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DIVISION II
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STATE OF WASHINGTON
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No. 38437-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Jacob Sherman,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00295-3

The Honorable Judges F. Mark McCaulay, David L. Edwards,
and Gordon L. Godfrey

Appellant's Opening Brief - CORRECTED

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting Mr. Sherman's unwarned custodial statements.
2. The trial court erred by concluding that Mr. Sherman was not in custody for *Miranda* purposes.
3. The trial court abused its discretion by refusing to bifurcate the trial.
4. The trial court's refusal to bifurcate the trial was based on a misunderstanding of the law.
5. Mr. Sherman's felony conviction for violation of a no contact order infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
6. The state failed to prove that Mr. Sherman was the restrained party in a no contact order.
7. The state failed to prove that Mr. Sherman had two qualifying prior convictions for violating a no contact order.
8. The trial court erred by sentencing Mr. Sherman with an offender score of five.
9. The 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person's custodial statements may not be admitted into evidence during the state's case-in-chief absent *Miranda* warnings and a valid waiver. The trial court admitted Mr. Sherman's unwarned custodial statements. Did the admission of Mr. Sherman's unwarned custodial statements violate his Fifth and Fourteenth Amendment privilege against self-incrimination?

2. A person is in custody for *Miranda* purposes if a reasonable person would not feel at liberty to terminate the interrogation and leave. Here, Mr. Sherman was commanded to stop, detained for 4-5 minutes while another person was interviewed, confronted with the other person's accusation, and asked what happened. Was Mr. Sherman in custody for *Miranda* purposes because a reasonable person would not have felt free to terminate the interrogation and leave?

3. A trial court has discretion to bifurcate a trial when appropriate. Here, the trial judge believed he lacked discretion to bifurcate the proceedings. Did the trial court abuse his discretion by denying the request for bifurcation based on an erroneous understanding of the law?

4. Due process requires the state to prove every element of a criminal offense beyond a reasonable doubt. Mr. Sherman was convicted despite the state's failure to prove two elements of felony violation of a no contact order. Must Mr. Sherman's conviction be reversed and the case dismissed with prejudice?

5. Conviction for Violation of a No Contact Order requires proof that the accused person was restrained by a qualifying no contact order. The state did not present independent evidence (beyond identity of names) establishing beyond a reasonable doubt that Mr. Sherman was the person restrained by the order introduced into evidence at trial. Did Mr. Sherman's conviction for Violation of a No Contact Order violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

6. Felony violation of a no contact order requires proof that the accused person has two prior qualifying convictions. The state introduced only one certified copy of a judgment and sentence showing a prior qualifying conviction, and the state's other evidence was insufficient to establish a second qualifying conviction. Did Mr. Sherman's conviction for felony violation of a no contact order violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

7. To establish that a prior conviction relates to the person on trial, the prosecution must produce independent evidence beyond mere identity of names linking the accused person to the prior convictions. The state did not introduce independent evidence (beyond identity of names) proving that Mr. Sherman was the same person named in the two alleged prior convictions. Did Mr. Sherman's conviction for felony violation of a no contact order violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

8. Under the Fifth and Fourteenth Amendments, an offender has a constitutional right to remain silent pending sentencing, and the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA permit the court to use a prosecutor's bare assertions as prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On May 27, 2008, Jacob Sherman was walking outside an apartment building when he was ordered to stop by Officer Salstrom. RP (8/25/08) 24, 26. Mr. Sherman stopped and was ordered to approach the officer. He complied. RP (8/25/08) 26. The officer was responding to a report of possible domestic violence in an apartment above where Mr. Sherman was. RP (8/25/08) 23. The officer questioned Mr. Sherman, who identified himself and said that he was going to his car. RP (8/25/08) 24.

While Officer Salstrom detained Mr. Sherman, another officer went up to the apartment and spoke with McKayla Smith. RP (8/25/08) 24-25, 32. After the officers conferred, Officer Salstrom asked Mr. Sherman if he had bitten Smith. RP (8/25/08) 24-25. Mr. Sherman said that he did bite her during sex (after she'd bitten him). RP (8/25/08) 25. Officer Salstrom arrested Mr. Sherman and read him his constitutional rights. RP (8/25/08) 25.

Smith told the officers that there had been a no contact order restraining Mr. Sherman from contacting her, but that she believed it had only been valid for three months and had expired. RP (9/18/08) 30-31.

Mr. Sherman was charged with felony Violation of a No Contact Order. CP 21. Initially, the state alleged that he assaulted Smith in violation of a no contact order. Information, Supp. CP. The state then amended the Information to charge two counts, based on the same incident, alleging that he assaulted Smith in violation of the no contact order (Count I), and that he violated the order after having been twice convicted of a similar offense (Count II). Amended Information, Supp. CP. Mr. Sherman moved to sever the two counts. Defendant's Trial Memorandum, Motion in Limine, Motion to Sever Counts, Supp. CP. The state then moved to amend the Information yet again to charge a single violation by alternate means. CP 21.

Mr. Sherman objected to the Second Amended Information, and asked the court either to bifurcate the trial or to order the state to choose one alternative. RP (9/17/08) 43-52. Counsel argued that proof that Mr. Sherman had twice been convicted of violating restraining orders (under the second alternative means) would prejudice the jury beyond repair. RP (9/17/08) 45-51. The court denied both of Mr. Sherman's requests. The court held that Mr. Sherman would not be prejudiced, and that bifurcation would violate double jeopardy. RP (9/17/08) 47-51.

Mr. Sherman sought to suppress his pre-*Miranda* statements, arguing that he was subjected to custodial interrogation without *Miranda*

warnings, and that he did not waive his right to remain silent and his right to counsel. RP (8/25/08) 22-41. The court denied the motion. Findings of Fact and Conclusions of Law, CP 23. The court concluded that the officers lacked probable cause to detain Mr. Sherman, but that their actions were justified by a reasonable suspicion of criminal activity. CP 23. According to the court, this meant that Mr. Sherman was not “in custody.” CP 23.

At trial, the state presented a document called “Domestic Violence No-Contact Order.” Exhibit 1, Supp. CP. The document restrained a person named Jacob Nathaniel Sherman, DOB 04/27/1986. Exhibit 1, Supp. CP. The state did not present any evidence that the person on trial was the same person named in the order. RP (9/18/08) 12-108; Exhibit 1, Supp. CP.

To prove that Mr. Sherman had two prior convictions for violating restraining orders, the state sought to admit one Judgment and Sentence, and one docket report. Exhibits 2 and 3, Supp. CP. Mr. Sherman objected to the admission of the docket report, arguing that it was not the best evidence of a prior conviction and that no one from Thurston County (where the report originated) testified. RP (9/17/08) 52-60; RP (9/18/08) 86-98; Second Supplemental Trial Memorandum, Supp. CP. The court

admitted the docket report, allowing a Grays Harbor County clerk to testify about the Thurston county document. RP (9/18/08) 94-98.

The jury found Mr. Sherman guilty of Violation of a No Contact Order. Verdict Form, Supp. CP. The jury also answered “yes” to both questions on a special verdict form:

Was the conduct that constituted a violation of the no contact order an assault?

ANSWER: yes.

Has the defendant twice been previously convicted for violating the provisions of a no contact order?

ANSWER: yes.

Special Verdict Form, Supp. CP.

At sentencing, both the state and Mr. Sherman filed Sentencing Statements. Defendant’s Sentencing Statement, Statement of Prosecuting Attorney, Supp. CP. The prosecuting attorney alleged several prior felonies and also alleged that Mr. Sherman was on community custody status at the time of the offense. Statement of Prosecuting Attorney, p. 4, Supp. CP. Mr. Sherman did not agree or stipulate to these priors or the custody status. RP (10/13/08) 66-75; Defendant’s Sentencing Statement, Supp. CP. The court adopted the prosecutor’s allegations, and sentenced Mr. Sherman with an offender score of five. CP 25.

Mr. Sherman filed this timely appeal. CP 32-33.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. SHERMAN'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY ADMITTING HIS UNWARNED CUSTODIAL STATEMENTS.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment.¹ U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The law presumes that statements made by a suspect while in custody were compelled in violation of the privilege against self-incrimination. *State v. Corn*, 95 Wn. App. 41, 57, 975 P.2d 520 (1999).

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694

¹ Similarly, Article I, Section 9 of the Washington State Constitution, provides that “No person shall be compelled in any case to give evidence against himself...” Wash. Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

(1966)). Failure to provide the required warnings and obtain a waiver requires exclusion of any statements obtained. *Seibert*, at 608. It is “clearly established” that statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a voluntary, knowing, and intelligent waiver of her or his rights. *Hart v. Attorney General of Florida*, 323 F.3d 884, 891-892 (11th Cir. 2003) (citing *Miranda*, at 475).

Custodial interrogation occurs whenever a person in custody is subjected to “either express questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Thus any express questions posed to a person in custody must be preceded by *Miranda* warnings.² *Rhode Island v. Innis*.

Whether or not a person is ‘in custody’ for *Miranda* purposes rests upon “[t]wo discrete inquiries....: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S.

² The sole exception is for routine booking questions asked for record-keeping purposes. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (footnote omitted). The latter determination is a mixed question of law and fact subject to *de novo* review. *Keohane*, at 112; see *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

A reviewing court examines the totality of the circumstances and decides “whether a reasonable person in such circumstances would conclude after brief questioning that he or she would not be free to leave.” *United States v. Brobst*, 558 F.3d 982, 995 (9th Cir. 2009) (citation and internal quotation marks omitted). Relevant factors include (1) the language used to summon the suspect, (2) the extent to which the suspect is confronted with evidence of guilt, (3) the physical surroundings, (4) the duration of the detention, and (5) the degree of pressure applied to detain the individual. *Brobst*, at 995. If a reasonable person would not feel at liberty to terminate the interrogation and leave, the circumstances are deemed equivalent to formal arrest and the person is ‘in custody’ for *Miranda* purposes. *Keohane*, at 112.

In this case, Mr. Sherman was in custody for *Miranda* purposes when Officer Salstrom asked him about the incident. First, when Officer Salstrom saw Mr. Sherman, he told him to stop (or, as Salstrom wrote in his report, “commanded” him to stop). RP (8/25/08) 25, 26. Second, Officer Salstrom detained Mr. Sherman for 4-5 minutes, and told him

they'd wait until the other officer checked on what had happened. RP (8/25/08) 32. Third, the officer confronted Mr. Sherman with Smith's claim that Sherman had bitten her. RP (8/25/08) 24-25. The officer then asked Mr. Sherman what happened. RP (8/25/08) 32.

A reasonable person who is told (or "commanded") by a police officer to stop, and who is then told to wait (while another officer investigates for 4-5 minutes), and who is confronted with another person's accusation, would not feel free to leave. Accordingly, Mr. Sherman was in custody when Officer Salstrom asked him what happened. *Keohane, supra*. The question should have been preceded by *Miranda* warnings. *Seibert, supra*.

The trial judge applied the wrong legal standard to determine whether or not Mr. Sherman was in custody for *Miranda* purposes. Instead of asking whether or not a reasonable person would have felt free to leave, the court focused on whether the officers "had the right to detain the defendant for a reasonable period of time..." Findings of Fact and Conclusions of Law, CP 23. This inquiry applies to a Fourth Amendment determination of whether or not a seizure was justified; it does not apply to a determination of whether or not a person is in custody for *Miranda* purposes. *Compare Keohane, supra, with Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *see also, e.g., United States v.*

Martinez, 462 F.3d 903, 908 (8th Cir. 2006) (“Whether [a suspect] was ‘in custody’ for purposes of *Miranda* after being handcuffed during the *Terry* stop is a separate question from whether that handcuffing constituted an arrest for which probable cause was required.”)

Because Mr. Sherman was in custody for *Miranda* purposes, and because the officer did not administer *Miranda* warnings prior to asking him what happened, the admission of his statements violated his constitutional privilege against self-incrimination. *Seibert, supra*.

Constitutional error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Woods*, 138 Wn.App. 191, 202, 156 P.3d 309 (2007). A reviewing court must be “convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and [that] the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The error here was not harmless beyond a reasonable doubt. The evidence that Mr. Sherman assaulted Smith was not overwhelming:

neither Erin nor Timothy Brasher (Smith's neighbors) saw Mr. Sherman assault Smith, or even heard him yelling at her. RP (9/18/08) 59-72, 75-86. Although Smith had some injuries, none were consistent with her claim that Mr. Sherman had choked her. RP (9/18/08) 17-18, 23, 25, 49-50, 80, 85. Under these circumstances, the error was not harmless. *Burke, supra*. The conviction must be reversed and the case remanded for a new trial, with instructions to exclude Mr. Sherman's statements. *Keohane, supra*.

II. THE TRIAL COURT'S REFUSAL TO BIFURCATE THE TRIAL WAS AN ABUSE OF DISCRETION BECAUSE IT WAS BASED ON AN ERRONEOUS UNDERSTANDING OF THE LAW.

A trial court has broad discretion to control the order and manner of trial. *State v. Monschke*, 133 Wn. App. 313, 334-335, 135 P.3d 966 (2006). This includes discretion to bifurcate a trial where appropriate. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (citing *Monschke*, at 335).³

³ In *Roswell*, the trial judge refused the defendant's request that he be allowed to stipulate to his prior sexual offenses and waive jury on that issue, in order to keep the prior convictions from the jury. The Supreme Court held that "the trial court did not abuse its discretion in refusing to grant Roswell's motion to bifurcate." *Roswell*, at 198. However, the Court did not rule that trial judges lack such discretion.

A decision based on the wrong legal standard is made for untenable reasons: a court “necessarily abuse[s] its discretion” if its ruling is based on “an erroneous view of the law.” *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

Here, the court abused its discretion in denying Mr. Sherman’s motion to bifurcate. The court refused to bifurcate the proceedings because it believed that to do so would violate double jeopardy. RP (9/17/08) 52. This is incorrect: the double jeopardy clause does not prohibit bifurcated proceedings in which the jury finds aggravating or elevating factors in a separate proceeding after the base crime is established. *See, e.g., Roswell, supra.*⁴

By using the wrong legal standard, the trial judge abused his discretion. *Quismundo, supra.* The conviction must be reversed and the case remanded to the trial court for a new trial, with instructions to consider Mr. Sherman’s motion to bifurcate. *Quismundo, supra.*

⁴ *See also, e.g.,* CrR 6.5 (which refers to the “second phase of any trial that is bifurcated”), and RCW 9.94A.537(4), which contemplates bifurcated trials for certain aggravating factors relevant to exceptional sentences.

III. MR. SHERMAN’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF THE CHARGED CRIME BEYOND A REASONABLE DOUBT.

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). 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. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.⁵ *DeVries*, at 849. The remedy for a conviction based on

⁵ Although a claim of insufficiency admits the truth of the state’s evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991), *citation omitted*.

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*.

To obtain a conviction for felony violation of a restraining order under RCW 26.50.110, the prosecution is required to prove beyond a reasonable doubt that the restrained person knows of an applicable order, that the person's conduct violates a provision of the order, and that the person either assaulted a protected party or had at least two previous convictions for violating the provisions of a restraining order. RCW 26.50.110.

The Supreme Court has long held that where a prior conviction is an element of an offense,

[t]he record of [the] former conviction is not sufficient alone to show that defendant in the present prosecution was formerly convicted. It must be shown by evidence independent of the record of the former conviction that the person whose former conviction is proved is the defendant in the present prosecution. The state has the burden of producing evidence to prove such identity.

State v. Harkness, 1 Wn.2d 530, 543, 96 P.2d 460 (1939). To sustain this burden, the prosecutor "must do more than authenticate and admit the document; it also must show beyond a reasonable doubt 'that the person named therein is the same person on trial.' ...[T]he State cannot do this by showing identity of names alone." *State v. Huber*, 129 Wn. App. 499,

502, 119 P.3d 388 (2005) (footnotes omitted) (quoting *State v. Kelly*, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)).

The same principle should apply when the state is required to show that the defendant is the person named in a restraining order. This is so because a restraining order, like a prior conviction, is only applicable if the person named is the same person charged with violating the order. Thus as with a prior conviction, the identity of names, without more, is insufficient to prove that the person on trial is the person restrained by the order. *See, e.g., Huber, supra.*

A. The state failed to prove that Mr. Sherman was restrained by a no contact order in effect on May 27, 2008.

Exhibit 1, a pretrial “Domestic Violence No-Contact Order” issued pursuant to RCW 10.99 was introduced without any foundational testimony. RP (9/18/08) 86; Exhibit 1, Supp. CP. The order was signed by a person designated “defendant;” however, the signature is illegible, and does not even appear to match the signature on another document submitted as evidence. *Compare* Exhibit 1 *with* Exhibit 3, Supp. CP.

Smith testified that an order restraining Mr. Sherman was entered in February of 2008 (which corresponds to the date on Exhibit 1), but she never received a copy of the order and believed it was only in effect for three months. RP (9/18/08) 30-31.

Furthermore, Exhibit 1 is designated a pretrial order, rather than a post-conviction order. Exhibit 1, Supp. CP. By law, pretrial orders expire upon the occurrence or nonoccurrence of certain events. Orders entered prior to charging expire at arraignment or (if charges are not filed) within 72 hours. RCW 10.99.040(5). Orders entered after charges are filed (including those issued at arraignment) “terminate if the defendant is acquitted or the charges are dismissed.” RCW 10.99.040(3). The state produced no evidence proving when the order was issued in relation to the filing of charges; nor did the prosecution establish the status of the charges on May 27, 2008. In the absence of such evidence, the state failed to prove, even as a preliminary matter, that the order was in effect on the date of the alleged violation.

Because the evidence was insufficient to prove the existence of an order restraining Mr. Sherman on May 27, 2008, his conviction violated his Fourteenth Amendment right to due process. *Smalis, supra*. The conviction must be reversed and the case dismissed with prejudice.

Smalis, supra.

B. The state failed to prove that Mr. Sherman had two qualifying prior convictions for violating a no contact order.

To prove that Mr. Sherman had two qualifying prior convictions, the state introduced a certified copy of a Thurston County docket printout

(together with the testimony of a Grays Harbor County deputy clerk), and a certified copy of a Thurston County “Felony Judgment and Sentence.” Exhibits 2 and 3, Supp. CP.

According to the clerk’s testimony, the letter “G” on the docket printout meant that the defendant in that case had been found guilty. RP (9/18/08) 95-98. Although a prior conviction can be established by means other than a certified copy of a judgment and sentence, the insubstantial evidence presented in this case does not establish beyond a reasonable doubt that anyone named Jacob Sherman was convicted of violation of a no contact order.

In addition, the prosecutor failed to link the alleged prior convictions to Mr. Sherman. Exhibit 3 (the Thurston County Judgment and Sentence) did not contain a description (other than to say that the person convicted was a non-Hispanic Caucasian male). No comparison was made between the fingerprints on Exhibit 3 and Mr. Sherman’s booking fingerprints (Exhibit 15, Supp. CP).⁶ Exhibit 3 was signed by a person designated as “defendant,” but no one testified that the signature

⁶ The state did produce a fingerprint expert who matched Mr. Sherman’s booking fingerprints (Exhibit 15) to fingerprints on Exhibits 13 and 14; however, neither of those exhibits were connected to the prior convictions alleged by the state. *See* Exhibits 13, 14, 15, Supp. CP.

was that of Mr. Sherman, and it did not even appear to match the signature in Exhibit 1. Exhibits 1 and 3, Supp. CP.

Given the absence of evidence establishing two qualifying prior convictions or linking those alleged priors to Mr. Sherman, the state failed to prove the felony offense. Accordingly, the special verdict relating to the prior convictions must be vacated.⁷ If the conviction is reversed and the case remanded for a new trial, the state may not proceed with felony charges on the theory that Mr. Sherman has two qualifying prior convictions. *Smalis, supra*.

IV. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences

⁷ Since the jury also found that Mr. Sherman had assaulted Smith, the felony charge need not be reversed on this basis.

from an offender's silence pending sentencing. *Mitchell*, at 328-329.

Thus, for example, it is improper to imply lack of remorse from an accused person's presentencing silence. *Post*, at 758.

The state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Ford* at 482. This rule is constitutionally based, and thus cannot be altered by statute; as the Supreme Court pointed out, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Ford*, at 482.

In 2008, the legislature amended RCW 9.94A500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), "[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is "acknowledged in a trial or at the time of sentencing," and

“[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).⁸

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford, supra*.

Mr. Sherman should have been sentenced with an offender score of one, because the prosecutor produced evidence (at trial) of only one prior felony conviction.⁹ Exhibit 3, Supp. CP. Defense counsel was very careful not to admit or affirmatively acknowledge any additional criminal history, even though he filed a sentencing statement and made argument at the sentencing hearing. Defendant’s Sentencing Statement, Supp. CP; *see also* RP (10/14/08). Instead of sentencing him with an offender score of one, the trial judge adopted the prosecutor’s statement of criminal history

⁸ Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

⁹ In the absence of a sworn denial, identity of names is sufficient to establish prior convictions for sentencing purposes. *State v. Ammons*, 105 Wn.2d 175, 190, 713 P.2d 719 (1986) (“We hold that the identity of names is sufficient proof, which may be rebutted by the defendant’s declaration under oath that he is not the same person named in the prior conviction.”) This is in contrast to the evidence needed to establish a prior conviction where such conviction is an element of an offense. *Huber, supra*.

and sentenced Mr. Sherman with an offender score of five. CP 25. By accepting the prosecutor's statement, the court relied on "bare assertions" of criminal history in violation of *Ford, supra*. Because the prosecutor failed to prove Mr. Sherman's criminal history, the judgment and sentence must be vacated and the case remanded to the trial court for resentencing. *Ford, supra*.

CONCLUSION

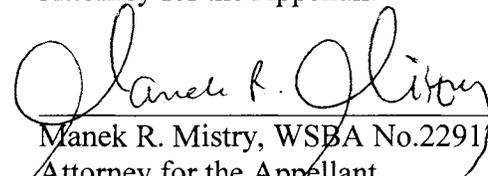
Mr. Sherman's conviction for felony violation of a no contact order must be reversed. The case must either be dismissed with prejudice or remanded for a new trial. In the alternative, Mr. Sherman's sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on August 5, 2009.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

CERTIFICATE OF MAILING

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

Jacob Sherman, DOC #891684
Monroe Correctional Complex
P. O. Box 777
Monroe, WA 98272-0777

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

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

All postage prepaid, on August 5, 2009.

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 August 5, 2009.

[Signature]
Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant