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STATE OF WASHINGTON  
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DEPUTY

**NO. 40156-8-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JAMES STAFFORD,**

**Appellant.**

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**BRIEF OF APPELLANT**

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 **ORIGINAL**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court's use of a "to convict" instruction that omitted an element of the offense charged violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

2. The trial court denied the defendant his right to a fair trial under United States Constitution, Fourteenth Amendment, and Washington Constitution, Article 1, § 3, when it admitted irrelevant, unfairly prejudicial hearsay over defendant's objection.

3. The trial court erred when it entered a "no contact" order that was not a crime related prohibition under RCW 9.94A.505(8).

*Issues Pertaining to Assignment of Error*

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 7 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction when the state fails to present substantial evidence on the charged crime?

2. Does a trial court deny a defendant the right to a fair trial under United States Constitution, Fourteenth Amendment, and Washington Constitution, Article 1, § 3, if it admits irrelevant, unfairly prejudicial hearsay over defendant's objection when the jury more likely than not would have returned a verdict of acquittal but for the admission of that evidence?

3. Does a trial court err if it enters a "no contact" under RCW 9.94A.505(8) that is not a crime related prohibition?

## STATEMENT OF THE CASE

### *Factual History*

At about 11:00 am on September 19, 2009, Sergeant Yamashita and Officers Houts and Tierney of the Washougal Police Department, along with Clark County Deputy Sheriff Chris Nicholls responded to a domestic dispute at 2107 32nd in the City of Washougal. RP 57-60, 84-85, 111-113.<sup>1</sup> The defendant James Stafford lives at this address with his elderly, infirm mother. RP 141-146. Once the officers arrived, they spoke with family members outside the house, and then walked about 75 feet up a hill towards the defendant's Recreational Vehicle (RV). RP 61-62, 84-87, 111-113. As they got up to the RV, one or two of the officers told the defendant that he was under arrest and repeatedly ordered him to come out. *Id.* When the defendant refused, the officers tried to go in the main door of the RV, but it was locked. RP 69. Deputy Nicholls then tried to open the door with a crowbar but was unsuccessful. RP 121. At this point, Officer Houts went around to the driver's door and tried to get in at that location. RP 69.

As Officer Houts went to the driver's doors, Sergeant Yamashita saw an open sliding window with a screen over it on the side of the RV that might

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<sup>1</sup>The record in this case includes one volume of continuously numbered verbatim reports of the trial held on December 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> of 2009, and the sentencing hearing held on December 14, 2009. This single volume is referred to herein as "RP [page #]."

provide access. RP 92-93. The screen had a slight tear in it, and Deputy Nicholls pulled at the hole but was unable to get the screen out. *Id.* Upon seeing this, Sergeant Yamashita cut the screen open with her duty knife. RP 92-93, 115-116. Deputy Nicholls was then able to pull the screen off of the RV, after which Sergeant Yamashita shoved at a bookcase that was leaning against the window obscuring most of the view into the RV. *Id.* Either just before or just after Sergeant Yamashita shoved on the bookcase, a number of small objects came flying out of the window. *Id.* These items included a battery, an iPhone, a pipe clamp, an I-bolt, and a number of other miscellaneous things. RP 95-98. Although it was dark inside the RV, Sergeant Yamashita stated that it “appeared” or “seemed” like the defendant had thrown the items out of the window as she thought she saw the defendant’s arm move in a throwing motion. RP 93-94. Deputy Nicholls did see items come out the window, but did not see the defendant at all. RP 116-120.

After the items came out of the window, the officer heard the defendant yell that he was coming out. RP 134. The defendant then exited the main door of the RV. RP 70-71. According to Deputy Houts, the defendant was very angry and agitated when he came out of the RV, he was flailing his arms about, he appeared ready to run, and he refused to comply with his orders to lay down on the ground and submit to being handcuffed.

RP 71-72. According to the defendant, once he stepped out, he complied with the officers' commands. RP 144. Regardless of whose version was the more accurate, both sides agreed that once the defendant exited the RV, Officer Houts subdued him with a Taser and put him in handcuffs. RP 70-73.

At the time the officers approached the defendant's RV, they did not have a warrant to arrest the defendant. RP 118. Neither did they have a warrant authorizing their entry in to the RV. *Id.* Finally, they did not claim the existence of exigent circumstances that necessitated their entry into the RV. *Id.*

#### ***Procedural History***

By information filed on September 23, 2009, and amended on November 19, 2009, the Clark County Prosecutor charged the defendant with one count each of attempted first degree arson, felony harassment, third degree assault of a police officer "to wit: Washougal Police Sgt. Yamashita." CP 1-2, 15-16. On the day of trial, the state moved to dismiss the first two counts, and the case proceeded to a trial by jury on the sole count of third degree assault. RP 1-8. During the trial, the state called three witnesses: Officer Houts, Sergeant Yamashita, and Deputy Nicholls. RP 56, 83, 110. The defendant then took the stand as the only witness for the defense, after which the state called Officer Houts and Deputy Nicholls in short rebuttal. RP 140, 178, 183. These witnesses testified to the facts set out in the

preceding factual history. *See* Factual History. In addition, the defendant stated that he did not throw any items out of the window. RP 147-148. Rather, some items fell out when Deputy Nicholls pulled the screen off and a board and fan fell next to the window, knocking items off of the book shelf. *Id.*

Prior to trial, and during the trial, the state sought to have the officers testify to the information dispatch had given them prior to responding to the residence. RP 9-10, 39-53. The defense had objected to the admission of this evidence and the court had initially sustained the defendant's objections. *Id.* However, at the end of Deputy Nicholls' testimony, the state again sought permission to elicit this evidence, and the court ultimately overruled the defendant's objections. RP 121-130. Based upon this revised ruling, the following evidence and instructions were presented before the jury on redirect-examination of Deputy Nicholls by the state:

Q. You were informed some – you also said you were informed some things from Dispatch; is that correct?

A. Yes, sir.

Q. Okay.

MR. HARVEY: Yes, Your Honor.

THE COURT: Ask the questions.

Q. Relating to what you were informed – can you tell the jury relating to what you were informed about Mr. Stafford –

THE COURT: Stop.

– by dispatch?

THE COURT: All right. Ladies and gentlemen, I am now instructing you that the answer to this question you're not to accept it as truth, but only to – for it to be shown how it affected this officer's conduct at the scene. Okay? You may answer.

DEPUTY NICHOLLS: Thank you, Your Honor.

A. Dispatch advised that Mr. Stafford was acting irrational and that he would assault police officers when they arrived on scene.

MR. HARVEY: And with that, Your Honor, no further questions.

RP 132-133.

Following the reception of evidence, the court instructed the jury without objection. RP 183. The “to convict” instruction stated as follows:

#### INSTRUCTION NO. 9

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18<sup>th</sup> of September 2009 the defendant assaulted Washougal Police Sgt. Yamashita

(2) That at the time of the assault, Sgt. Yam[a]shita[] was a law enforcement officer; and

(3) That the defendant knew at the time of the assault that Sgt. Yam[a]shita was a law enforcement officer; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 52.

After the court's instructions, the parties presented closing argument.

RP 187-208. At 3:51 that afternoon, the jury retired for deliberation. RP 200. A little less than an hour later, at 4:43, the jury sent out the following inquiry:

Did the objects fly out of the window before Officer Yamashita pushed on the shelf[?]

CP 54.

The court replied in writing, stating: "Rely on the evidence presented in court." CP 55. Neither the clerk's "In Court Record," nor the computer Log Sheet of the trial reveal how much longer the jury deliberated that day. CP 56-59, 60-66. Neither do these documents reveal at which time the jury reconvened the next day to continue deliberation. *Id.* However, these documents do reveal that at 10:29 am the next day the jury returned a verdict of "guilty." CP 55.

One week later, the court sentenced the defendant within the standard range. CP 69-78. Although the defendant did not have any prior felony

convictions, the court did not employ the “first offender” option and did not impose a term of community custody. *Id.* However, as part of the judgment and sentence, the court entered the following no contact order under paragraph 4.5.<sup>2</sup>

- The defendant shall not have contact with CHRISTOPHER A STAFFORD, SONIA K RICHARDSON, Kim E Yamashita, Perry E Houts, including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 5 years (which does not exceed the maximum statutory sentence).

CP 74 (underlining and strike-out in original).

Following imposition of the sentence, the defendant filed timely notice of appeal. CP 79.

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<sup>2</sup>Although the court did not check the box provided to impose this provision, Appellant understands this to be a scrivener’s error, based upon the following. First, it appears that the court itself crossed out the first two names listed. Second, it also appears that the court wrote in the number “5.” Neither of these actions would have been necessary had the court’s failure to check the box been meant as an indication that the court was not imposing “no contact” provisions.

## ARGUMENT

### I. THE TRIAL COURT'S USE OF A "TO CONVICT" INSTRUCTION THAT FAILED TO SET OUT ALL OF THE ELEMENTS OF THE ALLEGED OFFENSE CHARGED DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Under this rule, the court must correctly instruct the jury on all of the elements of the offense charged. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). The failure to so instruct the jury constitutes constitutional error that may be raised for the first time on appeal. *Id.*

For example, in *State v. Salas*, 74 Wn.App. 400, 873 P.2d 578 (1994), the defendant was charged with vehicular homicide under an information alleging all three possible alternatives for committing that offense. At the end of the trial, the court, without objection from the defense, instructed the jury that to convict, the state had to prove (1) that the defendant drove while intoxicated, and (2) that the defendant's driving caused the death of another person. The court's instruction did not include the judicially created element

that intoxication be a proximate cause of the accident that caused the death.

Following deliberation, the jury returned a verdict of guilty, and the defendant appealed, arguing that the court's instructions to the jury violated his right to due process because it did not require that the state prove all the elements of the offense charged. The state replied that the defendant's failure to object to the erroneous instruction precluded the argument on appeal. However, the Court of Appeals rejected the state's argument, holding that (1) the court had failed to instruct on the judicially created causation element, and (2) the defense could raise the objection for the first time on appeal because it was an error of constitutional magnitude. Thus, the court reversed the conviction and remanded for a new trial.

In the case at bar, the state charged the defendant with third degree assault under RCW 9A.36.031(1)(g). This statute states as follows:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; . . .

RCW 9A.36.031(1)(g).

Under this statute, the gravamen of this offense includes the following three elements: (1) the defendant assaulted another person, (2) at the time of

the assault, the person assaulted was “a law enforcement officer or other employee of a law enforcement agency,” and (3) at the time of the assault, the person assaulted was “performing his or her official duties.” These elements are reflected in the current Washington Patterned Instructions Criminal (WPIC), which gives the following “to convict” instruction for this offense:

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) that on or about \_\_\_\_\_, the defendant assaulted \_\_\_\_\_;

(2) That at the time of the assault \_\_\_\_\_ was a law enforcement officer or other employee of a law enforcement agency *who was performing his or her official duties*; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

11 Washington Practice WPIC 35.23.02 (emphasis added).

As is reflected in both a plain reading of the statute, as well as the interpretation of RCW 9A.36.031(1)(g) given by the Washington Supreme Court Committee on Jury Instructions in WPIC 35.23.02, one of the essential elements of the crime of third degree assault of a police officer is that, at the

time of the assault, the officer “was performing his or her official duties.”

In the case at bar, the “to convict” instruction the court gave to the jury omitted this essential element of the crime. This instruction, No. 9, stated as follows:

#### INSTRUCTION NO. 9

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18<sup>th</sup> of September 2009 the defendant assaulted Washougal Police Sgt. Yamashita

(2) That at the time of the assault, Sgt. Yam[a]shita[] was a law enforcement officer; and

(3) That the defendant knew at the time of the assault that Sgt. Yam[a]shita was a law enforcement officer; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 52.

As the decision in *Salas* pointed out, the trial court’s failure to instruct the jury in the “to convict” instruction on each and every element of the crime charged is a manifest error of constitutional magnitude that may be raised for

the first time on appeal. In addition, since it is an error of constitutional magnitude, this court on appeal must reverse the conviction unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not “harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

In the case at bar, the record does point out facts that indicate that at the time the alleged assault occurred, Sergeant Yamashita might well not have been in the performance of her official duties. This evidence was as follows: (1) the RV was the defendant’s property and he had a reasonable expectation of privacy in it; (2) the RV was sitting on private property with the consent of the defendant’s mother, who was the property owner; (3) the officers did not have a warrant to arrest the defendant, (4) the officers did not have a warrant to search the RV; (5) the officer did not claim the existence of exigent circumstances allowing them to forcibly enter the defendant’s RV; (5) the officers were damaging the RV by trying to pry the door open with a crowbar and by ripping off a window screen, and (6) the officers did not have legal justification to force the defendant out of his RV. Under these facts, it

was well within the purview of the jury to conclude that the state had failed to prove beyond a reasonable doubt that Officer Yamashita acted within her official duties at the time she was assaulted. Thus, the state cannot prove beyond a reasonable doubt that the failure to instruct the jury on all of the elements of the offense charged was harmless. As a result, the defendant is entitled to a new trial.

**II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AND WASHINGTON CONSTITUTION, ARTICLE 1, § 3, WHEN IT ADMITTED IRRELEVANT, UNFAIRLY PREJUDICIAL HEARSAY OVER DEFENDANT'S OBJECTION.**

In the case at bar, the trial court, over defense objection, allowed the state to elicit the following during the direct examination of Deputy Nicholls:

Q. You were informed some – you also said you were informed some things from Dispatch; is that correct?

A. Yes, sir.

Q. Okay.

MR. HARVEY: Yes, Your Honor.

THE COURT: Ask the questions.

Q. Relating to what you were informed – can you tell the jury relating to what you were informed about Mr. Stafford –

THE COURT: Stop.

– by dispatch?

THE COURT: All right. Ladies and gentlemen, I am now instructing you that the answer to this question you're not to accept it as truth, but only to – for it to be shown how it affected this officer's conduct at the scene. Okay? You may answer.

DEPUTY NICHOLLS: Thank you, Your Honor.

A. Dispatch advised that Mr. Stafford was acting irrational and that he would assault police officers when they arrived on scene.

MR. HARVEY: And with that, Your Honor, no further questions.

RP 125-126.

The defendant assigns error to this evidence on the basis that (1) it was inadmissible hearsay and irrelevant, and (2) to the extent that it was relevant, it was more prejudicial than probative. The following sets out these arguments.

***(1) The Claim from Dispatch that the Defendant “Was Acting Irrational” and “Would Assault Police Officers When They Arrived on Scene” Was Inadmissible Hearsay and Irrelevant.***

Under ER 802, hearsay “is not admissible except as provided by these rules, by other court rules, or by statute.” Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase “other than one made by the declarant while testifying at

the trial or hearing” includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003).

The statement that “dispatch advised that Mr. Stafford was acting irrational and that he would assault police officers when they arrive on scene” was hearsay since it was the introduction of “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

In this case, the state will probably argue that the state was not hearsay because the court had instructed the jury that it could only consider it to show “how it affected this officer’s conduct at the scene.” The problem with this argument is twofold. First, “how” this statement “affected” the officer’s conduct at the scene, was not a fact at issue before the jury. Rather, given the facts of the case and the testimony presented, the sole fact at issue before the jury was whether or not the defendant intentionally threw a number of small items out of the window at Sergeant Yamashita. Thus, how the statement by dispatch “affected the officer’s conduct at the scene” was completely irrelevant. Second, the evidence was so unfairly prejudicial that no limiting instruction could vitiate its improper effect. The following sets out this argument.

Under ER 401, “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.” Under ER 402, “all relevant evidence is admissible,” with certain limitations. By contrast, under this same rule, “[e]vidence which is not relevant is not admissible.” Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the “existence of any fact” as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) .

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery, and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant’s arguments, the court first noted that lay witnesses may testify concerning the mental capacity of a defendant so long as the witness’ opinion is based on facts the witness personally observed.

The court then noted that the trial court did not abuse its discretion when it excluded the defendant's proposed witness because she did not meet these criteria as she had never observed the defendant when he was abusing drugs.

In the case at bar, the ultimate question before the jury was whether or not the state could prove beyond a reasonable doubt that the defendant intentionally threw items as Sergeant Yamashita. Thus, the issue of how the statement from dispatch affected the officers was irrelevant and therefore inadmissible. In fact, the evidence that dispatch told the officers that the defendant "would assault police officers when they arrived on scene" would only be relevant for one purpose: to prove that it was true. Thus, it was both irrelevant and inadmissible hearsay.

***(2) The Claim from Dispatch that the Defendant "Was Acting Irrational" and "Would Assault Police Officers When They Arrived on Scene" Was More Prejudicial than Probative.***

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403, a court should consider the following: (1) the importance of the fact that the evidence is intended to prove, (2) the strength and length of the chain of inferences necessary to establish the fact, (3) whether or not the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d

1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr.

Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

*State v. Acosta*, 123 Wn.App. at 426 (footnote omitted).

Turning to the case at bar, the trial court allowed the state to elicit the fact that someone had called dispatch, presumably a family member or friend at the scene, and stated that the defendant was irrational and he would assault police officers when they arrived on the scene. This evidence was even more unfairly prejudicial than the recitation of the defendant's criminal history in *Acosta* because in the case at bar, the statement from dispatch was that the defendant intended to or would commit the very crime for which he was being tried. As such, any potential relevance in the admission of this evidence was outweighed by its unfairly prejudicial effect. Thus, the trial court erred when it allowed the state to elicit this evidence.

In this case, the defense argues that the admission of this highly prejudicial evidence denied the defendant his due process right to a fair trial. Thus, as manifest error of constitutional magnitude, the defendant is entitled to a new trial unless that the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, supra. However, unlike the failure to instruct the jury on each and every element of the crime charged, this court has often held that the trial court's ruling on the admission or exclusion of

evidence is not seen as an error of constitutional magnitude. Under this alternative, the defendant is entitled to a new trial if, within reasonable probability, the error materially affected the outcome of the trial. *State v. Zwicker*, 105 Wn.2d 228, 713 P.2d 1101 (1986).

In the case at bar, the fact most at issue was whether or not the defendant intentionally threw items out the window at Sergeant Yamashita. Her evidence and that of Deputy Nicholls tended to indicate that he did, as they both testified that they believed the items came out the window at an angle and velocity inconsistent with them having fallen out. However, their evidence was far from conclusive and there was evidence to the contrary. First, the defendant denied throwing any items out the window. Second, there was a bookcase directly against the window which was disturbed when Deputy Nicholls pulled the screen off the open window. Third, all of the witnesses described significant movement of the RV sufficient to cause the items to come out of the window. In addition, one of the items that came out of the window was an iPhone, an expensive electronic device one would not expect a person to throw. Finally, the officers described the items as coming out at the same time, which would be more consistent with them falling as opposed to being thrown.

The inconclusive nature of this evidence was obviously not lost on the jury, which took many hours to decide what was, in essence, a single issue

case. In addition, the question the jury sent out also indicated that they were conflicted on the issue of an intentional act by the defendant. This questions read as follows:

Did the objects fly out of the window before Officer Yamashita pushed on the shelf[?]

CP 54.

In this case, the parties both focused on the issue of whether or not the defendant threw the items out the window. The jury also obviously focused on this issue as determinative in the case. The importance of this single question illustrates the highly prejudicial nature of admitting the statement from dispatch that the defendant “was acting irrational” and “would assault police officers when they arrived on scene.” In fact, given the inconclusive nature of the remaining evidence, it is highly likely that the admission of the dispatch statement was what convinced the jury to vote for conviction over acquittal, the ameliorative instruction notwithstanding. Consequently, the error in admitting this evidence did materially affect the verdict, thereby entitling the defendant to a new trial.

**III. THE TRIAL COURT ERRED WHEN IT ENTERED A “NO CONTACT” ORDER THAT WAS NOT A CRIME RELATED PROHIBITION UNDER RCW 9.94A.505(8).**

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant argues that the trial court exceeded its statutory authority when it imposed a no contact order prohibiting the defendant from having contact with Officer Houts because the sentencing reform act did not authorize the imposition of this prohibition. The following sets out this argument.

Initially, it should be noted that the trial court in this case did not employ the first offender option and did not impose a term of community custody upon the defendant. This fact is set out in paragraph 4.2 of the judgement and sentence in which the court left blank the section for imposing a term of community custody. *See* CP 72. Thus, the imposition of the no contact order in regards to Officer Houts cannot be justified as a condition the legislature authorized as part of a community custody condition. This does not mean, however, that the court could not enter such an order since RCW

9.94A.505(8) does authorize the imposition of “crime related prohibitions.”

This statute states:

(8) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.505(8).

Under this section, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). Under RCW 9.94A.030(13), a condition is a “crime-related prohibition” if it directly relates to “the circumstances of the crime.” This statutory conditions states:

(13) “Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(13).

In the case at bar, the imposition of the no contact order in regards to Sergeant Yamashita was “directly relate[d] to the circumstances of the crime for which” the defendant was convicted, since the defendant was convicted of assaulting Sergeant Yamashita. However, the defendant was not charged

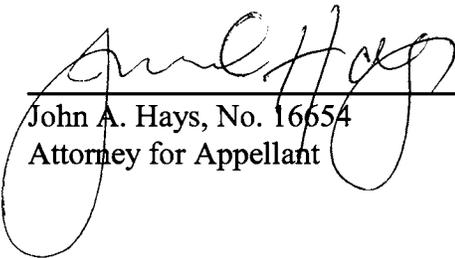
with or convicted of assaulting Officer Houts. Neither did the evidence at trial indicate that the defendant expressed any animus towards this officer. Rather, the only thing the defendant did in relation to Officer Houts was to fail his commands to exit the RV and to get on the ground. Thus, in paragraph 4.5 of the Judgment and Sentence, the court exceeded its statutory authority when it prohibited the defendant from having contact with Perry Houts. As a result, this court should strike that part of the sentence.

## CONCLUSION

The defendant is entitled to a new trial based upon the trial court's failure to instruct the jury on all of the elements of the offense, and based upon the trial court's admission of unfairly prejudicial evidence. In the alternative, this court should order the trial court to strike the no contact order that is not reasonably related to the defendant's criminal conduct.

DATED this \_\_\_\_\_ day of May, 2010.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

## INSTRUCTION NO. 9

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18<sup>th</sup> of September 2009 the defendant assaulted Washougal Police Sgt. Yamashita

(2) That at the time of the assault, Sgt. Yam[a]shita[] was a law enforcement officer; and

(3) That the defendant knew at the time of the assault that Sgt. Yam[a]shita was a law enforcement officer; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

**RCW 9A.36.031**  
**Assault in the Third Degree**

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a firefighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

(h) Assaults a peace officer with a projectile stun gun; or

(i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: “Nurse” means a person licensed under chapter 18.79 RCW; “physician” means a person licensed under chapter 18.57 or 18.71 RCW; and “health care provider” means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.

(2) Assault in the third degree is a class C felony.

#### **RCW 9.94A.030(13)**

##### **Definitions**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

. . .

(13) “Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

#### **RCW 9.94A.505(8)**

##### **Sentences**

(8) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

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

STATE OF WASHINGTON,  
Respondent,

NO. 40156-8-II

vs.

AFFIRMATION OF SERVICE

JAMES STAFFORD,  
Appellant.

STATE OF WASHINGTON )  
County of Clark ) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On May 10<sup>th</sup>, 2010, I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2. AFFIRMATION OF SERVICE

to the following:

ARTHUR D. CURTIS  
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VANCOUVER, WA 98666-5000

JAMES STAFFORD  
2107 32<sup>ND</sup> AVE  
WASHOUGAL, WA 98671

Dated this 10<sup>TH</sup> day of MAY, 2010 at LONGVIEW, Washington.

Cathy Russell  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS