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ASSIGNMENTS OF ERROR

1. Mr. Hall's burglary conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. Mr. Hall's conviction for Violation of a Protection Order infringed on his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
3. The trial judge erred in convicting Mr. Hall of Residential Burglary in the absence of a finding that he intended to commit a crime within the residence.
4. Mr. Hall was denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments by his attorney's failure to object to the admission of his statements under the *corpus delicti* rule.
5. The trial court erred in entering Finding of Fact Nos. 1.3, 1.5, 1.6, 1.7.
6. The trial court erred in entering Conclusion of Law Nos. 2.3, 2.4.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Burglary requires proof of an unlawful entry and intent to commit a crime. The state failed to prove that Mr. Hall entered unlawfully or that he intended to commit a crime. Did the conviction for Residential Burglary violate Mr. Hall's Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. Violation of a Protection Order requires proof that the accused person knew of "the order" alleged to have been violated. The state failed to prove that Mr. Hall knew of the May 25th Revised Temporary Restraining Order he was alleged to have violated. Did the conviction for Violation of a Protection Order infringe Mr. Hall's Fourteenth Amendment right to due process because it was based on insufficient evidence?

3. An accused person has a constitutional right to the effective assistance of counsel. Defense counsel provided ineffective assistance when he failed to object to the admission of Mr. Hall's statements under the *corpus delicti* rule. Was Mr. Hall denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Bow Star Hall and Sandra Hanson had a child together. RP (6/9/08) 39. Ms. Hanson obtained a Temporary Restraining Order from Commissioner Mitchell on May 4, 2007. Supp. CP, Exhibit 6, 7. The order restrained Mr. Hall from disturbing Ms. Hanson's peace, going to her home, and other actions. It further provided "Violation of a Restraining Order in paragraph 3.1 with actual notice of its terms is a criminal offense under Chapter 26.50 RCW and will subject the violator to arrest. RCW 26.09.060." Supp. CP, Exhibit 7. Mr. Hall was in court when it was signed. Supp. CP Exhibit 6, 7. The terms of that order indicated that it expired on May 4, 2007. Supp. CP, Exhibit 7 (page 3).

The court entered a Revised Temporary Restraining Order on May 25, 2007, with a 2008 expiration date. Supp. CP, Exhibit 4, 5. Mr. Hall was not present when the Revised Temporary Restraining Order was entered, and was not served with a copy of it.¹ RP (6/9/08) 56, 59.

In the early morning of April 18, 2008, Mr. Hall went to Sandra Hanson's house (where he used to live with her) and demanded to see his son. RP (6/9/08) 5-6, 35. Ms. Hanson was home, as were her two

¹ A notice of hearing for entry of the Revised Temporary Restraining Order was apparently mailed to Mr. Hall at the wrong address. RP (6/9/08) 84.

roommates at the time: her sister, Sharon Hanson, and Aimee Devous. RP (6/9/08) 4, Ms. Devous described Mr. Hall as “not right,” “scary,” “irrational,” “hallucinating,” “bizarre,” “schizophrenic,” “not on same earth as we were,” and “delusional”. RP (6/9/08) 8-9, 11, 24-25, 26, 33. She said he was crying and telling Sandra they needed to go to church, that the devil would get them, and he occasionally called Sandra and Sharon by different names. RP (6/9/08) 10, 11-12, 26. According to Sandra Hanson, Mr. Hall was talking about a devil monster and monster worms, said their son had been taken over by a devil, and was generally not rational, talking in gibberish. RP (6/9/08) 40, 42-44, 53.

After a few hours, consisting mainly of the women sitting at the table listening to Mr. Hall, Sheriff’s Deputy Godbey arrived, responding to a call, and tried to get Mr. Hall to leave. RP (6/9/08) 14, 20, 29. Mr. Hall made statements about fish in the sea, chopping off heads, and told Godbey that he (Mr. Hall) was the officer’s boss. RP (6/9/08) 12, 15. Godbey explained that Mr. Hall seemed to deteriorate fast into nonsense about fish swimming, and at times was completely incomprehensible. RP (6/9/08) 58, 69. Mr. Hall successfully resisted the officer’s attempts to arrest him and later, several state troopers came, tazed Mr. Hall and took him from the house. RP (6/9/08) 15-19, 46-49.

The state charged Mr. Hall with Residential Burglary, Violation of a Protection Order, Resisting Arrest and Obstructing an Officer. To prove that Mr. Hall knew of the restraining order, the prosecutor introduced statements he had made to Godbey and to Ms. Hanson's mother.² Godbey told the court that when he asked Mr. Hall about the order, Mr. Hall said it had been "squashed," and referred to Judge Buzzard. RP (6/9/08) 58, 60. Ms. Devous testified that Godbey asked Mr. Hall if he was supposed to be there, and Mr. Hall replied that the court had recently dropped the charge, noting that the officer could ask Judge Buzzard about it. RP (6/9/08) 21, 34. Sandra Hanson testified to the same interaction. RP (6/9/08) 46. Ms. Hanson's mother testified that Mr. Hall told her (a month prior to the incident) that the protection order would expire May 8, that he hoped his most recent charge would "slide," and that he was trying to set up a visit with his son. RP (6/9/08) 75-76. Defense counsel did not raise a *corpus delicti* objection to any of this evidence. *See* RP (6/9/08) *generally*.

The court found Mr. Hall guilty of burglary, violation of the order, and resisting arrest, and found him not guilty of the obstructing charge. RP (6/9/08) 90-91. The court entered findings of fact and conclusions of

² Although Mr. Hall had not been served prior to the incident, the state did introduce proof that he had been served after being jailed on these charges. Supp. CP, Exhibit 1.

law, but did not find that Mr. Hall intended to commit a crime against a person or property inside the residence. CP 4-6. Bow Star Hall was sentenced and timely appealed. CP 3, 7-16.

ARGUMENT

I. MR. HALL'S CONVICTIONS ON COUNTS I AND II VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE EACH ESSENTIAL ELEMENT OF THE CHARGED CRIMES.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The sufficiency of the evidence may be raised for the first time on appeal. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Colquitt*, at 796. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

At the conclusion of a bench trial, the trial court is required to enter findings of fact and conclusions of law sufficient to sustain the conviction.

CrR 6.1(d). In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn.App. 259, 265, 39 P.3d 1010 (2002).

- A. Mr. Hall's conviction of Count II (Violation of a Protection Order) must be reversed process because the evidence was insufficient to prove that Mr. Hall knew of the Revised Temporary Restraining Order entered on May 25, 2007.

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335, 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269, 274, 110 P.3d 1179 (2005). Questions of statutory construction are addressed *de novo*. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); *State Owned Forests v. Sutherland*, 124 Wn.App. 400, 409, 101 P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789, (2004). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

RCW 26.50.110, which criminalizes violation of a restraining order, provides (in relevant part) as follows: "Whenever an order is granted under this chapter... and the respondent or person to be restrained knows of the order, a violation of any [restraint provision] of the order is a

gross misdemeanor...” RCW 26.50.110. Under the plain language of the statute, conviction requires proof that the person restrained knows of “the order;” that is, the specific order in effect at the time of the alleged violation, and which the person is accused of violating.³

The state failed to prove that Mr. Hall knew of “the order” in effect on the violation date. In this case, a Revised Temporary Restraining Order was entered on May 25, 2007. Mr. Hall had not been properly served with notice of the hearing at which the order was entered, and he was not present in court when the Revised Temporary Restraining Order was entered. The May 25th order was not served on Mr. Hall, and the state presented no evidence that he was somehow otherwise aware of this particular order. (The Revised Temporary Restraining Order superseded the original Temporary Restraining Order, entered on May 4, 2007. The May 4th order was therefore not in effect on the offense date.)

Because the state failed to prove that Mr. Hall knew of “the order” in effect on the violation date, whose terms he was accused of violating, the evidence was insufficient to convict him under RCW 26.50.110. It is irrelevant that Mr. Hall allegedly knew of the superseded May 4th order,

³ Even if this language were determined to be capable of more than one interpretation, the rule of lenity requires that it be interpreted in favor of the accused. *State v. Gonzales Flores*, 164 Wn.2d 1, 16, 186 P.3d 1038 (2008).

since that order was not in effect on the violation date. Accordingly, the conviction must be reversed and the case dismissed with prejudice.

Smalis, supra.

B. Mr. Hall's burglary conviction must be reversed because the evidence was insufficient to prove an unlawful entry and intent to commit a crime, and the trial judge did not find that he intended to commit a crime against a person or property within the residence.

Under RCW 9A.52.025(1), "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." The elements thus include, *inter alia*, (1) unlawful entry (or remaining), and (2) intent to commit a crime. The state's proof was deficient on both of these elements.

1. The evidence was insufficient to prove an unlawful entry, because the state failed to establish Mr. Hall knew of the May 25th restraining order.

To prove unlawful entry for purposes of Count I, the state relied on Mr. Hall's entry in violation of the restraining order. The trial court found Mr. Hall's entry to be unlawful based on his violation of the restraining order. Findings Nos. 1.5-1.7, CP 5. Since the state failed to prove that Mr. Hall knew of "the order"—the May 15th restraining order in effect at the time of his entry—the trial court's finding of an unlawful entry was based on insufficient evidence. Furthermore, Mr. Hall referred to the

residence as his house, Ms. Hanson acknowledged that he had lived there previously, and the trial judge did not note any other basis to find the entry unlawful. CP 4-5. Accordingly, the burglary conviction must be reversed and the case dismissed with prejudice. *Smalis, supra.*

2. The state failed to prove that Mr. Hall intended to commit a crime against persons or property within the residence, and the trial judge did not find such intent.

The evidence here was insufficient to prove that Mr. Hall intended to commit a crime against persons or property within the residence. First, the testimony made clear (and the court noted) that Mr. Hall was “out of his mind” and/or “not in his right mind” at the time of the offense, and thus may have lacked any criminal intent. Second, as noted above, the state failed to prove that he knew of the May 25th order, and thus could not have intended to violate that order.

In fact, the trial judge did not find that Mr. Hall intended to commit a crime against a person or property inside the residence. CP 4-6.

In the absence of such a finding, the court presumes the state failed to meet its burden. *Armenta, supra; Byrd, supra.*

The court’s findings are inadequate to sustain Mr. Hall’s conviction for Residential Burglary. Accordingly, the conviction must be reversed and the burglary charge must be dismissed with prejudice.

Smalis.

II. MR. HALL WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BECAUSE HIS ATTORNEY FAILED TO OBJECT TO THE ADMISSION OF STATEMENTS UNDER THE *CORPUS DELICTI* RULE.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that,

but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

The *corpus delicti*, or body of the crime, must be proved by evidence sufficient to establish a criminal act. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). Before an accused person’s statement may be admitted into evidence, the *corpus delicti* of the charged crime must be established by independent evidence. *Brockob*, at 328. The independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *Brockob*, at 329. If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Brockob*, at 329-330.

Where the *corpus delicti* is not established by independent evidence, failure to object to admission of an accused person’s statements constitutes ineffective assistance. *State v. C.D.W.*, 76 Wn. App. 761, 764-765, 887 P.2d 911 (1995). Under such circumstances, “the failure to raise the issue of the *corpus delicti* rule... cannot be characterized as a trial strategy;” instead, it is “simply an inexcusable omission on the part of defense counsel.” *C.D.W.*, at 764. Furthermore, such deficient

performance necessarily prejudices the defendant: in the absence of sufficient independent evidence, the defendant's statements are excluded and the defendant is acquitted. *C.D.W.*, at 764-765.

A person is guilty of violating a protection order under RCW 26.50.110 whenever she or he knows of the order and violates any restraint provision "(i) prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party... (ii) excluding the person from a residence, workplace, school, or day care... [or] (iii) prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location." RCW 26.50.110.

The *corpus delicti* of the crime requires proof of the defendant's knowledge of the order. *State v. Phillips*, 94 Wn. App. 829, 833, 974 P.2d 1245 (1999). Absent independent proof of the defendant's knowledge, any statements proving knowledge must be excluded. *Phillips*, at 833.

Here, the state failed to offer independent proof that Mr. Hall had actual knowledge of the restraining order. Defense counsel should have objected to admission of the statements, and the failure to do so was deficient performance. *Phillips*, *supra*; *C.D.W.*, *supra*. Had counsel objected under the *corpus delicti* rule, the state would have been unable to establish Mr. Hall's knowledge, and he would have been acquitted of

Count II. Accordingly, his conviction on Count II must be reversed and the case remanded for a new trial.

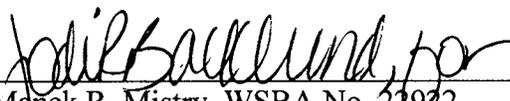
Count I must also be reversed. Had counsel objected under the *corpus delicti* rule, the state would have been unable to prove unlawful entry or intent to commit a crime within the residence. *See, e.g., State v. Stinton*, 121 Wn. App. 569, 89 P.3d 717 (2004) (violation of restraining order can be the basis for the unlawful entry and for the intent to commit a crime).

CONCLUSION

For the foregoing reasons, Counts I and II must be reversed and dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on December 11, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Bow Star Hall
129 Beck Rd.
Onalaska, WA 98570

and to:

Lewis County Prosecuting Attorney
MS:pro01
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Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 11, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 11, 2008.

[Signature]

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