RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 04, 2017 1:35 PM
CLERK'S OFFICE

RECEIVED VIA PORTAL

355438-III
~~SUPREME COURT NO. 93451-7~~

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN E. STUTZKE,

Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining To Assignments Of Error 2

B. STATEMENT OF THE CASE 3

1. Pre-trial proceedings culminating in withdrawal of counsel and no substitute counsel appointed 3

2. Trial evidence 11

3. Outcome 19

C. ARGUMENT 20

1. THE COURT VIOLATED STUTZKE'S SIXTH AMENDMENT RIGHT TO COUNSEL IN GRANTING ASSIGNED COUNSEL'S MOTION TO WITHDRAW IN THE ABSENCE OF AN ACTUAL CONFLICT OF INTEREST 20

2. THE COURT VIOLATED STUTZKE'S SIXTH AMENDMENT RIGHT TO COUNSEL IN FORCING HIM TO REPRESENT HIMSELF AT TRIAL AFTER RULING HE "CONSTRUCTIVELY WAIVED" HIS RIGHT TO COUNSEL THROUGH HIS ACTIONS 23

3. SUFFICIENT EVIDENCE DOES NOT SUPPORT THE VOYEURISM CONVICTION BECAUSE THE STATE FAILED TO PROVE STUTZKE VIEWED TOWNSHEND FOR MORE THAN A BRIEF PERIOD OF TIME WITHOUT HER KNOWLEDGE 28

4. STUTZKE'S CONVICTION FOR VIOLATION OF THE PROTECTION ORDER MUST BE VACATED BECAUSE IT MERGES INTO HIS FELONY STALKING CONVICTION 35

TABLE OF CONTENTS

Page

5. THE LENGTH OF THE COMMUNITY CUSTODY TERM FOR THE STALKING CONVICTION EXCEEDS THE STATUTORY MAXIMUM 39

6. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE COMMUNITY CUSTODY FOR THE GROSS MISDEMEANOR CONVICTION AND THE COURT COULD NOT IMPOSE PROBATION BECAUSE IT SENTENCED STUTZKE TO SERVE THE MAXIMUM TERM OF CONFINEMENT 41

7. THE SEXUAL ASSAULT PROTECTION ORDER ISSUED IN CONJUNCTION WITH STUTZKE'S SENTENCE EXCEEDS THE STATUTORY MAXIMUM TERM 43

8. THE JUDGMENT AND SENTENCE CONTAINS A CLERICAL ERROR IN NEED OF CORRECTION 44

D. CONCLUSION 45

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Ahten v. Barnes,
158 Wn. App. 343, 242 P.3d 35 (2010) 30

Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1,
124 Wn.2d 816, 881 P.2d 986 (1994) 34

City of Seattle v. Klein,
161 Wn.2d 554, 166 P.3d 1149 (2007) 26

City of Tacoma v. Bishop,
82 Wn. App. 850, 920 P.2d 214 (1996) 24-27

Davis v. Dep't of Licensing,
137 Wn.2d 957, 977 P.2d 554 (1999) 30

In re Detention of Turay,
139 Wn.2d 379, 986 P.2d 790 (1999) 24

In re Pers. Restraint of Hopkins,
137 Wn.2d 897, 976 P.2d 616 (1999) 32

In re Pers. Restraint of Mayer,
128 Wn. App. 694, 117 P.3d 353 (2005) 45

In re Postsentence Review of Leach,
161 Wn.2d 180, 163 P.3d 782 (2007) 40, 41

In re Welfare of G.E.,
116 Wn. App. 326, 65 P.3d 1219 (2003) 25

Ski Acres, Inc. v. Kittitas Cnty.,
118 Wn.2d 852, 827 P.2d 1000 (1992) 31

State ex rel. Schmitz v. Knight,
142 Wn. App. 291, 174 P.3d 1198 (2007) 24, 26-28

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Bahl,
164 Wn.2d 739, 193 P.3d 678 (2008) 39

State v. Budik,
173 Wn.2d 727, 272 P.3d 816 (2012) 30

State v. Colquitt,
133 Wn. App. 789, 137 P.3d 892 (2006) 33

State v. Davis,
177 Wn. App. 454, 311 P.3d 1278 (2013),
review denied, 179 Wn.2d 1025, 320 P.3d 719 (2014) 36

State v. Delgado,
148 Wn.2d 723, 63 P.3d 792 (2003) 30

State v. Diaz-Flores,
148 Wn. App. 911, 201 P.3d 1073,
review denied, 166 Wn.2d 1017, 210 P.3d 1019 (2009) 31

State v. Enlow,
143 Wn. App. 463, 178 P.3d 366 (2008) 29

State v. Fleming,
137 Wn. App. 645, 154 P.3d 304 (2007) 33, 34

State v. Freeman,
153 Wn.2d 765, 108 P.3d 753 (2005) 35

State v. Gailus,
136 Wn. App. 191, 147 P.3d 1300 (2006),
overruled on other grounds by
State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009) 42

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 29

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Hill,
123 Wn.2d 641, 870 P.2d 313 (1994) 29

State v. Hundley,
126 Wn.2d 418, 895 P.2d 403 (1995) 28

State v. J.P.,
149 Wn.2d 444, 69 P.3d 318 (2003) 30

State v. Kier,
164 Wn.2d 798, 194 P.3d 212 (2008) 35

State v. Madsen,
168 Wn.2d 496, 229 P.3d 714 (2010) 25

State v. McDonald,
183 Wn. App. 272, 333 P.3d 451 (2014) 44

State v. Murray,
118 Wn. App. 518, 77 P.3d 1188 (2003) 39, 41

State v. Osborne,
70 Wn. App. 640, 855 P.2d 302 (1993) 20

State v. Parmelee,
108 Wn. App. 702, 32 P.3d 1029 (2001) 36-39

State v. Paulson,
131 Wn. App. 579, 128 P.3d 133 (2006) 40

State v. Ralph,
175 Wn. App. 814, 308 P.3d 729 (2013) 35

State v. Ramos,
83 Wn. App. 622, 628, 922 P.2d 193 (1996) 21

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Regan,
143 Wn. App. 419, 177 P.3d 783 (2008) 21

State v. Rich,
184 Wn.2d 897, 365 P.3d 746 (2016) 29

State v. Roggenkamp,
153 Wn.2d 614, 106 P.3d 196 (2005) 30

State v. Russell,
84 Wn. App. 1, 925 P.2d 633 (1996) 31

State v. Silva,
108 Wn. App. 536, 31 P.3d 729 (2001) 23

State v. Sinclair,
46 Wn. App. 433, 730 P.2d 742 (1986),
review denied, 108 Wn.2d 1006 (1987) 22

State v. Stevenson,
128 Wn. App. 179, 114 P.3d 699 (2005) 29

State v. Stone,
165 Wn. App. 796, 268 P.3d 226 (2012) 24

State v. Vicuna,
119 Wn. App. 26, 79 P.3d 1 (2003),
review denied, 152 Wn.2d 1008 (2004) 20-22

State v. Whittaker,
192 Wn. App. 395, 367 P.3d 1092 (2016) 36-39

FEDERAL CASES

Arizona v. Fulminante,
499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) 28

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Brewer v. Williams,
430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) 24

Frazer v. United States,
18 F.3d 778 (9th Cir. 1994) 23

Gideon v. Wainwright,
372 U.S. 335, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963) 20

In re Winship,
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 28

Mickens v. Taylor,
535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) 21

United States v. Baker,
256 F.3d 855 (9th Cir. 2001) 21

United States v. Cronic,
466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) 20, 28

United States v. Goldberg,
67 F.3d 1092 (3rd Cir. 1995) 24, 28

United States v. Leggett,
162 F.3d 237 (3rd Cir. 1998) 27

United States v. Levy,
25 F.3d 146 (2d Cir. 1994) 21

United States v. McLeod,
53 F.3d 322 (11th Cir. 1995) 27

United States v. Moore,
159 F.3d 1154 (9th Cir. 1998) 22

TABLE OF AUTHORITIES

Page

FEDERAL CASES

United States v. Thomas,
357 F.3d 357 (3d Cir. 2004) 27

OTHER AUTHORITIES

CrR 3.5 18

CrR 6.1(d) 1

RCW 7.90.150(6)(a) 43

RCW 7.90.150(6)(c) 43

RCW 9A.20.021(2) 41

RCW 9A.44.115 31

RCW 9A.44.115(1)(e) 30, 33

RCW 9A.44.115(2) 29, 30

RCW 9A.46.110(1) 36

RCW 9A.46.110(5) 36

RCW 9A.46.110(5)(b) 37, 39

RCW 9A.46.110(5)(b)(ii) 37

RCW 9.94A.501(1) 42

RCW 9.94A.501(2) 42

RCW 9.94A.701(2) 39

RCW 9.94A.030(55) 40

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

RCW 9.94A.411(2) 40

RCW 9.94A.701(3)(a) 40

RCW 9.95.210(1) 41

RCW 10.14.170 41

RCW 10.99.020(5) 44

Sentencing Reform Act 39, 41

U.S. Const. amend. V 35

U.S. Const. amend. VI 1, 2, 20, 23

U.S. Const. amend. XIV 28

Wash. Const. art. I, § 3 28

Wash. Const. art. I, § 9 35

Wash. Const. art. I, § 22 ..... 20, 23

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's Sixth Amendment right to counsel when it allowed assigned counsel to withdraw due to a purported conflict of interest.

2. The court violated appellant's Sixth Amendment right to counsel when, following the withdrawal of assigned counsel, the court refused to appoint new counsel.

3. The evidence is insufficient to convict appellant of voyeurism.

4. The court erred in entering the following conclusion of law: "The State has proven beyond a reasonable doubt that on or about August 16, 2013, in the State of Washington, Benjamin Stutzke did, for the purpose of arousing and gratifying his sexual desire, knowingly view Michelle Townshend, as well as view Michelle Townshend's intimate areas, without Michelle Townshend's knowledge and consent and under circumstances where Michelle Townshend's had a reasonable expectation of privacy." CP 52 (CL 1).[1]

5. The convictions for stalking and violation of a protection order violate the constitutional prohibition against double jeopardy.

---

[1] The trial court's CrR 6.1(d) findings of fact and conclusions of law are attached as appendix A.

6. The court erroneously imposed an 18-month term of community custody for the stalking offense. CP 64.

7. The court erroneously imposed a term of community custody on the gross misdemeanor conviction for violating a protection order under count 2. CP 64.

8. The court erred in entering a sexual assault protection order issued in conjunction with appellant's sentence that exceeds the statutory maximum term. CP 110-11.

9. The judgment and sentence contains a clerical error. CP 58.

Issues Pertaining to Assignments of Error

1. Whether the court violated appellant's Sixth Amendment right to counsel in granting assigned counsel's motion to withdraw where the record does not show an actual conflict of interest supported withdrawal?

2. Whether the court violated appellant's Sixth Amendment right to counsel in ruling appellant "constructively waived" his right to counsel, where appellant was never warned that he would waive this right if he engaged in dilatory tactics, and the record does not show appellant forfeited his right to counsel through his conduct?

3. Whether the evidence is insufficient to support the voyeurism conviction because the plain language of statute requires

viewing a person for more than a brief period of time without that person's knowledge, but the evidence does not establish the fact?

4. Whether the convictions for stalking and violating a protection order violate double jeopardy under the merger doctrine because the protection order violation was necessary to elevate the stalking offense from a gross misdemeanor to a felony?

5. Where the controlling statute dictates a 12-month term of community custody for "crimes against persons," did the trial court exceed its sentencing authority when it imposed an 18-month term of community custody for the stalking offense?

6. Whether the court lacked statutory authority to impose a term of community custody for the gross misdemeanor conviction of violating a protection order because the offense is not among those listed in the statute as authorizing a community custody term? Further, whether probation for this conviction is unauthorized because the court ordered confinement for the statutory maximum term?

7. Where the controlling statute mandates the term of a sexual assault protection order issued in conjunction with a criminal prosecution may not exceed two years beyond the expiration of the associated sentence, whether the protection order issued in appellant's case exceeds the term allowed by statute?

8. Whether the clerical error in the judgment and sentence, describing the stalking conviction as a "domestic violence" offense, must be corrected?

B. STATEMENT OF THE CASE

a. Pre-trial proceedings culminating in withdrawal of counsel and no substitute counsel appointed.

The State charged Benjamin Stutzke with voyeurism, violation of a protection order, felony stalking and attempted residential burglary, alleged to have occurred on August 16, 2013. CP 37-38. The judge twice found reason to doubt Stutzke's competency to stand trial and ordered expert evaluation, but ultimately found him competent, whereupon proceedings resumed. 2RP[2] 3; 4RP 11-12, 20-21, 24; CP 3-14, 16-21, 82-102.

At a pre-trial conference on December 4, 2015, Stutzke asked to dismiss his public defender and get a different attorney. 4RP 38-39. At the time, Mr. Harget of the Spokane County Public Defender's Office represented him. 4RP 38. Stutzke expressed his desire to hire an attorney. 4RP 39. The judge told him that if it dismissed his current public defender,

---

[2] The verbatim report of proceedings is cited as follows: 1RP - 9/11/13; 2RP - 7/11/14; 3RP - one volume consisting of 12/1/14, 12/2/14; 4RP - five consecutively paginated volumes consisting of 2/27/15, 3/4/15, 4/6/15, 7/20/15, 10/23/15, 10/30/15, 12/4/15, 12/15/15, 1/12/16, 1/26/16, 2/11/16, 2/18/16, 5/13/16, 5/19/16, 5/23/16, 5/31/16, 6/1/16, 6/23/16, 8/18/16.

the court would not assign another one: "So if you want to dismiss your attorney, you're going to have to proceed without an attorney." 4RP 40. When asked why he wanted to dismiss his attorney, Stutzke indicated the two did not work well together. 4RP 41. He was upset that the trial kept getting continued. 4RP 45. Harget noted Stutzke had probably served more time in jail than what he could be sentenced to. 4RP 42-43. The judge extolled Harget's virtues and then asked Stutzke if he wanted to proceed without or without an attorney. 4RP 47. Stutzke said he wanted to proceed with an attorney. 4RP 47. The judge ruled Harget would remain Stutzke's attorney. 4RP 48. Stutzke was uncertain whether he wanted to continue with Harget. 4RP 48. The judge said he did not see any reason why Harget should not remain on the case. 4RP 50. Stutzke expressed frustration at the trial being previously continued. 4RP 50-51. Harget noted he still had competency concerns. 4RP 53. Stutzke connected the previous competency proceedings with his desire to dismiss his attorney. 4RP 53-54. The judge denied Stutzke's request to be released and continued the case over his objection. 4RP 51-54.

At the next court date of December 15, 2015, Stutzke requested to represent himself because his attorney encouraged him to plead guilty and they did not work well together. 4RP 56-57, 62. After the court conducted a colloquy on proceeding pro se, Stutzke said he wanted an

attorney but did not want his assigned public defender. 4RP 61-62. The judge found no basis to substitute attorneys. 4RP 62. Stutzke said he wanted responsibility for his case. 4RP 63. The judge warned if he waived his right to an attorney, it was discretionary with the court whether he could withdraw that waiver later. 4RP 63. After further colloquy, the judge found Stutzke knowingly, voluntarily and intelligently waived his right to an attorney. 4RP 65-66; CP 23-25. Mr. Charbonneau thereafter served as standby counsel. 4RP 66-67, 70, 75.

On February 18, 2016, Stutzke requested a public defender. 4RP 143-45. When asked if he was requesting Charbonneau to represent him, Stutzke pointed out they might have a conflict of interest because Stutzke grew up with his brother. 4RP 148. Charbonneau did not think there was a conflict of interest. 4RP 148-49. The judge found no conflict. 4RP 149. Stutzke asked the court to appoint Charbonneau as counsel. 4RP 149. The judge appointed Charbonneau and continued the trial date. 4RP 149-53.

On May 13, 2016, Stutzke informed the court that his attorney had not met with him for a month and a half and had not been representing him well in the last few months. 4RP 156-57. Charbonneau said he did not have a chance to meet with Stutzke because he had been in trial. 4RP 157. Stutzke expressed concern that his attorney had the smell of alcohol

on his breath and hadn't met with him for two months. 4RP 159-60. The judge said Charbonneau's appearance was no different than usual and he had no reason to believe Charbonneau drank alcohol that morning. 4RP 161. The judge declined Stutzke's invitation to smell Charbonneau's breath or have him take a breathalyzer test. 4RP 161-62. The judge said Charbonneau had always provided quality representation and there was no reason to believe he didn't provide the same kind of representation to Stutzke. 4RP 162. The judge noted the delay in bringing the case to trial stemmed from Stutzke going pro se and then later reacquiring an attorney, which necessitated continuances. 4RP 162-63. Stutzke did not ask for Charbonneau to be removed, but the judge said he would remain Stutzke's attorney. 4RP 163.

On May 19, 2016, Charbonneau told the court that Stutzke was unhappy with his representation. 4RP 172. He related that Stutzke spoke with his supervisor, who told Stutzke that he would not be getting a new public defender. 4RP 172-73. Stutzke refused to speak with Charbonneau earlier that morning. 4RP 173. Charbonneau wasn't sure he could be effective if he could not speak with Stutzke in preparing for trial. 4RP 173. Stutzke said he did not ask for a new public defender in speaking with the supervisor, but raised the concerns that were aired at the previous hearing. 4RP 174. Stutzke didn't meet with his attorney earlier that morning

because he questioned his confidence and zeal. 4RP 175. The judge recounted Stutzke's previous choices to go pro se and then to later request an attorney. 4RP 177. Stutzke chose to have an attorney, so Charbonneau would remain his attorney. 4RP 177. Stutzke said he would still like to defend himself. 4RP 177. The judge reiterated Charbonneau would remain as attorney. 4RP 179.

On May 23, 2016, the prosecutor put on the record that Charbonneau informed her the previous week that his office would move to withdraw "not only himself but the entire office due to Mr. Stutzke's actions and ethic violation claims by him." 4RP 182. The prosecutor was concerned Charbonneau was not "in a position to speak with Mr. Stutzke and vice versa because they're, at this point, in an adversarial position." 4RP 182. The prosecutor was "aware" that "Risk Management has become involved due to claims that Mr. Stutzke has made and there is an anticipation, at least through Risk Management, that there'll have to be an investigation into the matter, which obviously puts Mr. Charbonneau and Mr. Stutzke in an adversarial position." 4RP 182-83.

Charbonneau agreed with the prosecutor, saying "[a]t this point it's a clear conflict of interest in my opinion, our office's opinion. I spoke

with Mr. Krzyminski[3] on Friday. He does believe the entire case should be out of our office. So this is my motion to withdraw." 4RP 183. Charbonneau said they were in such an adversarial position that "I believe I'm almost obligated and then also entitled under the RPCs to break privilege at some point in order to defend myself. I'm not sure if we're quite there yet but I'm getting some additional advice on that. But we're close." 4RP 183. According to Charbonneau, "things" had "risen to a level where there can't be an attorney-client relationship. I can no longer communicate with Mr. Stutzke in any way, shape or form." 4RP 183-84. Charbonneau knew the court was looking "for a more factual basis" but was not sure how specific he could get on the record. 4RP 184.

The prosecutor said she would step out if the court wanted to inquire into a "potential attorney-client issue he'd have to make a record on." 4RP 184. The judge declined the offer. 4RP 184. The judge recounted that Stutzke refused to meet with Charbonneau on May 19 and accused him of being intoxicated in court on May 13. 4RP 184. "[B]ecause of the alleged ethical violations or whatever allegations that are being made that Mr. Charbonneau is not able to represent Mr. Stutzke," the judge granted the motion authorizing allowing Charbonneau

[3] The court later explained Mr. Krzyminski was in charge of the public defender's office. 4RP 189.

and the entire public defender office to withdraw as counsel. 4RP 184-85; CP 103-04.

The judge then rejected Stutzke's assertion that his accusation of intoxication was well-founded. 4RP 185-86. When Stutzke asked about the entire office withdrawing, the judge explained "there's a conflict between the office and you so no one from that office is going to represent you." 4RP 189. The judge asked if he wanted to proceed without an attorney. 4RP 189. Stutzke responded "I'm going to proceed for now. I'm just going to -- I'll make a statement and then we can go from there." 4RP 189. He wanted to make a statement about "the last two and a half years." 4RP 189-90. The judge wanted to "figure out this attorney issue first." 4RP 190.

The judge recited a history of the case, including (1) Stutzke's failure to appear at arraignment; (2) alleged violation of the no-contact provision as a condition of release; (3) two competency evaluations; (4) he waived his right to a jury trial and then later decided to rescind the waiver; (5) he had a conflict with Mr. Harget and was allowed to proceed pro se; (6) while pro se, he refused to come to court on one occasion; (7) he refused to meet with the prosecutor on another occasion and refused to attend scheduled interviews; (8) at Stutzke's request, the court appointed Charbonneau as counsel, which delayed the trial because he needed time

to prepare; (9) on May 13 he accused Charbonneau of being intoxicated; and (10) on May 19 he refused to meet with Charbonneau, which meant the latter wasn't ready for trial.[4] 4RP 190-93. The judge received word that Stutzke refused to come to court that day. 4RP 193. Regardless of whether Stutzke chose to proceed with or without an attorney, the judge found Stutzke "constructively waived" his right to an attorney. 4RP 193-94. The judge said if another attorney were appointed, that attorney would need time to prepare. 4RP 193. The case had been going on for almost three year and victims have rights as well. 4RP 19-943. It was time to proceed to trial. 4RP 194.[5] Stutzke subsequently waived his right to a jury trial and the case proceeded to a bench trial, where the following evidence was produced. 4RP 271-75.

b. Trial evidence

Stutzke lived with his parents in a residence located in Spokane County. RP 380-82, 613-14. In 1987, Michelle and Don Townshend purchased a home on the adjoining property. 4RP 377, 380-81, 528. The Townshend family developed a typical neighborly relationship with the

---

[4] Stutzke disputed he refused to meet with Charbonneau; the latter set up meetings but did not show up. 4RP 194.

[5] At the next court date, when Stutzke asked where he could get another attorney free of charge and described his attempts to find a private attorney, the court told Stutzke "I already made findings regarding your right to an attorney." 4RP 216-17.

Stutzke family. 4RP 381-83, 522. Ms. Townshend knew Benjamin Stutzke since he was less than 10 years old. 4RP 382. In 2002, Stutzke left the area to do missionary work. 4RP 584.

He remembered Townshend gave him a hug when he returned home in the spring of 2009. 4RP 582-84. Around that time, Townshend hosted a high school graduation party for her son, Michael, outside on the lawn. 4RP 384. She invited the Stutzke family. 4RP 462. During the party, Townshend noticed Stutzke stood too close to her and followed her back to the house. 4RP 385-86. He remained inside her residence after the party was over. 4RP 386. She felt uncomfortable. 4RP 386. Townshend called Stutzke's father, who came to get his son. 4RP 386. Townshend did not have a dating or physical relationship with Stutzke, and she never indicated she wanted one.[6] 4RP 383-84.

In the early morning of September 23, 2009, Townshend walked naked out of the shower from her bathroom and saw Stutzke standing in the driveway, looking in the window. 4RP 387-88. Townshend went back to the bathroom. 4RP 388. She called Stutzke's father and informed him of the incident. 4RP 389. Stutzke's father assured her it was okay.

---

[6] She claimed not to remember going to the Stutzke residence for dinner in May 2009. 4RP 458, 462. She also denied remembering that Stutzke had mowed her lawn and babysat her s on Brendon in the past. 4RP 455. Stutzke testified to these activities and more involving his contact with Townshend in past years. 4RP 603.

4RP 389. Stutzke testified that he saw Townshend naked in her bedroom on two occasions in 2009. 4RP 591.

On September 29, 2009, Townshend returned home from working at school and found Stutzke's mother waiting for her. 4RP 389. She told Townshend that she found her son in Townshend's house. 4RP 389. There were signs that he had been inside. 4RP 390-91. Townshend notified the authorities. 4RP 391. Stutzke acknowledged he entered Townshend's home uninvited. 4RP 594.

The next day, Townshend petitioned the court for a restraining order. 4RP 391-92. Townshend described the events as scary and inappropriate. 4RP 394-95. She did not want or invite this behavior. 4RP 395. The court entered a one-year protection order prohibiting Stutzke from having any contact with Townshend. 4RP 396-97; Ex. 3.

From August 2011 to July 2012, Townshend lived in Germany. 4RP 398. She wanted to teach abroad and wanted to distance herself from Stutzke. 4RP 398-99. There is a winery near Townshend's house, which consists of a warehouse, a tasting room and an apartment above the tasting room. 4RP 378-79. While Townshend was in Germany, her son Brendon moved into an apartment above the tasting room. 4RP 399. During this period, a winery employee, Jill Rider, spoke with Stutzke after he knocked on the door to the tasting room. 4RP 496-500. After the conversation

ended and Rider went back to work, she heard footsteps coming from the upstairs apartment. 4RP 498-99. Rider called Don and Brendon. 4RP 499. Upon entering the apartment, they found Stutzke in the bathroom. 4RP 528. Stutzke told them he entered the apartment to view pornography on the internet. 4RP 529. He was escorted off the property. 4RP 529. Ms. Townshend was informed of the incident via email. 4RP 405. She felt sick and disgusted. 4RP 406.

Stutzke acknowledged being inside the apartment. 4RP 608. He explained at trial that he did not have internet access at his house so he went over there to use the computer. 4RP 608-09. He checked Facebook and looked at pornography. 4RP 609. He said it had nothing to do with Townshend. 4RP 610.

After Townshend returned home in 2012 and resumed her teaching job, her sister Laurie and Laurie's son lived with her beginning in September. 4RP 407-08. During this time, Stutzke came to the door a couple of times, asking to see her. 4RP 408. Laurie would answer and tell Stutzke that Townshend did not want to talk with him. 4RP 409. Townshend did not want anything to do with him. 4RP 410. In 2013, she started reporting to Crime Check that Stutzke was coming to her home. 4RP 411. She was scared. 4RP 411.

On March 5, 2013, Townshend petitioned for a second anti-harassment order. 4RP 411-17. At a hearing on March 15, 2013, in which Stutzke appeared, the court entered a two-year protection order naming Townshend as the protected party and Stutzke as the restrained party. 4RP 414; Ex. 5. Stutzke signed the protection order. 4RP 595. The protection order restrained Stutzke from entering or being within 50 feet of Townshend's known location and her property, and prohibited Stutzke from having any contact with Townshend. Ex. 5.

Around July 5, 2013, Brendon noticed Stutzke walking on Townshend's property toward the house. 4RP 531-33. Stutzke said he wanted to say "hi" to Townshend or apologize. 4RP 537-38. Brendon told Stutzke that he was not allowed on the property and Stutzke went back to his house. 4RP 533. Brendon told his mother about the incident. 4RP 417-19. She was frightened and frustrated. 4RP 418. Stutzke admitted he violated the protection order by entering the Townshend property around the July 4th holiday. 4RP 611-12. He explained he wanted to speak with her because he was frustrated at the way the March 2013 court hearing went. 4RP 611-12.

Townshend gave her version of the events that transpired on August 16, 2013. On that day, Townshend awoke in her bedroom at about 6 a.m., used the bathroom, returned to her bedroom, and opened the

window blinds and the window.[7] 4RP 430-31. The bedroom window has a vertical hinge and opens like a door. 4RP 432-33. Lying in bed, she can see the window. 4RP 435-36. After opening the window to a 45-degree angle, Townshend went back to bed, lying on top of the covers while naked. 4RP 436, 483, 516. After dozing off for a brief period, Townshend awoke to see Stutzke outside her window. 4RP 437-38, 516-17. She described Stutzke as "moving up" when she saw him. 4RP 438-39, 441. She saw him standing up into the center of the window. 4RP 483. His eyes were "glazed over and intense." 4RP 443. His mouth was open. 4RP 443. His hands were on the window sill while he was standing there. 4RP 447-48; Ex. 14. Stutzke did not divert his eyes or turn his head. 4RP 517. Townshend felt stunned and terrified. 4RP 444. She jumped from her bed and pulled the blinds off the wall in trying to pull them over the window. 4RP 444. She told Stutzke to go away. 4RP 444-45. Stutzke asked "Are you sure?" 4RP 445. She again told him to go away. 4RP 446. She didn't know if he left: "I didn't look." 4RP 447. She left her bedroom and called Crime Check. 4RP 447. Townshend thought he was there to sexually violate her. 4RP 447.

Stutzke gave his version of the interaction at trial. He acknowledged leaving his parent's home and going over to Townshend's

---

[7] She lived alone at this time. 4RP 430-31.

house uninvited sometime before 7 a.m. 4RP 580, 585-86, 613-14. He explained he went over to confront her about some things she said at the previous court hearing on the protection order. 4RP 580, 619. He crossed her lawn, went behind the bush in front of her window, ducked under the open window and stood up. 4RP 585-90, 611. The window was at a 90-degree angle. 4RP 580. He intended to wake her up. 4RP 604. She saw him before he saw her. 4RP 599. She screamed before he saw her. 4RP 605. They were both startled. 4RP 599. He could not see her from where he was standing. 4RP 605. He was about five feet away from Townshend. 4RP 597. She told him to go away, he asked if she was sure, and she said "yes." 4RP 580-81. He then left immediately. 4RP 580-81. The entire interaction lasted seven seconds. 4RP 581. He denied being there for the purpose of sexual gratification and denied seeing her intimate areas. 4RP 581. He did not enter her room. 4RP 582.

Deputy Ruff was dispatched to the scene and met with Townshend. 4RP 448-49. Ruff described her as timid, nervous and scared. 4RP 549. Ruff then went to the Stutzke residence, knocked on the door, rang the doorbell and announced his presence, but received no response. 4RP 557. Ruff returned later that day, announced his presence, knocked on the door and rang the doorbell, but again received no response. 4RP 557-58.

Stutzke testified he did not answer the door because he did not like Ruff's aggressive approach. 4RP 616-17.

During the late afternoon that same day, Townshend walked from her house to speak with Rider in the tasting room. 4RP 449-50. The Stutzke residence is visible from this location. 4RP 450; Ex. 17. Townshend and Rider were standing outside the tasting room when she heard Stutzke yelling "Michelle." 4RP 450-51. Townshend started to cry and shake. 4RP 503. Rider reported to Townshend that he was screaming her name out the window. 4RP 451. Rider testified the voice came from the area of Stutzke's house.[8] 4RP 504. Townshend was frightened. 4RP 451. Rider called the police. 4RP 451. Townshend and Rider went into the tasting room and locked the door. 4RP 451.

In response to the 911 call, Deputy Ruff and Deputy Sutter, a female officer, went to the Stutzke residence. 4RP 302-03, 558-59.[9] Sutter knocked on the door while calling Stutzke's name, thinking he might open the door for a woman. 4RP 304, 559-60. Stutzke quickly opened the door and said "Oh, I thought you were Michelle." 4RP 304,

---

[8] Stutzke testified he could see her property if he stood in an outbuilding on the Stutzke property that was close to the tasting room on Townshend's property. 4RP 627-29. But he denied seeing Townshend after the encounter earlier that morning. 4RP 626-27, 630.

[9] Deputy Sutter's CrR 3.5 testimony was incorporated into the State's case-in-chief as evidence. 4RP 306, 309.

560. When Ruff asked why he hadn't answered the door earlier in the day, Stutzke responded he was not ready to go to jail. 4RP 560-61. Stutzke told Ruff that he went to Townshend's home for "no good reason." 4RP 560. Ruff testified that during transport to jail, Stutzke said he did not know why Michelle was doing this to him and they were in love. 4RP 570-71, 573-74. Stutzke denied saying this. 4RP 582-83.

After August 16, Townshend received nightly phone calls. 4RP 519. When Townshend answered the phone, the caller would not respond. 4RP 519. She applied contact paper over her bedroom windows, installed deadbolts on her doors, moved her bed away from the bedroom window, and spent the next two months sleeping at night under her piano. 4RP 452-54.

c. Outcome

The trial court, sitting as trier of fact, acquitted Stutzke on the burglary count but found him guilty of the remaining counts. CP 52-53. The court sentenced Stutzke to a total of 14 months in confinement plus terms of supervision. CP 63-64. Stutzke appeals. CP 109.

C. ARGUMENT

1. THE COURT VIOLATED STUTZKE'S SIXTH AMENDMENT RIGHT TO COUNSEL IN GRANTING ASSIGNED COUNSEL'S MOTION TO WITHDRAW IN THE ABSENCE OF AN ACTUAL CONFLICT OF INTEREST.

A defendant is guaranteed the right to the assistance of counsel in criminal proceedings. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Indigent persons facing felony charges, or misdemeanor charges involving potential incarceration, have the right to appointed counsel. State v. Osborne, 70 Wn. App. 640, 643, 855 P.2d 302 (1993) (citing Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963)). "An accused's right to be represented by counsel is a fundamental component of our criminal justice system." United States v. Cronic, 466 U.S. 648, 653, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The court violated Stutzke's right to counsel when it granted assigned counsel's motion to withdraw based on a purported conflict of interest. The record does not establish an actual conflict of interest justifying withdrawal. The convictions must be reversed because the erroneous withdrawal deprived Stutzke of counsel to represent him at trial.

Determining whether a conflict of interest precludes continued representation of a client is a question of law subject to de novo review. State v. Vicuna, 119 Wn. App. 26, 30, 79 P.3d 1 (2003), review denied,

152 Wn.2d 1008 (2004). The trial court has a duty to determine whether an actual conflict exists before it may grant a motion to withdraw. Vicuna, 119 Wn. App. at 30. Without an actual conflict of interest, it is error to permit withdrawal of counsel. State v. Ramos, 83 Wn. App. 622, 624, 628, 922 P.2d 193 (1996). The record must show an actual conflict existed. Vicuna, 119 Wn. App. at 32. Counsel's assertion that such a conflict exists is not good enough. Id. at 33.

An actual conflict of interest is "a conflict that affected counsel's performance — as opposed to a mere theoretical division of loyalties." State v. Regan, 143 Wn. App. 419, 427-28, 177 P.3d 783 (2008) (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). Thus, an "attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001) (quoting United States v. Levy, 25 F.3d 146, 155 (2d Cir. 1994)).

The record shows no actual conflict of interest in Stutzke's case. The most that can be said is that the conflict involved some sort of claimed ethical violation. 4RP 182-84. It is established that a defendant's filing of a formal bar association complaint against his attorney does not create a

conflict sufficient to require withdrawal. State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987). A threat to file a malpractice claim does not establish actual conflict. United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998). The trial court had a duty to get to the bottom of the matter and make an informed decision on whether an actual conflict existed. Vicuna, 119 Wn. App. at 30. Its failure to do so here is error.

Concerns about jeopardizing attorney-client privilege and the defendant's constitutional rights to effective assistance of counsel and to remain silent "do not eliminate the trial court's obligation to make an informed decision — it is not sufficient to rely upon defense counsel's assertion that a conflict exists, even if made in good faith." Id. at 32-33. Options are available to assist the court in making an informed inquiry, such as an *in camera* review with a sealed record. Id. at 33. Indeed, the State offered to step out of the courtroom so that the trial court could make an informed inquiry into the matter. The court declined to do so. 4RP 184. The court's failure to establish through inquiry that an actual conflict existed renders its decision to allow withdrawal improper. The court needed to do more than simply rely on the vague assertions of counsel.

The error in allowing counsel to withdraw cannot be deemed harmless because the error left Stutzke without counsel altogether. After

granting the motion to withdraw, the court refused to appoint another attorney on the ground that he had waived his right to one. The court's waiver decision is addressed in section C.2., infra. The court would not have made that decision had it properly denied counsel's motion to withdraw based on an insufficient showing of actual conflict. Stutzke would have had an attorney to represent him at trial. Allowing assigned counsel to withdraw had the effect of forcing Stutzke to represent himself. The "deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error.'" State v. Silva, 108 Wn. App. 536, 542, 31 P.3d 729 (2001) (quoting Frazer v. United States, 18 F.3d 778, 782 (9th Cir. 1994)). The convictions must be reversed.

2. THE COURT VIOLATED STUTZKE'S SIXTH AMENDMENT RIGHT TO COUNSEL IN FORCING HIM TO REPRESENT HIMSELF AT TRIAL AFTER RULING HE "CONSTRUCTIVELY WAIVED" HIS RIGHT TO COUNSEL THROUGH HIS ACTIONS.

The right to counsel is fundamental. That right can be lost, but only in limited circumstances, none of which are present here. The trial court forced Stutzke to represent himself at trial after ruling he "constructively waived" his right to counsel through his actions. 4RP 193-94. The court violated Stutzke's right to counsel in so doing. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The record does not show voluntary

relinquishment of counsel, waiver of counsel by conduct, or forfeiture of counsel. This structural error requires reversal of the convictions and remand for a new trial.

Determining the requirements that must be satisfied in order to find an effective waiver of the constitutional right to counsel is a question of law reviewed de novo. State v. Stone, 165 Wn. App. 796, 815, 268 P.3d 226 (2012); United States v. Goldberg, 67 F.3d 1092, 1097 (3rd Cir. 1995); see also Brewer v. Williams, 430 U.S. 387, 403-04, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) (the question of waiver of counsel is not one of historical fact, but requires application of constitutional principles to the facts as found). There are three ways a defendant may lose the right to counsel: (1) voluntary relinquishment, (2) waiver by conduct; or (3) forfeiture through "extremely dilatory conduct." City of Tacoma v. Bishop, 82 Wn. App. 850, 859, 920 P.2d 214 (1996) (citing Goldberg, 67 F.3d at 1099-1102).

Courts are required to indulge in "'every reasonable presumption' against a defendant's waiver of his or her right to counsel." In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting Brewer, 430 U.S. at 404). Waiver is a knowing and voluntary relinquishment and is typically "indicated by an affirmative, verbal request." State ex rel. Schmitz v. Knight, 142 Wn. App. 291, 295, 174

P.3d 1198 (2007) (quoting Bishop, 82 Wn. App. at 858). The request must be unequivocal. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

Stutzke did not voluntarily relinquish his right to counsel and the court did not find that he did. Although Stutzke expressed concern over Mr. Charbonneau's representation, he did not request to represent himself going into the hearing at which the court allowed counsel to withdraw. It was only after the court authorized withdrawal that it asked Stutzke whether he wanted to proceed without an attorney. 4RP 189. Stutzke did not make an unequivocal request to represent himself at trial at this point. 4RP 189-90. Even if he had, the decision was involuntary. The withdrawal of counsel forced Stutzke into the position. The court did not find a voluntary relinquishment of counsel. Instead, the court took the decision away from Stutzke in ruling he had "constructively waived" his right to counsel. 4RP 193-94.

Waiver by conduct is not established here. "If a defendant engages in dilatory tactics or hinders a proceeding, a court may find that the defendant waived his right to counsel by conduct." In re Welfare of G.E., 116 Wn. App. 326, 334, 65 P.3d 1219 (2003) (citing Bishop, 82 Wn. App. at 859). Waiver by conduct requires the court to first warn the defendant on the record that his dilatory conduct will be deemed a waiver of the right

to an attorney and advise him of the dangers and consequences of proceeding without counsel. City of Seattle v. Klein, 161 Wn.2d 554, 562, 166 P.3d 1149 (2007); Schmitz, 142 Wn. App. at 295; Bishop, 82 Wn. App. at 859. Stutzke received no such warning. The trial court never warned him that he would lose the right to counsel if he persisted in engaging in dilatory behavior. There is no waiver by conduct.

The court did not find Stutzke forfeited his right to counsel. Even if it had, the record does not establish forfeiture. In "rare circumstances," forfeiture of counsel has been found. Klein, 161 Wn.2d at 563. "This harsh result applies only in very limited circumstances, when the party engages in extremely severe and dilatory conduct." Schmitz, 142 Wn. App. at 295. There is no such misconduct in Stutzke's case. The court recited a laundry list of things that had delayed trial, but most of them had nothing to do with counsel (failure to appear at arraignment, competency evaluations, waiver of right to jury and later reassertion of the right, refusing to meet with prosecutor and attend interviews while pro se). 4RP 190-93. All of the cases addressing waiver by forfeiture show the extremely serious misconduct must be related to counsel. Other reasons for delay do not factor into the equation. This makes sense. Why would counsel be waived based on behavior unrelated to having counsel? There would be no logical connection between the behavior and the outcome.

The misconduct must be "egregious." Bishop, 82 Wn. App. at 860. For example, a defendant who threatened his attorney with physical bodily harm and attempted to persuade his attorney to engage in unethical conduct was held to have forfeited his right to the assistance of counsel. United States v. McLeod, 53 F.3d 322, 326 (11th Cir. 1995); see also United States v. Thomas, 357 F.3d 357, 362-65 (3d Cir. 2004) (affirming trial court's finding that defendant had impliedly waived his right to counsel by threatening to harm and verbally abusing his attorney as well as by urging his attorney to engage in professional misconduct); United States v. Leggett, 162 F.3d 237, 250-51 (3rd Cir. 1998) (defendant engaged in extremely serious misconduct and forfeited his right to counsel when he physically assaulted his attorney during a court hearing). Deciding to go pro se and then later seeking reappointment of counsel, refusing to meet with counsel on two occasions, expressing dissatisfaction with counsel, and lodging some sort of ethical complaint does not rise to the level of egregious misconduct needed to show waiver by forfeiture.

Courts have addressed forfeiture in the context of a party failing to obtain counsel altogether. See Bishop, 82 Wn. App. at 860 (no forfeiture where defendant appeared three times without an attorney after being informed it was his responsibility to contact the department of assigned counsel); Schmitz, 142 Wn. App. at 293, 296-97 (failure to apply for a

public defender despite repeated instruction from the court to do so was dilatory "game playing,", but did not rise to the level of extremely dilatory conduct required for forfeiture of the right to counsel). Those cases are inapplicable. Stutzke had counsel. The court took it away from him. The complete denial of counsel is a structural error requiring automatic reversal. Schmitz, 142 Wn. App. at 297; Goldberg, 67 F.3d at 1103; Cronic, 466 U.S. at 659 n. 25; Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

3. SUFFICIENT EVIDENCE DOES NOT SUPPORT THE VOYEURISM CONVICTION BECAUSE THE STATE FAILED TO PROVE STUTZKE VIEWED TOWNSHEND FOR MORE THAN A BRIEF PERIOD OF TIME WITHOUT HER KNOWLEDGE.

The State needed to prove Stutzke knowingly viewed Townshend without her knowledge for more than a brief period of time. The evidence, looked at the in light most favorable to the State, fails to meet this standard. The voyeurism conviction must therefore be reversed,

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the

State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

To sustain a conviction following a bench trial, (1) substantial evidence must support the findings of fact; (2) the findings of fact must support the conclusions of law; and (3) the conclusions of law must support the judgment. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law are reviewed de novo. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

The sufficiency of evidence in Stutzke's case turns on the meaning of the voyeurism statute. That, too, is a question of law reviewed de novo. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). RCW 9A.44.115(2) provides:

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly *views*, photographs, or films:
> (a) *Another person without that person's knowledge and consent* while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or
> (b) *The intimate areas of another person without that person's knowledge and consent* and under circumstances

> where the person has a reasonable expectation of privacy, whether in a public or private place.

"Views" is defined as "the intentional looking upon of another person *for more than a brief period of time*, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity." RCW 9A.44.115(1)(e).

Statutes are construed "so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (internal quotation marks omitted) (quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Court must give a literal and strict interpretation to criminal statutes, assuming the legislature "means exactly what it says." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

The plain language of the voyeurism statute requires the person to intentionally view another person "without that person's knowledge *and* consent." RCW 9A.44.115(2) (emphasis added). That viewing must be "for more than a brief period of time." RCW 9A.44.115(1)(e). The word "and" conveys a conjunctive meaning. Ahten v. Barnes, 158 Wn. App. 343, 352 n.5, 242 P.3d 35 (2010). The voyeurism statute uses "and," not "or": "without that person's knowledge *and* consent." RCW 9A.44.115(2).

"We thus read the 'and' as simply being an 'and'. The Legislature would have used the word 'or' if it had intended to convey a disjunctive meaning." Ski Acres, Inc. v. Kittitas Cnty., 118 Wn.2d 852, 857, 827 P.2d 1000 (1992). Applying this principle, the voyeurism statute requires not only viewing another without that person's *consent* for more than a brief period of time, but also viewing another without that person's *knowledge* for more than a brief period of time. This accords with the recognized legislative intent for RCW 9A.44.115, which is to protect against "the surreptitious viewing of [another] for purposes of sexual gratification." State v. Diaz-Flores, 148 Wn. App. 911, 917, 201 P.3d 1073, review denied, 166 Wn.2d 1017, 210 P.3d 1019 (2009).

Even if the statute were susceptible to different reasonable interpretations, Stutzke's interpretation prevails. "Under the rule of lenity, any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). This conclusion conforms with the principle that "criminal statutes are to be strictly construed with doubts as to whether conduct was criminal resolved in favor of the defendant." State v. Russell, 84 Wn. App. 1, 4, 925 P.2d 633 (1996). Under the rule of lenity, the State needs to prove the accused viewed a person without her knowledge for more than a brief period of time.

The State did not prove that here. Townshend testified she did not know how long Stutzke was in proximity to her. 4RP 468. Although she "couldn't say," she offered maybe a minute or two passed between the time she saw Stutzke's head and the time she left the room. 4RP 468. When pressed, she described the interaction as lasting as long as it takes to say "go away," Stutzke asking if she were sure," her saying "go away" again, and her leaving the room. 4RP 469. She agreed with Stutzke that this interaction lasted about seven seconds. 4RP 471. Later she testified "I saw the defendant at my window and it was from the time that I saw the defendant's face until the time I left the room was a few minutes." 4RP 488. The trial court did not make a finding as to the length of time that Stutzke viewed Townshend.

Looked at in the light most favorable to the State and most strongly against Stutzke, the evidence may have been sufficient to show Stutzke viewed Townshend for more than a brief period of time *without her consent*. According to Townshend, Stutzke did not divert his gaze as she tried to close the blinds and told him to go away. 4RP 517.

But the evidence does not show Stutzke viewed Townshend for more than a brief period of time *without her knowledge*. That is fatal to the conviction. Townshend saw his face when she opened her eyes. 4RP 517. Stutzke had his hands on the window sill while he stood there

looking at her. 4RP 447-48. Townshend saw Stutzke in motion, "moving up" and standing up into the center of the window. 4RP 438-39, 441, 483. At most, this evidence shows he glimpsed her for a brief period of time before she knew he was there. It would be speculation that Stutzke viewed her for more than a brief period of time without her knowledge. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

In State v. Fleming, a divided court held the evidence showed more than a brief view and affirmed a voyeurism conviction. State v. Fleming, 137 Wn. App. 645, 648, 154 P.3d 304 (2007). In that case, Ms. Hone was using the restroom when Mr. Fleming entered the stall next to her. "She noticed his shoes facing the toilet and then saw the shoes were gone. She looked up and saw Mr. Fleming looking directly down at her. He stuck his tongue out at Ms. Hone. She started yelling and told him she had a cell phone to call 911. Ms. Hone got up, grabbed her purse, and got out of the bathroom stall." Fleming, 137 Wn. App at 648. Under these circumstances, a rational jury could find Fleming intentionally viewed Ms. Hone "in other than a casual or cursory manner" and for "more than a brief period of time." Id. (quoting RCW 9A.44.115(1)(e)). "Ms. Hone had enough time to see Mr. Fleming looking at her, to yell at him, to tell him

she had a cell phone, and to run out of the stall. He in turn had enough time to stare and stick his tongue out at her." Id. The dissent believed the rule of lenity required the court to interpret the phrase "more than a brief period of time" as contemplating more than the brief encounter established by the State. Id. at 649 (Schultheis, A.C.J., dissenting).

Stutzke disagrees with the Fleming court's cursory interpretation of the voyeurism statute. The majority in Fleming did not consider the argument advanced by Stutzke. It did not address the theory that the viewing must be not only without consent but also without the person's knowledge for more than a brief period of time. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Stutzke's legal theory is sound and, when applied to the evidence in this case, shows the evidence is insufficient to convict. For this reason, the trial court erred in concluding the State proved Stutzke was guilty of voyeurism. CP 52 (CL 1).

4. STUTZKE'S CONVICTION FOR VIOLATION OF THE PROTECTION ORDER MUST BE VACATED BECAUSE IT MERGES INTO HIS FELONY STALKING CONVICTION.

Stutzke's conviction for violating the protection order violates the prohibition against double jeopardy. Proof of the protection order violation was necessary to elevate his stalking conviction from a gross misdemeanor to a felony. The convictions merge. Stutzke's conviction for violating the protection order must therefore be vacated.

The State can bring multiple charges arising from the same criminal conduct in a single proceeding. State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. Kier, 164 Wn.2d at 803; U.S. Constitution amend. V; Wash. Constitution, art. I, § 9. Double jeopardy errors may be raised for the first time on appeal. State v. Ralph, 175 Wn. App. 814, 823, 308 P.3d 729 (2013). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Stutzke's convictions for both stalking and violation of a no-contact order violate double jeopardy under the merger doctrine. "Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that

violates several statutory provisions." State v. Davis, 177 Wn. App. 454, 460, 311 P.3d 1278 (2013), review denied, 179 Wn.2d 1025, 320 P.3d 719 (2014). The prohibition against double jeopardy is the foundation for the merger doctrine. State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). The doctrine applies "when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." Parmelee, 108 Wn. App. at 710. "[W]hen the degree of one offense is raised by conduct separately criminalized by the legislature, [courts] presume the legislature intended to punish both offenses through a greater sentence for the greater crime." Freeman, 153 Wn.2d at 772-73. Courts "look at how the offenses were charged and proved, and do not look at the crimes in the abstract." State v. Whittaker, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016).

Stalking is defined in RCW 9A.46.110(1). It is generally a gross misdemeanor, but becomes a felony if any one of several circumstances is present. RCW 9A.46.110(5). One such circumstance occurs when "the stalking violates any protective order protecting the person being stalked." RCW 9A.46.110(5)(b)(ii). Stutzke was charged and convicted under this subsection. CP 38, 53, 58. Parmelee and Whittaker show why Stutzke's conviction for violating a no-contact order merges with the stalking conviction.

In Parmelee, the Court of Appeals held violation of a protective order merges into stalking when it elevates stalking to a felony under RCW 9A.46.110(5)(b)(ii). Parmelee, 108 Wn. App. at 710-11. Parmelee was convicted of one count of felony stalking and three counts of gross misdemeanor protective order violations. Id. at 708. The court concluded that "two of Parmelee's three convictions for protection order violations merge into the felony stalking conviction because the State was required to prove facts to support at least two of the protection order violation convictions in order to establish facts sufficient for a felony stalking conviction under RCW 9A.46.110(5)(b)." Id. at 711. In reaching this conclusion, the Parmelee court explained that stalking requires a finding of repeated harassment or repeated following. Id. Two harassing events are sufficient to satisfy the requirement that the behavior be repeated. Id. Thus, with respect to at least two of Parmelee's three protection order violations, the State was required to prove those violations occurred to secure convictions for both felony stalking and the protection order violations. Id. As such, two of Parmelee's protection order violations were essential elements of the crime of felony stalking. Id. Because protection order violations are crimes defined elsewhere in the criminal statutes, they merged into the stalking conviction. Id.

Parmelee is on point with Stutzke's case in all relevant respects. As in Parmelee, the State in Stutzke's case was required to prove violation of the protection order to secure convictions for both felony stalking and the protection order violation. As charged and proven, the protection order violation was an essential element of the crime of felony stalking. The convictions merge.

In Whittaker, the defendant was convicted of felony stalking and violation of a no-contact order. Whittaker, 192 Wn. App at 399. Whittaker's stalking conviction was elevated to a felony because his stalking violated a court order protecting the victim. Id. at 411. Citing Parmelee, the Whittaker court applied the merger doctrine. Id. at 412-13. The verdict failed to make clear which of several possible violations of a court order elevated the stalking conviction to a felony. Id. at 399, 415-16. The rule of lenity required the felony violation of a court order conviction to merge into the felony stalking conviction. Id. at 399, 416.

In Stutzke's case, there is no ambiguity. The State charged Stutzke with committing the crime of stalking on August 16, 2013. CP 38. There are at most two violations of the protection order that occurred on August 16, 2013, and the trial court's findings show it relied on those same violations to convict Stutzke of felony stalking. CP 46-48, 50 (FF 39-50, 62-65). Stutzke was convicted of one count of violation of a protection

order and one count of felony stalking. CP 52-53. To convict for felony stalking, the State needed to prove Stutzke violated a court order protecting Townshend. Thus, a protective order violation was an essential element of stalking. It elevated the stalking conviction from a gross misdemeanor to a felony. RCW 9A.46.110(5)(b). The merger doctrine prohibits Stutzke's conviction for violation of a protection order. Under Parmelee and Whittaker, Stutzke's conviction for violation of a protection order must be vacated.

5. THE LENGTH OF THE COMMUNITY CUSTODY TERM FOR THE STALKING CONVICTION EXCEEDS THE STATUTORY MAXIMUM.

The court erred in imposing a community custody term of 18 months for the stalking offense under count 3. CP 58, 64. The lawful term of community custody is 12 months.

Sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The court here imposed 18 months of community custody for the stalking offense on the basis that there is "18 months for Violent Offenses." CP 64. RCW 9.94A.701(2) provides "A court shall, in

addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." Stalking, however, is not a "violent offense" as defined by statute. RCW 9.94A.030(55) (listing crimes that qualify as a "violent offense"). For this reason, the court lacked statutory authority to impose 18 months of community custody for the stalking offense.

The offense of stalking is listed as a "crime against persons" under RCW 9.94A.411(2). RCW 9.94A.701(3)(a) provides "A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: (a) Any crime against persons under RCW 9.94A.411(2)." Under the plain language of RCW 9.94A.701(3)(a), the term of community custody for stalking is 12 months.

"A trial court may impose a sentence that is only authorized by statute." In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). The court here exceeded its statutory authority in imposing 18 months of community custody for the stalking offense.

"When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." Murray, 118 Wn. App. at 522. The appropriate remedy is reversal of the erroneous community custody portion of the sentence. Leach, 161 Wn.2d at 188. This Court should therefore reverse the unlawful term of community custody and remand for correction of the judgment and sentence to reflect a 12-month term of community custody for the stalking offense.

6. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE COMMUNITY CUSTODY FOR THE GROSS MISDEMEANOR CONVICTION AND THE COURT COULD NOT IMPOSE PROBATION BECAUSE IT SENTENCED STUTZKE TO SERVE THE MAXIMUM TERM OF CONFINEMENT.

Violation of a civil anti-harassment protection order is a gross misdemeanor. RCW 10.14.170. A gross misdemeanor is punishable by imprisonment for a maximum term of not more than 364 days. RCW 9A.20.021(2). The court can suspend the imposition or the execution of the sentence and impose up to two years of probation. RCW 9.95.210(1).

The court here imposed a sentence of 364 days in confinement on the gross misdemeanor conviction for violating a protection order under count 2. CP 59, 63. The court also imposed 24 months of "community custody" on that count. CP 64; RP 716.

The court did not have statutory authority to impose community custody for Stutzke's gross misdemeanor conviction. The DOC has authority to supervise "offenders who are sentenced to probation in superior court, pursuant to RCW 9.92.060, 9.95.204, or 9.95.210" and place them on community custody, but only for those convicted of certain specified offenses. RCW 9.94A.501(1), (2). Stutzke's conviction is not among those specified offenses. For this reason, the court lacked authority to impose community custody.

A court can grant probation by "suspend[ing] the imposition or the execution of the sentence." RCW 9.95.210(1). But if a court imposes a maximum sentence of confinement and actually suspends none of it, the court lacks the authority to impose probation. State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), overruled on other grounds by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). There is no authority to impose a term of probation on this count. The sentence did not actually suspend any jail time. For this reason, the court had no authority to order a term of probation for count 2. Gailus, 136 Wn. App. at 201.

7. THE SEXUAL ASSAULT PROTECTION ORDER ISSUED IN CONJUNCTION WITH STUTZKE'S SENTENCE EXCEEDS THE STATUTORY MAXIMUM TERM.

The trial court erred in setting an expiration date of August 18, 2026 for the sexual assault protection order. CP 110-11. This Court should vacate the order and remand for determination of a lawful expiration date.

When an offender is found guilty of a sex offense, any sentencing condition that restricts an offender's ability to contact the victim is referred to as a "sexual assault protection order." RCW 7.90.150(6)(a). By the statute's plain language, "[a] final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole." RCW 7.90.150(6)(c).

Because Stutzke was convicted of a sex offense (voyeurism) and the resulting sentence precludes contact with the victim, it was appropriate for the trial court to enter a sexual assault protection order. RCW 7.90.150(6)(a). The term of such an order issued in conjunction with a sentence, however, may not exceed expiration of the sentence by more than two years. RCW 7.90.150(6)(c).

The trial court entered a sexual assault protection order set to expire on August 18, 2026. CP 110. Stutzke was sentenced on August 18, 2016. CP 63. He is lawfully subject to 12 months of community custody. CP 64; see C.5., supra. The protection order must expire two years after the expiration of Stutzke's period of community custody. The maximum expiration date falls well before the August 18, 2026 date set by the court. This Court should therefore vacate the sexual assault protection order and remand for imposition of an order that contains a lawful expiration date.

8. THE JUDGMENT AND SENTENCE CONTAINS A CLERICAL ERROR IN NEED OF CORRECTION.

Under the heading of "findings," the judgment and sentence states Stutzke was found guilty of "Count no.: III Stalking – Domestic Violence." CP 58. The "domestic violence" designation is a clerical error. A crime of "domestic violence" is one in which the crime is committed by one family or household member against another. RCW 10.99.020(5); State v. McDonald, 183 Wn. App. 272, 278-79, 333 P.3d 451 (2014). The State did not charge Stutzke with committing a domestic violence offense and the trial court did not find any such offense had been committed. CP 38, 59. There is a space for "For the crime(s) charged in Count ___, domestic violence was pled and proved. RCW 10.99.020." CP 59. That space is left unchecked. The court found there has never been any type of

intimate relationship between Stutzke and Townshend. CP 41 (FF 10). From all of this, it is clear the domestic violence designation for count 3 is a clerical error, which should be corrected. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (remanding to trial court for correction of the scrivener's errors in the judgment and sentence).

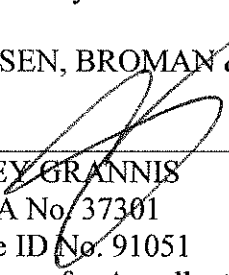
D. CONCLUSION

For the reasons set forth, Stutzke requests reversal of the convictions. In the event this Court declines to reverse, Stutzke requests vacature of the conviction for violating a protection order due to the double jeopardy, correction of the sentencing errors, and correction of the error in the sexual assault protection order.

DATED this 4th day of May 2017

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

FILED

JUN 23 2016

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE	
STATE OF WASHINGTON, Plaintiff, vs. BENJAMIN E. STUTZKE, Defendant.	NO. 2013-01-02973-2 FINDINGS OF FACT & CONCLUSIONS OF LAW – BENCH TRIAL

THIS MATTER came before the Court for a bench trial on May 23, May 31, and June 1, 2016. By information, the State of Washington charged the Defendant, Benjamin E. Stutzke, with Count I – Voyeurism; Count II – Violation of a Civil Anti-Harassment Protection Order; Count III – Stalking; and Count IV – Attempted Residential Burglary. The State of Washington is represented by Deputy Prosecuting Attorney Kelly Fitzgerald. The Defendant proceeded to trial *pro se*.

The following individuals appeared and testified at trial: Michelle Townshend, Jill Rider, Brendon Townshend, Deputy Chad Ruff, Deputy Jennifer Sutter, and Benjamin Stutzke. The official Clerk's Exhibit List includes all of the exhibits that were offered and admitted into evidence at trial. Although mindful of the oral arguments of the parties, in

entering the following Findings of Fact the Court only relied on the testimony and exhibits that were offered and admitted into evidence.

Consistent with the Court's ruling in the motions *in limine*, all evidence of the Defendant's prior bad acts were only considered for the purpose of establishing specific elements of the crimes charged (i.e. whether the alleged victim feared the Defendant intended to injure her, whether the alleged victim's fear was reasonable, whether the Defendant's alleged conduct was for the purpose of arousing or satisfying his sexual desire, whether the Defendant knew or reasonably should have known that the alleged victim was afraid, intimidated or harassed by him, and whether the Defendant repeatedly followed and/or harassed the alleged victim). The Court did not consider evidence of prior bad acts for any other purpose.

After considering all of the evidence, the Court hereby enters the following:

FINDINGS OF FACT

1. Benjamin Stutzke is currently 37 years old and was raised by his parents, Dan and Carol Stutzke, along with his sister, Jessica, and brother, Luke.
2. The Stutzke residence is located at 7005 E. Day Mt. Spokane Road, Mead, Spokane County, Washington, a relatively rural area.
3. In 1987, Don and Michelle Townshend purchased a home located at 16112 N. Green Bluff Road, Colbert, Spokane County, Washington.
4. Although not accessible from the same road, the Townshend's property neighbors the Stutzke's property. A small field separates two homes.

5. Since purchasing the property, the Townshend's constructed a winery near the home. The winery consists of a warehouse, a tasting room, and an apartment directly above the tasting room.
6. Don and Michelle Townshend have two children in common, Michael and Brendon.
7. Since moving into the home located at 16112 N. Green Bluff Road, the Townshend family developed a typical neighborly relationship with the Stutzke family. As such, during their early years it was common for children from both families to run back and forth between the homes.
8. At some point prior to 2009, Mr. Stutzke left the Spokane area to serve on a mission trip.
9. In May 2009, Mr. Stutzke returned from his mission service. During this time, Ms. Townshend was residing alone in the family home. Upon his return, Mr. Stutzke expected both the Northwest and Ms. Townshend to embrace his homecoming.
10. Ms. Townshend and Mr. Stutzke have never had a dating relationship, physical relationship, or any other type of intimate relationship.
11. In the spring of 2009, Ms. Townshend hosted a high school graduation party for her son, Michael. The Stutzke family was invited to this event, although Mr. Stutzke was not individually invited.
12. It seems this party was the genesis of Mr. Stutzke's peculiar and unwanted attention towards Ms. Townsend. Both during and following the party, Ms.

Townshend noticed Mr. Stutzke consistently invaded her personal space while speaking with her, followed her around the property, and remained on her property and inside of her residence beyond the conclusion of the party, necessitating Ms. Townshend's call to Dan Stutzke requesting Mr. Stutzke be taken home.

13. Some months later, in the early morning hours of September 23, 2009, Ms. Townshend finished showering and walked from her bathroom into her bedroom completely unclothed. Once in her bedroom, she noticed Mr. Stutzke standing in her driveway staring at her through her bedroom window. Ms. Townshend immediately retreated back into the bathroom.
14. While in her bedroom and visible to Mr. Stutzke, Ms. Townshend noticed Mr. Stutzke never diverted his eyes or otherwise attempt to discontinue viewing her.
15. After this event, Ms. Townshend called Mr. Stutzke's father, Dan, reported what had occurred, and informed him that Mr. Stutzke was not welcome on the Townshend property.
16. One week later, on September 29, 2009, while Ms. Townshend was at work, Mr. Stutzke entered and remained inside Ms. Townshend's home without her permission or consent. Mr. Stutzke's mother found him inside Ms. Townshend's home and notified both law enforcement and Ms. Townshend.
17. Mr. Stutzke admitted to entering and remaining inside Ms. Townshend's home without her permission or consent.

18. As a result of Mr. Stutzke's unwanted attention, his uninvited entry into her home, and his viewing of her naked through her bedroom window from the driveway, on September 30, 2009, Ms. Townshend petitioned the Spokane County District Court for an anti-harassment protection order.
19. Ms. Townshend's petition for an anti-harassment protection order was based, in large part, upon Mr. Stutzke's unpredictable behavior. His actions made Ms. Townshend feel as if she was being stalked, which scared her.
20. Subsequent to the hearing of October 28, 2009, Judge Patti Connelly Walker entered an order for protection for a period of one year prohibiting Mr. Stutzke from having any contact with Ms. Townshend.
21. From August 2011 through late July 2012, Ms. Townshend taught abroad in Germany. She chose to teach abroad for two reasons: First, Ms. Townshend had a desire to teach abroad and, secondly, Ms. Townshend wanted to distance herself from Mr. Stutzke.
22. While Ms. Townshend was in Germany, her son, Brendon, moved into the apartment located over the tasting room of the winery. Ms. Townshend and Brendon stayed in constant contact via email.
23. During the time Ms. Townshend was in Germany, a winery employee, Jill Rider, heard someone walking in the apartment above the tasting room. She called Don Townshend, who resided a short distance away, to come and investigate. Both Don Townshend and Brendon responded to the winery at Ms. Rider's request.

24. Upon entering the apartment over the tasting room, Mr. Townshend and Brendon found Mr. Stutzke hiding in the bathroom. By his own admission, Mr. Stutzke entered the apartment without permission in order to obtain internet access as he wanted to use Facebook and view pornography. Mr. Townshend and Brendon spoke with Mr. Stutzke but did not otherwise take action against him.

25. Mr. Stutzke's unlawful entry into the apartment was reported to Ms. Townshend in Germany. It sickened Ms. Townshend to learn that Mr. Stutzke's behavior was persisting.

26. When Ms. Townshend returned home in late July 2012, she had her sister, Laurie, and Laurie's son reside with her. During this time, Mr. Stutzke made numerous attempts at contacting Ms. Townshend by going to Ms. Townshend's house. Laurie would answer the door and would repeatedly inform Mr. Stutzke that Ms. Townshend did not want any contact with him.

27. In addition to Mr. Stutzke's preoccupation with Ms. Townshend, he was intrigued by her sister, Laurie. According to Mr. Stutzke, his curiosity was aroused as Laurie looked similar to his ex-girlfriend who, like Ms. Townshend, was also named Michelle.

28. By the end of 2012, Ms. Townshend became increasing scared over Mr. Stutzke's unwanted contact. He had been repeatedly told to stay off the Townshend property but was still seen walking across the property and continued ringing Ms. Townshend's doorbell.

29. Between late 2012 and early 2013, Ms. Townshend began calling Crime Check each time Mr. Stutzke came onto her property.

30. On March 5, 2013, a neighbor of Ms. Townshend found Mr. Stutzke once again walking from his parents' house towards Ms. Townshend's bedroom window. Ms. Townshend was notified, causing her to petition for a second anti-harassment order.

31. After a hearing on March 15, 2013, in which Mr. Stutzke appeared and participated, Judge Patti Connelly Walker entered a two-year order for protection naming Ms. Townshend as the protected party and Mr. Stutzke as the restrained party.

32. Mr. Stutzke signed the order for protection and was give a copy.

33. The order for protection entered on March 15, 2013, was effective until March 15, 2015, and restrained Mr. Stutzke from entering or being within 50 feet of any known location of Ms. Townshend, from entering or being within 50 feet of Ms. Townshend's property located at 16112 N. Green Bluff Road, Colbert, Washington, from having any contact with Ms. Townshend, and from surveilling Ms. Townshend.

34. The orders for protection from both October 28, 2009, and March 15, 2013, placed Mr. Stutzke on notice that Ms. Townshend was fearful of him.

35. On July 5, 2013, while the order for protection was in effect, Brendon found Mr. Stutzke walking on Ms. Townshend's property between the winery and house,

along a bank of trees. Before being spotted by Brendon, Mr. Stutzke made it within several feet of Ms. Townshend's house.

36. When Mr. Stutzke was confronted by Brendon, Mr. Stutzke asserted he was on the property because he wanted to speak with Ms. Townshend. Brendon told Mr. Stutzke that he was not allowed on the Townshend property.

37. Mr. Stutzke admitted that on July 5, 2013, he knowingly violated the order for protection by entering Ms. Townshend's property.

38. The events of July 5, 2013, increased Ms. Townshend's fear of Mr. Stutzke. Previously, Mr. Stutzke would trespass on her property and unlawfully enter both her home and winery. Since the order for protection was entered, Mr. Stutzke was now trespassing in violation of an order for protection.

39. Ms. Townshend's fear of Mr. Stutzke's behavior climaxed on August 16, 2013. At approximately 6:00 a.m. on August 16, 2013, Ms. Townshend awoke. After using the restroom, Ms. Townshend opened the blinds covering her master bedroom window, then opened the window.

40. The bedroom window has a vertical hinge on one side and opens similar to the way an interior home door opens. The base of the window sits approximately one to two feet above the bedroom floor and about four to five feet above the ground on the exterior of the home.

41. There remains a dispute as to whether the window was opened to a 45 degree angle from the house or a 90 degree angle. The degree at which the window was opened is immaterial as it is undisputed that Mr. Stutzke placed himself

between the open window and window frame when viewing Ms. Townshend in her bedroom.

42. After opening the window, Ms. Townsend went back to bed, this time laying down on top of the covers while completely naked.

43. After briefly dozing off, Ms. Townshend awoke to find Mr. Stutzke standing at the open window with his hands resting on the window sill staring at her. Mr. Stutzke was about five feet from Ms. Townshend when she awoke.

44. In noticing Mr. Stutzke at her bedroom window, Ms. Townshend was stunned and terrified. She jumped from her bed while yelling at Mr. Stutzke to leave. Ms. Townshend attempted to close the window blinds but in her haste pulled the blinds from the wall.

45. In response to Ms. Townshend's directive to leave, Mr. Stutzke responded by asking, "Are you sure?"

46. Given the location of the window, while Ms. Townsend attempted to close the blinds, the midsection of her unclothed body would have been within a few feet of Mr. Stutzke's face.

47. During the entire interaction between Ms. Townshend and Mr. Stutzke, Ms. Townshend noticed that Mr. Stutzke's eyes appeared glazed over, his mouth hung open, and his hands rested on the window sill. Upon being caught, Mr. Stutzke's demeanor remained calm and unchanged.

48. At no point during the contact did Mr. Stutzke ever divert his eyes or turn his head. Rather, for the entirety of the time Mr. Stutzke viewed Ms. Townshend while she was naked inside of her bedroom, his focus was on her.

49. During the contact, Mr. Stuzke never inserted any part of his body beyond the window frame.

50. Mr. Stutzke admitted to going directly from his parent's residence to Ms. Townshend's bedroom window sometime before 7:00 a.m. on August 16, 2013, for the purpose of confronting Ms. Townshend about comments she made at the March 15, 2013, anti-harassment hearing.

51. Prior to viewing Ms. Townshend through her bedroom window on August 16, 2013, Mr. Stutzke never made any attempts to first contact her either by knocking on her front door, ringing her doorbell, or calling her.

52. Mr. Stutzke admitted that his viewing of Ms. Townshend naked in her bedroom on August 16, 2013, was the third time he had viewed her naked while she was in her bedroom, the two previous events occurring in 2009.

53. Based upon the totality of Ms. Townshend's history with Mr. Stutzke, including Mr. Stutzke being caught viewing pornography in the apartment above the tasting room, the two previous occasions Mr. Stutzke had been caught viewing her naked through her bedroom window, Mr. Stutzke's violation of the order for protection on July 5, 2009, Mr. Stutzke's repeated attempts to contact Ms. Townshend through her sister, and Mr. Stutzke's behavior, appearance, and

statements as he peered through her bedroom window on August 16, 2013, Ms. Townshend believed that Mr. Stutzke was there to sexually violate her.

54. Ms. Townshend called law enforcement, resulting in Deputy Chad Ruff from the Spokane County Sheriff's Office responding to her home.

55. While in route to Ms. Townshend's home, Deputy Ruff reviewed the order for protection entered March 15, 2013, protecting Ms. Townshend and restraining Mr. Stutzke.

56. Upon arrival, Deputy Ruff met with Ms. Townshend, and while she spoke in generalities about Mr. Stutzke, he noticed her to be timid, nervous, and scared.

57. As Deputy Ruff was able to get Ms. Townshend to speak as to the specifics of the events of that morning, Ms. Townshend exhibited increased fear by crying and trembling.

58. At approximately 8:35 a.m., Deputy Ruff went to the Stutzke residence with the intent of contacting Mr. Stutzke. Deputy Ruff aggressively knocked on Mr. Stutzke's door, rang the doorbell, and verbally announced he was there.

59. Deputy Ruff spent approximately ten minutes trying to contact Mr. Stutzke, but to no avail.

60. Although Mr. Stutzke heard the Deputy knocking and ringing the doorbell, he chose not to answer the door as he did not like the Deputy's "violent approach."

61. Sometime later that day, Deputy Ruff returned to the Stutzke home in hope of contacting Mr. Stutzke. Again, he knocked on the door and rang the doorbell, but received no response.

62. At some point following the Deputy's second attempt, Ms. Townshend went from her house to the tasting room to speak with Ms. Rider. As Ms. Townshend and Ms. Rider were between the tasting room and the house, they both heard someone from the Stutzke residence continually shouting "Michelle."

63. Ms. Rider noticed that as they heard "Michelle" being yelled Ms. Townshend began to shake and cry.

64. Ms. Rider recalled Ms. Townshend's tone was similar to the way she sounded earlier in the day when they spoke on the phone following Mr. Stutzke viewing her through the bedroom window.

65. Upon hearing someone from the Stutzke residence repeatedly yelling "Michelle," both Ms. Townshend and Ms. Rider went into the tasting room and locked the door. Ms. Townshend was shaking so badly that Ms. Rider had to place the call to 911.

66. In response to the 911 call, at approximately 5:56 p.m., both Deputy Ruff and Deputy Jennifer Sutter, a female deputy from the Spokane County Sheriff's Office, responded to the Stutzke's residence.

67. Deputy Ruff and Deputy Sutter decided to approach the Stutzke residence in a different manner in the hopes that Mr. Stutzke would answer the door.

68. The third attempt at trying to get Mr. Stutzke to answer the door consisted of Deputy Sutter gently knocking on the door while calling out Mr. Stutzke's name with the thought that he might open the door for a woman.

69. Indeed, within 30 seconds, Mr. Stutzke opened the door for Deputy Sutter. Deputy Sutter inquired as to why he opened the door on the third attempt. Mr. Stutzke responded by stating that he thought it was Michelle at the door.

70. Upon being asked by Deputy Ruff why he didn't answer the door earlier in the day, Mr. Stutzke responded by stating that he wasn't ready to go to jail.

71. Mr. Stutzke confessed to Deputy Ruff that he had gone to Ms. Townshend's home earlier in the day for "no good reason."

72. Mr. Stutzke was arrested for violating the anti-harassment order for protection.

73. Upon being transported to the Spokane County Jail in Deputy Ruff's vehicle, without provocation Mr. Stutzke stated that he did not know why Michelle was doing this to him as they are in love.

74. Following the events of August 16, 2013, Ms. Townshend applied contact paper over her bedroom windows, had deadbolts installed on her doors, moved her bed away from the bedroom window, and spent the next two months sleeping at night under her piano.

75. After the events of August 16, 2013, Ms. Townshend began receiving nightly phone calls. When Ms. Townshend answered the phone, the caller would not respond.

76. At trial, while under direct examination by the State, Ms. Townshend's demeanor was timid and tearful. Upon being cross-examined by Mr. Stutzke, Ms. Townshend would not look at Mr. Stutzke, was crying, trembled, and sounded as

if she was hyperventilating. Ms. Townshend's difficultly in testifying required the Court to take two recesses so she regain her composure.

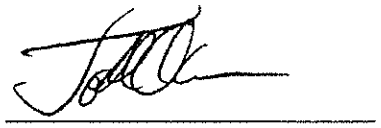
After entering the foregoing Findings of Fact, the Court hereby enters the following:

CONCLUSIONS OF LAW

1. The State has proven beyond a reasonable doubt that on or about August 16, 2013, in the State of Washington, Benjamin Stutzke did, for the purpose of arousing and gratifying his sexual desire, knowingly view Michelle Townshend, as well as view Michelle Townshend's intimate areas, without Michelle Townshend's knowledge and consent and under circumstances where Michelle Townshend had a reasonable expectation of privacy.
2. Therefore, the Court finds Benjamin Stutzke GUILTY of the crime of Voyeurism as charged in Count I.
3. The State has proven beyond a reasonable doubt that on or about August 16, 2013, a valid court order for protection existed restraining Mr. Stutzke from entering or coming within 50 feet of 16112 N. Green Bluff Road, Colbert, Washington, from having any contact with Michelle Townshend, from coming within 50 feet of Michelle Townshend, and from surveilling Michelle Townshend, that Benjamin Stutzke knew of the existence of the order for protection, that Benjamin Stutzke willfully disobeyed the order for protection, and that this act occurred in the State of Washington.
4. Therefore, the Court finds Benjamin Stutzke GUILTY of the crime of Violation of a Civil Anti-Harassment Protection Order as charged in Count II.

5. The State has proven beyond a reasonable doubt that on or about August 16, 2013, Benjamin Stutzke intentionally and repeatedly harassed or repeatedly followed Michelle Townshend, that Michelle Townshend was placed in fear that Benjamin Stutzke intended to injure her, that Michelle Townshend's fear was one that a reasonable person in the same situation would experience under all the circumstances, that Benjamin Stutzke knew or reasonably should have known that Michelle Townshend was afraid or intimidated of him, that Benjamin Stutzke acted without lawful authority, that Benjamin Stutzke's acts were in violation of a protective order entered March 15, 2013, that protected Michelle Townshend, and that these acts occurred in the State of Washington.
6. Therefore, the Court finds Benjamin Stutzke GUILTY of the crime of Stalking as charged in Count III.
7. Although Michelle Townshend possessed a reasonable fear that Benjamin Stutzke intended on sexually violating her when he appeared at her bedroom window on August 16, 2013, the State has failed to prove beyond a reasonable doubt that Benjamin Stutzke did an act that was a substantial step towards entering or remaining in Michelle Townshend's dwelling.
8. Therefore, the Court finds Benjamin Stutzke NOT GUILTY of the crime of Attempted Residential Burglary as charged in Count IV.

DATED this 23rd day of June, 2016.



Judge John O. Cooney

NIELSEN, BROMAN & KOCH P.L.L.C.

May 04, 2017 - 1:35 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	93451-7
Appellate Court Case Title:	State of Washington v. Benjamin Eric Stutzke
Superior Court Case Number:	13-1-02973-2

The following documents have been uploaded:

- 934517_Briefs_20170504133318SC546236_0278.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was BOA 93451-7.pdf

A copy of the uploaded files will be sent to:

- grannisc@nwattorney.net
- nielsene@nwattorney.net
- bobrien@spokanecounty.org
- scpaappeals@spokanecounty.org
- Sloanej@nwattorney.net

Comments:

Copy mailed to client: Mr. Benjamin Stutzke 7005 E Day Mount Spokane Rd Mead, WA 99021

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Casey Grannis - Email: grannisc@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20170504133318SC546236