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STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

MARK SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 07-1-00134-2

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED January 7, 2008, Port Orchard, WA mm  
**Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether, viewing the evidence in a light most favorable to the state, the evidence was sufficient to show that the Defendant had three prior convictions for violating orders issued pursuant to RCW 26.50 when the evidence showed that: (1) the Defendant had three prior convictions for violating Bremerton Municipal 9A.32.080; (2) BMC 9A.32.080 adopted RCW 26.50 by reference; and, (3) At the time it was adopted and at time of the Defendant's convictions, RCW 26.50 only outlawed violations of orders issued under RCW 26.50. From these facts the court could only conclude that the Defendant had been convicted of violating orders issued under RCW 26.50 as this was the only conduct covered by the law under which the Defendant's convictions were entered?

2. Whether the Defendant's claim of ineffective assistance of counsel must fail when the Defendant has failed to show that counsel's performance was deficient or that there was prejudice?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Defendant, Mark Smith, was charged by information filed in Kitsap County Superior Court with felony violation of a court order. CP 1. The information alleged that the violation was a felony based on the fact that the Defendant had at least two prior convictions for violation of a court order.

CP 1. Prior to trial, the Defendant filed a *Knapstad* motion to dismiss, which the trial court denied. CP 10, 99. Following a stipulated facts trial, the trial court found the Defendant guilty as charged, and imposed a standard range sentence. RP (4/10) 8, 13; CP 60-61, 82. This appeal followed.

**B. FACTS**

On January 20, 2007, Deputy Dave Meyer observed the Defendant drive a car into the driveway at a residence in Bremerton, Washington. CP 57-58. Upon contact, the Defendant admitted he lived at the residence with Shelley Hollick. CP 58. The Defendant also admitted that he was aware that there was a valid no contact order prohibiting him from contacting Ms. Hollick or from coming within 500 feet of her residence. CP 58, 67. The Deputy also contacted Ms. Hollick at the residence, and the Defendant later admitted that he had been living at the residence full time for "half a week," and had been staying with Ms. Hollick off and on since he'd been released from jail in early December. CP 64.

The Defendant's criminal history consisted of approximately 85 criminal convictions including three prior convictions for violation of a court order. CP 69-81, 82. The three prior convictions for violation of a court order consisted of the following:

A June 26, 1989 conviction in Bremerton Municipal Court cause number 83905 for violation of a protection order pursuant to Bremerton Municipal Code section 9A.32.080. CP 69-72.

A December 5, 1988 conviction in Bremerton Municipal Court cause number 89710 for violation of a protection order pursuant to Bremerton Municipal Code section 9A.32.080. CP 73-77.

A December 5, 1988 conviction in Bremerton Municipal Court cause number 89720 for violation of a protection order pursuant to Bremerton Municipal Code section 9A.32.080. CP 78-81.

Prior to trial, the Defendant filed a motion and declaration for pretrial dismissal pursuant to *State v. Knapstad*. CP 10. In this motion, the Defendant argued that the documents supporting the prior convictions showed that the convictions were for violations of 9A.32.080, which appeared to be a Bremerton Municipal Code citation. CP 13. The Defendant then argued that the prior convictions did not specifically show that the convictions were based on violations of orders issued under chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, 74.34 or a valid foreign protection order, and thus the records were not relevant and did not establish that the Defendant had the two predicate convictions required to establish the charge of felony violation of a court order. CP 13-14.

The State filed a written response noting that on October 15, 1986, Ordinance No. 4078 was passed, and that section 71 of this ordinance stated

that "RCW chapter 26.50 is hereby adopted by reference," and that section 71 was later codified as Bremerton Municipal Code 9A.32.080. CP 24-25. The State, therefore, argued that since the Defendant's three prior convictions were all pursuant to Bremerton Municipal Code 9A.32.080 (which, in turn, adopted RCW 26.50) the prior convictions necessarily qualified as predicate offenses pursuant to RCW 26.50.110. CP 25-26.

When the motion was argued below, Defense counsel argued that the documentation showed that the prior convictions were under 9A.32.080, which he believed was the Bremerton Municipal Code citation. RP (3/19) 3. Defense counsel also noted that "under the circumstances of the timing of this," that section of the Bremerton Code incorporated only RCW 26.50 by reference. RP (3/19) 3. Defense counsel then argued that there was nothing in the record which specifically stated that the actual protection orders underlying the prior convictions fell within the statutory provisions of current RCW 26.50.110, and that the prior convictions, therefore, were not relevant. RP (3/19) 3-5.

The State responded by arguing that, at the relevant time periods, the Bremerton Code incorporated RCW 26.50 by reference and that, by examining the documents and the law, the court could find that the prior convictions were based on violations of RCW 26.50 which, by definition, necessarily met the requirements for predicate offenses. RP (3/19) 7-11.

The trial court denied the Defendant's motion and entered written conclusions of law for the *Knapstad* motion. CP 99. The trial court specifically ruled that all three of the Defendant's prior convictions qualified as prior offenses under RCW 26.50.110(5). CP 100.

At trial, the Defendant signed a Verdict on Submission of Stipulated Facts which stated that he agreed and stipulated that the information contained in the written recitation of facts as well as the "attached exhibits, shall be submitted to the Court as an accurate record of facts upon which the Court will make its ruling as to the guilt of the Defendant." CP 57. The attached exhibits included the police report regarding the 2007 violation, the 2006 no contact order, and the documents relating to the prior convictions. CP 57-81. The Defendant did, however, preserve his ability to again object at trial to the relevance of the prior convictions. CP 58. Defense counsel explained at trial that the objection regarding relevance was "the exact same legal argument" raised in the *Knapstad* motion. RP (4/10) 7.

At trial, the Defendant renewed the objection to the prior conviction, and explained that it was his understanding that the court would find that the current case involved either a gross misdemeanor or a felony. RP (4/10) 5-8.

The trial court denied the objection and found the Defendant guilty of a felony violation beyond a reasonable doubt. RP (4/10) 7-8, CP 60-61. The

trial court then imposed a standard range sentence. CP 82. This appeal followed.

### III. ARGUMENT

- A. **VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO SHOW THAT THE DEFENDANT HAD THREE PRIOR CONVICTIONS FOR VIOLATING ORDERS ISSUED PURSUANT TO RCW 26.50 BECAUSE THE EVIDENCE SHOWED THAT: (1) THE DEFENDANT HAD THREE PRIOR CONVICTIONS FOR VIOLATING BREMERTON MUNICIPAL 9A.32.080; (2) BMC 9A.32.080 ADOPTED RCW 26.50 BY REFERENCE; AND, (3) AT THE TIME IT WAS ADOPTED AND AT TIME OF THE DEFENDANT'S CONVICTIONS, RCW 26.50 ONLY OUTLAWED VIOLATIONS OF ORDERS ISSUED UNDER RCW 26.50. FROM THESE FACTS THE COURT COULD ONLY CONCLUDE THAT THE DEFENDANT HAD BEEN CONVICTED OF VIOLATING ORDERS ISSUED UNDER RCW 26.50, AS THIS WAS THE ONLY CONDUCT COVERED BY THE LAW UNDER WHICH THE DEFENDANT'S CONVICTIONS WERE ENTERED.**

Smith argues that the evidence was insufficient to support the conviction for felony violation of a court order. App.'s Br. at 7. This claim is without merit because the evidence was sufficient to show that the Defendant had three prior qualifying convictions as defined by RCW 26.50.110(5).

In considering a challenge to the sufficiency of the State's evidence, an appellate court, after viewing the evidence in the light most favorable to the State, must decide whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of evidence is challenged in a criminal case, this court draws all reasonable inferences from the evidence in favor of the State and interprets them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385 (1980). *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Under RCW 26.50.110(5), a conviction for violating a no contact order (NCO) issued under certain statutes is a felony if the offender has at least two prior convictions for violating NCOs issued under those same statutes.<sup>1</sup> The issue raised by the Defendant in the present appeal is whether

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<sup>1</sup> RCW 26.50.110(5) states that:

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

there was sufficient evidence for the trial court to find that his prior convictions were qualifying convictions pursuant to RCW 26.50.110. App.'s Br. at 7, 10. Specifically, the Defendant argues that because the actual orders underlying the Defendant's prior convictions were not part of the record, it is impossible to tell what type of protection orders the Defendant violated and that it is impossible to determine whether the Defendant violated an order granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34 or a valid foreign protection order. App.'s Br. at 16. The Defendant's argument, however, is without merit because based on the dates of the Defendant's prior convictions the evidence showed that the convictions were for violations of orders issued under RCW 26.50, and thus, the evidence was sufficient.

***1. The Defendant's three priors were for violations of Bremerton Municipal Code section 9A.32.080, and all three of the convictions were entered in 1988 or 1989, with offense dates that occurred in 1987 or 1988.***

In the court below, the State produced documentation regarding three prior convictions. The first conviction, as demonstrated by Exhibit C to the Verdict on Submission of Stipulated Facts, involved a 1989 conviction for violation of a protection order pursuant to Bremerton Municipal Code

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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.

9A.32.080. CP 70-72. The offense date for this conviction was December 5, 1987. CP 70-72.

The second conviction, as demonstrated by Exhibit D to the Verdict on Submission of Stipulated Facts, involved a 1988 conviction for violation of a protection order pursuant to Bremerton Municipal Code 9A.32.080. CP 74-77. The offense date for this conviction was August 3, 1988. CP 74-77.

The third conviction, as demonstrated by Exhibit E to the Verdict on Submission of Stipulated Facts, involved a December, 1989 conviction for violation of a protection order pursuant to Bremerton Municipal Code 9A.32.080. CP 79-81. The offense date for this conviction was August 8, 1988. CP 79-81. In short, all of three violations occurred in 1987 or 1988, and the convictions were entered in 1988 or 1989.

2. ***At the time of the Defendant's prior convictions, RCW 26.50 only criminalized violation of orders issued under 26.50, and since the Defendant's prior convictions were under Bremerton Municipal Code 9A.32.080 which incorporated RCW 26.50, the defendant's prior convictions were, by necessity, based upon violations of orders issued under RCW 26.50.***

As outlined in the State's brief below, on October 15, 1986 Ordinance 4078 was passed and this ordinance, codified in section 9A.32.080 of the Bremerton Municipal Code, adopted RCW 26.50 by reference.<sup>2</sup> At

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<sup>2</sup> The State has attached a copy of Section 71 of Ordinance 4078, pursuant to RAP 10.3(8) and 10.4(c). See Appendix A. This section clearly states that, "RCW Chapter 26.50 is

that time, the only portion of chapter 26.50 which provided for a criminal penalty was RCW 26.50.110(1), which provided as follows:

Whenever an order for protection is granted under this chapter 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 is a misdemeanor.

RCW 26.50.110(1) (1986)(enacted by laws 1984, ch. 263, § 12, effective Sept 1, 1984).

It must be noted that, as it read at the time, RCW 26.50 did not criminalize violations of orders issued under any other chapters of the RCW.<sup>3</sup>

In fact, RCW 26.50 did not criminalize violations of orders issued under any other chapters until 2001, when the statute was amended to include violations of orders issued under chapter 10.99, 26.09, 26.10, 26.26 or 74.34. See RCW

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hereby adopted by reference.” When the ordinance was codified as BMC 9A.32.080, however, the code section contained a scrivener’s error and stated that RCW “26.150” was adopted by reference. Appendix B. There was (and is), however, no such thing as RCW chapter “26.150.” Thus the scrivener’s error was obvious and the code section as written was absurd and meaningless. In such cases, a court should supply the missing language in order to effectuate the purpose of the legislation. For instance, when a statutory omission creates a contradiction in the statute that renders the statute absurd and undermines its sole purpose, the courts have supplied the missing language in order to effectuate the purpose of the legislation. See, *State v. Taylor*, 97 Wn.2d 724, 729-30, 649 P.2d 633 (1982); *State v. King*, 111 Wn App. 430, 436, 45 P.3d 221 (2002) (Holding that, “In this case where the legislative intent is clear and there is no ambiguity, it is imperative to supply the correct numbering in order to correct the obvious error and make the statutes rational). See also *State v. Edwards*, 104 Wn.2d 63, 68, 701 P.2d 508 (1985); *State v. S.M.H.*, 76 Wn. App. 550, 557, 887 P.2d 903 (1995); *State v. Brasel*, 28 Wn. App. 303, 623 P.2d 696 (1981).

In the present case, there can be no question about the purpose of the legislation because the ordinance contains the correct citation (26.50) and the code section obviously inserted an extra “1” which rendered the code section meaningless.

<sup>3</sup> See Appendix C.

26.50.110(1) (2001) (amended by Laws 2000, ch. 119, § 24).<sup>3</sup> The Defendant's three prior convictions in the present case occurred in 1988 and 1989, long before the 2001 amendments to RCW 26.50.110.

In short, at the time of the Defendant's prior convictions in the present case, the only types of orders for which violations were punishable under RCW 26.50.110 were orders issued under chapter 26.50. Thus, as Bremerton Municipal Code section 9A.32.080 specifically adopted RCW 26.50 (and not any other chapters), this court can reach but one conclusion: that the Defendant's three convictions in 1988 and 1989 for violating Bremerton Municipal Code section 9A.32.080 were, by necessity, based upon violations of orders issued under RCW 26.50.<sup>4</sup> As the only types of orders that were

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<sup>3</sup> Later, in 2006, violations of orders issued under chapter 7.90 were added. See RCW 26.50.110(1) (2006)(amended by Laws 2006, ch. 138, § 25).

<sup>4</sup> Furthermore, at the time the Bremerton Municipal Code adopted RCW 26.50, and throughout the period of time in which the Defendant's three prior convictions were committed and adjudicated, violations of orders issued under RCW 10.99 were criminalized by a completely different statute: namely, RCW 10.99.040. See RCW 10.99.040(4)(1989)(providing that violations of orders issued under RCW 10.99 was a misdemeanor). Similarly, violation of orders issued under chapter 26.09 were punishable under RCW 26.09.300. See RCW 26.09.300(1)(1989)(providing that violations of orders issued under RCW 26.09 was a misdemeanor). Violation of orders issued under chapter 26.10 were punishable under RCW 26.10.220. See RCW 26.10.220(1)(1989)(providing that violations of orders issued under RCW 26.10 was a misdemeanor).

The statute authorizing orders under RCW 26.26 did not even come into effect until 1995, and when the law initially came into effect, violations of orders issued under 26.26 were only punishable pursuant to RCW 26.26.130(8)-(10). See RCW 26.26.130(8)-(10)(1995)(Laws 1995, ch. 246, § 31, adding subsecs. (8) to (10))(providing for the issuance of restraining orders and stating that violations of orders issued under RCW 26.26 was a misdemeanor). It also appears that although the statutes authorizing restraining orders under chapter 74.34.110 have been around since 1986, violations of such orders were not criminalized until 2001 when RCW 26.50 was amended to include orders issued under 74.34. See RCW 26.50.110(1) (2001)(amended by Laws 2000, ch. 119, § 24). In addition, the

covered by RCW 26.50.110 in the late 1980's were orders issued under that same chapter, the evidence was sufficient to show that the Defendant's three prior convictions were qualifying convictions pursuant to RCW 26.50.110.

A similar type of analysis was used by the court in *State v. Gray*, 134 Wn. App. 547, 138 P.3d 1123 (2006). In *Gray*, a defendant was convicted of violation of a no contact order after he had two previous convictions for violating no contact orders. *Gray*, 134 Wn. App. at 549. One of the prior convictions was from a previous Seattle Municipal Court conviction. *Gray*, 134 Wn. App. at 551. At trial, the Defendant twice moved to dismiss, arguing that the State had failed to prove that the Seattle Municipal Court violation was based on a NCO issued under one of the requisite statutes. *Gray*, 134 Wn. App. at 551. The trial court denied the motion each time. *Gray*, 134 Wn. App. at 551. In discussing whether there was a basis for the trial court to conclude that the prior conviction was based on a NCO issued under a listed statute, the court noted that the actual NCO that the prior conviction was based on only listed a citation to the Seattle Municipal Code as the basis for the order. *Gray*, 134 Wn. App. at 558. The order, however,

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statutes concerning foreign protections was not enacted until 1999, and violations of foreign protection orders was initially governed by RCW 26.52.070 until the legislature later included foreign protection order violations under RCW 26.50 in 2001. See RCW 26.52.070(2000)(Laws 1999, ch. 184, § 9 (providing that a violation of a foreign protection orders was a misdemeanor); RCW 26.50.110(1) (2001)(amended by Laws 2000, ch. 119, § 24). Finally, sexual assault protection orders issued under RCW 7.90 did not even exist until 2006. See RCW 7.90.090(Laws 2006 c 138 § 10, eff. June 7, 2006.).

also stated that a violation of the order is a “criminal offense under Seattle Municipal Code 12A.06.180 and chapter 26.50 RCW.” *Gray*, 134 Wn. App. at 558. The State, therefore, argued that since a criminal offense under RCW 26.50 necessarily requires the violation of an NCO issued under one of the state statutes listed in RCW 26.50.110(5), the Seattle NCO must have been issued under a listed statute. *Gray*, 134 Wn. App. at 558-59. The defendant argued that simply because the NCO warned that a violation was an offense under RCW 26.50, this did not mean that the NCO was issued under RCW 26.50. *Gray*, 134 Wn. App. at 559.

The court agreed with the State and noted that RCW 26.50.110(1) provided that a violation of an NCO is a criminal offense “whenever an order is granted under this chapter [26.50] chapter 10.99, 26.09, 26.10, 26.26 or 74.34, or there is a valid foreign protection order as defined in RCW 26.52.020.” *Gray*, 134 Wn. App. at 559. The court then stated that,

The plain language of the statute demonstrates that a violation of an NCO that is a criminal offense under chapter 26.50 RCW necessarily means that NCO was issued under the authority of one of the listed state statutes, even if the NCO itself lists only the local statutory authority.

*Gray*, 134 Wn. App. at 559.

The basic reasoning behind the court’s statement is simple. The plain language of the statute provides that to commit a criminal offense under

chapter 26.50, one must, by definition have violated an order issued under one of the enumerated statutes. Thus, if a person is convicted under 26.50, that person by necessity must have violated an order issued under on of the enumerated statutes. In short, a defendant's conviction for a crime that outlaws a specific act shows by necessity that the Defendant committed that act.

In the present case, the analysis is decidedly less complicated than the analysis in *Gray*, since the only types of orders covered by RCW 26.50 at the time of the Defendant's convictions (and at the time the Bremerton Municipal Code adopted the language of the statute), were orders that had been issued pursuant to RCW chapter 26.50. The plain language of the statute, therefore, demonstrated that a violation that was a criminal offense under chapter 26.50 (and Bremerton Municipal Code 9A.32.080) necessarily meant that there had to have been a violation of an order issued under chapter 26.50; no other types of orders were covered by RCW 26.50 or BMC 9A.32.080 at that time. Proof that the Defendant had been convicted of the code section, therefore, by necessity, proved that the Defendant violated an order issued under RCW 26.50.<sup>5</sup>

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<sup>5</sup> In addition, it is well settled that collateral attacks on the constitutional validity of prior convictions is not appropriate in later trials. *See, State v. Ammons*, 105 Wn.2d 175, 189, 713

In conclusion, the record below showed that the Defendant had been convicted in Bremerton Municipal Court of violating Bremerton Municipal Code 9A.32.080. This code section adopted RCW 26.50, which (prior to 2001) provided for criminal charges if and only if a defendant violated an order issued under that chapter. From these facts, this court can reach but one conclusion: that the Defendant had three prior convictions for violating an order issued under RCW 26.50. The evidence, therefore, was sufficient to show that the Defendant's prior convictions were qualifying convictions under the current version of RCW 26.50.110, and the Defendant's argument to the contrary must fail.

**B. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT OR THAT THERE WAS PREJUDICE.**

The Defendant next claims that he received ineffective assistance of counsel because his trial counsel did not raise additional objections to the admission of the documents relating to his prior offenses. App.'s Br. at 19. Specifically, the Defendant argues that his counsel should have argued that the documents were inadmissible because the State failed to establish that the Defendant was the same person named in those documents. App.'s Br. at 21.

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P.2d 719, *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986).

This claim is without merit because: (1) given the Defendant's stipulation below that the documents were admissible but for the objection he raised in the *Knapstad* motion, the State had no reason to develop the record regarding identity, and, (2) the documents did establish that the Defendant was the same person named in the documents, thus the Defendant cannot show that the proposed objection would have been granted or that he was prejudiced by counsel's failure to raise the proposed objection.

To establish that counsel was ineffective, the Defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing court will find counsel to be ineffective if his or her representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To prevail on a claim of ineffective assistance based on the failure of trial counsel to object to the admission of evidence, a defendant must establish: (1) that the failure to object fell below prevailing professional norms; (2) that the proposed objection likely would have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

In the present case, the Defendant acknowledges that he stipulated to the fact that the State would be admitting the documents outlining his prior convictions while still preserving his previous objection that the prior convictions were not relevant (based upon his claim that the evidence was insufficient to show that the convictions were qualifying convictions under RCW 26.50.110). App.'s Br. at 21, CP 59.

The Defendant, however, now claims that his counsel was ineffective for failing to object to the admission of the documents attached to the

stipulation based upon a claim that the State failed to establish that he was the same Mark Allen Smith named in the prior judgments. App.'s Br. at 21.

The Defendant's argument is tantamount to a claim that the a trial counsel is ineffective if he or she fails to object to the admissibility of certain evidence after the Defendant has stipulated to the admissibility of such evidence.<sup>6</sup> The stipulation in the present case stated that the trial court could consider the factual stipulation and the attached exhibits with one caveat: that the Defendant was preserving his right to again object based on the legal argument raised in his *Knapstad* motion. CP 57-58, RP (4/10) 7. Thus, once the stipulation was entered, the State had no reasons to further develop the record regarding identification in order to ensure the documents were admitted. The Defendant, therefore, cannot now claim that the record was deficient when any deficiency was caused by his stipulation.<sup>7</sup>

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<sup>6</sup> Such an argument would be similar to a claim that a defense counsel was ineffective for signing a 3.5 stipulation when there was no evidence in the record that the Defendant had been advised of his Miranda warnings. Such an argument, however, is without merit since the reason the record in such a case would not contain evidence of the advisement of rights is because there would be no need for such testimony given the 3.5 stipulation.

<sup>7</sup> Similar arguments have been previously rejected by Washington courts. For instance, it is well settled that a defendant, by entering into a stipulation, waives his right to assert the government's duty to present evidence to the jury on the stipulated element. *State v. Wolf*, 134 Wn. App. 196, 199, 139 P.3d 414 (2006)(holding that defendant waived the right to put the State to its burden of proof on the element of having previously been convicted of a serious offense by his written stipulation).

In short, once the stipulation was entered outlining that the Defendant agreed to the admission of the documents without further objection, the State had no reason to further develop the record regarding admissibility and the Defendant cannot now argue ineffective assistance based on a claim that the record was insufficient to admit the challenged evidence if not for the stipulation. In addition, raising such an objection would have violated the terms of the stipulation. For all of these reasons, the Defendant's claim of ineffective assistance must fail.

In addition, the Defendant has never claimed, even on appeal, that he was not the person named in the prior convictions, and the record below, even without the stipulation, demonstrates that the Defendant was in fact the same person named in the prior convictions. First, as outlined in the charging document, the Defendant's name is Mark Allen Smith and his date of birth is 10/03/1959. CP 1. The 2007 arrest report that was admitted without objection lists this same name and date of birth, and also states that the Defendant is a white male, 6'1" tall, weighing 190 pounds, with red hair. CP 63.

The documents admitted concerning each of the three prior convictions also show that the Defendant involved in those convictions was Mark Allen Smith with the exact same date of birth, the same height, the same weight (although one of the documents list his weight as 192 pounds as

opposed to 190 pounds), and the same red hair. The evidence, therefore, even without the stipulation, demonstrates that the same Mark Allen Smith named in the current information was the same person named in the prior convictions.<sup>8</sup> The State, therefore, produced sufficient independent evidence to prove the Defendant was the same person named in the prior convictions. *See State v. Brezillac*, 19 Wn. App. 11, 14-15, 573 P.2d 1343 (1978).

Thus, even if the Defendant's trial counsel had objected to the admissibility of the documents based on a claim that the documents did not show that the Defendant was the same person named in the documents, the Defendant cannot show that the objection would have been sustained. For the same reasons, the Defendant cannot show that counsel's failure to object prejudiced him.

For all of the above stated reasons, the Defendant's claim of ineffective assistance of counsel must fail.

#### IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

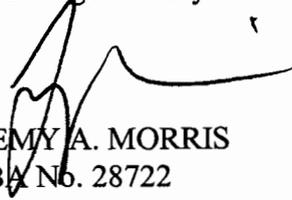
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<sup>8</sup> Moreover, although the trial record does not reveal the physical description of the Defendant as he sat in court, the trial court would have been able to compare the description in the exhibits to his observations of the Defendant.

DATED January 7, 2008.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

DOCUMENT1

# Appendix A

SECTION 70. Domestic violence: State statutes adopted by reference. RCW Chapter 10.99 is hereby adopted by reference.

SECTION 71. Civil Protection Order: State statutes adopted by reference. RCW Chapter 26.50 is hereby adopted by reference.

SECTION 72. Custodial interference. The following statutes of the State of Washington is hereby adopted by reference:

RCW 9A.40.070 Custodial interference in the second degree  
RCW 9A.40.080 Custodial interference--Assessment of costs--  
Defense--Consent defense, restricted

SECTION 73. Definitions. RCW 9A.56.010 is hereby adopted by reference.

SECTION 74. Theft--Defined. RCW 9A.56.020 is hereby adopted by reference.

SECTION 75. Theft in the third degree. RCW 9A.56.050 is hereby adopted by reference.

SECTION 76. Unlawful issuance of checks or drafts. RCW 9A.56.060 is hereby adopted by reference excluding section four (4) thereof.

SECTION 77. Shoplifting.

(a) A person is guilty of shoplifting if he wilfully takes possession of goods, wares, or merchandise of the value of \$250.00 or less offered for sale by any wholesale or retail store or other merchantile establishment without the consent of the seller, with the intention of converting such goods, wares or merchandise to his own use without having paid the purchase price thereof.

(b) A duly appointed city, county, or state law enforcement officer may, upon a charge being made and without a warrant, arrest any person whom he has cause to believe has committed or attempted to commit the crime of shoplifting.

(c) Shoplifting is a misdemeanor and shall be punished by a maximum fine not to exceed five hundred dollars. The court shall impose a mandatory minimum fine of one hundred dollars upon a first conviction, and such fine shall not be suspended or deferred. Upon a subsequent conviction, the court shall impose a mandatory minimum fine of three hundred dollars and such fine shall not be suspended or deferred.

SECTION 78. Shopping cart theft. RCW 9A.56.270 is hereby adopted by reference.

SECTION 79. Theft of cable television services. RCW 9A.56.220 is hereby adopted by reference.

SECTION 80. Possessing stolen property--Definitions, credit cards, presumption. RCW 9A.56.140 is hereby adopted by reference.

SECTION 81. Possessing stolen property in the third degree. RCW 9A.56.170 is hereby adopted by reference.

# Appendix B

(Ord. 4078 §69, 1986).

9A.32.070 DOMESTIC VIOLENCE - STATE STATUTES ADOPTED BY REFERENCE. RCW Chapter 10.99 is adopted by reference. (Ord. 4078 §70, 1986).

9A.32.080 CIVIL PROTECTION ORDER - STATE STATUTES ADOPTED BY REFERENCE. RCW Chapter 26.150 is adopted by reference. (Ord. 4078 §71, 1986).

9A.32.090 CUSTODIAL INTERFERENCE. The following statutes of the State are adopted by reference:

RCW 9A.40.070 Custodial interference in the second degree.

RCW 9A.40.080 Custodian interference - Assessment of costs  
- Defense - Consent defense, restricted.

(Ord. 4078 §72, 1986).

## CHAPTER 9A.36

### THEFT AND ROBBERY

#### Sections:

9A.36.010 Definitions.

9A.36.020 Theft - Defined.

9A.36.030 Theft in the third degree.

9A.36.040 Unlawful issuance of checks or drafts.

9A.36.050 Shoplifting.

9A.36.060 Shopping cart theft.

9A.36.070 Theft of cable television services.

9A.36.080 Possessing stolen property - Definitions,  
credit cards, presumption.

9A.36.090 Possessing stolen property in the third  
degree.

9A.36.100 Restoration of stolen property - Duty of  
Officers.

9A.36.110 Malicious Mischief in the third degree.

9A.36.120 Malicious Mischief and physical damage -  
Defined.

9A.36.130 Trespass - Definitions.

9A.36.140 Criminal trespass in the first degree.

# Appendix C

WA ST 26.50.110

Page 2

West's RCWA 26.50.110

1986 Main Volume Historical and Statutory Notes

Main Volume Text

26.50.110. Violation of order--Penalties

(1) Whenever an order for protection is granted under this chapter 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 is a misdemeanor.

(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 that restrains the person or excludes the person from a residence, if the person restrained knows of the order.

(3) A violation of an order for protection shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order for protection granted under this chapter, 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.

Added by Laws 1984, ch. 263, § 12, eff. Sept. 1, 1984.

LIBRARY REFERENCES

1986 Main Volume Library References

- Contempt ↪70 et seq.
- Criminal Law ↪13(2).
- Injunction ↪216 et seq.
- C.J.S. Contempt § 91 et seq.
- C.J.S. Criminal Law § 23.
- C.J.S. Injunctions § 285.

NOTES OF DECISIONS

Validity 1 ..... enter p5

1. Validity

This section making violation of an order for protection punishable as a misdemeanor or as contempt did not violate equal protection. State v. Horton (Wash.App.1989) 54 Wash.App. 837, 776 P.2d 703.

West's R C W A 26.50.110

WA ST 26.50.110

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