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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 41753-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

TARA ROSE FENNEL,

Appellant.

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BRIEF OF APPELLANT

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ORIGINAL

**TABLE OF CONTENTS**

Page

A. TABLE OF AUTHORITIES ..... iv

B. ASSIGNMENT OF ERROR

    1. Assignment of Error ..... 1

    2. Issue Pertaining to Assignment of Error ..... 2

C. STATEMENT OF THE CASE

    1. Factual History ..... 3

    2. Procedural History ..... 6

D. ARGUMENT

**I. THE TRIAL COURT VIOLATED THE DEFENDANT’S  
RIGHT TO DUE PROCESS UNDER WASHINGTON  
CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES  
CONSTITUTION, FOURTEENTH AMENDMENT, WHEN  
IT ENTERED JUDGMENT AGAINST THE DEFENDANT  
FOR FIRST DEGREE MALICIOUS MISCHIEF BECAUSE  
SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS  
CHARGE ..... 9**

**II. TRIAL COUNSEL’S FAILURE TO PROPOSE AN  
INSTRUCTION CAUTIONING THE JURY ABOUT  
BELIEVING THE TESTIMONY OF AN ACCOMPLICE  
DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF  
COUNSEL UNDER WASHINGTON CONSTITUTION,  
ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT ..... 12**

**III. THE TRIAL COURT ERRED WHEN IT ENTERED A  
“NO CONTACT” ORDER THAT WAS NOT AUTHORIZED  
UNDER RCW 9.94A.703 ..... 15**

E. CONCLUSION ..... 20

F. APPENDIX

1. Washington Constitution, Article 1, § 3 .....	21
2. Washington Constitution, Article 1, § 22 .....	21
3. United States Constitution, Sixth Amendment .....	22
4. United States Constitution, Fourteenth Amendment .....	22
5. RCW 9.94A.650 .....	23
6. RCW 9.94A.703 .....	24
7. RCW 9A.48.070 .....	27
8. RCW 9A.48.080 .....	27
9. WPIC 6.05 .....	28

**TABLE OF AUTHORITIES**

Page

*Federal Cases*

*Church v. Kinchelse*,  
767 F.2d 639 (9th Cir. 1985) ..... 13

*In re Winship*,  
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 9

*Jackson v. Virginia*,  
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ..... 10

*Strickland v. Washington*,  
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) ..... 12

*State Cases*

*State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983) ..... 9

*State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) ..... 13

*State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) ..... 13

*State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972) ..... 9

*State v. Mulcare*, 189 Wash. 625, 66 P.2d 360 (1937) ..... 15

*State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005) ..... 18

*State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) ..... 10

*State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996) ..... 15

***Constitutional Provisions***

Washington Constitution, Article 1, § 3 ..... 9  
United States Constitution, Fourteenth Amendment ..... 9  
United States Constitution, Sixth Amendment ..... 12, 15  
Washington Constitution, Article 1, § 22 ..... 12, 15

***Statutes and Court Rules***

RCW 9.94A.030 ..... 18  
RCW 9.94A.650 ..... 15, 16  
RCW 9.94A.703 ..... 15, 17  
RCW 9A.48.070 ..... 10, 11

***Other Authorities***

WPIC 6.05 ..... 13, 14

## ***ASSIGNMENT OF ERROR***

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

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against the defendant for first degree malicious mischief because substantial evidence does not support this charge.

2. Trial counsel's failure to propose an instruction cautioning the jury about believing the testimony of an accomplice denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

3. The trial court erred when it entered a "no contact" order that was not authorized under RCW 9.94A.703.

*Issues Pertaining to Assignment of Error*

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against the defendant for first degree malicious mischief because substantial evidence does not support this charge?

2. In a case in which the majority of the state's evidence is presented through the testimony of an accomplice, does a defense counsel's failure to propose an instruction cautioning the jury about believing the testimony of an accomplice deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the jury would more likely than not have returned a verdict of acquittal had it been given the instruction?

3. When sentencing a defendant under the first offender option found in RCW 9.94A.650, does a trial court err if it enters a "no contact order" that was not authorized under RCW 9.94A.703?

## STATEMENT OF THE CASE

### *Factual History*

No long before midnight on August 9, 2008, the defendant Tara Rose Fennel went to the Silver Star Tavern in Longview with two friends by the names of Lindsey Divine and Laura Lee Quigley. RP 129-134.<sup>1</sup> While both the defendant and Lindsey were of legal age, Laura Quigley was not. *Id.* The defendant and Ms Divine entered first. RP 134-141. They then went to a side door, and gave Ms Quigley Ms Divine's identification in case a tavern employee "carded" Ms Quigley. *Id.* Within a minute or two of entering, one of the Tavern's security guards saw Ms Quigley and asked her for proof she was over 21-years-old. *Id.* Ms Quigley then handed over Ms Divine's identification. *Id.* When she did, the security guard showed it to Kelly Rothwell and Chris Moon, the two bartenders on duty. *Id.*

When Ms Rothwell looked at the identification, she recognized the deception and informed Mr. Moon of that fact. RP 59-63, Mr. Moon then approached Ms Quigley and ordered her to leave. RP 113-117. Ms Quigley complied with his order, and Ms Divine followed her out of the building. *Id.* According to Ms Rothwell, when the defendant saw what was happening, she approached the bar and began arguing with Ms Rothwell, calling her a

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<sup>1</sup>The record on appeal includes three volumes of continuously numbered verbatim reports, referred to herein as "RP [page #]."

number of rude names including “bitch.” RP 59-63. She also accused Ms Rothwell of “sleeping with” Ms Divine’s boyfriend. *Id.* Ms Rothwell responded by ordering the defendant to leave the tavern. *Id.* The defendant complied and went out the same door as had Ms Divine and Ms Quigley. *Id.* According to Ms Rothwell and Mr. Moon, when the defendant left the Tavern she was wearing a white jacket and had her hair up, and Ms Divine had on a black top. *Id.*

At about 2:30 that next morning, Ms Rothwell and Mr. Moon left the Tavern after closing and walked to their cars in the back parking area. RP 64, 117-119. As they approached Ms Rothwell’s 2001 Black BMW, they saw that someone had “keyed” a number of rude words in the sides and trunk, including the word “bitch.” *Id.* After seeing this, Ms Rothwell called the police. RP 65-69. The next evening, a Washington State Patrol (WSP) Trooper arrived and took a number of photos of the damaged vehicle, as did Ms Rothwell’s insurance adjustor a few days later. RP 15-20, 188-191. A Longview Police Officer later took custody of security videos taken both inside and outside the Silver Star Tavern just before and after midnight on the night in question. RP 22-33.

The video taken inside showed the defendant in a white top with her hair up arguing with Ms Rothwell and leaving the Tavern after Ms Divine and Ms Quigley. RP 33-35. The video outside showed Ms Divine and Ms

Quigley getting into Mitsubishi Montero, followed by the defendant, who got into the front passenger seat. RP 36-39. The vehicle then drove out of the parking lot, into the alley, and then over to the parking lot of a bank. 39-41. At that point, the video shows the Montero stop, and shows the defendant and either Ms Divine or Ms Quigley get out, walk up to Ms Rothwell's vehicle in the back parking area of the Silver Star Tavern, and bend down by the side of that vehicle. RP 42-44. The video then shows them return to the Montero. RP 45-46.

According to Ms Divine, who later testified for the state, when she, the defendant, and Ms Quigley drove out of the parking lot, they discussed vandalizing Ms Rothwell's car. RP 134-141. Based on these comments, Ms Quigley, who was driving, pulled into the parking lot of the bank. *Id.* Ms Divine and the defendant then got out and walked back to where Ms Rothwell's car was parked. *Id.* Once they got there, the defendant began gouging words into the side of the car with a key. *Id.* Ms Divine claimed that once they got to the car, she became scared and did not do any damage to it. *Id.* Ms Divine further stated that once they got back to their car, Ms Quigley claimed that they had not been at the vehicle long enough to do any damage. RP 163-165. According to Ms Divine, as a result of this comment, the defendant and Ms Quigley returned to the vehicle while she waited. *Id.* Ms Divine denied seeing what happened when the defendant returned to Ms

Rothwell's vehicle with Ms Quigley. *Id.*

### ***Procedural History***

By information filed February 17, 2010, the Cowlitz County Prosecutor charged the defendant Tara Rose Fennel with one count of first degree malicious mischief, claimed that she had knowingly caused over \$1,500.00 damage to Ms Rothwell's BMW. CP 1-2. This case later came on for trial with the state calling seven witnesses, including the WSP trooper who took the initial report, two investigating police officers, as well as Kelly Rothwell, Chris Moon, and Lindsey Divine. RP 13, 22, 58, 113, 129, 184, 209. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History.

In addition, the state called Claudio Sanchez as a witness. RP184. Mr. Sanchez was Ms Rothwell's insurance adjuster. RP 184-186. He testified that he had examined Ms Rothwell's vehicle, taken pictures, and prepared an estimate of damages. RP 185-193. The court admitted this estimate into evidence as Exhibit No. 5. *Id.* The photographs Mr. Sanchez took, admitted along with photographs the WSP Trooper took, showed damage to the sides of the vehicle and the top of the trunk lid, as described by a number of witnesses who examined the vehicle after it was vandalized. RP 22-29, 188-191; Exhibits 2B, 3A, 7A. While the photographs show damage to the top of the trunk lid, they do not show any damage to the metal

“BMW” emblem affixed to the back of the trunk lid or the model numbers also attached to the back of the trunk lid. Exhibits 2B, 3A, 7A. In spite of this fact, Mr. Sanchez’s repair estimate included the costs of replacing these two undamaged parts with new parts. Exhibit 5. Mr. Sanchez listed the cost for a new “BMW” emblem at \$26.28 and the cost of the new model numbers at \$27.68. Exhibit 5, page 2.

Following the close of the state’s case, the defense moved to dismiss on the basis that the state had failed to prove that the defendant was the person, or one of the persons, who had damaged Ms Rothwell’s car. RP 228-231. The court denied the motion. RP 231. The defense then called a private investigator, who testified to his repeated, unsuccessful attempts to contact Ms Quigley. RP 223-227. The defense then proposed to call evidence that Ms Quigley had previously admitted that she was the person who keyed Ms. Rothwell’s car, arguing that this hearsay evidence was admissible under ER 804(b)(3) as a statement against penal interest. RP 255-256. The court refused to allow the presentation of this evidence, ruling that the defense had failed to show that Ms Quigley was unavailable as a witness as was required under the rule. *Id.* Following this decision, the defense rested. RP 259.

In spite of the fact that the state had used the testimony of an accomplice to present the majority of its evidence identifying the defendant

as the person who had damaged Ms Rothwell's vehicle, the defendant's trial attorney did not propose a written instruction based upon WPIC 6.05 cautioning the jury about the credibility of the testimony of an accomplice who is later called by the state. RP 260-292. By contrast, the state did propose an instruction on accomplice liability, which the court gave over the defendant's objection. *Id.*

Following instructions from the court, the parties presented their closing arguments. RP 293-308, 308-357. The jury then retired for deliberation, later returning a verdict of guilty to the original charge. RP 362-363; CP 54-55. One week later, the court sentenced the defendant under the first offender option. CP 57-69. This sentence included a "no contact order" that precluded the defendant from having contact for 10 years with both Kelly Rothwell, the victim listed in the information, as well as Lindsey Divine. CP 61. Following imposition of sentence, the defendant filed timely notice of appeal. CP 72.

## ARGUMENT

### I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT FOR FIRST DEGREE MALICIOUS MISCHIEF BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE.

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). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

*State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that the record does not contain substantial evidence to support the conclusion that the defendant did over \$1,500.00 damage to the property of Kelly Rothwell, as was required for conviction under the statute charged. The following sets out this argument

Under former RCW 9A.48.070(1)(a), as charged in the information, a person is guilty of first degree malicious mischief if he or she “knowingly and maliciously” causes “physical damage” to the “property of another” if that damage is “in an amount exceeding one thousand five hundred dollars.”

The specific language of the statute is as follows:

(1) A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding one thousand five hundred dollars;

RCW 9A.48.070(1)(a).

In the case at bar, the state proved the fact of the damage through three witnesses and a series of photographs taken by two witnesses. The photographs showed that a person or persons had taken a key and scratched words into the side and the trunk lid of Kelly Rothwell's BMW. However, these photographs also showed that there was no damage to the back of the trunk lid. Neither was there any damage to the metal "BMW" emblem affixed to the back of the trunk lid or the model numbers also attached to the back of the trunk lid. Exhibits 2B, 3A, 7A. In spite of this fact, Mr. Sanchez's repair estimate included the costs of replacing these two undamaged parts with new parts. Exhibit 5. Mr. Sanchez listed the cost for a new "BMW" emblem at \$26.28 and the cost of the new model numbers at \$27.68. Exhibit 5, page 2. While a new emblem and new model numbers undoubtedly looked nicer on a freshly painted trunk lid than the used emblem and used model numbers would have looked, the fact was that there was not damage to these parts of the vehicle. As a result, these two parts should not have been included in the estimate of damages. With these two items deleted, the amount of damages dropped from \$1,515.56 to \$1,462.60. Thus, since the value of the damages was not over \$1,500.00, the trial court violated

the defendant's right to due process when it entered judgment against her for the crime of first degree malicious mischief.

**II. TRIAL COUNSEL'S FAILURE TO PROPOSE AN INSTRUCTION CAUTIONING THE JURY ABOUT BELIEVING THE TESTIMONY OF AN ACCOMPLICE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to propose WPIC 6.05. This instruction states:

Testimony of an accomplice, given on behalf of the [State][City][County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

WPIC 6.05.

The Washington Supreme Court Committee on Jury Instructions suggests that the trial court should give this instruction “if requested by the defense, in every case in which the State relies upon the testimony of an accomplice.” *See* Note on Use, WPIC 6.05. The Committee goes on to state that the court should not use this instruction “if an accomplice or codefendant testifies for the defendant.” *Id.* The usefulness to the defense

of convincing the court to use this instruction flows from the fact that it is, in essence, a negative comment on the credibility of a state's witness. There is no negative consequence to the defense from proposing it and convincing the court to use it. Consequently, no reasonable defense attorney would fail to propose the use of this instruction if the facts of a case allowed for such a proposal.

In case at bar, the facts of the case did allow for the proposal and use of WPIC 6.05. As is apparent from Lindsey Divine's testimony, she and Laura Quigley all acted in concert with the defendant as accomplices in vandalizing Kelly Rothwell's car, or at least in encouraging the others to vandalize Kelly Rothwell's car. Thus, by the very definition the court gave to the jury, Lindsey Divine was an accomplice to the defendant's alleged criminal activity. Consequently, since the state called Lindsey Divine as a witness for the state, WPIC 6.05 was available for use and there was no tactical reason for the defendant's trial attorney to fail to propose it. This failure fell below the standard of a reasonably prudent attorney

In addition, the failure to propose the use of WPIC 6.05 also caused prejudice to the defense because Lindsey Divine provided the strongest testimony for the state's argument that the defendant agreed to and did damage Kelly Rothwell's car. With the use of WPIC 6.05 significantly calling Lindsey Divine's testimony into question, there is a high likelihood

that the jury would have acquitted the defendant. Thus, trial counsel's failure to propose the use of this instruction denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, she is entitled to a new trial.

**III. THE TRIAL COURT ERRED WHEN IT ENTERED A “NO CONTACT” ORDER THAT WAS NOT AUTHORIZED UNDER RCW 9.94A.703.**

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 her from having contact with Lindsey Divine 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 sentenced the defendant under the first offender option found in RCW 9.94A.650, and imposed a 12 month term of community custody upon the defendant. Subsection (2), (3), and (4) of the first offender option states the following

concerning what the court may and may not do when sentencing under that provision:

(2) In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

(3) The court may impose up to one year of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed two years.

(4) As a condition of community custody, in addition to any conditions authorized in RCW 9.94A.703, the court may order the offender to pay all court-ordered legal financial obligations and/or perform community restitution work.

RCW 9.94A.650(2)-(4).

Although RCW 9.94A.650 does not specifically grant the court authority to impose a no contact order, it does grant the court authority to impose community custody conditions under RCW 9.94A.703. Section (3) of that statute does grant the court the discretionary authority to impose certain no contact orders. This section states:

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

RCW 9.94A.703(3).

While this subsection does allow the court to impose no contact orders as a condition of community custody, it does not grant the court unfettered authority to do so. Rather, under subpart (3) the court may only prohibit a defendant from "direct or indirect contact with the victim of the crime or a specified class of individuals." In the case at bar, Lindsey Divine was not the "victim" of the offense. Kelly Rothwell was the "victim." Neither was Lindsey Divine a "specified class of individuals." Thus, while the court had authority under this provision to prohibit the defendant from having contact with Kelly Rothwell, it did not have authority under this section to prohibit the defendant from having contact with Lindsey Divine.

In this case, the state may argue that if the trial court did not have authority to issue the no contact order under RCW 9.94A.703(3)(b), it did have such authority under subsection (f) of that same provision, which states that the court may impose "crime-related prohibitions." However, any such

argument would violate that rule requiring courts to construe statutes “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Under this rule, were subpart (f) of RCW 9.94A.703(3) interpreted to give the court authority to impose no contact orders generally, then subpart (b), which grants the court authority to impose no contact orders in limited circumstances would become superfluous. To avoid this result, this court should not interpret subpart (f) to grant the courts general authority to impose no contact orders. In addition, as the following explains, the imposition of a no contact order against someone other than the victim does not qualify as a “crime-related” prohibition.

Under RCW 9.94A.030(10), a condition is a “crime-related prohibition” if it directly relates to “the circumstances of the crime.” This statutory condition states:

(10) “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(10).

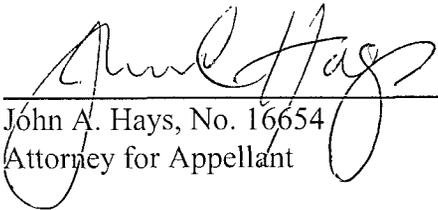
In the case at bar, the imposition of the no contact order in regards to Kelly Rothwell was “directly relate[d] to the circumstances of the crime for which” the defendant was convicted, since the defendant was convicted of damaging Kelly Rothwell’s vehicle. However, the defendant was not charged with or convicted of damaging any property belonging to Lindsey Divine, who appeared at trial as a state’s witness. Thus, in paragraph 4.3 of the Judgment and Sentence, the court exceeded its statutory authority when it prohibited the defendant from having contact with Lindsey Divine. As a result, this court should order the trial court to strike that part of the sentence.

**CONCLUSION**

The defendant's conviction should be reversed and the case remanded for a new trial. In the alternative, the defendant's conviction for first degree malicious mischief should be vacated and the case remanded for entry of judgement for second degree malicious mischief and for striking the no contact order prohibiting contact with Lindsey Divine.

DATED this 21 day of July, 2011.

Respectfully submitted,

  
\_\_\_\_\_  
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.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**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.

**RCW 9.94A.650**  
**First-time Offender Waiver**

(1) This section applies to offenders who have never been previously convicted of a felony in this state, federal court, or another state, and who have never participated in a program of deferred prosecution for a felony, and who are convicted of a felony that is not:

(a) Classified as a violent offense or a sex offense under this chapter;

(b) Manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or flunitrazepam classified in Schedule IV;

(c) Manufacture, delivery, or possession with intent to deliver a methamphetamine, its salts, isomers, and salts of its isomers as defined in RCW 69.50.206(d)(2);

(d) The selling for profit of any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana; or

(e) Felony driving while under the influence of intoxicating liquor or any drug or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

(2) In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

(3) The court may impose up to one year of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed two years.

(4) As a condition of community custody, in addition to any conditions authorized in RCW 9.94A.703, the court may order the offender to pay all court-ordered legal financial obligations and/or perform community restitution work.

**RCW 9.94A.703**  
**Community custody — Conditions.**

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) Mandatory conditions. As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

(c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) Special conditions.

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing

program offered or approved by the department of social and health services.

(ii) For purposes of this section, “alcohol or drug-related traffic offense” means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW 46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law.

**RCW 9A.48.070 (former)**  
**Malicious Mischief in the First Degree**

(1) A person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding one thousand five hundred dollars;

(b) Causes an interruption or impairment of service rendered to the public by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication; or

(c) Causes an impairment of the safety, efficiency, or operation of an aircraft by physically damaging or tampering with the aircraft or aircraft equipment, fuel, lubricant, or parts.

(2) Malicious mischief in the first degree is a class B felony.

**RCW 9A.48.080 (former)**  
**Malicious Mischief in the Second Degree**

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding two hundred fifty dollars; or

(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

(2) Malicious mischief in the second degree is a class C felony.

**WPIC 6.05**  
**Testimony of Accomplice**

Testimony of an accomplice, given on behalf of the *[State][City][County]*, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

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

STATE OF WASHINGTON,  
Respondent

COURT OF APPEALS NO:  
41753-7-II

vs.

TARA ROSE FENNEL,  
Appellant

AFFIRMATION OF SERVICE

STATE OF WASHINGTON )  
County of Cowlitz ) : ss.

DONNA BAKER, 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 July 22, 2011, I personally placed in the mail the following documents

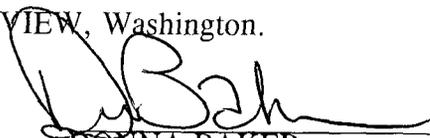
1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE
3. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

to the following:

SUSAN I. BAUR  
COWLITZ COUNTY PROS ATTY  
312 S.W. 1ST STREET  
KELSO, WA 98626

TARA ROSE FENNEL  
946 9<sup>TH</sup>, #4  
LONGVIEW, WA 98632

Dated this 22<sup>ST</sup>, day of JULY, 2011 at LONGVIEW, Washington.



DONNA BAKER  
LEGAL ASSISTANT TO JOHN A. HAYS

AFFIRMATION OF SERVICE - 1

**John A. Hays**  
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