

~~COURT OF APPEALS
DIVISION II~~

~~09 AUG 22 AM 12:03~~

NO. 38910-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

~~STATE OF WASHINGTON
BY _____
DEPUTY
DIVISION TWO~~

STATE OF WASHINGTON,
Respondent,

v.

LINDA RAE BOZAK,
Appellant.

09 AUG 21 PM 1:52
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY *[Signature]*
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Craddock Verser

APPELLANT'S OPENING BRIEF

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1/1/2010 11:17

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT.....1

B. ASSIGNMENTS OF ERROR.....1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

D. STATEMENT OF THE CASE.....3

E. ARGUMENT.....10

 1. THE TRIAL COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION WHERE THE STATE PRESENTED EVIDENCE OF SEVERAL DISTINCT ACTS OF THEFT, ANY OF WHICH COULD BE THE BASIS OF A CRIMINAL CONVICTION..... 10

 2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED DOMESTIC VIOLENCE PERPETRATOR TREATMENT AS A CONDITION OF SENTENCE UNDER THE MISTAKEN BELIEF THAT IT WAS REQUIRED BY LAW TO DO SO.....14

 3. THE NO CONTACT ORDER ISSUED AS A CONDITION OF SENTENCE SHOULD BE CORRECTED TO REFLECT THAT THE UNDERLYING CONVICTION IS FOR A GROSS MISDEMEANOR, NOT A FELONY..... 16

F. CONCLUSION.....16

TABLE OF AUTHORITIES

United States Supreme Court Decision

<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1975).....	13
--	----

Washington Supreme Court Decisions

<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	10, 11
--	--------

<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10, <u>cert. denied</u> , 501 U.S. 1237 (1991).....	11
---	----

<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988)....	10, 11, 13
--	------------

<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	11
---	----

<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 129 S.Ct. 2007 (2009).....	14
--	----

<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	14
--	----

<u>Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.</u> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	14
---	----

Washington Court of Appeals Decisions

<u>State v. Adamy</u> , ___ Wn. App. ___, ___ P.3d ___, 2009 WL 2461721 at *2 (No. 27206-1-III, August 13, 2009).....	14
---	----

<u>State v. Felix</u> , 125 Wn. App. 575, 105 P.3d 427, <u>rev. denied</u> , 155 Wn.2d 1003 (2005).....	14
---	----

<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993), <u>rev. denied</u> , 124 Wn.2d 1018 (1994).....	13
--	----

<u>State v. King</u> , 75 Wn. App. 899, 872 P.2d 1115 (1994), <u>rev. denied</u> , 125 Wn.2d 1021 (1995).....	13
---	----

State v. Langford, 12 Wn. App. 228, 529 P.2d 839 (1974),
rev. denied, 85 Wn.2d 1005 (1975).....15

State v. Winston, 135 Wn. App. 400, 144 P.3d 363 (2006).....14-15

Constitutional Provisions

United States Constitution, Sixth Amendment..... 10

Washington Constitution, article 1, section 21..... 10

Statutes

RCW 9.41.040..... 16

RCW 9.92.060..... 15

RCW 9.94A.650.....14

RCW 9.94A.703.....14

RCW 9.95.210..... 15

RCW 9A.56.050.....16

RCW 10.99.020..... 10

Court Rule

RAP 2.5(a)..... 11

A. SUMMARY OF ARGUMENT.

In this appeal of her conviction for theft in the third degree, Linda Bozak asserts that (1) the trial court erroneously failed to provide a unanimity instruction, (2) the trial court abused its discretion in imposing domestic violence treatment, and (3) the no-contact order issued as a condition of sentence incorrectly states that the underlying conviction is for a felony. These errors require reversal of the conviction, or in the alternative, a remand for resentencing.

B. ASSIGNMENTS OF ERROR.

1. The trial court erroneously failed to provide a unanimity instruction.

2. The trial court abused its discretion in imposing domestic violence treatment as a condition of sentence.

3. The no-contact order issued as a condition of sentence incorrectly states that the underlying conviction is for a felony.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Criminal defendants have a constitutional right under the constitutions of the United States and Washington to a unanimous jury verdict. Where evidence is presented of multiple distinct acts,

any of which could be the basis of a criminal conviction, either (1) the State must elect which act it is relying on, or (2) the trial court must instruct the jury that they must unanimously agree that the same act has been proven beyond a reasonable doubt. In this case, there was evidence presented of numerous alleged acts that could support a theft conviction, including the theft of doors, hardware, appliances, drywall, a chainsaw, outboard motors, and a vehicle. Where the State did not elect which act of theft it was relying on as the basis for conviction, did the trial court's failure to provide a unanimity instruction require reversal of the conviction?

2. A trial court abuses its discretion when it imposes a condition of sentence without using its discretion or that is based on an erroneous view of the law. Where the trial court ordered Ms. Bozak to obtain domestic violence treatment based on a mistaken belief that it was required by law to do so, did it abuse its discretion?

3. Ms. Bozak was convicted of theft in the third degree, a gross misdemeanor. Where the no-contact order issued as a condition of sentence incorrectly states that the underlying conviction is for a felony, must the order be corrected?

D. STATEMENT OF THE CASE.

Linda Bozak lived her entire life in the home located at 3230 San Juan Avenue in Port Townsend. RP 110. The home once belonged to her mother. RP 64, 109. In 1989 or 1990, Michael "Dean" Bozak moved into the home with Ms. Bozak and her mother, and he and Ms. Bozak were married in 1993. RP 108-09, 225. Several years later, Ms. Bozak's mother died, and the house was left to Ms. Bozak and her two siblings. RP 65. The Bozaks took out a mortgage and bought out the siblings shares in the home. RP 65, 265.

In August 2007, the Bozaks separated and Mr. Bozak moved out of the residence. RP 70-71. Dissolution proceedings ensued, and Mr. Bozak acknowledged it was not an amicable divorce. RP 120. During the next year, Ms. Bozak continued to live in the home, and Mr. Bozak would go over to the house only to drop off or pick up their son. RP 72.

The final decree of dissolution, dated June 2008, awarded both the marital debt and the home to Mr. Bozak. Ex. 1 at 5-6; RP 61, 63-66. The divorce decree also provided that Ms. Bozak was to vacate the home by September 8, 2008. Ex. 1 at 2; RP 68-69. The home contained all of Ms. Bozak's belongings, as well as

items belonging to the Bozak's children, extended family, and housemates. RP 232-33. On September 8, 2008, Ms. Bozak had not obtained another residence and was still living in the home. RP 69, 274. Mr. Bozak did not object to her continued residence in the home. RP 127.

Between September 8 and September 19, 2008, Mr. Bozak continued to bring their son over to the residence to visit Ms. Bozak, but he did not go inside the home. RP 70, 233-35. On September 19, 2008, Mr. Bozak went to the residence. He became concerned about the condition of the home and called his attorney, and they then called the police. RP 70.

Officer William Corrigan from the Port Townsend Police Department responded to the call and went to the residence. RP 27. Both Mr. and Ms. Bozak were angry and speaking loudly. RP 29-30, 45. Officer Corrigan examined the home. The doors were leaning against walls or doorjambs, having been taken off their hinges and the hardware removed. RP 33, 46. All of the cabinet doors in the kitchen were removed. RP 34-35. The refrigerator, range, microwave, washing machine, dryer, and chest freezer were gone. RP 33, 78, 80-81. A medicine cabinet was removed from the bathroom wall. RP 38, 90. A piece of drywall (approximately

five feet in diameter) had been removed from a bedroom wall where there had once been a mural. RP 37, 87. The bathroom had some graffiti painted on the walls, and three windows near the entry had small holes in them. RP 38-39. Numerous items were piled outside, including the living room carpet. RP 41, 94. The laundry room cabinet doors, shower head, and a closet shelf and rod were also missing. RP 97-100.

The officer did not see a copy of the divorce decree, but based on what he was told by Mr. Bozak and his attorney, he arrested Ms. Bozak and took her to jail. RP 42-43, 56. She was subsequently charged with theft in the first degree and malicious mischief in the first degree, both charges alleged to be domestic violence offenses. CP 1-2.

Ms. Bozak stated the home was built sometime during the 1920's, and other witnesses described it as "pretty rundown." RP 170, 223. At trial, Ms. Bozak explained that she was constantly taking on home-improvement projects, and that the house "was a continuous project." RP 238, 268. Although she lost the home in the divorce, she wanted to continue making improvements as a tribute to her mother. RP 247.

The doors, cabinet doors, and hardware were all removed by Ms. Bozak in order to paint the home. RP 241, 255-56. She testified she did not remove any of the doors or cabinet doors from the property, but had placed the cabinet doors in a shed, on an adjoining lot, for safe-keeping. RP 242, 256, 258. There was primer and paint in sheds. RP 243. She planned to re-hang the doors once done painting. RP 243. At trial, Mr. Bozak agreed that he found the cabinet doors, with the hardware on them, in the shed two or three days after Ms. Bozak's arrest, although he claimed that five or six of them were still missing. RP 84-86, 123.¹

Ms. Bozak explained at trial that she still had possession of the hardware for the doors. She explained that she was concerned about thefts at her property, which had occurred before, and she kept the hardware with her in order to remove paint and buff them up. RP 258, 279. Mr. Bozak testified that he spent approximately \$70 to buy new hinges, knobs, and screws for the exterior doors. RP 104-05.

¹ Shortly before trial, Ms. Bozak and her attorney, along with Dennis Hartsell, a family friend, were allowed to walk through the home to assess its condition. Both Ms. Bozak and Mr. Hartsell testified that all of the cupboard doors had been re-hung. RP 192, 257-58.

Ms. Bozak testified that the bathroom plumbing leaked, and that she was repairing the leak as well as installing a new shower. RP 252-53. Dennis Hartsell, who is part-owner of a construction company and a family friend to both Mr. and Ms. Bozak, testified that in August 2008 he went to the home at Ms. Bozak's request in order to advise her regarding painting and home repairs. RP 183, 185, 186, 194, 197. Ms. Bozak was planning to replace the medicine cabinet with a new, better one she had purchased. RP 246. Mr. Bozak testified that he never recovered the medicine cabinet. RP 90.

The mural had sentimental value to Ms. Bozak, having been painted by her and her mother together, and she cut it out in order to make a table top from it. RP 237-38, 276-77. Ms. Bozak assumed that Mr. Bozak would not mind her removing the mural, since she planned to replace the drywall before moving out. RP 239, 277. Mr. Bozak verified that there was a large piece of drywall in the home with which to patch the hole. RP 120. The mural had been very carefully removed without any damage to the wall studs. RP 51, 119, 190.

Ms. Bozak acknowledged taking the appliances, but disputed that they belonged to her ex-husband. Mr. Bozak

assumed that the appliances belonged to him, since he was awarded the home in the dissolution. RP 78, 114, 132. However, the divorce decree did not specifically award the appliances to either Mr. or Ms. Bozak, and Ms. Bozak believed that they were hers to take. Ex. 1; 235. She gave the range and microwave to Mr. Bozak prior to trial. RP 81-82, 236.

Mr. Bozak testified that the items in the yard held no value to him, and that the living room carpet was in poor condition and needed to be replaced anyway. RP 94, 122. A family friend described the carpet as "way past its due to be taken out." RP 196-97. Ms. Bozak testified that the holes in the windows were caused by the son of her housemates. RP 245-46. The graffiti in the bathroom was painted by a friend, but she intended to paint over it before Mr. Bozak saw it. RP 248-50.

The dissolution decree awarded certain personal property to Mr. Bozak, including a chainsaw, two outboard motors, and a Pontiac Grand Prix. Ex. 1 at 5; RP 66-68. The decree valued the chainsaw at \$150, the motors at \$200 and \$100, and the car at \$100. Ex. 1 at 5; RP 66-68. Mr. Bozak testified that when he moved out in August 2007, the chainsaw and outboard motors were in a barn located on the property, and that they were gone

when he took possession of the property thirteen months later in September 2008. RP 67-68, 117-18. He acknowledged that the barn was unsecured, and that he made no attempt before September 2008 to either secure the barn or make arrangements to retrieve his belongings. RP 117. Mr. Bozak also testified that the car was left on the property when he moved out in August 2007, but that it was gone in September 2008. RP 66, 115.

Ms. Bozak explained that she had no idea what happened to the chainsaw or the outboard motors, and that she assumed Mr. Bozak had retrieved them "long ago." RP 227, 230, 270. She explained that she removed the Grand Prix from the property before the dissolution decree was issued in June 2008, and that she still had it. RP 230, 273-74. The car had belonged to her before the marriage, she was fixing it up, and wanted to keep it. RP 230. She was willing to pay for the vehicle, and assumed that she could do so and have \$100 deducted from the settlement money owed to her by Mr. Bozak. RP 230-31, 274.

At the conclusion of the trial, the jury was instructed regarding the lesser included offenses of theft in the second degree and theft in the third degree, as well as malicious mischief in the second degree and malicious mischief in the third degree.

CP 43-47, 54-58, 60-63. The jury was unable to reach a verdict on the malicious mischief charges and a mistrial was declared. RP 371. The jury found Ms. Bozak not guilty of both first and second degree theft, but guilty of theft in the third degree. CP 67-69. Pursuant to RCW 10.99.020, the jury was given a special verdict form asking if Mr. and Ms. Bozak were members of the same family or household. The jury answered in the affirmative. CP 70. This appeal timely follows on her behalf. CP 74.

E. ARGUMENT.

1. THE TRIAL COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION WHERE THE STATE PRESENTED EVIDENCE OF SEVERAL DISTINCT ACTS OF THEFT, ANY OF WHICH COULD BE THE BASIS OF A CRIMINAL CONVICTION.

The federal constitutional right to trial by jury and the state constitutional right to conviction only upon a unanimous jury verdict require jury unanimity on all essential elements of the crime charged. State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); U.S. Const. amend. 6; Wash. Const. art. I, § 21. When the evidence indicates multiple distinct acts, any one of which could form the basis for a conviction, either the State must elect which

act it is relying on as the basis for the charge, or the court must instruct the jury that it must unanimously agree that the same act has been proven beyond a reasonable doubt. Camarillo, 115 Wn.2d at 64; Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

Where neither alternative is followed, constitutional error “stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all elements necessary for a conviction.” Kitchen, 110 Wn.2d at 411. Such an error is a manifest error affecting a constitutional right that can be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991); RAP 2.5(a).

As set out in the Statement of Facts, there was testimony at trial concerning numerous acts of alleged theft, including the kitchen and laundry room appliances, cabinet doors, door hinges and doorknobs, drywall, the bathroom medicine cabinet and shower head, the master closet shelf and clothes rod, the chainsaw and outboard motors, and the Grand Prix. RP 33-35, 37, 38, 66-68, 78, 80-81, 87, 90, 97-100, 117-18, 123, 230, 235-36, 279.

In closing argument, the prosecuting attorney failed to elect which act of theft he was relying on as the basis for the theft charge. Rather, he argued that the taking of the appliances, the hardware for the doors, the chainsaw and outboard motors, and the Grand Prix were all acts of theft that justified a theft conviction. RP 314-15, 345-46, 355, 359-60.

In addition, the jury instructions did not clarify which act of theft the jury was to consider. Instruction 17, the "to-convict" instruction for the charge of theft in the third degree, merely states as an element of the crime that "the defendant wrongfully obtained or exerted unauthorized control over property of another not exceeding \$250.00 in value." CP 47.

Thus, the evidence, State's closing argument, and jury instructions all invited the jury to base a conviction on any of the alleged acts of theft. In addition, the jury was never instructed that it had to unanimously agree as to which act of theft had been proven beyond a reasonable doubt in order to render a guilty verdict. CP 29-63. The confusion as to the actual basis for conviction was apparent at sentencing, where the State requested \$100 in restitution, possibly for the Grand Prix. RP 378. The trial

court granted this request, while acknowledging to Ms. Bozak, “I don’t know what theft [the jury] convicted you of.” CP 72; RP 386.

The failure to require a unanimous verdict is an error of constitutional magnitude, and as such, is reversible unless it is “harmless beyond a reasonable doubt.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1975); State v. King, 75 Wn. App. 899, 903, 872 P.2d 1115 (1994), rev. denied, 125 Wn.2d 1021 (1995). Prejudice is presumed, and the error is harmless “only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 406; State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994).

Given the numerous acts of alleged theft, the lack of clarity in the jury instructions, and the failure of the State to elect a particular act as a basis for the charge, the jurors may well not have been unanimous as to which act of theft they relied on when convicting Ms. Bozak. The error was not harmless beyond a reasonable doubt, and the conviction must be reversed.

2. THE TRIAL COURT ABUSED ITS DISCRETION
WHEN IT IMPOSED DOMESTIC VIOLENCE
PERPETRATOR TREATMENT AS A CONDITION
OF SENTENCE UNDER THE MISTAKEN BELIEF
THAT IT WAS REQUIRED BY LAW TO DO SO.

Appellate courts review sentencing conditions for an abuse of discretion. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007 (2009). An abuse of discretion implies “a lack of use of any discretion at all.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 34, 482 P.2d 775 (1971). A trial court abuses its discretion when its ruling is based on an erroneous view of the law. Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993); State v. Adamy, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 2461721 at *2 (No. 27206-1-III, August 13, 2009).

A finding of domestic violence does not increase the potential punishment for the underlying offense. State v. Felix, 125 Wn. App. 575, 578, 105 P.3d 427, rev. denied, 155 Wn.2d 1003 (2005). As a result of a felony domestic violence conviction, treatment may be ordered in conjunction with a first-time offender waiver, RCW 9.94A.650, or as a condition of community custody, RCW 9.94A.703. However, the imposition of domestic violence treatment is discretionary, not mandatory. State v. Winston, 135

Wn. App. 400, 408-09, 144 P.3d 363 (2006). Similarly, there is no requirement that domestic violence treatment be imposed after a misdemeanor conviction for a domestic violence offense.

Under RCW 9.92.060 and RCW 9.95.210, the trial court has discretion to attach reasonable conditions to an order granting probation. State v. Langford, 12 Wn. App. 228, 230, 529 P.2d 839 (1974), rev. denied, 85 Wn.2d 1005 (1975). However, in this case, the trial court did not use its discretion when it imposed domestic violence treatment as a condition of Ms. Bozak's suspended sentence. Rather, the trial court imposed the treatment requirement in the mistaken assumption that it was required to do so:

It's my understanding if you get convicted of domestic violence you have to go through that perpetrator's program . . . you've been convicted of a crime of domestic violence so you do have to do that.

RP 387. By its mistaken view of the law and subsequent failure to exercise any discretion, the trial court abused its discretion. The requirement for domestic violence treatment should be removed from the judgment and sentence.

3. THE NO CONTACT ORDER ISSUED AS A
CONDITION OF SENTENCE SHOULD BE
CORRECTED TO REFLECT THAT THE
UNDERLYING CONVICTION IS FOR A GROSS
MISDEMEANOR, NOT A FELONY.

The no-contact order issued in conjunction with the judgment and sentence is printed on the form to be used where the underlying conviction is for a felony. Supp. CP ____ (Sub. No. 55). A copy of the no-contact order is attached as Appendix A. This form was used in error, since Ms. Bozak's only conviction was for theft in the third degree, a gross misdemeanor. CP 69; RCW 9A.56.050. Ms. Bozak requests that the no-contact order be corrected to reflect that the underlying conviction is for a gross misdemeanor, not a felony.²

F. CONCLUSION.

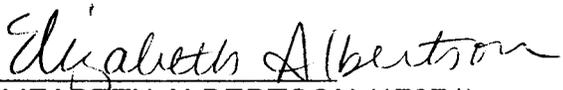
Reversal of Ms. Bozak's theft conviction is required where the trial court erroneously failed to provide a unanimity instruction. In the alternative, the case should be remanded for resentencing where the trial court abused its discretion in imposing domestic

² This correction is necessary to alleviate potential confusion. For example, page 2 of the no-contact order prohibits possession of a firearm based on RCW 9.41.040(2)(a)(i). While this statute forbids a person from possessing a firearm when he or she has been convicted of a felony or particular misdemeanor domestic violence offenses, it does not prohibit possession of a firearm by one who has been convicted of a theft in the third degree involving domestic violence.

violence treatment, and the no-contact order issued as a condition of sentence incorrectly states that the underlying conviction is for a felony.

DATED this 20th day of August, 2009.

Respectfully submitted,


ELIZABETH ALBERTSON (17071)
Washington Appellate Project (91052)
Attorneys for Appellant

Appendix A

FILED

2009 JAN 23 AM 9:27

IN SUPERIOR COURT
JEFFERSON COUNTY CLERK

**Superior Court of Washington
County of Jefferson**

State of Washington, Plaintiff,

v.

Linda Rae Bozak, Defendant.

FBI: 708078VC8
SID: WA24330874
DOB: 12/22/70

No. 08-1-00206-9

**Domestic Violence No-Contact Order
(Felony)**

(clj = NOCON)
(superior cts = ORNC)

- Pretrial
- Post conviction
- Clerk's action required

1. Based upon the certificate of probable cause and/or other documents contained in the case record, testimony, and the statements of counsel, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to chapter 10.99 RCW.

This order protects: **Michael Dean Bozak.**

2. The court further finds that the defendant's relationship to a person protected by this order is: current or former spouse parent of a common child current or former cohabitant as intimate partner other family or household member as defined in RCW 10.99.

3. (Pretrial order for crimes not defined as serious offenses in RCW 9.41.010) The court makes the following findings pursuant to RCW 9.41.800: the defendant used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; the defendant previously committed an offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040; or possession of a firearm or other dangerous weapon by the defendant presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

It Is Ordered:

Defendant is **Restrained** from:

- A. Causing or attempting to cause physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking the protected person(s).
- B. Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by defendant's lawyers with the protected person(s).
- C. Entering or knowingly coming within or knowingly remaining within 500 feet (distance) of the protected person's(s) residence school place of employment other: *except to go to her 2 lots in 3200 block of Sun Junco*

55

- D. (Pretrial: crimes not defined as serious offenses in RCW 9.41.010, RCW 9.41.800 findings made) Obtaining or possessing a firearm, other dangerous weapon or concealed pistol license.
- (Pretrial: crimes defined as serious offenses) Obtaining, owning, possessing or controlling a firearm.
- (Conviction) Obtaining, owning, possessing or controlling a firearm.

It is Further Ordered:

- (Pretrial order) The defendant shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to:

Warnings to the Defendant: Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

Willful violation of this order is punishable under RCW 26.50.110. Violation of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if the defendant has at least two previous convictions for violating a protection order issued under Titles 7, 10, 26 or 74.

If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, the defendant may be subject to criminal prosecution in federal court under 18 U.S.C. § 2261, 2261A, or 2262.

In addition to the state and federal prohibitions against possessing a firearm upon conviction of a felony or a qualifying misdemeanor, upon the court issuing a no-contact order after a hearing at which the defendant had an opportunity to participate, the defendant, if a spouse or former spouse, a parent of a common child, or a current or former cohabitant as intimate partner of a person protected by this order, may not possess a firearm or ammunition for as long as the no-contact order is in effect. 18 U.S.C. § 922(g). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. If the defendant is convicted of an offense of domestic violence, the defendant will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9); RCW 9.41.040.

You can be Arrested even if the Person or Persons who Obtained the Order Invite or Allow You to Violate the Order's Prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

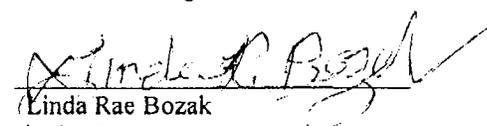
Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to: Jefferson County Sheriff's Office Port Townsend Police Department where the above-named protected person(s) lives, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

This No-Contact Order expires upon final disposition of this cause.

Done in Open Court in the presence of the defendant the 23rd day of January, 2009.


 Scott W. Rosekrans WSBA# 40118 - Attorney for Defendant
 Deputy Prosecuting Attorney WSBA No. 18502


 Judge

 Linda Rae Bozak
 Defendant

