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NO. 36288-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MARK ALLEN SMITH,

Appellant.

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APPELLANT'S BRIEF

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred in overruling Mr. Smith's objection to the introduction of irrelevant evidence that proved an element of the crime charged.

2. The trial court erred in finding Mr. Smith guilty to the charge of violation of a felony no contact order when such a verdict was not support by substantial evidence.

3. The trial counsel's failure to object when the State moved to admit exhibits B through D violated Mr. Smith's right to effective assistance of counsel under the Washington Constitution, Article I, Section 22 and the Sixth Amendment to the United States Constitution.

## II. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Does a trial court deny Mr. Smith's due process rights under the Washington State Constitution, Article I, Section 3, and the Fourth Amendment to the United States Constitution by entering a conviction for the charge of felony violation of a no contact order which was unsupported by substantial evidence?

(Assignment of Error Nos. 1 and 2)

2. Does trial counsel's failure to object when the State moved to admit exhibits B through D violate Mr. Smith's right to effective assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution when the State did not prove Mr. Smith committed the crimes listed in the exhibits? (Assignment of Error No. 3)

### III. STATEMENT OF THE CASE

Mr. Smith was charged by Information of the crime of Felony Violation of a Court order. CP 1. The information alleged Mr. Smith violated a order issued by the Kitsap County District Court, and had two previous convictions for violating the provisions of a court order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52 and/or 74.34 RCW, or a valid foreign protection order. CP 1-2.

On February 27, 2007, defense counsel filed a motion to dismiss the charge pursuant to *State v Knapstad*, 107 Wn.2d 346, 349, 729 P.2d 48 (1986), CP10. The State responded to the motion in written form on March 18, 2007. CP 21. The State presented records from the Bremerton Municipal Court for Citation

Number 89720, Citation Number 89710 and Citation Number 83905 attached to their responsive materials. CP 31-45.

The motion to dismiss was heard on March 19, 2007. RP 03/19/2007, 2. The Honorable Judge Sally Olsen heard and ruled on the motion. RP 03/19/2007. Defense counsel argued that evidence of any prior convictions for violating no contact orders were not relevant on the basis the convictions were not qualifying convictions under RCW 26.50.110(5). Mr. Smith's motion for dismissal was denied. RP 03/19/2007, 18.

On April 10, 2007 Mr. Smith signed a stipulation allowing the trial court to determine the outcome of the case on facts agreed by the parties. RP 04/10/2007, 2, CP 57. The Honorable Judge Roof presided over the trial on stipulated facts. RP 04/10/2007. Judge Roof found Mr. Smith guilty of the charge of Violation of a No Contact Order. RP 04/10/2007, 8, CP 82. Mr. Smith was sentenced to 41 months of confinement. CP 82. This appeal follows that conviction. CP 94.

The following facts were stipulated to by the parties at the time of the trial:

On January 20, 2007 Deputy Dave Meyer was on patrol. CP 57. On that evening Deputy Meyer observed that a passenger in a vehicle was not wearing her seatbelt. CP 57. Mr. Smith was the driver of the vehicle. CP 58. Mr. Smith pulled over his vehicle into the driveway of space number 54 at 7410 Old Military Road in Bremerton, Washington. CP 58. Mr. Smith told Deputy Meyer that he lived at that residence with Ms. Hollick. CP 58. Ms. Hollick resided at space number 54 at 7410 Old Military Road in Bremerton, Washington. CP 58. A no contact order had been previously entered which ordered Mr. Smith to not contact Ms. Hollick or enter or come within 500 feet of Ms. Hollick's residence. CP 58. The order was valid on January 20, 2007. CP 12 Mr. Smith and Ms. Hollick have been members of the same household and had a dating relationship in the past. CP 58-59.

At the time of trial, defense counsel renewed his objection to the admissibility of prior conviction records contained in Exhibits C, D, and E attached to the verdict on submission of stipulated facts. RP 04/10/2007, CP 69-81. These exhibits include Judgement and Sentences, Washington uniform court documents, and Bremerton Municipal Court dockets. CP 69-81. Defense counsel objected to

the trial court's consideration of these documents pursuant to the grounds described in the motion to dismiss under State v. Knapstad, *supra*, and relevancy grounds. RR 04/10/2007, 5. The trial court denied the motion and stated as follows:

And I appreciate your wishing to make sure the record is clear, and I believe it is. I am disinclined to change the law of this case, at this point, without addressing the merits myself. The motion previously had been denied and stands as denied, but it has been renewed for the record.

RP 4/10/2007, 7.

Judge Roof found Mr. Smith guilty of the charge. RP 04/10/2007, 8. Mr. Smith challenges the conviction entered against him in this matter.

#### IV. ARGUMENT

1. Does a trial court deny Mr. Smith's due process rights under the Washington State Constitution, Article I, Section 3 and the Fourth Amendment to the United States Constitution by entering a conviction for the charge of Felony Violation of a No Contact Order which was unsupported by substantial evidence and the Court reviewed irrelevant evidence?

Defense counsel for Mr. Smith file a motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

CP 10. In a case where the facts are undisputed and no rational trier of fact could find beyond a reasonable doubt based on the undisputed facts, then judicial economy and fairness demand that the Court dismiss the case at the pre-trial stage. *Id.* at 349. If after considering all reasonable inferences in favor of the State, the Court finds that the evidence is insufficient to prove the charge, the Court must dismiss. *Id.* at 352-353. Under the case of *State v. Zakei*, 61 Wn.App. 805, 811 *n.3*, 812 P.2d 512 (1991) *aff'd on other grounds*, 119 Wn.2d 563, 834 P.2d 1046 (1996) and *State v. Olson*, 73 Wn.App. 348, *n.6*, 869 P.2d 110 (1994), the denial of the *Knapstad* motion is not appealable once a trial is conducted. However, the issues raised in the *Knapstad* motion merge into the trial. In this case Mr. Smith assigns error to all of the Court's conclusions of law made following the motion to dismiss to the extent the claims are allowed under the case law previously cited. In this case, the objection to the admissibility of the alleged prior convictions, and the linked claim of sufficiency of the evidence, was raised during the motion to dismiss and again at the time of the stipulated facts trial. RP 04/10/2007, 5. Judge Roof relied on the ruling made by Judge Olsen, and declined to address the merits of

the defense counsel's objections at the time of the stipulated facts trial. However, under the case law stated above, the issues presented in this brief have been preserved for appeal and Mr. Smith is contesting the sufficiency of the evidence warranting a conviction in this matter.

Statutory interpretations are reviewed de novo as a question of law. *Telepage, Inc. V. City of Tacoma Dept. Of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). If a statute's meaning is plain on its face, the Court should give effect to that plain meaning. *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.2d 12401 (2004). The determination of what type of no contact orders have been violated is a question of law. The court should exercise de novo review on this issue.

The State must prove every element of a crime charged beyond a reasonable doubt to satisfy a defendant's due process of rights guaranteed under the Washington State and Federal Constitution. *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). 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). Any conviction not supported by substantial evidence may be attached for the first time on appeal as a due process violation. *Id.*

Substantial evidence in the context of a criminal case is defined as 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). The State must 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 if substantial evidence exists 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).

Both the Washington State and Federal Constitutions guarantee all defendants the right to a fair trial untainted from inadmissible or prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). Those Constitutions also guarantee the right to a fair trial untainted by unreliable evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

RCW 26.50.110 defines the charge of Violation of a No Contact Order. In the case at hand the State charged Mr. Smith with felony Violation of a No Contact Order under RCW 26.50.110(1) and RCW 26.50.110(5). RCW 26.50.110(1) states as follows:

(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...

The state alleged Mr. Smith committed two prior Violations of a No Contact Order. CP 1. Consequently, the State charged Mr. Smith with a felony Violation of a No Contact Order pursuant to RCW 26.50.110(5). That statute reads as follows:

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.

Under that provision of the statute, a Violation of a No Contact Order is elevated to a felony charge when a defendant has two prior Violation of a No Contact Order issued under the statutes specifically listed.

The question presented in this case is whether Mr. Smith has two prior convictions which are qualifying convictions under the statute. It is apparent from the plain language of the statute, the State has the burden of proving beyond a reasonable doubt in order to obtain a conviction for a felony under RCW 26.50.110(5), the additional element that Mr. Smith has two prior convictions for

violation of the listed predicate offenses. In other words, to obtain a conviction under RCW 26.50.110(5), the State had the burden of proving Mr. Smith had two prior qualifying convictions for violating an order issued under the statutes listed.

The case of *State v. Miller*, 156 Wn.2d 23, 1213 P.3d 827 (2005) addresses the procedure the Court is to follow when determining if a defendant's prior convictions for Violation of a No Contact Order are qualifying convictions under RCW 26.50.110(5). The Court is a gatekeeper of the evidence, and it is the Court's responsibility to determine if a piece of evidence is relevant to the case. *State v. Miller, supra; State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005). If the State is unable to prove the prior convictions are qualifying convictions pursuant to RCW 26.50.110(5), evidence of the convictions are not relevant and therefore inadmissible.

In the case of *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), the Washington State Supreme Court determined that existence of prior no contact order convictions is a question of law to be determined by the Court. In the case of *State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005) the court determined that the character of any prior no contact order violations was an element of

the offense that the State had the burden to prove to the jury beyond a reasonable doubt. Either as a question of law for the Court to determine (as articulated in *Miller*) or a question of fact for the jury to determine (as articulated in *Arthur*), it remains clear under both cases the State has the burden of producing evidence to provide that the two or more prior convictions arise from violations of qualifying no contact orders. Without such evidence, the Court cannot sustain a conviction for a felony Violation of a No Contact order under RCW 26.50.110(5). In other words, the State must provide evidence to support the existence of the character of the underlying orders violated to determine if the criteria in RCW 26.50.110(5) is met.

The case of *State v. Arthur, supra*, sets forth the requirements for the evidence of the predicate offenses.

“We stress that the prerequisites are not simply no-contact order violations, but violations of certain statutes. And it is those elements specifically that create the felony. We have no quarrel with the proposition that the trial court should examine the documents to see if they are relevant and not admit them if they are irrelevant to the previous convictions for the prerequisite statutes.”

*State v. Arthur*, 126 Wn.App. at 250, 108 P.2d 169.

Although the *Arthur* case has been overruled in part by the case of *State v. Miller, supra*, the portion of the case addressing the role of the Court or Jury to determine if prior offenses are qualifying offenses under RCW 26.50.110(5) was overruled by *Miller*. However, the case is still good law for the proposition that the prior convictions must be one of the specific violations or issued under the specific chapters listed in RCW 26.50.110(5) to be qualifying convictions establishing a felony level offense. Subsequent cases have interpreted *Miller* to require the Court to provide a gatekeeping function and determine the admissibility of prior Violation of No Contact Orders. See *State v. Gray*, 134 Wn.App. 547, 138 P3d 1123 (2006). The key to this evaluation of admissibility is whether the prior violations were issued under the listed statutes in RCW 26.50.110(5). *Id.* The Court also stated in footnote 20 of *State v. Gray*:

This is in addition to other issues bearing on the validity/applicability of any NCO, including whether it is issued by a competent court, statutorily sufficient, and clear or adequate on its face. See *Miller*, 156 Wn.2d at 31.

All of those issue are of importance in this case. The records of the issuance of no previous no contact orders were not provided by the

State, and the records of convictions were not sufficient as argued throughout this brief.

The only possible relevancy of the prior convictions is the address the prior conviction requirement found in RCW 26.50.110(5). Perhaps if the same protected party was listed in the prior and current alleged violations, the information could have been relevant under 404(b). However, that information was not provided by the State and is not a basis for relevancy of the documents in this case. The prior convictions are not qualifying convictions and therefore irrelevant and should not have been considered by the Court. The Court improperly admitted evidence of prior convictions. The evidence of prior convictions is not only irrelevant, but also is not sufficient to warrant a conviction.

The records show the convictions were for violations of 9A.32.080. CP 68-80. This is not one of the statutes listed in RCW 26.50.110(5). It was assumed that 9A.32.080 is a citation to the Bremerton Municipal Code. CP 14. RCW 9A.32.080 does not exist and RCW Chapter 9A.32 refers to homicides.

In support of the State's claim that Mr. Smith's prior convictions were qualifying convictions, the prosecutor argued that

the Bremerton Municipal Code ordinance 4078, section 71 passed on October 15, 1986 became 9A.32.080 of the Bremerton Municipal Code. CP 19. The State did not provide a copy of Bremerton Municipal Code 9A.32.080 showing the code was in effect in 1986. RP 03/19/2007, 11-12. Nor did the State provide a copy the ordinance to the Court. RP 03/19/2007, 12. The State did not provide a copy of Bremerton Municipal Code in effect at the time of the alleged convictions occurring in 1988-1989. Finally, the State did not provide copies of the no contact orders themselves to allow the Court to determine whether the orders were issued under State statute rather than Municipal code. The orders must be issued under a statute in order for violations of the orders to be a qualifying offense under RCW 26.50.110(5).

The trial court did not conduct any independent research to verify the language contained in the ordinance 4078. RP 03/19/2007. Instead the Court relied on the statement of the law contained in the brief submitted by the prosecutor. RP 3/19/2007.

“In the state’s brief - and I trust they have cited the statute correctly on page 4- that ordinance, Bremerton Ordinance 4078, passed on October 15, 1986. Section 71 apparently was the precursor to 9A.32.080.”

RP 03/19/2007, 17-18. The Court did not appear to have independent knowledge of the Bremerton Municipal Court or Bremerton Ordinance No. 4078.

In this case the State provided Exhibits B through D in an attempt to prove Mr. Smith had two prior convictions for violating a no contact order under RCW 26.05.110(5). Exhibit C attached to the verdict on submission of stipulated facts is a copy of the Judgment and Sentence in the case of *City of Bremerton v. Mark Smith*, No. 83905 entered on June 26, 1989. CP 69-72. The Judgment and Sentence states that the court found Mr. Smith guilty of "Vio. Prot. Order." The document fails to state what type of "Prot. Order" Mr. Smith was found to have violated. The document fails to prove that Mr. Smith 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. It is impossible to determine from the Judgment and Sentence if the conviction was for a violation of any of those statutes. Case law previously cited clearly places the burden on the State to prove the conviction is a qualifying conviction of the statutes listed in RCW 26.05.110(5). The State did not meet the burden. The other

documents in this exhibit include the citation issued by law enforcement, and a Bremerton Municipal Court Docket sheet.

Exhibit D includes a Judgement and Sentence in the case of *City of Bremerton v. Mark Smith*, No. 89710 entered on December 5, 1988. CP71-75. The Judgement and Sentence states that the court found Mr. Smith guilty of "Vio. Order For Protection". The document fails to state what type of order for protection Mr. Smith was found to have violated. The document fails to provide that Mr. Smith 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. It is impossible to determine from the Judgment and Sentence if the conviction was for a violation of any of those statutes. Once again the State was unable to meet its burden of proving the conviction was a qualifying conviction under RCW 26.50.110(5).

Exhibit E includes a citation written by law enforcement on August 8, 1988 alleging Violation of a Protection Order, a record of court proceedings and a Bremerton Municipal Court Docket. CP 76-79. The record of court proceedings does not indicate the nature of the crime Mr. Smith was convicted of. Once again, the exhibits fail to

establish what type of order Mr. Smith was found to have violated. The document fails to prove that Mr. Smith 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. It is impossible to determine from the Judgment and Sentence if the conviction was for a violation of any of those statutes. Once again the State was unable to meet its burden of proving the conviction was a qualifying conviction under RCW 26.50.110(5).

Although the exhibits described above suggest that some sort of violation of a protection order occurred, there is nothing in the record demonstrating the violations fell within the statutory provisions of RCW 26.50.110(5). The State did not establish that the violations were of the statutes cited in RCW 26.50.110(5). The statute and legislative intent is clear. The State must prove one of the statutes listed in RCW 26.50.110(5) was involved in the prior conviction to warrant a felony level contact order violation. Mr. Smith was convicted of a municipal court ordinance, not a state statute. Consequently, the prior convictions cannot be qualifying convictions under RCW 26.50.110(5). The State did not meet its burden. The plain language of the statute requires the convictions fall under one of the statutes

listed. If the conviction was not for a violation of one of the statutes listed, the offense cannot be a qualifying offense.

Furthermore in this case the record is silent as to the type of restraining orders, or which Court entered the restraining orders that were violated. The State did not present substantial evidence of qualifying convictions under RCW 26.50.110(5). As a result, this Court cannot sustain Mr. Smith's conviction.

**2. Is trial counsel's failure to object when the State moved to admit Exhibits B through D violate Mr. Smith's right to effective assistance of counsel under the Washington State Constitution Article I Section 22 and Sixth Amendment to the United States Constitution when the State did not prove Mr. Smith committed the crimes listed in the exhibits?**

Under the Sixth Amendment to the United States Constitution, and Article I, Section 22 of the Washington State Constitution, a defendant is entitled to effective assistance of counsel. The standard for evaluating claims of ineffective assistance of counsel 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). A two-part test is used to determine if counsel's assistance was effective as set forth.

First the defendant must show trial counsel's performance fell below that required of a reasonable competent defense attorney. Second, the convicted defendant must show counsel's conduct caused prejudice. *State v. Strickland*, 466 U.S. at 687, 89 L.Ed.2d at 693, 104 S.Ct. At 2064-65. Prejudice is shown when, "there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Church v. Kinchelse*, 767 F.2d 639, 643 (6<sup>th</sup> Cir. 1985) *citing State v. Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. At 2068. The standard under the Washington State Constitution is essentially identical to the standard set forth by the Supreme Court as identified above. Counsel must have failed to act as a reasonable prudent attorney. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978). Counsel's ineffective assistance must have caused prejudice to the defendant. *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1987).

In the event a previous conviction is an underlying element of the current offense charged, the identify of the name alone is not

sufficient proof of the identity of the person to warrant the court in submitting to the fact finding. *State v. Hunter*, 29 Wn.App. 218, 221, 627 P.2d 1339 (1981). The State must do more than authenticate and admit the document. *State v. Huber*, 129 Wn.App. 499, 502, 119 P.3d 388 (2005) *quoting State v. Kelly*, 52 Wn.2d 676, 678, 328 P.2d 362 (1958). The State must also show beyond a reasonable doubt, “that the person named therein is the same person on trial.” *Id.*

Mr. Smith stipulated the fact that the state would be moving to admit documents, named Exhibits C, D and E for the purposes of determining if Mr. Smith had at least two prior convictions for violating no contact orders. CP 59. Furthermore, Mr. Smith stipulated that he was objecting to the admissibility of the exhibits based on ER 401, 402. *Id.* The State did not present any evidence to identify that Mr. Smith was the person named in any no contact orders. Mr. Smith is claiming ineffective assistance of counsel based upon trial counsel’s failure to object to exhibits C, D, and E on the basis of lack of foundation due to the State’s failure to establish Mr. Smith was the same person listed in the exhibits.

When 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 not sufficient. Since the State failed to present any evidence at all that Mr. Smith in this case was the defendant named in any of the exhibits, there was not foundational basis for admitting these exhibits. There is no possible tactical advantage in the failure to object.

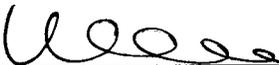
The exhibits constituted the only evidence that Mr. Smith had two prior convictions for violation of no contact orders. Therefore, absent trial counsel's deficient failure to make this objection, the Court would not have admitted these exhibits and the Court would have been required to grant Mr. Smith's motion to dismiss. Trial counsel's deficient conduct caused prejudice and denied Mr. Smith the right to effective assistance of counsel under Article I, Section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution.

#### V. CONCLUSION

This court should reverse the conviction entered against Mr. Smith and remand the case with instructions to dismiss because the State failed to present substantial evidence on every element of the crime charged. In the alterative, this court should reverse and

remand the case for entry of a misdemeanor conviction for violation  
of a no contact order.

RESPECTFULLY SUBMITTED this 21 day of  
September, 2007.

  
\_\_\_\_\_  
MICHELLE BACON ADAMS  
WSBA No. 25200  
Attorney for Appellant

LEXSTAT RCW 26.50.110

ANNOTATED REVISED CODE OF WASHINGTON  
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\*\*\* Statutes current through all newly enacted legislation \*\*\*  
\*\*\* that is effective through July 21, 2007 \*\*\*  
\*\*\* Annotations current through July 12, 2007 \*\*\*

TITLE 26. DOMESTIC RELATIONS  
CHAPTER 26.50. DOMESTIC VIOLENCE PREVENTION

**GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

*Rev. Code Wash. (ARCW) § 26.50.110 (2007)*

**Legislative Alert:** LEXSEE 2007 Wa. HB 1642 -- See section 2.

§ 26.50.110. Violation of order -- Penalties

(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.

**HISTORY:** 2006 c 138 § 25; 2000 c 119 § 24; 1996 c 248 § 16; 1995 c 246 § 14; 1992 c 86 § 5; 1991 c 301 § 6; 1984 c 263 § 12.

**NOTES:**

SHORT TITLE -- 2006 C 138: See *RCW 7.90.900*.

APPLICATION -- 2000 C 119: See note following *RCW 26.50.021*.

SEVERABILITY -- 1995 C 246: See note following *RCW 26.50.010*.

FINDING -- 1991 C 301: See note following *RCW 10.99.020*.

**CROSS REFERENCES.**

Violation of order protecting vulnerable adult: *RCW 74.34.145*.

**EFFECT OF AMENDMENTS.**

2006 c 138 § 25, effective June 7, 2006, added the reference to chapter 7.90 RCW throughout the section.

2000 c 119 § 24, effective June 8, 2000, rewrote this section.

## CONSTITUTION OF WASHINGTON

is not sufficient to support a claim for libel. *Sidor v. Public Disclosure Commission* (1980) 25 Wash.2d 408, 637 P.2d 1147, 30 L.Ed.2d 496.

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would violate constitutional limits on recovery for libel. *Sidor v. Public Disclosure Commission* (1980) 25 Wash. App. 127, 607 P.2d 859, review denied.

### 18. Petition for redress of grievances

The First Amendment right to petition the government for redress (U.S.C.A. Const. Amend. 1) is not absolute and, to obtain same, a litigant must comply with court rules and the law of standing. *Filan v. Martin* (1984) 38 Wash. App. 91, 684 P.2d 769.

### 19. Public assistance

Provision of RCWA 74.04.300 authorizing the department of social and health services to recoup a 25 percent fraud penalty through mandatory deductions from future assistance payments does not violate the supremacy clause of the United States constitution. *Bazan v. Department of Social and Health Services* (1980) 26 Wash. App. 16, 612 P.2d 413, review granted, dismissed.

### 20. Residency requirements

Where city's classification system, under which it denied use of road located within boundaries of city-owned property to logging operators in watershed if they employed residents of small town located within watershed apparently barred plaintiff, who was resident of small town, from watershed employment only so long as he was a resident of town, the classification system was analogous to a continuing residency requirement, which does not burden fundamental right to travel. *Duranceau v. City of Tacoma* (1980) 27 Wash. App. 777, 620 P.2d 533.

### 21. Right to travel

The right to interstate and the right to intrastate travel are fundamental constitutionally guaranteed rights. *Duranceau v. City of Tacoma* (1980) 27 Wash. App. 777, 620 P.2d 533.

### 22. Right to vote

Supremacy Clause requires that State Supreme Court satisfy the United States Supreme Court's test for departure from the strict one-person, one-vote rule in analyzing claims regarding alleged

## PERSONAL RIGHTS

violations of state constitutional right to vote. *Foster v. Sunnyside Valley Irr. Dist.* (1984) 102 Wash.2d 395, 687 P.2d 841.

### 23. Retirement and pensions

ERISA regulates all employee benefits plans sponsored by an employer or an employee organization. *Matter of Estate of Egelhoff* (1998) 93 Wash. App. 314, 968 P.2d 924, review granted 137 Wash.2d 1032, 980 P.2d 1283, affirmed 139 Wash.2d 557, 989 P.2d 80, corrected, certiorari granted 120 S.Ct. 2687, 530 U.S. 1242, 147 L.Ed.2d 960, reversed and remanded 121 S.Ct. 1322.

### 24. State as party, actions, jurisdiction

Provision of the United States Constitution vesting original jurisdiction in the Supreme Court when the state is a party (U.S.C.A. Const. Art. 3, § 2) does not apply to cases between a state and its own citizens. *Filan v. Martin* (1984) 38 Wash. App. 91, 684 P.2d 769.

### 25. State court authority

Even where the matter is one of federal law, Washington courts are not bound by the interpretations of nonconstitutional federal law rendered by inferior federal courts, even the Ninth Circuit. *Matter of Estate of Egelhoff* (1998) 93 Wash. App. 314, 968 P.2d 924, review granted 137 Wash.2d 1032, 980 P.2d 1283, affirmed 139 Wash.2d 557, 989 P.2d 80, corrected, certiorari granted.

## § 3. Personal Rights

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

Adopted 1889.

### Cross References

No state to deprive any person of life, liberty, or property without due process of law, see Const. Art. 7, § 1.

### Law Review and Journal Commentaries

Administrative fair hearing requirements in public assistance cases, and constitutional due process requirements. 4 Gonz.L.Rev. 357.

Airmail route certificates: due process cancellation. 21 Wash.L.Rev. 123, 206 (1946).

Anders in the fifty states: Some appellants' equal protection is more equal

## Art. 1, § 3

ed 120 S.Ct. 2687, 530 U.S. 1242, 147 L.Ed.2d 960, reversed and remanded 121 S.Ct. 1322.

State courts are ultimate arbiters of state law, unless a state court's interpretation restricts liberties guaranteed entire citizenry under federal constitution. *Federated Publications, Inc. v. Kurtz* (1980) 94 Wash.2d 51, 615 P.2d 440.

### 26. Treaties

Treaties are binding on states as well as federal government. *State v. Pang* (1997) 132 Wash.2d 852, 940 P.2d 1293, corrected 948 P.2d 381, certiorari denied 118 S.Ct. 628, 522 U.S. 1029, 139 L.Ed.2d 608.

States are bound, by the supremacy clause, to respect the terms of treaties entered into by Congress. *State v. Miller* (1984) 102 Wash.2d 678, 689 P.2d 81.

Supremacy clause required departments of game and fisheries to comply with orders necessary to implement United States supreme court's interpretation of rights guaranteed by Indian treaty; therefore, such departments as parties to federal litigation, could be ordered to promulgate and enforce such treaty rights even if state law withheld from them power to do so; overruling *Puget Sound Gillnetters Ass'n v. Moos* (1979) 92 Wash.2d 939, 603 P.2d 819.

## RIGHTS OF ACCUSED

## Art. 1, § 22

and remand for a new trial. *State v. Wicke* (1979) 91 Wash.2d 638, 591 P.2d 452.

In view of constitutional provision preserving inviolacy of right to trial by jury, assignment of error urging Supreme Court to review action of jury in inflicting death penalty presented no question which that court could decide. *State v. White* (1962) 60 Wash.2d 551, 374 P.2d 942, certiorari denied 84 S.Ct. 154, 375 U.S. 883, 11 L.Ed.2d 113.

In application of this constitutional provision, only appellate courts have no right to "trench upon the province of the jury upon questions of fact." *Cop-*

*po v. Van Wieringen* (1950) 36 Wash.2d 120, 217 P.2d 294.

Appellate court is not trenching on province of jury on question of fact in violation of provision that right of trial by jury shall remain inviolate when it makes determination of record showing no evidence on which jury could make finding. *Gable v. Allen* (1946) 25 Wash.2d 186, 169 P.2d 699.

On appeal from judgment notwithstanding verdict, it is deemed duty of court to uphold this section's provision that right of trial by jury shall remain inviolate. *Allen v. Landre* (1922) 120 Wash. 171, 206 P. 845.

### § 22. Rights of the Accused

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 or 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 any money or fees to secure the rights herein guaranteed.

Enacted 1889. Amended by Amendment 10 (Laws 1921, ch. 13, § 1, p. 10, approved Nov. 1922).

#### Historical Notes

Amendment 10 rewrote the section, which originally read:

In criminal prosecution, the accused shall have the right to appear and defend in person, and 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 alleged to have

**Proposal and Ratification**

See note under Amendment [I].

**AMENDMENT [V.]**

**Capital crimes; double jeopardy; self-incrimination; due process;  
just compensation for property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Proposal and Ratification**

See note under Amendment [I].

**AMENDMENT [VI.]**

**Jury trial for crimes, and procedural rights**

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 defence.

**Proposal and Ratification**

See note under Amendment [I].

**AMENDMENT [VII.]**

**Civil trials**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any

**AMENDMENTS**

**Amend. 14, § 3**

New Hampshire .....	June 30, 1865	South Carolina .....	November 13, 1865
New Jersey .....	January 23, 1866	Tennessee .....	April 7, 1865
New York .....	February 3, 1865	Texas .....	February 18, 1870
North Carolina .....	December 4, 1865	Vermont .....	March 9, 1865
Ohio .....	February 10, 1865	Virginia .....	February 9, 1865
Oregon .....	December 11, 1865	West Virginia .....	February 3, 1865
Pennsylvania .....	February 8, 1865	Wisconsin .....	February 24, 1865
Rhode Island .....	February 2, 1865		

**AMENDMENT XIV.**

**§ 1. Citizenship rights not to be abridged by states**

Section 1. All persons born or naturalized in the United States, 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 laws.

**§ 2. Apportionment of Representatives in Congress**

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**§ 3. Persons disqualified from holding office**

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

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IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON, )  
 ) No. 07-1-00134-2  
 )  
 ) Plaintiff, )  
 ) CONCLUSIONS OF LAW FOR *KNAPSTAD*  
 )  
 ) v. ) MOTION TO DISMISS  
 )  
 )  
 ) MARK ALLEN SMITH, )  
 ) Age: 47; DOB: 10/03/1959, )  
 )  
 )  
 ) Defendant. )

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a *Knapstad* Motion to Dismiss; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following-

CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That Bremerton Municipal Code 9A.32.080 clearly indicates that it adopts by reference Chapter 26.50 of the Revised Code of Washington (RCW).



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**III.**

That Section 71 of the Bremerton City Ordinance No. 4078, which was passed on October 15, 1986, adopted by reference RCW Chapter 26.50.

**IV.**

That when a city adopts a state statute by reference the intent is that a violation of the city ordinance is also a violation of the applicable state statute.

**V.**

That the defendant has at least two prior convictions for violating domestic violence protection orders that qualify as underlying convictions under RCW 26.50.110(5).

**VI.**

That Case No. 83905, with a violation date of December 5, 1987, qualifies as an underlying conviction under RCW 26.50.110(5) for violating a domestic violence protection order.

**VII.**

That Case No. 89710, with a violation date of August 3, 1988, qualifies as an underlying conviction under RCW 26.50.110(5) for violating a domestic violence protection order.

**VIII.**

That Case No. 89720, with a violation date of August 8, 1988, qualifies as an underlying conviction under RCW 26.50.110(5) for violating a domestic violence protection order.

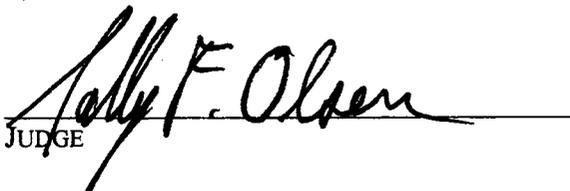
**IX.**

That evidence of the three prior convictions for violating domestic violence protection orders is admissible at trial.

**X.**

That the defendant's motion to dismiss is denied.

SO ORDERED this 11 day of April, 2007.

  
JUDGE



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PRESENTED BY-

STATE OF WASHINGTON

KRISTIE BRHAM, WSBA NO. 32764  
Deputy Prosecuting Attorney

APPROVED <sup>As to Form</sup> ~~FOR ENTRY~~

*William G. Hauge*

House, WSBA NO. 33356  
Attorney for Defendant

Prosecutor's File Number-07-101555-43

FINDINGS OF FACT AND CONCLUSIONS OF LAW;  
Page 3 of 3



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NO. 36288-7-II

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

STATE OF WASHINGTON  
OF  
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

MARK ALLEN SMITH,

Appellant.

CERTIFICATION OF MAILING

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

**Original Brief of Appellant Mailed To:**

Clerk of Court  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

**Copy of Brief of Appellant Hand-Delivered To:**

Mr. Randall Sutton  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS-35  
Port Orchard, WA 98366

Copy of Brief of Appellant Mailed To:

Mark A. Smith / DOC #724968  
c/o Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326-9723

DATED this 21st day of September, 2007, at Port Orchard,  
Washington.

  
JEANNE L. HOSKINSON  
Legal Assistant