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NO. 54805-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEITH G. GEORGE,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHARLES W. MERTEL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The double jeopardy clause prohibits a defendant from being tried twice for the same offense. Jeopardy attaches when a jury is impaneled and sworn, or at a bench trial when a judge receives evidence. Jeopardy does not attach during pretrial proceedings or at a probable cause determination. At the time defendant, Keith George, was charged in Kent Municipal Court with Violation of a No Contact Order (VNCO), he was charged with the same offense and Felony Harassment in superior court. The municipal court, acting without knowledge of the superior court case, dismissed the VNCO charge for “insufficient evidence” prior to trial by judge or jury. A superior court jury later found George guilty of VNCO. Where George obtained dismissal of the VNCO in municipal court prior to trial, has he failed to show that he was twice placed in jeopardy?

2. In Washington, a defendant who is in custody must be brought to trial within 60 days of the commencement date. When a defendant fails to appear for a court proceeding, the commencement date is reset to the defendant’s next court appearance. While George’s second VNCO charge was pending in Renton Municipal Court, he failed to appear for a pretrial hearing,

and the court issued a bench warrant. At the time, George was in custody at the county jail on other charges. Subsequently, George reappeared in municipal court, and after dismissal of the case without prejudice, he was tried for VNCO and two other counts in superior court less than 60 days later. Was George tried within the time allowed for trial? Did he fail to preserve error by not responding to the trial court's request for briefing to explain his objection?

3. Evidence supports a conviction when any rational trier of fact could find the crime elements proven beyond a reasonable doubt. A sufficiency challenge admits the truth of trial evidence and requires all reasonable inferences to be drawn in the State's favor. A conviction for VNCO requires proof that a defendant violated a valid protection order. The evidence showed that George violated a valid three-year "temporary" restraining order (TRO), issued in California, by having repeated contact with the victim in Washington. Prior to these incidents, a Washington court issued a 14-day restraining order, but later denied the victim's request for a "full" restraining order and noted that any prior restraining order would expire. The Washington court's denial order made no express reference to dismissing the California TRO. Could any

rational trier of fact have found beyond a reasonable doubt that the California TRO remained in effect on the charged incident dates?

4. A conviction for Felony Harassment requires the trier of fact to find beyond a reasonable doubt the essential element that the victim reasonably believed the defendant would carry out a threat to kill. The jury found beyond a reasonable doubt all essential elements of misdemeanor Harassment. Where the court's instructions, however, did not inform the jury of the element requiring the victim's reasonable belief of the defendant's threat to kill, should George's conviction for Felony Harassment be reversed?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Keith George, with Felony Harassment – Domestic Violence, a violation of RCW 9A.46.020(1), (2), occurring on or about February 14, 2004, and Domestic Violence Violation of a No Contact Order (VNCO), a violation of RCW 26.50.110(1), occurring on or about February 21, 2004. CP 1-2. For trial, the State added another count of VNCO, occurring on or about December 22, 2003. CP 7. A jury found George guilty

of all three counts. CP 13-16, 39-40. The court imposed a standard range sentence of 12 months of incarceration for Felony Harassment, a consecutive sentence of 12 months for the February 14, 2004 VNCO and a 12-month suspended sentence for the December 22, 2003 VNCO. CP 50, 44.

The two misdemeanor VNCO counts originated in Kent and Renton municipal courts. The December 22, 2003 VNCO was filed in Renton Municipal Court on January 6, 2004 under Case Number CR33049 as a violation of RCW 26.09.300(1). Brief of Appellant (BOA), Appendix (App.) B at 1.¹ The February 21, 2004 VNCO was filed in Kent Municipal Court on February 24, 2004 under Case Number K43924FV as a violation of RCW 26.50.110. BOA, App. A at 1.

The Renton docket for the December 22, 2003 VNCO shows that on May 17, 2004, George failed to appear for a pretrial motion hearing in that case, and the court issued a bench warrant. BOA, App. B at 12. At the time, George was incarcerated at the Regional Justice Center jail in Kent on his other domestic violence charges

¹ The Court of Appeals granted George's motion for judicial notice of documentation from the VNCO charges originally filed in Kent and Renton municipal courts. The State cites to the copies of these documents attached to George's opening brief.

and could not be transported to Renton. Id. When George reappeared in Renton Municipal Court on June 4, 2004, the court reset a jury trial date for July 15, 2004. BOA, App. B at 13. This date was well within the new 60-day time period for trial under CrRLJ 3.3(c)(2)(ii) following George's failure to appear. The Renton trial date was stricken, however, when the city prosecutor moved for dismissal without prejudice on June 14, 2004 to allow the State to refile this charge in superior court. BOA, App. B at 13. King County Superior Court allowed the State to amend its information to add this charge on July 13, 2004 during a pretrial hearing in George's felony case. CP 6-7; 2RP 3.²

The State filed the February 21, 2004 VNCO in superior court in its original Information as Count II on February 27, 2004. CP 1-2. This filing occurred only three days after the same charge had been filed in Kent Municipal Court. The Kent court, however, failed to dismiss the charge after it was filed in superior court. Instead, the Kent court subsequently conducted a pretrial hearing on April 28, 2004 in which the city prosecutor added an additional charge from yet another misdemeanor case pending against

² The Verbatim Report of Proceedings for George's trial and sentencing is cited as follows: July 12, 2004 (1RP); July 13, 2004 (2RP); July 19, 2004 (3RP); July 20, 2004 (4RP); July 21, 2004 (5RP); August 13, 2004 (6RP).

George, K43955FV. BOA, App. A at 3. At the hearing, the Kent court noted that it had ordered the city prosecutor to provide all discovery to the defense by March 16, 2004. Id. The court also had ordered the city prosecutor to show that it had “met its burden for proof of personal service,” presumably a reference to service of the underlying protection order that George was accused of violating.³ BOA, App. A at 4. The docket reflects that the prosecutor then offered an exhibit, which the court found insufficient to show proof of personal service; the docket stated that the court “dismisses restraining order violations with prejudice.” Id. The docket gave no indication that this dismissal occurred after George had waived his right to a jury trial, evidence had been received in a bench trial, or after a jury had been impaneled and sworn.

2. TRIAL FACTS.

Julianna George suffered long-term domestic abuse by her husband, Keith George. 3RP 42-43. For example, while the couple was living in California in 1996, Keith broke Julianna’s nose.

³ As George concedes, there is no requirement for proof of personal service in a VNCO case. BOA at 12 n.3 (citing City of Auburn v. Solis-Marcial, 119 Wn. App. 398, 400, 79 P.3d 1574 (2003)). The city, therefore, did not have a burden to prove personal service.

3RP 101. The incident occurred in their home with Julianna's children present. 3RP 101. Yet, at various times during the relationship when Keith was incarcerated, Julianna felt safe. 3RP 113-14. She would return to Keith because he was her husband, and because she thought things would get better. 3RP 43. In 2001, Keith pushed Julianna against a stove in their home while one of her daughters told him to stop. 3RP 104. Julianna fled from the home and ran down the street in fear. 3RP 104.

On July 10, 2001, Julianna obtained a restraining order from a California court. 3RP 103, 115; 4RP 49. She got the order because she "didn't want to be hurt anymore." 3RP 54. The California order by its terms did not expire for three years, until July 10, 2004. 4RP 23. It was valid throughout California and in all other states. 4RP 43.

On November 19, 2001, a police officer in San Joaquin County, California, performed a traffic stop on a vehicle driven by Keith. 4RP 35. The vehicle was registered to Keith and had a personalized license plate bearing his initials. 4RP 36. While checking identification and license information with a radio dispatcher, the officer learned that Keith was the restrained party in the order obtained by Julianna, which had yet to be served on him.

4RP 38. Following a procedure approved in California to effectuate personal service, the officer had the dispatcher read the details of the order to Keith over a speaker. 4RP 39. As part of this procedure, the dispatcher was required to read the names of the protected and restrained parties from the order, the court of issuance, issuance and expiration dates, and the case number. 4RP 39. The dispatcher also read aloud warnings from the order that prohibited contact. 4RP 39. After the traffic stop, the officer completed a proof-of-service form that was filed in court. 4RP 41, 43.

While the restraining order was still in effect, Julianna allowed Keith to return to her, again believing that the relationship would improve. 3RP 55. Keith then moved from California to Seattle in 2002 to make a new start. 3RP 56; 4RP 79. Julianna later joined him, and they lived together in an apartment for about eight months. 3RP 57. They then moved to a rental house that was owned by Carina Borja and her sister, Brenda Borja. 3RP 58; 4RP 78. After four months, however, Julianna moved out due to Keith's domestic violence. 3RP 58.

Keith did not want Julianna to go. 3RP 63. While Julianna was in the process of moving from their rental house, Keith

searched her boxed property. 3RP 66. He later mentioned that he had found a copy of the California restraining order. 3RP 66, 81.

Julianna moved into domestic violence shelter housing and obtained a temporary restraining order from King County Superior Court in August 2003. 3RP 73-74; 4RP 18. By its terms, the order was valid only until the next hearing, which was fourteen days later. 4RP 60. Keith came to Julianna's shelter housing to ask her to braid his hair; she agreed to avoid upsetting him. 3RP 74. He did not like her living there. 3RP 77. When he told her that he wanted her to come back to him, she feigned agreement for her safety. 3RP 77. She also began carrying a barbecue fork in her purse as a means of protection against him. 3RP 78.

In late summer 2003, Keith contacted Carina Borja to inform her that Julie had moved out, and that he was having trouble paying the rent. 3RP 6. Carina and her sister learned that he was having "emotional problems" over Julianna's departure and had lost his job. 3RP 6. They attempted to work out a payment schedule that would allow him to stay in the house. 3RP 6. A time came, however, when the Borjas received no further rental payments. 3RP 7. They filed an action against Julianna in small claims court, because her name was still on the lease. 3RP 7. A mediator

arranged for Julianna to begin paying back rent in increments. 3RP 25. The Borjas eventually decided to sell the house. 3RP 9.

In October 2003, King County Superior Court denied Julianna's request for a long-term restraining order because she still allowed Keith to contact her. 3RP 83; 4RP 60. From November through December of 2003, Keith began contacting Julianna without notice at the hospital where she worked. 3RP 61, 82-83. These contacts caused her problems, and she did not want him to continue coming to the hospital. 3RP 61-62. She gave a security guard a copy of the California order. 3RP 61.

On December 22, 2003, Julianna was working at the hospital when Keith arrived. 3RP 62. Security staff intercepted him within a few feet of the main entrance. 3RP 62; 4RP 11. A security guard informed Keith that he was not welcome, due to the domestic violence situation with his wife; he could only be at the hospital if he was there for a doctor's appointment or to visit a patient. 4RP 12. Keith claimed to have no knowledge of any restraining order against him. 4RP 12. He claimed to have documentation showing that any previous incidents of domestic violence had been resolved in the courts. 4RP 12. He said he would return the next day with the documentation. 4RP 12. Julianna saw Keith leave the

premises. 3RP 62. Keith did not return to show security staff the promised documentation. 4RP 12.

In January 2004, the Borjas told Keith that they were going to sell the rental house and that he would have to vacate it once they found a buyer. 3RP 19. Keith became very upset because he had nowhere else to go, which he blamed on Julie. 3RP 19. He said that they were "supposed to be together." 3RP 19. He refused to consider moving to a shelter that the Borjas had located for him. 3RP 23.

On February 14, 2004, Julianna was working a Saturday shift at the hospital. 3RP 68. She received a call from Carina Borja, who had gone to the rental house to meet with her sister and prepare for the arrival of an appraiser. 3RP 70. At the house, Carina and her sister encountered Keith, who was packing his belongings. 3RP 13, 35. Keith complained that Julianna had not been returning his calls. 3RP 13. Although Keith normally became emotional and upset when talking about problems with his wife, he was speaking calmly and deliberately about her. 3RP 14. He then said that "he was going to kill her, and he was going to cut off her head, and nobody would find her." 3RP 14. He stated that "she couldn't keep looking over her shoulder, forever, because a wife

had to be beside her husband, no matter what.” 3RP 14. When Carina and her sister attempted to persuade him that he should move on with his life, he said “no, no, no” in a very decided voice. 3RP 14, 37. He said that he was “really angry.” 3RP 17. Carina became scared for Julianna’s safety due to Keith’s threat to kill her, so she went outside and called her on a cellphone. 3RP 15, 28.

Carina told Julianna that Keith was really angry and had said that he was coming to kill her. 3RP 70. Carina said that Keith had threatened to cut off Julianna’s head. 3RP 71. When Keith came outside and asked if Carina was speaking to Julianna on the cellphone, she replied that she was talking to a “client.” She had become scared and did not want trouble. 3RP 15.

Because Keith was upset, Julianna believed that he was capable of carrying out his threats. 3RP 71. She thought that, in that frame of mind, he would come to the hospital to hurt or kill her. 3RP 107. Julianna called the police, then informed the hospital’s security. 3RP 71. A security officer noticed that Julianna appeared “very nervous” and was “in fear that something was going to happen to her.” 4RP 30. He guided her to a quiet work area away from any windows. 4RP 31. Julianna later met with police in person and provided a statement about Keith’s threats. 3RP 72.

On February 21, 2004, Julianna was still living in the domestic violence shelter housing. 3RP 79. At around 8:30 in the evening, she heard a noise outside and looked through a window. 3RP 79. Keith was outside the residence. 3RP 79. He had arrived uninvited. 3RP 79. Julianna called the police. 3RP 79.

At trial, Keith admitted going to the hospital where Julianna worked on December 22, 2003 to contact her. 4RP 83. He was met by security officers who told him “there was a restraining order in place.” 4RP 84. Keith agreed to leave the premises. He promised to return with paperwork showing that there was no restraining order in effect, which he failed to do. 4RP 84-85. He admitted to meeting with the Borjas on February 14, 2004 at the rental house, although he denied speaking to them about his wife. 4RP 82, 94. He stated he was packing his things, and he felt it was “unfair” that he had to move. 4RP 90. He could not explain why Carina and Brenda both testified to hearing him threaten to kill Julianna. 4RP 97. He did not specifically deny going to Julianna’s shelter housing on February 21, 2004 to contact her.

C. ARGUMENT

1. GEORGE FAILS TO SHOW ANY DOUBLE JEOPARDY VIOLATION.

George claims that his VNCO conviction, which originated with a charge filed and later dismissed “with prejudice” in Kent Municipal Court, violates double jeopardy. He does not contend that he was actually tried in municipal court prior to his jury trial in superior court. Rather, he reads the municipal court’s pretrial dismissal order as an adjudication on the merits, tantamount to a dismissal at the close of the State’s case-in-chief at trial. Because jeopardy did not attach in the municipal court prosecution, there was no double jeopardy violation. Moreover, to the extent the dismissal order can be read as a decision on the merits, the municipal court acted without authority because the charge had already been filed in a court of original jurisdiction. Under the circumstances, the dismissal order was not rendered by a court of competent jurisdiction, and jeopardy again failed to attach. For these reasons, George’s claim should be rejected.

a. The Double Jeopardy Standard.

The double jeopardy clause of the United States Constitution provides that no person shall “be subject to the same offense to be

twice put in jeopardy of life or limb." U.S. Const. amend. 5. In Washington, the state constitution similarly provides that "[n]o person shall be ... twice put in jeopardy of the same offense." Wash. Const. art. 1, § 9. The federal and state double jeopardy clauses are coextensive. In re Personal Restraint of Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003). The term "jeopardy" refers to the "danger of conviction and punishment which the defendant in a criminal prosecution incurs when he is put on trial before a court of competent jurisdiction under an indictment sufficient in form and substance to sustain a conviction." State v. Williams, 57 Wn.2d 231, 232, 356 P.2d 99 (1960).

Jeopardy does not attach, and the double jeopardy clause has no application, "until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.'" Serfass v. United States, 420 U.S. 377, 388, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975) (citations omitted) (double jeopardy clause did not bar subsequent trial of defendant who had moved successfully for dismissal of indictment prior to trial by jury or judge). Put another way, jeopardy "attaches in a jury trial when the jury is impaneled, or in a bench trial when the court begins to receive evidence." State v. Higley, 78 Wn. App. 172, 179, 902 P.2d 659 (1995).

A dismissal for insufficient evidence “at the close of the prosecution’s case in chief” constitutes an acquittal that bars subsequent prosecution under the double jeopardy clause. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). Jeopardy does not attach, however, merely because a charge is filed or pretrial proceedings are held. Higley, 78 Wn. App. at 179 (citing Serfass, 420 U.S. at 389). Where a court deems pretrial dismissal of a prosecution an “acquittal,” but jeopardy has not attached as a matter of law, the court’s terminology “has no talismanic quality for purposes of the Double Jeopardy Clause.” Serfass, 420 U.S. at 392. Thus, jeopardy does not attach if a court grants a defense motion to dismiss prior to a defendant’s waiver of the right to jury trial; under such circumstances, the court has not rendered a determination regarding the defendant’s guilt or innocence for double jeopardy purposes. Id. at 389. Lastly, where a court that lacks competent jurisdiction conducts a criminal trial, jeopardy does not attach and the double jeopardy clause does not bar retrial. State v. Cockrell, 102 Wn.2d 561, 567, 689 P.2d 32 (1984).

b. Jeopardy Never Attached to George's VNCO Charge While It Was Pending Before Kent Municipal Court.

George acknowledges that the VNCO conviction he challenges as a double jeopardy violation was based on a charge filed in King County Superior Court only three days after it was filed in Kent Municipal Court. BOA at 4. He presents documentation to show that the Kent court later dismissed its case, purportedly "with prejudice," because the city prosecutor presented "insufficient evidence to establish personal service." BOA at 5, App. A at 3-5.⁴ What George fails to show, however, is that at the time of the April 28, 2004 dismissal by the municipal court, a jury had been impaneled and sworn, or that he had waived his right to a jury trial and was in the midst of a bench trial on the VNCO charge. Thus, he fails to establish that jeopardy attached during the municipal prosecution to bar the superior court prosecution.

The Kent docket plainly shows that on April 28, 2004, the municipal court held a pretrial hearing on procedural issues including joinder of charges, amendment, and discovery deadlines. BOA, App. A at 3. The docket is silent as to the superior court

⁴ George tacitly acknowledges that the Kent court's stated basis for dismissal was contrary to controlling Washington law. BOA at 12 n. 3 ("[Personal service] is not an essential element of the offense of violation of a court order").

prosecution. At no point does the docket show that George waived his right to a jury trial, or that the court had begun to hear evidence in the city prosecutor's case-in-chief during a bench trial.

Absent proof of George's waiver of the right to a jury trial⁵ and the city's presentation of evidence in a bench trial, jeopardy never attached, and no bar arose to subsequent trial. Serfass, 420 U.S. at 389. It is irrelevant that the court considered an exhibit offered by the city to satisfy the court's demand for "proof of personal service." See BOA, App. A at 4. "It is of course true that many preliminary proceedings and motions, where evidence is received, do not amount to jeopardy. Thus, a preliminary hearing does not put the defendant in jeopardy." United States v. Hill, 473 F.2d 759, 763 (9th Cir. 1973). Similarly, it is irrelevant that the municipal court purported to dismiss the VNCO charge "with prejudice." Serfass, 420 U.S. at 392 (where jeopardy did not attach, court's terminology in dismissing initial prosecution had "no talismanic quality for purposes of the Double Jeopardy Clause").

Moreover, the municipal court's pretrial dismissal of the VNCO charge for insufficient evidence of personal service, a fact

⁵ A bench trial before a court of limited jurisdiction requires a defendant to file "a written waiver of a jury trial" and obtain the court's consent. CrRLJ 6.1.1(a). George has produced no such documentation in support of his claim.

held not to be an essential element under Solis-Marcial, 119 Wn. App. at 400, did not constitute a determination on the merits implicating double jeopardy principles. State v. Lewis, 16 Wn. App. 791, 793, 559 P.2d 581 (1977) (trial court's granting of motion to dismiss for lack of proof of a non-element of charged offense was not a determination on the merits for double jeopardy purposes). The State was no more bound by the municipal court's dismissal than by a finding of insufficient probable cause at a preliminary hearing. See State v. Jefferson, 79 Wn.2d 345, 347, 485 P.2d 77 (1971) ("even where the magistrate finds insufficient evidence during the preliminary hearing to establish probable cause, the prosecutor is not bound by this determination; and he may still choose to file an information in superior court when he is satisfied that probable cause exists").

Even if the municipal court's dismissal of the VNCO charge could be read as a decision on the merits, however, jeopardy did not attach because the municipal court lacked competent jurisdiction to entertain the defense motion to dismiss. While RCW 3.66.060 grants "district" courts jurisdiction over misdemeanors "concurrent" to that of superior courts, the term "concurrent" is synonymous with "equal," but not "simultaneous": to read the

statute otherwise leads to the absurd conclusion that the legislature authorized simultaneous trials of the same misdemeanors in district and superior courts. See Seattle v. Crockett, 87 Wn.2d 253, 256, 551 P.2d 740 (1976) (“the procedural rules applicable to superior courts and courts of limited jurisdiction . . . were designed to operate in conjunction with one another and not to require meaningless and useless duplication”). Here, the municipal court had competent jurisdiction over the VNCO charge only until it was filed in superior court.

The Washington constitution grants original jurisdiction over criminal actions, felony and misdemeanor, to superior courts. Wash. Const. art. 1, § 25; art. 4, § 1, 6. Municipal courts have limited jurisdiction over criminal actions only as specified by the legislature. Wash. Const. Art. 4, § 1. A municipal court, such as Kent Municipal Court, lacks authority to try a case involving both felony and misdemeanor counts because no law grants courts of limited jurisdiction the authority to try felony cases. See State v. Wernick, 40 Wn. App. 266, 268, 698 P.2d 573 (1985). More significantly, no law grants municipal courts authority to dismiss a criminal action with prejudice that is already pending in superior court.

In State v. Cockrell, 102 Wn.2d 561, 567, 689 P.2d 32 (1984), the Washington Supreme Court recognized that a double jeopardy violation did not arise where a defendant was initially tried before a court lacking competent jurisdiction. The Cockrell court noted that jeopardy did not attach under such circumstances because the defendant was not at risk for an effective determination of guilt. Cockrell, 102 Wn.2d at 567 (quoting Serfass, 430 U.S. at 391-92). Thus, the timely filing of an affidavit of prejudice in Cockrell deprived the trial court of competent jurisdiction over criminal charges; even though the court nonetheless proceeded to conduct a trial, jeopardy never attached to bar retrial after remand. Id.

Because the State had already filed the challenged VNCO charge against George in superior court when the municipal court purportedly dismissed it with prejudice, the municipal court was not at the time a court of competent jurisdiction. See Wernick, 40 Wn. App. at 270 (filing of case in superior court that had been pending in district court gave superior court rules precedence over district court rules). Accordingly, jeopardy never attached during the municipal court proceedings.

For these reasons, George's double jeopardy claim should be rejected.

2. GEORGE FAILS TO SHOW ANY VIOLATION OF THE RULES GOVERNING TIME FOR TRIAL.

George claims that his VNCO conviction, which originated with a charge filed and later dismissed in Renton Municipal Court, violated the time for trial rules. This Court should refuse to review the issue because George failed to preserve it sufficiently in the trial court. In addition, because George misreads his commencement date, which was reset after his second failure to appear, he erroneously concludes that time for trial expired while the charge was pending in municipal court. Lastly, because George's time-for-trial calculations fail to exclude time spent on court proceedings for unrelated charges, he also fails to show a violation of the time-for-trial rules. Thus, George's claim must fail.

- a. George's Failure to Specify a Time for Trial Objection Resulted in Waiver of the Issue On Appeal.

At the time of George's superior court arraignment on the refiled VNCO charge from Renton Municipal Court on July 13, 2004, the following colloquy took place:

THE COURT: WE HAVE HERE -- THE FIRST THING BEFORE ME IS A MOTION AND ORDER PERMITTING FILING OF THE SECOND AMENDED INFORMATION. AND SO WE WILL NEED TO HAVE AN ARRAIGNMENT ON THAT. FIRST OF ALL, IS THERE ANY OBJECTION TO THE FILING OF THE SECOND AMENDED INFORMATION?

MR. HAMMERSTAD: COULD I HAVE ONE MOMENT, YOUR HONOR?

THE COURT: SURE.

MR. HAMMERSTAD: **WE DON'T OBJECT, YOUR HONOR.**

2RP 2 (emphasis added).

Subsequently, however, the defense attorney made a belated objection at George's request::

MR. HAMMERSTAD: YOU HONOR, MR. GEORGE WANTED ME TO STATE FOR THE RECORD THAT THE RENTON MUNICIPAL COURT CHARGE -- HE HAS BEEN HELD --

MR. GEORGE: SINCE FEBRUARY. AND I ASKED FOR A SPEEDY TRIAL, AND I HAVEN'T SEEN A TRIAL YET.

MR. HAMMERSTAD: BY NOT OBJECTING TO THE AMENDED INFORMATION, HE IS NOT WAIVING ANY CLAIMS.

THE COURT: THE RIGHT TO SPEEDY TRIAL ON THAT CHARGE?

MR. HAMMERSTAD: CORRECT.

THE COURT: WE'LL GO AHEAD AND GO FORWARD WITH TRIAL ON THAT. **AND YOU AT ANY TIME CAN SUBMIT A BRIEF TO ME ON THE SPEEDY TRIAL ISSUE WITH REGARD TO THE RENTON CHARGE,** WHICH, NOW, WILL BE INCORPORATED INTO COUNT III HERE. AND SO YOU UNDERSTAND THAT? ALL RIGHT.

2RP 4-5 (emphasis added).

The record shows that the defense did not submit the required briefing or again raise the issue. An appellate court may refuse to review an issue raised for the first time that was not fairly raised in the trial court. RAP 2.5(a). This rule is designed to encourage efficient use of judicial resources. A trial court should be given the opportunity to address an error to avoid subsequent appeals. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Given George's failure to respond to the trial court's specific request for briefing to support the issue he now raises, this Court should refuse to review it under RAP 2.5(a).

Moreover, the issue does not fall under the exception that allows for review of a "manifest error affecting a constitutional right." RAP 2.5(a)(3). While a defendant has a constitutional right to a speedy trial, a violation of the court rules designed to protect this right does not by itself establish manifest error affecting a constitutional right. See State v. Whelchel, 97 Wn. App. 813, 817, 988 P.2d 20 (1999) ("Speedy trial rules are a framework to strictly implement, not substitute for the constitutional rights to speedy trial"). As discussed below, the record demonstrates that there was no violation of the court rules regarding time for trial. Thus, no

manifest error arose affecting George's constitutional rights. For these reasons, George's claim should be rejected.

b. The Time for Trial Standard.

CrRLJ 3.3 governs the time for trial in a criminal action pending before a court of limited jurisdiction.⁶ Under CrRLJ 3.3(b)(1)(i), a defendant who is detained in jail must be brought to trial within "60 days after the commencement date specified in this rule." The initial commencement date is the date of arraignment. CrRLJ 3.3(c)(1). When a defendant fails to appear for any proceeding at which he is required to attend, however, the commencement date is reset to "the date of the defendant's next appearance." CrRLJ 3.3(c)(2)(ii). Under such circumstances, the time for trial expires 60 days after the defendant reappears in the court of limited jurisdiction.

⁶ The parallel superior court rule is CrR 3.3.

- c. George's Second Failure to Appear in Renton Municipal Court Reset His Commencement Date, And He Was Timely Tried Less Than 60 Days After His Reappearance.

George erroneously calculates that he was brought to trial on the VNCO charge originally filed in Renton Municipal Court "76 days" after the commencement date. BOA at 14. He acknowledges his out-of-custody arraignment on February 2, 2004 and that he subsequently failed to appear for a pretrial conference on March 1, 2004, when the court issued a bench warrant. Id. He then counts a 60-day period for trial starting on March 12, 2004, the date on which he reappeared in custody in Renton Municipal Court. Id. Because the charge was not dismissed without prejudice for refiling in superior court until June 14, 2004, 76 days later, he claims a speedy trial violation. Id.

George neglects to mention that less than 60 days after his reappearance on March 12, 2004, which became his commencement date after his first failure to appear pursuant to CrRLJ 3.3(c)(1), Renton Municipal Court ordered that he be released on personal recognizance on May 6, 2004. BOA, App. B at 11. As the docket indicates, this release extended the time-for-

trial expiration to 90 days, until June 10, 2004. Id.; see CrRLJ 3.3(b)(3) (“If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days”).

The docket then shows that George again failed to appear on May 17, 2004 for a pretrial hearing. BOA, App. B at 11-12. At that time, George was in custody at the Regional Justice Center jail and could not be transported to the Renton City Jail. BOA, App. B at 12. Thus, the municipal court issued a second bench warrant to secure his presence. Id. When George next appeared in custody in Renton Municipal Court on June 4, 2004, this became the reset commencement date under CrRLJ 3.3(c)(2)(ii), and the 60-day time for trial did not expire until August 3, 2004.⁷ As George concedes, he was arraigned and brought to trial while in custody on this charge in superior court on July 13, 2004. This was within the time allowed for trial under CrR 3.3(b)(1)(i). Thus, the record shows that his claim lacks merit.

⁷ The resetting of the commencement date to compensate for a defendant's failure to appear and the necessity of issuing a bench warrant, is roughly equivalent to the tolling of time for trial where a court lacks a mechanism to compel authorities and courts in another jurisdiction to honor a transport order. See City of Seattle v. Guay, 150 Wn.2d 288, 76 P.3d 231 (2003). In neither situation can the court or prosecution compel the attendance of a defendant detained in another jurisdiction.

In addition, CrRLJ 3.3(e)(2) excludes from the computation of time for trial proceedings on unrelated charges, including “pre-trial proceedings, trial and sentencing.” During the time allowed for trial on George’s VNCO charge in Renton Municipal Court, he attended pre-trial proceedings on unrelated charges in Kent Municipal Court (e.g., the April 28, 2004 pretrial hearing in Kent Municipal Court, BOA, App. A at 3-5)⁸ and was then detained at the Regional Justice Center Jail from May 17, 2004 on the unrelated superior court charge of Felony Harassment, and the Renton bench warrant hold, until his reappearance in Renton Municipal Court on June 4, 2004, 19 days later. BOA, App. B at 11-12. At a minimum, therefore, 20 days should be excluded from George’s total of 76 days, which again shows that he was brought to trial within the 60-day period allowed by CrR 3.3(b)(1)(i). Therefore, George’s claim must fail.

⁸ George submits a partial docket for his prosecution in Kent Municipal Court, showing only the April 28, 2004 proceedings. Clearly, he attended other proceedings in Kent Municipal Court on this unrelated charge, as shown by the reference in the docket to a March 16, 2004 pretrial hearing. BOA, App. A at 3. Review of the entire Kent docket to establish additional proceedings is unnecessary, however, in light of George’s May 17, 2004 failure to appear and the excluded periods already established by the record.

3. SUFFICIENT EVIDENCE SHOWED THAT GEORGE VIOLATED A VALID RESTRAINING ORDER.

George alleges that a Washington court dismissed the California TRO giving rise to his two VNCO charges prior to the incident dates. He therefore claims that insufficient evidence supports his VNCO convictions because no valid TRO existed. As a factual matter, George fails to establish that the Washington court dismissed the California court's TRO. As a legal matter, George fails to cite any authority authorizing the Washington court to dismiss the California Court's TRO, even if that had been the Washington court's intention. Viewing the trial evidence in the light most favorable to the State, a rational trier of fact could have found that George twice violated a valid order prohibiting contact with his wife. Therefore, George's claim lacks merit.

A defendant cannot be convicted of VNCO if the violated court order was invalid at the time of the charged incident. State v. Miller, 123 Wn. App. 92, 96 P.3d 1001 (2004); City of Seattle v. Edwards, 87 Wn. App. 305, 308, 941 P.2d 697 (1997). Yet, George makes no claim that the California TRO was facially invalid, or was issued by a court that lacked jurisdiction or misapplied controlling California law. He does not dispute that the California

TRO, by its terms, was in effect on the charged incident dates underlying his VNCO convictions. Nor does he claim that the trial court improperly admitted evidence of the California TRO for the jury's consideration. Rather, because the July 10, 2001 California order was labeled a "Temporary Restraining Order," and because a Washington court denied George's wife a "full Order" while dismissing "[a]ny previously entered Temporary Order" on October 23, 2003, he concludes that "the California order was not valid at the time of the incidents charged against Mr. George." BOA at 17.

A cursory review of the record shows that the "Temporary Order" referenced by the Washington court on October 23, 2003 was the initial 14-day restraining order that it issued after Julianna George's filing of a petition and initial ex parte hearing. 3RP 73-74; 4RP 18, 60. This order, entitled "**Temporary Order** for Protection and Notice of Hearing – DV," by its terms, was issued on August 1, 2003 and remained effective only until August 15, 2003. BOA, App. E at 1 (emphasis added). The order, by its terms, anticipated a subsequent hearing at which the restrained party was directed to show cause "why this **temporary order** should not be made effective for one year or more" BOA, App. E at 2 (emphasis added). The Washington court's October 23, 2003 "Denial Order,"

which was issued after expiration of the temporary order, contained boilerplate language referencing expiration of any previously entered “**Temporary Order.**” BOA, App. F at 2. The order cited Julianna’s admitted contact with her husband “since the **Temporary Order** of Protection was entered” as the basis for denial of a full order. BOA, App. F at 1. The Denial Order made no reference to the California court’s order, which was entitled “Restraining Order After Hearing (CLETS) (Domestic Violence Prevention).” BOA, App. C at 1. Not only is the California order not entitled “Temporary Order,” it was not “temporary” by its terms: the California order remained in effect for three years, a period of time greater than the minimum one-year duration of the Washington court’s “full” order. *Id.*; BOA, App. E at 2. These circumstances show that the Washington court never intended to dismiss the California TRO.

In addition, George cites no authority showing that the Washington court had authority to dismiss the California court’s order. Such a dismissal by the Washington court would have amounted to a violation of full faith and credit under federal law. 18 U.S.C. 2265 (“Any protection order issued . . . by the court of one State . . . shall be accorded full faith and credit by the court of

another State . . . and enforced as if it were the order of the enforcing State”). Thus, George’s challenge to the validity of the California TRO is meritless.

An appellate court reviews a sufficiency challenge by determining whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 222, 616 P.2d 628 (1980). Such a challenge “admits the truth of the State’s evidence and all reasonable inferences therefrom.” State v. Gohl, 109 Wn. App. 817, 823, 37 P.3d 293 (2001). These inferences “must be drawn in favor of the State and most strongly against the defendant.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

At trial, the State presented evidence that George was restrained by a valid TRO issued in California, which he repeatedly violated by having contact with his wife. This evidence must be construed in the light most favorable to the State. Accordingly, George has failed to show that insufficient evidence supports his VNCO convictions for violating the California TRO.

**4. GEORGE'S FELONY HARASSMENT CONVICTION
MUST BE REVERSED DUE TO OMISSION OF AN
ESSENTIAL ELEMENT IN THE COURT'S
INSTRUCTIONS TO THE JURY.**

George contends that his trial rights were violated by the court's jury instructions, which bifurcated the elements of Felony Harassment into a "to convict" instruction and a special verdict form. Because this issue was resolved in the State's favor by the Washington Supreme Court after the filing of George's opening brief, George's claim must be rejected under controlling law.

George also contends that the instructions erroneously failed to inform the jury of the essential element that the victim reasonably believed that George would carry out his threat to kill. The State concedes that the instructions omitted this essential element of Felony Harassment, and that the case must be reversed for further proceedings.

The crime of Harassment is set forth as follows:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . .
 - (b) The person by words or conduct places the

person threatened in reasonable fear that the threat will be carried out. . . .

(2) (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if . . . the following applies: . . .

(ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

RCW 9A.46.020.

The statute makes clear that if the threat made is a threat to kill, the offense is elevated from a misdemeanor to a felony. The trial court's "to convict" and definitional instructions for the Harassment charge did not include the element of a threat to kill. CP 25-26. Rather, the court submitted this element to the jury in a special verdict form. CP 28. The jury only considered this form after finding George guilty of the elements of the base crime of misdemeanor Harassment. CP 35-36. The special verdict form asked, "Was the threat that was made a threat to kill?" CP 28. The jury answered this in the affirmative. BOA, App. I at 2.

George argues that this bifurcation violated his trial rights, since the "to convict" instruction did not state that he made a threat to kill. After George filed his opening brief, the Washington

Supreme Court rejected the same argument in State v. Mills, ___ Wn.2d ___, 109 P.3d 415 (Slip Op. filed April 7, 2005) (holding that a single element may be bifurcated from the “to convict” instruction to a special verdict form where the element elevates the base crime of misdemeanor Harassment to a felony). Thus, this argument must be rejected under controlling law.

George next asserts that, despite the jury’s special verdict, the court’s instructions did not expressly define felony harassment with regard to the requirement that the victim reasonably believe that the defendant would carry out a threat to kill. The record appears to confirm this omission. The Mills court held that omission of instruction of this element, which the supreme court previously held to be essential for Felony Harassment in State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003), was reversible error. Mills, 109 P.3d at 422. The Mills court also rejected the State’s argument that the error was harmless under the circumstances. Id. at 421 n.7.

The trial court’s jury instructions in George’s case, although not identical to those in Mills, do not appear to provide a basis for harmless error. Given the omission of instructions regarding an essential element, this Court should reverse George’s conviction for

Felony Harassment. Mills, 109 P.3d at 422. The case should be remanded for either a guilty plea or new trial on the charge of Felony Harassment. If the parties do not proceed to a new trial, George's misdemeanor Harassment conviction should stand. See State v. Woolfolk, 95 Wn. App. 541, 977 P.2d 1 (1999) (reversing firearm enhancement and remanding "for retrial on the question of whether Woolfolk was armed with a firearm," while letting stand the underlying conviction for drug possession).

D. CONCLUSION

For the foregoing reasons, the State asks this court to affirm George's VNCO convictions and sentences. Because sufficient evidence supports the jury's verdict of guilt for misdemeanor Harassment, George's misdemeanor conviction must stand. The case should be remanded only for a new trial on the specific

question of whether George's wife reasonably believed his threat to
kill for the charge of Felony Harassment.

DATED this 19th day of May, 2005.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

By: 
Patrick J. Preston, WSBA #24361
Deputy Prosecuting Attorney
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah M. Hrobsky and Gregory C. Link, attorneys for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. KEITH G. GEORGE, Cause No. 54805-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

5/19/05

Date

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