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No. 52969-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Baron Ashley,

Appellant.

Clark County Superior Court Cause No. 18-1-00974-0

The Honorable Judge Robert A. Lewis

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Ashley's suppression motion.
2. The police violated Mr. Ashley's Fourth and Fourteenth Amendment right to be free from unreasonable searches.
3. The police invaded Mr. Ashley's private affairs in violation of Wash. Const. art. I, §7.
4. The police improperly installed a hidden camera and conducted round-the-clock enhanced surveillance for several weeks at the apartment complex they believed Mr. Ashley was visiting.

ISSUE 1: Intrusive technology-assisted surveillance conducted without a warrant violates the Fourth Amendment and Wash. Const. art. I, §7. Did the police violate Mr. Ashley's constitutional rights by installing a hidden camera and making a digital video recording of the comings and goings of every resident and guest of the apartment complex?

5. The evidence was insufficient to convict Mr. Ashley of felony no contact order violations.
6. The State failed to prove the constitutional validity of Mr. Ashley's predicate convictions.
7. Mr. Ashley's prior guilty pleas were involuntary because he was not informed of the direct consequences of conviction.
8. Mr. Ashley's prior guilty pleas were involuntary because the record of the plea hearing does not affirmatively show that he understood the relationship between the law and the facts.

ISSUE 2: Where an accused person challenges the constitutional validity of a predicate conviction, the State bears the burden of proving its validity beyond a reasonable doubt. Did the State fail to prove beyond a reasonable doubt the constitutional validity of Mr. Ashley's predicate convictions?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Baron Ashley and Lorrie Brookshire married in 2016. RP 340. Brookshire, now Ashley, has two children and a job. RP 341, 343. She needed help with the children, and her husband was willing to give it. RP 339-344. But there was a no contact order. Ex. 4A (11/20/18) Supp. CP.

The couple tried multiple times to get it lifted, without luck. RP 92-93, 307, 343. The order allowed for contact that related to the children, but not in-person contact. RP 289-290. So, they arranged to minimize their time together while making sure the children were cared for.¹ RP 306, 341-344.

Detective Sandra Aldridge was asked to find Mr. Ashley. She believed he was staying with his family. RP 272-274. At Detective Aldridge's request, Sergeant Joseph Graaff placed a hidden digital camera outside the apartment complex in March of 2018. RP 164-165. Graaff hung the camera from a cable owned by Comcast but did not request or obtain permission from Comcast to do so. RP 125-127, 165.

Graaff did not obtain a warrant prior to installing the hidden camera. RP 173. He testified that he'd personally placed about 150 such

¹ Mrs. Ashley even provided a notarized copy of her work schedule to Mr. Ashley's prior attorney in an effort to establish that the pair was not having face-to-face contact when he was at the home. RP 343. She had her oldest child text Mr. Ashley to come over after she had gone to work. RP 344.

surveillance cameras around the city over the past five years and had never sought a warrant or asked the city attorney for advice on the need for a warrant. RP 173, 177, 181-182.

The hidden camera was installed on March 9, and it remained there (at least) until Mr. Ashley was arrested on April 3, 2018. CP 81-83. The camera recorded continuously. CP 81-83.

Aldridge reviewed the camera footage. CP 81-83. On several occasions, she saw a person she believed to be Mr. Ashley, although she never once saw the person's face. CP 81-83. Nor did Aldridge ever see the person enter Ms. Brookshire's apartment.² CP 81-83; RP 139.

Following her review of the video, Aldridge obtained a warrant to search Ms. Brookshire's apartment. CP 81-86. Officers executed the warrant on April 3rd, and arrested Mr. Ashley at the apartment. CP 87. At the time Aldridge requested a warrant, the only other information tying Mr. Ashley to the apartment was John DeGroat's encounter with him in the complex's parking lot in January of 2018. CP 81.

The State charged Mr. Ashley with two counts of felony violation of a no contact order, as well as residential burglary. CP 383-384.

² Detective Aldridge initially testified that the door to the apartment was not visible on the video. RP 139. She later testified that the front door was only partially covered by a brick wall. RP 158-159.

Before trial, Mr. Ashley moved to suppress the evidence from the surveillance devices used by the police. CP 3, 69, 217, 244, 370. Excerpts from the video surveillance were admitted into evidence. Ex. 1 (11/19/18) Supp. CP.

Some of the clips introduced into evidence show one or more people walking between the apartment complex and the parking lot. Ex. 1 (11/19/18) Supp. CP. It is not clear from the video that the people shown in the footage are the same from one clip to the next. Ex. 1 (11/19/18) Supp. CP. The race of the people captured in the footage cannot be discerned in most of the clips; however, in some clips, the camera recorded a dark-skinned person. Ex. 1 (11/19/18) Supp. CP. In her testimony, Aldridge insisted that the person was African-American and not another ethnicity. RP 138.

Mr. Ashley argued that the warrantless video surveillance violated his rights under the Fourth Amendment and Wash. Const. art. I, §7. CP 3, 69, 217, 244, 370; RP 118-212. He also pointed out that the search warrant affidavit was insufficient when the improperly obtained material was excised. CP 3, 69, 217, 244, 370. The trial court denied Mr. Ashley's suppression motion.³ RP 200-212.

³ The court did not enter written findings of fact and conclusions of law; the oral ruling spans 12 pages of transcription. RP 200-212.

The violations were charged as felonies based on an allegation that Mr. Ashley had at least two prior convictions for violating a no contact order. CP 383-384. To prove this allegation, the State planned to rely on a 2017 guilty plea to three violations of a district court no-contract order. CP 341-366, 383-384; RP 227-245.

Prior to trial, Mr. Ashley challenged the constitutionality of his 2017 convictions.⁴ CP 199-216; RP 227-245. The State submitted certified copies of documents from the prior case as well as a video recording of the plea hearing. CP 341-366; Ex. 2 (11/19/18), Supp. CP.

The 2017 plea form, covering all three charges, indicates that “[t]he crime with which I am charged carries a maximum sentence of 364 days in jail.” CP 342. It also notified Mr. Ashley that the court could impose any sentence “up to the maximum authorized by law.” CP 342.

The plea form does not include notice that Mr. Ashley could be subject to three consecutive 364-day terms based on the three charges to which he pled guilty. CP 342. Nor did the judge discuss this possibility with Mr. Ashley at the plea hearing. Ex. 2 (11/19/18), Supp. CP.

⁴ The defense also argued that because the matters all were under one cause number and sentenced on the same day, they should not count separately. RP 33-35.

Instead of outlining the elements required for conviction, the plea form referenced the charging document. CP 341. When asked to “state in my own words what I did that makes me guilty,” Mr. Ashley wrote:

On June 16, 17, and 18, 2017, I violated a No Contact Order in Clark County, Washington when I responded to telephone calls from my wife. Even though she was trying to get the court orders dismissed, I should not have responded.
CP 345.

No facts were added to this statement during the judge’s colloquy with Mr. Ashley. Ex. 2 (11/19/18), Supp. CP.

The trial judge found the prior convictions constitutional. RP 231-235, 244-245, 263-266.

At trial, Mr. Ashley admitted that he had been in the home helping his family. RP 358-362. The jury acquitted him on the burglary charge, but he was convicted of both felony violations of a contact order. CP 413-415; RP 428.

At sentencing, the court found that Mr. Ashley had over 9 points and sentenced him to a total of 60 months. RP 566-571; CP 624-642. Mr. Ashley timely appeals. CP 642.

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE GRANTED MR. ASHLEY’S SUPPRESSION MOTION AND EXCLUDED ALL FRUITS OF THE WARRANTLESS INTRUSION INTO HIS PRIVATE AFFAIRS.

Using a hidden camera, police spied on the apartment complex where Lorrie Ashley (f.k.a. Brookshire) lived. The camera operated twenty-four hours a day, seven days a week. It recorded continuously, and officers were able to zoom in on the recorded images and review the footage at will.

The use of this hidden camera over a period of weeks “disturbed [Mr. Ashley] in his private affairs” without authority of law. Wash. Const. art. I, §7. It also amounted to a warrantless search under the Fourth Amendment. The evidence derived from this hidden camera footage should have been suppressed.

A. The covert video surveillance operation amounted to an unconstitutional intrusion into Mr. Ashley’s private affairs.

Under the state constitution, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”⁵ Wash. Const. art. I, §7. The “closer officers come to intrusion into a dwelling, the greater the constitutional protection.” *State v. Chrisman*, 100 Wn.2d 814,

⁵ Art. I, §7 provides greater protection than the Fourth Amendment. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). In this case, the hidden camera surveillance also violated Mr. Ashley’s Fourth Amendment rights, as discussed elsewhere.

820, 676 P.2d 419 (1984). Here, the hidden-camera surveillance of the apartment complex impermissibly intruded on Mr. Ashley's private affairs and violated his rights under Wash. Const. art. I, §7.

The use of sense-enhanced surveillance may violate art. I, §7 if it involves "a particularly intrusive method of viewing." *Young*, 123 Wn.2d at 182. In *Young*, police used thermal imaging to detect heat patterns emanating from a house. *Id.*, at 183. The officers in *Young* made their observations from "a lawful, nonintrusive vantage point." *Id.*

The Supreme Court concluded that "the infrared surveillance not only violated the defendant's private affairs, but also constituted a violation of the Washington State Constitution's protection against the warrantless invasion of his home." *Id.*, at 188. The court characterized thermal imaging as "a particularly intrusive means of observation." *Id.*, at 183.

The *Young* court reiterated that the state constitutional right to privacy protects more than just "the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.'" *Id.*, at 181-182 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

The court went on to say that the right to privacy should not be tied “to the constantly changing state of technology.” *Id.*, at 184. Instead, “our legal right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry.” *Id.*

Like the infrared surveillance at issue in *Young*, the hidden camera used here amounted to “a particularly intrusive means of observation.” *Id.*, at 183. Police made secret around-the-clock recordings seven days a week for nearly a month, with no notice to any of the people who were caught on video. CP 81-83.

The hidden camera captured the comings and goings of every person who accessed the apartment complex from the parking lot.⁶ Ex. 1 (11/19/18), Supp. CP. As in *Young*, police were able “to conduct their surveillance without [anyone’s] knowledge.” *Id.*, at 183.

The *Young* court’s condemnation of warrantless thermal imaging applies equally to this case:

Such unrestricted, sense-enhanced observations present a dangerous amount of police discretion... Not only does this practice eviscerate the traditional requirement that police identify a particular suspect prior to initiating a search, but it also facilitates clandestine investigations by the police force, which are not subject to the traditional restraint of public accountability...Such

⁶ In *Young*, the court found it “especially troubling” that police targeted neighboring homes with the thermal imaging device. *Id.*, at 186-187.

secret surveillance may not only chill free expression, but also may encourage arbitrary and inappropriate police conduct.

Id., at 187.

By conducting round-the-clock video surveillance using a concealed camera, the police improperly intruded on the private affairs of every resident of the apartment complex, as well as other visitors and guests. The officers violated Mr. Ashley’s constitutional right to privacy under Wash. Const. art. I, §7.

All evidence stemming from the unlawful surveillance should have been suppressed. *Id.* Mr. Ashley’s convictions must be reversed, and the case remanded. *Id.*

B. The covert surveillance operation qualified as an unreasonable search for Fourth Amendment purposes.

Under the Fourth Amendment, a search occurs when police infringe a person’s reasonable expectation of privacy. *Carpenter v. United States*, --- U.S. ---, ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). The analysis is “informed by historical understandings” of what was deemed unreasonable when the Fourth Amendment was adopted. *Id.*

A central aim of the Framers was “to place obstacles in the way of a too permeating police surveillance.” *United States v. Di Re*, 332 U.S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948). The Supreme Court has “kept this attention to Founding-era understandings in mind when

applying the Fourth Amendment to innovations in surveillance tools.”⁷

Carpenter, --- U.S. at ____.

Mr. Ashley’s case involves such an overly “permeating police surveillance.” *Di Re*, 332 U.S. at 595. *Id.* By placing a hidden camera near the apartment complex and recording every arrival and departure, twenty-four hours per day, seven days per week over the course of several weeks, the police improperly infringed Mr. Ashley’s reasonable expectation of privacy. *Carpenter*, --- U.S. at ____; *see also State v. Phillip*, No. 77175-2-I, Slip Op. at *6 (Wash. Ct. App. July 1, 2019).

In *Carpenter*, police were granted court orders allowing access to Cell Site Location Information (CSLI) maintained by the defendant’s cell phone carriers. *Carpenter*, --- U.S. at _____. Using the data, police were able to create a historical record of the defendant’s approximate location during the time periods they were investigating. *Id.*

The Supreme Court found that the government “invaded [the defendant’s] reasonable expectation of privacy” by obtaining his CSLI data. *Id.* The court rested its conclusion (in part) on a growing concern about “sweeping modes of surveillance.” *Id.*, at ____ (discussing *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) and

⁷ This led the Supreme Court to reach the same conclusion as the *Young* court with respect to thermal imaging. *See Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)

United States v. Jones, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)). Much of the court’s discussion focused on the intensity of the surveillance made possible by advances in technology.⁸ *Id.*, at ____.

At the time *Carpenter* was decided, five justices had already agreed that long-term GPS tracking could amount to a search even where the person travels on public streets. *Id.*, at _____. The court noted that “[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere.” *Id.*

Here, as in *Carpenter*, the hidden-camera surveillance was so intrusive as to invade Mr. Ashley’s reasonable expectation of privacy. *Id.* Neither Mr. Ashley, Mrs. Ashley, nor any of the other tenants or visitors to the apartment complex should have had their comings and goings monitored every hour of the day for weeks by means of a hidden police camera.

The “permeating police surveillance”⁹ undertaken here was so intrusive that it amounted to a search, and thus violated the Fourth Amendment. Police should have sought judicial approval before spying on the residents and guests of the apartment complex. Because they failed to

⁸ In *dicta*, the court noted that it did not intend to “call into question conventional surveillance techniques and tools, such as security cameras.” *Id.*, at _____. The court’s *dicta* did not specify whether a hidden police camera set up to record footage around the clock for weeks at a time would qualify as a “conventional” surveillance technique. *Id.*

⁹ *Di Re*, 332 U.S. at 595.

do so, Mr. Ashley's convictions must be reversed. Any evidence stemming from the unlawful surveillance must be suppressed. *Id.*

C. Once improperly obtained information is removed, the search warrant affidavit did not provide probable cause to search the apartment.

Evidence stemming from an unconstitutional search must be suppressed. *State v. Eisfeldt*, 163 Wn.2d 628, 640, 185 P.3d 580 (2008). In addition, such evidence may not be used to support a search warrant application. *Id.*

A court must assess a warrant application "without the illegally gathered information to determine if the remaining facts present probable cause to support the search warrant." *Id.* If the affidavit, when viewed in this light, fails to establish probable cause, then evidence obtained pursuant to the warrant must also be suppressed. *Id.*

When evidence obtained through the illegal surveillance is excised from Detective Aldridge's affidavit, the application does not provide probable cause to enter and search the apartment. CP 78-84. At the time Aldridge requested a warrant, the only other information tying Mr. Ashley to the apartment was John DeGroat's encounter with him in the complex's parking lot in January of 2018. CP 81. This information did not provide probable cause to search the apartment in April.

In the absence of the surveillance recordings, the warrant affidavit does not supply probable cause. *Id.* The evidence seized pursuant to the warrant must be suppressed. *Id.* This includes any other evidence “obtained as a direct result of [the] unconstitutional search[es];” such derivative evidence must also be excluded as fruit of the poisonous tree.¹⁰ *Id.*

Mr. Ashley’s convictions must be reversed and the evidence suppressed. His case must be remanded to the trial court. *See State v. McKee*, 193 Wn.2d 271, 273, 438 P.3d 528 (2019) (discussing the appropriate remedy following suppression of evidence).

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE A FELONY NO CONTACT ORDER VIOLATION BECAUSE THE STATE FAILED TO SHOW THE CONSTITUTIONAL VALIDITY OF MR. ASHLEY’S PREDICATE CONVICTIONS.

Prior to trial, Mr. Ashley challenged the constitutional validity of his prior convictions for violating a no contact order. The State did not show that his guilty pleas were entered knowingly, intelligently, and

¹⁰ In this case, the fruit of the poisonous tree includes not only items seized pursuant to the warrant, but also Mr. Ashley’s recorded telephone conversation from the jail. RP 299-309. Mr. Ashley was in custody as a result of his arrest during execution of the warrant. RP 276-283; CP 87. There is no “unforeseeable intervening act” that “genuinely sever[ed] the causal connection between official misconduct”—the unconstitutional searches—and Mr. Ashley’s recorded conversation. *State v. Mayfield*, 192 Wn.2d 871, 898, 434 P.3d 58 (2019) (outlining Washington’s attenuation doctrine).

voluntarily. Because of this, it failed to prove the constitutional validity of the prior convictions.

The evidence was insufficient to establish a felony no contact order violation. Mr. Ashley's convictions must be reversed, and the charges dismissed with prejudice.

A. The State had the burden of proving beyond a reasonable doubt the constitutional validity of Mr. Ashley's predicate convictions.

To convict Mr. Ashley of felony violation of a no contact order, the State was obligated to prove that he had two prior convictions. RCW 26.50.110(5). The statute requires proof of constitutionally valid prior convictions. *See State v. Gore*, 101 Wn.2d 481, 486, 681 P.2d 227 (1984) (addressing predicate convictions for unlawful possession of a firearm charge); *State v. Swindell*, 93 Wn.2d 192, 197, 607 P.2d 852 (1980) (same).

An accused person may challenge the constitutional validity of a predicate conviction where the prior conviction is an element of an offense. *State v. Summers*, 120 Wn.2d 801, 810, 846 P.2d 490 (1993). Once the accused person alleges a constitutional infirmity, the State "must prove beyond a reasonable doubt that the predicate conviction is constitutionally sound." *Id.*

Here, Mr. Ashley challenged the constitutional validity of his prior convictions. CP 199-216. He argued that his prior guilty pleas were not voluntary. CP 199-216. He pointed out that “[t]he elements of the offense are not set forth in the form... [and] No satisfactory factual basis is provided in the form.” CP 200. He also argued that a guilty plea cannot be voluntary if the defendant is not fully advised of the sentencing consequences. CP 199, 203, 206-208.

Because Mr. Ashley challenged the constitutional validity of the predicate convictions, the State bore the burden of proving “beyond a reasonable doubt that the predicate conviction[s] [are] constitutionally sound.” *Id.* It failed to do so. Accordingly, the evidence was insufficient to prove a felony no contact order violation.

B. The State failed to prove beyond a reasonable doubt that Mr. Ashley’s prior convictions for no contact order violations were constitutionally valid.

Due process requires an affirmative showing that an accused person’s guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969); *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004). In this case, the record of the plea hearing does not affirmatively show that Mr. Ashley’s guilty pleas were knowing, intelligent, and voluntary.

1. The record does not affirmatively show that Mr. Ashley was informed of the direct consequences of conviction.

A defendant must understand the sentencing consequences of a guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). Mr. Ashley was not advised of the direct consequences of his pleas.

When a person pleads guilty to multiple non-felony charges, the sentencing court has discretion to run the sentences consecutively. RCW 9.92.080(3). Here, Mr. Ashley pled guilty to three gross misdemeanors; however, nothing in the record of the plea hearing shows that he was notified or understood the judge could impose consecutive sentences totaling nearly three years in custody.

The written plea form indicates that “[t]he crime with which I am charged carries a maximum sentence of 364 days in jail.” CP 342. It notified Mr. Ashley that “[t]he judge can give me any sentence up to the maximum authorized by law.” CP 342. However, the plea form says nothing about the possibility of consecutive sentences for multiple convictions. CP 342. Nor did the judge address the issue during his colloquy with Mr. Ashley. Ex. 2 (11/19/18), Supp. CP.

The record does not affirmatively show that Mr. Ashley knew he could receive nearly three years of incarceration. Because of this, his

guilty pleas were involuntary. *Id.*; see also *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

The State failed to prove beyond a reasonable doubt the constitutional validity of Mr. Ashley's prior convictions. *Summers*, 120 Wn.2d at 810. The evidence was therefore insufficient to prove a felony no contact order violation. *Id.*

2. The record does not affirmatively show an adequate factual basis for Mr. Ashley's guilty pleas.

To satisfy the requirements of due process, the accused person must understand the law, the facts, and the relationship between the two. *State v. R.L.D.*, 132 Wn. App. 699, 704-706, 133 P.3d 505 (2006). The defendant "must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements." *Id.*, at 704.

A guilty plea cannot be "truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). Absent an accurate understanding of the relationship between the law and the facts, "a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea." *R.L.D.*, 132 Wn. App. at 704-706.

Here, the record of the plea hearing does not affirmatively show that Mr. Ashley understood the law, the facts, and the relationship between the two. Because of this, the State failed to prove the constitutionality of his predicate convictions. *Id.*

A conviction under RCW 26.50.110 requires proof of the existence of a restraining order, the accused person's knowledge of the order, and a violation of certain enumerated restraint provisions. RCW 26.50.110(1)(a); *see also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.51 (4th Ed). These include "restraint provisions prohibiting contact with a protected party." RCW 26.50.110(1)(a)(i).

Here, the record of Mr. Ashley's guilty plea does not show any understanding of the State's obligation to prove his knowledge; nor does it show that he understood the State had to prove that he violated "restraint provisions prohibiting contact with a protected party." RCW 26.50.110(1)(a)(i). The record is therefore inadequate to prove that his guilty pleas were knowing, intelligent, and voluntary. *Id.*

Mr. Ashley's plea form includes a statement of facts outlining the offense. CP 345. However, his statement of facts does not address all the elements required for conviction. In his plea form, Mr. Ashley indicated that:

On June 16, 17, and 18, 2017, I violated a No Contact Order in Clark County, Washington when I responded to telephone calls from my wife. Even though she was trying to get the court orders dismissed, I should not have responded.
CP 345.

He reaffirmed this statement in his colloquy with the judge. Ex. 2 (11/19/18), Supp. CP. No additional facts were elicited during this colloquy. Ex. 2 (11/19/18), Supp. CP.

The statement is deficient for two reasons. First, it does not address the knowledge element. CP 345; Ex. 2 (11/19/18), Supp. CP. Nothing in the written plea form or in the colloquy with the judge shows that Mr. Ashley understood the State's obligation to prove that he knew of the order at the time of the alleged violations. CP 345; Ex. 2 (11/19/18), Supp. CP.

Second, the statement does not reflect the requirement that the State prove that the order included "restraint provisions prohibiting contact with a protected party" and that Mr. Ashley violated one such provision.¹¹ RCW 26.50.110(1)(a).

In the absence of an adequate factual basis, the record of the plea hearing does not show "an accurate understanding of the relation of the facts to the law." *Id.* Accordingly, the State failed to prove beyond a

¹¹ Mr. Ashley wrote that he "violated a No Contact Order... when [he] responded to telephone calls from [his] wife," and that he "should not have responded," but did not indicate that the order prohibited contact with his wife via telephone. CP 345.

reasonable doubt the constitutional validity of Mr. Ashley's predicate convictions.

The evidence was insufficient to prove a felony violation of RCW 26.50.110(1)(a). Mr. Ashley's convictions must be reversed. *Summers*, 120 Wn.2d at 810.

C. The proper remedy is reversal and dismissal with prejudice.

Reversal for insufficient evidence is equivalent to an acquittal. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016). Remand for resentencing on a lesser included offense is only permissible when the jury has explicitly been instructed on the lesser offense. *Id.*

Here, the prosecutor did not seek instruction on any lesser offense. Accordingly, the charges must be dismissed with prejudice. *Id.*; *In re Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012).

CONCLUSION

Police installed a hidden camera outside an apartment complex and recorded the comings and goings of residents and their guests. The camera remained in place for several weeks, and recorded footage 24 hours per day, seven days per week. This sense-enhanced surveillance was "particularly intrusive." *Young*, 123 Wn.2d at 182. It violated Wash.

Const. art. I, §7 and the Fourth Amendment. All evidence flowing from the illegal surveillance should have been suppressed.

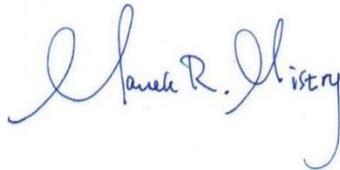
In addition, the State failed to prove the constitutional validity of Mr. Ashley's prior convictions for violating a no contact order. The evidence was therefore insufficient to prove a felony violation in this case. The present convictions must be reversed, and the charges dismissed with prejudice.

Respectfully submitted on July 31, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Baron Ashley, DOC# 838760
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
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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 Olympia, Washington on July 31, 2019.



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

BACKLUND & MISTRY

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