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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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No. 42028-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jeremy Mills,**

Appellant.

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Thurston County Superior Court Cause No. 10-1-01821-6

The Honorable Judge Thomas McPhee

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. Mr. Mills's felony conviction for Violation of a No Contact Order infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The prosecution failed to prove beyond a reasonable doubt that Mr. Mills was the restrained party in a no contact order.
3. The prosecution failed to prove beyond a reasonable doubt that Ms. Morgan was the protected party in a no contact order.
4. Neither the evidence nor the parties' stipulation established that Mr. Mills had two prior qualifying convictions.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Conviction for Violation of a No Contact Order requires proof that the accused person was restrained by a no contact order. Here, the prosecutor did not present independent evidence (beyond identity of first and last names) establishing beyond a reasonable doubt that Mr. Mills was the person restrained by the order introduced into evidence at trial. Did Mr. Mills's conviction infringe his Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. The prosecution was required to prove that Jennifer Morgan was the protected party in a restraining order. Here, the prosecutor did not present independent evidence (beyond identity of first and last names) establishing beyond a reasonable doubt that the Jennifer Morgan who testified at trial was the same "Jennifer L. Morgan" named in the restraining order introduced into evidence at trial. Did Mr. Mills's conviction infringe his Fourteenth Amendment right to due process because it was based on insufficient evidence?
3. Violation of a No Contact Order is a felony if the accused person has twice previously been convicted of violating a qualified protection order. In this case, neither the evidence

nor the stipulation of the parties established that Mr. Mills had two prior qualifying convictions. Did Mr. Mills's felony conviction infringe violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

The state charged Jeremy Mills with felony Violation of a No Contact Order. CP 2. The allegation was that he called and spoke to Jennifer Morgan, the mother of his child, in violation of a court order. RP<sup>1</sup> 47-61.

At trial, the state offered and the court admitted Exhibit 1, a Domestic Violence No Contact Order. Trial Exhibit 1, Supp. CP. It listed “Jennifer L. Morgan, DOB 8-5-82,” as the protected party, and “Jeremy L. Mills, DOB 8-21-77,” as the restrained party. Trial Exhibit 1, Supp. CP.

Jennifer Morgan testified that she received a call from Jeremy Mills, and that she did not want to report “it.” RP 48-52. She was not asked and did not identify Exhibit 1, or provide her middle initial or date of birth. Nor did she provide Jeremy Mills’s date of birth. RP 47-53. She was not asked if there was a valid No Contact Order in effect at the time. RP 47-53.

The state called Deputy Bryant to testify about Exhibit 1. Bryant did not identify the parties named in the order as the same people involved in the present case. RP 54-61.

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<sup>1</sup> The only volume of the Verbatim Report of Proceedings referred to in this brief is from March 31, 2011.

The parties presented a stipulation for the jury that “the Defendant Jeremy Logan Mills has twice been previously convicted for violating the provisions of a no contact order.” Stipulation, Supp. CP. The court read this to the jury. RP 46.

The jury convicted Mr. Mills as charged. CP 3-12. After sentencing, he timely appealed. CP 3-12, 13-22.

### **ARGUMENT**

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

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

- B. The Fourteenth Amendment's due process clause requires the state to prove the crime charged beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). 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).

- C. The prosecution failed to establish beyond a reasonable doubt that Mr. Mills and Ms. Morgan were the people named in the restraining order.

Conviction for violating a restraining order requires proof beyond a reasonable doubt that the accused person is restrained by a valid order.

*See* RCW 26.50.110. To establish that the accused person is the same

person restrained by the order, the prosecution must introduce evidence

beyond mere identity of names:

To sustain this burden when criminal liability depends on the accused's being the person to whom a document pertains ... the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt "that the person named therein is the same person on trial." Because "in many instances [people] bear identical names," the State cannot do this by showing "identity of names alone." Rather, it must show, "by evidence independent of the record," that the person named therein is the defendant in the present action.

*State v. Huber*, 129 Wash. App. 499, 502, 119 P.3d 388 (2005) (citations and footnotes omitted).

At Mr. Mills’s trial, the prosecution introduced a post-conviction “Domestic Violence No-Contact Order.” Exhibit 1, Supp. CP. The document’s caption listed the name “Jeremy L. Mills,” with a date of birth of “8-21-77.” No independent evidence was introduced to prove beyond a reasonable doubt that the person named in the order was the same person charged in this case and present at trial. RP 47-61. Ms. Morgan did not confirm the existence of the order or its applicability to the Jeremy Mills who was present in court. RP 47-53. No one testified regarding his date of birth. RP 47-61. No evidence was presented relating the cause number on Exhibit 1 to the Jeremy Mills accused in this case. RP 47-61.

Similarly, the prosecution failed to prove that the protected party named in the order—“Jennifer L. Morgan [DOB] 8-5-1982”—was the Jennifer Morgan who appeared in court and testified. Ms. Morgan did not provide her date of birth, did not reference the order in her testimony, and did not indicate that she was the protected party of any protection order.<sup>2</sup> RP 47-53.

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<sup>2</sup> Nor did Ms. Morgan testify that her middle initial was “L.” RP 47-53.

Because the prosecution failed to follow the requirements of *Huber, supra*, the evidence was insufficient as a matter of law to establish that Mr. Mills was the person restrained by the order and that Ms. Morgan was the person protected by the order. *Id.* Accordingly, the evidence was insufficient for a finding of guilt, and the conviction violated Mr. Mills's Fourteenth Amendment right to due process. *Winship, supra*. The conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

D. Neither the evidence nor the parties' stipulation established that Mr. Mills had two prior qualifying convictions.

Violation of a No Contact Order is elevated to a felony if the accused person "has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020." RCW 26.50.110(5). Omitted from the list of qualifying orders are protection orders issued under RCW 10.14.<sup>3</sup> Because omissions from a statute are deemed to be exclusions,<sup>4</sup> a

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<sup>3</sup> Violation of such orders is criminalized by RCW 10.14.170.

<sup>4</sup> See *In re Detention of Martin*, 163 Wash.2d 501, 510, 182 P.3d 951 (2008) (citing the maxim *expressio unius est exclusio alterius*); see also *Adams v. King County*, 164 Wash.2d 640, 650, 192 P.3d 891 (2008).

violation of a protection order issued under RCW 10.14 may not be charged under RCW 26.50.110.

This requirement was reflected in the court's instructions to the jury, which required the jury to find that Mr. Mills had twice previously been convicted of violating the no contact order introduced into evidence "or a similar no contact order." Instructions Nos. 7 and 9, Supp. CP. The state did not object to these instructions, and thus they are the law of the case. *See, e.g., State v. Abuan*, \_\_\_ Wash. App. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2011).

In this case, the parties entered a stipulation,<sup>5</sup> which the court read to the jury during trial:

The agreement or stipulation of the parties is as follows: "The parties in this case stipulate and agree that the following is true and correct: The Defendant, Jeremy Logan Mills, has twice been previously convicted for violating the provisions of a No Contact Order. These separate convictions were on May 1, 2009, and May 1, 2009."  
Stipulation, Supp. CP; RP 46.

The stipulation did not remove the element from the jury's consideration; instead, it was a stipulation to fact which the jury could consider in deciding whether or not the element had been satisfied. RP 43-44; *see also* Instruction No. 10, Supp. CP.

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<sup>5</sup> The stipulation was presented in lieu of Proposed Exhibits 2 and 3, Supp. CP.

The stipulation did not specify the statute(s) under which the prior convictions were entered, or whether the underlying protection orders qualified as predicate orders under RCW 26.50.110(5).<sup>6</sup> Nor did the parties stipulate that the prior convictions were for violation of a “similar no contact order,” as required under Instructions Nos. 7 and 9. Supp. CP. Thus, the prosecution failed to prove beyond a reasonable doubt that the prior convictions were for violation of a qualified order<sup>7</sup> under RCW 26.50.110, or for violation of a “similar no contact order” under Instructions Nos. 7 and 9.

Accordingly, the evidence and the stipulation were insufficient to establish the felony offense, and Mr. Mills’s conviction of felony violation of a no contact order violated his Fourteenth Amendment right to due process. *Winship, supra*. The conviction must be reversed and the felony charge dismissed with prejudice. *Smalis, supra*.

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<sup>6</sup> By contrast, the proposed exhibits themselves made clear that the orders violated were issued pursuant to RCW 10.99. Proposed Exhibits Nos. 2 and 3, Supp. CP.

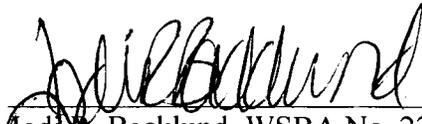
<sup>7</sup>As opposed to a protection order issued under RCW 10.14.

**CONCLUSION**

For the foregoing reasons, Mr. Mills's conviction must be reversed and the case dismissed with prejudice.

Respectfully submitted on July 20, 2011.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

Jeremy Mills, DOC #871042  
Olympic Corrections Center  
11235 Hoh Mainline  
Forks, WA 98331

and to:

Thurston County Prosecutors Office  
2000 Lakeridge Dr SW Bldg 2  
Olympia WA 98502-6090

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

All postage prepaid, on July 20, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 20, 2011.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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