

NO. 34959-4-III

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

STATE OF WASHINGTON
v.
RUDY WILLIAMS

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

The Honorable Scott D. Gallina, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Williams was denied his right to counsel by the court's failure to conduct a timely colloquy regarding proceeding pro se.
2. Williams was denied due process where the state proceeded by way of forfeiture by wrongdoing without proving forfeiture by wrong doing by clear, cogent and convincing evidence.
3. The state failed to prove the three charges of witness tampering.
4. The state failed to prove assault in the third degree.
5. Williams assigns error to the bench trial finding of fact two that Williams struck Shoemaker with a belt and caused bodily harm.
6. Williams assigns error to the bench trial finding of fact four that Williams wrote a letter threatening Shoemaker and Bonds when he indicated that Shoemaker and Bonds must sign the letters or Williams would get 10 years of incarceration.
7. Williams assigns error to the bench trial conclusions

of law one that the state met the criteria for proceeding to trial by way of forfeiture by wrongdoing.

8. Williams assigns error to the bench trial conclusion of law two that the state established that Williams committed wrongdoing.

9. Williams assigns error to the bench trial conclusion of law three that the state established that Williams intended Shoemaker and La'Quan to absent themselves from trial.

10. Williams assigns error to the bench trial conclusion of law four that the state established that Williams caused Shoemaker and La'Quan to absent themselves from trial.

11. Williams assigns error to the bench trial order permitting the state to proceed by way of forfeiture by wrongdoing.

12. The state failed to prove felony violation of a no contact order as charged.

13. The charging document was constitutionally deficient with regards to count 1, the charge of violation of a no contact order.

Issues Presented on Appeal

1. Was Williams denied his right to counsel by the court's failure to conduct a colloquy regarding proceeding pro se until after Williams represented himself during four substantive hearings?
2. Was William's denied due process where the state proceeded by way of forfeiture by wrongdoing without proving forfeiture by wrongdoing by clear, cogent and convincing evidence?
3. Did the state fail to prove the three charges of witness tampering where there were no threats in any of the letters?
4. Did the state fail to prove assault in the third degree where there was insufficient evidence of bodily harm?
5. Did the trial court err by permitting the state to proceed by way of forfeiture by wrongdoing?
6. Did the state fail to prove felony violation of a no contact order as charged where there was no evidence that Williams recklessly created a substantial risk of death or serious bodily injury to Shoemaker?
7. Was the felony no contact order charge

constitutionally deficient where it set forth the elements of a misdemeanor but provided a numerical citation to a felony?

B. STATEMENT OF THE CASE

a. Procedure-Pretrial

Rudy Williams was originally charged with assault in the fourth degree. CP 4. Williams was charged by amended information with felony violation of a no contact order, assault in the third degree and three counts of witness tampering. CP 19. The assault was charged as follows: "That on or about the 3rd day of May 2016, in Asotin County, Washington, with criminal negligence the Defendant caused bodily harm to Misty Shoemaker by means of a weapon or other instrument likely to produce bodily harm." CP 19.

The court charged Williams with violating a no contact order under "RCW 26.50.110(4)". CP 19. The charging document provided:

That on or about the 3rd day of May 2016, in Asotin County, Washington, the above named Defendant with knowledge that the Nez Perce County District Court, had previously issued a no contact order pursuant to Chapter 26.50 RCW in State of Idaho v. Rudy Eugene Williams.

CP 19. Williams waived his right to a jury trial and was convicted by

the bench on all charges. CP 57, 83. The court entered findings and conclusions following the bench trial. CP 83. The court imposed an exceptional sentence based on the aggravating factor, “free crimes”. CP 40, 63.

Williams proceeded pro se without a waiver of his right to counsel for four substantive hearings held on: October 17, 2016, October 31, 2016, November 14, 2016, and November 18, 2016. RP 2-82. After the fourth hearing, on the day of trial, the court engaged Williams in a colloquy regarding proceeding pro se. RP 82-87. On November 21, 2016, the state filed a document entitled “colloquy and defendant’s waiver of right to counsel”. CP 53.

On May 5, 2016, Williams requested new counsel because he could no longer work with his existing attorney. RP 10, 20-21. The court refused to listen to William’s reasons. RP 21. On June 6, 2016, Williams again requested new counsel due to disagreements and lack of dedication to the case. RP 32-33. The court informed Williams that he could raise his concern on appeal. RP 34.

Hey, Mr. Williams, the -- the issues that you’re bringing up may be very valid things that you want to include in an appeal for ineffective assistance of counsel. I can’t tell you that; it’s not my place to intervene on that level. What I am telling you is that

Mr. Laws is licensed counsel in this state, he is on contract with the county, and he is your appointed lawyer. So, if you are at such divergence with him that you feel like you want to represent yourself, you are welcome to do so, but I can't simply cut him loose and give you another attorney. I don't have them available to me to do that. Mr. Bottomly, the other defense counsel here, is just about capped out on his cases. He maybe has two or three left. And Mr. John Fay is up to his eyebrows in cases of his own. Ah, that's who I have available.

RP 34. Following the judge's refusal to appoint new counsel, Williams stated that, "I'm going to have to try to represent myself for now. Ah, I'd ask the Court that they, ah – they keep that in mind to, ah, maybe put me on somebody else's caseload further down the road if possible." RP 34. The judge referenced an advisement that he gave Williams the "last time":

THE JUDGE: All right.

Well, Mr. Williams, you remember the advisement I gave you last time that if you represent yourself, ah, I can't save you from up here. Ah, you're going to be required -- MR. WILLIAMS: -- (Inaudible) --

THE JUDGE: -- to know the laws of evidence and the rules of procedure just like any lawyer would be required to do. Ah, and any objection that the State has, I can't play with kid gloves just because you're representing yourself pro se; do you understand?

MR. WILLIAMS: Ah, I have to.

THE JUDGE: Okay.

MR. WILLIAMS: I mean, I just don't -- I don't have any choice right now. I don't have any choice right now at all. I mean, I could do a better defense

RP 35.

On October 31, 2016, the court entertained hearings regarding the defense wish to interview Misty Shoemaker, the complainant. RP 46-50. On November 14, 2016, Williams requested an interlocutory appeal packet, to which the court responded that no such pleadings were available. RP 61-62. Williams unsuccessfully moved to suppress his son's and Shoemaker's out of court statements, and unsuccessfully moved to reduce the felony no contact order back to the originally charged, assault in the fourth degree. RP 67-70.

Williams also objected to speedy trial violations due to being in jail for 8 months and only requesting 1-2 continuances. RP 73. The court denied these motions. RP 64, 74.

On November 18, 2016, before the court engaged Williams in a valid colloquy regarding his wish to proceed pro se, the court granted the state's state motion to proceed without the witnesses by way of forfeiture by wrongdoing. RP 82.

This appeal follows. CP 67.

b. Facts related to Alleged Assault-Violation No Contact Order.

Asotin Deputy Daniel Vargas testified that Shoemaker told him that Williams struck her with a belt three times. RP 133. Vargas who is not an expert testified that the mark on Shoemaker's back was "consistent with what she was saying that it was a belt." RP 134. The skin was not broken on Shoemaker's back and she did not seek medical attention or complain of pain. RP 147. When Vargas questioned Shoemaker, she was not afraid or in danger. RP 143, 146-47.

According to Vargas, Shoemaker and William's son La'Quan also said Williams struck Shoemaker with a belt three times. RP 136. Vargas also testified that La'Quan did not state that he saw his father hit his mother but rather that he heard it. RP 154-55. Vargas later testified that La'Quan said he saw his father strike his mother. RP 158.

The state introduced a valid no contact order with Williams's signature, issued in Idaho on January 19, 2016, prohibiting Williams from having contact with Shoemaker through January 19, 2018.

RP 140-42; Exhibit P-2. Williams did not challenge the validity of the no contact order during trial.

The no contact order arose out of another allegation of assault in violation of a no contact order in which Lisa Bonds was alleged to have been a witness. RP 168. The state issued subpoenas for Shoemaker and Bonds, and issued a material witness warrant for Shoemaker, but neither appeared for interviews or the trial. RP 82; CP 83.

(i) State's Closing

The state argued in closing that it met the elements of felony violation of a no contact order because Williams knew of the existence of a no contact order and he assaulted Shoemaker. CP 249-52.

Ah, as stated before on the felony domestic violence no contact order charge, Deputy Vargas stated that this assault took place on May 3;

...

therefore, this part of the element is satisfied.

As further evidence of violating the no contact provision of the order, he not only remained in the apartment after Ms. Shoemaker and Laquan arrived, but he got into an argument and then struck her with a belt. He had direct contact with her; that's clear from the record. That's a violation of the order; therefore,

that element's satisfied. That the defendant's conduct, ah, was an assault. I'm going to come back to this one at -- give argument on the assault third degree, Your Honor. And for those reasons, I believe that, ah, this element is satisfied as well under that basis.

RP 250-51.

c. Facts Related to Witness Tampering

Pretrial, the prosecutor informed the court that according to Vargas, Williams told him that Shoemaker and La'Quan would not testify against him. RP 111. According to Williams, he stated that:

I in no way suggested to the Prosecutor that I believe that Misty Shoemaker would not testify. After my decisions with Mr. --after my discussion with Mr. Thomsen at the Garfield County Jail, Misty Shoemaker was given a hearing regarding her release from jail. Ms. Shoemaker was instructed by the officer to -- by your office to maintain contact with the Prosecutor's Office at least once a week and to maintain all court dates. This was done of Misty Shoemaker's own free will and under no strict -- and under your strict, ah, \$10,000 bond that the Court imposed. If she refused, ah, I must have not had an opportunity to question Ms. Shoemaker due to her own willingness to make herself available and to this Court, Misty Shoemaker has, in fact, avoided my previous lawyer, Mr. Laws, and his own office's many attempts to interview Misty Shoemaker. Misty Shoemaker had also deliberately avoided the victim witness coordinator on several occasions with respect to the allegations. Misty Shoemaker has -- Misty Shoemaker has deliberately on her own accord avoiding any follow-up interviews with the

Prosecutor's Office for over the past seven months. Misty Shoemaker has avoided filing and or entering into a voluntary statement from the very beginning of this case. Your Honor -- Your Honor, ah, there is absolutely no physical evidence that proves that I even threatened Misty Shoemaker and or bribed Misty Shoemaker here today. There are no phone calls that would indicate that I asked Misty Shoemaker to be here -- not to be here today. The Prosecutor's Office knows -- the Prosecutor's Office has now visited -- visited audio recording -- the Prosecutor's Office has no visiting audio recording to indicate to the Court that I may have persuaded someone to keep Misty Shoemaker from being here today. Sir, there are no -- there's nothing incriminating in these all -- in these allegations that incriminate -- that indicate that I may have -- I'm getting nervous; I'm sorry. There's nothing --

RP 112-114.

During trial, Asotin County Detective Jackie Nichols testified that the Asotin County Jail intercepted letters they believed were written by Williams. RP 208-09. Nichols who is not a handwriting expert testified that the letters were written by Williams. RP 225, 236. Nichols basis for this opinion was her having seen Williams's handwriting for twelve years and her opinion that the writing looked the same on some of the letters. RP 223-26, 236. "I don't have professional training, but that doesn't mean I don't have experience." RP 242.

The state did not submit an established sample of Williams's handwriting.

(i) Letters

The intercepted letters provide the following:

Ah, there's a numbered list and "Number one: please print out all statements. Number two: after all are signed and notarized, please get three copies of each. Number three: deliver Misty's and Lisa's Idaho statements to my Idaho lawyer, Mr. Rick Cuddihy's office at 312 17th Street, number 208-746-0104" in parenthesis "or contact my sister, Maria, number 509-552-3977, and she can handle after statements are notarized" end of parenthesis. Number four: my lawyer tells me that Washington assault charge will be dropped to a misdemeanor breaking a no contact order only if Lewiston's charge is dropped first. **Ultimately, must have Washington statement" -- must is quotation marks -- "from Misty signed and notarized or I will be giving -- be given years because the State can use the police report against me, even though Misty doesn't show.**

(emphasis added). RP 213-14. Based on this letter, the trial court entered Finding of Fact 4 which provides in relevant part:

Notably, inside the letter was a list of six instructions which instructed Ms. McNeill to have Misty Shoemaker and Lisa Bond sign and notarize three recantation letters that were also in the envelope. Included in the instructions was a threat that these statements must be signed or Mr. Williams would be giving" 10 years "even if Misty do[es]n't show."

CP 83.

The second letter was titled "Idaho District Court".

It's titled "Idaho District Court". Ah, there's a date, but no date written after it. "I'm writing this statement regarding an incident that occurred at the Cedars Inn Motel, Lewiston, Idaho, between Rudy Williams and Misty Shoemaker. While Mr. Williams was very verbally abusive towards Ms. Shoemaker and myself, he never touched Ms. Shoemaker. Though they were loud and very nasty with one another, I was just personally upset with Mr. Williams for adding me to his personal disputes. This is my reason for filing initial statement during the Cedars Inn incident. Please understand that I am sorry and that I never, again, will express this sort of conduct with your office in the future. Sincerely"

-- and then it -- there's just dot, dot, dot, and print, and a colon, signed, colon, witness, colon, date.

RP 215-16. The third letter provided:

"Courthouse" and a date and no date written. "I, Misty M. Shoemaker, am writing this court's letter to the courts because of an altercation that caused Rudy Williams to get arrested on a fourth degree domestic charge at the Cedars Motel Inn. I need to advise the courts that Rudy Williams has never at any time physically placed his hands on me" parenthesis "we have unfortunately at times been very argumentative with one another" end parenthesis. "Me and Rudy are now separated and it is my intention to hold no more ill will towards him personally. Though my actions this far weren't right, I feel that the only way for me to move forward is to try and clear up any malicious, negative actions that I

may have caused others. I sincerely apologize for any troubles that I may have caused your office. Thank you for your time.” Ah, then a date, print, colon, signed, colon, and witnessed, colon.”

RP 217-18. The fourth Letter provided:

“Asotin County Superior Court”, date. “This statement is with regards to a false incident, which was to have occurred on 5-4-6 at 1933 13th Street, Clarkston, Washington” parenthesis “this is my children’s father’s home, Rudy Williams” end parenthesis. “After arriving unbeknownst to Mr. Williams, a brief argument ensued where I called the Asotin County Police Department and falsely accused Mr. Williams of striking me. After a rocky 15-years relationship where both parties have faults, I can’t consciously allow my own personal vindictive issues to become involved. I also recently discovered that I suffer from a bipolar disorder, which I believe also contributed to my 219-actions on 5-4-16.” Parenthesis “attached is a copy of medication/ext.” end parenthesis. “Though” quotation marks “not physically abusive, he is mentally abusive and it is my hope that Mr. Williams will receive some type of drug and alcohol treatment to better himself. The courts have my most humble apologies. I truly didn’t know how exactly to handle myself or the verbally abusive situation I was in that led to this apology. I am so sorry for the court’s inconvenience. Sincerely” dot, dot, dot, name, signed, witness, date.”

RP 219-20.

C. ARGUMENTS

1. WILLIAMS WAS DENIED HIS
CONSTITUTIONAL RIGHT TO
COUNSEL DURING ALL CRITICAL

STAGES OF HIS CASE; WILLIAMS DID NOT MAKE A KNOWING, VOLUNTARY AND INTELLIGENT DECISION TO WAIVE HIS RIGHT TO COUNSEL UNTIL AFTER HE WAS FORCED TO PROCEED PRO SE DURING FOUR CRITICAL, SUBSTANTIVE HEARINGS

The issue here is that the court did not adequately engage Williams in any sort of colloquy to determine if he was making a knowing, voluntary and intelligent decision to waive his right to counsel until after he proceeded pro se during four substantive hearings. This is particularly critical in this case because Williams asked for new counsel and was equivocal about proceeding pro se but felt he had no other choice. RP 10, 20-21, 32-34, 88-89, 92.

- a. Waiver of Right to Counsel Must be Knowing, Voluntary and Intelligent.

The federal and state constitution's guarantee the right to counsel at all critical phases in a criminal prosecution. U.S. Const. Amend. VI; Wash. Const. art. I, § 22; *Coleman v. Alabama*, 399 U.S. 1, 7, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *State v. Roberts*, 142 Wn.2d 471, 515, 14 P.3d 713 (2000). The right may be waived, but it must be done so knowingly, voluntarily, and intelligently. *City*

of *Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

To meet this standard, the court must assure that the defendant is “*made aware of the dangers and disadvantages of self-representation*, so that the record will establish that “he knows what he is doing and his choice is made with eyes open.” *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (*emphasis added, quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

The state has the burden to demonstrate that the waiver is valid. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). Federal and other state courts apply a de novo standard of review to a criminal defendant’s waiver of his Sixth Amendment right to assistance of counsel. *United States v. McBride*, 362 F.3d 360, 365-66 (6th Cir. 2004) (Ninth Circuit applies de novo standard of review).

“The fact that a defendant is well educated, can read, or has been on trial previously is not dispositive as to whether he understood the relative advantages and disadvantages of self-representation in a particular situation.” *Acrey*, 103 Wn.2d at 211.

In *Acrey*, our Supreme Court “strongly recommended such a

colloquy” but held that other evidence in the record **may** be adequate if it demonstrates that the defendant was made aware of the dangers and disadvantages of self-representation, so that he knows what he is doing and his choice is made with eyes open. *Acrey*, 103 Wn.2d at 210-11. The Court cautioned “that only rarely will adequate information exist on the record, in the absence of a colloquy, to show the required awareness of the risks of self-representation.” *Acrey*, 103 Wn.2d at 211.

In *Acrey*, the trial court read a form advising *Acrey* of his trial rights, including the right to counsel. *Acrey*, 103 Wn.2d at 205-06. *Acrey* did not expressly waive counsel but the trial court found an implicit waiver because *Acrey* proceeded without counsel. *Id.* There was no colloquy and the record was inadequate to establish that *Acrey* was advised of the dangers and disadvantages of proceeding pro se. *Acrey*, 103 Wn.2d at 211-12. The Court reversed and remanded for a new trial due to lack of a valid waiver of the right to counsel. *Acrey*, 103 Wn.2d at 212.

Here *Williams* made repeated requests for new counsel because he did not trust his attorney. RP 10, 20-21, 32-34, 88-89, 92. *Williams* did not want to proceed pro se but felt he had no other

choice when the court refused to appoint new counsel. *Id.*

Williams was not advised of the risks and disadvantages of proceeding pro se during four substantive hearings that included: Williams request for new counsel (RP 10); the state's motion to dismiss the assault in the fourth degree and recharge the incident as a felony (RP 5-6); a second request for new counsel where the judge referenced a prior advisement (RP 35); requests to interview the complainant and the state's witnesses (RP 46-50); motions in limine regarding unavailable witness testimony and suppression of those witnesses testimony (RP 63); speedy trial right violations (RP 73); and the state's motion to proceed with forfeiture by wrongdoing (RP 82).

Each of these hearings was a critical phase of the criminal proceeding in which Williams was entitled to counsel. *Coleman*, 399 U.S. at 7; *Roberts*, 142 Wn.2d at 515.

After these matters were handled in four separate hearings, the court conducted an on the record colloquy. RP 83-88. When the court finished its colloquy, Williams reiterated that he could not work with his former lawyer because he felt threatened by him. RP 88-92. Williams did not believe he had a choice but to try to

represent himself. RP 92.

This is not one of those rare cases where the record establishes that Williams understood the risks and advantages of proceeding pro se. It is a case, as egregious as *Acrey* where the court did not make an adequate inquiry to determine a valid waiver, and where the state cannot prove a valid waiver. Williams like *Acrey* just proceeded through the hearings because he had no other choice. The remedy is to reverse and remand for new trial. *Acrey*, 103 Wn.2d at 212.

b. Williams Equivocal

Williams' desire for another attorney and his concerns about proceeding pro se cannot form the basis of a knowing, voluntary and intelligent decision to waive his right to counsel. A criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand, and the demand must be unequivocal in the context of the record as a whole. *State v. Luvene*, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995).

“[A] defendant's desire not to be represented by a particular court-appointed counsel does not by itself constitute an unequivocal request by the defendant for self-representation.” *State*

v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Statements of desire not to be represented by a court-appointed attorney do not express an intent to represent oneself without counsel. Nor do these statements constitute the necessary unequivocal request for self-representation. *State v. Garcia*, 92 Wn.2d 647, 655, 600 P.2d 1010 (1979) (citations omitted).

In *Garcia*, the defendant did not make an unequivocal request to proceed pro se. Rather his court appointed counsel mentioned that Garcia might want to represent himself, to which Garcia stated: “But in that case I do not wish to have this attorney with me because I believe that he hasn't been representing me right and I believe I haven't been represented.” *Garcia*, 92 Wn.2d at 655. The Court reversed and remanded for a new trial holding that Garcia’s statement was not a request to proceed pro se. *Id.* *C.f.*, *DeWeese*, 117 Wn.2d 369.

Garcia is instructive. The differences between these cases is minimal. In *Garcia* his attorney made mention of Garcia’s request to proceed pro se and Garcia indicated that he did not want the attorney assigned to him. *Garcia*, 92 Wn.2d at 655. Here Williams expressed his desire for new, competent counsel and his default

was that he had no choice but to proceed pro se. In both cases, the court failed to engage in a meaningful colloquy. This Court should apply the remedy use in *Garcia*, to reverse and remand for a new trial.

DeWeese, is also instructive. The defendant was displeased with his second attorney and requested a third attorney but failed to provide adequate grounds for new appointed counsel. *Deweese*, 117 Wn.2d at 378-79. The court engaged DeWeese in a thorough colloquy and DeWeese stated he had no choice but to proceed pro se. *Id.* The Court held that DeWeese made a knowing, voluntary and intelligent decision and chose to proceed pro se after an adequate colloquy on the record. *DeWeese*, 117 Wn.2d at 378-79.

DeWeese is distinguishable on grounds that DeWeese unlike Williams, was provided a timely and thorough colloquy on the record and Deweese made a choice because he had already been provided two different court appointed attorneys. Here, the trial court did not provide a timely colloquy and unlike in *DeWeese*, Williams did not fire two different attorneys, but after the court denied his motion for new counsel, Williams believed he had no choice but to try to represent himself. RP 10, 20-21, 32-34, 88-89.

In the context of the entire record, Williams was equivocal like *Garcia*. When a defendant is equivocal in his wish to proceed pro se, his request cannot be considered knowing, voluntary and intelligent. *State v. Madsen*, 168 Wn.2d 496, 504-05, 229 P.3d 714 (2010).

The trial court erred in ruling that Williams made a knowing, voluntary and intelligent decision to proceed pro se. The remedy is to reverse and remand for a new trial. *Garcia*, 92 Wn.2d at 655.

2. WILLIAMS WAS DENIED HIS RIGHT TO DUE PROCESS WHERE THE STATE WAS PERMITTED TO PROCEED BY WAY OF FORFEITURE BY WRONG DOING WITHOUT PROVING THE ELEMENTS BY CLEAR, COGENT AND CONVINCING EVIDENCE.

The Sixth Amendment gives criminal defendants the right to confront the witnesses against them. U.S. Const. Amends. VI; XIV; *State v. Kolowski*, 166 Wn.2d 409, 417, 209 P.3d 279 (2009). A criminal defendant may forfeit this right under limited circumstances: such as forfeiture by wrongdoing. *State v. Mason*, 160 Wn.2d 910, 925, 162 P.3d 396 (2007).

Forfeiture by wrong doing permits the introduction of a

witness' statements "when clear, cogent, and convincing evidence shows that the witness has been made unavailable by the wrongdoing of the defendant and that the defendant engaged in the wrongful conduct with the intention to prevent the witness from testifying." *State v. Dobbs*, 180 Wn.2d 1, 10-11, 320 P.3d 705 (2014).

Under the clear, cogent, and convincing standard, the fact at issue must be shown to be "highly probable." *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). The Washington Supreme Court has stated, "We recognize that this is not an easy standard to meet, but the right of confrontation should not be easily deemed forfeited by an accused." *Mason*, 160 Wn.2d at 927.

Under this high standard, the state must make a substantial showing of causation before a defendant may be stripped of his constitutional right to confront his accusers. *See, e.g., Dobbs*, 180 Wn.2d at 1-2 (causation proved by showing defendant repeatedly threatened the witness with physical violence); *Mason*, 160 Wn.2d at 925 (causation proved by showing defendant murdered the witness).

a. Insufficient Evidence of Causation.

The record in this case does not contain clear, cogent, and convincing evidence that Williams caused Shoemaker's or Bond's unavailability. The state presented evidence that it found an envelope addressed to "Cathy" with a return address from "Daniel K" that contained several letters. RP 213-220.

The state argued that the letter to Cathy consisted of witness tampering because Williams informed Cathy that he needed Shoemaker to notarize a "letter" to get the charges reduced. RP 213-14. Moreover, Williams stating he was facing 10 years of incarceration was not a threat, but rather the likely result if convicted.

Merely asking for a notarized letter without any sort of intimidation does not amount to wrongdoing that caused Shoemaker not to appear. It is equally as probable that the author was asking Shoemaker to clarify the nature of the contact in Idaho.

The second letter was titled "Idaho District Court". The letter explains that the incident in Idaho was a verbal dispute not a physical dispute. RP 215-16. The letter does not indicate that it was intended to be signed by Shoemaker. Id.

The third letter provided titled “Courthouse” was a declaration with Shoemaker’s name- clarifying that Williams did not engage in physical abuse. RP 217-18. The fourth Letter titled, “Asotin County Superior Court”, was also a declaration from Shoemaker. RP 219-20.

There was no evidence presented that any of these letters were ever sent or received, or that Williams, if he was the author, intended to cause Shoemaker to absent herself from trial, rather than clarify the record of what occurred.

The statements differ from the hearsay introduced by the police officers, but there was no proof that the initial statements to police were truthful and the letter untruthful, rather than a clarification. Moreover, there were no threats in any of the letters. RP 213-220.

Even if authored by Williams, the letters do meet the clear cogent and convincing burden of proof that they consist of wrongdoing that caused Shoemaker, LaQuan, and Bonds not to appear for trial.¹

¹ In the interest of efficiency, this argument will be referenced in the argument section following addressing lack of sufficient evidence to establish the elements of witness tampering.

(i) Lack of Causation: No Evidence
Williams Intimidated Witnesses
into Not Appearing For Trial.

There was insufficient evidence that Williams intimidated witnesses into not appearing for trial. The evidence presented suggested the opposite. The prosecutor informed the court that Shoemaker and her son had not made themselves available to the state. RP 82. According to the state, Williams indicated at a later date that neither would testify against him. RP 111. Williams did not however indicate that he knew the reason or that he was the cause. Williams also repeatedly indicated that he wanted to interview Shoemaker before trial. RP 118.

This evidence does not establish that Williams caused Shoemaker to absent herself from trial but rather suggests that she evaded all contact with the state, even after the court issued a material witness warrant. RP 111.

There was no evidence presented that the letter was ever sent, or received by Shoemaker or Bonds which defeats both the elements of the crime and the entire premise for permitting the evidence through forfeiture by wrongdoing.

Accordingly, the state did not prove by clear, cogent and convincing evidence that Williams caused the witnesses not to appear for court. Consequently, the trial court erred when it found Williams forfeited his right to confront his accuser and admitted Shoemaker, Bonds, and La'Quan's hearsay statements regarding the alleged assault and violation of the no contact order. This Court should reverse these convictions and remand for dismissal with prejudice.

3. THE STATED FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT WILLIAMS COMMITTED WITNESS TAMPERING.

The state failed to prove Williams committed three counts of witness tampering by writing four letters. RP 12-20.

In a criminal case, the state must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560(1979). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v.*

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.*

This Court defers to the jury’s resolution of conflicting testimony, evaluation of witness credibility, and decision regarding the persuasiveness and the appropriate weight to be given the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

RCW 9A.72.120 defines witness tampering in relevant part as follows:

1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

- (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
- (b) Absent himself or herself from such proceedings; or....

RCW 9A.72.120.

State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990) is a witness tampering case where the Supreme Court held the

evidence presented at trial was insufficient to sustain a conviction for witness tampering. *Rempel* is instructive. In *Rempel*, the state charged Dale Rempel with attempted rape. *Rempel*, 114 Wn.2d at 81. Rempel called the victim from jail and apologized, stated “it” was going to ruin his life, and asked the victim to “drop the charges.” *Rempel*, 114 Wn.2d at 83.

The Court first looked at Mr. Rempel’s literal words, noting they did not contain a request to withhold testimony, an express threat, or a promise of any reward, but rather reflected a lay person’s perception that the complaining witness can cause a prosecution to be discontinued. *Rempel*, 114 Wn.2d at 83.

Second, the Court explained that the state “is entitled to rely on the inferential meaning of the words and the context in which they were used.” *Rempel*, 114 Wn.2d at 83-84. In context, in Rempel’s case, Rempel’s literal words did not contain an attempt to induce the victim to withhold testimony.

The Court reasoned that in the right factual context, the words “drop the charges”, might sustain a conviction in the right factual context. *Rempel*, 114 Wn.2d at 84. However, in the context of Rempel’s conversation, it was not reasonable to infer that he

actually attempted to induce the victim to withhold testimony.

Rempel, 114 Wn.2d at 83-84.

In Williams's case, he sent the same message sent in

Rempel: to drop the charges or Williams his life would be ruined:

Number four: my lawyer tells me that Washington assault charge will be dropped to a misdemeanor breaking a no contact order only if Lewiston's charge is dropped first. **Ultimately, must have Washington statement" -- must is quotation marks -- "from Misty signed and notarized or I will be giving -- be given years because the State can use the police report against me, even though Misty doesn't show.**

RP 213-14.

The letters, in context did not support an inference that Williams attempted to induce Bonds and Shoemaker to absent themselves from trial or to change or withhold their testimony. Williams's letter expressing the need for a notarized statement to avoid jail time, was not a threat or inducement to testify falsely. Rather it was a tacit request, even less direct than the "drop the charges" request in *Rempel*, that the Court held was not a threat. *Id.*

The complainant in *Rempel* testified that she did not feel

threatened by Rempel's persistent request that she drop the charges. *Rempel*, 114 Wn.2d at 84. In Williams's case there was no testimony from Shoemaker or Bonds, but unlike in *Rempel*, here, Williams never made a direct request that either Shoemaker or Bonds change or withhold their testimony. RP 212-20.

Moreover, the fact that these witnesses did not present themselves for trial cannot be attributed to Williams because the evidence suggested that Shoemaker refused to cooperate with the authorities even when Williams requested to interview her. RP 113.

Accordingly, as in *Rempel*, the state failed to prove beyond a reasonable doubt that Williams threatened Shoemaker and Bonds to withhold or change their testimony or to absent themselves from the trial. This Court should reverse and remand for dismissal with prejudice.

4. THE STATE FAILED TO PROVE
BEYOND A REASONABLE DOUBT
THE CRIME OF ASSAULT IN THE
THIRD DEGREE.

As stated previously, the state must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 316.

The state charged assault in the third degree under RCW 9A.36.031(1)(d). This statute provides in relevant part:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

.....
(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

Id. The state failed to prove the element of “bodily harm”. Williams challenged the “alleged belt mark” in closing, explaining that the state’s evidence amounted to only the lesser included offense of misdemeanor assault in the fourth degree. RP 268, 278.

Bodily harm is defined as:

(4)(a) “Bodily injury,” “physical injury,” or “bodily harm” means physical pain or injury, illness, or an impairment of physical condition;

RCW 9A.04.110(4)(a).

A person is guilty of fourth degree assault if, ‘under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.’ RCW 9A.36.041(amended after the commission of the alleged offense in this case: effective May 10, 2017, S.S.H.B. 1163).

For purposes of this case, assault is defined as:

(1) 'Assault' means an unauthorized touching, including spitting and/or throwing a substance/object, striking, cutting, or shooting by an offender resulting in physical injury to an employee.

WAC 137-78-010.

The evidence in this case regarding bodily injury was limited officer Varga stating Shoemaker had belt shaped marks on her back, and an Exhibit: P-1, allegedly depicting a single belt mark. RP 139, 147. The state presented hearsay evidence from Shoemaker that Williams struck her with a belt. RP 137. He did not break the skin, she did not express that she was in pain, she did not seek medical attention and she was not hysterical or afraid. RP 147.

There was no evidence that Shoemaker experienced pain, injury, illness or impairment. Without evidence to establish one of these conditions, the state failed to prove "bodily injury" as charged. RCW 9A.04.110(4)(a); RCW 9A.36.031(1)(d).

Williams was correct in arguing in closing that the state only established assault in the fourth degree because the acts consisted of an unwanted touching that did not create bodily harm. RCW 9A.36.041.

This evidence when viewed in the light most favorable to the state does not establish either directly or by inference, that Williams recklessness created a substantial risk of death or serious physical injury. *Salinas*, 119 Wn.2d at 201. Accordingly, this Court must reverse and remand for dismissal with prejudice.

5. WILLIAMS WAS DENIED DUE PROCESS WHERE HE WAS CONVICTED OF A CRIME THE STATE FAILED TO ALLEGE IN THE CHARGING DOCUMENT: FELONY VIOLATION OF A NO CONTACT ORDER.

The information in this case alleged misdemeanor violation of a no contact order, but Williams was convicted of felony violation of a no contact order. When an information alleges only one crime, it is constitutional error to instruct the jury on a different, uncharged crime. *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012).

“[T]he Due Process Clause [U.S. Const. Amend. XIV] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime *with which he is charged.*” *In re Winship*, 397 U.S. 358, 364, 90

S.Ct. 1068, 25 L.Ed.2d 368 (1970) (emphasis added); *Jackson*, 443 U.S. at 319.

The Court in *Kirwin* determined that Federal case law and the Washington state constitution require the appellate court to review a sufficiency of the evidence challenge to the crime charged, not the uncharged alternative. Art. I, § 22; *Kirwin*, 166 Wn. App. at 672-73.

The state charged Ms. Kirwin with three counts of first degree custodial interference. Custodial interference has three separate means of commission and the state elected the first alternative. *Kirwin*, 166 Wn. App. at 661-662. The charging document filed against Ms. Kirwin alleged the first alternative. *Id.* The jury was instructed on an uncharged alternate means and convicted under the to-convict instructions. *Kirwin*, 166 Wn. App. at 663-64. The judgement reflected convictions under the offense specified in the charging document, not set forth in the to-convict instructions. *Id.*

The Court in *Kirwin* explained that the only remedy was to reverse and remand for dismissal with prejudice because to do otherwise would reward the state for its error and deprive the

defendant of his due process right the ability to challenge the sufficiency of the evidence against the charged crime for which he was convicted. *Kirwin*, 166 Wn. App. at 665.

In *Auburn v. Brooke*, 119 Wn.2d 623, 638, 836 P.2d 212 (1992) the Court held that citation to the numerical code does not provide the defendant with his due process right to be notified of the charges faces. *Brooke*, 119 Wn.2d at 638.

Kirwin and *Brook* are analogous and provide instruction for this case. Here the facts did not describe the elements of the crime enumerated in the charging document. Substantively, the charging document described a misdemeanor and numerically a felony. CP 19.

The elements in the charging document provided in relevant part that Williams knowingly violated an existing no contact order. CP 19. These elements meet the definition of RCW 26.50.110(1)(a) which provides:

(1)(a) Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, any temporary order for protection granted under chapter 7.40 RCW pursuant to chapter 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows

of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

Id. RCW 26.50.110(1)(a) is a misdemeanor. Id.

The numerical citation to RCW 26.50.110(4) contains the following means to commit felony violation of a no contact order by:

(1) any assault in violation of a no-contact order that does not amount to first or second degree assault, *and* (2) any conduct in violation of a protection order that is reckless and creates a substantial risk of death or serious physical injury to another person. Id. This provision is a felony. Id.

The state did not set forth these elements in the charging document but argued that because Williams committed an assault, he was guilty of felony violation of a no contact order. RP 259-52. The court found Williams guilty of the uncharged crime which violated his due process rights to be informed of the charges. *Brooke*, 119 Wn.2d at 638.

Here, as in *Kirwin* the state did not attempt to untimely amend the information to meet the facts of its case, but rather proceeded to argue an uncharged crime. The trial court's entering a

conviction for felony violation of a no contact order by assault was an error that must be reversed and the matter remanded for dismissal with prejudice. *Kirwin*, 166 Wn. App. at 665.

Remand for a new trial is not the proper remedy under this Court's decision in *Kirwin*. *Kirwin*, 166 Wn. App. at 665.

D. CONCLUSION

Rudy Williams respectfully requests this Court reverse for dismissal with prejudice all of his charges: three counts of witness tampering; assault in the third degree; and felony violation of a no contact order.

DATED this 19th day of July 2017.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Asotin County Prosecutor at bnichols@co.asotin.wa.us and Rudy Williams/DOC#761174, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed, on July 19, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Rudy Williams.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

July 19, 2017 - 10:53 AM

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