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NO. 63607-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK BROWN,

Appellant.

REC'D
MAR 05 2010
King County Prosecutor
Appellate Unit

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

The Honorable Mary Yu, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's multiple convictions for violating a no contact order violate the prohibition against double jeopardy.

2. Brown was deprived of his right to unanimous jury verdicts.

3. The trial court erred in allowing the prosecutor to argue facts not in evidence.

4. Appellant received ineffective assistance of counsel at sentencing.

5. The state failed to prove the no contact order violations qualified as felonies.

Issues Pertaining to Assignments of Error

1. Whether appellant's two convictions for violating a no contact order on October 27 and October 28, 2007, violate the prohibition against double jeopardy, where they were based on a continuing course of conduct?

2. Whether appellant's two convictions for violating a no contact order on December 7 and December 9, 2007, violate the prohibition against double jeopardy, where they were based on a continuing course of conduct?

3. Whether Brown's right to unanimous jury verdicts was violated, where the state introduced evidence of multiple acts that could have formed the basis for each no contact order conviction, the state failed to specify the act upon which the jury should rely for each count, and the court failed to instruct the jury it must be unanimous as to the chosen act?

4. Appellant's girlfriend testified he could not have committed several of the charges, because he was with her at the time the violations were alleged to occur. The state presented telephone records suggesting that on the dates charged, appellant made telephone calls to two numbers, separate and apart from the numbers associated with the protected party. On cross-examination of appellant's girlfriend, the prosecutor played two CDs of recorded conversations between appellant and his girlfriend. Listed on each CD was one of the numbers the previously admitted telephone records showed appellant called on the dates charged. Appellant's girlfriend recognized her voice on the recordings, but did not recognize the numbers listed on the CDs. The state presented no evidence linking the recorded conversations to the numbers listed on the CDs, and no evidence establishing when the calls were recorded. Did the trial court err in allowing the

prosecutor to argue – over defense objection – that the state had established appellant called his girlfriend on the dates charged and therefore was not with her on those dates?

5. Whether appellant received ineffective assistance of counsel at sentencing, where defense counsel argued neither that the two October offenses nor that the two December offenses constituted same criminal conduct, despite the court's ruling no unanimity instruction was required, as the offenses were continuing in nature?

6. Where the state failed to prove appellant had two prior valid convictions for violating a no contact order, did the state fail to prove the current no contact order violations constituted felonies?¹

B. STATEMENT OF THE CASE

1. The Charges

Following a lengthy trial in King County Superior Court, appellant Frederick Brown was convicted of five counts of felony violation of a no contact order (VNCO) and one misdemeanor count of interfering with an emergency call, each allegedly committed

¹ Resolution of this final issue depends on the Supreme Court's decision in State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008), rev. granted, 165 Wn.2d 1003, 198 P.3d 512 (2008).

against his former girlfriend, Denise Apodaca. CP 1-7, 207, 209-14. Brown was acquitted of two counts of burglary, also allegedly committed against Apodaca, as well as lesser included offenses of trespassing and assault.² CP 204-206, 208.

Brown and Apodaca were in a dating relationship until fall 2007. CP 3; RP (9/11/08) 149. On September 2, 2007, the Kent Municipal court entered the no contact order the state alleged Brown violated in this case. CP 3; RP (9/11/08) 149. Specifically, the state alleged Brown violated the order by contacting Apodaca on: October 27, 2007 (count II), October 28, 2007 (count IV); November 20, 2007 (V); December 7, 2007 (VI); and December 9, 2007 (VII). CP 26-30.

(i) October 27-28, 2007

The state presented phone records showing someone who signed up for phone services with Virgin Mobile identifying himself as Frederick Brown³ telephoned Apodaca's home phone and cellular phone numerous times over the course of October 27,

² Because Brown was acquitted of the burglaries, this brief will focus on the alleged no contact order violations.

³ Virgin Mobile does not verify any of its subscriber information. RP (9/29/08) 99.

through October 28.⁴ RP (9/16/08) 20, 54; RP (9/29/08) 47-49. A records custodian testified the phone associated with Brown telephoned Apodaca's cell phone 86 times on October 27, and 45 times on October 28, between 12:10 a.m. and 10:30 p.m. RP (9/29/08) 57-60. The number associated with Brown also called Apodaca's home phone between October 27 and October 29. RP (9/29/08) 61-63.

Apodaca testified Brown was calling her repeatedly, asking her to pick him up from Auburn. RP (9/11/08) 150. Apodaca claimed she said no, but Brown later showed up at her apartment and began ringing the doorbell. RP (9/11/08) 150. Apodaca claimed that she was lying on her bed, when Brown kicked the door in. He reportedly barged in and asked who else was there. RP (9/11/08) 151. Apodaca, who was by herself, testified she was about to telephone 911 on her cordless home phone, but Brown grabbed it and ran out. RP (9/11/08) 153. Apodaca claimed she was on her cell phone talking to 911 when Brown returned and

⁴ Phone records indicated Apodaca called the number associated with Brown numerous times between October 27 and October 28, as well as numerous, consecutive days preceding November 20. RP (9/29/08) 95-96, 103-108. According to Apodaca, she called only on a few occasions, because she was trying to figure out who was calling her. RP (9/16/08) 98, 156, 159; RP (9/30/08) 117-18, 120. But phone records showed she called it over 200 times. RP (9/30/08) 94-99.

threw the cordless phone battery at her before leaving again.⁵ RP (9/11/08) 157.

Police testified they responded, following Apodaca's 911 call, on October 28, at approximately 3:40 a.m. RP (9/17/08) 66, 96. A police officer testified Apodaca's home phone was lying on the ground, with its battery cover off, appearing to have been dropped. One of the officers found the battery, and the phone still worked. RP (9/17/08) 98. In fact, numerous calls came in on it in the officer's presence. RP (9/17/08) 68-71. The officer answered a couple of them, but no one was on the other end. RP (9/17/08) 68. According to the officer, Apodaca's cell phone was also ringing. RP (9/17/08) 98.

A police dog attempted a track, but did not detect any scent. RP (9/17/08) 97, 122; RP (9/18/08) 90. His handler believed it was because no one was there. RP (9/18/08) 96.⁶

(ii) November 20, 2007

As with the October charges, the state presented phone records showing someone who signed up for phone services with

⁵ The 911 call was recorded, however, and Apodaca gave no indication Brown returned or threw anything at her. RP (9/16/08) 137.

⁶ One of the burglary charges was based on Apodaca's allegations relating to October 28, but the jury acquitted Brown of that charge. CP 26, 208.

Virgin Mobile identifying himself as Frederick Brown telephoned Apodaca's home phone and cellular phone numerous times over the course of November 19-20, 2007. RP (9/16/08) 20, 54; RP (9/29/08) 47-49. There were two pages worth of phone calls recorded for November 19, between 11:02 a.m. and 11:57 p.m. RP (9/29/08) 65-66. For November 20, there was three-quarters of a page worth of phone calls, starting at 12:04 a.m., ending at 5:49 a.m. RP (9/29/08) 66. Calls were also made to Apodaca's home phone between November 19 and 20. RP (9/29/08) 66-67.

Apodaca testified she started receiving a rash of phone calls on November 19, 2007. RP (9/16/08) 18, 25. She described 20-25 "blocked calls" on her cell phone, starting around 10:30-11:00 p.m. RP (9/16/08) 20. She claimed she answered one such call, and it was Brown. He reportedly said he was at home. RP (9/16/08) 20-21.

Apodaca testified she received more calls the next morning, around 3:00 a.m. She claimed it was Brown, who wanted to talk. RP (9/16/08) 28. According to Apodaca, sometime around 4:30 a.m., Brown started ringing her doorbell. RP (9/16/08) 143. Apodaca claimed she could see him through the peephole. RP (9/16/08) 29.

Apodaca called 911 about an hour later, after she reportedly saw Brown standing by her car in the parking lot. RP (9/16/08) 29, 141. While watching through her bedroom window, Apodaca saw Brown get into a white van that pulled up. RP (9/16/08) 29-30. The van parked by the laundry room of the apartment building. RP (9/16/08) 32. While on the phone with 911, Apodaca claimed she saw Brown in the driver's seat of the van. RP (9/16/08) 31.

Police arrived around 5:30 a.m. and pulled Brown out of the van. RP (9/16/08) 31-32; RP (9/17/08) 168-71. The state offered evidence indicating the distance between the van and the apartment building. RP (9/17/08) 155. However, police officers admitted they did not measure for themselves the distance between the van and the apartment. RP (9/11/08) 53; RP (9/17/08) 164.

(iii) December 7-9, 2007

The state presented phone records showing someone who signed up for phone services with Virgin Mobile identifying himself as Frederick Brown telephoned Apodaca's home phone and cellular phone numerous times over the course of Friday, December 7, through early Sunday morning, December 9, 2007. RP (9/16/08) 20, 54; RP (9/29/08) 47-49. The records custodian testified there was a page worth of calls to Apodaca's cell phone on

December 7, between 10:59 p.m. and 11:59 p.m. RP (9/29/08) 69. There were four pages worth of calls on December 8, between 12:26 a.m. and 11:56 p.m. RP (9/29/08) 68-69. There were also calls made to Apodaca's cell number on December 9, between 12:31 a.m. and 2:36 a.m. RP (9/29/08) 70. On all three days, the number associated with Brown also called Apodaca's home phone. RP (9/29/08) 70-72.

Apodaca testified she started getting blocked calls on Friday night around 10:30, 11:00 p.m. RP (9/16/08) 36-38. She claimed she answered one, and it was Brown.⁷ RP (9/16/08) 146. She called police around midnight. RP (9/17/09) 184-85, 201. One of the responding officers testified Apodaca received a couple of calls while he was there. RP (9/17/08) 186. The officer looked at the phone, but the number was blocked. RP (9/17/08) 186. The officer answered the second call, announced he was a police officer, but no one responded.⁸ RP (9/17/08) 186.

⁷ In contrast, her friend Nimensio Rivera testified Apodaca merely thought it was Brown. Every time she answered one of the calls, no one was on the other end. RP (9/22/08) 9, 29.

⁸ The testimony is somewhat confusing as to whether police actually responded on December 7. Rivera testified police did not respond, because nothing much happened. RP (9/22/08) 12. Yet, one officer testified police did in fact respond. RP (9/17/08) 186.

Apodaca testified she kept a log of the calls she received December 7 and 8, carrying over to the 9th. RP (9/16/08) 57; RP (9/17/08) 188, 194. She thought she answered one of these calls and told Brown to stop calling. RP (9/16/08) 60.

On December 9, Apodaca was returning from a birthday party at the Muckleshoot Casino with Nimensio Rivera around 2:00 a.m., when she reportedly encountered Brown in the parking lot of her apartment building. RP (9/16/08) 26, 35, 42. She claimed Brown was "right there" as she was getting out of the car. RP (9/16/08) 26. She was about to call 911 on her cell phone, but Brown purportedly broke off the top of the flip phone and walked away. RP (9/16/08) 26, 43. Rivera testified he followed Brown for a while but gave up and returned to the apartment, where Apodaca was on the phone with 911. RP (9/16/08) 45-46; RP (9/22/08) 16-17.

When police arrived, Apodaca led them to Brown's house. RP (9/16/08) 151-52, 196. He was not at home. RP (9/17/08) 197. The house manager had not seen Brown in several days. RP (9/29/08) 147, 150.

(iv) Brown's Alibi

In fact, Brown's girlfriend Tonya Webster testified Brown was with her that weekend, since Saturday morning, December 8, until Sunday, December 9, and beyond. RP (9/29/08) 173-75. Saturday night, the couple decided to go dancing and did not return to Webster's until 1:20 a.m. RP (9/29/08) 176-78. Later, they decided to get some of Brown's belongings at his residence. When they arrived, however, they saw Apodaca's car and the police and decided not to stop. RP (9/29/08) 180-81. Brown later called 911 to investigate, but was told there was no warrant for his arrest. RP (9/29/08) 182.

Webster testified the couple was also together the weekend of October 27-28. Webster picked Brown up after work, on Friday, October 26. RP (9/29/08) 172-73. They hung out at the apartment Webster shared with Rebecca Moreland, who was scheduled to undergo nose surgery on Wednesday, October 31. RP (9/29/08) 172-74; RP (9/30/08) 71-72. Because of the upcoming surgery, Moreland and Webster remembered cleaning house and decorating for Halloween in advance, because Moreland would be laid up after the surgery. Both remembered Brown was present supervising their efforts. RP (9/29/08) 173; RP (9/30/08) 71-73.

While cross-examining Webster, the state sought to play snippets of recorded telephone calls Brown purportedly made to Webster while in jail. The prosecutor had established through the Virgin Mobile records custodian that the number associated with Brown made: 37 phone calls to (253) 876-5471 between October 27 and 29; 10 calls to the same number between November 19 and 20; and 34 phone calls to (253) 639-3301 between December 7 and December 9. RP (9/29/08) 63-68. The prosecutor alleged Brown's recorded jail calls were to these same numbers, which the prosecutor surmised were former cell numbers of Webster's. Anticipating that Webster might not remember her prior cell phone numbers, the prosecutor argued that recognition of her own voice on these recordings – which the prosecutor claimed involved the same numbers as identified by the Virgin Mobile custodian – would impeach Webster's testimony she was with Brown during the relevant October and December weekends. RP (9/30/08) 37-39.

The defense objected the state had not provided notice and could not establish foundation without calling someone from the jail to explain how the telephone numbers were obtained. RP (9/30/08) 39. The prosecutor responded she would call the jail sergeant in rebuttal if necessary:

I intend to show her the disk that I have that has the phone number on it, and I intend to ask her if that's her phone number. I – if she's already denied it. I intend to play a call from that disk and ask her if it's her voice. And depending on what she says, then I have a line of questioning about that phone number. And then, if necessary, the State will call in rebuttal the jail sergeant that counsel is well aware burns CDs, all the CDs that have been provided in this case, to establish what the phone number is.

RP (9/30/08) 40.

The court ruled the prosecutor could pursue this line of questioning "taking it one question at a time[.]" RP (9/30/08) 40-41.

On cross, the prosecutor asked Webster whether she previously had a cell phone number of (253) 876-5471. RP (9/30/08) 47. When Webster stated she did not remember, the prosecutor indicated she was going to play a disk listing that phone number. RP (9/30/08) 46-48. During the ensuing sidebar, the defense reiterated its foundation objection. RP (9/30/08) 50. The court resolved to allow further inquiry, based on the prosecutor's assurance she would "call somebody from the jail who then can indicate that this track came from this phone number." RP (9/30/08) 51.

When cross-examination resumed, the prosecutor played the CD with (253) 876-5471 listed on it. Webster recognized one of

the voices on the recording as her own. RP (9/30/08) 54. Next, the prosecutor played a CD with (253) 639-3301 listed on it. Again, Webster recognized one of the voices on the recording as her own. RP (9/30/08) 61-62. Webster did not recall having a cell phone with that number, however. RP (9/30/08) 61.

When the defense rested, it objected to the state calling the jail sergeant to testify in rebuttal for the state:

The purpose of rebuttal testimony is to rebut evidence introduced by the defense. What the State is doing here is laying foundation for evidence they introduced on cross. This was not evidence introduced by the defense, this was not a new matter brought before the Court by the defense, these jail phone calls are not defense's evidence, and this is not rebuttal.

RP (9/30/08) 111. The court agreed and excluded the proffered rebuttal evidence. RP (9/30/08) 114.

Because the state failed to establish any nexus between Webster's voice recognition on the CDs and the numbers listed on those CDs, the defense moved to preclude reference to those numbers in closing.

It's my position, Your Honor, that the only reason the jury has heard this phone number at all is because the State read it. And, of course, counsel's questions and remarks aren't evidence and so really this phone number and its connection to that witness

is entirely from the State. It's not in evidence, there is no evidence of that connection.

RP (10/1/08) 5. The court resolved the defense was free to make that argument but it would not preclude argument by the state regarding the phone numbers. RP (10/1/08) 5-6.

The prosecutor focused on impeaching Webster with the alleged phone number evidence in closing:

Mr. Webster, she is the defendant's current girlfriend. She's been with him ever since August of 2007. She came in to tell you that he was with her every minute of every day for the weekend of October 27th through October 29th. Mr. Watkinson from Virgin Mobile told you that there were 37 calls between the defendant's cell phone and Ms. Webster's cell phone number 253-876-5471 –

MR. HILL [defense counsel]: Objection. Facts not the evidence.

THE COURT: Overruled. Go ahead.

MS. GILCHRIST: -- on that weekend; 37 phone calls. Now, Ms. Webster claimed that she couldn't remember her phone numbers. She has had three or four cell phone numbers in less than a year and she doesn't remember what those are. Doesn't remember any of the digits, can't tell us anything about them. When I played a call that was made to that phone number, she said well, yes, that was me; yes, that was Frederick, but –

MR. HILL: Objection. Facts not in evidence.

THE COURT: Overruled. Go ahead.

MS. GILCHRIST: -- and that may have been my phone number, I don't know, I guess so. Not giving us a straight answer.

On the November dates she said she dropped him off some time prior to 5:30 because she went to work at 8:00 at his house and there was a white van there and maybe some people there, but he definitely was with her on the night of the 19th. So there are nine calls between the defendant's cell phone and Ms. Webster's cell phone on November 19th. And I asked her after we talked about all of these dates and that he was with her every minute of every day, well, if he was with you then he wouldn't have any reason to call you, would he. No.

On the weekend of the 8th and the 9th of December when they went to a club in Tacoma there are 29 calls between the defendant and Ms. Webster's other phone number, 253-639-3301. Again, I played a phone call between her and Frederick Brown. She identified both of the voices. She said that may have been her cell phone number, she doesn't know, she can't remember. Not able to give a straight answer about that. Twenty-nine phone calls.

So a total of 37 plus 9 plus 29 while he's with you every minute of every day. I mean, that's just not reasonable that someone would be calling you if they were with you.

RP (10/1/08) 33-35.

2. Motion for New Trial

Over the state's objection, the court included language in the to convict instructions requiring the jury to find the no contact order violations occurred in King County, as opposed to Washington State. CP 190, 192-195; 19RP (9/30/08) 135, 151. During

deliberations, the jury inquired: “Do both parties have to be in King Co. when the violation of the NCO occurs?” CP 217. Realizing the state had objected to the King County language, the court answered “No,” over defense objection. CP 218.

In a motion for a new trial, the defense argued that by its inclusion in the to convict instructions, the venue of King County became an element of the offense the state was required to prove. See e.g. State v. Hickman, 135 Wn.2d 97, 106, 954 P.2d 900 (1998) (state assumes burden of proving an otherwise unnecessary element when the added element is included in the to convict without objection). According to the defense, the state presented no evidence regarding the parties’ locations at the time of the alleged telephone calls. The defense argued the lack of such evidence presented a problem, because it was unclear whether the jury convicted based on the in-person or telephonic contact for counts IV, V and VII:

In the instant case, no Petrich⁹ instruction was given to the Jury, and it is therefore impossible to tell, first,

⁹ Where multiple acts relate to one charge, the state must elect the act on which it relies to convict the defendant, or the trial court must provide a unanimity instruction - a Petrich instruction. State v. Petrich, 101 Wash.2d 566, 572, 683 P.2d 173 (1984). The failure to do so in multiple acts cases is constitutional error. “The error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act], resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” State v. Kitchen, 110 Wash.2d 403, 411, 756 P.2d 105 (1988).

whether the jury convicted Mr. Brown based on the allegation of telephonic or in-person contact and, second, whether the jury was unanimous as to its decision. If the jury returned a verdict of guilty as to Counts IV, V, and VII based on telephonic rather than in-person contact, the verdict would be flawed because, again, the State presented no evidence regarding the geographic location of either party. Because there was insufficient evidence as to this alternative, these counts must, also, be dismissed.

CP 226.

At a hearing on the motion, before defense counsel was allowed to withdraw,¹⁰ the court found the state made a sufficient objection to the inclusion of venue to preclude application of Hickman. RP (11/5/08) 8. Defense counsel indicated the court would still have to find the jury would have found – beyond a reasonable doubt – both in-person and telephonic contact to dispense with the unanimity issue. RP (11/5/08) 5.

In response, the state argued, “it was a continuing course of conduct on each of the five charges of felony violation of a no contact order and not distinct acts as – that would require a Petrich instruction.” RP (11/5/07) 7. Defense counsel responded that the state’s continuing course of conduct argument raised double jeopardy concerns:

Your Honor, I think the State's position on this strikes me as problematic. If it's the State's position now that what they charged was a continuing course of conduct then we run into problems with say the December charges or the October charges where one charge comes from October 27th, then one charge from October 28th, one charge from December 7th, one charge from the 8th. And so if it's a continuing course of conduct that the State charges, how do we get to those separate counts? Where does the course of conduct get cut off? Can the State take as many pieces as they want to create as many counts as they want or – and then subsequently come back and say oh, no, it's all one count?

RP (11/5/07) 11.

Ultimately, the court took the matter under advisement for a later ruling. RP (11/5/07) 13. Meanwhile, however, defense counsel was allowed to withdraw and new counsel was appointed. CP 229; RP (11/14/08) 11-12; RP (12/12/08) 2.

When the motion was reheard with new counsel, no one addressed the double jeopardy concern raised by former counsel. RP (4/24/09). The state maintained its position the in-person and telephonic contact was a continuing course of conduct for which no unanimity instruction was required:

On each count the contact occurs over the course of a couple of hours where the defendant is calling Ms. Apodaca, talking to her on the phone. In

¹⁰ Counsel believed he had a conflict of interest precluding his continued representation, based on his failure to request a unanimity instruction. RP (11/5/08) 14.

Counts IV and V requesting to see her, wanting to talk to her. And when she repeatedly hangs up on him and does not want to talk to him then he shows up at her apartment.

I'd ask the Court to find that this behavior, the multiple contacts is a continuing course of conduct and did not require a Petrich instruction in this case.

The case law indicates that the Court can find a continuing course of conduct if the defendant's actions were designed to achieve a single objective and that's exactly the facts that we have here. Mr. Brown wanted to speak with Ms. Apodaca. He wanted to talk to her and he continued to try to reach her and then eventually shows up in person to achieve that objective. And that's the case for each count.

There is – I gave multiple examples of different types of cases that include continuing course of conduct and they range from conduct that occurs within minutes of each other, multiple acts that occur within minutes of each other, within hours of each other and even one case that the multiple acts occurred over the course of three weeks. So I think the Court could easily find that the defendant's actions in Counts IV and V and VII are a continuing course of conduct. A Petrich instruction was not required and that would be upheld if the case was appealed.

RP (4/24/09) 7. The court agreed Brown's actions amounted to a continuing course of conduct and denied the motion for a new trial.

CP 228; RP (4/24/09) 12-15.

3. Challenge to Underlying Prior Convictions¹¹

One of the issues pre-trial was the validity of the underlying no contact order convictions relied upon by the state to elevate the current no contact order violations to felonies.¹² Supp. CP __ (sub. no. 66, State's Response to Motion to Dismiss, 8/11/08). The defense argued three of the four priors were unconstitutional, because they were based on benign telephone calls, rather than threatening conduct or coming within a proscribed geographic area.¹³ RP (8/11/08) 15-16; see e.g. State v. Madrid, 145 Wn. App.

¹¹ These facts pertain to the issue that depends on the outcome in Bunker.

¹² Brown had four misdemeanor VNCO convictions: 2 on one judgment and sentence from Edmonds Municipal Court; 1 on a separate judgment and sentence from Edmonds; and 1 from Tukwila Municipal Court. CP 3; RP (9/18/08) 135-36.

¹³ For each of the prior municipal court convictions, Brown was convicted of violating the pre-2007 version of RCW 26.50.110, which provided:

Whenever an order is granted under [. . .] chapter 10.99 [. . .] and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, work place, school, or day care, or of a provision prohibiting a person from knowingly coming within or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

RCW 26.50.110 (emphasis added).

RCW 10.31.100(2)(a) requires arrest only if a person:

has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from

106, 192 P.3d 909 (2008) (finding former statute criminalizes arrestable violations only, i.e. those involving threats of violence or coming within a prohibited area); and State v. Hogan, 145 Wn. App. 210, 192 P.3d 915 (2008) (same).

The state agreed three of the convictions involved telephone calls, but argued the court should follow this Court's decision in State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008), rev. granted, 165 Wn.2d 1003, 198 P.3d 512 (2008). In Bunker, this Court held the former statute was ambiguous, but that legislative intent was to criminalize all no contact order violations. The trial court agreed with this Court's reasoning, and ruled two of the priors would be admitted to prove the current violations constituted felonies. RP (8/11/08) 23-24.

going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person . . .

C. ARGUMENT

1. BROWN'S MULTIPLE CONVICTIONS FOR VIOLATING THE NO CONTACT ORDER ON CONSECUTIVE DAYS IN OCTOBER AND DECEMBER VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY, AS BROWN'S CONDUCT WAS CONTINUING.

The state cannot have it both ways. Either Brown's conduct in October and December was continuing and his multiple convictions therefore violate double jeopardy, or there is a unanimity issue with respect to each no contact order count. The Petrich issue will be addressed in argument section 3, infra.

State and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983); Albernaz v. United States, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981); see Const. art. I, § 9 ("No person shall be . . . twice put in jeopardy for the same offense."); U.S. Const. amend. V (same). When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime. State v. Westling, 145 Wn.2d 607, 610, 40 P. 3d 669 (2002); State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

In State v. Petrich, our Supreme Court stated:

Under appropriate facts, a continuing course of conduct may form the basis of one charge in an information. But "one continuing offense" must be distinguished from "several distinct acts," each of which could be the basis for a criminal charge. To determine whether one continuing offense may be charged, the facts must be evaluated in a commonsense manner.

Petrich, 101 Wn.2d at 571. Although evidence of conduct at different times and places tends to show several distinct acts, evidence that the defendant engaged "in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts." State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294(1995).

Applying this standard to RCW 26.50.110, the statute defining the offense of violating a no-contact order, this court held in State v. Spencer, 128 Wn. App. 132, 137-38, 114 P.3d 1222 (2005), "the nature of a violation of a no-contact order leads to a reasonable conclusion that the legislature intended that the offense be a continuing crime." Accordingly:

Once a defendant enters the prohibited zone, the crime begins but is not complete--it continues. As long as the defendant remains within the prohibited zone, he continues to violate the no-contact order.

Spencer, 128 Wn. App. 132, 137-38.

While the Court in Spencer was evaluating a no contact order violation based on entry into a prohibited zone, a common sense evaluation of the facts here, consisting of continuous telephone calls followed by entry into a prohibited zone, likewise leads to the conclusion that Brown's October conduct was a continuing offense, as was his December conduct. Indeed, the prosecutor and court agreed the offenses were continuing, such that no unanimity instruction was required. Specifically, the court found:

So as to Count IV, the contact on October 28th. There are three separate acts at issue. One, calls on the cell phone and home phone; two, in-person contact in the form of kicking in the door, and three, coming within a thousand feet of her residence just before kicking in the door. The evidence shows that the calls were continuous and almost nonstop over the course of hours. That Mr. Brown eventually showing up at her residence at approximately three in the morning.

Under these acts the Court finds that the numerous acts committed by Mr. Brown were intended to secure the same and single objective which was to have contact with Mr. Apodaca, and as such supports the finding that his actions were a continuous course of conduct.

In regard to Count VII, the contact on December 9th, as previously discussed there is a dispute as to if there is one contact at issue or two. Mr. Brown's actions beginning December 9th and the

early hours of December 10th [sic] were all part of the continuous effort by Mr. Brown to contact, intimidate and control Ms. Apodaca.

The evidence supports the finding that Mr. Brown began calling Ms. Apodaca on the phone starting December 7th and continued calls through the 8th, culminating with him contacting her in the parking lot of her apartment, grabbing her phone and breaking it on December 9th. There is evidence in the record that Mr. Brown subsequently made calls to Ms. Apodaca's home phone as the State argued in its closing argument remarks.

In this case the State elected to charge him for the contact on December 9th which it's free to do and I'm not finding that there was any error on this basis for granting a new trial. Because I'm also finding that the actions of Mr. Brown over this three day period were a continuing course of conduct, I do not find that a Petrich instruction was necessary on Count VII.

RP (4/24/09) 12-14.

In response, the state may point to Division Two's decision in State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (2009), where it held two emails sent to Allen's ex-girlfriend on February 12 and February 14 supplied the basis for two convictions. The first was the return of an email she sent him when they were dating. The second was an invitation to join a social networking website. Allen, 150 Wn. App. at 305-06. The ex-girlfriend read both emails on the same day. Division Two rejected Allen's double jeopardy challenge, reasoning:

Here, Allen sent Foley two different e-mail messages on different days. The no-contact order prohibited him from contacting her in this manner, and his punishment for those violations should not depend on when Foley happened to read her email.

Allen, 150 Wn. App. at 314; see also State v. Parmelee, 108 Wn. App. 702, 32 P.3d 1029 (2001) (three counts of violating a no contact order based on three different letters to protected party).

Allen is not analogous to the circumstances here, however, where Brown's purported contact was incessant, as established by the phone records. Brown continued calling even when he entered the prohibited zone. As found by the trial court, the continuous conduct at issue here was committed with a single objective – to contact the protected party – unlike Allen. For that same reason, Parmelee is likewise not analogous. Moreover, the opinion did not address the precise issue raised here; rather, it held that Parmelee's convictions for violating a no contact order *and stalking* did not violate double jeopardy. Parmelee, 108 Wn. App. at 709.

Evaluating the facts in a commonsense manner, as the trial court did here, leads to the conclusion that one of Brown's October convictions and one of his December convictions violate the prohibition against double jeopardy and should be reversed. Westling, 145 Wn.2d at 613.

2. THIS COURT SHOULD REVERSE THE NO CONTACT ORDER CONVICTIONS BECAUSE THE JURY INSTRUCTIONS FAILED TO INSURE JURY UNANIMITY.

Should this Court conclude that neither Brown's October conduct nor his December conduct constituted a continuing offense, there arises a unanimity problem with respect to each no contact order conviction, because the state presented evidence of multiple acts that could have formed the basis for each charge but failed to elect a specific act for the jury to find, and the court failed to instruct the jury it must be unanimous as to the act chosen.

An accused has the right to a unanimous jury. Const. art. 1, § 22; U. S. Const. amend. 6; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). To ensure unanimity where the state introduces evidence of multiple acts but charges one offense, the Washington Supreme Court allows the state two options. The state may elect the act it relies on, or the court may instruct on unanimity. If neither option is taken, the state cannot prove the verdict was unanimous. A court's failure to follow one of these options, therefore, is constitutional error. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); State v. Kitchen, 110 Wn.2d 403,

756 P.2d 105 (1988); Petrich, 101 Wn.2d at 572; U.S. Const. amend. 6; Const. art. 1, § 22.

In Petrich, the court reversed a conviction involving one charge of indecent liberties and one charge of statutory rape because the state presented evidence of multiple instances of the offense at different times and places. Petrich, 101 Wn.2d at 568. Though the state attempted to persuade the court the different acts constituted one continuous course of conduct, the court disagreed. Each alleged act occurred in a separate identifying place and a separate time frame. Petrich, 101 Wn.2d at 570. The court reasoned it had no way to conclude the jury agreed on a single underlying act for each of the two convictions, and the error was not harmless. The court therefore reversed the convictions. Petrich, 101 Wn.2d at 573.

Here, the state also presented evidence of multiple acts the jury could have relied upon to convict for each count. For count II (October 27), the state presented evidence of repeated phone calls. For count IV (October 28), the state presented evidence of repeated phone calls, as well as in-person contact. The same is true for count V (November 20), as well as count VII (December 9). For count VI, the state presented repeated phone calls.

In closing, the prosecutor did not elect which act the jury should rely on to convict for each count. RP (10/1/08) 22-28. Nor was the jury instructed it must be unanimous as to which act it relied upon. CP 161-203. This violated Brown's right to a unanimous jury verdict for each count.

The lack of jury unanimity is constitutional error. It is presumed prejudicial and requires reversal unless the prosecution proves the error harmless beyond a reasonable doubt. State v. VanderHouwen, 163 Wn.2d 25, 38-39, 177 P.3d 393 (2008); Coleman, 159 Wn.2d at 510, 512. The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. Coleman, 159 Wn.2d at 512 (citing Kitchen, 110 Wn.2d at 411-12). Put another way, the state does not meet its burden unless it convinces this Court that no rational juror could have a reasonable doubt regarding either of the incidents. Kitchen, at 409, 412 (citing State v. Loehner, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) (Scholfield, J., concurring), rev. denied, 105 Wn.2d 1011 (1986)).

The state cannot meet its burden because a rational juror could have doubts about several of the contacts alleged. For instance, for count IV, jurors could have had doubts about the in-

person contact alleged by Apodaca. Significantly, the jury did not convict Brown of burglary, which indicates some jurors may not have believed Brown rang Apodaca's door bell or kicked in her door. For count V, jurors may have had a reasonable doubt as to whether Brown came within 1,000 feet of Apodaca's apartment.¹⁴ After all, he was arrested in a van in the parking lot and the police admitted they did not measure Brown's distance from Apodaca's apartment. For count VII, Brown had an alibi. His current girlfriend testified Brown was with her the entire evening. And for count VI, Rivera testified no one was on the line when Apodaca answered the phone on December 7, and that she merely speculated it was Brown. Accordingly, the state cannot meet its burden of showing no rational jury could have had a reasonable doubt as to the multiple acts alleged for each count in this case. This court should reverse the convictions.

3. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE FACTS NOT IN EVIDENCE.

In closing, the prosecutor argued Brown could not have been with Webster the weekend of October 27-29 or the weekend of

¹⁴ The no contact order prohibited Brown from "having any contact [with Apodaca] coming within a thousand feet of her residence, her school, her

December 7-9, because the state had established Brown called Webster repeatedly on those dates. If they were together, the prosecutor reasoned, there would have been no reason for Brown to call Webster. RP (10/1/08) 33-35. The trial court erred in allowing the prosecutor to make this argument, and in overruling defense counsel's timely objections to the prosecutor's argument, as it was based on facts not in evidence. See e.g. State v. Staten, 60 Wn. App. 163, 173, 802 P.2d 1384 (1991) (it is improper for a prosecutor to argue from facts not in evidence). The court's rulings in this regard essentially sanctioned prosecutorial misconduct.

The Virgin Mobile custodian testified that during the relevant October weekend, the phone number associated with Brown called (253) 876-5471 37 times. RP (9/29/08) 63-64. The custodian did not identify the subscriber associated with that number, however. Nor did Webster identify that number as belonging to her. RP (9/30/08) 46, 54. On cross, the prosecutor stated it was showing Webster a CD with (253) 876-5471 listed on it. RP (9/30/08) 47. Although Webster recognized her voice on the CD (RP (9/30/08) 54), the state presented no testimony the telephone call was actually made to the number listed or when the call was made.

workplace or her person." RP (10/1/08) 19-20.

WPIC 1.02 (attorney's statements and arguments are not evidence). Whether the prosecutor intended to call the jail sergeant to establish that the number at which Brown reportedly called Webster was in fact the number identified by the Virgin Mobile custodian, the court disallowed the testimony. Accordingly, the state failed to establish Brown called Webster during the relevant October time frame. The trial court erred in allowing the prosecutor to argue otherwise.

The same is true regarding the relevant December weekend. The Virgin Mobile custodian testified that between December 7 and December 9, the phone number associated with Brown called (253) 639-3301 34 times times. RP (9/29/08) 64-65. Again, however, the custodian did not identify the subscriber associated with that number. Nor did Webster identify that number as belonging to her. RP (9/30/08) 61. On cross, the prosecutor stated it was showing Webster a CD with (253) 639-3301 listed on it. RP (9/30/08) 47. Although Webster recognized her voice on the CD (RP (9/30/08) 62), the state presented no testimony the telephone call was actually made to the number listed or when the call was made. WPIC 1.02 (attorney's statements and arguments are not evidence). Whether the prosecutor intended to call the jail sergeant

to establish that the number at which Brown reportedly called Webster was in fact the number identified by the Virgin Mobile custodian, the court disallowed that testimony. Accordingly, the state failed to establish Brown called Webster during the relevant December time frame. The trial court erred in allowing the prosecutor to argue otherwise.

The court's error and the prosecutor's improper argument prejudiced Brown. It impeached Webster's credibility and undercut Brown's alibi defense for the October and December charges. This Court should reverse counts II, IV, VI and VII.

4. BROWN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING BECAUSE HIS ATTORNEY FAILED TO ARGUE COUNTS II AND IV AND COUNTS VI AND VII CONSTITUTED THE SAME CRIMINAL CONDUCT.

Brown was sentenced with an offender score of four. He had no prior felony convictions, but the current no contact order convictions were scored against each other. CP 497-506. In ruling on the motion for a new trial, the court explicitly found the October offenses and December offenses constituted a continuing course of conduct. Despite this, defense counsel did not argue counts II and IV and counts VI and VII constituted the same criminal conduct. Because such an argument would have resulted in a lowered

offender score and concomitant standard range, Brown received ineffective assistance of counsel.

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P. 2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

The presumption of competent performance is overcome by demonstrating the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Crawford, 159 Wn. 2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

The same criminal conduct rules require two or more crimes to involve the same criminal intent, the same time and place, and the same victim. RCW 9.94A.589(1)(a). The October offenses and December offenses constituted the same criminal conduct, respectively. The October offenses were committed against the same victim and with the same intent – to contact Apodaca. Moreover, they were committed at the same time and place, as the trial court specifically found that they were continuing offenses. See e.g. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, review denied, 129 Wn.2d 1016 (1996) (A continuing course of conduct tends to arise where all the acts occurred at the same time and place and promoted the same objective). The same is true of the December offenses. The offenses were committed at the same time and place, against the same individual and with the same intent.

Had defense counsel made this argument, it would have lowered Brown's offender score by two points, resulting in a lower standard range. State v. Haddock, 141 Wn.2d 103, 108, 3 P.3d 733 (2000). Counsel's failure cannot be viewed as legitimate strategy and prejudiced Brown, as it increased his offender score. This Court should reverse and remand for resentencing.

5. THE FELONY VNCO CONVICTIONS SHOULD BE REVERSED, BECAUSE THE STATE FAILED TO PROVE THE VALIDITY OF THE UNDERLYING PRIOR CONVICTIONS.

The state failed to prove the validity of the underlying prior convictions required to elevate the current no contact order violations to felonies. Because the prior convictions were based on non-threatening telephone contact, Brown's conduct was not criminal at the time, under the former statute. This Court has held the former statute is ambiguous, but that the Legislature intended to criminalize all no contact order violations. State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008), rev. granted, 165 Wn.2d 1003, 198 P.3d 512 (2008). Brown raises the issue here to preserve it, in the event the Supreme Court reverses Bunker.

The state must prove all the elements of a charged crime beyond a reasonable doubt. U.S. Const., amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995). Where violations of no contact orders are concerned: "The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged." State v. Miller, 156 Wn.2d 23, 31, 123

P.3d 827 (2005). An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. Miller, 156 Wn.2d at 31. Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed. Miller, 156 Wn.2d at 31.

Logically, when charged as a felony, the “applicability” of the prior convictions is likewise an element of the crime. See e.g. State v. Carmen, 118 Wn. App. 655, 665, 77 P.3d 368 (2003) (trial court, not jury, is required to determine the validity of the predicate convictions for purposes of whether the defendant is guilty of felony violation of a no contact order); Miller, 156 Wn.2d at 831 (“Carmen also noted, properly, that “[t]he very relevancy of the prior convictions depended upon whether they qualified as predicate convictions under the statute”) (citing Carmen, 118 Wn. App. at 664).

Contrary to the trial court’s ruling in this case, the underlying no contact order convictions upon which the felony charges were based were not applicable, because they were based on conduct

that was not criminal at the time they were committed. This Court therefore should reverse Brown's convictions.

In construing a statute, the appellate court looks first to the statute's plain language in order to give effect to legislative intent. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). If the statutory language is unambiguous, the court derives the legislature's intent from the words of the statute alone. Watson, 146 Wn.2d at 955. A statute is ambiguous if a reasonable person can interpret it in more than one way. Watson, 146 Wn.2d at 954-55. Appellate courts interpret and construe statutes to give effect to all the language used, with no portion rendered meaningless or superfluous. Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

To support the felonies, the state relied on Brown's prior convictions for violating the pre-2007 version of RCW 26.50.110, which provides:

Whenever an order is granted under [. . .] chapter 10.99 [. . .] and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, work place, school, or day care, or of a provision prohibiting a person from knowingly coming within or knowingly remaining

within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

RCW 26.50.110 (emphasis added).¹⁵

Although it is a long sentence, it is not ambiguous. The meaning of the sentence is clear when correctly interpreted under common rules of grammar. The "last antecedent rule" provides the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); In re Seahome Park Care Ctr., 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995). The last antecedent rule is a rule of grammar and a rule of statutory construction. Berrocal v. Fernandez, 155 Wn.2d 585, 600, 121 P.3d 82 (2005) (C. Johnson, J., dissenting) (the common rules of

¹⁵ RCW 10.31.100(2)(a) requires arrest only if a person:

has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person . . .

grammar, which include the last antecedent rule, are used to construe the meaning of a statute). The last antecedent rule applies unless a contrary intent appears in the statute. State v. Wentz, 149 Wn.2d 342, 351, 68 P.3d 282 (2003).

The Madrid and Hogan courts recognized that the pre-2007 RCW 26.50.110(1) is not ambiguous, using the last antecedent rule and its corollary. Both courts found that the comma preceding "for which an arrest is required" was a significant indicator of the legislature's intent that the "arrest provision" apply to all previous antecedents. Madrid, 145 Wn. App. at 115; Hogan, 145 Wn. App. at 217-18. The Hogan court concluded that the presence of the comma was not the result of a scrivener's error, observing that if the comma were removed, "portions of the 'for which an arrest is required under RCW 10.31.100(2)(a) or (b)' language would be superfluous." 145 Wn. App. at 217. This is because if the arrest provision is read as only modifying the immediately prior antecedent -- the reference to "foreign protection orders" -- the interpretation would make the arrest provision's reference to RCW 10.31.100(2)(a) "meaningless and inapplicable." Hogan, 145 Wn.

RCW 10.31.100(2)(a). RCW 10.31.100(2)(b) applies only to foreign protection orders, and is not applicable in this appeal.

App. at 218. The Madrid court reached the same conclusion, stating:

Subsection (2)(b) of the arrest provision only applies to foreign protection orders, the subject of the last prior antecedent, whereas subsection (2)(a) has a broader application. This suggests that the arrest provision must have applied to all prior antecedents, including "restraint provisions," in order to prevent subsection (2)(a) from being rendered meaningless.

145 Wn. App. at 115.

In Bunker, this Court found the statute ambiguous and interpreted legislative intent as intending to criminalize all no contact order violations, despite the last antecedent rule. Bunker, 144 Wn. App. 415-17. If the Supreme Court ultimately disagrees with this Court's decision, however, this Court should reverse Brown's felony convictions.

D. CONCLUSION

As found by the trial court, Brown's October and December conduct respectively constituted continuing offenses. It necessarily follows that his multiple convictions for each continuing episode violate the prohibition against double jeopardy. One October conviction and one December conviction should be vacated.

Assuming this Court disagrees, however, Brown was deprived of his right to a unanimous verdict for counts II, IV, V, VI and VII, because the jury was not instructed it must be unanimous as to the specific act relied on to convict. This Court should reverse and remand for a new trial.

Because the prosecutor was allowed to argue facts not in evidence, over defense counsel's objection, to gut Brown's alibi defense, this Court should reverse all convictions, except count V for which no alibi was presented, and remand for a new trial on counts II, IV, VI, VII and VIII (the interfering count).

Brown received ineffective assistance of counsel at sentencing, because defense counsel failed to argue counts II and IV and counts VI and VII constituted the same criminal conduct, which would have resulted in a lower offender score, as the court

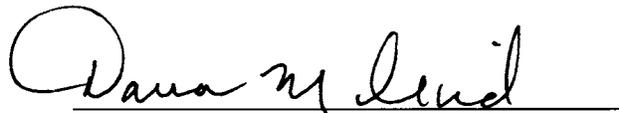
had already found the offenses were continuing and were committed with the same objective purpose.

Finally, depending on the Supreme Court's decision in Bunker, the state failed to prove the validity/applicability of the underlying convictions to make the current no contact order convictions felonies.

Dated this 5th day of March, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "Dana M. Lind". The signature is written in a cursive style with a large initial "D".

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 63607-3-1 |
| |) | |
| FREDERICK BROWN, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FREDERICK BROWN
NO. 209030241
KING COUNTY JAIL
REGIONAL JUSTICE CENTER
620 W. JAMES STREET

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF MARCH, 2010:

x Patrick Mayovsky

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2010 MAR -5 PM 4:03