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**State of Washington**  
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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

HARRY LAMMON, JR., APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF FERRY COUNTY

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**BRIEF OF RESPONDENT**

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INDEX

**I. APPELLANT’S ASSIGNMENTS OF ERROR ..... 1**

**II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2**

**III. STATEMENT OF THE CASE ..... 2**

**IV. ARGUMENT ..... 4**

I. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE UNIT OF PROSECUTION FOR A VIOLATION OF A NO-CONTACT ORDER IS EACH CALL MADE TO THE VICTIM.....4

II. APPELLANT/DEFENDANT WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE CHALLENGES SOUGHT BY APPELLANT WERE UNLIKELY TO HAVE BEEN SUCCESSFUL AND WHERE DEFENSE COUNSEL DID SEEK TO CONSOLIDATE THE PREDICATE PRIOR OFFENSES.....12

**V. CONCLUSION ..... 16**

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

State v. Adel, 136 Wn. 2d 629, 633-34, 965 P.2d 1072 (1998)..... 5

State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005)..... 5, 8

State v. Vidales Morales, 174 Wn. App. 370, 384-85, 298 P.3d 791 (2013)  
..... 5, 10, 11

State v. Berry, 129 Wn. App. 59, 69, 117 P.3d 1162 (2005)..... 5, 6

State v. Brown, 159 Wn. App. 1, 10, 248 P.3d 518 (2010) ..... 6, 7, 8, 11

State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (2009) ..... 6, 7, 8, 11

State v. Parmelee, 108 Wn. App. 702, 709, 32 P.3d 1029 (2001) ..... 7, 11

State v. Tek, 2013 Wash. App. LEXIS 937 (No. 42227-1-II) (2013) ... 7, 8,  
11

State v. Yarborough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009)..... 13

State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) ..... 13

In re Pers. Restraint of Cross, 180 Wn.2d 664, 693, 327 P.3d 660 (2014)  
..... 13, 14

In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998)13

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ..... 21

State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)..... 14

**FEDERAL COURT CASES**

Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed.  
2d 674 (1984)..... 13

**RULES**

GR 14.1 ..... 8

**STATE STATUTES**

RCW 26.50.110 ..... 4, 6, 8, 9, 10, 16

## I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court violated Defendant's Fifth and Fourth Amendment rights to be free from double jeopardy by entering a separate conviction for each of his violations of a domestic violence no-contact order.

2. The trial court violated Defendant's Wash. Const. art. I, § 9 rights to be free from double jeopardy by entering a separate conviction for each of his violations of a domestic violence no-contact order.

3. Defendant's predicate domestic violence no-contact order convictions were entered in violation of Defendant's Fifth and Fourth Amendment rights to be free from double jeopardy.

4. Defendant's predicate domestic violence no-contact order convictions were entered in violation of Defendant's Wash. Const. art. I, § 9 right to be free from double jeopardy.

5. Defense counsel's failure to challenge Defendant's predicate domestic violence no-contact order convictions constituted ineffective assistance of counsel.

6. Defendant was prejudiced by his attorney's ineffective assistance.

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

1. Whether the trial court violated the constitutional prohibition on double jeopardy by entering a separate conviction for each of three separate phone calls made by the Defendant to the Protected Party in violation of a domestic violence no-contact order?

2. Whether Trial Defense Counsel's performance was so deficient as to constitute ineffective assistance of counsel when Defense Counsel did not challenge that Defendant's prior predicate convictions constituted separate units of prosecution but did seek to have the counts consolidated for purposes of sentencing?

## **III. STATEMENT OF THE CASE**

On June 14, 2012, Defendant Harry Lammon, Jr. threatened to kill his wife, Candace Lammon. CP 73. He further threatened to tie her to a bed, "have his way with her" for three days, and stated that if he hadn't killed her by then, she would wish she was dead. *Id.* Defendant stated that he would kill her and bury her under a cactus in Yakima. *Id.* On December 13, 2012, Defendant pled guilty to domestic violence harassment in King County Superior Court in connection with the above charges. CP 63-88.

Then, on November 20, 2013, Defendant was again found guilty of domestic violence harassment against Candace Lammon, this time in King County Municipal Court. CP 89-90.

Fast-forward to August 23, 2017, when Ferry County District Court granted Candace Lammon a civil protection order in case CVH 17-17, prohibiting Defendant from contacting her. CP 6.

10 days later, on September 2, 2017, Mr. Lammon violated that order by placing two separate calls to Ms. Lammon. CP 37. Mr. Lammon was subsequently convicted of two counts of violation of a no-contact order on March 13, 2018. CP 32-37. The Judge in the criminal case specifically hand-wrote in that Judgment and Sentence the words “abide by all conditions [of] DV NCO CVH17-17”. CP 33.

However, in September of 2018, on three occasions, Defendant Harry Lammon, Jr. again knowingly violated that domestic violence no-contact order by placing a call to the protected party, Candace Lammon. CP 40-41. During each of the three calls Mr. Lammon left a voicemail for Candace, for a total of three voicemails. *Id.*

Mr. Lammon admitted via stipulation to knowingly making the calls and was convicted of three counts of felony-level violation of a protection order (domestic violence). CP 47-50.

At sentencing, Mr. Lammon received 13 months in prison, the lowest sentence allowable under the sentencing guideline absent a finding for an exceptional sentence downward. CP 91-102. Appellant now appeals the convictions on the basis that Defendant's rights to be free from double jeopardy were violated and that Defense Counsel's representation was deficient such that it deprived him of the constitutional right to counsel. For the reasons set forth below, the State respectfully disagrees and requests that this court deny the appeal and affirm the convictions and sentence.

#### **IV. ARGUMENT**

##### **I. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE UNIT OF PROSECUTION FOR A VIOLATION OF A NO-CONTACT ORDER IS EACH CALL MADE TO THE VICTIM.**

Appellant argues that the Trial Court violated his rights by entering convictions for three separate no-contact order violations for each of his three calls to the protected party. Thus, what is at issue is the Trial Court's denial of Defendant's motion to consolidate the three counts and the Trial Court's conclusion of law that under RCW 26.50.110(1) each violation of a no-contact order is an individual unit of prosecution and that the State is therefore permitted to charge each violation of a no-contact order as a separate count.

To analyze whether a double jeopardy has occurred for punishment under the same statute multiple times, we must determine the unit of prosecution intended by the legislature. State v. Adel, 136 Wn. 2d 629, 633-34, 965 P.2d 1072 (1998). The first step in determining the proper unit of prosecution is to examine the language of the statute. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). See also State v. Vidales Morales, 174 Wn. App. 370, 384-85, 298 P.3d 791 (2013):

A defendant may face multiple charges arising from the same criminal conduct but the principle of double jeopardy precludes multiple punishments for the same offense. The determination of whether or not a defendant faces multiple convictions for the same crime depends on the unit of prosecution. The unit of prosecution for a crime may be an act or a course of conduct. *The proper question is to determine what act or course of conduct the legislature has defined as the punishable act.*

Internal quotations omitted, emphasis added. A Court of Appeals reviews questions of statutory construction *de novo*. State v. Berry, 129 Wn. App. 59, 69, 117 P.3d 1162 (2005).

The approach to analyzing the unit of prosecution is well settled.

Id. at 385.

The first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

Id. If the statute is ambiguous as to the unit of prosecution, the rule of lenity applies and the ambiguity is resolved against turning a single transaction into multiple offenses. Id.

The unit-of-prosecution question as it pertains to RCW 26.50.110 is not a novel issue for Washington Courts. Division 1 of the Washington State Court of Appeals has previously held that the unit of prosecution for violation of a no-contact order is “a violation”, meaning one. State v. Brown, 159 Wn. App. 1, 10, 248 P.3d 518 (2010).

...RCW 26.50.110(1) punishes “a violation” of a no-contact order. Use of the word “a” supports the State’s reading that the unit of prosecution is each single violation of a no-contact order. The Supreme Court has consistently interpreted the legislature’s use of the “a” in a criminal statute as authorizing punishment for each individual instance of criminal conduct, *even if multiple instances of such conduct occur simultaneously*.

Id. at 11, internal quotations omitted, emphasis added.

Division 2 of the Washington State Court of Appeals interpreted the RCW 26.50.110 in State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (2009). There Allen sent two e-mails on different days that the victim viewed at the same time and he was convicted of two no-contact order violations. Allen argued that because the victim viewed the emails at the same time, one of his convictions violated double jeopardy. The Court disagreed, reasoning that the statute focuses on the defendant’s actions,

not the victim's, and held that each act of sending an e-mail constituted a statutory violation and therefore there was no double jeopardy infringement. Allen, 150 Wn. App. At 313. Division 1 of the Washington Court of Appeals similarly held that three no-contact order charges for sending three letters did not violate the prohibitions against double jeopardy. State v. Parmelee, 108 Wn. App. 702, 709, 32 P.3d 1029 (2001).

In State v. Brown, the defendant argued that multiple convictions for violating the no-contact order on consecutive days violated the prohibition against double jeopardy and that his conduct was continuing. State v. Brown, 159 Wn. App. 1 at 9. Brown argued that his continuous phone calls kept him in the "prohibited zone" and therefore he committed only one statutory violation. Id. at 12. The Court disagreed, holding that the State could charge multiple counts for multiple contacts. Id. at 13. "The unit of prosecution analysis is a pure question of legislative intent, while the continuing course of conduct analysis... is a factual inquiry undertaken by the trial court." Id.

In an unpublished case from 2013, Division 2 of the Washington Court of Appeals addressed a case with nearly identical facts. In State v.

Tek, 2013 Wash. App. LEXIS 937 (No. 42227-1-II) (2013)<sup>1</sup>, Defendant Tek was charged with 36 counts of violation of no-contact order with his wife Andrea for calling her from jail. Some of the calls were continuations of the same conversation because the jail system automatically disconnected all calls after 15 minutes. On appeal, Tek argued that the 36 convictions violated the double jeopardy prohibition and that he should only have been charged with 12 counts because many of the calls were continuations of conversations. The Court, relying on State v. Brown, cited above, held that each call constituted a single unit of prosecution.

As Division One correctly noted, the Supreme Court held in State v. Ose that the use of the word “a” in criminal statutes usually indicates authorization of punishment for each individual instance of criminal conduct. RCW 26.50.110 criminalizes “a violation” of a no-contact order, meaning an act in contravention of that order. An offense is consummated when the defendant does something to contact the subject of the restraining order, not when a conversation is actually initiated. In other words, the statute is keyed purely to an action undertaken by the defendant. Where Tek and Andrea understood one conversation to stop and another to begin is no more relevant than when the victim in Allen read the emails.

*A faithful application of Allen requires us to hold that a lengthy message broken up into several messages by the*

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<sup>1</sup> Under GR 14.1, unpublished opinions of the Court of Appeals filed on or after March 1, 2013 may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the Court deems appropriate.

*carrier constitutes separate violations of RCW 26.50.110.* Tek had to make the affirmative act of picking up the phone and dialing anew each time he was dropped by the jail carrier. In each of the 36 instances in which he was charged with violating the no-contact order, he made an affirmative act to get in contact with Andrea – precisely the conduct targeted by RCW 26.50.110. The 36 violations of a no-contact order did not violate double jeopardy provisions.

Id. at 22, internal quotations omitted, emphasis added. The above case, although not binding authority, nevertheless provides persuasive authority as to how to treat the fact pattern before this Court.

The above cases all concern the application of the unit-of-prosecution question to RCW 26.50.110. In each case, the applicable Court has determined that the RCW is not ambiguous. Because the statute is not ambiguous, the rule of lenity does not apply. Appellant argues that the statute is ambiguous because the Court has, in the past, allowed the State to charge one count per day when multiple violations have occurred on each day. However, the fact that the Court recognizes that the State has discretion to elect *not* to charge every violation of a no-contact order does not mean that the authorizing statute is ambiguous such that the rule of lenity would be implicated. Quite the contrary, Courts have repeatedly found the language of the statute to be unambiguous for purposes of the unit-of-prosecution analysis.

Defendant argues that the Trial Court's choice to quantify the unit of prosecution as each call is arbitrary and "could just as easily have concluded that each minute of Mr. Lammon's voicemail messages constituted one unit of prosecution. Or each sentence. Or each word. Or each second." Brief of Appellant, pg. 8. The Trial Court's decision was not ambiguous where it was based on precedent which interpreted "a violation" to be an act undertaken to contact the protected person. Appellant apparently concedes that each call may be a violation, but only so long as the calls happen on separate dates. This kind of distinction, while it may be made by the State for purposes of ease of charging when there are multiple offenses per day on multiple days, does nothing to alleviate the purported ambiguity of the statute. Would Appellant still support charges-by-date if the alleged violations had happened at 11:59 PM one day and 12:01 AM the next day?

The only logical interpretation – the one consistently relied upon by Washington Courts – is that "a violation" means an act undertaken to initiate contact. Because the language of the statute is not ambiguous, the rule of lenity is not implicated and the Trial Court properly determined that each call made by Mr. Lammon was "a violation" for purposes of RCW 26.50.110.

Once the unit of prosecution is determined, the factual analysis is necessary to decide if more than one unit of prosecution is present. State v. Vidales Morales, 174 Wn. App. at 388. Double jeopardy is avoided only where the facts of the case support multiple units of prosecution. Id. Here, although Mr. Lammon's phone calls were made close in time and were made to the same victim for the purpose of continuing his message to her, each time he chose to pick up the phone and dial her number, he made an affirmative decision to violate the no-contact order, which he himself admits in the messages. This is exactly the conduct RCW 26.50.110 intends to prohibit. Therefore here, as in Tek, Brown, Allen, and Parmelee, each contact initiated by the Defendant is properly charged in a separate count.

Appellant contends that the Trial Court's interpretation of the unit-of-prosecution question produces the absurd result of encouraging a person who intends to engage in violation of a no-contact order to contact the protected party in person, rather than on the phone. While this may be the practical effect for those criminal defendants who engage in a lengthy analysis of the repercussions of their actions ahead of time, this Prosecutor seriously doubts that there are enough of those defendants who pre-plan their violations such that this ruling would make an appreciable difference. Moreover, Appellant ignores the significant mental and

emotional effects on a protected party that occur when a restrained party repeatedly violates a no-contact order by repeatedly calling the protected party. Whether the restrained party feels that the contact is innocuous or not, or a better alternative to in-person contact, the message conveyed to the protected party is that the restrained party does not care about the Court's order, that they don't care about the protected party's desire to be left alone, and that they are willing to do whatever they have to do to get in contact with the protected party. For an individual likely already suffering from the cumulative effects of the actions that led to the no-contact order being put in place to begin with, this type of repeated contact is intensely damaging.

**II. APPELLANT/DEFENDANT WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE CHALLENGES SOUGHT BY APPELLANT WERE UNLIKELY TO HAVE BEEN SUCCESSFUL AND WHERE DEFENSE COUNSEL DID SEEK TO CONSOLIDATE THE PREDICATE PRIOR OFFENSES.**

Appellant claims that the Defendant's two prior NCO violations, which occurred on the same day in September 2017, were also entered in violation of double jeopardy for the same reasons pertaining to the present charges from 2018. The State, based on the same legal arguments presented above, disagrees.

Appellant further claims that because Defense Counsel did not challenge the validity of the underlying offenses, Defense Counsel's performance was deficient and therefore constituted ineffective assistance of counsel.

An appellate court reviews an ineffective assistance of counsel claim de novo as they present mixed questions of law and fact. State v. Yarborough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009); State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). To establish ineffective assistance of counsel, the defendant must show that (1) defense counsel's performance was deficient and (2) this performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the Court finds either prong has not been met, it need not address the other prong. In re Pers. Restraint of Cross, 180 Wn.2d 664, 693, 327 P.3d 660 (2014). To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. Id. The reasonableness of a particular action is evaluated by examining the circumstances at the time of the act, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, and to evaluate the conduct from counsel's perspective at the time. Id. at 694. Prejudice occurs when, but for the deficient performance, there is a

reasonable probability that the outcome would have differed. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A reviewing court presumes that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The presumption is rebutted if there is no possible tactical explanation for counsel's action. In re Pers. Restraint of Cross, Id. at 694. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for the claim that the defendant received ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Appellant concedes that the unit-of-prosecution arguments pertaining to the underlying prior convictions are the same as the unit-of-prosecution arguments pertaining the present convictions. Brief of Appellant, p. 10. Defense Counsel raised those arguments pretrial, when he filed the Motion and Affidavit to Consolidate Counts, CP 5-22. The Trial Court ruled against Defendant on that motion, finding that each violation of a no-contact order is a unit of prosecution and that each call made by the defendant could be charged in a separate count. CP 43-44. A challenge to the validity of the underlying offenses would have essentially asked the Trial Court to answer the same question and reiterate the same ruling. Thus, Appellant seems to be asking this Court to find that Defense

Counsel was ineffective because he did not engage in duplicative and futile motions practice.

Defense Counsel's performance did not fall below the objective standards of reasonableness because there was not a reasonable probability that his failure to challenge the validity of the underlying offense affected the outcome of the proceedings. The Trial Court's ruling on the unit-of-prosecution question was clear. Therefore, it is unlikely, that had Defense Counsel challenged the prior underlying convictions on the same grounds previously rejected by the Trial Court, that the Trial Court would have found the prior underlying convictions to be invalid.

Moreover, Defense Counsel did present the argument Appellant alludes to. At the December 17, 2018 Sentencing Hearing, Defense Counsel attempted to convince the Trial Court that the two prior convictions should not both count as predicate offenses and should be consolidated. CP 47-48. This argument was rejected by the Trial Court, but it was raised.

A tactical decision to not challenge that violations had occurred, but rather to focus on the sentencing and scoring issues in an attempt to secure the shortest sentence possible is a legitimate tactic, even if ultimately unsuccessful. Because there appears to be a tactical

explanation for Defense Counsel's actions, those actions cannot form the basis for an ineffective assistance of counsel claim.

## V. CONCLUSION

The State respectfully requests that the court deny Appellant's request vacate his convictions. The Trial Court properly determined that each phone call made by the Defendant was "a violation" for purposes of RCW 26.50.110 and that each violation was properly charged as a separate count. Because each violation was properly charged as a separate violation, Defendant's three convictions for his three violations do not run afoul of double jeopardy principles.

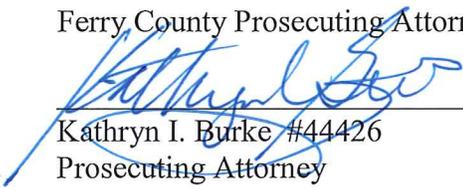
In addition, Defense Counsel did not provide ineffective assistance of counsel where Defense Counsel engaged in rigorous, though ultimately unsuccessful, pretrial motions practice, including attempting to consolidate Defendant's three counts into one count. Because the Trial Court had already ruled that each phone call violation may be charged as a separate count, Defense Counsel was not deficient in not requesting that the Trial Court apply the same analysis to Defendant's prior predicate offenses, where the likelihood of a different outcome was remote. Finally, Defense Counsel was not deficient where Defense Counsel did continue to challenge the underlying offenses and move for consolidation even up to and upon the day of sentencing. The mere fact that Defendant was

unsatisfied with the ultimate outcome of his criminal case does not render his attorney's efforts deficient or ineffective, especially where Defense Counsel did show a legitimate tactic in focusing on the sentencing issues, rather than on the violations (which were well-documented in recorded phone calls).

Therefore, the State respectfully requests that this Court enter an order denying Appellant's motion and affirming Defendant's conviction and sentence.

Dated this 9 day of August, 2019.

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# FERRY COUNTY PROSECUTORS OFFICE

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