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C. STATEMENT OF THE CASE

The Thurston County Prosecuting Attorney charged Gary Lynn Barckley with one count of felony violation of a no contact order, based upon two prior convictions. CP 3. The incident allegedly occurred on December 12, 2006. CP 3.

At trial, the State presented testimony from the complaining witness, Brenda Huhtala. Trial RP 40. Ms. Huhtala testified that she and Mr. Barckley had been in a relationship for 13 years and had one child in common. Trial RP 41. Their child is Hunter, who was aged six at the time. Trial RP 42. Hunter is not protected by the no-contact order Mr. Barckley was accused of violating. Trial RP 44, 49. On December 12,

2006, Mr. Barckley called the home where Brenda and Hunter lived and left a message, asking Hunter for his social security number for tax purposes. Trial RP 42. Hunter has an older sister who could help him obtain and convey that information. Trial RP 55, 57. Hunter can use a telephone, knows how to push the button on an answering machine to listen to messages, and has called his father in the past. Trial RP 55-56.

Mr. Barckley was convicted of violating a no-contact order, and the jury found by special verdict that he had two prior convictions for violating a no-contact order. CP 4-5. Up until his sentencing hearing, the State believed, and conveyed to Mr. Barckley, that his standard range sentence was 6-12 months. Trial RP 94. At sentencing, however, the State asserted that Mr. Barckley's actual range was 33-43 months in prison, and Mr. Barckley's attorney offered no objection to this calculation. RP (2-19-09), p. 3. Mr. Barckley was given 33 months in prison. CP 25. This timely appeal followed. CP 32.

D. ARGUMENT

I. MR. BARCKLEY'S CONVICTION SHOULD BE REVERSED AND DISMISSED BECAUSE HIS CONDUCT WAS NOT CRIMINAL UNDER FORMER RCW 26.50.110.

Mr. Barckley asserts that his conviction should be reversed because at the time he committed his crime, violating a no-contact order

by making a phone call was not a criminal offense. In 2006, RCW

26.50.110 (1) read:

Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26 or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100 (2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

Currently, there is a split of authority about whether the version of RCW 26.50.110 in effect between 2000 and 2007 criminalized violations of a no-contact order which did not involve acts or threats of violence or involve a violation of a restraint provision. In *State v. Bunker*, 144 Wn.App. 407, 415, 183 P.3d 1086 (2008), *review granted* 165 Wn.2d 1003, 198 P.3d 512, Division I held that former RCW 26.50.110 was ambiguous, and resolved the ambiguity in favor of the government. Then, in *State v. Madrid*, 145 Wn.App. 106, 192 P.3d 909 (2008) and again in *State v. Hogan*, 145 Wn.App. 210, 192 P.3d 915 (2008) Division II held that RCW 26.50.110 was not ambiguous and clearly did not criminalize violations of a no-contact order which did not involve acts or threats of violence or involve a violation of a restraint provision. Using the last

antecedent rule, the Court held that the term “for which an arrest is required under RCW 10.31.100 (2) (a) or (b) modified each preceding clause, not merely the one immediately preceding it. *Hogan* at 217-18; *Madrid* at 114-15. In *State v. Wofford*, 148 Wn.App. 870, 201 P.3d 389 (2009) and *State v. Allen*, 150 Wn.App. 300, 207 P.3d 483 (2009) two different panels of Division II¹, disagreed with the holdings in *Madrid* and *Hogan* and adopted the reasoning of Division I in *Bunker*, holding that the 2007 amendments to RCW 26.50.110 revealed that the legislature’s intent, when it butchered RCW 26.50.110 in 2000, was never to de-criminalize certain methods of violating a no-contact order (such as by making a non-threatening phone call or sending a non-threatening letter or email).

Mr. Barckley asks this Court to adopt the reasoning of *Madrid* and *Hogan* and reverse his conviction because his conduct in leaving a telephone message did not amount to an act or threat of violence and did not involve a violation of a restraint provision.²

The Supreme Court has accepted review of *State v. Bunker*, and as of this writing the case is still pending awaiting briefing. Should the

¹ Judges Penoyer, Bridgewater, Houghton and Hunt comprised the majority in *Madrid* and *Hogan*. Judge Houghton wrote a concurring opinion in both *Wofford* and *Allen* explaining her reconsideration of her concurrence in *Madrid*. Judge Hunt wrote a concurring opinion in *Allen* explaining her reconsideration of her concurrences in both *Madrid* and *Hogan*.

² Although Mr. Barckley was convicted of violating RCW 26.50.110 (5), felony violation of a no contact order, the criminalization of the underlying conduct is governed by RCW 26.50.110 (1). The felony conviction was based upon his prior offenses.

Supreme Court overrule *Madrid* and *Hogan*, and affirm *Bunker*, Mr.

Barckley will withdraw this assignment of error.

II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. BARCKLEY'S CONVICTION BECAUSE HE IS NOT RESTRAINED FROM CONTACTING HIS CHILD.

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 same is true for sentencing enhancements. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008). Evidence is insufficient 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. *DeVries* at 849.

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*.

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*.

Here, the State misled the jury by arguing that if Mr. Barckley called Ms. Huhtala’s residence to speak with someone other than her who was not protected by the no-contact order, he would nevertheless have violated the no-contact order because Ms. Huhtala lived there. (See RP p. 78). Under the State’s theory, if Mr. Barckley had called Hunter, spoken with him, and told him he loved him, he would still have violated this no-contact order which protects Ms. Huhtala. There is no authority for such a proposition. Hunter is not protected by this order, and he doesn’t become

de facto protected simply because he is six or because he lives with Ms. Huhtala. Hunter's age, and the fact that he lives with Ms. Huhtala, does not by itself constitute sufficient evidence that Mr. Barckley violated the no-contact order by trying to contact Hunter.

The State also made a significant fuss over the fact that when Mr. Barckley was in prison some time ago, he sought to have the no-contact order modified so that Ms. Huhtala could bring Hunter to see him. The State argued that this was somehow evidence that Hunter *actually was* protected by this order and Mr. Barckley knew it. (See Trial RP 85). This was patently false and misleading. Unlike receiving a phone call, which Hunter can do on his own according to the evidence, Hunter would not have been able to drive himself to a prison to visit Mr. Barckley. Therefore, it was necessary for Mr. Barckley to seek modification of the order so that Ms. Huhtala could bring Hunter to visit him. The order simply did not prohibit Mr. Barckley from contacting Hunter and the State deliberately misled the jury by implying that it did.

The only evidence presented by the State in this case was that Mr. Barckley attempted to contact his son, which he had a legal right to do. The State presented no evidence that Mr. Barckley had willful contact with Ms. Huhtala, either directly or indirectly. Although the State made much of the fact that Mr. Barckley called to get Hunter's social security

number, arguing that Hunter would have to get that information from Ms. Huhtala and that would constitute indirect contact with Ms. Huhtala, the un-rebutted evidence was that Hunter had an older sister from whom he could have obtained that information. If Mr. Barckley had left a message for Hunter saying "I love you," would that be sufficient evidence that Mr. Barckley had willful contact with Ms. Huhtala? Mr. Barckley submits it would not. Likewise, leaving a message for Hunter, who he has a legal right to contact, did not constitute sufficient evidence that Mr. Barckley had willful contact with Ms. Huhtala. Mr. Barckley's conviction should be reversed and dismissed.

E. CONCLUSION

Mr. Barckley's conviction should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 17th day of September, 2009.


ANNE CRUSER, WSBA No. 27944
Attorney for Mr. Barckley

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

STATE OF WASHINGTON,)
) Court of Appeals No. 38993-2-II
) Thurston County No. 07-1-01565-9
 Respondent,)
)
 vs.)
) AFFIDAVIT OF MAILING
 GARY LYNN BARCKLEY,)
)
 Appellant.)
 _____)

ANNE M. CRUSER, being sworn on oath, states that on the 17th day of September
2009, declares that she placed a properly stamped envelope in the mails of the United

States addressed to:

Carol La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
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anne-cruser@kalama.com

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Mr. Gary Barckley
DOC# 742499
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326-0769

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) VRP (TO MS. LaVERNE)
- (3) DESIGNATION OF EXHIBITS
- (4) AFFIDAVIT OF MAILING

Affiant further declares that she placed a properly stamped envelope in the mails of the United States addressed to:

AND

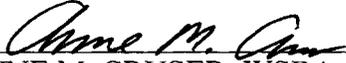
Betty Gould, Clerk
Thurston County Clerk's Office
2000 Lakeridge Dr. S.W., Bldg. 2
Olympia, WA 98502

and that said envelope contained the following:

- (1) DESIGNATION OF EXHIBITS
- (2) AFFIDAVIT OF MAILING

Dated this 17th day of September, 2009.

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ANNE M. CRUSER, WSBA #27944
Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: September 17, 2009, Kalama, WA

Signature: Anne M. Cruser