

62916-6

62916-6

NO. 62916-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER CARTER,

Appellant.

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

APPELLANT'S REPLY BRIEF

2009 DEC 14 PM 1:53

CLERK OF COURT
STATE OF WASHINGTON
[Signature]

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A. ARGUMENT.

1. THE PROSECUTION CONCEDES IT FAILED TO PROVE AN ELEMENT OF THE OFFENSE YET ASKS THIS COURT TO IGNORE THE BASIC REQUIREMENTS OF DUE PROCESS BY RE-OPENING THE CASE AND OFFERING NEW EVIDENCE ON APPEAL

The prosecution's efforts to introduce new evidence during the appeal to prove a legally essential element of the offense charged make a mockery of the due process required at a trial and demonstrate an extraordinary extension of the basic requirements of proof and the long-established limitations of appellate review.

The prosecution concedes, as it must, the facial invalidity of a Judgment and Sentence it offered as proof of an essential element of the offense of felony violation of a no contact order. The only evidence it presented as to one of the prior convictions necessary to find Carter guilty of felony violation of a no contact order was that Carter had been convicted under "RCW 9A.36.021" (i.e., assault in the fourth degree), of an offense titled "violation of post-sentence court order." Ex. 7 (copy attached to Opening Brief, Appendix B).

On appeal, the prosecution theorizes that it should be relieved of its burden of offering facially sufficient evidence

establishing the validity of the prior conviction because either (1) its burden of proof exists only if the defense objects before the evidence is admitted, or (2) the prosecution consulted some mysterious and unexplained “ECR” information and personally verified that the conviction was a proper predicate at the time of trial. However, Carter objected to the sufficiency of evidence at the close of the State’s case and did not waive the prosecution’s burden of proof. The State never cured the error by re-opening its case then or providing proof so that the trial court record contained the necessary information.

The State’s claim rests on an extraordinary extension of the basic principles of due process and the concept of *de novo* review of a legal issue. The state and federal constitutions place the fundamental and heavy burden of proving all elements of a charged offense at trial, not after trial. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Even in a civil case with a lesser burden of proof, when a party should have known about and had information available at trial, “there is no reason to excuse its failure to present the evidence to the trial court.” Harbison v. Garden Valley Outfitters, 69 Wn.App. 590, 594, 849 P.2d 669 (1993). The State’s burden of proof and the prohibition of double jeopardy are

bedrock foundations of criminal process and the State simply subverts them here. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.”); U.S. Const. amends. 5, 6; Wash. Const. art. I, §§ 9, 22. The prosecution’s argument undermines the principle that courts do not dispense with a jury trial and the requirement that the prosecution prove its case “simply because a defendant is obviously guilty.” Crawford v. Washington, 541 U.S. 36, 62, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In State v. Carmen, 118 Wn.App. 655, 664, 77 P.3d 368 (2003), rev. denied, 151 Wn.2d 1039 (2004), the trial judge rejected the defense motion to dismiss for insufficient proof of a valid prior conviction, and it cemented that ruling before sentencing by reviewing the court files from the pertinent convictions. Id. at 664. The Court of Appeals affirmed, but cautioned against adopting this belated fact-finding approach. The Carmen Court acknowledged that “the sentencing stage is not the ideal time for determination of the admissibility of evidence that the jury has already viewed and upon which it based its guilty verdict.” Id. It suggested that in future cases, the State must be prepared to prove the validity of

convictions “before requesting admission of the evidence of the conviction(s).” Id. at 668. Moreover, the Carmen Court premised its ruling on the defendant’s failure to complain about the timing of the trial court’s post-verdict examination of court records. Id. Here, Carter challenges the substantially belated introduction of evidence sought by the prosecution.

Similarly, in State v. Gray, 134 Wn.App. 547, 558, 148 P.3d 1123 (2006), the defendant did not complain about the sufficiency of the State’s evidence establishing the defendant’s prior convictions until the State had concluded its case in chief. The trial court looked at the pertinent statutes to determine whether the Seattle Municipal Court conviction was issued under the necessary statutory authority. The Court of Appeals found “the trial court did not err” in examining additional evidence to find the no contact order was issued under the pertinent authority. Id.

No doubt mindful of this Court’s explicit warning to the prosecution in Carmen that in future case it should be prepared to prove the essential legal application of the prior conviction at the time of trial, when it offers the evidence, the prosecution concedes that Carter’s case is “less idyllic” than either Gray or Carmen. Resp. Brf. at 23. The deficiency in the “idyllic” nature of this case is

that the prosecution offered a facially invalid Judgment and Sentence that does not show Carter was convicted of an eligible offense, it was unprepared to prove the validity of this prior in trial court, and it never offered evidence anytime before sentencing. 118 Wn.App. at 668.

The State belittles its requirement of proving the validity of the prior convictions by claiming it was simply an issue for the trial court that may be “cured” on appeal. But this was an issue presented to the jury, an issue that they were instructed to consider and decide, and an essential element of the felony violation of a no contact order. 10/1/08RP 81, 88. The State’s failure to support its claim with evidence that Carter had a valid and applicable predicate conviction means it did not prove the essential elements and it is not permitted to reopen the trial on appeal. Even if the trial court expressed concern that it should not consult extra-judicial evidence, and under Carmen it could have done so, this does not excuse the prosecution’s failure to understand the law and comply with its burden of proof during the trial.

Finally, the prosecution speculates that there could be no other order for which he was convicted in 1996 than a no contact order violation. But the very broad title of the purported conviction

“violation of a post sentence court order,” could certainly extend to an array of conduct not limited to a no contact order violation. See e.g., former RCW 9.9A.200 (1996) (granting court authority to modify judgment and sentence if offender violates any condition of sentence). Furthermore, the prosecution concedes the Judgment and Sentence contains errors, but does not explain how the Court can know which part is erroneous and which part trustworthy. This Court cannot speculate as to which parts of the Judgment and Sentence are accurate and then deduce the underlying offense, when there is no ability to measure its accuracy.

Cementing the prosecution’s perversion of due process and shifting of its burden of proving its case, the State asks that at the least, Carter must be ordered to raise this issue in a personal restraint petition where the State would be allowed to offer new evidence. Resp. Brf. at 24 n.11. The prosecution does not claim this issue is improperly raised on direct appeal and cites no legal authority whatsoever for this Court postponing a ripe and justiciable claim until it is brought in an arena where Carter has no right to the assistance of counsel, where the burden of proof would be even more lenient on the prosecution and falls heavily on the defendant, and where Carter has no right to relief unless he is still in custody at

the time he files his petition. See In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 147, 866 P.2d 8 (1994) (explaining petitioner's burden of proof in personal restraint petition). The reason the record does not contain all of the information the State wants this Court to consider is not Carter's fault, but the fault of the prosecutor who did not follow Carmen and prepare to prove the validity of the conviction at the time it offered the evidence. 118 Wn.App. at 664.

The State's extraordinary efforts to shirk its well-established and fundamental burden of proof should be rejected and Carter's conviction for felony violation of a no contact order must be vacated. Upon remand, the court may enter a conviction for the gross misdemeanor of violating a no contact order, because it is a lesser offense that is unaffected by the State's failure of proving the greater offense. State v. Robbins, 68 Wn.App. 873, 877, 846 P.2d 585 (1993) (remanding for entry of lesser degree of burglary when State failed to prove all elements of greater offense of residential burglary).

2. EFFECTIVE ASSISTANCE OF COUNSEL
REQUIRES A “LEGITIMATE” TRIAL STRATEGY,
NOT ONE DENOUNCED BY CASE LAW, AND NOT
ONE THAT UNREASONABLY IGNORES THE
ONLY AVAILABLE AND HELPFUL LEGAL
DEFENSE

a. The prosecution concedes there was no legitimate reason to introduce prejudicial criminal history. The State agrees counsel could not have benefitted in any way from failing to redact Ex. 6, the judgment and sentence that listed Carter’s four felony convictions, including first degree robbery, second degree theft, delivery of a controlled substance, and *felony* violation of a no contact order – the same offense charged in the case. Resp. Brf. at 28.¹ The prosecution contends that counsel’s incompetent failure to shield the jury from this irrelevant information could not have affected the outcome of the case. But, as argued more fully below, Carter’s criminal history is precisely the type of evidence that would tip the scales because Carter presented a sympathetic and reasonable explanation that he was only looking after the safety of his daughter, and he thought the years-old no contact order had expired.

¹ Absent this judgment and sentence listing criminal convictions, the jury would not have known, nor did it need to know, that Carter had been convicted on two previous occasions of the greater felony level of this offense.

b. The prosecution ignores the illegitimacy of any strategic reason counsel waived his objection to the proof of prior convictions. Defense counsel's strategy, the prosecution posits, was to delay his objection until the prosecution could not correct the error by offering additional proof. Yet while this could be a plausible strategy in *some* cases, it is not a reasonable strategy in a felony violation of a no contact order case because controlling precedent rejects this strategy. As explained in Gray, an attorney must object to the prosecution's proof of the validity of prior convictions at the time the prosecution offers its evidence. Gray involved precisely the same scenario as in the case at bar, was published before Carter's trial, and clearly directs counsel's obligation to object when the evidence is offered. 134 Wn.App. at 556.

When there is relevant case law deciding the very issue in a case, counsel must make reasonable efforts to abide by the requirements of this case law. State v. Kyllo, 166 Wn.2d 856, 868, 215 P.3d 117 (2009). With proper research, counsel would have discovered caselaw required him raise his objection at the time the State offered its evidence or it would be waiver. Counsel's

“strategy” was illegitimate and his representation fell below the standard of competence. Id.

c. The necessity defense was available and there was no legitimate reason not to seek a jury instruction on this defense. Carter had the right to have the jury instructed on a defense that is supported by substantial evidence. This Court considers whether an instruction should have been given with deference to the jury, who weighs the evidence and decides credibility questions. State v. Ginn, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006).

The prosecution misunderstands Carter’s testimony when it paints the necessity defense as unavailable. Carter acted out of his concern about his teenage daughter who he feared was living on the streets. 10/1/08RP 46-48. He worried that she was not safe. He was not trying to force her to return to his home, rather he wanted to know whether she was in a safe place. When he went to Baker’s home for the purpose of looking for his daughter, he received assurances that she was safe. Id. at 50, 60. This satisfied his pressing concern for her safety, because he did not think Baker’s home was an unsafe place for his daughter, and he left.

The prosecution also injects specious and unreasonable claims in this portion of its brief about Carter and Baker's relationship. Resp. Brf. at 34. This Court should disregard the appellate prosecutor's assertions that Baker fled after the incident because of her fear of Carter when no kernel of such evidence existed. Baker's disinterest in prosecuting Carter or being in contact with the police about the case may just as readily stem from an array of personal issues that have nothing to do with a fear of seeing Carter. At most, the evidence showed Baker was upset when she saw Carter on this day but her reasons for being upset were never offered and cannot be speculated about now. The prosecution's efforts to taint Carter based on accusations it never offered at trial must be ignored on appeal.

d. The prejudice from counsel's deficient performance must be examined cumulatively and shows his incompetence affected the outcome of the trial. The prosecution concedes it was unreasonable for counsel to want the jury to learn about Carter's violent and unsavory past and that evidence would never have been admitted absent counsel's failure to ask the court to redact the judgment and sentence. It offers no possible legitimate strategy counsel could have pursued when he saved his

objection to Carter's prior convictions until after the prosecution rested, because case law mandates the objection be raised earlier or it will be deemed waived. Finally, the prosecution misapprehends the necessity under which Carter acted when he believed he had no choice but to look for his daughter in any possible location to ascertain her safety.

Counsel's deficient performance reasonably affected the outcome of the trial. Carter had a sincere and reasonable ground for going to Baker's home and he did not overstay that visit. Once he satisfied his necessity of determining his daughter's safety, he left. He did not wish to involve the police and demand they search Baker's home to look for his daughter because he did not want his older daughter forcibly removed by the police, and did not want his young daughter, who lived with Baker, traumatized by a police presence in the home. 10/1/08RP 46, 49-50, 52. Carter had previously notified the police of her absence but they had not located her and he felt he had no choice but to look for his daughter personally. Id. at 47. His testimony satisfied the requirement that he was acting out of necessity, seeking only avoid the greater harm that his daughter could be in a dangerous situation, and he had a

limited conversation with his former girlfriend, while remaining in his car, in order to satisfy his concern.

The prosecution also misunderstands Carter's argument that the necessity defense would appeal to juror sympathy. While it is true that the verdict may not rest on sympathy, empathy and understanding of Carter's motive, coupled with the legitimate and viable defense of necessity, would have had great persuasive effect with the jury, who would have had a valid outlet to express their understanding of Carter's predicament and the legal excuse that was available to him under the circumstances. Without the necessity defense, Carter had no viable defense other than the possibility he misread the expiration date of the no contact order. Notably, defense counsel's closing argument is skimpy at best, thus demonstrating counsel's inability to craft a defense without an instruction on necessity. Defense counsel's failure to pursue a viable and winnable theory of defense, along with his failure to keep highly prejudicial information about Carter from the jury when Carter's credibility was central to the jury's belief that he did not know about the no contact order, and counsel's failure to know that the law mandated an objection to evidence at the time it was admitted, denied Carter his right to effective assistance of counsel.

3. THE INADEQUATE CHARGING DOCUMENT DENIED CARTER THE MANDATORY NOTICE OF THE ELEMENTS OF THE OFFENSE CHARGED.

The offense of felony violation of a no contact order requires as its essential elements that the accused person violates a no contact order having been previously convicted of two violations of no contact orders issued under specific statutory authority. RCW 26.50.110. The accused person receives notice of the particular underlying conduct by receiving notice of the particular underlying offenses.

Contrary to the prosecution's claim, merely reciting the statutory language is not always sufficient to provide the necessary factual notice. City of Seattle v. Termain, 124 Wn.App. 798, 803, 103 P.3d 209 (2004); State v. Clowes, 104 Wn.App. 935, 941, 18 P.3d 596 (2001). In Termain, the Court faulted the charging document for failing to identify the underlying no-contact order with any degree of specificity. Termain relied on State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989), whose "core holding" was that a defendant must be apprised not only of the legal elements but also "of the conduct of the defendant which is alleged to have

constituted the crime.” Id. (citing Leach, 113 Wn.2d at 688-89; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991)).

The bail jumping cases the prosecution focuses on are inapplicable to the case at bar. The bail jumping statute requires the prosecution to specify a particular offense charged and the defendant’s knowing failure to appear in court. RCW 9A.76.170(1); State v. Williams, 162 Wn.2d 177, 184, 170 P.3d 30 (2007). The bail jumping statute varies the penalty imposed based on the classification of the charged offense. RCW 9A.76.170(2). In Williams, the court ruled that the charging document must provide the accused with notice of the penalty, by either listing the classification of the charged offense or otherwise specifying the name of the charged offense. 162 Wn.2d at 185. In Williams, the same charging document accused the defendant of committing a particular offense by name and failing to appear in court for this same offense, and by listing the offense in the charging document, he received the necessary notice. Id.

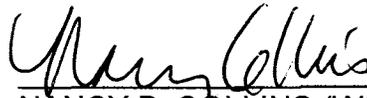
Here, Carter was not informed of the underlying conduct that was an essential element of the charge. The insufficient charging document denied him the notice to which he is entitled.

B. CONCLUSION.

For the foregoing reasons and those discussed in Appellant's Opening Brief, Mr. Carter respectfully requests this Court reverse his conviction for inadequate proof and deficient representation of counsel and remand the case for further proceedings consistent with this Court's ruling.

DATED this 14th day of December 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	
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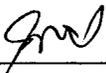
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COURT OF APPEALS
STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF DECEMBER, 2009.

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