

72140-2

72140-2

NO. 72140-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

DEREK WHITTAKER,

Appellant.



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

The Honorable Dean S. Lum, Judge

BRIEF OF APPELLANT

MARY T. SWIFT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support appellant's conviction for felony stalking.

2. The trial court erred in entering a no-contact order term that exceeded the statutory maximum.

3. The trial court erred in failing to vacate appellant's conviction for felony violation of a no-contact order when that offense merges into the greater offense of felony stalking.

Issues Pertaining to Assignments of Error

1. To convict for stalking, the State must prove the defendant repeatedly followed or repeatedly harassed another person. Repeatedly means two or more times. Where the State put forth evidence of only one following event, is there insufficient evidence to support this alternative means of stalking?

2. To prove repeated harassment, the State must show the complaining witness suffered actual and substantial emotional distress. Where the complaining witness said she was numb to and not shocked by appellant's contact during the charging period, is there insufficient evidence that appellant's conduct rose to the level of harassment?

3. The length of a no-contact order cannot exceed the statutory maximum for the crime. The statutory maximum for felony

stalking is 10 years, while the maximum for felony violation of a no-contact order is five years. Does the 10-year no-contact order imposed here exceed the statutory maximum if this court reverses and dismisses appellant's felony stalking conviction for insufficient evidence?

4. Where appellant's conviction for violation of a no-contact order elevated the crime of stalking from a gross misdemeanor to a felony, must appellant's no-contact order violation conviction be vacated because it merges into his felony stalking conviction?

B. STATEMENT OF THE CASE

The State charged Derek Whittaker with one count of felony violation of a court order and one count of felony stalking Sayward Spalding between December 17, 2013 and January 3, 2014. CP 18-19. Both counts included allegations of domestic violence and rapid recidivism. CP 18-19.

Spalding is a hairdresser in Duvall, Washington. 3RP 69-70.<sup>1</sup> For several years, Spalding worked simultaneously at Salon Sola in Bellevue and Urban Chic Salon in Duvall. 3RP 39, 72-73. She is married and has a young daughter. 3RP 70. Whittaker's family also lives in Duvall, though Whittaker has struggled with homelessness. 3RP 82, 152; 4RP 24. Duvall is

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<sup>1</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – February 11, May 13, May 22, May 28, 2014; 2RP – May 28, 2014; 3RP – May 29, 2014; 4RP – June 2, June 3, June 27, 2014.

a small, close-knit community, with a population of only 6,000 or 7,000. 3RP 9, 185.

Whittaker and Spalding met in April 2012 and became friends. 3RP 75-78. At the time, Spalding and her husband still lived together but were separated and slept in different beds. 3RP 78-80, 137. Spalding was intrigued by Whittaker and they began spending more time together. 3RP 80-81. She said they went on walks and shared secrets with each other. 3RP 82. Spalding and Whittaker became physically affectionate: they kissed and had oral sex, but did not have sexual intercourse. 3RP 82-84, 143. Their physical relationship lasted for about three and a half months. 3RP 84.

However, Spalding and her husband eventually decided to repair their marriage, so Spalding told Whittaker she could no longer see him. 3RP 84-86. She explained that Whittaker was initially understanding about the situation, but his behavior soon changed and he began texting and calling often. 3RP 86-90. When Whittaker started showing up at her work and home, Spalding told him he needed to leave. 3RP 89-90. Spalding said Whittaker was “not aggressive” and “not threatening”; he was just “not getting the point.” 3RP 152.

Spalding explained that Whittaker’s continued contact was a nuisance, but did not make her fearful until late August 2013. 2RP 121-22. At this particular time, Whittaker appeared at Spalding’s home late at night,

“[k]icking, banging hard on the door, yelling, screaming, leaning in, walking in my foyer, yelling at my husband, just screaming at my husband to come down here. Trying to wake my five-year -- four-year-old up, at the time.” 2RP 123-24. Spalding called 911. 2RP 124. This incident prompted Spalding to get a protection order against Whittaker in September 2013. 2RP 128; 3RP 90. She said, though, that Whittaker continued to contact her by phone, text message, and in person. 3RP 91.

Spalding described two other incidents where Whittaker acted aggressively: once he punched a post in her presence and another time he eavesdropped on her at Urban Chic Salon. 2RP 156-58. She said “[o]ther than that,” though, “I was never afraid of him.” 2RP 158. Whittaker made threats to hurt himself in front of Spalding, but never threatened her or her family. 2RP 125-29. Spalding also explained there were multiple times Whittaker was “kind and respectful” when she asked him to leave. 2RP 158. And, there were times when Spalding initiated contact with Whittaker, even after she sought the protection order. 2RP 159.

In late 2013, Spalding signed a lease for space in downtown Duvall to start her own hair salon called Bella Couture Parlor. 3RP 72-74. Bella Couture is located on the main street in Duvall, close to several other businesses and restaurants. 3RP 10, 17-18; 4RP 18-19. Spalding spent 12 to 15 days from Thanksgiving to December 10, 2013 setting up the new salon.

3RP 97-98. Once she finished, she did not spend any time at the salon between December 10th and January 3rd when it opened. 3RP 98.

Whittaker was in jail from November 5 to December 18, 2013, and had no contact with Spalding during that time. 3RP 162-63; 4RP 130. A five-year no-contact order was entered on December 17, 2013, prohibiting Whittaker from contacting Spalding or coming within 1,000 feet of her home or workplace. Ex. 18.

After Whittaker's release on December 18th, Spalding said she began receiving text messages from an unknown number, but believed Whittaker sent them because their content was consistent with his past messages. 3RP 99-104. The text messages generally asked Spalding if she could talk once more for five or ten minutes. Exs. 11-15; 3RP 103-07. Spalding would usually ignore or delete the text messages, but would also sometimes respond to them. 3RP 107-08.

Spalding also said she received a phone call from Whittaker after his release on the 18th in which he told her, "I've seen your new shop. It looks great. You did a great job. I'm proud of you. Good for you." 3RP 95. Spalding told Whittaker he should not know about her new salon, but he responded, "I know exactly where your new shop is." 3RP 95. Spalding explained, however, that she did not see Whittaker between December 17th and January 3rd. 3RP 107.

Spalding began working at her new salon on January 3, 2014. 3RP 108. Her colleague, Heather Jordan, was also working that day. 3RP 108. Jordan knew about the protection order in place against Whittaker. 3RP 42-44, 109. That evening, Jordan saw Whittaker stop in the indoor hallway and look into the salon through the window in the door. 3RP 48-50. She recognized him from past interactions at Urban Chic Salon. 3RP 42-44, 49. Whittaker then walked down the hall and stopped in the bathroom for several minutes. 3RP 20, 30-35. On his way back down the hall, he briefly glanced in the salon window without stopping. 3RP 32-35, 48-50. Spalding had her back to the door, so she never saw Whittaker that day. 3RP 111, 114. Jordan called 911 and the police arrived shortly thereafter. 3RP 51-52.

Police arrested Whittaker on January 4, 2014. 3RP 187, 193. Not until this date did Spalding inform police about the phone call and text messages she received from Whittaker between December 18th and January 3rd. 3RP 172-73; 4RP 26.

At trial, Whittaker stipulated he had two prior convictions for violating a court order protecting Spalding. CP 20-21; 4RP 32.

The jury found Whittaker guilty on both counts, with a special verdict finding of domestic violence based on Whittaker's and Spalding's "dating relationship." CP 22-25, 59. In a bifurcated trial, the jury also found Whittaker committed both offenses shortly after being released from

incarceration. CP 26-27. The trial court sentenced Whittaker to 12.75 months of confinement and 12.75 months of community custody. CP 80.

Whittaker filed a timely notice of appeal. CP 87.

C. ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS THE FELONY STALKING CONVICTION.

The evidence is insufficient to sustain Whittaker's felony stalking conviction for two reasons. First, where the State proved only one following incident, it did not prove repeated following. Second, the repeated phone contact with Spalding did not rise to the level of harassment, because Spalding did not suffer actual and substantial emotional distress during the charging period. When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

In every criminal prosecution, due process requires the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. State v. Vasquez, 178

Wn.2d 1, 6, 309 P.3d 318 (2013). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” Id. at 16. Such inferences must “logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.” Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

Here, the to-convict instruction for felony stalking required the State to prove six elements:

- (1) That between December 17, 2013, and January 3, 2014, the defendant intentionally and repeatedly harassed or repeatedly followed Sayward Spalding; and
- (2) That Sayward Spalding reasonably feared that the defendant intended to injure Sayward Spalding or another person; and
- (3) That the defendant
  - (a) intended to frighten, intimidate, or harass Sayward Spalding; or
  - (b) knew or reasonably should have known that Sayward Spalding was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her; and
- (4) That the defendant acted without lawful authority; and
- (5) That the defendant violated a protective order protecting Sayward Spalding; and

- (6) That any of the defendant's acts occurred in the State of Washington.

CP 50; see also RCW 9A.46.110. The jury was further instructed that it "need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." CP 51.

There are two alternative means of committing stalking: repeatedly harassing or repeatedly following another person. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). The State did not elect between these alternatives. See CP 23, 50; 4RP 51. When alternative means of committing a single offense are presented to a jury, each alternative must be supported by substantial evidence in order to safeguard the accused's right to a unanimous verdict. State v. Garcia, 179 Wn.2d 828, 835-36, 318 P.3d 266 (2014).

- a. There is insufficient evidence that Whittaker repeatedly followed Spalding.

"Follows" means "deliberately maintaining visual or physical proximity to a specific person over a period of time." RCW 9A.46.110(6)(b). In addition:

A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that

the alleged stalker follows the person while in transit from one location to another.

Id. “Repeatedly” is defined as “on two or more separate occasions,” which means distinct, individual, noncontinuous incidents. RCW 9A.46.110(6)(e); Kintz, 169 Wn.2d at 548.

Only two possible following incidents occurred between December 17, 2013 and January 3, 2014. The first was on January 3rd when Whittaker walked by Spalding’s hair salon and looked in the window. This is supported by substantial evidence in the record. The second was when Whittaker told Spalding over the phone that he had seen her new salon and it “looks great.” 3RP 95. However, to find this constituted following is contrary to the evidence, because Spalding was not physically present at the salon between December 17th and January 3rd. The State therefore failed to put forth sufficient evidence that Whittaker repeatedly followed Spalding during the relevant time period.

Spalding testified she spent 12 to 15 days between Thanksgiving and December 10th setting up the new salon. 3RP 97-98. During this time she worked at night and there were no blinds in the windows, so people could have easily seen into the salon. 3RP 98. However, she explained that once she finished preparing the salon, she spent no time there between December 10th and January 3rd when it opened: “I didn’t spend any time there. I said,

I'm done until I'm here to work. I have to work in Bellevue and then I'm taking two weeks off." 3RP 98.

Whittaker was incarcerated from November 5 to December 18, 2013. 4RP 130. Then, sometime shortly after Whittaker's release, he told Spalding over the phone, "I've seen your new shop. It looks great. You did a great job. I'm proud of you. Good for you . . . I know exactly where your new shop is." 3RP 95, 166. The State presumably intended the jury to infer Whittaker followed Spalding as she set up the new salon. However, Spalding was not physically present between December 10th and January 3rd. Therefore, even if Whittaker walked by Spalding's salon between December 18th and January 3rd, he was not in "visual or physical proximity" to Spalding, as required by RCW 9A.46.110(6)(b). In fact, based on Spalding's testimony, visual or physical proximity was impossible until January 3rd.

Furthermore, no evidence shows that Whittaker deliberately appeared at Spalding's new salon between December 18th and January 3rd, when Whittaker was homeless. 3RP 152; 4RP 24. Spalding's salon is on the main street in Duvall, near several other businesses. 4RP 18-19. She acknowledged the salon could be seen from the street and from the Duvall library. 3RP 95, 112, 169-70. She did not send out any press releases about the salon opening, but admitted her business partner might have. 3RP 116-

17. Thus, there were many non-intentional ways Whittaker could have discovered Spalding's new salon. By contrast, no evidence established Whittaker's deliberate physical proximity to the salon. On this record, any finding of deliberateness would require speculation, which cannot support a conviction. See Vasquez, 178 Wn.2d at 6.

State v. Ainslie, 103 Wn. App. 1, 11 P.3d 318 (2000), is instructive and distinguishable. Ainslie argued there was insufficient evidence to show he followed and deliberately maintained contact with J.P. Id. at 6. The court rejected this argument, because Ainslie (1) regularly parked within sight of J.P.'s house when J.P. was there; (2) he once got out of his car as J.P. walked toward him; and (3) he was seen in J.P.'s yard. Id. at 7. Furthermore, J.P.'s father as well as her friend, C.P., did not see Ainslie while J.P. was out of town, but Ainslie reappeared in his parked car once J.P. returned. Id.

Ainslie demonstrates the type of repeated following incidents that support a stalking conviction. There is no similar evidence here. The only following incident occurred on January 3rd when Whittaker walked by the salon. It was impossible for Whittaker to maintain visual or physical proximity to Spalding in her salon before then, because she was not there. Whittaker was denied his right to a unanimous jury verdict because the State did not prove he repeatedly followed Spalding.

- b. There is insufficient evidence that Whittaker repeatedly harassed Spalding.

“Harasses” means “a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose.” RCW 10.14.020(2); RCW 9A.46.110(6)(c). “The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner.” RCW 10.14.020(2) (emphasis added). “Substantial” means “considerable in amount, value, or worth.” State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280 (2002)).

There is no dispute that Whittaker contacted Spalding several times by text message and at least once by telephone during the charging period. However, this contact did not cause actual and substantial emotional distress, as required to establish that Whittaker’s repeated contact rose to the level of harassment.

Spalding testified Whittaker started contacting her by phone and text message when he was released from jail on December 18th. 3RP 94-95. The text messages generally asked Spalding to talk once more for five or ten minutes, then “goodbye for good.” 3RP 103-07; Exs. 11-15. They were not

threatening or aggressive. See Exs. 11-15. When asked how she felt about this communication, Spalding said, "I was so numb to it. They had been happening for a year-and-a-half. I mean, I was -- again, told to file papers, long before I did, so I was very numb to getting it." 3RP 107. Spalding explained she would usually delete or ignore Whittaker's text messages, but would also sometimes respond. 3RP 108. She did not report this contact to the police until January 4th. 3RP 173.

Spalding testified to three prior incidents that made her afraid of Whittaker, but "[o]ther than that . . . I was never afraid of him." 3RP 158. She also explained, "I have changed -- my whole life has changed. Everything in my life has changed. The way I live my life. The way I look over my shoulder. The way I park. I've been reclusive for a year-and-a-half." 3RP 129. The State may argue this type of evidence shows Spalding suffered emotional distress between December 17th and January 3rd.

However, this evidence goes to the context of Whittaker's and Spalding's relationship, not its content. The content is that Spalding was "numb" to Whittaker's contact during the charging period. She did not consider the text messages and phone calls to be serious enough to call the police until January 4th. Instead, she ignored or deleted the text messages. Furthermore, she was "not shocked" by Whittaker walking by her salon on January 3rd. 3RP 114. This does not demonstrate actual and substantial

emotional distress. If this court holds otherwise, then virtually any reaction to unwanted contact would rise to the level of substantial emotional distress. This court should not write “shall actually cause substantial emotional distress to the petitioner” out of the statute. RCW 10.14.020(2); State v. Lilyblad, 163 Wn.2d 1, 11, 177 P.3d 686 (2008) (“This court may not interpret any part of a statute as meaningless or superfluous.”)

In State v. Askham, sufficient evidence showed that repeated e-mails caused actual emotional distress when the complaining witness testified he felt threatened by them. 120 Wn. App. 872, 883-84, 86 P.3d 1224 (2004). But Spalding did not testify to any similar reaction between December 18th and January 3rd. Her reaction to Whittaker’s conduct before December 18th is not evidence of her reaction to his conduct after December 18th. Nor should Whittaker be penalized for Spalding’s prior response to his behavior.

The State failed to prove that Whittaker’s contact caused Spalding to suffer actual and substantial emotional distress during the charging period. As such, there is insufficient evidence of the alternative means that Whittaker repeatedly harassed Spalding.

The State overreached in charging Whittaker with felony stalking. It sought a conviction based on past interactions between Whittaker and Spalding, rather than on what actually happened between December 17th and January 3rd. This court should reverse and dismiss Whittaker’s stalking

conviction, because there is insufficient evidence of both alternative means that Whittaker repeatedly following and repeatedly harassed Spalding. See Hickman, 135 Wn.2d at 103. If this court determines there is sufficient evidence for one of these alternative means, then the remedy is to reverse and remand for retrial on only that alternative means. Garcia, 179 Wn.2d at 843-44. Whittaker cannot be retried on any alternative means for which there is insufficient evidence. Id. at 844.

- c. If this court reverses and dismisses Whittaker's stalking conviction, then it must also remand for correction of the 10-year no-contact order.

The appropriate time limit for a no-contact order imposed at sentencing is the statutory maximum for the crime. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007). The trial court ordered Whittaker to have no contact with Spalding for 10 years, because the statutory maximum for felony stalking, a class B felony, is 10 years. CP 82; RCW 9A.46.110(5)(b); RCW 9A.20.021(1)(b). But felony violation of a no-contact order is a class C felony, with a statutory maximum of five years. RCW 26.50.110(5); RCW 9A.20.021(1)(c). If this court reverses and dismisses Whittaker's stalking conviction, then the 10-year no-contact order exceeds the statutory maximum. The remedy is to remand for correction of the sentencing error. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

2. WHITTAKER'S CONVICTION FOR VIOLATION OF NO-CONTACT ORDER MUST BE DISMISSED BECAUSE IT MERGES INTO HIS FELONY STALKING CONVICTION.

Proof of Whittaker's no-contact order violation was necessary to elevate his stalking conviction from a gross misdemeanor to a felony. This implicates the merger doctrine. Whittaker's conviction for violation of a no-contact order should therefore be dismissed because it merges into his felony stalking conviction.

The State may bring multiple charges arising from the same criminal conduct in a single proceeding. State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. Id. Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). This court's review is de novo. Id. at 770.

Double jeopardy is the foundation for the merger doctrine. State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). The doctrine is a rule of statutory construction used to determine legislative intent. Id.; State v. Chesnokov, 175 Wn. App. 345, 349, 305 P.3d 1103 (2013). It applies

“when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code.” Parmelee, 108 Wn. App. at 710. This is so even when the two crimes have formally different elements. Freeman, 153 Wn.2d at 772. Put another way, “when the degree of one offense is raised by conduct separately criminalized by the legislature, [courts] presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” Id. at 772-73.

Stalking is defined in RCW 9A.46.110(1). It is generally a gross misdemeanor, but becomes a felony if any one of several circumstances is present. RCW 9A.46.110(5). One such circumstance occurs when “the stalking violates any protective order protecting the person being stalked.” RCW 9A.46.110(5)(b)(ii). Whittaker was convicted under this subsection. CP 23, 50.

In Parmelee, this court held that violation of a protective order merges into stalking when it elevates stalking to a felony under RCW 9A.46.110(5)(b)(ii). 108 Wn. App. at 710-11. Parmelee was convicted of one count of felony stalking and three counts of gross misdemeanor protective order violations. Id. at 708. The court concluded that “two of Parmelee’s three convictions for protection order violations merge into the felony stalking conviction because the State was required to prove facts to support at least two of the protection order violation convictions in order to

establish facts sufficient for a felony stalking conviction under RCW 9A.46.110(5)(b).” Id. at 711.

In reaching this conclusion, the court explained that stalking requires a finding of repeated harassment or repeated following. Id. Two harassing events are sufficient to satisfy the requirement that the behavior be repeated. Id. Thus, with respect to at least two of Parmelee’s three protection order violations, the State was required to prove those violations occurred in order to secure convictions for both felony stalking and the protection order violations. Id. As such, two of Parmelee’s protection order violations were essential elements of the crime of felony stalking. Id. Because protection order violations are crimes defined elsewhere in the criminal statutes, they merged into the stalking conviction. Id.

Under Parmelee, the merger doctrine applies here in two ways. Whittaker was convicted of one count of violation of a no-contact order and one count of felony stalking. To convict for felony stalking, the State needed to prove that Whittaker “violated a protective order protecting Sayward Spalding.” CP 50. Thus, a protective order violation was an essential element of stalking. It elevated Whittaker’s stalking conviction from a gross misdemeanor to a felony. See RCW 9A.46.110(5). The merger doctrine therefore prohibits Whittaker’s conviction for violation of a no-contact order.

Furthermore, in order to convict for felony stalking, the State needed to prove that Whittaker repeatedly harassed or repeatedly followed Spalding. CP 50. The State did not elect between these alternative means, see CP 50, and so sufficient evidence must support both. Kintz, 169 Wn.2d at 551-52. As discussed above, the State alleged only two possible following incidents. 4RP 51-54. The first was the phone call where Whittaker told Spalding the new salon looked good. 4RP 52. The second was when Whittaker walked by the salon on January 3rd—the same conduct that resulted in the no-contact order violation. 4RP 53. Thus, the State needed to prove Whittaker violated the no-contact order in order to prove he repeatedly followed Spalding—an essential element of stalking. This is analogous to Parmelee, where the State used two protective order violations to prove repeated harassment. 108 Wn. App. at 711.

Under clear and controlling case law, Whittaker's conviction for violation of a no-contact order merges into his felony stalking conviction. This court should accordingly vacate Whittaker's conviction for violation of a no-contact order and remand for resentencing. Chesnokov, 175 Wn. App. at 354-56.

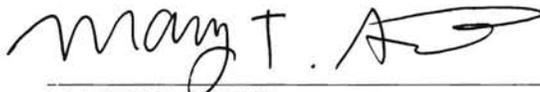
D. CONCLUSION

For the reasons stated above, this court should reverse and dismiss Whittaker's felony stalking conviction for insufficient evidence. In the alternative, this court should vacate Whittaker's conviction for felony violation of a no-contact order because it merges into his stalking conviction.

DATED this 23<sup>rd</sup> day of December, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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MARY T. SWIFT  
WSBA No. 45668  
Office ID No. 91051

Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72140-2-1
	)	
DEREK WHITTAKER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23<sup>RD</sup> DAY OF DECEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DEREK WHITTAKER  
234 12<sup>TH</sup> STREET SE  
AUBURN, WA 98002

SIGNED IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF DECEMBER, 2014.

X Patrick Mayovsky