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OF WASHINGTON

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STATE OF WASHINGTON

NO. 33779-7-II BY  DEPUTY

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

ROGER CRAIG DEAVER,

Appellant.

BRIEF OF APPELLANT

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P.M. 5-5-06

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court abused its discretion when it admitted Exhibits 2, 3, 4, 5, 6 and 7 because the state failed to establish a proper foundation for their admission.

2. Defense counsel's failure to object to the admission of Exhibit 1 denied the defendant the right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment because the state failed to lay a proper foundation for the admission of this exhibit.

3. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment for felony violation of a no contact order because the state failed to present substantial evidence on this charge.

4. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, and the defendant's right to jury trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment when it added a community custody point that was neither alleged in the information or proven to the jury.

Issues Pertaining to Assignment of Error

1. Does a trial court abuse its discretion if it admits exhibits when the state fails to establish a proper foundation for the admission of the exhibits?

2. Does a defense counsel's failure to object to the admission of the key state's exhibit violate the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when the state failed to lay a proper foundation for the admission of the exhibit?

3. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment for felony violation of a no contact order when the state fails to present substantial evidence on this charge?

4. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment and a defendant's right to jury trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment when it adds a community custody point that the state neither alleged in the information or proved to the jury?

STATEMENT OF THE CASE

Prior Case Histories

On May 24, 2004, a defendant by the name of "Roger Deaver" appeared in Clark County District on a Fourth Degree Assault charge. Exhibit 7¹. At that time, District Court Judge Melnick entered a pretrial order prohibiting this "Roger Deaver" from having contact with a person named "Ruth Costillo Lima." The order states:

YOU SHALL HAVE NO CONTACT WITH THE ABOVE NAMED VICTIMS(S) EITHER IN PERSON, BY TELEPHONE OR IN WRITING, THROUGH ANY OTHER PERSON, OR IN ANY OTHER WAY.

Exhibit 7.

The order goes on to state the following concerning the conditions of release for this "Roger Deaver":

You are released from custody pending trial on the following terms and conditions of this NO CONTACT ORDER:

1. You are to appear at all times and places ordered by the Court.

Exhibit 7.

On August 20, 2004, under citation number 279467, a police officer arrested, cited, and booked this same "Roger Deaver" for violating the

¹Exhibit 7 includes three documents: (1) a Statement of Defendant on Plea of Guilty in Clark County District Court Cause Number 281002, (2) a Judgment and Sentence in that same cause number, and (3) a pretrial/post-trial No Contact Order in that cause number.

pretrial no contact order Judge Melnick issued on May 24, 2005 in District Court Cause Number 281002. Exhibit 5. Three days later this same “Roger Deaver” appeared before District Court Judge Schreiber, who entered a pretrial No Contact order prohibiting this “Roger Deaver” from having any contact with a “Ruth Castillo Lima.” Exhibit 6². The signature of this “Roger Deaver” appears on the document after an acknowledgment of receipt. *Id.*

On September 29, 2004, this same person named “Roger Deaver” pled guilty on both the assault charge in cause number 281002 and the violation of the no contact order charge in cause number 279467. Exhibit 6, Exhibit 7. His signatures appear on both guilty pleas and both judgment and sentences. *Id.* On that same day District Court Judge Schreiber also “extended” the two no contact orders from that date to the September 29, 2006. *Id.* The second page of the first no contact order states:

You are hereby advised that you have been convicted of one or more of the following crimes against a member of your family or household:

Assault in the Fourth Degree.

This No Contact Order is extended and shall remain in effect until 9-

²Exhibit 6 includes three documents: (1) a Statement of Defendant on Plea of Guilty in Clark County District Court Cause Number 279467, (2) a Judgment and Sentence in the same cause number, and (3) a pretrial/post-trial no contact order in that same cause number.

29-06.

Exhibit 7, page 2.

The second page of the No Contact order in the second case contains the same language except for the offense named. Exhibit 6. Both the pretrial and post-trial portions of the no contact orders in both cases bear the signature of a person named "Roger Deaver." Exhibit 7.

On December 1, 2004, the Clark County Prosecutor charged this same "Roger Deaver" under Clark County Superior Court Cause Number 04-1-01954 by amended information with one count of attempted burglary and one count of violation of the no contact orders issued in District Court Cause Numbers 279467 and 281002. Exhibit 2. On that same day this "Roger Deaver" entered a guilty plea to both charges. Exhibit 3. The court then sentenced "Roger Deaver" and entered a Post Conviction "Domestic Violence No-Contact Order" under the same superior court cause number. Exhibit 1, Exhibit 4.

Factual History

On January 27, 2005, Ruth Marilla Castillo-Lima was at her home on N.E. 88th in Vancouver with her children when the defendant in this case came to visit. RP 22-26. The defendant is the father of her children. RP 24-25. Although she told him to leave, he ended up staying the night downstairs while she and the children slept upstairs. RP 27. The next morning Ms.

Castillo-Lima took the defendant's cell phone without the defendant's knowledge and went into a closet where she called 911. RP 28. When the defendant found her he asked what she was doing. RP 31. Within a few minutes the police arrived and knocked loudly on the door and announced who they were. RP 31-32. When they did so the defendant, who was upstairs, told Ms. Castillo Lima to not open the front door. *Id.* In spite of this request, Ms. Castillo-Lima went downstairs and opened the door so the police could enter. *Id.* Initially the police ordered the defendant to come downstairs but he did not respond. RP 58-59. After more officers arrived, the police went upstairs and arrested the defendant, who was in the bathroom. RP 59, 72-74.

Procedural History

By amended information filed August 10, 2005, the Clark County Prosecutor charged defendant Roger Deaver with one count of felony violation of a no contact order. CP 38. The information alleges the following:

COUNT 01 - FELONY DOMESTIC VIOLENCE COURT ORDER VIOLATION (AT LEAST TWO PREVIOUS CONVICTIONS) - 26.50.110(5)

That he, ROGER CRAIG DEAVER, in the County of Clark, State of Washington, on or about January 28, 2005, with knowledge that the Clark County Superior court had previously issued a no contact order pursuant to Chapter 10.99 RCW in Cause No. 04-1-01954-1, did violate the no contact order pursuant to Chapter 10.99 RCW in cause

No. 04-1-01954-1, did violate the order while the order was in effect by knowingly violating the restraint provisions therein, to wit by having contact with Ruth Castillo Lima and furthermore, the defendant has at least two previous convictions for violation of a court order issued pursuant to Chapter 10.99 RCW, to wit: 279467 CLS and 04-1-01954-1; contrary to Revised Code of Washington 16.50.100(5).

CP 38.

The case later came on for trial before a jury with the state calling Ruth Marilla Castillo-Lima, Deputy Phillip Walker, and Deputy Michael Johnson as it's only witnesses. RP 21, 22, 68³. These witnesses testified to the facts related in the preceding *Factual History. Id.* In addition, during Ms. Castillo-Lima's testimony, the state handed her Exhibit No.1 and asked her the following:

Q. I'm handing you what's been marked as Exhibit No. 1. And on the first part of this, there's a sentence that reads: "This order protects -" and then there's a name written in. Is that your name?

A. Yes.

Q. And there's also a date of birth there. Is that your date of birth?

A. Yes. Yes.

Q. And what is your date of birth?

A. 11/27/64.

³The record in this case includes three continuously numbered volumes, referred to herein as "RP."

RP 24.

The defense did not object that the witness was testifying to the content of an exhibit that it will not even been identified or had a proper foundation established, much less admitted into evidence. *Id.* Following this testimony the state moved for the admission of Exhibit No. 1 and the court granted the motion. RP 24-25. The defense did not object, even though defense counsel had made a pretrial motion to exclude any exhibits presented without proper foundation. RP 13-14, 24-25. By contrast, between the testimony of the two deputies, the state handed the court proposed exhibits 2, 3, 4, 5, 6, and 7 and moved that they be admitted into evidence even though the state had presented no witness to identify what the exhibits were or to establish a foundation for the admission of the exhibits. RP 66. The court granted the motion over the defendant's objection that the state had failed to establish a proper foundation for any of these exhibits. RP 13-14, 47, 66.

On cross-examination of the state's witnesses, each admitted that he or she had not been present during the creation of Exhibits 1 through 7 and had no personal knowledge concerning the creation of the exhibits. RP 53, 60, 63, 77-78. In addition, the state did not present any evidence that the "Roger Deaver" named in exhibits 1 through 7 and who signed those documents was the Roger Deaver who was on trial before the court. RP 21-

55, 55-68, 68-75.

Following the testimony of it's three witnesses, the state rested it's case. RP 79. The defense then rested it's case without calling any witnesses. RP 79-86. The court later instructed the jury and allowed counsel to present closing argument. RP 93-111. After argument the jury retired to deliberate, and later returned a verdict of guilty. RP 113, 68. The jury also returned a special verdict that the state had proven that the defendant had two prior convictions for violating a protection order issued under RCW 10.99. CP 69.

The court later sentenced the defendant to what the court believed was the standard range based upon it's own finding that the defendant was on community custody at the time he committed the offense in this case. CP 82-86. The claim that the defendant was on community custody was not made in the information and was neither argued or proven to the jury. CP 38, RP 21-75. After sentencing, the defendant filed a timely notice of appeal. RP 97.

ARGUMENT

I. THE TRIAL COURT ABUSED IT'S DISCRETION WHEN IT ADMITTED EXHIBITS 2, 3, 4, 5, 6 AND 7 BECAUSE THE STATE FAILED TO ESTABLISH A PROPER FOUNDATION FOR THEIR ADMISSION

The decision whether or not to admit a particular exhibit into evidence at trial lies within the sound discretion of the trial court. *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997). As such a court on appeal will not reverse that decision absent a manifest abuse of discretion. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. Id.

In the case at bar, the defense argues that the trial court abused its discretion when it admitted Exhibits 2, 3, 4, 5, 6 and 7 because the state failed to present sufficient evidence that the defendant was the person named in the documents. The following sets out this argument.

In the case at bar, the defendant was charged with Felony Violation of a No Contact Order under RCW 26.50.110(1)&(5). The first subsection of this statute states as follows in relevant part:

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly

coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. . . .

RCW 26.50.110(1).

Under this subsection, the state must prove the following elements in order to secure a conviction:

(1) that an order was granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020,

(2) that the language of the order informs the defendant that a violation of the order is a crime,

(3) that the defendant get notice of the order, prior to the violation, and

(4) that the defendant then knowingly violate the provisions of the order.

Under this subsection, a defendant's violation of one of the specified types of protection orders is a gross misdemeanor, unless the conditions set out in subsections (4) or (5) are also proven. The fifth subsection states as follows.

(5) A violation of a court order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the

offender violated.

RCW 26.50.110(5).

Under this subsection, a misdemeanor violation under subsection (1) becomes a felony if the state can also prove that “the offender has at least two previous convictions for violating the provisions of an order issued under chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.”

As is apparent from the plain language of this statute, in order to obtain a conviction for a felony under RCW 26.50.110(5), the state has the burden of proving beyond a reasonable doubt that the defendant has two prior convictions for violation of the listed predicate offenses. As a result, proof of the two prior convictions constitutes an element of the offense charged.

In this case, the state attempted to meet this burden by introducing certified copies of two prior convictions for a person or persons with a name similar to or the same as that of the defendant. However, the state failed to call any person to testify that the defendant was the person named in the judgments and sentences. Neither did the state call a witness to testify that the defendant’s signature appeared on those documents. Under this court’s decision in *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), this evidence is not sufficient to prove that the defendant was the person named in the judgment and sentence. The following examines this case.

In *Hunter, supra*, the state charged the defendant with attempted escape from the Cowlitz County Jail where he was being incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held “pursuant to a felony conviction,” the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named “Dallas E. Hunter” as the defendant. Following conviction, the defendant appealed, arguing in part that the trial court erred when it admitted the judgments because the state failed to present evidence that he was the person identified therein.

In addressing this argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant’s name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction. The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n.1, 572 P.2d 734 (1977).

State v. Hunter, 29 Wn.App at 221.

In *Hunter*, the state had also presented the evidence of a Probation

Officer from the Department of Corrections who had revoked the defendant from his work release program and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County Felony Convictions. Based upon this “independent” evidence to prove that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the judgments. The court stated:

We hold that [the Probation Officer’s] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents. *State v. Brezillac, supra*.

State v. Hunter, 29 Wn.App. At 221-222.

In the case at bar, the state charged the defendant with felony violation of a no contact order. Thus, the state had the burden of proving both the existence of a no contact order, as well as the existence of two prior convictions under RCW 10.99. The state attempted to meet this burden by offering certified copies of two prior convictions for a person with the same or a similar name to the defendant.

However, as is clear under *Hunter*, since both the existence of the no contact order and the existence of the prior convictions were elements of the offenses charged, the “identity of the names alone is not sufficient proof of the identity of [the] person to warrant the court in submitting to the jury” the

documents upon which the state relied. In this case, unlike *Hunter*, the state failed to call any witness to present any evidence to prove that the defendant sitting before the jury was the person named in the judgments. As a result, absent this corroborating evidence, the trial court erred when it overruled the defendant's objection to the admission of these documents.

II. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE ADMISSION OF EXHIBIT 1 DENIED THE DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT BECAUSE THE STATE FAILED TO LAY A PROPER FOUNDATION FOR THE ADMISSION OF THIS EXHIBIT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct

caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsels failure to object to the admission of Exhibit 1. In this case Exhibit 1 purports to be a no contact order prohibiting a person by the name of Roger Deaver from having contact with a Ruth Castillo-Lima. While the document was certified by the clerk as accurate and is self-authenticating, the state failed to present any evidence at all that the defendant was the person named in the document. As was set out in the previous argument, under *State v. Hunter*, if the state seeks to introduce a document to prove the existence of a crime, then a mere identity of names between the defendant before the court and the person named in the document is insufficient. Since the state

failed to present any evidence at all that the defendant in the case at bar was the defendant named in Exhibit 1, there was no basis for admitting Exhibit 1. Indeed, trial counsel recognized this fact when he brought a pretrial motion in limine to preclude any documents with proper foundation, and when he renewed that issue when he objected to the admission of Exhibits 2, 3, 4, 5, 6 and 7. Why counsel failed to object to the admission of Exhibit 1 on the same basis is a mystery as no possible tactical advantage existed in failing to object.

In addition, Exhibit 1 constituted the only evidence that the defendant had acted in violation of a no contact order issue under RCW 10.99. Indeed, it was the order that the state alleged in the information that the defendant had violated. Thus, absent counsel's deficient failure to make this objection, Exhibit 1 would have been excluded, and the court would have been forced to grant the defendant's later motion to dismiss. Thus, counsel's deficient conduct caused prejudice and denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT FOR FELONY VIOLATION OF A NO CONTACT ORDER BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d

549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

As was set out in Argument I in this case, in order to elevate a defendant’s conviction from a misdemeanor to a felony, the state bears the burden of proving beyond a reasonable doubt that the defendant had two prior convictions for violation of a no contact order issued under RCW 10.99. Seen in the light most favorable to the state, Exhibits 2 through 7 constitute substantial evidence that someone with the same or a similar name to the defendant has two prior convictions for violating no contact order issued under RCW 10.99. However, as was clarified in the *Hunter* case, an identity or similarity in names does not constitute substantial evidence that the defendant is the person named in the prior convictions. Thus, in the case at bar, the state has failed to present substantial evidence that the defendant has

the two prior convictions required to elevate his crime from a misdemeanor to a felony.

IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, AND THE DEFENDANT'S RIGHT TO JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT WHEN IT ADDED A COMMUNITY CUSTODY POINT THAT WAS NEITHER ALLEGED IN THE INFORMATION OR PROVEN TO THE JURY.

Under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, a charging document must contain “[a]ll essential elements of a crime” so as to give the defendant notice of the charges and allow the defendant to prepare a defense. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Thus, a defendant may only be convicted of the crime charged, or a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987); *State v. Taylor*, 90 WnApp. 312, 950 P.2d 526 (1998). As this Division of the Court of Appeals has previously stated:

Generally, the State must give the accused notice of the charge he will face at trial. An accused cannot be convicted of an uncharged or inadequately charged offense. A jury may, however, find an accused guilty of a lesser degree offense when the State charges the accused with a higher degree of a multiple degree offense. In such instances, the State does not have to notify the defendant that he may be convicted of the lesser included offense.

State v. Taylor, 90 Wn.App. at 322 (citations omitted).

This constitutional principle is also adopted in by statute in RCW

10.61.010, which states as follows:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

RCW 10.61.010.

These principles also apply to the imposition of sentencing enhancements based upon the existence of specific facts such as the commission of a crime within a particular protected area (school zone enhancement under RCW 69.50.435), the use of a firearm in the commission of a crime (firearm enhancement under RCW 9.94A.533(3), the use of a deadly weapon during the commission of an offense (deadly weapon enhancement under RCW 9.94A.533(4), and the existence of prior convictions for the same offense (elevating harassment to a felony under RCW 26.50.110).

For example in *State v. Theroff*, 95 Wn.2d. 385, 622 P.2d 1240 (1980), the state filed an information charging the defendant with two counts of first degree murder. At the same time, the state filed a “notice” informing the defendant that it would seek to enhance his sentence under RCW 9.41.025 (firearm enhancement) and RCW 9.95.040 (deadly weapon enhancement). The state later filed an amended information adding a third count of felony

murder. The jury eventually returned a verdict that the defendant was guilty to Second Degree Murder. The jury also returned a special verdict that the defendant was armed with a firearm during the commission of the offenses. The court later sentenced the defendant and included a firearms enhancement.

On appeal, the defendant argued in part that the inclusion of the firearms enhancement in his sentence violated his constitutional right to notice and due process because the enhancement was not alleged in either the original or amended informations. The state responded that the separate notice of was sufficient to put the defendant on notice that the state would be seeking the sentence enhancement. The Washington Supreme Court rejected the state's argument. Initially, the court stated:

A separate notice of intention to seek an enhanced penalty under RCW 9.41.025 and 9.95.040 was served and filed with the first information. This was not done with the amended information. In *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972), we determined that intention to charge under RCW 9.41.025 should be set forth in the information. In *State v. Cosner*, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975), Justice Hamilton writing for the court, said:

The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or RCW 9.95.040, or both, due process of law requires that the information contain specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction. Failure of the State to so allege precludes reliance upon the statutes by the trial court or the Board of Prison Terms and Paroles.

We do not propose to recede from these holdings. Rather, we again emphasize the necessity of prosecuting attorneys uniformly adhering to the announced rule. Preferably, compliance should take

the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding, i. e., firearms and/or deadly weapons.

(Citations omitted.)

State v. Theroff, 95 Wn.2d at 392.

The court then went on to note that it was specifically adopting the quoted language from *State v. Frazier*. The court held:

We adopt the above language in this case. It is the rule in this state clear and easy to follow. When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information. Our concern is more than infatuation with mere technical requirements. As we said in *Frazier, supra* 81 Wn. at 634, 503 P.2d 1073:

The inclusion of this separate issue in the information and verdict will give the appellant notice prior to trial that, if convicted, and if the jury finds the facts causing the aggravation are correct, she will have no possibility of probation. Her decision to enter a plea of guilty to a lesser charge if the prosecutor and court in their discretion would so accept it, is only one of the practical consequences that follow from receipt of notice at a time while alternative courses of action on her part are still available to her.

Because the prosecutor here did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant. The conviction is otherwise affirmed and the case remanded to the trial court for resentencing consistent with this opinion.

State v. Theroff, 95 Wn.2d at 392-393. See also, *In re Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981) (the enhanced penalty “allegation must be included in the information”); *State v. Cosner*, 85 Wn.2d 45, 50, 530 P.2d 317 (1975) (“due process of law requires that the information contain specific allegations ... putting the accused person upon notice that enhanced consequences will

flow with a conviction”); *State v. Frazier*, 81 Wn.2d 628, 635, 503 P.2d 1073 (1972) (“where a greater punishment will be imposed ... notice of this must be set forth in the information”); *State v. Porter*, 81 Wn.2d 663, 663-64, 504 P.2d 301 (1972) (where “[t]here was no indication of [mandatory minimum sentence] in the information” the matter had to be “remanded for resentencing”); *In re Bush*, 26 Wn.App. 486, 490, 616 P.2d 666 (1980), *aff’d*, 95 Wn.2d 551, 627 P.2d 953 (1981) (“due process of law requires that the information contain specific allegations ... putting the accused person upon notice that enhanced consequences will flow with a conviction”) (quoting *Cosner*, 85 Wn.2d at 50, 530 P.2d 317); *State v. Shaffer*, 18 Wn.App. 652, 655, 571 P.2d 220 (1977), *review denied*, 90 Wn.2d 1014, *cert. denied*, 439 U.S. 1050, 99 S.Ct. 729, 58 L.Ed.2d 710 (1978) (“due process of law requires that the information contain specific allegations ... putting the accused person upon notice that enhanced consequences will flow with a conviction”) (quoting *Cosner*, 85 Wn.2d at 50, 530 P.2d 317); *State v. Stamm*, 16 Wn.App. 603, 616, 618, 559 P.2d 1 (1976), *review denied*, 91 Wn.2d 1013 (1977) (due process violated absent “a specific allegation in the information of the particular enhanced penalty statute to be relied upon at sentencing”); *State v. Smith*, 11 Wn.App. 216, 225, 521 P.2d 1197 (1974) (“it is required that the prosecution allege ... the ‘factor [which] aggravates [the] offense and causes [a] defendant to be subject to a greater punishment’”); *State v. Mims*,

9 Wn.App. 213, 219, 511 P.2d 1383 (1973) (“due process of law requires notice in the information of a potentially greater penalty”).⁴

In *Theroff*, the defendant did not allege that he did not have notice of the state’s claim that the enhancement applied. Similarly, in the case at bar, the defendant does not claim that he did not have notice of the state’s claim that he was on community custody at the time of his crime. In *Theroff*, the defendant did not claim that substantial evidence did not support the jury’s special verdict that he was armed with a firearm at the time of the offense. Similarly, in the case at bar, the defense does not claim that the defendant was not on community custody at the time of the offense; he admitted as much during the guilty plea colloquy. However, in *Theroff* the information and amended information both failed to allege the firearm enhancement. Absent such an allegation in the information, the court cannot impose the enhancement. Similarly, in the case at bar, the information, amended information, and second amended information all failed to allege that the defendant was on community custody at the time he committed the offense alleged. Thus, in this case, as in *Theroff* the court erred when it imposed the enhanced sentence.

In this case, the state may argue that adding a point for being on

⁴This list is taken from footnote 10 in *State v. Crawford*, 128 Wn.App. 376, 115 P.3d 187 (2005).

community custody at the time of the event is merely a sentencing consequence akin to a prior conviction and as such it is not a sentencing “enhancement” that need be alleged in the information. Any such argument should fail for two reasons. First, the effect of proving the community custody allegation has the same effect as any other enhancement: it increases the amount of punishment that a defendant is facing. The case at bar is a good example of this fact. In this case, absent the community custody point, the defendant would have been facing a standard range of 12 to 14 months in prison. With the community custody point, his range changed and he was facing a range of from 13 to 17 months in prison with court having actually imposed 17 months. Thus, by adding the claim that the defendant was on community custody at the time of his crime, the defendant was facing an increased maximum sentence of 3 months in prison.

Second, the decision in *State v. Jones*, 126 Wn.App. 136, 107 P.3d 755 (2005), explains that the fact whether or not a defendant was on community custody at the time of committing a crime is a fact that the state must prove beyond a reasonable doubt as any other enhancement. In this consolidated case, two defendants argued that the trial court’s determination that they were on community custody at the time of committing their current crimes violated their constitutional rights as defined in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) to have every fact necessary to

punishment found beyond a reasonable doubt by a jury. In one case the defendant during sentence had challenged the claim that he was on community custody at the time of his crime. The other defendant did not challenge this allegation.

On appeal, the state argued that the fact of being on community custody at the time of committing an offense falls within the “prior conviction” exception recognized in *Blakely*. In addressing these arguments, the court first noted the following concerning community custody and community placement.

More importantly, whether one convicted of an offense is on community placement or community custody at the time of the current offense cannot be determined from the fact of a prior conviction. Too many variables are involved.

For example, a defendant may receive credit for preconviction incarceration, the length of which may not be specified in the judgment and sentence. The defendant may receive additional credit for preconviction incarceration if the local detention facility awarded him good conduct time. And even if both of these determinations are in the relevant judgment and sentence, there is no possible way for the sentence to reflect whether the defendant will eventually become entitled to “[e]arned release time” under RCW 9.94A.728, which may be as much as 50 percent of the sentence imposed. Moreover, under RCW 9.94A.728(2)(d), the DOC may deny release to community custody status for some offenses even if a defendant has obtained “earned release” if the DOC does not approve of the defendant’s living arrangements. Thus, the fact of the prior conviction does not establish when community placement actually begins.

When community placement ends can also vary. Under RCW 9.94A.715(1), defendants may receive community custody in terms of a range of months “or up to the period of earned release ... whichever is

longer.” The high and low end of the range can differ by as much as two years. Under CW 9.94A.715(4), it is the DOC, not the sentencing court, that determines where in the range the defendant's term falls.

State v. Jones, 126 Wn.App. at 143-144 (footnotes omitted).

The court then held that based upon the impossibility of determining the existence and length of community custody from the fact of a conviction, the community custody issue did not fall within the “prior conviction” exception in *Blakely*. The court held:

The chief problem with the State’s approach is that it offends the basic reason for the fundamental rule of *Apprendi* and *Blakely*: ensuring that the procedural protections afforded by the Sixth Amendment apply to factual determinations that may increase a sentence. No such safeguards exist here for the determination of whether the defendants were on community placement at the times of their offenses. As Division III of this court recognized in *State v. Ortega*, [120 Wn.App. 165, 84 P.3d 935 (2004)], the determination of “facts of a prior conviction that are not specified in the indictment, judgment, jury instructions, or verdict” do not bear the same procedural protections as facts necessarily determined by the jury's verdict. Thus, such determinations are not within the narrow exception the cases dictate.

State v. Jones, 126 Wn.App. at 146 (footnotes omitted); *see also State v. Hochhalter*, No. 32117-3-II (filed 2-2-2006); *cf. State v. Giles*, No. 33027-0-II (filed 5-3-2006).⁵

As the decision in *Jones* and *Hochhalter* explain, the issue whether or

⁵In *State v. Hunt*, 128 Wn.App. 535, 116 P.3d 450 (2005) Division III came to the opposite conclusion. The Washington Supreme Court accepted review in *Jones* and heard argument on February 7, 2006. *See* http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar.

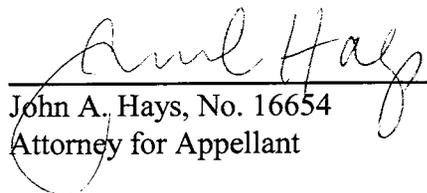
not a person is on community custody or community supervision at the time of committing a new crime is a fact that increases punishment that must be proven to a jury beyond a reasonable doubt under United States Constitution, Sixth Amendment as interpreted in *Blakely*. Consequently, it is not merely a sentencing consequence that flows from a prior conviction. As a result, absent an allegation in the information that the defendant was on community custody at the time of the current offense, and absent a decision from the jury on the issue, the trial court cannot increase a defendant's offender score even if the defendant admits or the state proves the fact.

CONCLUSION

The defendant's conviction should be reversed because the state failed to present substantial evidence of the crime charged. In the alternative, the court should reverse the defendant's conviction because the state failed to present substantial evidence that the defendant had two prior convictions for violation of no contact order issued under RCW 10.99. In the second alternative, this court should vacate the sentence and remand for sentencing without the community custody point because the state's failure to allege or prove it to the jury precludes using it to enhance the defendant's sentence.

DATED this 5th day of May, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 26.50.110(1)&(5)

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. . . .

(5) A violation of a court order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

FILED
COURT OF APPEALS
DIVISION II

06 MAY -9 PM 4:11

STATE OF WASHINGTON

BY DM
DEPUTY

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

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 ROGER CRAIG DEEVER,)
10 Appellant,)

CLARK CO. NO.05-1-00299-9
APPEAL NO: 33779-7-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON)
12) vs.
12 COUNTY OF CLARK)

13 CATHY RUSSELL, being duly sworn on oath, states that on the 5TH day of MAY, 2006,
14 affiant deposited into the mails of the United States of America, a properly stamped envelope
directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
16 1200 FRANKLIN ST.
17 VANCOUVER, WA 98668

ROGER CRAIG DEEVER #877385
MCNEIL ISLAND CORR CTR.
P.O. BOX 881000
STEILACOOM, WA 98288-1000

and that said envelope contained the following:

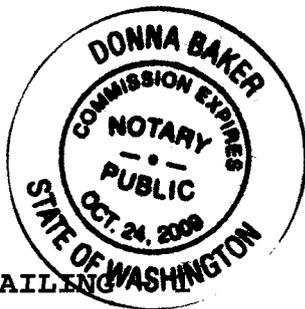
- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 5TH day of MAY, 2006.

Cathy Russell
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 5th day of MAY, 2006.

[Signature]
NOTARY PUBLIC in and for the
State of Washington,
Residing at: Kelso WA 98626
Commission expires: 10-24-09



AFFIDAVIT OF MAILING

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