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NO. 51861-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON BROOKS,  
Appellant.

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

Kitsap County Cause No. 51861-9-II

The Honorable Jennifer A. Forbes, Judge

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BRIEF OF APPELLANT

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Skylar T. Brett  
Attorney for Appellant

LAW OFFICE OF SKYLAR T. BRETT  
PO BOX 18084  
SEATTLE, WA 98118  
(206) 494-0098  
skylarbrettlawoffice@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ISSUES AND ASSIGNMENTS OF ERROR ..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS ..... 3**

**ARGUMENT ..... 6**

**I. Mr. Brooks’s defense attorney provided ineffective assistance of counsel by failing to move for a mistrial when the court dismissed the felony harassment charge after extensive, highly-prejudicial evidence of that charge had already been admitted. .... 6**

A. Because of the significant risk that the evidence admitted in support of the later-dismissed felony harassment charge unfairly prejudiced the jury and encouraged an improper propensity inference as to the remaining charge, Mr. Brooks’s defense attorney should have moved for a mistrial when that charge was dismissed.  
7

B. In the alternative, Mr. Brooks’s defense attorney should have asked the judge to give a cautionary instruction prohibiting the jury from considering the evidence admitted in support of the dismissed felony harassment charge for any purpose. .... 11

<b>II.</b>	<b>The court violated Mr. Brooks’s right to a unanimous verdict by failing to instruct the jury that it had to unanimously agree regarding which of the two alleged acts of violating the no-contact order had been proved beyond a reasonable doubt.....</b>	<b>14</b>
<b>III.</b>	<b>The court’s to-convict instruction violated Mr. Brooks’s right to due process by impermissibly lowering the state’s burden of proof.....</b>	<b>17</b>
<b>IV.</b>	<b>The court exceeded its statutory authority by sentencing Mr. Brooks to a combined period of incarceration and community custody longer than the 60-month statutory maximum for class C felonies. ....</b>	<b>20</b>
	<b>CONCLUSION .....</b>	<b>20</b>

## TABLE OF AUTHORITIES

### WASHINGTON STATE CASES

<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	18
<i>State v. Aumick</i> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....	18, 19
<i>State v. Babcock</i> , 145 Wn. App. 157, 185 P.3d 1213 (2008) 8, 9, 10, 11, 12	
<i>State v. Bobenhouse</i> , 166 Wn.2d 881, 214 P.3d 907 (2009).....	15
<i>State v. Boyd</i> , 174 Wn.2d 470, 275 P.3d 321 (2012).....	20
<i>State v. Coleman</i> , 159 Wn.2d 509, 150 P.3d 1126 (2007).....	15, 16
<i>State v. DeRyke</i> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	18
<i>State v. Escalana</i> , 49 Wn. App. 251, 742 P.2d 190 (1987) .....	8
<i>State v. Estes</i> , 188 Wn.2d 450, 395 P.3d 1045 (2017).....	7
<i>State v. Gunderson</i> , 181 Wn.2d 916, 337 P.3d 1090 (2014) .....	12
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015).....	6, 7, 11, 13
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	15
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	18
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	18, 19
<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 881 P.2d 231 (1994).....	15
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	1, 2, 14, 15
<i>State v. Powell</i> , 150 Wn. App. 139, 206 P.3d 703 (2009) .....	12
<i>State v. Russell</i> , 171 Wn.2d 118, 249 P.3d 604 (2011).....	12, 14
<i>State v. Sibert</i> , 168 Wn.2d 306, 230 P.3d 142 (2010).....	15

<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997) (Smith II) .....	18, 19
<i>State v. Smith</i> , 154 Wn. App. 272, 223 P.3d 1262 (2009) .....	13
<i>State v. Suleski</i> , 67 Wn.2d 45, 406 P.2d 613 (1965).....	8, 9, 12
<i>State v. Zillyette</i> , 178 Wn.2d 153, 307 P.3d 712 (2013).....	17

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI .....	1, 6
U.S. Const. Amend. XIV .....	1, 2, 6, 17
Wash. Const. art. I, § 21.....	1, 15
Wash. Const. art. I, § 22.....	1, 6

**STATUTES**

RCW 10.99 .....	18
RCW 26.09 .....	18
RCW 26.10 .....	18
RCW 26.26 .....	18
RCW 26.50 .....	18
RCW 26.50.110 .....	17, 18, 19, 20
RCW 7.90 .....	18
RCW 74.34 .....	18
RCW 9.94A.....	18
RCW 9A.20.021.....	20
RCW 9A.46.....	18

**OTHER AUTHORITIES**

ER 404 ..... 8, 12  
RAP 2.5..... 15, 17

## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Brooks was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Brooks was deprived of his Wash. Const. art. I, § 22 right to the effective assistance of counsel.
3. Mr. Brooks's attorney provided ineffective assistance of counsel by failing to move for a mistrial at the close of the state's evidence.
4. Mr. Brooks was prejudiced by his attorney's deficient performance.

**ISSUE 1:** The admission of prejudicial evidence in support of a charge that is later dismissed can constitute a "trial irregularity" requiring a mistrial. Did Mr. Brooks's defense attorney provide ineffective assistance of counsel by failing to move for a mistrial when the state presented extensive evidence that he had threatened someone with a gun when that charge was dismissed (on the state's motion) at the close of the state's case and the evidence strongly encouraged the jury to convict of the remaining charge based on an improper propensity inference?

5. Mr. Brooks's attorney provided ineffective assistance of counsel by failing to request and instruction admonishing the jury against considering the evidence admitted in support of the later-dismissed charge.

**ISSUE 2:** At the request of defense counsel, a trial court must instruct the jury not to consider evidence that appears to support an improper propensity inference for that purpose. Did Mr. Brooks's attorney provide ineffective assistance of counsel by failing to such an instruction admonishing the jury against considering the evidence admitted in support of the later-dismissed harassment charge for any purpose?

6. The trial court violated Mr. Brooks's Wash. Const. art. I, § 21 right to a unanimous verdict.
7. The trial court erred by failing to give a "*Petrich* instruction."

**ISSUE 3:** When the state presents evidence of multiple acts, any of which could be relied upon to find the accused

guilty of a charged offense, the state must either elect to rely upon only one such act or the court must instruct the jury that it must unanimously agree which act has been proved. Did the trial court violated Mr. Brooks's right to a unanimous verdict by failing to give a "*Petrich* instruction" when the prosecutor told the jury during closing that they could convict if it found that either of two alleged instances of conduct had been proved?

8. The trial court erred by giving jury instruction number 11.
9. The court's to-convict instruction violated Mr. Brooks's Fourteenth Amendment right to Due Process.
10. The court's to-convict instruction failed to make the state's burden manifestly clear to the average juror.

**ISSUE 4:** Violation of a no-contact order is elevated to a felony only if the state proves beyond a reasonable doubt that the accused has two prior convictions for violations of specifically enumerated types of court orders. Did the court's to-convict instruction violate Mr. Brooks's right to due process by requiring the jury to convict if it found that he had twice been previously convicted of violating *any* type of court order?

11. The sentencing court exceeded its authority by imposing a combined prison and community custody term exceeding the 5-year statutory maximum for class C felonies.

**ISSUE 5:** The potential sentence for a class C felony is limited to five years, including the total of any period incarceration and any term of community custody. Did the trial court exceed its authority by sentencing Mr. Brooks to 60 months in prison and 12 months of Community Custody for a class C felony?

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

Jacqueline Brown manages the Parkwood Terrace Apartment complex, which has 76 units. RP 187-88.<sup>1</sup> One day, she saw one of her tenants walking through the parking lot with a man whom she did not know. RP 213-14. The pair separated, and the tenant went back to her apartment alone. RP 214-15.

A short time later, Ms. Brown knocked on that tenant's door because her maintenance man claimed that a man with whom she was associated had just threatened him. RP 200-02. Ms. Brown asked the tenant if there was a man in her apartment and a man came outside. RP 217-18. Ms. Brown called 911 and described the man as he walked away. RP 218-20.

Later, the police stopped Brandon Brooks four blocks from the apartment complex. RP 140-42. Ms. Brown came to that scene and identified Mr. Brooks as the person who had been in the parking lot and, later, in the apartment. RP 80.

The police arrested Mr. Brooks and charged him with felony harassment (for allegedly threatening to kill the maintenance employee) and with felony violation of a no-contact order (because there was an

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<sup>1</sup> Unless otherwise noted, all citations to the Verbatim Report of Proceedings refer to the chronologically-numbered volumes covering 11/21/17 through 11/30/17.

order in place prohibiting him from contacting the tenant of the apartment). CP 9-12.

At trial, Ms. Brown identified the tenant of the apartment as Leslie Hammit and the man who had walked through the parking lot and left the apartment as Mr. Brooks. RP 193-99, 223.

Ms. Brown also testified three different times that Mr. Brooks had threatened the maintenance employee. RP 201-02, 217, 225. She said, specifically, that he had threatened “to shoot someone.” RP 225.

Two police officers also testified that Mr. Brooks had threatened the employee with a gun. RP 75, 143. An officer who interviewed the maintenance employee said that his voice was shaking and that he was quivering following the alleged incident. RP 76-78.

The maintenance person who was alleged to have been threatened by Mr. Brooks did not testify at trial. *See RP generally*. The state did not call any other witness to the alleged threat, either. *See RP generally*. As a result, the state moved to dismiss the felony harassment charge at the close of evidence. RP 289.

Once the harassment charge was dismissed, Mr. Brooks’s defense attorney did not move for a mistrial, even though evidence in support of that charge had already been admitted. RP 289; *See also* RP 75, 143, 201-02, 217, 225. Defense counsel also did not ask for an instruction

cautioning the jury not to consider the evidence of the alleged threat or use of a gun in determining whether Mr. Brooks was guilty of the charge for violating a no-contact order. RP 289.

Ms. Hammit also did not testify at trial. *See* RP *generally*. Instead, the state relied on Ms. Brown's identification and prior court documents to show that she was the protected party of the no-contact order. *See* Ex. 2A, 8A, 9A. The state also offered court documents demonstrating that Mr. Brooks had two prior convictions for violating a no-contact order. Ex. 4A, 5A.

In closing argument, the prosecutor pointed out that Ms. Brown claimed to have seen Mr. Brooks with Ms. Hammit on two separate occasions: once in the parking lot and again later in the apartment. RP 317. The prosecutor told the jury that they could rely on either one of those incidents to find Mr. Brooks guilty of violating the no-contact order. RP 317, 342.

But the court's instructions to the jury did not inform the jury that they had to unanimously agree which of those incidents had been proved beyond a reasonable doubt in order to convict. CP 55-71. The instructions also did not caution the jury against considering the allegations that Mr. Brooks had threatened the absent maintenance employee with a gun in determining guilt as to the no-contact order charge. CP 55-71.

The to-convict instruction for the remaining charge included an element requiring proof that “[t]he defendant had twice been previously convicted for violating the provisions of a court order.” CP 68.

The jury found Mr. Brooks guilty of the felony charge for violation of a no-contact order. CP 72. The court sentenced him to 60 months of incarceration followed by 12 months of community custody. CP 187-88.

This timely appeal follows. CP 178.

## **ARGUMENT**

### **I. MR. BROOKS’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MOVE FOR A MISTRIAL WHEN THE COURT DISMISSED THE FELONY HARASSMENT CHARGE AFTER EXTENSIVE, HIGHLY-PREJUDICIAL EVIDENCE OF THAT CHARGE HAD ALREADY BEEN ADMITTED.**

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).<sup>2</sup>

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel’s deficient performance if there is a

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<sup>2</sup> Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

(Continued)

reasonable probability<sup>3</sup> that counsel’s mistakes affected the outcome of the proceedings. *Id.*

Here, Mr. Brooks’s defense attorney provided ineffective assistance of counsel by failing to move for a mistrial after the felony harassment charge was dismissed, when extensive, highly-prejudicial evidence had already been admitted in support of that charge. In the alternative, defense counsel provided ineffective assistance by failing – at the very least – to request a curative instruction prohibiting the jury from considering that evidence when determining guilt of the remaining charge for violation of the no-contact order.

- A. Because of the significant risk that the evidence admitted in support of the later-dismissed felony harassment charge unfairly prejudiced the jury and encouraged an improper propensity inference as to the remaining charge, Mr. Brooks’s defense attorney should have moved for a mistrial when that charge was dismissed.

The charge that Mr. Brooks had threatened the maintenance employee was dismissed at the end of the state’s case. RP 289. But that was only after the jury had heard from almost every fact witness that he

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<sup>3</sup> A “reasonable probability” under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; see also *Jones*, 183 Wn.2d at 339.

had threatened to kill that employee with a gun. *See* RP 75-78, 143, 201-02, 217, 225.

Admission of prejudicial evidence in support of a charge that is later dismissed can constitute a “trial irregularity” requiring a mistrial. *See e.g. State v. Babcock*, 145 Wn. App. 157, 163–66, 185 P.3d 1213 (2008); *State v. Suleski*, 67 Wn.2d 45, 406 P.2d 613 (1965). To determine whether the trial irregularity deprived the accused of a fair trial, the court considers three factors: (1) the seriousness of the irregularity, (2) whether the “irregular” evidence was cumulative of the properly-admitted evidence, and (3) whether the irregularity could have been cured by a jury instruction. *Babcock*, 145 Wn. App. at 163 (*citing State v. Escalana*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987)).

The *Babcock* court held that the trial court had abused its discretion by denying a defense motion for a mistrial based on admission of hearsay testimony in support of a charge that the accused had molested a child when that charge was eventually dismissed, leaving the jury to consider only whether he had molested a second child. *Id.*

In that circumstance – turning to the first factor – the court found that the trial irregularity was “extremely serious” because the effect of the testimony regarding the later-dismissed allegation was analogous to the admission of other bad acts evidence under ER 404(b). *Id.* at 163-64.

Similarly, in Mr. Brooks's case, the repeated allegations that he had threatened the maintenance employee with a gun strongly encouraged the jury to make the improper propensity inference that ER 404(b) is designed to prohibit. *Id.* Especially in light of the absence of testimony from Ms. Hammit, herself, the evidence making Mr. Brooks appear particularly violent carried a high potential that the jury would infer that he must have knowingly violated the no-contact order because he was already engaged in criminal behavior on that day.

Turning to the second element, the evidence alleging that Mr. Brooks had threatened to kill someone with a gun was not cumulative of any other properly-admitted evidence. *Babcock*, 145 Wn. App. at 164. Indeed, there was no other allegation that Mr. Brooks had engaged in any violent behavior at all. *See RP generally.*

Finally, regarding the third element, the *Babcock* court noted that “no instruction can ‘remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.’” *Id.* (quoting *Escalona*, 49 Wn. App. at 255). Specifically, the *Babcock* court relied on the idea that the improper admission of evidence of a crime similar to the charged offense is “inherently difficult to disregard.” *Id.*; *See also Suleski*, 67 Wn.2d at 51 (“...where evidence is admitted which is inherently

prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors, a subsequent withdrawal of that evidence, even when accompanied by an instruction to disregard, cannot logically be said to remove the prejudicial impression created”).

Though the allegation that Mr. Brooks had threatened the maintenance worker with a gun did not concern the same offense as the other charge for violation of a no-contact order, it was far more prejudicial than evidence that he had violated some other court order on the same day because it was the only evidence that he had engaged in any violent action. Like in *Babcock*, the evidence of the alleged threat was “inherently prejudicial” and “likely to impress itself upon the minds of the jurors.” *Id.* It could not have been cured with a cautionary instruction.<sup>4</sup>

Mr. Brooks’s defense attorney provided deficient performance by failing to move for a mistrial following the dismissal of the felony assault charge. Counsel’s actions fell below an objective test of reasonableness because a mistrial would have been required under *Babcock* and the failure to move for one deprived Mr. Brooks of the opportunity for a new trial regarding the no-contact order charge, untainted by highly-prejudicial evidence that he had engaged in violent conduct.

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<sup>4</sup> Below, Mr. Brooks argues that his attorney provided ineffective assistance of counsel by failing – at the very least – to propose a curative jury instruction. That argument is made in the alternative.

There is also a reasonable probability that counsel's deficient performance affected the outcome of Mr. Brooks's trial. The alleged victim of the remaining charge did not testify at trial. *See RP generally.* The police did not find Mr. Brooks in the presence of the person who was protected by the no-contact order. Rather, he was found some time later four blocks away. RP 140-42. As a result, the state's case hinged on the identification by Ms. Brown, who had seen Mr. Brooks only for two very brief moments, one of which was from a distance. RP 213-14, 217-18. The state's evidence in support of the charge for violation of a no-contact order was not overwhelming. Mr. Brook was prejudiced by his attorney's unreasonable failure to move for a mistrial. *Jones*, 183 Wn.2d at 339.

Mr. Brooks's defense attorney provided ineffective assistance of counsel by unreasonably failing to move for a mistrial based on the admission of highly-prejudicial evidence in support of a later-dismissed charge. *Id.*; *Babcock*, 145 Wn. App. at 163. Mr. Brooks's conviction must be reversed. *Id.*

B. In the alternative, Mr. Brooks's defense attorney should have asked the judge to give a cautionary instruction prohibiting the jury from considering the evidence admitted in support of the dismissed felony harassment charge for any purpose.

In the alternative, if this Court determines that a mistrial was not necessary, Mr. Brooks's defense attorney nonetheless provided ineffective

assistance of counsel by unreasonably failing to propose an instruction admonishing the jury against considering the evidence admitted in support of the dismissed charge (and the fact of the charge, itself) for any purpose.

Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to the defense. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009).

Under ER 404(b), the trial court must instruct the jury against considering evidence of other bad acts to infer that the accused has a propensity for criminal behavior. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). The trial courts in both *Babcock* and *Suleski* issued a curative instruction, warning the jury against considering the evidence admitted in support of the dismissed charge.<sup>5</sup> *Babcock*, 145 Wn. App. at 162; *Suleski*, 67 Wn.2d at 49.

But the court is not required to give such an instruction *sua sponte*. *State v. Russell*, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). Rather, it is the duty of defense counsel to propose the curative instruction when it is necessary to protect the accused from unfair prejudice. *Id.*

In the alternative, even if a mistrial was not required in Mr. Brooks's case, defense counsel provided deficient performance by failing

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<sup>5</sup> As noted above, however, the appellate courts in those cases later held that the curative instructions were inadequate to vitiate the prejudice. *Babcock*, 145 Wn. App. at 164; *Suleski*, 67 Wn.2d at 51.

to request an instruction admonishing the jury against considering the evidence that Mr. Brooks had threatened the maintenance employee with a gun for any purpose. *Id.*

No reasonable trial strategy was advanced by counsel's failure to propose such an instruction. *State v. Smith*, 154 Wn. App. 272, 278, 223 P.3d 1262 (2009) (even strategic decisions can constitute ineffective assistance of counsel if they are unreasonable and, therefore, do not constitute "legitimate trial tactic[s]"). Three different witnesses – two of whom were police officers – testified that Mr. Brooks had threatened the employee with a gun. RP 75, 143, 201-02, 217, 225. It was not reasonable to assume that the jury could have overlooked or forgotten that evidence so long as it was not emphasized by a curative instruction. Counsel's performance fell below an objective standard of reasonableness. *Jones*, 183 Wn.2d at 339.

Mr. Brooks was prejudiced by his attorney's deficient performance. *Id.* As outlined above, the evidence against Mr. Brooks was far from overwhelming. But the risk that the jury would have convicted him based on an improper inference that he had a propensity to commit crimes was very high. There is a reasonable probability that the defense counsel's failure to request a curative instruction affected the outcome of Mr. Brooks's trial. *Id.*

Mr. Brooks's defense attorney provided ineffective assistance of counsel by failing to request an instruction prohibiting the jury from considering the evidence admitted in support of the dismissed harassment charge. *Id.*; *Russell*, 171 Wn.2d at 123. Mr. Brooks's conviction must be reversed. *Id.*

**II. THE COURT VIOLATED MR. BROOKS'S RIGHT TO A UNANIMOUS VERDICT BY FAILING TO INSTRUCT THE JURY THAT IT HAD TO UNANIMOUSLY AGREE REGARDING WHICH OF THE TWO ALLEGED ACTS OF VIOLATING THE NO-CONTACT ORDER HAD BEEN PROVED BEYOND A REASONABLE DOUBT.**

Ms. Brown claimed to have seen Mr. Brooks and Ms. Hammit together on two separate occasions: once in the parking lot and again, later, at Ms. Hammit's apartment. RP 213-15, 217-18. She said that Mr. Brooks and Ms. Hammit separated in the parking lot and Ms. Hammit went home alone. RP 214-15. But she also said that they were together again very shortly thereafter in the apartment. RP 217-18.

In closing, the prosecutor told the jury at least two times that they could rely on either one of those alleged contacts to find Mr. Brooks guilty of violating the no-contact order. RP 317, 342. But the court never instructed the jury that they had to unanimously agree that a single incident had been proved beyond a reasonable doubt in order to convict. *See* CP 55-71. This failure to provide a "*Petrich* instruction" deprived Mr. Brooks of his constitutional right to a unanimous verdict.

People accused of crimes in Washington have a right to a unanimous jury verdict. Art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

When the prosecution presents evidence of multiple acts of misconduct, any of which could be relied on to find the defendant guilty of the charged crime, “either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) (citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)) (“Where multiple acts relate to one charge, the State must elect the act on which it relies to convict the defendant, or the trial court must provide a unanimity instruction - a Petrich instruction.”).<sup>6</sup>

Prejudice is presumed where there is neither an election nor a unanimity instruction in a multiple acts case. *Coleman*, 159 Wn.2d at 512. This presumption can only be overcome when no rational juror could have a reasonable doubt as to any of the alleged acts. *Id.* (citing *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). Reversal is required

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<sup>6</sup> Failure to provide a *Petrich* instruction in a multiple acts case is constitutional error, reviewed *de novo*. *Bobenhouse*, 166 Wn.2d at 888; *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). Because the error is manifest and affects Mr. Brooks’s constitutional right to a unanimous verdict, it may also be raised for the first time on appeal. RAP 2.5(a)(3).

in a multiple acts case whenever there is a risk that the jury was not unanimous. *Id.* at 515.

In Mr. Brooks's case, the jury could have had a reasonable doubt about either one of the alleged contacts because Ms. Brown was unable to explain how Mr. Brooks was present in Ms. Hammit's apartment almost immediately after the pair had separated in the parking lot. See RP 213-15, 217-18. This inconsistency in Ms. Brown's version of events could easily have led the jury to conclude that she had misidentified the person with Ms. Hammit as Mr. Brooks on at least one of those occasions. The absence of corroborating testimony from either Ms. Hammit or the maintenance man could also have created a reasonable doubt in the mind of the jury. By presenting evidence of the two separate acts without a unanimity instruction, however, the jury was permitted to "aggregate evidence improperly," filling in the holes in the state's case and leading to the significant risk that the verdict was based on the belief by some jurors that Mr. Brooks had been present in the parking lot while others believed only that he had been present in the apartment. *Coleman*, 159 Wn.2d at 512.

The court's failure to provide a unanimity instruction differentiating the separate acts of possession prejudiced Mr. Brooks and

violated his constitutional right to a unanimous verdict. *Id.* Mr. Brooks’s conviction must be reversed. *Id.*

**III. THE COURT’S TO-CONVICT INSTRUCTION VIOLATED MR. BROOKS’S RIGHT TO DUE PROCESS BY IMPERMISSIBLY LOWERING THE STATE’S BURDEN OF PROOF.**

The court’s to-convict instruction in Mr. Brooks’s case required the jury to convict for felony violation of a no-contact order if it found that Mr. Brooks had “twice been previously convicted for violating the provisions of a court order.” CP 68.

But the legislature has only elevated violation of a no-contact order to a felony if the state proves that the accused has at least two previous convictions for violation of orders issued under *specifically enumerated chapters* of the RCW. RCW 26.50.110(5).

The court violated Mr. Brooks’s right to due process and failed to hold the state to its true burden of proof by instructing the jury to convict if it simply found that he had two prior convictions for violation of any imaginable type of court order.

A trial court’s failure to instruct the jury as to every element of the crime charged violates due process.<sup>7</sup> U.S. Const. Amend. XIV; *State v.*

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<sup>7</sup> Alleged constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Instruction No. 18 creates a manifest error affecting a constitutional right, and thus may be reviewed for the first time on

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*Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

Jurors have the right to regard the court’s elements instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (Smith II). This is so even if the missing element is supplied by other instructions. *Id*; *Lorenz*, 152 Wn.2d at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

A conviction for violating a no-contact order is elevated from a gross misdemeanor to a felony if the state proves beyond a reasonable doubt that the accused has been previously convicted twice of violation of the provisions of an order issued under RCW chapter 26.50, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order. RCW 26.50.110(5).

Only violations of an order issued under the enumerated chapters of the RCW can provide the predicate convictions necessary to elevate a

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appeal. RAP 2.5(a)(3). Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyлло*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

current violation of a no-contact order allegation to a felony. RCW 26.50.110(5).

But the court's instruction in Mr. Brooks's case required the jury to convict Mr. Brooks if it found that he had twice been previously convicted for violating the provisions of *any* court order. CP 68.

The court's to-convict instruction violated Mr. Brooks's right to due process and impermissibly lowered the state's burden of proof by requiring conviction even if the state failed to prove that Mr. Brooks had twice been previously convicted for violating *an applicable* no-contact order. *Aumick*, 126 Wn.2d at 429; *Lorenz*, 152 Wn.2d at 31; *Smith II*, 131 Wn.2d at 263; RCW 26.50.110(5).

The court's to-convict instruction violated Mr. Brooks's right to due process and failed to make the state's burden manifestly clear to the average juror. *Aumick*, 126 Wn.2d at 429; *Lorenz*, 152 Wn.2d at 31; *Smith II*, 131 Wn.2d at 263; RCW 26.50.110(5). Mr. Brooks's conviction must be reversed. *Id.*

**IV. THE COURT EXCEEDED ITS STATUTORY AUTHORITY BY SENTENCING MR. BROOKS TO A COMBINED PERIOD OF INCARCERATION AND COMMUNITY CUSTODY LONGER THAN THE 60-MONTH STATUTORY MAXIMUM FOR CLASS C FELONIES.**

Felony Violation of a No-Contact Order is a class C felony. RCW 26.50.110(4). It carries a maximum sentence of five years. RCW 9A.20.021(1)(c).

The five-year maximum includes the total combined period of incarceration and community custody. RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

Accordingly, a sentencing court exceeds its authority by imposing a sentence for a class C felony consisting of prison time and a period of community custody, which total to more than 60 months. *Id.*

The sentencing court in Mr. Brooks's case exceed its authority by doing just that: sentencing him (for a class C felony) to 60 months in prison and an additional 12 months of community custody. CP 187-88.

Mr. Brooks's case must be remanded for resentencing within the statutory maximum at RCW 9A.20.021(1)(c). *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

**CONCLUSION**

Mr. Brooks received ineffective assistance of counsel. The court's instructions failed to inform the jury that they had to unanimously agree

which of the alleged contacts had been proved beyond a reasonable doubt. The court's to-convict instruction impermissibly lowered the state's burden of proof. Mr. Brooks's conviction must be reversed.

In the alternative, Mr. Brooks's sentence of 60 months in full custody plus 12 months of community custody exceeded the statutory maximum of 5 years. Mr. Brooks's case must be remanded for resentencing within the statutory maximum.

Respectfully submitted on August 8, 2018,



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Brandon Brooks/DOC#357164  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney  
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Seattle, Washington on August 8, 2018.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

# LAW OFFICE OF SKYLAR BRETT

August 08, 2018 - 3:33 PM

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