FILED
Court of Appeals
Division III
State of Washington
7/3/2018 3:44 PM

No. 35441-5-III
Whitman County Superior Court No. 17-1-193-38

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Respondent

v.

KEITH ALAN KIMBALL, Appellant

BRIEF OF RESPONDENT

Attorney for Respondent

Wendy Lierman
Deputy Prosecutor
Whitman County
WSBA No. 46963

PO Box 30
Colfax, WA 99111-0030
(509) 397-6250

TABLE OF AUTHORITIES

Federal Cases **Page**

Miller v. California, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).....23

Washington Cases **Page**

City of Bremerton v. Widell, 146 Wn.2d 561, 569, *cert. denied*, 537 U.S. 1007 (2002).....9-10

City of Seattle v. Huff, 111 Wn.2d 923, 767 P.2d 572 (1989).....14-16

City of Seattle v. May, 171 Wn.2d 847, 256 P.3d 1161 (2011).....9-11

City of Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (1990).....19-20, 22

In re Marriage of Davison, 112 Wn.App. 251, 48 P.3d 358 (2002).....27

In re Marriage of Meredith, 148 Wn. App. 887, 201 P.3d 1056, (2009).....13, 18

In re Marriage of Suggs, 152 Wn.2d. 74, 93 P.3d 161 (2004)...5, 13-14, 17

Ravenscroft v. Washington Water Power Co., 136 Wn.2d 911, 969 P.2d 75 (1998).....23

Seattle v. Eze, 111 Wn.2d 22, 26–27, 759 P.2d 366 (1988).....19

Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995).....27

State v. Alphonse, 142 Wn. App 417, 197 P.3d 1211 (2008)...18, 20, 23-24

State v. Bilal, 77 Wn.App. 720, 893 P.2d 674 (1995) 27

State v. Bunker, 144 Wn.2d, 238 P.3d 487 (2008).....6-7

State v. Dejarlais, 136 Wn.2d 939, 969 P.2d 90 (1998).....8

State v. Dugan, 96 Wn.App. 346, 979 P.2d 885 (1999).....27

State v. Hardy, 37 Wn.App. 463, 681 P.2d 852 (1984).....30

State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014).....29

State v. King, 24 Wn. App. 495, 601 P.2d 982 (1979).....26, 30

State v. Ladenburg, 67 Wn.App. 749, 840 P.2d 228 (1992).....27

State v. Myles, 127 Wn.2d 807, 903 P.2d 979 (1995).....19, 23

State v. Noah, 103 Wn. App. 29, 9 P.3d 858 (2000).....9,11-12, 14-15

State v. Perala, 132 Wn. App. 98 130 P.3d 852 (2006).....27-28

State v. Post, 118 Wn.2d 596, 826 P.2d 172 (1992).....27

State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365, 1374 (1993).....14

State v. Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999).....30-34

State v. Sisemore, 114 Wn.App. 75, 55 P.3d 1178 (2002).....25

State v. Turner, 98 Wn.2d 731, 739 (1983).....10

Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 205,
280 L.Ed.2d 674 (1984).....29

United States v. Tavares, 100 F.3d 995 (D.C. Cir. 1996).....33

Statutes **Page**

RCW 9.61.230.....24

RCW 10.99.050 25

RCW 26.50.020(5).....10-11

RCW 26.50.110.....5-8, 10, 25

WPIC **Page**

WPIC 36.51.02.....25

Rules **Page**

RAP 16.3 26

Other Sources **Page**

Black's Law Dictionary (10th ed. 2014).....9

Webster's Third New International Dictionary.....23-24

RESTATEMENT OF THE ISSUES

I. Does RCW 26.50.110 criminalize contact with the protected party outside the provided scope of the protection order?

II. Is the Appellant collaterally barred from attacking the validity of the protection order?

III. Is the protection order a time, place, and manner restriction?

IV. Has the Appellant met his burden of proof that the restraint provision restricting contact to "parenting issues" and "parenting plan logistics" is unconstitutionally vague?

V. Has the Appellant met his burden of proof to show Judge Libey should have recused himself?

VI. Has the Appellant met his burden of proof to show he received ineffective assistance of counsel?

STATEMENT OF THE CASE

On July 24, 2015, the Superior Court of Washington for Whitman County granted Kara Anne Kimball an Order for Protection. CP 49. The Order, which states that Appellant committed domestic violence, restrains the appellant, Keith Alan Kimball[1], from communicating with Kara, except for written "communications relating to parenting issues or parenting plan logistics" unless it is an emergency. CP 50. Further, it prohibits him from coming within fifty feet of Kara Ann Kimball. *Id.* The order was issued as a result of a dissolution proceeding. RP 36 ll. 8-12.

On January 19th, February 2nd, and February 6th, 2017, Kimball sent Kara several text messages. CP 52- 60. Some of those text messages included the following language:

> "How evil are you?...Fuck you and your bullshit. You are an abuser. Nothing will change that,"
>
> "Excuse me for thinking you might have a soul. I took enough abuse from you to last a lifetime. So I'm beyond giving a shit about your bs…Your BS fantasies are extremely destructive," and
>
> "You have succeeded in completely ruining my life. Because you insist in continuing this lie I have not been able to get a job and am completely broke. I loved you and

[1] The Respondent will adopt the Appellant's designations.

> treated you with compassion…How can you be so ungrateful and vindictive?"

Id. The state charged Kimball with three counts of violating a protection order. CP 1-3.

Pretrial, the trial court granted Kimball's Motion for Bill of Particulars. RP 3, RP 5 ll. 3-10, RP 9 ll. 9-11. The trial court thereafter denied Kimball's motion to dismiss where he alleged: 1) the protection order was unconstitutionally vague, 2) the protection order violated his right to free speech, and 3) that violating the restraint provision was not criminal. CP 69-70. The case proceeded to jury trial. CP 112. At trial, the court sustained some of defense counsel's objections. RP 45. After the state rested, defense counsel requested a recess and, when trial resumed, defense counsel stated, "[w]e will not be presenting a defense" and rested. RP 53 ll. 6-21; 61- 62. The court gave one of Kimball's proposed jury instructions regarding leniency over the state's objection. RP 67- 71.

Kimball was found guilty of three counts of violation of a protection order. RP 110-111. At sentencing, Kimball gave a lengthy speech to the court about the history of his relationship with his daughters, ex-wife, law enforcement, and the court, as well as statements regarding the divorce, protection order, and prior conviction processes. RP 121- 132. He made passing reference to getting no chance to defend himself at trial,

but did not explain how he was prevented from doing so. *Id.* at 122. He made mention that he wanted to "say stuff" in trial about his character and show some letters that say he is a great dad. *Id.* at 132. He told the court that he "was told nothing matters, that none of it matters. That all the good that I've ever done in my life just doesn't matter." *Id.*

A lot of his speech consisted of blaming the victim. *Id.* at 121-132. He told the court that because of the abuse he had suffered during his marriage from his wife, he had a disability which went away overnight when he decided to stand up for himself against said wife. *Id.* at 121. He alleged that his children are failing math and science classes because of being in their mother's care. *Id.* at 126 ll. 2-12. Kimball went on to say that his children don't understand – " they've never been told the truth of what's happened. Because their mother knows that it's all based on a lie. And if she tells them what's been happening, that they will rebel, they will be like no." *Id.* at 126 ll. 13-17. Very little of his speech was related to the text messages he sent her. *Id.* He told the court "those texts were not the normal me." *Id.* at 128, l 1. Absent is any statement that he believed those messages fell within the parameters of the protection order or that those messages were 100 % about raising their daughters. *Id.* at 122-132. Kimball told the Judge that he had asked his attorney to ask for a change of venue and to ask the Judge to recuse himself, but that counsel refused to

do so. *Id.* at 18 ll. 7-9. He never said that he demanded to testify and that his attorney prevented him from doing so. *Id.* at 121-132. He was sentenced to the low-end of the sentencing range despite the state's recommendation the court impose a high-end sentence. RP 134 ll. 12-13.

ARGUMENT

RCW 26.50.110 does criminalize violations of restraint provisions even where the restraint provisions limit, rather than completely prohibit, communication. Kimball is collaterally barred from arguing the validity of the protection order. The protection order is a lawful time, place, and manner restriction. Appellant has not met his burden of proof required for the restraint provision to be ruled as unconstitutionally vague.

Regarding his Statement of Additional Grounds, Kimball has failed to meet his burden of proof to show ineffective assistance of counsel and has failed to prove that the Judge should have recused himself. Further, he has failed to cite to the record and his grounds are a matter for Personal Restraint Petition rather than an appeal.

The Constitutional challenges are reviewed de novo. *In re Marriage of Suggs*, 152 Wn.2d 74, 79, 93 P.3d 161 (2004), *as amended on denial of reconsideration* (Nov. 2, 2004). Appellant's statutory challenge is also reviewed de novo, and the Court "interpret[s] statutes to give effect

to the legislature's intentions." *State v. Bunker*, 169 Wn.2d 571, 577–78, 238 P.3d 487, 490 (2010).

I. RCW 26.50.110 CRIMINALIZES KIMBALL'S CONDUCT BECAUSE HE VIOLATED A RESTRAINT PROVISION.

RCW 26.50.110 provides, in pertinent part, that "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[2]: (i) The restraint provisions prohibiting acts…or restraint provisions prohibiting contact with a protected party[.]" When the court granted Kara a protection order, the court ordered that "[r]espondent is ***restrained*** from coming near and from having any contact or communication with petitioner, except for communications relating to parenting issues or parenting plan logistics." CP 50. Thus, the prohibition on contacting Kara about anything other than parenting issues or parenting plan logistics is a restraint provision.

The Washington Supreme Court, sitting *en banc*, held that the court "begin[s] by examining the plain language of the statute. 'The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Bunker*, 169 Wn.2d at 578. In that case, the defendants argued that only "contacts with a protected party that are

[2] Subsections (4) and (5) designate when a violation is a felony.

violent, threaten violence, or occur in a specifically prohibited place" are criminalized under RCW 26.50.110. *Id.* at 574. That court held, without holding the statute ambiguous, that:

> [A]ll violations of no-contact order restraint provisions are misdemeanors or felonies under former RCW 26.50.110[3]. First, it is clear that the legislature intended a criminal misdemeanor or felony penalty for no-contact order violations under former RCW 26.50.110(1). Subsection (3) of the same statute states that violation of a no-contact order "shall *also* constitute contempt of court, and is subject to the penalties prescribed by law." Former RCW 26.50.110(3) (emphasis added). The word "also" indicates that contempt of court is punishment in addition to some other punishment. *See* Webster's Third New International Dictionary 62 (2002) ("also" means "in addition: as well"). Subsection (1) clearly designates that this baseline punishment is a gross misdemeanor or felony, depending on the factual context.

Id. at 579.

The current version of RCW 26.50.110(3) also provides that contempt may be in addition to criminal penalties. It currently reads, in pertinent part, "A violation of an order issued under this chapter,...shall also constitute contempt of court, and is subject to the penalties prescribed by law." Just as former RCW 26.50.110 allowed for both criminal and

---

[3] Both the 2000 and 2017(currently in effect) versions of RCW 26.50.110 are attached as exhibits 1 and 2 respectively for comparison.

contempt prosecutions of the defendants' conduct in *Bunker,* the current version of RCW 26.50.110 also allows for both criminal and contempt prosecutions of Kimball's conduct for exceeding the scope of the restraint provision governing contact with Kara.

Appellant alleges that because Kimball was not forbidden from all contact with Kara he was not subject to a restraint provision that could be prosecuted criminally. *Brief of Appellant* at 5. That argument fails. The Appellant bases this argument on an erroneous assumption that for the restraint provision to be criminally enforced, it must prohibit contact absolutely. *Id.* at 6. However, nowhere in the statute is such a requirement to be found. Ex 2. The Washington Supreme Court has noted that "... nothing in the statute prevents drafting a protection order which allows some contact, for instance, by telephone or through a third party. There is no requirement that all contact be prohibited." *State v. Dejarlais*, 136 Wn.2d 939, 945, 969 P.2d 90 (1998). Respondent could find no authority which would support Appellant's theory that contact must be absolutely prohibited before a violation could be prosecuted criminally.

The basis of Kimball's argument stems from the definition of "prohibit" found in Black's Law Dictionary that "prohibit" means "to forbid by law." *Brief of Appellant* at 7-8. But even under Kimball's limited definition, his conduct was still prohibited because he was forbidden by

law from contacting Kara about anything other than parenting plan logistics or parenting issues. A further reading of the definition "prohibit" also defines "prohibit" as "[t]o prevent, preclude, *or severely hinder*." Black's Law Dictionary (10th ed. 2014)(emphasis added). In this case, Kimball was "severely hindered" from having unfettered contact with Kara and was completely prevented and precluded from contact with Kara about anything other than parenting issues or parenting plan logistics. Of note is that "prohibit" is *not* defined in terms which would require absolute prevention or preclusion, or to be completely forbidden to be considered a prohibition. The Court should affirm the trial court's ruling that RCW 26.50.110 criminalizes the violation of the restraint provision at issue.

II. KIMBALL IS COLLATERALLY BARRED FROM ARGUING THE VALIDITY OF THE PROTECTION ORDER.

Kimball is barred from challenging the validity of the protection order in a criminal case for violating that order. *City of Seattle v. May,* 171 Wn.2d 847, 852 256 p.3D 1161 (2011)(citing *State v. Noah,* 103 Wn. App. 29, 46, 9 P.3d 858 (2000). The "collateral bar rule" generally provides that "[a] court order which is merely erroneous must be obeyed despite the error and may not be collaterally attacked in a contempt proceeding." *City of Bremerton v. Widell*, 146 Wn.2d 561, 569, 51 P.3d 733 *cert. denied*,

537 U.S. 1007 (2002). The policy underlying the collateral bar rule is respect for independent judicial decision making. *Id.* This rule also deters individuals from violating court orders they believe to be invalid, encouraging them to instead challenge the orders through legal proceedings. *Id.* The proper method for challenging a court order is through the legal system, not by disregarding the order. *State v. Turner*, 98 Wn.2d 731, 739, 658 P.2d 658 (1983).

An exception to the collateral bar rule exists that would allow the defendant to argue the protection order is void. *May,* 171 Wn.2d at 852. However, "[a]n order is void only if there is "an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant." *Id.* The Washington Supreme Court has held that:

> For an order to be void, the court must lack the power to issue the *type* of order. Provided that such power exists, any error in issuing an order may not be collaterally attacked. In sum, [the Appellant] can challenge the validity of the underlying domestic violence protection order only insofar as he can show that the order is absolutely void; the collateral bar rule precludes him from arguing that the order is merely erroneous."

Id. at 852-853. That court held "the superior court possessed jurisdiction 'to issue the type of order,' that is, to issue a permanent domestic violence protection order. RCW 26.50.020(5) creates such jurisdiction. Any defects

within the order simply go to whether the order was 'merely erroneous, however flagrant' and cannot be collaterally attacked." *Id.* In that case, it was held that the court issuing the protection order had jurisdiction to issue the order and thus was not void; therefore, the collateral bar rule prohibited the defendant from challenging the validity of the protection order in a subsequent criminal proceeding. *Id.* at 855. The *May* court then went on to hold that:

> "Today, we clarify that, in a proceeding for violation of a court order, the trial court's gate-keeping role includes excluding orders that are void, orders that are inapplicable to the crime charged (i.e., the order either does not apply to the defendant or does not apply to the charged conduct), and orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct).... The collateral bar rule precludes challenges to the validity—but not the applicability—of a court order in a proceeding for violation of such an order except for challenges to the issuing court's jurisdiction to issue the type of order in question. Void orders and inapplicable orders are inadmissible in such proceedings."

Id. at 855.

In another case, *State v. Noah*, 103 Wn. App. 29, 34, 9 P.3d 858 (2000), the defendant had an anti-harassment order against him for harassing a mental health counselor in his personal and professional life.

Noah argued that any restrictions on his lawful "picketing" near the counselor's business constituted a prior restraint on his freedom of speech, and specifically, that the 300-foot no contact zone was unconstitutional as an invalid place restriction. *Id.* at 41-42. Moreover, he disputed the validity of the Superior Court's contempt findings. *Id.* at 45. The court stated that the order was merely voidable, and not void even were they to find the 300-foot distance improper. *Id.* at 44. Additionally, the court order would have been valid even if the distance provision needed revising because the issuing court still had "constitutional and statutory authority to impose a reasonable distance of no contact." *Id.* The court found that the defendant was really arguing erroneous application of the law and held that a "court does not lose jurisdiction merely by interpreting the law erroneously." *Id.* at 47. The court held that the defendant "violated the anti-harassment order before directly challenging the constitutionality of the law on which it was based.... Because we find the order was not void, the subsequent contempt order may not be attacked collaterally." *Id.* Because parties held in contempt are barred from collaterally attacking the constitutionality of the law upon which the order was based, the court held the order could not be collaterally attacked and the contempt order was affirmed. *Id.* at 52.

Importantly, in both *In re Marriage of Suggs,* 152 Wn.2d at 79, and *In re Marriage of Meredith*, 148 Wn. App. at 891, cases cited by Kimball in support of his argument, the party prohibited from contact challenged that order directly, rather than violating the order, and then challenging the order collaterally through criminal proceedings. Thus, Kimball is in a different position than Suggs and Meredith because he attacks the validity of the order in a criminal proceeding after violating the protection order. Kimball argues that the protection order is invalid because it is an improper prior restraint. Kimball is really arguing that the provision restricting contact is an improper time, place, and manner restriction. This would make the order voidable, but not void. Kimball's argument that the restraint provision is an improper prior restraint is collaterally barred in the criminal proceeding and must be made in the civil proceeding in which the order was entered. The court should hold Appellant's argument, that the order is an unlawful prior restraint on speech to be collaterally barred.

III. THE PROTECTION ORDER IS NOT AN UNLAWFUL PRIOR RESTRAINT ON SPEECH.

The Washington Supreme Court has adopted the United States Supreme Court's definition of prior restraints on speech as "'[A]dministrative and judicial orders *forbidding* certain communications

when issued in advance of the time that such communications are to occur.'... Temporary restraining orders and permanent injunctions—*i.e.,* court orders that actually forbid speech activities—are classic examples of prior restraints." *In re Marriage of Suggs*, 152 Wn.2d 74, 81, 93 P.3d 161 (2004), *as amended on denial of reconsideration* (Nov. 2, 2004). The provision allowing contact as to parenting issues and parenting plan logistics is not a restraint, but rather permission to make contact. The restraint provision at issue is a valid time, place, and manner restriction.

Under the Washington Constitution, courts analyze whether statutes are valid time, place, and manner restrictions for public forums if they are " 'content neutral, are narrowly tailored to serve a compelling government interest, and leave open ample alternative channels of communications." *State v. Noah*, 103 Wn. App. 29, 41, 9 P.3d 858 (2000), *as amended on reconsideration* (Oct. 30, 2000). Speech in nonpublic forums, such as speech over the phone, may be restricted if " '... the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral.' "*City of Seattle v. Huff*, 111 Wn.2d 923, 926, 767 P.2d 572 (1989). Furthermore, "[l]imitations upon fundamental rights are permissible, provided they are imposed sensitively." *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365, 1374 (1993).

In *Noah, supra*, after analyzing a no contact anti-harassment order, the Court of Appeals upheld the restraint provision forbidding contact with the petitioner holding that:

> Protecting citizens from harassment is a compelling state interest. The legislature authorizes the court to order that the defendant have no contact with his intended victim… The statute is content neutral—no contact—whether profession of love, screams of hate or anything in between. The interest to be served is the safety, security, and peace of mind of the victim. It is narrowly tailored by focus on the victim and a no contact zone around the victim. It leaves open ample alternative channels of communications, by leaving open every alternative channel so long as no contact is made with the victim and the proscribed zone is not violated.

Noah, 103 Wn. App. at 41. Under the *Noah* court's ruling, even constitutionally protected speech may lawfully be forbidden. That court upheld an anti-harassment order that restrained the respondent from any attempt at contact with the petitioner or his family. *Id.* at 40.

The *Huff* court also found it reasonable for an ordinance to distinguish threats of injury or property damage made with criminal intent from other kinds of communication, and also found it reasonable to penalize callers who made the threats. *Huff,* 111 Wn.2d at 927. That court also found the restriction to be viewpoint neutral because it allowed any

viewpoint to be expressed without penalty unless there was an accompanying threat. *Id.*

The restraint provision at issue here is a valid time, place, and manner restriction. It is narrowly tailored to serve a compelling state interest because it protects Kara from harassment just as the anti-harassment order in *Noah* served a compelling interest in protecting the petitioner from harassment. Like the *Noah* order, which focused on the victim and the victim's family, the restraint provision in this case is narrowly tailored because it focuses solely on Kara, the victim. The order does not restrict Kimball from having contact with anyone else; therefore, it leaves open ample alternative channels of communication because every other channel of communication is permitted, so long as it does not happen within 50 feet of Kara, just as the *Noah* order similarly left ample alternative channels of communication. Because the forum at issue is a private one, written communication between Kara and Kimball only, then under the rule in *Huff,* speech may be restricted so long as it is reasonable and viewpoint neutral. Just as it is reasonable to restrict communications from containing threats as in the *Huff* ordinance, it is reasonable to restrict communications from Kimball, who was found to have committed domestic violence, from contacting Kara about anything other than parenting issues or parenting plan logistics because it protects Kara while

at the same time acknowledges the realities of parents having two children in common. The limitation on Kimball's right to free speech was sensitively imposed because the court recognized the realities of this family's dynamic, and allowed permission for contact about parenting issues and parenting plan logistics. Just as the ordinance in *Huff* was viewpoint neutral, the restraint provision here is viewpoint neutral as Kimball can say anything he wants, positive, negative, or neutral about parenting issues or parenting plan logistics.

The Appellant relies on *In re Marriage of Suggs,* and *In re Marriage of Meredith* for support that the restraint provision in the case at bar is an unlawful prior restraint on Kimball's freedom of speech; however, both of those cases are distinguishable. In both cases, the speech being prohibited was not limited to the petitioner in the protection order. In *Suggs,* the court found the anti-harassment order was an unlawful prior restraint because it forbade the respondent from "knowingly and willfully making invalid and unsubstantiated allegations or complaints *to third parties* which are designed for the purpose of annoying, harassing, vexing, or otherwise harming Andrew O. Hamilton and for no lawful purpose." *In re Marriage of Suggs*, 152 Wn.2d 74, 81, 93 P.3d 161 (2004), *as amended on denial of reconsideration* (Nov. 2, 2004)(emphasis added). That restrained party was forbidden from communicating with *everyone*.

In *Meredith,* the respondent was restrained from:

> "contacting *any* agency regarding Ms. Muriel's immigration status, including but not limited to the Department of Homeland Security (Citizenship and Immigration Services, Immigration and Customs Enforcement or Customs and Border Protection), the Executive Office of Immigration Review (the immigration court system), or the Department of State. Any contact that Mr. Meredith believes to be necessary must first be approved by this court through the undersigned judge/department."

In re Marriage of Meredith, 148 Wn. App. 887, 895, 201 P.3d 1056 (2009)(emphasis in original.) That restrained party was forbidden from contacting any agency. In contrast, Kimball is only restrained from contacting Kara, thus making this case analogous to *Noah* where the court upheld the protection order because the protection was focused on the victim and allowed all other channels of communication. The Court should find that the domestic violence protection order is not an unlawful prior restraint on Kimball's free speech and should affirm the trial court.

IV. THE APPELLANT CANNOT MEET HIS BURDEN TO SHOW THAT THE NO CONTACT ORDER IS IMPERMISSIBLY VAGUE.

Kimball concedes that the burden is on him to show the no contact order is impermissibly vague. *Brief of Appellant* at 16. He must demonstrate beyond a reasonable doubt the order either 1) fails to

sufficiently define the offense so ordinary people understand what conduct is prohibited, or 2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement." *State v. Alphones,* 142 Wn. App 417, 437 197 P.3d 1211 (2008). He cannot meet this burden.

A. Ordinary people can understand what is being prohibited.

The Washington Supreme court has held that:

> "impossible standards of specificity" or "mathematical certainty" are not required because some degree of vagueness is inherent in the use of language. "Consequently, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct". *Eze,* 111 Wn.2d at 27.

State v. Myles, 127 Wn.2d 807, 812, 903 P.2d 979 (1995), *as amended* (Nov. 14, 1995). Nor does the test require absolute agreement; rather "[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement, the ordinance is sufficiently definite." *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

In *Douglass,* the Washington Supreme Court clarified that "'vagueness in the constitutional sense is not mere uncertainty.'

Vagueness in the constitutional sense means that persons of ordinary intelligence are obliged to guess as to what conduct the ordinance proscribes." *Id.* at 179. (internal citation omitted.)

In *State v. Alphonse,* the defendant was found guilty of felony and misdemeanor telephone harassment after he left threatening and sexually explicit voicemails to a police officer. 142 Wn. App. 417, 424, 174 P.3d 684 (2008). On appeal the defendant argued the part of the statue which prohibited "lewd, lascivious, indecent or obscene" words was unconstitutionally vague because he must guess whether his use of certain words was "indecent," "lewd," or "lascivious." *Id.* at 437. The Court of Appeals held "[f]or a statute to be unconstitutional, its terms must be " 'so loose and obscure that they cannot be clearly applied in any context.' " *Id.* citing *Douglass* at 182, n.7. Furthermore, the terms are not to be considered in a vacuum, but rather in context with the entire order. *See Id.* at 180.

Alphonse, had argued "because some of the words he used may be deemed by some to be 'indecent,' 'lewd' or 'lascivious,' but may be commonly used by others, a person must guess whether using these words would constitute criminal conduct." *Id.* at 438. The court rejected his argument finding it was neither logical nor credible. *Id.*

The restraint provision in this case sufficiently defines the scope of the prohibition so ordinary people know what conduct is proscribed: communication about anything other than parenting issues or parenting plan logistics. The restraint provision terms are not 'so loose and obscure' they cannot be clearly applied in any context. Any message having nothing to do with parenting issues or parenting plan logistics would clearly violate the order. The purpose of the protection order is to protect Kara from Kimball's harassment and abuse; therefore, when viewing the terms of the restraint provision in context, it is clear that the restraint provision prohibits Kimball from contacting Kara about anything unrelated to raising their children or carrying out the terms of the parenting plan. Just as the Court of Appeals found the arguments advanced in *Alphonse* to be neither logical nor credible, so too should this court find Kimball's argument he did not know his statements:

> "How evil are you?...Fuck you and your bullshit. You are an abuser. Nothing will change that ,"
>
> "Excuse me for thinking you might have a soul. I took enough abuse from you to last a lifetime. So I'm beyond giving a shit about your bs…Your BS fantasies are extremely destructive," and
>
> "You have succeeded in completely ruining my life. Because you insist in continuing this lie I have not been able to get a job and

> am completely broke. I loved you and treated you with compassion…How can you be so ungrateful and vindictive?"

were not about parenting issues or parenting plan logistics likewise illogical and incredible. Kimball has not met his burden of proving beyond a reasonable doubt the restraint provision fails to sufficiently define the offense so ordinary people understand what conduct is barred. Indeed, twelve ordinary people were capable of understanding what conduct is barred as they returned verdicts of guilty.

B. There are ascertainable standards of guilt which protect against arbitrary enforcement.

Kimball has failed to prove beyond a reasonable doubt that the restraint provision fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. For an ordinance, "[t]he question primarily is whether the statute "proscribes conduct by resort to 'inherently subjective terms.' " *Douglass,* 115 Wn.2d at 181. "Again, the terms of the ordinance are not viewed in a vacuum; rather, the question is whether the terms are 'inherently subjective in the context in which they are used.'" *Id.* at 181.The fact the statute may require a subjective evaluation by a law enforcement officer does not render the statute

unconstitutional; only if the statute invites an inordinate amount of discretion is it unconstitutional. *Myles*, 127 Wn.2d at 807.

Kimball has failed to show beyond a reasonable doubt how the terms "parenting issues" and "parenting plan logistics" are inherently subjective terms which would lead to an inordinate amount of discretion. Inherently subjective terms would be terms such as "good", "bad", "beautiful", or "ugly". Both the Washington and United States Supreme Courts have found the term "obscene" not to be unconstitutionally vague. *Alphonse,* 142 Wn. App. at 438. *See also, Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

If the term "obscene" is not unconstitutionally vague because people of ordinary intelligence are presumed to be able to adeptly apply the *Miller* test for obscenity, then terms such as "parenting issues" and "parenting plan logistics" cannot be unconstitutionally vague because people of ordinary intelligence should be presumed to be able to rely on the plain and ordinary meaning of "parenting issues" and "parenting plan logistics" and view them in the context of the entire domestic violence protection order. The word 'parenting' would be given its "plain and ordinary meaning." *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 920-921 (1998). Parenting is defined as "the raising of a child by its parents". Webster's Third New International Dictionary,

Unabridged, s.v. "parenting," last accessed May 17, 2018, http://unabridged.merriam-webster.com. So "parenting issues" would be issues related to the raising of a child by its parents. Thus, if the message was not about an issue related to raising the children or carrying out the parenting plan then the message violates the restraint provision. The statements offered by the prosecution at Kimball's trial like "[e]xcuse me for thinking you might have a soul. I took enough abuse from you to last a lifetime. So I'm beyond giving a shit about your bs…Your BS fantasies are extremely destructive" are not related to the issue of raising their daughters; rather they are angry rants directed solely at Kara and are unrelated to the children.

In *Alphonse,* the court held that because the statute had an intent element there were "sufficient guidelines to prevent arbitrary enforcement." 142 Wn. App at 439. The court noted the defendant failed "to demonstrate how protected speech will be subject to an inordinate amount of police discretion when the State may only charge those complaints that are made with criminal intent." *Id.* at 439. The Court stated "[b]ecause it includes an intent element, RCW 9.61.230 defines the proscribed conduct in reference to the caller, not the recipient, and thereby contains sufficient guidelines to prevent arbitrary enforcement." *Id.* There is also a mens rea element for violating a court order and the jury was

properly instructed on the mens rea element in this case. *See, e.g. State v. Sisemore*, 114 Wn.App. 75, 55 P.3d 1178 (2002)(RCW 26.50.110 and RCW 10.99.050 require a willful or knowing violation); see also WPIC 36.51.02; *see also* CP 102-104 (jury instructed on mens rea for violation of a no contact order). Thus, as in *Alphonse*, the State could prosecute Kimball's communications made with the requisite mens rea and the jury could only convict him if the state proved the mens rea element. Therefore, there are sufficient guidelines to prevent arbitrary enforcement.

Kimball has failed to demonstrate how protected speech will be subject to an inordinate amount of discretion when the state may only prosecute those communications Kimball knew violated a restraint provision. It is Kimball's burden to prove beyond a reasonable doubt the restraint provision resorted to inherently subjective terms the result of which is a provision that fails to provide ascertainable standards of guilt, and he has not met that burden. This Court should affirm the trial court's ruling that the restraint provision is not vague.

//

//

V. KIMBALL HAS FAILED TO SUPPORT HIS STATEMENT OF ADDITIONAL GROUNDS AND FURTHER THOSE MATTERS CANNOT BE RESOLVED BY RESORT TO THE RECORD.

Pursuant to RAP 10.10(c) "[o]nly documents *that* are contained in the record on review should be attached or referred to in the statement." Kimball has attached and referred to email documents not contained in the record. Therefore, they should not be considered. Additionally, Kimball seeks review of matters that cannot be resolved by resort to the record, in which case his only recourse is to bring a Personal Restraint Petition under RAP 16.3. *State v. King*, 24 Wn. App. 495, 505, 601 P.2d 982, 988 (1979).

VI. KIMBALL HAS FAILED TO DEMONSTRATE ACTUAL OR POTENTIAL BIAS TO SUPPORT JUDICIAL RECUSAL.

Kimball's Statement of Additional Grounds alleges that the trial judge should have recused himself because he did not elect to represent Kimball in 2015 in his divorce. SAG. He further alleges that Judge Libey and former Judge Frazier were friends, and that may have played a factor in Judge Libey's decision making. SAG. Kimball does not cite to anywhere in the record where it was proven that Judge Libey, when in private practice in 2015, refused to represent Kimball. Nor does Kimball cite to any authority that, even had the judge elected not to take Kimball as a client, such election would require Judge Libey to recuse himself from a

criminal case involving Kimball two years later. Nor is there evidence of any friendship between the judges, or that such a friendship played any part in Judge Libey's decision making. "Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned." *State v. Perala,* 132 Wn. App. 98, 110–11, 130 P.3d 852 (2006). The court has stated:

> Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.' " *State v. Bilal,* 77 Wash.App. 720, 722, 893 P.2d 674 (1995) (quoting *State v. Ladenburg,* 67 Wash.App. 749, 754–55, 840 P.2d 228 (1992)). In order to establish that the trial court's involvement in the matter violated the appearance of fairness, the claimant must provide some evidence of the judge's actual or potential bias. *State v. Post,* 118 Wash.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). The critical concern is determining whether a proceeding would appear to be fair to a reasonably prudent and disinterested person. *State v. Dugan,* 96 Wash.App. 346, 354, 979 P.2d 885 (1999). " 'The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts.' " *In re Marriage of Davison,* 112 Wash.App. 251, 257, 48 P.3d 358 (2002) (quoting *Sherman v. State,* 128 Wash.2d 164, 206, 905 P.2d

> 355 (1995)) (internal quotation marks omitted).

Id. at 112–13. As the court noted, the claimant, in this case Kimball, must provide some evidence of the judge's potential or actual bias. Kimball has not done so. Without such evidence, a reasonably prudent and disinterested person would not know and understand all the relevant facts and thus, could not determine whether the parties obtained a fair, impartial and neutral hearing. What is of record, however, is that Judge Libey granted defendant's motion for a bill of particulars, gave Kimball's proposed jury instruction regarding leniency over the state's objection, and sentenced the defendant to the low- end of the sentencing range despite the state's recommendation for the high-end of the range. RP 3, RP 5 ll. 3-10, RP 9 ll. 9-11; RP 67- 71; RP 118 ll. 7-9, 14-15; RP 134 ll. 12-13. A review of the record (without considering Kimball's proffered evidence which is outside the record) shows that the proceedings against Kimball were fair. Furthermore, a litigant who proceeds to trial "knowing of a reason for potential disqualification of the judge waives the objection and cannot challenge the court's qualifications on appeal." *State v. Perala*, 132 Wn. App. 98, 113, 130 P.3d 852 (2006). Since Kimball proceeded to trial, he waived the objection and cannot now challenge the court's

qualifications on appeal. The court should find that there is no merit to the Appellant's Additional Ground 2.

VII. KIMBALL HAS NOT MET HIS BURDEN OF PROOF REQUIRED FOR A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The burden is on a defendant to establish ineffective assistance of counsel by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) that he was prejudiced by showing there was a reasonable probability that the result of the trial would have been different. *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014) citing *Strickland v. Washington,* 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The court need not analyze both prongs if the defendant fails to meet either. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984).

Kimball has not shown that his attorney's representation fell below an objective standard of reasonableness by failing to make a motion for a change of venue or recusal. Nor has Kimball demonstrated that his counsel prevented him from testifying. Furthermore, he has not shown that had he testified, or had a motion for venue and recusal been made and granted, the result of the trial would have been different.

A. Preventing Testimony

Kimball must prove by a preponderance of the evidence that his attorney actually prevented him from testifying in the face of unequivocal demands that he testify;"[i]n the absence of such demands by the defendant, however, [the court] will presume that the defendant elected not to take the stand upon the advice of counsel." *State v. Robinson*, 138 Wn.2d 753, 764, 982 P.2d 590 (1999). In *Robinson,* the Washington Supreme Court analyzed the issue:

> "This is not to say that defendants who accept tactical advice from their attorneys on the decision to testify can later claim that their right to testify was denied. *State v. Hardy,* 37 Wash.App. 463, 466-67, 681 P.2d 852 (1984); *State v. King,* 24 Wash.App. 495, 500, 601 P.2d 982 (1979). We must distinguish between cases in which the attorney actually prevents the defendant from taking the stand, and cases in which counsel "merely advise[s][the] defendant against testifying as a matter of trial tactics." *King,* 24 Wash.App. at 499, 601 P.2d 982. Furthermore, while the decision to testify should ultimately be made by the client, it is entirely appropriate for the attorney to advise and inform the client in making the decision to take the stand. "Unaccompanied by coercion, legal advice concerning [the] exercise of the right to testify infringes no right, but simply discharges defense counsel's ethical responsibility to the accused."

Id. at 763–64. However, to prevail on such a claim the Appellant must first allege specific facts and then demonstrate that there is substantial, factual evidence from the record that his allegations are credible. *Id.* at 760. Mere allegations alone are insufficient. *Id.* At sentencing, he claimed that he did not get the chance to defend himself, but failed to say how or why he did not get the chance to defend himself. Were there exhibits that he wanted shown that were not shown? He mentioned letters that he wanted to show that said how good of a dad he was, but there were no letters offered into evidence. Were there cross examination questions he wished would have been asked? He does not say. He mentioned that he wanted to "say stuff" about his good character, but did not say why he did not take the stand to testify. Despite telling the court that his attorney refused Kimball's request to move for a change of venue and for the judge to recuse himself, he never says that his attorney refused to let him testify or that he demanded he testify.

In *Robinson*, the defendant had an affidavit from his trial counsel admitting that the defendant had pleaded with counsel to testify and that for personal reasons counsel refused his client's request. *Id.* at 757. He also submitted several affidavits, some of which indicated defendant had unequivocally demanded to testify, that a guard had seen counsel storm

out after telling defendant to find another attorney, that a guard heard the defendant complaining about not being able to testify, and another attorney who said the defendant, at trial, complained to her that he wished to testify. *Id.* at 760. In the case at bar, Kimball has referenced nothing in the record to support his claim that he was actually prevented from testifying[4].

At trial, after the state rested, defense requested a recess. RP 53 After the recess, the defense announced that it rested. RP 61-62. The court then took an extended lunch recess. RP 63 l. 12. Kimball did not testify. Unlike in the *Robinson* case, there is no record that at the time of trial Kimball made an unequivocal demand to testify and that his attorney actually prevented him from doing so. It is possible that during the recesses Kimball and his counsel discussed the State's case, what Kimball's testimony would be, and counsel's recommendation whether Kimball should testify. At sentencing Kimball said that he was told "nothing matters, that none of it matters" in reference to him wanting to talk about his good character and show letters of people saying he is a great dad. Maybe counsel advised that those subjects were a matter for

[4] And, the presentation of affidavits must be made by personal restraint petition, as such evidence would be outside the record. In *Robinson*, the Supreme Court was presented with affidavits which were filed in support of defendant's motion for a new trial, the subject of the direct appeal. No such affidavits or motions were filed in this case.

sentencing and not trial. It is possible that Kimball took advice of counsel to not testify for strategic reasons. If that is the case, then counsel was simply discharging his ethical responsibility to Kimball. Kimball did not tell the court that his counsel refused an unequivocal demand from Kimball to testify even though Kimball had no qualms telling the court about the two motions Kimball requested that counsel refused to make. Given the absence of any credible evidence that Kimball made an unequivocal demand to testify to defense counsel, the court must presume that Kimball elected not to take the stand on advice of counsel.

The Supreme Court held that a defendant's claim that he was actually prevented from testifying by counsel should be analyzed as an ineffective assistance of counsel claim, and that courts should use the two-part *Strickland* analysis. *Robinson*, 138 Wn.2d at 765. Under the *Strickland* analysis, to succeed on an ineffective assistance of counsel claim, Kimball must prove that, had he testified, there is a reasonable probability the result at trial would have been different. The *Robinson* court has noted "[i]n some cases, the defendant's testimony would have no impact, or even a negative impact, on the result of his trial." *Id.* at 769 (quoting *United States v. Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996)).

At sentencing, Mr. Kimball gave a lengthy speech to the court about the history of his relationship with his daughters, ex-wife, law

enforcement, and the court, as well as statements regarding the divorce, protection order, and prior conviction processes. RP 121-132. Most of Appellant's colloquy blamed the victim. *Id.* Very little of it was related to the text messages that he sent her. *Id.* He admitted to sending those texts telling the court "those texts were not the normal me." Nowhere in his colloquy did he say that he believe those messages fell within the parameters of the protection order. He does not say that those messages were 100 % about raising their daughters. It is unlikely that most of what Kimball may have wanted to testify about would have survived an objection to relevance. It is possible that his testimony could have had a negative impact on his case or no impact at all. Kimball has not shown that, had he testified, the outcome of trial would have been different. Without this showing he cannot prove prejudice. The court should find that Kimball has failed to meet his burden for Ground 1.

B. Recusal

Kimball alleges that counsel was ineffective by failing to file a motion for recusal. However, for the reasons stated above in part VI, Kimball is not able to prove that recusal would have been required. Without providing evidence of the trial judge's actual or potential bias, Kimball cannot prove that counsel's representation fell below an objective standard of reasonableness in failing to bring a motion to recuse. Nor has

Kimball proven he was prejudiced; he has failed to demonstrate a reasonable probability that the result of the trial would have been different had the motion to recuse been made and granted. Because Kimball has failed to provide proof of either element required for a finding of ineffective assistance of counsel, the Court should find that he has failed to meet the required burden of proof and that his argument lacks merit.

C. Change of Venue

Kimball also alleges that he received ineffective assistance of counsel because counsel did not move for a change of venue. Appellant's Statement of Additional Grounds fails to show why a change of venue would have been necessary or how moving the trial to another county would have resulted in a different verdict at trial and, thus, cannot show prejudice. The court should hold that Kimball has failed to meet his burden to prove ineffective assistance of counsel and should find his argument without merit.

//

//

CONCLUSION

Based on the foregoing, the Respondent requests this Court affirm the trial court's rulings and hold the Statement of Additional Grounds to be without merit.

Dated this 3rd day of July, 2018.

Wendy Lierman, WSBA 46963
Senior Deputy Prosecuting Attorney
Whitman County
PO Box 30
Colfax, WA 99111-0030
(509) 397-6250

Exhibit One

Former RCW 26.50.110:

(1) Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 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 the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable probable cause to believe has violated an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

[2006 c 138 § 25; 2000 c 119 § 24; 1996 c 248 §16; 1995 c 246 § 14; 1992 c 86 § 5; 1991 c 301 § 6; 1984 c263 § 12.]

Exhibit Two

Current RCW 26.50.110

(1)(a) Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 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:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;

(ii) A provision excluding the person from a residence, workplace, school, or day care;

(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;

(iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or

(v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

(b) Upon conviction, and in addition to any other penalties provided by law, the court:

(i) May require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(ii) Shall impose a fine of fifteen dollars, in addition to any penalty or fine imposed, for a violation of a domestic violence protection order issued under this chapter. Revenue from the fifteen dollar fine must be remitted monthly to the state treasury for deposit in the domestic violence prevention account.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 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 a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law

enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

RCWA § 26.50.110 (West)

IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. KEITH ALAN KIMBALL, Defendant,	Court of Appeals No. 35441-5-III No. 17-1-00032-38 AFFIDAVIT OF DELIVERY

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the 3RD DAY OF JULY, 2018 I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

-EMAILED TO ANDREA BURKHART AT ANDREA@2ARROWS.NET
-MAILED TO ANDREA BURKHART, TWO ARROWS, PLLC, PO BOX 1241, WALLA WALLA, WA 99362-0023
-MAILED TO KEITH ALAN KIMBALL #400816, 1313 N. 13TH AVE, WALLA WALLA, WA 99362

DATED this 3RD DAY OF JULY, 2018.

Amanda Pelissier
AMANDA PELISSIER

SIGNED before me on the 3RD DAY OF JULY, 2018

KRISTINA A. COOPER
NOTARY PUBLIC
COMMISSION EXPIRES 3-09-19
STATE OF WASHINGTON

Kristina A. Cooper
NOTARY PUBLIC in and for the State of Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2019

Denis P. Tracy
Whitman County Prosecuting Attorney
P.O. Box 30, Colfax, WA 99111-0030
(509) 397-6250, Fax (509) 397-5659

WHITMAN COUNTY PROSECUTOR'S OFFICE

July 03, 2018 - 3:44 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35441-5
Appellate Court Case Title:	State of Washington v. Keith Alan Kimball
Superior Court Case Number:	17-1-00032-3

The following documents have been uploaded:

- 354415_Briefs_Plus_20180703115637D3762555_0096.pdf
  This File Contains:
  Affidavit/Declaration - Service
  Briefs - Respondents
  The Original File Name was BRIEF OF RESPONDENT.pdf

A copy of the uploaded files will be sent to:

- Andrea@2arrows.net
- denist@co.whitman.wa.us

Comments:

Sender Name: Amanda Pelissier - Email: amandap@co.whitman.wa.us
Filing on Behalf of: Wendy Marie Lierman - Email: wendy.lierman@co.whitman.wa.us (Alternate Email: amandap@co.whitman.wa.us)

Address:
PO Box 30
Colfax, WA, 99111
Phone: (509) 397-6250

Note: The Filing Id is 20180703115637D3762555