

NO. 35814-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBB EUGENE YORK,

Appellant.

BY _____
STATE OF WASHINGTON
JUL 15 11:52
COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it overruled defendant's objection to the introduction of inadmissible hearsay that proved an element of the crime charged.

2. The trial court violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when it allowed the prosecutor to introduce the testimonial statements of a non-witness to prove an element of the crime charged.

3. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when she argued substantively from testimony the court did not admit substantively.

4. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of guilt on a charge unsupported by substantial evidence.

5. Trial counsel's failure to object when the state moved to admit exhibits I through V violated the defendant's right to effective assistance of

counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it overrules a defendant's objection to the introduction of inadmissible hearsay that proves an element of the crime charged?

2. Does a trial court violate a defendant's right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment if it allows a prosecutor to introduce the testimonial statements of a non-witness to prove an element of the crime charged?

3. Does a prosecutor commit misconduct and deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if in closing she argues substantively from testimony the court did not admit substantively?

4. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of guilt on a charge unsupported by substantial evidence?

5. Does a trial counsel's failure to object when the state moves to admit exhibits that lack proper foundation violate a defendant's right to

effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when substantial evidence would not support a conviction without the admission of those exhibits?

STATEMENT OF THE CASE

Factual History

On November 2, 2006, at 5:40 pm Clark County Sheriff's Deputy Shawn Boyle was coming out the restroom of the Ridgefield Chevron station in Clark County when he bumped into the defendant Robb York, whom Deputy Boyle recognized from junior high school. RP 4-5. Deputy Boyle then watched as the defendant got into the front passenger seat of a vehicle, which then drove off with a female at the wheel. RP 6-7. At this point Deputy Boyle requested a registration check on the vehicle and a warrants check on the defendant. RP 10-12. Following his request dispatch told him that the vehicle was registered to a Nicole McNeil and that there was a valid no contact order that prohibited the defendant from having contact with a Nicole McNeil. *Id.* The driver of the vehicle matched the general physical characteristics listed for the registered owner of the vehicle and the protected party on the no contact order. *Id.*

After receiving the information about the registered owner and the protection order Deputy Boyle pursued the vehicle and pulled it over on I-5. RP 12. After the vehicle stopped he approached the passenger side and ordered the defendant out. RP 17, 21. When the defendant asked why, Deputy Boyle told the defendant that he was under arrest and that if he didn't get out of the vehicle he would use a taser on him. RP 21-22. The defendant

got out, stating that “the order was not served.” RP 22. After handcuffing the defendant, Deputy Boyle asked the driver if she was Nicole McNeil and she said that she was. RP 18. Deputy Boyle then ordered her to produce a driver’s licence which she did. RP 26-27. According to Deputy Boyle the driver’s license had the name “Nicole McNeil” on it. *Id.*

Procedural History

By information filed November 22, 2006, the Clark County Prosecutor charged defendant Robb Eugene York with one count of felony violation of a not contact order under RCW 26.50.110(5). CP 1-2. The information alleged that the defendant had contact with Nicole McNeil in violation of two orders issued under RCW 10.99. *Id.* The information also alleged that this violation was a felony based upon the following:

[T]he defendant has at least two previous convictions for violating the provisions of a no-contact order issued under Chapter 10.99 RCW, to wit: Clark County District Court Cause No(s): 1430V and 13882; contrary to Revised Code of Washington 26.50.110(5).

CP 1.

The case later came on for trial before a jury with the state calling two witnesses: Deputy Boyle and Tracy Neuhauser, the Clark County District Court Administrator. RP 4-27, 28-46. The state did not call the driver of the vehicle as a witness and did not present any testimony or explanation for this failure. RP 4-79. Neither did the state call any witnesses to testify that they

knew who the driver of the vehicle was or that she was the person identified in Exhibit 1 and 3 and the protected party in those no contact orders. *Id.*

In his testimony, Deputy Boyle explained about bumping into the defendant at the service station and about seeing him leave as the passenger in a vehicle driven by a female. RP 1-9. Over defense objections of hearsay, the state elicited testimony from Deputy Boyle that dispatch told him that (1) the vehicle was registered to a Nicole McNeil, (2) what the physical description of Nicole McNeil was, and (3) that there was a “valid” no-contact order in place that prohibited a “Robb York” from having contact with a Nicole McNeil. RP 6-10. In response to the objection the state claimed that it was not attempting to elicit this evidence substantively. RP 7. Specifically the state argued the following concerning Deputy Boyle’s testimony of what dispatch told him:

MS. RIDDELL: Just for the res geste of what happened, Your Honor, and laying the foundation of why the deputy did the things he did, and . . .

RP 7.

The court then provided the state with the rest of its argument, commenting:

THE COURT: . . . It’s not being offered to the jury for the proof of the matters alleged therein, but the information for the basis to perform – to give him a basis for proceeding.

RP 7.

Based upon the prosecutor's representation the court overruled the objection but did give a limiting instruction as to the information provided by dispatch. RP 9. This instruction stated:

THE COURT: Ladies and gentlemen of the jury, information is going to be received by the officer from the Dispatch. It is being presented for the information being supplied to the officer, it cannot be used as truth of the matters that are contained therein.

The only way to determine whether there is a valid no-contact order will be the court documents that will be subsequently presented, but this is information formulating the basis by which the officer obtained information necessary to take additional steps. With that in mind, you may proceed.

RP 9.

The defense also objected that any testimony from Deputy Boyle concerning what the driver of the vehicle said to him in response to his questions would be inadmissible hearsay and would violate the defendant's right to confrontation as set out in the *Crawford* case. RP 13-18, 54. The state responded that it was not seeking to admit this evidence substantively.

RP 14. On this point the prosecutor stated:

MS. RIDDELL: Again, Your Honor, we're not offering that for the truth of the matter asserted. He's ascertained that in may different ways about who it was, as well as that continued to be as the res geste of the – of him taking further steps and beginning to arrest the defendant.

RP 14.

The court overruled the objections and allowed Deputy Boyle to

testify that he asked the driver if she was Nicole McNeil and she responded that she was. RP 18. In addition, the court also allowed Deputy Boyle to testify over defense objection that dispatch had told him that the protection order was “confirmed, and that the driver had a Washington State driver’s license that had the name Nicole McNeil on it. RP 14, 25-27.

Following Deputy Boyle the state called Tracy Neuhauser as its second and final witness. RP 28. During her testimony Ms. Neuhauser identified five exhibits. RP 28-46. There were:

Exhibit 1: A domestic violence no contact order issued on 3-30-06 under RCW 10.99 in *City of Vancouver v. Robb Eugene York*, No. 57282, prohibiting the named defendant from having contact with “MCNEEL, NICOLE LEA.”

Exhibit 2: A Statement of Defendant on Plea of Guilty in *State of Washington v. Robb E. York*, No. 14307V dated 3-3-06. Paragraph 4(b) of this document states: The document does not state that crimes to which the named defendant was plead guilty¹, although the defendant written statement admits to violating “a valid DV no contact order issue by a court of competent jurisdiction by having contact with Nicole McNeel.” The document does not state what type of “DV no contact order” the named defendant admitted to violating.

Exhibit 3: A judgment and sentence in *State of Washington v. Robb E. York*, No. 14307V dated 3-30-06. The document states that the court found the named defendant guilty of “HARASSMENT - DV” and “VIOL OF PROT ORDER”. The document does not state what type of “PROT ORDER” the named defendant was found to have violated.

¹In fact paragraph 4(b) of the Statement of Defendant on Plea of Guilty stated that the defendant was pleading to the crimes noted in “Appendix ‘A’”. The exhibit does not have an appendix A attached to it.

Exhibit 4: A “short docket” on a 1997 case in which a “Robb Eugene York” was found guilty on 3-24-97 of “7.46.040 VIOL OF HARASSMENT/NO CON.” The document states that the named defendant pled guilty on arraignment but does not give the name of the court and does not state whether or not the defendant was represented by counsel.

Exhibit 5: A domestic violence no contact order issued on 3-30-06 under RCW 10.99 in *State of Washington v. Robb E. York*, No. 14307V, prohibiting the named defendant from having contact with Nicole McNeel.

Exhibit 1-5.

All of the exhibits except number 4 bear the signature of a “Robb York.” *See* Exhibits. No witness at trial testified that the named defendant in the cases in any of the exhibits was the defendant in the case at bar or that the signatures on the exhibits belonged to the defendant in the case at bar. RP 1-48. In fact, the state did not present any identifying information, whether by fingerprint, handwriting comparison, or through a witness to identify either (1) the defendant in the case at bar as the person named in the exhibits, or (2) the driver of the vehicle as the protected party in the no contact orders reflected in exhibits 1 and 5. *Id.*

In spite of the prosecutor’s prior representation during trial that it did not seek to admit the information from dispatch substantively, and in spite of the court’s limiting instruction that the evidence was not admitted substantively, during closing argument the state none the less argued substantively from the information from the dispatch center. RP 65. The

state argued:

How do we know that that person they had contact with was, in fact, Nicole McNeil? We know because the deputy asked for her ID and verified that her ID was Nicole McNeil and that she looked the same as that picture that was on that ID.

We know because he had a physical description of Nicole McNeil, what she looked like from Dispatch, and the person that was driving that car matched that description.

And we know that the car was registered to somebody named Nicole McNeil, and that a woman fitting that description was driving that car.

We also know that -- and Nicole McNeil is the person who is restrained, that the defendant is restrained from contacting in the no-contact order.

So all of those things, all of those are indicators that obviously this person that he had contact was (sic), was in fact Nicole McNeil.

RP 65 (emphasis added).

Following deliberation the jury returned a verdict of guilty to the charged of violation of a no contact order and “yes” to a special verdict that asked whether or not the defendant had “twice been previously convicted for violating the provisions of a no-contact order.” CP 33, 34. The court later sentenced the defendant to 15 months, which was within the standard range. CP 36-54. Following imposition of sentence the defendant filed timely notice of appeal. RP 55.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT OVERRULED DEFENDANT'S OBJECTION TO THE INTRODUCTION OF INADMISSIBLE HEARSAY THAT PROVED AN ELEMENT OF THE CRIME CHARGED.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

For example, in *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999), the prosecutor filed a motion to revoke a defendant's SOSSA sentence, based in large part on a claim that he had exposed himself to a 13-year-old and a 14-year-old girl. During the revocation hearing, the state relied upon hearsay to establish the facts of the alleged exposure, and the state did not present any evidence as to why it failed to call the two girls themselves. After the court granted the motion and revoked the sentence, the defendant appealed arguing in part that the trial court denied him due process when it admitted the hearsay account of the incident without presenting any evidence on the reliability of the hearsay. The Washington Supreme Court agreed, holding

that the trial court had violated the defendant's due process rights when it based its decision at least in part upon unreliable evidence.

In the case at bar, the trial court admitted the following evidence over defense objection: (1) Deputy Boyle's testimony that dispatch told him that there was a valid protection order prohibiting Robb York from having contact with Nicole McNeil, (2) Deputy Boyle's testimony that dispatch told him that Nicole McNeil was the registered owner of the vehicle in which the defendant was riding along with a description of Ms. McNeil, (3) Deputy Boyle's testimony that the driver of the vehicle told him that she was Nicole McNeil, (4) Deputy Boyle's testimony that the driver of the vehicle handed him a driver's license and told him that it belonged to her, and (5) Deputy Boyle's testimony that the driver's license bore the name of Nicole McNeil. As the following explains, this evidence was inadmissible hearsay and its use denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase “other than one made by the declarant while testifying at the trial or hearing” includes an out of court statement made by an in court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). This restriction arises from the “unwillingness to countenance the general use of prior prepared statements” as substantive evidence. See Advisory Committee’s Note to Federal Rules of Evidence 801(d)(1).

In this case the defense repeatedly objected that Deputy Boyle’s testimony as to what dispatch, the driver of the vehicle, or the driver’s license told him was in admissible hearsay. In response the state claimed that it was not eliciting this evidence to prove the truth of the matters contained in it. Specifically the state argued the following concerning Deputy Boyle’s testimony of what dispatch told him:

MS. RIDDELL: Just for the res geste of what happened, Your Honor, and laying the foundation of why the deputy did the things he did, and . . .

RP 7.

The court then provided the state with the rest of its argument, commenting:

THE COURT: . . . It’s not being offered to the jury for the proof of the matters alleged therein, but the information for the basis to perform – to given him a basis for proceeding.

RP 7.

Based upon the prosecutor's representation the court overruled the objection but did give a limiting instruction as to the information provided by dispatch. RP 9. This instruction stated:

THE COURT: Ladies and gentlemen of the jury, information is going to be received by the officer from the Dispatch. It is being presented for the information being supplied to the officer, cannot be used as truth of the matters that are contained therein.

The only way to determine whether there is a valid no-contact order will be the court documents that will be subsequently presented, but this is information formulating the basis by which the officer obtained information necessary to take additional steps. With that in mind, you may proceed.

RP 9.

The defense also objected that any testimony from Deputy Boyle concerning what the driver of the vehicle said to him in response to his questions would be inadmissible hearsay and would violate the defendant's right to confrontation as set out in the *Crawford* case. RP 13-18, 54. The state responded that it was not seeking to admit this evidence substantively.

RP 14. On this point the prosecutor stated:

MS. RIDDELL: Again, Your Honor, we're not offering that for the truth of the matter asserted. He's ascertained that in many different ways about who it was, as well as that continued to be as the res geste of the – of him taking further steps and beginning to arrest the defendant.

RP 14.

In fact the state deceived the court when it made these claims. As a

careful review of the following portion of the state's closing argument reveals the state specifically elicited this evidence in an attempt to use it substantively.

How do we know that that person they had contact with was, in fact, Nicole McNeil? We know because the deputy asked for her ID and verified that her ID was Nicole McNeil and that she looked the same as that picture that was on that ID.

We know because he had a physical description of Nicole McNeil, what she looked like from Dispatch, and the person that was driving that car matched that description.

And we know that the car was registered to somebody named Nicole McNeil, and that a woman fitting that description was driving that car.

We also know that -- and Nicole McNeil is the person who is restrained, that the defendant is restrained from contacting in the no-contact order.

So all of those things, all of those are indicators that obviously this person that he had contact was (sic), was in fact Nicole McNeil.

RP 65 (emphasis added).

In the case at bar the only evidence the state elicited concerning the identity of the driver of the vehicle came through the inadmissible hearsay the state initially stated it was not seeking to introduce substantively. Absent this evidence it is more likely than not that the jury would have returned a verdict of "not guilty." In addition, absent this inadmissible hearsay there is no substantial evidence to prove the identity of the driver of the vehicle. As a result, the admission of this evidence denied the defendant his right to a fair

trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, and the defendant is entitled to a new trial.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT WHEN IT ALLOWED THE PROSECUTOR TO INTRODUCE THE TESTIMONIAL STATEMENTS OF A NON-WITNESS TO PROVE AN ELEMENT OF THE CRIME CHARGED.

The Sixth Amendment provides that a person accused of a crime has the right “to be confronted with witnesses against him.” Similarly Article 1, § 22 of the Washington State Constitution states that “[i]n criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face.” While case law indicates that analysis is similar under both clauses, five justices of our Supreme Court have concluded that Article 1, § 22 is more protective of a defendant’s confrontation rights than the Sixth Amendment. *State v. Foster*, 135 Wn.2d 441, 474-484, 957 P.2d 712 (1998) (*See* concurrence/dissent opinion of Alexander, J., at 474-481, dissenting opinion of Johnson, J. at 481-484).

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court had occasion to reevaluate the scope of the confrontation clause in relation to the admission of a prior statement made by a witness who did not testify in the case. The following

examines this case.

In *Crawford* the state charged the defendant with assault after he confronted and stabbed the complaining witness during an argument about the defendant's wife, who was present during the incident. The defendant argued self-defense. In order to rebut this claim, the state attempted to call the defendant's wife. When the defendant successfully exercised his privilege to prevent her testimony, the state moved to admit her statements to the police after the incident under the argument that they undercut the claim of self-defense. The defense objected that such statements were inadmissible hearsay and violated the defendant's right to confrontation.

The state countered that the statements fell under the hearsay exceptions of statements against penal interest because, at the time the wife made the statements, she was also a suspect in the assault. The state further argued that the statements did not violate the defendant's confrontation rights because under the decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the statements bore "adequate 'indicia of reliability'".

The court granted the prosecutor's motion, ruling that the statements did qualify as "statements against penal interest," and that under *Ohio v. Roberts*, there was not confrontation violation because the statements bore sufficient indicia of reliability. The defendant was subsequently convicted, and he appealed. The Court of Appeals reversed, finding insufficient indicia

of reliability, but the Washington Supreme Court disagreed and affirmed the conviction. The defendant thereafter obtained review before the United States Supreme Court.

In its opinion the Supreme Court first made an extensive review of origins of the legal principle of confrontation, noting that the “right to confront one’s accusers is a concept that dates back to Roman times.” The court then examined the common law origins of the right to confrontation, particularly in relation to the “infamous political trials” such as the treason trial of Sir Walter Raleigh in 1603 in which he was convicted largely upon the admission of an alleged co-conspirator’s statement, in spite of Sir Walter Raleigh’s call that he be confronted by his accuser. Based largely upon the abuses perceived in these trials, the common law courts recognized that in criminal trials a defendant should be afforded the right to confront and cross-examine the witnesses called against him.

In *Crawford*, the court noted that the one exception allowed under the common law involved the admission of prior testimony given by a witness under circumstances in which the defendant was afforded the right to confrontation at the prior hearing. In this one exception, the common law found no confrontation denial in admitting the prior testimony if the witness was no longer available.

In *Crawford*, the United States Supreme Court overturned its prior

rule that an out-of-court statement could be admitted as evidence solely based on whether it fell within a “firmly rooted hearsay exception,” or was given under circumstances showing it to be trustworthy. 124 S.Ct. at 1364, 1369. *Crawford* rejected decisional law that equated the confrontation clause analysis with admissibility under hearsay rules. *Id.* at 1370-71. The Court reasoned that the Sixth Amendment is not based on the reliability of evidence. “It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.* at 1370. Thus in *Crawford*, the court “reject[ed]” the view that the reliability-based framework of *Roberts* or the rules of evidence, govern the admissibility of out-of-court statements. The court held:

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

124 S.Ct. at 1374.

In *Crawford* the Court did not definitively explain the scope of what “testimonial evidence” is. *Id.* at 1374 (“we leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”). However, the Court did set out a “core class of ‘testimonial’ statements,” the admission of which would violate the confrontation clause without the in court testimony of the proponent.” *Id.* at 1364. This “core class” of “testimonial statements” includes not only formal affidavits and confessions to police officers, but also

“pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 1364. Thus, the “common nucleus” of the confrontation clause includes “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* This definition includes at its core statements elicited in response to police questioning during an investigation. *State v. Walker*, 129 Wn.App. 258, 268, 118 P.3d 935 (2005); *see also State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005) (Domestic violence victim’s statements in response to police questioning are testimonial for purposes of confrontation under the Sixth Amendment).

In the case at bar Deputy Boyle began an investigation upon seeing the defendant get into a vehicle in violation of a protection order that prohibited him from having contact with the driver. The officer continued this investigation by stopping the vehicle, ordering the defendant out of the car and then arresting him. At this point the officer began questioning the driver in order to get more evidence as part of the investigation. The purpose of this questioning was to determine the identity of the driver. Thus, all of the statements by dispatch as well as the driver’s statements to the officer, along with her actions in giving the officer her driver’s license were testimonial for the purposes of confrontation under the Sixth Amendment.

As a result, the trial court's admission of this evidence violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

The denial of the right to confrontation is an error of constitutional magnitude and requires a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). An error is harmless beyond a reasonable doubt if untainted evidence properly admitted at trial was so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). In this case the state cannot meet this burden because absent the inadmissible hearsay there was no evidence at all concerning the identity of the driver as the protected party in a protection order. As a result the defendant is entitled to a new trial.

III. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN SHE ARGUED SUBSTANTIVELY FROM TESTIMONY THE COURT DID NOT ADMIT SUBSTANTIVELY.

As was previously stated, due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial, untainted from prejudicial evidence. *State v. Swenson*, *supra*; *Bruton v. United States*, *supra*. This right to a fair trial includes the

right to have the court correctly define the law, and to have the state refrain from committing misconduct by inviting the jury to ignore the court's rulings on the facts and instructions on the law. *State v. Cantabrana*, 83 Wn.App. 204, 921 P.2d 572 (1996); *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order in limine precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing the jury should consider such conditions in determining whether or not to impose the death penalty. The court agreed with this argument and reversed the death sentence. The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he

was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar the prosecutor sought the introduction of hearsay evidence solely for the purpose of proving the "res gestae." In responding to the defendant's objections the prosecutor specifically disavowed the right to use this evidence substantively. The court overruled the defendant's argument based upon this representation and then instructed the jury that the evidence could not be used substantively. In spite of the state's specific representation and in spite of the trial court's limiting instruction the state did argue substantively from this evidence. This misconduct was just as blatant as that in *Gregory*. In addition this misconduct caused substantial prejudice because it allowed the state to shore up what was the missing evidence in its case, that the protected party in the no contact order was the driver of the vehicle. Thus, in the same manner that the trial court in *Gregory* reversed based upon prosecutorial misconduct so this court should reverse the

defendant's conviction based upon prosecutorial misconduct.

IV. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF GUILT ON A CHARGE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

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).

In the case at bar, the state charged the defendant 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).

The state also alleged that this offense was a felony because the defendant had two prior convictions for violating no contact orders listed in RCW 26.50.110(5). This subsection of the statute provides:

(5) A violation of a court order issued under this chapter, chapter 7.90, 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 7.90, 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).

Thus, in order to sustain a conviction for a felony violation of no contact order, the state had the burden of proving the following elements:

(1) that an order was granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020 was entered,

(2) that the order prohibits the defendant from having contact with the protected party,

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

(4) that the defendant got notice of the order, prior to the violation,

(5) that the defendant then knowingly violated the provisions of the order, and

(6) that the defendant had two prior convictions for violating an order granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020.

In the case at bar the evidence presented at trial does not constitute substantial evidence of these elements for three reasons: (1) the state failed to prove that the driver of the vehicle in which the defendant was a passenger was the protected party in the no contact order the court admitted into evidence; (2) the state failed to prove that the defendant was the person named in the judgments of prior convictions the court admitted into evidence; (3) the state failed to prove that the no contact order violations listed in the judgments the court admitted into evidence were qualifying convictions under RCW 26.50.110. The following presents these arguments.

(1) The State Failed to Prove That the Driver of the Vehicle in Which the Defendant Was a Passenger Was the Protected Party in the No Contact Order the Court Admitted into Evidence.

In the case at bar the state introduces the following evidence concerning the identity of the driver of the vehicle: (1) Deputy Boyle's testimony that dispatch told him that Nicole McNeil was the registered owner of the vehicle, (2) Deputy Boyle's testimony that the driver of the vehicle matched the general physical characteristics that dispatch gave him for the registered owner of the vehicle, (3) the driver told him she was Nicole McNeil, and (4) he reviewed a driver's license that the driver gave to him and it had the name "Nicole McNeil" on it. This evidence is insufficient to prove that the driver of the vehicle was the "Nicole McNeil" listed in the two protection orders entered as Exhibits 1 and 5 for two reasons. First, this

evidence was all inadmissible hearsay and its introduction violated the defendant's rights to a fair trial and confrontation. Second, with this evidence admitted, there was no witness or evidence to prove that the "Nicole McNeil" listed in Exhibits 1 and 5 was the "Nicole McNeil" listed as the protected party in exhibits 1 and 5.

(2) The State Failed to Prove That the Defendant Was the Person Named in the Judgments of Prior Convictions the Court Admitted into Evidence or That the Defendant Was the Person Restrained in the No Contact Orders.

In *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), the court addressed the issue of what constitutes substantial evidence on this issue of identity. In this case the state charged the defendant Dallas E. Hunter with attempted escape, alleging that he had tried to leave 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," as was required under the statute, 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 that the defendant was the person listed in the prior judgments and that he was the person restrained in the no contact orders entered into evidence. The only evidence the state presented on these two critical elements was the identity of names. No witness testified that the defendant was the person named in the two no contact orders and no witness testified that the defendant was the person listed in the judgment and sentences. As the court in *Hunter* clarifies, “identity of names alone” is not substantial evidence.

(3) The State Failed to Prove That the No Contact Order Violations Listed in the Judgments the Court Admitted into Evidence Were Qualifying Convictions under RCW 26.50.110.

As is clear from the statute, in order to elevate a violation of a protection order under RCW 26.50.110(1) to a felony under RCW 26.50.110(5), the state has the burden of proving that the defendant has two prior qualifying convictions for violating an order issued under one of the listed statutes. Whether or not the state has the burden of proving this to the jury as a matter of fact or the court as a matter of law is still very much up in question. In *State v. Carmen*, 118 Wn.App. 655, 77 P.3d 368 (2003), Division I of the Court of Appeals unequivocally states that the issue of what

types of orders were previously violated is one the court decides, not the jury. In *State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005), Division II of the Court of Appeals rejected the analysis in *Carmen* and held that the character of the prior convictions as violations of one or more of the listed statutes was an element of the offense that the state had the burden to prove to the jury beyond a reasonable doubt.

In *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), the Washington State Supreme Court addressed a related issue. In this case the defendant appealed a conviction for felony violation of a no contact order under RCW 26.50.110(1)&(5) that the state had the burden of proving that the underlying order and the prior orders violated were “valid.” After discussing both *Carmen* and *Arthur*, the court held that the underlying validity of the order alleged to have been violated or the orders underlying the prior convictions was a legal issue for the court to determine, not an element that the state had the burden of proving to the jury. In *State v. Gray*, 134 Wn.App. 547, 138 P.3d 1123 (2006), a case decided after *Miller*, Division I has taken the position that the *Miller* decision was a complete vindication of Division I’s position in *Carmen*. Defendant in the case at bar hardly reads the *Miller* decision as so holding, particularly given the fact that (1) *Miller* did not specifically overrule *Arthur*, and (2) the issue in *Miller* was not the same as the issues in *Carmen* and *Miller*.

Although defendant herein takes the position that the decision in *Arthur* is still good law, what is certain from all four of these cases is that the state still does have the burden of producing evidence to prove that the two or more prior convictions arise from violations of qualifying no contact orders. Absent this evidence the court cannot sustain a conviction for a felony violation of a no contact order under RCW 26.50.110(5). It matters not whether these facts must be proven to the court as a matter of law (*Carmen's* position) or the jury as an element of the offense (*Arthur's* position). There must still be evidence to support the existence of the character of the underlying orders violated.

In the case at bar the state introduced Exhibits 3 and 4 in an attempt to prove that the defendant had “two prior convictions for violating an order granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020.” Exhibit 3 is a judgment and sentence in *State of Washington v. Robb E. York*, No. 14307V dated 3-30-06. The document states that the court found the named defendant guilty of “HARASSMENT - DV” and “VIOL OF PROT ORDER”. The document does not state what type of “PROT ORDER” the named defendant was found to have violated. Thus, even were there proof that the defendant was the Robb E. York listed in the document, it fails entirely to prove that the named defendant was convicted of violating an order granted

under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020.” The conviction might be for such a violation and it might not. However, given that the burden was on the state to affirmatively prove the character of the prior conviction, this court cannot say that Exhibit 3 meets this requirement.

Exhibit 4 is a “short docket” on a 1997 case in which a “Robb Eugene York” was found guilty on 3-24-97 of “7.46.040 VIOL OF HARASSMENT/NO CON.” Unlike Exhibit 3 which does not state what type of no contact order the named defendant violated, this document does state this fact. The “7.46.040” list in front of “VIOL OF HARASSMENT/NO CON.” is actually the following Vancouver Municipal Code section²:

(a) Because of the likelihood of repeated harassment directed at those who have been victims of harassment in the past, when any defendant charged with a crime involving harassment is released from custody before trial on bail or personal recognizance, the court authorizing the release may require that the defendant:

(1) Stay away from the home, school, business or place of employment of the victim or victims of the alleged offense, or other location, as shall be specifically named by the court in the order;

(2) Refrain from contacting, intimidating, threatening or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named by

²In fact there has never been a state statute known as “RCW 7.46.040.”

the court in the order.

(b) The written order releasing the defendant shall contain the court's directives and shall bear the legend: "Violation of this order is a criminal offense under Vancouver Municipal Code Chapter 7.46 and RCW Chapter 9A.46." A certified copy of the order shall be provided to the victim by the clerk of the court.

(c) An intentional violation of a court order issued under this section is a misdemeanor.

Vancouver Municipal Code 7.46.040.

This municipal code section is a copy of the following state statute found in the Revised Code of Washington. It reads:

(1) Because of the likelihood of repeated harassment directed at those who have been victims of harassment in the past, when any defendant charged with a crime involving harassment is released from custody before trial on bail or personal recognizance, the court authorizing the release may require that the defendant:

(a) Stay away from the home, school, business, or place of employment of the victim or victims of the alleged offense or other location, as shall be specifically named by the court in the order;

(b) Refrain from contacting, intimidating, threatening, or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named by the court in the order.

(2) An intentional violation of a court order issued under this section is a misdemeanor. The written order releasing the defendant shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 9A.46 RCW. A certified copy

RCW 9A.46.040.

Both the code section and the statute allow the court to set a “no contact” provision as a condition of release for a person charged with a harassment charge. While the intentional violation of such a provision is itself a crime, as well as justification for revoking pretrial release, it is not an order “granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020.” Thus, even ignoring the lack of identity on Exhibit 4, it is not substantial evidence of a qualifying conviction under RCW 26.50.110(5). As a result this court cannot sustain the defendant’s conviction.

V. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE MOVED TO ADMIT EXHIBITS I THROUGH V VIOLATED THE DEFENDANT’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

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 counsel's failure to object to the admission of Exhibit 1, 2, 3, and 5, and trial counsel's failure to give a proper objection to the admission of Exhibit 4. 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 any of these exhibits, there was no foundational basis for admitting these exhibits. 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 failed in to object.

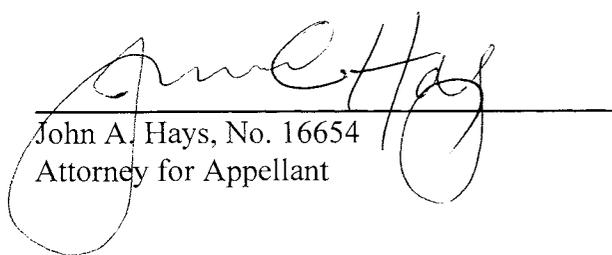
In addition these exhibits constituted the only evidence that the defendant had acted in violation of a no contact order issue under RCW 10.99 or that he had two prior convictions. Thus, absent counsel's deficient failure to make this objection, the court would not have admitted these exhibits and the 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.

CONCLUSION

This court should reverse and remand with instructions to dismiss because the state failed to present substantial evidence on every element of the crime charged. In the alternative, this court should reverse and remand for a new trial because (1) the trial court denied the defendant a fair trial and the right to confrontation when it admitted unreliable hearsay, (2) the prosecutor committed misconduct and denied the defendant a fair trial when she argued substantively from evidence not admitted for that purpose, and (3) trial counsel's failure to object to the admission of documents offered without foundation denied the defendant effective assistance of counsel

DATED this 11th day of June, 2007.

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, § 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 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) Whenever an order is granted under this chapter, chapter 7.90, 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. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.90, 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, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order

in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.90, 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, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 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, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.90, 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 7.90, 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.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.90, 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 court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

RCW 9A.46.040

**Court-ordered requirements upon person charged with
crime--Violation**

(1) Because of the likelihood of repeated harassment directed at those who have been victims of harassment in the past, when any defendant charged with a crime involving harassment is released from custody before trial on bail or personal recognizance, the court authorizing the release may require that the defendant:

(a) Stay away from the home, school, business, or place of employment of the victim or victims of the alleged offense or other location, as shall be specifically named by the court in the order;

(b) Refrain from contacting, intimidating, threatening, or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named by the court in the order.

(2) An intentional violation of a court order issued under this section is a misdemeanor. The written order releasing the defendant shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 9A.46 RCW. A certified copy of the order shall be provided to the victim by the clerk of the court.

Vancouver Municipal Code § 7.46.040
Court Ordered Requirements upon Person Charged with Crime

(a) Because of the likelihood of repeated harassment directed at those who have been victims of harassment in the past, when any defendant charged with a crime involving harassment is released from custody before trial on bail or personal recognizance, the court authorizing the release may require that the defendant:

(1) Stay away from the home, school, business or place of employment of the victim or victims of the alleged offense, or other location, as shall be specifically named by the court in the order;

(2) Refrain from contacting, intimidating, threatening or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named by the court in the order.

(b) The written order releasing the defendant shall contain the court's directives and shall bear the legend: "Violation of this order is a criminal offense under Vancouver Municipal Code Chapter 7.46 and RCW Chapter 9A.46." A certified copy of the order shall be provided to the victim by the clerk of the court.

(c) An intentional violation of a court order issued under this section is a misdemeanor.

HISTORY: (Ord. 3272 § 2 (part), 1996)

RECEIVED

JUN 13 2007

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

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07 JUN 13 11:52
STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 ROBB EUGENE YORK,)
)
 Appellant,)

CLARK CO. NO: 06-1-02208-4
APPEAL NO: 35814-0-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) vs.
 COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the 11TH day of JUNE, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

ROBB EUGENE YORK - #91405
WASH STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

and that said envelope contained the following:

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

DATED this 11TH day of JUNE, 2007.

[Signature: Cathy Russell]
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 11th day of JUNE, 2007.



[Signature: Heather Chittock]
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009

AFFIDAVIT OF MAILING - 1

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
(360) 423-3084