

NO. 33779-7-II

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

STATE OF WASHINGTON, Respondent, v. ROGER CRAIG DEAVER, Appellant.
FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE ROBERT L. HARRIS CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-00299-9
BRIEF OF RESPONDENT

Attorneys for Respondent:

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STATE OF WASHINGTON
CLARK COUNTY

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I. STATEMENT OF FACTS

The State accepts the Statement of Facts as set forth by the defendant in his Brief of Appellant. Where supplementation is needed, it will be added in the argument section of this brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR 1, 2 AND 3

The three assignments of error deal with the admission of exhibits at the time of trial and a claim by the defendant on appeal that there was not a proper foundation laid nor substantial evidence in the record to support the admission of the documentation. Specifically, the objections are to Exhibits 1 through 7 which relate to previous domestic violence difficulties that the defendant had had with this particular victim. The claim is further refined to argue that there was no correlation between the defendant on trial and the named individual in the exhibits.

The Court of Appeals reviews a trial court's evidentiary decision for an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). An abuse of discretion

occurs only when no reasonable person would take the view adopted by the trial court. Costellanos, 132 Wn.2d at 97. A party must raise an evidentiary objection before the trial court and not for the first time on appeal. State v. Thetford, 109 Wn.2d. 392, 397, 745 P.2d 496 (1987). That is, “a party may only assign error in the appellate court on a specific ground of an evidentiary objection made at trial.” State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). The Court of Appeals will review an error raised for the first time on appeal only if it involves an issue of constitutional magnitude. RAP 2.5(a)(3); State v. Newbern, 95 Wn.App. 277, 288, 975 P.2d 1041 (1999). Admissibility of evidence questions usually do not raise a manifest constitutional error. Newbern, 95 Wn.App. at 188.

The defense attorney in the brief of appellant has scoped out the issue that he is claiming as follows:

“While the document (Exhibit 1) 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..” (Br. of Appellant, p 16).

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.” (Br. of Appellant, p. 10).

In our case, Exhibit No. 1 was a certified copy of the Domestic Violence No-Contact Order under Clark County Superior Court No. 04-1-01954-1. A copy of Exhibit 1 is attached hereto and by this reference incorporated herein.

As part of this two page document, there is a signature line for the defendant and lines for the attorney after it has been signed by the Judge. The victim, had indicated that it was her name and date of birth on this particular document. (RP 24).

Concerning Exhibit No. 1, the parties stipulated that the defendant's signature appears on Exhibit No. 1.

“THE COURT: Are we all in agreement that Mr. Deaver signed Exhibit No. 1? There is a spot at the bottom that says, 'defendant' with his -- his signature on it.

MR. HOFF: (Conferring with defendant.) Mr. Deaver acknowledges that as his signature, Your Honor.

THE COURT: Alright. I just want to make sure we are all clear. “ (RP 83, l. 24-84, l. 6).

A stipulation is an admission that if the state's witnesses were called they would testify in accordance with the summary or the basis of the stipulation. State v. Wiley, 26 Wn.App. 422, 425, 613 P.2d 549 (1980). In general, a stipulation as to facts is

deemed a tactical decision. State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995). Determining which witnesses to call or which areas to question is a legitimate area of counsel's trial strategy. State v. Wilkinson, 12 Wn.App. 522, 526, 530 P.2d 340 (1975).

With that in mind, the pattern of the exhibits flows as follows:

Exhibit No. 1. Exhibit No. 1 (as previously indicated) is a certified copy of the Domestic Violence No-Contact Order under Clark County Superior Court Cause No. 04-1-01954-1. The defendant stipulated that his signature appears on this document and, therefore, he is the defendant who is named in the domestic violence no-contact order which protects Ruth Castillo-Lima. (DOB: 11/27/64).

Exhibit No. 2. The second exhibit is a certified copy of the Amended Information filed in Clark County Superior Court under Cause No. 04-1-01954-1. The two counts of the Amended Information reads as follows:

Count 1 – Attempted Burglary in the Second Degree – Domestic Violence – 9A.52.030/10.99.020/9A.28.020(3)(c)

That he, Roger Craig Deaver, in the County of Clark, State of Washington, between September 30, 2004 and October 2, 2004, with intent to commit the crime of Burglary in the Second Degree, did an act which was a substantial step toward the commission of that crime, to-wit: by attempting to commit a crime against a person or property therein, entered or remained unlawfully in the building of Ruth Lima, located at 1806 NE 104th Street, #C8, Vancouver, Washington; contrary to Revised Code of Washington 9A.52.030(1)

And further, that this crime was committed by one family or household member against another, and that this is domestic violence offense as defined by RCW 10.99.020 and within the meaning of RCW 9.41.040. [DV]

Count 2 – Domestic Violence Court Order Violation (Gross Misdemeanor) – 26.50.110(1)

That he, Roger Craig Deaver, in the County of Clark, State of Washington between September 30, 2004 and October 2, 2004, with knowledge that the Clark County District Court had previously issued a no contact order pursuant to Chapter 10.99 RCW in case #279467 CLS and #281002 CLS, did violate the order while the order was in effect by knowingly violating the restraint provisions therein, and/or by knowingly violating a provision excluding him or her from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location; contrary to Revised Code of Washington 26.50.110(1)."

As indicated, Count 2 makes reference to two District Court

No Contact Orders that had been violated.

Exhibit No. 3. The third exhibit was the Statement of Defendant on Plea of Guilty to a Non-Sex Offense. This change of plea is filed under Clark County Cause No. 04-1-01954-1 and is a plea of guilty by the defendant to the two counts of the Amended Information referred to as Exhibit No. 2.

Exhibit No. 4. The fourth exhibit is a certified copy of the Findings of Fact, Conclusions of Law and Judgment and Sentence (Misdemeanor) filed under Clark County Superior Court Cause No. 04-1-01954-1. This is the Judgment dealing with Count 2 which is the Domestic Violence Court-Order violation (Gross Misdemeanor) which is referred to in Exhibit No. 2 as

Count 2. On page 7 of Exhibit No. 4, the defendant is specifically prevented from having any contact with the victim, Ruth Castillo-Lima.

Exhibit No. 7. The seventh exhibit is the Citation under Clark County District Court No. 279467 relating to a violation of the No-Contact Order. This is the same Clark County District Court number as indicated in Count 2 of the Amended Information which the defendant pled guilty to.

Exhibit No. 8. The eighth exhibit was the Statement of Defendant on Plea of Guilty under District Court Citation No. 279467 which is the same one as acknowledged by the defendant under the Amended Information. (Exhibit 2).

Exhibit No. 9. The ninth exhibit was a Statement of Defendant on Plea of Guilty under Clark County District Court Citation 281002. This is also mentioned in the Count 2 of the Amended Information (Exhibit No. 2) which the defendant pled guilty to.

All of the relevant information flowed from the Stipulation and Agreement under Exhibit No. 1 that he signed the documentation. Because his signature appears on Exhibit No. 1 that ties directly into the Amended Information under the same cause number which ties into the Statement of Defendant on Plea of Guilty under the same cause number which ties into the two citations issued from the Clark County District Court which was part of Count 2 of the Amended Information which he pled guilty to.

The State submits that there is overwhelming evidence presented in this case and established through the documentation that the defendant was the person named in all of these documents. These claims of error are without merit.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant is that the trial court violated his due process rights by adding a community custody point that was neither alleged in the Information or proven to the jury.

In State v. Giles, 132 Wn.App. 738, 132 P.3d 1151 (2006), Division II of the Court of Appeals ruled that because of the fact that community placement arises out of a prior conviction, constitutional consideration under Blakely does not require the matter to be found by a jury beyond a reasonable doubt. The trial court's function in calculating an offender's score is directed to determining a standard range sentence, not an exceptional sentence. Blakely neither required submission of the factual issue

to a jury nor applied to the trial court's determination of Giles' standard range sentencing.

"We hold that (1) whether a defendant was on community placement for another crime when he committed the crime for which he is being sentenced is not an aggravating factor increasing the defendant's sentence beyond the standard sentencing range for the current crime; (2) therefore, the additional offender point based on Giles' community placement status does not implicate Blakely or require a factual determination by a jury; and (3) Giles' standard range sentence did not violate any Blakely principles." (Giles, supra at p. 744).

The State submits there is no error shown in this record.

IV. CONCLUSION

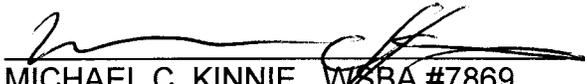
The trial court should be affirmed in all respects.

DATED this 27 day of June, 2006.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

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FILED
DEC 01 2004
JoAnne McBride, Clerk, Clark Co

SUPERIOR COURT OF WASHINGTON
COUNTY OF

STATE OF WASHINGTON, Plaintiff,
v. ROGER CRAIG DEEVER
Defendant

No 04-1-01954-1
DOMESTIC VIOLENCE NO-CONTACT ORDER
(clj = NOCON)
(superior cts = ORPRT)

SID WA12948018
If no SID, use DOB. 10/26/66

Pre-trial
 Post conviction
 Clerk's action required.

The court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to chapter 10.99 RCW. This order protects (name): RUTH CASTILLO LIMA
(DOB: 11/27/64)

This is a pretrial order prohibiting possession of firearms or other dangerous weapons and the court makes the findings pursuant to RCW 9A 10 000

IT IS ORDERED THAT

Defendant is RESTRAINED from

Causing or attempting to cause physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking the protected person

Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by defendant's lawyers with the protected person.

Entering or knowingly coming within or knowingly remaining within 500 FEET (distance) of the protected person's residence school place of employment other _____

(Pretrial order) The defendant shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to _____ [name/law enforcement agency] and the defendant is prohibited from obtaining or possessing a firearm, other dangerous weapon or concealed pistol license.

WARNINGS TO THE DEFENDANT. Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest, any assault, drive-by shooting, or

DOMESTIC VIOLENCE NO-CONTACT ORDER
(NOCON) (ORPRT) - Page 1 of 2
WPF CR 84 0420 (6/2002) - RCW 9 94A 110. 120.
10 99 040. 050

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reckless endangerment that is a violation of this order is a felony

Willful violation of this order is punishable under RCW 26.50 110 Violation of this order is a gross misdemeanor unless one of the following conditions apply. Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A 36.011 or 9A 36 021 is a class C felony Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony Also, a violation of this order is a class C felony if the defendant has at least two previous convictions for violating a protection order issued under Titles 10, 26 or 74.

If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, the defendant may be subject to criminal prosecution in federal court under 18 U.S.C. sections 2261, 2261A, or 2262

In addition to the state and federal prohibitions against possessing a firearm upon conviction of a felony or a qualifying misdemeanor, upon the court issuing a no-contact order after a hearing at which the defendant had an opportunity to participate, the defendant may not possess a firearm or ammunition for as long as the no-contact order is in effect 18 U.S.C. section 922(g) A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine If the respondent is convicted of an offense of domestic violence, the respondent will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. section 922(g)(9); RCW 9.41.040

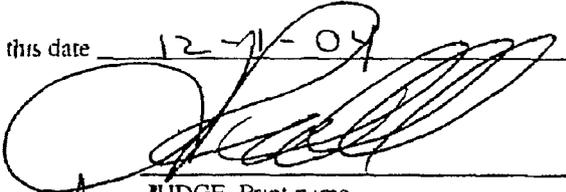
YOU CAN BE ARRESTED EVEN IF THE PERSON OR PERSONS WHO OBTAINED THE ORDER INVITE OR ALLOW YOU TO VIOLATE THE ORDER'S PROHIBITIONS. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application

Pursuant to 18 U.S.C. section 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order

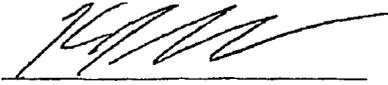
It is further ordered that the Clerk of the Court shall forward a copy of this order on or before the next judicial day to CLARK County Sheriff's Office [] Police Department where the above-named protected person lives which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants

THIS NO-CONTACT ORDER EXPIRES ON December 1, 2009

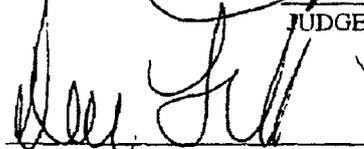
Done in Open Court in the presence of the defendant this date 12-1-09



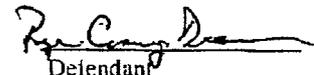
JUDGE Print name
John P. Wulke



Deputy Prosecuting Attorney
WSBA # 25660
Print name KEVIN J. MCCLURE



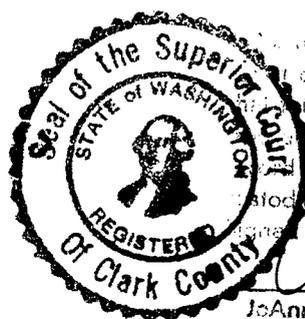
Attorney for Defendant
WSBA # 24514
Print name DEAN K. LANGSDORFF



Defendant

A completed law enforcement information sheet must be attached for identification purposes by the police or sheriff

WASHINGTON } ss.
CLARK



JoAnne McBride, County Clerk and Clerk of the Superior Court of Clark County, Washington, DO HEREBY CERTIFY that the document, consisting of 2 page(s), is a true and correct copy of the original now on file and of the original in my office and, as County Clerk, I am the legal custodian thereof.

Witness my hand and sealed at Vancouver, Washington this date:

August 09, 2005
JoAnne McBride, County Clerk
By: Marlene S. Drake

IN THE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

ROGER CRAIG DEAVER,
Appellant.

No. 33779-7-II

Clark Co. Cause No. 05-1-00299-9

DECLARATION OF TRANSMISSION
BY MAILING

FILED
COURT OFFICIALS
06 JUN -9 AM 8:53
STAMP
BY

STATE OF WASHINGTON)
) : ss
COUNTY OF CLARK)

On June 29, 2006, I deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

DATED this 29th day of June, 2006.

ROGER CRAIG DEAVER DOC #877385 c/o McNeil Island Corrections Center PO Box 881000 Steilacoom, WA 98288-1000	John A. Hays Attorney at Law 1402 Broadway Longview, WA 98632
TO: David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	

DOCUMENTS: BRIEF OF RESPONDENT

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

Charles J. Appford
 Date: June 29, 2006.
 Place: Vancouver, Washington.