,⁷ the only additional questioning Barnhill completed was at 12RP 128-38, and even this brief questioning was interrupted by the trial court three times for

⁷ 12RP 31-123, 12RP 128-38, and 13RP 3-23.

sustained objections and inappropriate questions. 12RP 134, 136, 138.

Barnhill waived any further questioning of the jury pool. 13RP 23.

c. Barnhill's Cross-Examination was Poorly Handled or else Abandoned Entirely.

Cross-examination by Barnhill was very limited. Of the three police officers testifying, he only cross-examined one, and then only for one page of transcript. 13RP 63; 14RP 14, 117. Moreover, his cross-examination of H.R.T.'s father at least once opened the door to otherwise inadmissible evidence; specifically, his repeated questions of why H.R.T.'s father would "assume" Barnhill and H.R.T. were having sex allowed the father to testify that he had been informed by an Auburn police officer that Barnhill was having sex with H.R.T. and also to imply that H.R.T. had told her father about the relationship herself. 13RP 80-81. Barnhill also frequently sought to testify himself during cross-examination, and, despite the briefness of his cross-examinations, they was frequently interrupted by additional sustained objections. See, e.g., 13RP 79, 94-95; 14RP 48, 68, 89.

- d. Barnhill Demonstrated Misapprehension of Nearly Every Legal Argument before him, and Continued to not Understand such Arguments even After Correction by the Court.

The number of poorly-considered arguments made by Barnhill could hardly be understated. Examples include:

1. Pretrial, Barnhill filed a *pro se* motion “recommending an alternative sentence.” CP 40-71. This motion suggested the court should dismiss the child rape 2 charge and sentence Barnhill to time served on the CMIP charge in exchange for Barnhill not filing charges against H.R.T. or her family, in light of H.R.T.’s recantation to Barnhill’s attorney. CP 41, 54-55, 68. This motion, which contained a great deal of personal information, appeared to assume that Barnhill’s early family life would be relevant to the court’s decision. CP 43-47, 53. This motion was apparently never heard because Barnhill’s violations of the protection order came to light beforehand.
2. Pretrial, Barnhill filed a motion to change the prosecutor, not asserting any signs of prejudice, but arguing that the female prosecutor was less likely to be fair to him than a male one would be. CP 86-87; 8RP 9-10. The motion was denied. CP 140. 8RP 10-11.
3. Pretrial, Barnhill argued repeatedly that H.R.T.’s statements to police were not admissible because of a typo in the statement’s paperwork that read “I cerify,” rather than “I certify.” CP 90-138; 8RP 11-12. The motion was denied. CP 139; 8RP 13. Barnhill continued to bring this matter to the court’s attention as a motion in limine, even though the court had already explained pretrial that H.R.T.’s statement was (as Barnhill argued) hearsay, would not be admitted as evidence, and was only usable by the State as impeachment evidence. 8RP 12-13; 11RP 10-11, 64-67.

4. Barnhill filed a “CrR 3.6” motion, arguing that because H.R.T. had recanted her allegations to Barnhill’s former attorney, H.R.T.’s “reckless disregard” for the truth retroactively denied the State probable cause, apparently under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and all evidence in the case had to be suppressed. CP 149, 152-53; 11RP 17-18, 47-50, 101-02, 119-20, 124-25. Barnhill repeatedly asserted that H.R.T. would have to be present to be cross-examined at such motion. CP 167; 11RP 45-46, 119. After consulting with standby counsel, Barnhill eventually withdrew this motion. 11RP 119-20, 124-25; 12RP 2.
5. Barnhill attempted to assert a right to use his medical records to testify about alleged mental health problems, but he did not specify a proper records custodian or treating medical professional to introduce such evidence. 11RP 111-15. Barnhill seemed to be, on the eve of trial, asserting a mental defense, but then waived the possibility by insisting on trial continuing forward as scheduled. 11RP 113-15, 123-24. The trial court indicated it would likely exclude the records, and Barnhill then agreed he would not attempt to admit them. 11RP 113-15, 123-24.
6. During trial, in both his “halftime” motion and his closing argument, Barnhill asserted that the State had failed to prove child rape because it failed to prove a specific date he had sex with H.R.T. 15RP 9-11, 16RP 3-5, 9-10. The State’s eventual objection to this misstatement of the law in closing argument was sustained. 16RP 10.
7. Post-trial, Barnhill’s combined his arguments regarding H.R.T.’s “hearsay” police statements with the “cerify” typo and his “CrR 3.6” motion under Franks as grounds for a new trial because of a failure of probable cause. 19RP 3, 8-15. Barnhill also re-asserted that he could not be convicted of child rape, given that the State had failed to prove a specific date for the offense. 19RP 15-18, 20-21. At the same hearing, Barnhill again unsuccessfully tried to have H.R.T. testify, just as he had at the pretrial motions. 19RP 3-4, 7.

In sum, unlike in Silva, the record here does not suggest Barnhill was a skilled litigator, but rather the reverse. Moreover, Barnhill received a less thorough colloquy than did the “skilled” defendant in Silva. 2RP 6-8. Compare Silva, 108 Wn. App. at 538, 540, 541. Under these circumstances, Barnhill’s waiver of counsel cannot be viewed as “knowing, voluntary, and intelligent” as required. DeWeese, 117 Wn.2d at 376-78.

If a defendant seeks to represent himself, but the trial court fails to explain the consequences of such a decision to him, a resulting conviction must be reversed. United States v. Arit, 41 F.3d 516, 521 (9th Cir. 1994). No “harmless error” analysis can salvage the convictions. Silva, 108 Wn. App. at 542. As in Silva, Barnhill’s convictions must be reversed. Id.

2. THE EVIDENCE IS INSUFFICIENT TO CONVICT BARNHILL OF COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES, AS CHARGED IN COUNT I.

When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). A claim of insufficiency admits the truth of the

State's evidence and all inferences that can reasonably be drawn from it.

State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

RCW 9.68A.090 provides: “[A] person who communicates with a minor for immoral purposes...is guilty of a gross misdemeanor.” When a defendant is charged with CMIP, the “communication” element of the charge requires both transmission of a message by the defendant and receipt by the victim. RCW 9.68A.090; State v. Hosier, 157 Wn.2d 1, 8-9, 133 P.3d 936 (2006) (“Requiring both transmittal and receipt is consistent with our prior case law and supported by common sense”). Here, the prosecutor elected in closing argument to rely upon a specific letter sent by Barnhill to H.R.T. as the basis for Count I. 15RP 20-22.

The letter was, however, one of the three letters intercepted by H.R.T.’s father and never received or read by her. 13RP 66-70, 88-90; 14RP 38, 86-87. The prosecutor even acknowledged in closing argument the relevant letter went un-received:

Now, the defendant communicated with [H.R.T.], and that letter was sent to her home, it was intercepted, but that letter was intended to be delivered to [H.R.T.]; you’ll see the envelope with her name on it, and that it’s from the defendant in Ohio.

15RP 22.

In Hosier, the Supreme Court upheld the defendant’s conviction for a count of CMIP because the victim’s father warned his daughter –

who was not, as here, in a nominally consensual relationship with the defendant – that she was potentially in danger and should not be outside alone. 157 Wn.2d at 5-6, 10-11. There is no such indication, however, of transmission of the contents of the letter through H.R.T.’s father as there was in Hosier. In fact, H.R.T.’s mother and father engaged in a physical altercation with H.R.T. in order to physically keep the letter from her. 13RP 68, 90. Under these circumstances, the crime of CMIP simply did not occur because no “communication” occurred. Hosier, 157 Wn.2d at 8-9.

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the only remedy. Hickman, 135 Wn.2d at 103. In Hickman, the venue of Snohomish County was inadvertently included as surplusage in the “to convict” instruction. 135 Wn.2d at 101. The evidence, however, did not establish that the crime occurred in that county. 135 Wn.2d at 105-06. Accordingly, the Supreme Court reversed and dismissed the charge. 135 Wn.2d at 106.

Here, the State elected in closing argument to specify Barnhill’s un-received letter to H.R.T. as the basis of the CMIP charge. 15RP 20-22. However, an un-received letter is not a “communication” under RCW 9.68A.090. Under Hosier and Hickman, Count I must be reversed and dismissed with prejudice.

3. THE EVIDENCE IS INSUFFICIENT TO CONVICT
SMASAL OF WITNESS TAMPERING AS
CHARGED IN COUNTS III, IV, V, VI, AND VII.

- a The State's Exhibit 3, 4, and 8 are
Fundamentally Flawed and Cannot Support
Conviction on Counts IV, V, VI, or VII.

All five of the witness tampering charges were based upon recorded phone calls made by Barnhill to H.R.T. during his time in the King County Jail (KCJ). CP 170-72; Exhibit 3, 4. In the charging document, they were distinguished from each other solely by date. CP 170-72.

The original jail recordings – like all recordings made of phone calls from KJC – were written into a computer's hard drive possessed by the jail. 14RP 4-5. At the prosecutor's request, a KJC investigator made copies of all calls made to H.R.T.'s prepaid cell phone, and burned those copies onto two compact discs (CD's), which were then delivered to the prosecuting attorney's office. 14RP 4, 8-9, 13.

The prosecutor took those recordings and chose excerpts from the calls that putatively established the witness tampering charges (Counts III through VII), as well as selections that established the two counts of SAPO (Counts VIII-IX) and an additional count of CMIP (Count X). 11RP 102, 104. Mid-trial, these excerpts were burned onto a new CD, which was eventually admitted at trial as Exhibit 4. 11RP 102, 104, 13RP

106; 14RP 76-77; Exhibits 4, 8. A transcript was made of this new CD, and the transcript was admitted as Exhibit 3.⁸ 11RP 107-08; 14RP 76-77; Exhibits 3, 8. The original two CD's from the jail were not made an exhibit or admitted into evidence, nor was a full transcript of the original CD's.

Before trying to admit Exhibits 3 and 4, the prosecutor sought to establish whether Barnhill would object on grounds of authenticity – either objecting that the identity of the callers was unclear, or objecting that the excerpts were not fairly and accurately taken from the original recordings. 11RP 102-09; 13RP 42-45, 106. Barnhill said he would not object as long as he got to hear the CD before it was played in court. 11RP 106, 109.⁹ The State prepared a stipulation to clarify the authenticity issues, and Barnhill willingly signed it on the morning of the last day of testimony. 14RP 3; Exhibit 8.

⁸ For most intents and purposes, the CD and the transcript are identical to each other, although a few lines are audible on the CD that are not transcribed, and the “TRACK” numbers listed in the transcript are not contained in the CD in any way discernable by appellate counsel. Exhibit 3, 4.

⁹ Barnhill perennially complained of his inability to view videos or hear recordings pertinent to the case because of his lack of access to the appropriate equipment while incarcerated. See, e.g., 7RP 6-7; 11RP 12-13; 18RP 3-4; 19RP 6. Apparently, Barnhill could only view or hear such discovery when his attorney or investigator came to visit him, and then he could view or hear the discovery by playing it on the visitor's laptop. Id.

The trial court partially read the stipulation to the jury, stopping before the information for the individual tracks on the CD. 14RP 77-78, 93. The next day, the State admitted the stipulation as an exhibit. 15RP 7-8; Exhibit 8. The State explained to the court that the stipulation was the only way the jurors would be able to identify which days the individual recordings were made, and therefore which recordings supported which counts. 15RP 6. Indeed, no notation regarding the time or date of the calls appears on either the CD or the transcript. Exhibit 3, 4.

The CD admitted by the State to prove Counts III-X has a total of eight tracks on it.¹⁰ Exhibit 3, 4. The stipulation, however, only identifies seven tracks. Exhibit 8. Moreover, the stipulation contains a column of data about from which of the two original CD's from KJC a given track on the new CD comes, and yet this column contradicts almost completely the corresponding data from the transcript. Exhibit 3, 8. The stipulation reads as follows:

The numbered tracks on Exhibit 4 relate to the following dates.

	<u>Original CD/Track</u>	<u>Date of Call</u>
Track 1	CD 1/Track 4	11/19/07
Track 2	CD 1/Track 7	11/22/07
Track 3	CD 1/Track 9	11/30/07

¹⁰ Appellate counsel notes that the remainder of these facts are most easily reviewed while also examining Exhibit 3 (transcript) and Exhibit 8 (stipulation) in conjunction with each other.

Track 4	CD 2/Track 1	11/21/07
Track 5	CD 2/Tracks 1 & 3	12/19/07
Track 6	CD 2/Track 5	12/20/07
Track 7	CD 2/Track 7	12/21/07

A review of the identifying data from the transcript, however, provides the following contradictory information.

<u>Actual track on CD (Ex 4)</u>	<u>Track as ID'd by Transcript (Ex 3)¹¹</u>	<u>Page in Ex. 3 I.D. notation appears</u>
Track 1	<u>DISC 1, TRACK 04</u>	Page 1
Track 2	<u>TRACK 5</u>	Page 7
Track 3	<u>TRACK 6</u>	Page 8
Track 4	<u>TRACK 07</u>	Page 15
Track 5	<u>TRACK 09</u>	Page 22
Track 6	<u>DISC 2, TRACK 01</u>	Page 27
Track 7	<u>TRACK 05</u>	Page 30
Track 8	<u>TRACK 07</u>	Page 33

The only track where these notations unambiguously agree is track 1 of the CD, identified both on the stipulation and the transcript as track 4 from the first of the original CD's from KJC. Exhibit 3 (page 1); Exhibit 8. This track plainly refers to Count III, as charged in the information as occurring on November 19, 2007. CP 170 (2nd amended information); CP 194 ("to convict" instruction for Count III). This Count is not attacked by the sufficiency argument.¹²

¹¹ The capitalization and formatting in this column is as it appears in the transcript. Exhibit 3.

¹² The only other track that seems well-identified by the transcript is track 5, identified in the transcript as "DISC 2, TRACK 01," but this only illustrates the problem more, as the stipulation identifies the original "CD

Despite the contradictions inherent in exhibits 3, 4, and 8, the SAPO's (Counts VIII and IX) can be sustained because of a separate exhibit, a call log showing on which days completed phone calls had been made to H.R.T. by Barnhill. Exhibit 5. The CMIP (Count X) can be sustained because the CD and transcript show a sexually explicit call made to H.R.T. by Barnhill arguably during the correct time frame, "on or about November 22, 2007." Exhibit 3 (pg. 18-19); Exhibit 4 (track 4); CP 173 (2nd amended information); CP 202 ("to convict" instruction for Count X).

But, unlike the case of the CMIP, Barnhill faced not one count of tampering with a witness for his phone calls from the King County Jail, but five. CP 170-72 (2nd amended information). Given the existence of five counts, the number and exact dates of the conversation become critical to distinguish the multiple counts and establish their number. Multiple tracks identified on Exhibits 3 and 4 could easily be from the same conversation and/or the same date, as, in fact, the stipulation demonstrates by its notation for the putative "track 5" which is identified as "CD 2/Tracks 1 & 3," both listed as from "12/19/07," even though CD 2/Track 1 is also identified in the stipulation as being "track 4," dated "11/21/07". Exhibits 3, 4, 8.

2/Track 1" as variously being "track 4" on Exhibit 4, from 11/21/07, or as "Track 5" on Exhibit 4, from 12/19/07. Exhibits 3, 8.

In this case, multiple charges cannot be sustained. It is clear that at some time or times, Barnhill did try to encourage H.R.T. to absent herself from trial, encouragement that plainly violates the witness tampering statute. Section C.3.b., below; RCW 9A.72.120(1)(b), Exhibit 3 (pgs. 25-26, 30). But where the date or dates of such encouragement and the number of conversations involved are utterly ambiguous, the jury cannot wildly speculate about the appropriate number of counts for the charged crimes. Because the conversation or conversations held on tracks 2-8 of Exhibit 3 and 4 cannot be firmly fixed to any dates or distinguished in terms of which are parts of the same conversation, witness tampering Counts IV, V, VI, and VII cannot be sustained.

b. In Those Tracks/Counts Where the State has Only Proven that Barnhill Tried to Get H.R.T. to Recant to His Attorney, the Elements of the Crime are not Proven Beyond a Reasonable Doubt.

RCW 9A.72.120 provides:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or...to withhold any testimony; or

(b) Absent himself or herself from such proceedings....^[13]

Under this law, behavior on Barnhill's part where he "attempted to induce" H.R.T. to absent herself from trial would clearly meet the definition of RCW 9A.72.120(1)(b).

What is significantly less clear is whether Barnhill's repeated attempts to get H.R.T. to telephone Barnhill's own attorney and recant her story to the attorney could constitute a crime under RCW 9A.72.120(1)(a). That means would require Barnhill "attempted to induce" H.R.T. to "testify falsely or...to withhold any testimony."

The term "testify" is defined as:

1. To give evidence as a witness <she testified that the Ford Bronco was at the defendant's home at the critical time>.
[or]
2. (Of a person or thing) to bear witness <the incomplete log entries testified to his sloppiness>.

BLACK'S LAW DICTIONARY, 1514, (8th ed. 2004).

The term "testimony" is defined as:

Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition.

BLACK'S at 1514.

¹³ A third means, "(c) Withhold[ing] from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency," was not charged and is not at issue in this case. CP 170-72 (second amended information).

Finally, the phrase “false testimony” is defined as:

Testimony that is untrue. This term is broader than perjury, which has a state-of-mind element. Unlike perjury, false testimony does not denote a crime. -- Also termed false evidence.

BLACK’S at 1515.

When a witness gives false information to an attorney, or indeed to a police officer, the witness is not “testifying.” The witness is neither under oath nor before a court. The witness cannot, for example, be prosecuted for perjury for giving such false information. When Barnhill attempted to get H.R.T. to contact his attorney and recant her story to the attorney, Barnhill was not attempting to get H.R.T. to “testify falsely” under RCW 9A.72.120(1)(a). Instead Barnhill was asking H.R.T. to lie. This is not a crime. Any other interpretation makes the use of the word “testimony” or “testify” meaningless.¹⁴

¹⁴ One case holds that in a similar situation, the State produced sufficient evidence to prove witness tampering. State v. Williamson, 131 Wn. App. 1, 86 P.2d 1221 (2004). However, in Williamson, the meaning of “testimony” was not at issue. 131 Wn.2d at 5-7. The Williamson court was focused on examining 1) whether the defendant had attempted to get the juvenile witness to withhold her testimony, rather than whether he attempted to change it; and 2) whether the defendant could have committed the crime even if he had no personal contact with the witness. Id.

c. The Appropriate Remedy is Dismissal.

As previously noted in section C.2., supra, retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. Hickman, 135 Wn.2d at 103. Because the State failed to adequately tie the tracks other than track 1 of the CD to particular dates or individuated conversations, Counts IV, V, VI, and VII should not be sustained. Moreover, those conversations that do not involve convincing H.R.T. to “testify falsely” or absent herself from trial cannot sustain witness tampering charges. Counts IV, V, VI, and VII should therefore be dismissed.

4. THE COURT SHOULD NOT HAVE FOUND BARNHILL’S TEXAS JUVENILE ADJUDICATIONS FOR “BURGLARY OF A HABITATION” COMPARABLE TO “RESIDENTIAL BURGLARIES” UNDER WASHINGTON LAW.

A court's calculation of an offender score is reviewed de novo.

State v. Larkins, 147 Wn. App. 858, 862, 199 P.3d 441 (2008); State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). Regarding prior out-of-state convictions, RCW 9.94A.525(3) provides:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law....

The goal is to ensure that defendants with prior convictions are treated similarly, regardless of where those convictions occurred. State v. Morley, 134 Wn.2d 588, 602, 952 P.2d 167 (1998).

The State bears the burden of proving both the existence and comparability of an offender's prior out-of-state convictions. Larkins, 147 Wn. App. at 862; State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Washington has adopted a two-part test for determining whether a conviction is comparable to a Washington felony, which must be the case before a foreign conviction is included in the offender score.¹⁵

First, the sentencing court compares the legal elements of the out-of-state crime with those of the apparently-equivalent Washington crime. If the crimes are comparable, then the court counts the defendant's out-of-state conviction as the comparable Washington crime. Morley, 134 Wn.2d at 605-06. See also In re Personal Restraint of Lavery, 154 Wn.2d 249, 254-55, 111 P.3d 837 (2005). If the elements are different, then the court must examine the undisputed facts from the record of the foreign conviction to determine whether it was for conduct that would satisfy the

¹⁵ The one exception to the "felony-only" rule is that when the current conviction is for a felony traffic offense, a sentencing court may include serious misdemeanor traffic offenses in the offender score. RCW 9.94A.525(11). This circumstance, however, is not at issue here.

elements of a comparable Washington felony. Morley, 134 Wn.2d at 606;
Lavery, 154 Wn.2d at 255.

In Washington, a person is guilty of residential burglary if:
with intent to commit a crime against a person or property
therein, the person enters or remains unlawfully in a
dwelling other than a vehicle.

RCW 9A.52.025 (emphasis added).

At the age of fifteen, Barnhill was adjudged guilty of four counts
of burglary in the state of Texas. In order to prove Barnhill's juvenile
adjudications, the State attached an "Order of Adjudication and Judgment
[sic] of Disposition with T.Y.C. Commitment." Supp. CP __ (Sub. No.
175 (Appendix B thereto), 11/13/08). This appears to be similar to
findings and conclusions from a Washington juvenile court. Id. The
Texas court found:

I.

[Barnhill], on or about the 30th day of May 2002, in the County
of Liberty, State of Texas, did then and there, intentionally or
knowingly enter a habitation, without the effective consent of
Craig MacArthur, the owner thereof, and committed theft of
property, to-wit:, [sic] (1) one large stereo "boom box",
AGAINST THE PEACE AND DIGNITY OF THE STATE.

II.

[Barnhill], on or about the 30th day of May 2002, in the County
of Liberty, State of Texas, did then and there, with the intent to
commit theft, intentionally or knowingly enter a habitation,
without the effective consent of Bill R. Murry, the owner

thereof, AGAINST THE PEACE AND DIGNITY OF THE STATE.

III.

[Barnhill], on or about the 30th day of May 2002, in the County of Liberty, State of Texas, did then and there, with the intent to commit theft, intentionally or knowingly enter a habitation, without the effective consent of Donald Rogers, the owner thereof, AGAINST THE PEACE AND DIGNITY OF THE STATE.

IV.

[Barnhill], on or about the 30th day of May 2002, in the County of Liberty, State of Texas, did then and there, with the intent to commit theft, intentionally or knowingly enter a habitation, without the effective consent of, [sic] Barry Ford, the owner thereof, AGAINST THE PEACE AND DIGNITY OF THE STATE.

Supp. CP __ (Sub. No. 175 (Appendix B thereto), 11/13/08).

The Texas statute Barnhill apparently violated was V.T.C.A.¹⁶

Penal Code §30.02, which defines burglary in relevant part as follows:

(a) A person commits an offense if, without the effective consent of the owner, the person:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or

....

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

....

(c) Except as provided in Subsection (d), an offense under this section is a:

¹⁶ V.T.C.A. is "Vernon's Texas Statutes and Codes Annotated."

- (1) state jail felony if committed in a building other than a habitation; or
- (2) felony of the second degree if committed in a habitation.

....
(Emphasis added). The section of law immediately preceding V.T.C.A.

Penal Code §30.02 – V.T.C.A. Penal Code §30.01(1) – defines

“habitation” as:

[A] structure or vehicle that is adapted for the overnight accommodation of persons....

(Emphasis added).

It is plain from the Texas statutes that Barnhill’s juvenile burglaries could, in fact, have been of vehicles and still been “burglary of a habitation” under Texas law. V.T.C.A. Penal Code §30.01(1), §30.02. They would not, of course, constitute “residential burglary” under Washington state law, which explicitly excludes entry into a vehicle as a proper basis for the crime. RCW 9A.52.025.

In fact, breaking into a vehicle with the intent to steal can either be a class C felony under Washington law – if it is of a motor home or a vehicle with permanently installed sleeping quarters or cooking facilities – or it can be a gross misdemeanor if the vehicle does not meet those requirements. RCW 9A.52.090, 9A.52.100. Without proof that Barnhill’s Texas crimes would be felonies under Washington law, they cannot be included in his offender score.

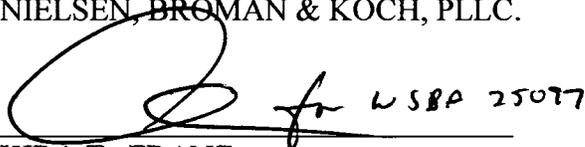
D. CONCLUSION

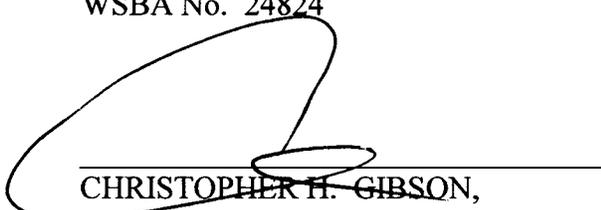
Because Barnhill was unconstitutionally denied his right to counsel, this Court should reverse all of his convictions and remand for a new trial. Because insufficient evidence supported Count I, Count IV, Count V, Count VI, and Count VII, those counts should be reversed and dismissed without benefit of retrial. As the issue may arise again on retrial, this Court should find that Barnhill's juvenile Texas adjudications for "burglary of a habitation" do not equate to "residential burglary" under Washington sentencing law.

DATED this 16th day of June, 2009.

Respectfully Submitted,

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State v. Christopher Barnhill
No. 62717-1-I

Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Christopher Barnhill 322338
Washington Corrections Center
PO Box 900
Shelton, WA 98584-

Containing a copy of the brief of appellant, in State v. Christopher Barnhill, Cause No. 62717-1-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane
Done in Seattle, Washington

6-16-09
Date

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STATE OF WASHINGTON