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NO. 53002-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

AARON JASON THOMAS,

Appellant.

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BRIEF OF APPELLANT,  
AARON JASON THOMAS

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY  
THE HONORABLE STEPHEN BROWN, JUDGE

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STEPHANIE TAPLIN  
Attorney for Appellant  
Newbry Law Office  
623 Dwight St.  
Port Orchard, WA 98366  
(360) 876-5567

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## I. INTRODUCTION

In November 2018, Aaron Thomas was contacted by his ex-girlfriend, Brittany Elzinga.<sup>1</sup> He met with Ms. Elzinga in a parking lot in Aberdeen, WA. However, a no-contact order prohibited Mr. Thomas from having contact with Ms. Elzinga. Mr. Thomas was charged and convicted of violating this no-contact order.

This Court should reverse Mr. Thomas's conviction for four reasons. First, trial counsel was ineffective by failing to move to exclude witnesses. This resulted in a witness and police officer assisting with jury selection. Second, during closing argument the prosecutor expressed his personal opinions about the case. Third, no rational jury could conclude beyond a reasonable doubt that Mr. Thomas knew of the no-contact order. Fourth, the trial court judge abused his discretion during sentencing. The court refused to consider whether the fact that Ms. Elzinga initiated contact amounted to a mitigating circumstance. The court also relied on impermissible bases for declining an exceptional downward sentence. Even if none of these errors alone warrant reversal, the cumulative effect denied Mr. Thomas a fair trial. This Court should reverse and remand.

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<sup>1</sup> Also known as Brittany Bagley.

## **ASSIGNMENTS OF ERROR**

Assignment of Error 1: Mr. Thomas's trial counsel provided ineffective assistance by failing to move to exclude a police officer and witness from assisting the prosecutor with jury selection.

Assignment of Error 2: The prosecutor committed misconduct that prejudiced Mr. Thomas by expressing his personal opinion about the evidence in closing argument.

Assignment of Error 3: The evidence at trial was insufficient to support Mr. Thomas's conviction for violating a domestic violence no-contact order.

Assignment of Error 4: The superior court abused its discretion by refusing to consider a mitigating factor when sentencing Mr. Thomas.

Assignment of Error 5: The superior court abused its discretion by relying on impermissible bases for refusing to impose an exceptional sentence below the standard range.

Assignment of Error 6: Cumulative error denied Mr. Thomas a fair trial.

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

Issue 1: Was trial counsel ineffective by failing to move to exclude witnesses pursuant to ER 615 when a police officer and witness for the state assisted the prosecutor with jury selection?

Issue 2: Did the prosecutor commit misconduct, prejudicing Mr. Thomas, by repeatedly expressing his personal opinion about the evidence in closing

argument?

Issue 3: Was there insufficient evidence to support Mr. Thomas's conviction when the state failed to prove beyond a reasonable doubt that Mr. Thomas knew of the existence of the no-contact order?

Issue 4: Did the superior court abuse its discretion when sentencing Mr. Thomas by refusing to consider an applicable mitigating circumstance?

Issue 5: Did the superior court abuse its discretion by relying on Mr. Thomas's "language," his decision to proceed to a jury trial, and an aggravating factor not found by the jury as bases for refusing to impose an exceptional sentence below the standard range?

Issue 6: Did cumulative error deny Mr. Thomas due process and a fair trial?

#### **STATEMENT OF THE CASE**

Aaron Thomas and Brittany Elzinga have a long and troubled history. They started dating in 2009 and had a romantic relationship, off and on, for approximately a decade. RP at 86. In 2015, Mr. Thomas was convicted of violating a no-contact order with Ms. Elzinga. Ex. 4. On March 23, 2015, the superior court in that case entered a domestic violence no-contact order prohibiting Mr. Thomas from having any contact with Ms. Elzinga for five years. Ex. 1.

In November 2018, Ms. Elzinga reached out to Mr. Thomas. 1/25/19 RP at 93. She felt she needed closure and wanted to speak with

him. *Id.* She drove to meet him at a parking lot in Aberdeen, WA. 1/25/19 RP at 94.

On November 20, 2018, police received a call about two people having sex in a car. 1/25/19 RP at 69, 81. Police responded to the scene, a parking lot behind a farm supply store in Aberdeen. *Id.* They saw a man and a woman in the car, with their clothing in disarray. 1/25/19 RP at 72, 82-83. The man immediately supplied a card identifying him as Aaron Thomas. 1/25/19 RP at 73. The woman initially gave an incorrect name and date of birth to police. 1/25/19 RP at 73, 83. She later identified herself as Brittany Elzinga. 1/25/19 RP at 83. Police arrested Mr. Thomas. 1/25/19 RP at 85. He was charged with felony violation of a domestic violence no-contact order. CP 1-2.

The case proceeded to trial on January 25, 2019. 1/25/19 RP at 7. The state called three witnesses: the two police officers who responded to the scene and Ms. Elzinga. 1/25/19 RP at 68, 79, 86. The police officers were Kyle Hoffman and Chad Pearsall. 1/25/19 RP at 68, 79.

Before testifying, Officer Pearsall helped the prosecutor with jury selection. 1/25/19 RP at 8. The prosecutor introduced Officer Pearsall to the jury and said the witness “will be assisting me today.” *Id.* Mr. Thomas’s attorney did not object or move to exclude witnesses. 1/25/19 RP at 8-9.

The state also admitted three exhibits at trial. 1/25/19 RP at 76, 94-95. These included the 2015 no-contact order and redacted copies of two judgement and sentences. Ex.s 1, 4, 5. The judgment and sentences were redacted to remove Mr. Thomas's unrelated criminal history. 1/25/19 RP at 66, 78. The exhibits established that Mr. Thomas was convicted of violating a court-order on two prior occasions, in 2011 and in 2015. Ex.s 4, 5. The incidents involved different victims. *Id.* The 2015 conviction resulted in the no-contact order at issue, with Ms. Elzinga. Ex.s 1, 4.

Mr. Thomas's trial attorney did not object to admission of the exhibits. 1/25/19 RP at 76, 78. He did not request redaction; that suggestion came from the judge. 1/25/19 RP at 66. Trial counsel waived an opening statement. 1/25/19 RP at 64. He did not call any witnesses and did not cross-examine any of the state's witnesses.<sup>2</sup> 1/25/19 RP at 76, 85, 94, 95.

At the conclusion of evidence, the parties presented closing arguments. 1/25/19 RP at 108, 121. During closing, the prosecutor repeatedly expressed his personal opinions. The prosecutor argued that Mr. Thomas had knowledge of the no-contact order, adding, "I think that's right

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<sup>2</sup> Mr. Thomas's counsel raised an unusual argument at trial. Outside the presence of the jury, he requested that Ms. Elzinga be advised of her rights before testifying. 1/25/19 RP at 90-91. Counsel argued that she could, in theory, face legal repercussions for assisting in the commission of a crime by helping Mr. Thomas violate the no-contact order. 1/25/19 RP at 91. The trial court judge rejected this argument and cautioned counsel against witness intimidation. 1/25/19 RP at 92.

here, right here, and right here,” referring to the exhibits. 1/25/19 RP at 115. The prosecutor also opined, “it seems to me,” that Mr. Thomas should have realized he was not permitted to have contact with Ms. Elzinga. *Id.* The prosecutor also argued that Mr. Thomas and Ms. Elzinga were part of the same household, adding, “that’s just my opinion.” 1/25/19 RP at 119. He also opined, “So I think based on Ms. Elzinga’s testimony you can conclude beyond a reasonable doubt that they were in a domestic relationship. This is a domestic violence case.” 1/25/19 RP at 120.

Mr. Thomas’s trial counsel did not object to any of the prosecutor’s statements. 1/25/19 RP at 115-16, 119-21. Counsel then delivered a brief closing argument, urging the jury to hold the state to its burden of proof. 1/25/19 RP at 121-22. The jury convicted Mr. Thomas of violating a domestic violence no-contact order. CP 50. The jury also found that Mr. Thomas and Ms. Elzinga had been part of the same family or household. CP 51.

The superior court sentenced Mr. Thomas on February 8, 2019. 2/8/19 RP at 3. Mr. Thomas’s trial counsel argued that a mitigating circumstance justified a sentence below the standard range.<sup>3</sup> CP 56-57; 2/8/19 RP at 3-4. Counsel argued that the victim, Ms. Elzinga, initiated the

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<sup>3</sup> In this case, due to Mr. Thomas’s prior convictions, the “range” was 60 to 60 months.

contact, mitigating Mr. Thomas's actions pursuant to RCW 9.94A.535(1)(a). *Id.* The superior court refused to consider this mitigating factor, citing a lack of legal support. 2/8/19 RP at 13, 15. Specifically, the judge said that he "did not see any legal authority" for Mr. Thomas's argument and stressed that it was "not my choice as a judge, that's a legislative issue." 2/8/19 RP at 15.

Instead of considering the mitigating factor raised by Mr. Thomas, the superior court judge identified other factors at play in this case. The court brought up an aggravating factor: that Mr. Thomas committed a crime shortly after his release from prison. 2/8/19 RP at 4-5. This aggravating factor was not raised by the state or proven to the jury. 2/8/19 RP at 3, 5; CP 44-51. Nonetheless, the court concluded that "I think the factors go both ways," adding "there will be all sorts of reasons for the court not to grant a mitigating factor." 2/8/19 RP at 14.

Mr. Thomas inartfully requested a lower sentence in his case. 2/8/19 RP at 7. The superior court cautioned him to "watch your language, or you are going to have some time added on." 2/8/19 RP at 7-8. Mr. Thomas also expressed that he took responsibility for his actions. 2/8/19 RP at 7. The superior court judge disagreed, stating "I don't know how you took responsibility," when "you have a jury trial . . . you rolled the dice." 2/8/19

RP at 8. In the end, the court sentenced Mr. Thomas to 60 months incarceration. 2/8/19 RP at 15; CP 59. Mr. Thomas appeals. CP 63.

### **ARGUMENT**

Mr. Thomas's conviction should be reversed due to pervasive errors in this case. Trial counsel was ineffective by failing to move to exclude witnesses, resulting in a witness and police officer assisting with jury selection. During closing, the prosecutor expressed his personal opinions about the case. Additionally, no rational jury could conclude beyond a reasonable doubt that Mr. Thomas knew of the no-contact order based on the evidence presented at trial. Finally, the trial court judge abused his discretion during sentencing. Even if none of these errors alone warrant reversal, the cumulative effect denied Mr. Thomas a fair trial.

#### **A. Trial Counsel was Ineffective by Failing to Move to Exclude Witnesses.**

Only three witnesses testified at Mr. Thomas's trial: two police officers and Ms. Elzinga. 1/25/19 RP at 68, 79, 86. Chad Pearsall, one of the officers, was a key witness for the state. He responded to the scene, witnessed Mr. Thomas and Ms. Elzinga in the car together, and interviewed Ms. Elzinga. 1/25/19 RP at 81-83. Before testifying, Officer Pearsall also assisted the prosecutor with jury selection. 1/25/19 RP at 8. Mr. Thomas's attorney failed to object or move to exclude this witness pursuant to ER 615.

1/25/19 RP at 8-9. This conduct amounted to ineffective assistance of counsel.

Every criminal defendant has a constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Ineffective assistance occurs when (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the client. *Hendrickson*, 129 Wn.2d at 77. Both requirements are met here.

**1. Reasonable trial counsel would have moved to exclude a police officer and witness from assisting with jury selection.**

Mr. Thomas's trial counsel was deficient in this case by failing to move to exclude witnesses pursuant to ER 615. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Generally, courts assume that trial counsel is effective. *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (1999). However, a defendant overcomes this presumption by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id.*

Here, no legitimate strategic or tactical reason justifies counsel's failure to move to exclude Officer Pearsall from the courtroom during jury selection. ER 615 provides, "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses." ER 615. The intent of this rule is "to discourage or expose inconsistencies, fabrication, or collusion." *State v. Skuza*, 156 Wn. App. 886, 896, 235 P.3d 842 (2010) (internal quotations omitted).

These same concerns apply when witnesses are present during jury selection. "Although voir dire does not involve testimony, there is nevertheless the potential for a witness to tailor testimony to the things seen, heard, and observed during voir dire or the potential for jurors to form improper impressions of a witness from observations made prior to testimony." *State v. Njonge*, 181 Wn.2d 546, 559-60, 334 P.3d 1068 (2014). Reasonable trial counsel would have moved to exclude Officer Pearsall due to this potential for tailoring testimony or improper impressions from jurors. Failure to do so constituted deficient performance.

**2. Trial counsel's deficient performance prejudiced Mr. Thomas.**

Counsel's deficient performance also prejudiced Mr. Thomas. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Personal*

*Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A “reasonable probability” is lower than a preponderance but more than a “conceivable effect on the outcome.” *Strickland*, 466 U.S. at 693-94. It exists when there is a probability “sufficient to undermine confidence in the outcome.” *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Here, Officer Pearsall’s participation in jury selection improperly bolstered his testimony. By assisting the prosecutor with jury selection, Officer Pearsall had the opportunity to tailor a jury, as well as tailor his testimony to that jury. *See Njonge*, 181 Wn.2d at 559-60. His presence also allowed the jury to form a favorable impression before he testified. *See id.* This undermined confidence in the outcome of the trial, prejudicing Mr. Thomas. *Estes*, 188 Wn.2d at 458. This Court should reverse.

**B. The Prosecutor Improperly Advanced his Personal Beliefs About the Case in Closing Argument.**

During closing argument, the prosecutor expressed his personal opinions about this case. The prosecutor repeatedly opined to the jury about Mr. Thomas’s mental state and about whether Mr. Thomas and Ms. Elzinga were part of the same household. 1/25/19 RP at 115, 119, 120. This Court should reverse because the prosecutor improperly commented on the evidence.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A “[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met in this case.

**1. The prosecutor committed misconduct by expressing his personal opinion about the evidence.**

The prosecutor’s statements during closing argument amounted to misconduct in this case. It is well established that a prosecutor cannot use his position of power and prestige to sway the jury. *In re Glasmann*, 175

Wn.2d 696, 706, 286 P.3d 673 (2012). A prosecutor may not express an individual opinion of the defendant’s guilt, independent of the evidence actually in the case. *Id.* Such an opinion is “likely to have significant persuasive force with the jury” due to the “prestige” of the office and the “fact-finding facilities presumably available” to prosecutors. *Id.* (internal quotations omitted).

Many Washington cases warn of the danger of a prosecutor expressing a personal opinion of guilt. *See, e.g., State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecutor to express his individual opinion that the accused is guilty, independent of the testimony in the case); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (permitting latitude to attorneys to argue the facts in evidence and reasonable inferences therefrom, but prohibiting statements of personal belief of a defendant’s guilt or innocence); *State v. Stith*, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993) (deeming a prosecutor’s comment in closing argument that the appellant “was just coming back and he was dealing [drugs] again’ impermissible opinion “testimony”); *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he “knew” the defendant committed the crime).

The Washington Supreme Court examined this issue in *Monday*, 171 Wn.2d 667. In that case, the prosecutor made a “variety of improper

comments during opening statements and closing argument,” including expressing his personal belief about the strength of the state’s case. *Id.* at 676-77. The Court reversed, holding that the prosecutor committed misconduct by improperly commenting on “the guilt and veracity of the accused.” *Id.* at 677.

Here, like in *Monday*, the prosecutor improperly expressed his personal opinions about the evidence to the jury. The prosecutor expressed his opinion that Mr. Thomas had knowledge of the no-contact order, stating “I think that’s right here, right here, and right here,” referring to the exhibits. 1/25/19 RP at 115. The prosecutor also opined, “it seems to me,” that Mr. Thomas knew he was prohibited from having contact with Ms. Elzinga. *Id.* The prosecutor argued that Mr. Thomas and Ms. Elzinga were part of the same household, adding, “that’s just my opinion.” 1/25/19 RP at 119. He opined, “So I think based on Ms. Elzinga’s testimony you can conclude beyond a reasonable doubt that they were in a domestic relationship. This is a domestic violence case.” 1/25/19 RP at 120.

Declaring “I think” the jury can conclude “beyond a reasonable doubt” amounts to an opinion on Mr. Thomas’s guilt. *Id.* Opining about what Mr. Thomas knew or should have known expresses the prosecutor’s personal opinion about the evidence. 1/25/19 RP at 115, 119. These statements improperly threw the weight of the prosecutor’s authority behind

his opinions, not the evidence. The prosecutor committed misconduct by expressing a personal opinion on Mr. Thomas's guilt. *See Monday*, 171 Wn.2d at 677.

**2. The prosecutor's misconduct prejudiced Mr. Thomas by improperly influencing the jury.**

The prosecutor's misconduct also prejudiced Mr. Thomas. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Mr. Thomas did not object at trial. 1/25/19 RP at 115, 119, 120. Thus, he must show that a jury instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443. "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

The Washington Supreme Court examined prosecutorial misconduct in *Glasmann*, 175 Wn.2d 696. In that case, the prosecutor improperly expressed his personal belief that Mr. Glasmann was guilty. *Glasmann*, 175 Wn.2d at 699. The prosecutor used PowerPoint slides during closing argument, showing pictures superimposed with the prosecutor's own commentary. *Id.* at 701. Several slides depicted pictures

of Mr. Glasmann with “GUILTY” superimposed over them. Defense counsel did not object. *Id.* at 702.

The Washington Supreme Court reversed, holding that the prosecutor committed misconduct by expressing his personal opinion of Mr. Glasmann’s guilt. *Id.* at 707. The prosecutor’s conduct prejudiced Mr. Glasmann by tainting the jury’s assessment of his mental state, a necessary determination for the crimes charged. *Id.* at 708. The Court held that “[a] prosecutor could never shout in closing argument that ‘Glasmann is guilty, guilty, guilty!’ and it would be highly prejudicial to do so.” *Id.*

Here, like in *Glasmann*, the prosecutor expressed to the jury his personal belief about the evidence in this case, specifically about Mr. Thomas’s mental state. 1/25/19 RP at 115, 119-20. As explained above, this amounted to misconduct. Mr. Thomas was prejudiced by this misconduct because, like in *Glasmann*, his mental state was central to the case. Mr. Thomas was charged with violating a no-contact order, a crime that requires the accused to “know” of the existence of the no-contact order and “knowingly” violate it. RCW 26.50.110(1). This was the same mental state at issue in *Glasmann*. 175 Wn.2d at 708. The prosecutor’s statements prejudiced Mr. Thomas by improperly influencing the jury’s assessment of his mental state, requiring reversal.

**C. No Rational Jury Could Have Found Beyond a Reasonable Doubt that Mr. Thomas Knew of the Existence of the No-Contact Order.**

At trial, the state presented insufficient evidence to support Mr. Thomas's conviction. "The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld." *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (internal quotations omitted). To determine whether sufficient evidence supports a conviction, courts view the evidence in the light most favorable to the state and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182, 185 (2014).

A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Here, Mr. Thomas was charged with violating a no-contact order. CP 1-2. A person violates a no-contact order when he is restrained by that order, "knows of the order," and "knowingly" violates a provision of the

order. RCW 26.50.110(1)(a). Ordinarily, violating a no-contact order is a gross misdemeanor. *Id.* However, this crime is elevated to a class C felony when the accused “has at least two previous convictions for violating the provisions” of a no-contact order. RCW 26.50.110(5). The prior convictions need not involve the same victims. *Id.*

A person knows or acts knowingly when “he or she is aware of a fact, facts, or circumstances or result.” RCW 9A.08.010(1)(b)(i). A jury is permitted to find that a person knew or acted knowingly when “he or she has information which would lead a reasonable person in the same situation to believe that facts exist.” RCW 9A.08.010(1)(b)(ii).

Mr. Thomas’s conviction must be reversed because no rational jury could find beyond a reasonable doubt that he knew of the existence of the no-contact order. *See* RCW 26.50.110(1)(a). No witness testified about Mr. Thomas’s mental state at the time of his alleged offense. *See generally*, 1/25/19 RP. Instead, the testimony strongly suggested that Mr. Thomas did not know about the no-contact order with Ms. Elzinga. When police arrived at the scene, Ms. Elzinga attempted to hide her identity; Mr. Thomas did not. 1/25/19 RP at 73, 83. He cooperated with police and immediately provided accurate identification with his name and date of birth. 1/25/19 RP at 73.

The only evidence the state presented that suggested Mr. Thomas knew of the no-contact order was his past conviction and the no-contact order itself. Ex.s 1, 4. In closing, the prosecutor argued that Mr. Thomas's signatures were on the no-contact order and the judgment and sentence, thus the jury could infer that he knew about the order's existence. 1/25/19 RP at 111, 115. However, no witness verified Mr. Thomas's signature. *See generally*, 1/25/19 RP. No one testified that he was actually present at court when the no-contact order was signed. *Id.* On this evidence alone, a rational jury could not have convicted Mr. Thomas beyond a reasonable doubt.

**D. The Trial Court Abused its Discretion by Refusing to Order an Exceptional Downward Sentence.**

Mr. Thomas requested a sentence below the standard range. 2/8/19 RP at 4-7. The superior court judge declined and imposed a standard sentence of 60 months. 2/8/19 RP at 15. When a defendant requests an exceptional sentence downward, review is limited to instances where the court (1) categorically refuses to impose an exceptional sentence downward or (2) relies on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Both instances were present in this case. The trial court erred by refusing to consider the mitigating circumstance raised by Mr. Thomas,

that Ms. Elzinga initiated the contact. 2/8/19 RP at 4, 15. The court also erred by refusing to impose an exceptional sentence downward based on impermissible reasons, including Mr. Thomas’s “language,” his choice of proceeding with a jury trial, and an aggravating factor not found by the jury. 2/8/19 RP at 7-8, 14-15. This Court should reverse and remand for resentencing.

**1. The trial court erred by refusing to consider the fact that Ms. Elzinga initiated contact as a mitigating circumstance in this case.**

At the sentencing hearing, Mr. Thomas pointed out that Ms. Elzinga initiated contact with him. 2/8/19 RP at 3-4. He argued that this was a mitigating circumstance pursuant to RCW 9.9A.535(1)(a). *Id.* The trial court refused to consider this argument. 2/8/19 RP at 15. Failing to consider this mitigating circumstance amounted to an abuse of discretion, justifying reversal.

Although trial court judges have discretion when making sentencing decisions, they must still act within the strictures of the law and principles of due process. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to *ask* the [sentencing] court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis

added). A trial court's failure to consider an exceptional sentence authorized by statute is an abuse of discretion. *Garcia-Martinez*, 88 Wn. App. at 329-30; *see also State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015) (citing *Grayson*, 154 Wn.2d at 342).

RCW 9.94A.535(1) provides that the sentencing court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." Here, Mr. Thomas argued a mitigating circumstance pursuant to RCW 9.94A.535(1)(a). This statute allows for a mitigated sentence when the court finds that, "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a).

The trial court categorically refused to consider whether RCW 9.94A.535(1)(a) applied in this case. The judge said that he "did not see any legal authority" for Mr. Thomas's argument raising this mitigating circumstance. 2/8/19 RP at 15. He also stressed that the issue was out of his hands, noting that it was "not my choice as a judge, that's a legislative issue." 2/8/19 RP at 15.

The trial court judge correctly noted that consent is not a defense to the crime of violating a domestic violence protection order. *Id.* However, that was not Mr. Thomas's argument at sentencing. Mr. Thomas asked the

court to consider whether the fact that Ms. Elzinga initiated contact was a mitigating circumstance pursuant to RCW 9.94A.535(1)(a). The trial court abused its discretion by refusing to consider this argument.

The Court of Appeals examined a similar situation in *State v. Bunker*, 144 Wn. App. 407, 183 P.3d 1086 (2008). In *Bunker*, the defendant was arrested for driving with his wife, who was protected by an active no-contact order. 144 Wn. App. at 411. He was convicted of violating the no-contact order. *Id.* At sentencing, Mr. Bunker requested an exceptional downward sentence pursuant to RCW 9.94A.535(1)(a) based on his wife's cooperation with the contact. *Id.* The trial court judge found that it did not have the discretion to grant an exceptional sentence on that basis. *Id.*

The Court of Appeals in *Bunker* reversed. The Court found that the trial court "abused its discretion when it sentenced [Bunker] because it erroneously believed that it did not have the authority to depart downward from the standard sentence range on the basis of the mitigating factor that [the victim] was willingly present in Bunker's truck tractor." *Id.* at 421. The Court noted that "there is, of course, no requirement that the trial court actually impose a mitigated exceptional sentence," but the court must consider the mitigated circumstance raised by the defendant under these circumstances. *Id.*

Here, like in *Bunker*, the trial court erred and abused its discretion by refusing to consider whether Ms. Elzinga initiating contact with Mr. Thomas amounted to a mitigating circumstance under RCW 9.94A.535(1)(a). A victim's consent to violation of a no-contact order is not automatically barred as a mitigating circumstance under this statute. *Bunker*, 144 Wn. App. at 421. This Court should reverse and remand because Mr. Thomas was "entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson*, 154 Wn.2d at 342.

**2. The trial court erred by relying on impermissible bases for refusing to impose an exceptional sentence below the standard range.**

A sentencing court also abuses its discretion by refusing to impose an exceptional downward sentence based on impermissible reasons. *Garcia-Martinez*, 88 Wn. App. at 330. A court relies on impermissible reasons "if, for example, the court states that no drug dealer should get an exceptional sentence down or if it refuses to consider the request because of the defendant's race, sex or religion." *Id.*

Here, the trial court relied on three impermissible bases for refusing to order an exception downward sentence. First, the court disapproved of Mr. Thomas's phrasing and cautioned him to "watch your language, or you are going to have some time added on." 2/8/19 RP at 7-8. Second, the court

faulted Mr. Thomas for proceeding to a jury trial. 2/8/19 RP at 7-8. The court rejected Mr. Thomas's contention that he took responsibility for his actions, stating "I don't know how you took responsibility," when "you have a jury trial . . . you rolled the dice." 2/8/19 RP at 8.

Third, the court relied on an unproven aggravating factor, stating, "So, isn't that an aggravating factor, committing a crime shortly after being released from prison?" 2/8/19 RP at 4-5. This aggravating factor was not raised by the state or found by the jury. 2/8/19 RP at 3, 5; CP 44-51. Sentencing courts can only rely on this factor if it is proven to a jury "beyond a reasonable doubt." RCW 9.94A.537(3); *see also* RCW 9.94A.535(3)(t).

The trial court ultimately imposed a standard sentence of 60 months. *Id.*; CP 59. In reaching this decision, the court stated, "I think the factors go both ways," adding "there will be all sorts of reasons for the court not to grant a mitigating factor." 2/8/19 RP at 14.

The reasons relied upon by the trial court for denying an exceptional downward sentence were impermissible in this case. It is unfair for a court to rely on a defendant's word choice to impose a lengthier sentence. It is also impermissible to penalize an accused at sentencing for exercising his constitutionally protected right to a jury trial. Finally, it is impermissible to rely on an unproven aggravating factor at sentencing. The trial court abused

its discretion by relying on these impermissible bases. *See Garcia-Martinez*, 88 Wn. App. at 330. This Court should reverse and remand for resentencing.

**E. Cumulative Error Denied Mr. Thomas Due Process.**

Even if each of the errors described above are not sufficient for reversal, their cumulative effect denied Mr. Thomas a fair trial and due process. This Court should reverse and remand because of the pervasiveness of the errors in this case.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors produce a trial that is fundamentally unfair. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (accumulated errors, including permitting inadmissible evidence and prosecutorial discovery violations, required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)

(reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

In this case, each of the errors made by trial counsel, the state, and the court warrant reversal. However, even if each error standing alone is harmless, the accumulation of these errors deprived Mr. Thomas of due process and a fair trial. *See Coe*, 101 Wn.2d at 789. This Court should reverse. *State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

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## II. CONCLUSION

Aaron Thomas's conviction must be reversed due to pervasive and significant errors. Trial counsel provided ineffective assistance by failing to move to exclude witnesses when a witness and police officer assisted the prosecutor with jury selection. During closing, the prosecutor expressed his personal opinions about the case and Mr. Thomas's mental state. The evidence at trial was insufficient for a rational jury to conclude beyond a reasonable doubt that Mr. Thomas knew of the no-contact order. Finally, the trial court judge abused his discretion by refusing to consider a mitigating circumstance and by denying an exceptional downward sentence based on impermissible reasons. The cumulative effect of these errors denied Mr. Thomas a fair trial. Mr. Thomas respectfully requests that this Court reverse his conviction and remanded to the trial court.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of July, 2019.



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STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, Aaron Thomas

No. 53002-3-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On July 26, 2019, I electronically filed a true and correct copy of the **Brief of Appellant, Aaron Jason Thomas**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Richard K. Petersen  
Deputy Prosecuting Attorney for Grays  
Harbor County

( X ) via email to:  
Appeals@co.Grays-  
Harbor.wa.us

Aaron Jason Thomas  
DOC # 329952  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

( X ) via U.S. mail

SIGNED in Port Orchard, Washington, this 26<sup>th</sup> day of July,

2019.



STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, Aaron Jason  
Thomas

**NEWBRY LAW OFFICE**

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Sender Name: Stephaine Taplin - Email: stephanie@newbrylaw.com  
Address:  
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