

66248-1

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NO. 66248-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

PEDRO POLO,

Appellant.

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

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's use of collateral estoppel to remove an element of the crime from the jury's consideration violated the appellant's federal and state constitutional rights to a jury trial on each element of the crime and his right to present a defense.¹

2. The trial court erred in denying the appellant's motion for a mistrial based on a serious irregularity occurring during jury selection.

3. The trial court erred in failing to correct the original judgment and sentence as ordered on remand from appellant's previous appeal.

4. References to sentencing conditions for another conviction not considered on retrial of the current charge should be stricken from the "amended" judgment and sentence.

Issues Pertaining to Assignments of Error

1. After this Court reversed the appellant's conviction for possession of a stolen vehicle, the State on remand moved to preclude the appellant from arguing he did not possess the vehicle, based on his prior DUI conviction. The trial court admitted the appellant's judgment and sentence for DUI, permitted a police officer to testify the DUI was based on driving the same stolen truck, and precluded Polo from arguing he was not driving

¹ This appears to be an issue of first impression in Washington.

the truck. The court, therefore, directed a verdict on the possession element of the charged crime. Such ruling has no precedent in Washington law.

Did the trial court's ruling violate the appellant's state and federal constitutional rights to a jury verdict on each element of the charged crime, as well as the appellant's right to present a defense?

2. After a prospective juror announced he was a Department of Corrections (DOC) employee familiar with Polo from "the files," defense counsel moved for a mistrial. Did the trial court's denial of the appellant's motion for a mistrial violate his rights to an impartial jury and a fair trial?

3. Section 5.7 of the court's original judgment and sentence states count 3 "is a felony in the commission of which a motor vehicle was used" for purposes of driver's license revocation under RCW 46.20.285. But count 3, a DUI, was a gross misdemeanor. Should the judgment and sentence be corrected, as the State conceded, and as this Court ordered in the previous appeal?²

4. To prevent confusion, should any other sentencing-related conditions related only to the DUI conviction, including that set forth in section 4.6, be removed from the amended judgment and sentence?

² The judgment and sentence and amended judgment and sentence are attached as an Appendices A and B, respectively.

B. STATEMENT OF THE CASE

1. Original charges, prior trial, and appeal

The Whatcom County prosecutor charged Pedro Polo with possession of a stolen motor vehicle (count 1), “hit and run” (count 2), DUI (count 3), and driving without a valid driver’s license (count 4). CP 81-89. On the State’s motion, the trial court dismissed counts 2 and 4. Brief of Appellant (BOA), case no. 63339-2-I.

A jury convicted Polo of the two remaining counts. The court sentenced Polo within the standard range and ordered the sentences on counts 1, a felony, and 3, a gross misdemeanor, to run concurrently. CP 51-59.

Polo appealed his conviction for possession of a stolen vehicle, arguing the information failed to set forth each essential element of the crime. Polo also assigned error to an apparent scrivener’s error in section 5.7 of the judgment and sentence that stated count 3 “is a felony in the commission of which a motor vehicle was used” for purposes of driver’s license revocation under RCW 46.20.285. BOA, case no. 63339-2-I.

The State filed a brief conceding count 1 should be dismissed without prejudice and that section 5.7 should be stricken. Brief of Respondent, case no. 63339-2-I.

This court accepted the state's concessions and remanded for dismissal of count 1 and amendment of the judgment and sentence. CP 40. The case mandated June 11, 2010. CP 39.

2. Retrial: Pretrial rulings on collateral estoppel and denial of mistrial motion

On retrial for possession of a stolen vehicle, the State asserted Polo was collaterally estopped from contesting the possession element because he had been convicted of DUI in the original trial.³ Supp. CP ____ (sub no. 46A, State's Res Judicata Memorandum).

The defense objected, contending it was improper to remove an element of the crime from the jury's consideration. RP 5-6. The court

³ Adopted in 2007, RCW 9A.56.068 provides, "A person is guilty of possession of a stolen vehicle if he or she [possesses] a stolen motor vehicle." RCW 9A.56.068. No published case has explicitly set forth the crime's essential elements. Consistent with possession of stolen property, however, the pattern jury instruction lists the following elements:

- (1) That on or about _____, the defendant knowingly . . . [possessed] . . . a stolen motor vehicle;
- (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
- (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
- (4) That any of these acts occurred in the State of Washington.

11A Washington Practice: Washington Pattern Jury Instructions: Criminal, 77.21 at 177-78 (3rd ed. 2008); 11A Wash. Prac. WPIC 77.20 at 176 (definitional instruction).

agreed with the State and informed the parties it would instruct the jury that, as a matter of law, Polo drove the car he was alleged to have possessed. RP 7-8.

Defense counsel later objected that because Polo made statements to a police officer denying he drove the truck, a directed verdict as to the possession element would constitute an impermissible judicial comment on Polo's credibility. RP 22-23. To circumvent the issue, the State suggested admitting an amended version of the judgment and sentence from the previous trial. RP 30, 34. The court agreed.⁴ RP 36-38. The State then claimed that despite Polo's statements to police, he should be precluded from arguing he was not driving. RP 39. The court agreed. RP 39-40. Defense counsel contended the court's ruling was tantamount to collateral estoppel on the element of possession, but the court dismissed counsel's concerns. RP 40-41.

Jury selection commenced.⁵ Supp. CP ____ (sub no. 48, Jury Trial Minutes, at 3-4). After the jury was selected, defense counsel put on the record a motion for a mistrial previously raised off the record:

⁴ It also ruled the probative value of admitting the judgment and sentence outweighed its prejudice. RP 36-38.

⁵ Mr. Polo ordered transcription of voir dire on April 14, 2011.

MR. CHALFIE: There's one thing prior to the jury coming in. During the jury selection, one of the prospective jurors, Number 13⁶, indicated that he knew the defendant and then went on to talk about his profession as being a [DOC] community supervisor.

THE COURT: I don't think he said community supervisor. He said [DOC].

MR. CHALFIE: [DOC]. He was aware of the defendant either from the files or was aware of his name or aware of him. I did off the record ask for a mistrial based on that. So I will make that formal request here.

THE COURT: That request is denied.

RP 43.

3. Retrial: Trial testimony

Early on Saturday, January 24, 2009, Whatcom County deputies learned a pickup truck had crashed into a tree. The truck was registered to an equipment rental business owned by Brian Zender and his brother. Zender testified his brother often drove the truck to and from work, but that other employees sometimes drove it as well. RP 56.

Zender last saw the truck previous Thursday was unaware it was missing until he arrived at the crash scene. RP 57, 116. Zender surmised his brother may have left the truck at work and taken another truck home. RP 45, 56. Zender testified keys were normally kept inside the business or in a

⁶ The minutes list the juror in question as "#714." Supp. CP ____ (sub no. 48, supra).

hide-a-key attached to the truck. But he acknowledged that in his original trial testimony that the keys were sometimes left in the ignition.⁷ RP 58-59.

Zender had not given anyone permission to drive the truck. RP 48. Following a hearsay objection, Zender was not permitted to testify whether his brother had given anyone permission. RP 48.

Deputy Michelle Boyd was dispatched to the scene of the crash. When she arrived, another officer had Polo detained about 50-75 yards south of the crash site. RP 69-70. Boyd observed blood⁸ on Polo's clothing and abrasions on his nose and wrist. RP 101. Boyd suspected the abrasions were from deployment of the truck's airbag. RP 156. Boyd also noticed what appeared to be glass fragments in Polo's stocking cap. RP 101. The hat belonged to Zender's brother, who often left it in the truck. RP 55, 103.

Polo appeared intoxicated and smelled of alcohol. RP 101, 110, 121. He fell asleep in the back of the patrol car while Boyd and Ferndale police determined which agency had jurisdiction. RP 117-18, 121. After establishing the sheriff's office had jurisdiction, Boyd arrested Polo. RP 118.

⁷ Zender provided a statement to the investigating deputy consistent with this prior testimony. RP 148.

⁸ Boyd characterized the blood as "fresh" but admitted on cross-examination she lacked the training to make such an observation. RP 145-46.

After reading Polo his Miranda⁹ warnings, Boyd asked if he was willing to speak with her. RP 119, 133-34. Polo replied, “yeah, but I wasn’t driving.” RP 123. Polo told Boyd he had walked from his girlfriend’s apartment to a convenience store¹⁰ before heading north on the road where he was detained.¹¹ RP 119. He explained he received his injuries in a fight with his girlfriend, Bedelia Banduas. RP 124, 158.

Polo told Boyd he saw a truck drive past quickly and then heard a crash. RP 120. Polo acknowledged drinking three 24-ounce cans of beer at 11:30 p.m., about two hours before police were dispatched to the crash site. RP 121.

The State introduced a redacted judgment and sentence informing jurors Polo had been convicted of DUI. RP 76, 127; Ex. 25. Boyd testified she knew the charge was based on Polo having driven the truck involved in the crash. RP 127.

⁹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

¹⁰ Zender’s business was near the convenience store and about two miles from the crash site. RP 123.

¹¹ Polo later expressed confusion about where he was stopped, telling Boyd during a DUI questionnaire he believed he was detained on a different road. RP 125, 151-53.

C. ARGUMENT

1. COLLATERAL ESTOPPEL VIOLATED MR. POLO'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO TRIAL BY JURY ON EACH ELEMENT OF THE CRIME.

The use of collateral estoppel to remove an element of a crime from the jury's consideration violates the right of the accused to a trial by jury on each element of the charged crime. There appears to be no Washington precedent that addresses the use of such "offensive" collateral estoppel in criminal proceedings. Moreover, the practice is disapproved of in the vast majority of jurisdictions that have considered it. While some courts permit the introduction of a conviction as *evidence*, Polo's conviction was given preclusive effect tantamount to a directed verdict on an element of the charged crime. Because this violated Polo's right to a jury trial and to present a defense, reversal is required.

- a. Use of collateral estoppel by the prosecution in a criminal case violates the accused's right to a jury trial on each element of the crime.

Due process and the right to trial by jury entitle an accused to have a jury determine every element of the crime beyond a reasonable doubt. U. S. Const. amends. 6, 14; Const. art. 1, § 21; Const art. 1, § 22 (amend. 10); Blakely v. Washington, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Collateral estoppel, part of the broader principle of res judicata, generally bars relitigation of issues actually determined in a prior action between the same parties. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469 (1970). Originally developed in civil cases, collateral estoppel has been applied by the United States Supreme Court in criminal cases for the benefit of the defendant. Id. at 443-47. The Supreme Court rests such an application on the Fifth Amendment's guaranty against double jeopardy. Id.

Washington courts appear to approve the use of collateral estoppel when asserted by the defense in appropriate circumstances. State v. Tili, 148 Wn.2d 350, 360-61, P.3d 1192 (2003). But none has ruled on the *offensive* use of collateral estoppel by the prosecution in a criminal case. Nor has the United States Supreme Court. Several federal and state courts have, however, with most ruling that such use in the criminal context is not appropriate. See Allen v. State, 192 Md.App. 625, 640-48, 995 A.2d 1013 (2010) (synthesizing over 40 years of case law and rejecting government's use of collateral estoppel to establish an element of the crime).

In United States v. Pelullo, for example, a jury convicted Pelullo of 49 counts of wire fraud and one count of racketeering under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961-1968 (RICO).

14 F.3d 881 (3d Cir. 1994). On appeal, the Third Circuit affirmed only one of the wire fraud counts, Count 54, reversed all the other convictions based on the erroneous admission of bank records. On retrial, the court admitted Count 54 into evidence. Additionally, the trial court instructed the jury that “as a matter of law” Pelullo had been found guilty of Count 54 so the jury did not have to consider whether the government proved it in determining whether he had committed the RICO offense. Pelullo, 14 F.3d at 888.

A jury convicted Pelullo on the remaining 48 counts of wire fraud and the one RICO count. Pelullo appealed, arguing the trial court erred when it admitted Count 54 and when, in jury instructions, the court applied the prior conviction against him as a matter of law as an element of the RICO offense. Id. at 888-89. The Third Circuit agreed and reversed.

In reaching its holding, the Pelullo court compared the language in the Sixth and Seventh amendments. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

The court found the “all criminal prosecutions” language “serves to guarantee a right that is absolute in the sense that it applies to all

criminal prosecutions or, put differently, to the prosecution of every crime.” Id. at 895. The court also held that “[t]he language of the Sixth Amendment does not admit of any indication that the absolute right to a jury trial in criminal cases can be modified by reasons of efficiency or public policy arguments.” Id. The court explained that its reading of the Sixth Amendment was supported by the fact that in criminal cases there is no mechanism available to the government that is comparable to a motion for directed verdict or summary judgment in civil cases.

Indeed, no matter how strong and even overwhelming the evidence is, and although a judge can grant a judgment of acquittal in favor of the defendant before or even after the jury renders its verdict, . . . a criminal defendant . . . can be convicted only by the verdict of the jury.

Id.

The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The court noted that the Seventh Amendment preserved the right to trial in civil cases only to the extent it existed when the Amendment was ratified in 1791. Id. at 895. While the use of collateral estoppel was sanctioned in civil cases when the amendments were adopted, it did not exist in the context of criminal cases. Id. at 896.

Pelullo cited with approval State v. Ingenito, 87 N.J. 204, 432 A.2d 912 (1981), a case condemning the use of collateral estoppel by the government. Ingenito was charged with possession of a firearm by a felon. The state sought to admit into evidence Ingenito's prior conviction for illegal transfer of weapons, which was based on conduct arising out of the same transaction as the felon-in-possession charge. After the court admitted evidence of the prior conviction, Ingenito appealed, arguing evidence of the prior conviction constituted estoppel on the possession issue.

The New Jersey Supreme Court agreed that use of the conviction constituted collateral estoppel infringed upon Ingenito's constitutional right to a jury trial, and violated his right to be presumed innocent. Id. at 915. In reaching that holding, the Ingenito court focused on a jury's duty in a criminal case, noting:

The application of collateral estoppel against a defendant constitutes an invasion of the fact finding and ultimate decisional functions of the jury. If an essential element of a case is presented as concluded or settled, effectively withholding from the jury crucial underlying facts, the jury's capacity to discharge fully its paramount deliberative and decisional responsibilities is irretrievably compromised.

Id. at 916. The court added:

[C]ollateral estoppel, applied affirmatively against a defendant in a criminal prosecution, violates the right to

trial by jury in that not only does it seriously hobble the jury in its quest for truth by removing significant facts from the deliberative process, but it constitutes a strong, perhaps irresistible, gravitational pull toward[] guilty verdict

Id. at 918-19 (footnote omitted). The court noted that in a criminal case the “question is not whether guilt may be spelt out of a record but whether guilt has been found by a jury.” Id. at 916 (quoting Bollenbach v. United States, 326 U.S. 607, 614, 66 S. Ct. 402, 90 L. Ed. 350 (1946)).

Other state cases reach similar holdings. In State v. Goss, 446 Mich. 587, 521 N.W.2d 312 (1994), for example, Goss was convicted of armed robbery and first degree felony murder. On appeal, the court affirmed the former but reversed the latter based on instructional error. On retrial for felony murder, the state moved in limine to: (1) bar Goss from re-litigating the underlying charge of armed robbery, and (2) instruct the jury that Goss had been found guilty of armed robbery, and that its only responsibility was to determine whether Goss was guilty of aiding and abetting the murder that occurred during the commission of the armed robbery. The court denied the motion and the State appealed.

The Michigan Supreme Court affirmed the trial court, explaining that, in the criminal context, a verdict directed in whole or in part violates the right of the accused to trial by a jury and to due process. Goss, 521 N.W.2d at 315 (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068,

25 L. Ed. 2d 368 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”) and Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (“although a judge [in a criminal case] may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.”)).

Finally, in Allen, the appellant was charged with several crimes relating to the stabbing of Butler. Allen raised self-defense and other defenses. The jury found Allen guilty of first-degree felony murder, second-degree murder, armed robbery, robbery, theft, and two counts of carrying a weapon openly with the intent to injure. Allen, 192 Md.App. at 631.

On appeal, the court vacated Allen’s felony murder conviction because the trial court gave an erroneous jury instruction that failed to inform the jury that for Allen to be guilty of felony murder, the intent to commit the robbery had to be formed before the stabbing. The court affirmed the remaining convictions. The prosecution then retried Allen on the felony murder charge on the theory that Allen had formed the intent to

steal the car before he killed Butler, while the defense's theory was that stealing the car was an afterthought. Id. at 631-32.

The jury again convicted Allen of felony murder.¹² On his second appeal, Allen argued the trial court erred when it instructed the jury that he had previously been convicted of armed robbery, so the jury need not determine whether he had committed the underlying felony. Allen claimed that instruction collaterally estopped him from arguing an essential element of the crime of felony murder and therefore improperly removed the issue from the jury's consideration. Id. at 633.

After a thorough analysis of case law from around the country, the court agreed. Id. at 649. The Allen court concluded that “the vast majority of cases that have faced this issue have sided with Pelullo.” Allen, 192 Md. App. at 645 (citing, in addition to cases discussed above, United States v. Gallardo Mendez, 150 F.3d 1240, 1244 (10th Cir.1998); United States v. Harnage, 976 F.2d 633, 633 (11th Cir.1992); State v.

¹² The evidence showed Butler and two friends drove to a well-known gay meeting place known as “the Stroll.” Allen approached Butler’s car and got in. Butler drove his friends home and then went home with Allen, where the two engaged in consensual sex. The next morning, Allen told Butler that he wanted to leave, but Butler made no effort to take him home. When Butler refused, Allen picked up Butler's car keys and stated he was going to drive away in Butler’s car. Butler approached Allen, who grabbed a kitchen knife, stabbed Butler repeatedly, and then fled in Butler's car. Id. at 632.

Johnson, 134 N.H. 498, 594 A.2d 1288 (1991); State v. Stiefel, 256 So.2d 581, 585 (Fla.App.1972) (in dicta)).

As Allen notes, however, some courts permit the government to use collateral estoppel to make its case. But as that court also notes, those cases usually fall into the category of “status” cases. Those cases hold a defendant charged with illegally entering the country is estopped from contesting his alienage where that issue has been previously decided. Hernandez-Uribe v. United States, 515 F.2d 20, 21 (8th Cir. 1975); Pena-Cabanillas v. United States, 394 F.2d 785, 786 (9th Cir. 1968); and United States v. Rangel-Perez, 179 F.Supp. 619, 625 (S.D.Cal.1959). The principal rationale for allowing the offensive use of collateral estoppel in those cases is judicial economy: Such violations are often recurring and result in repeated retrials at great expense and burden to the United States government. For example, in Rangel-Perez, the District Circuit said:

If the issue of alienage were to be tried each time a defendant makes an entry into the United States, . . . there would be less to deter future entries than at the present. Even though the present risk of prosecution for illegal entry would remain . . . , a defendant would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming. . . . The Government should not be put to the expense and burden of proving the issue . . . after one judicial determination has been made, each time an alien decides to reenter this country illegally.

Rangel-Perez, 179 F.Supp. at 626.

The status cases have, however, been routinely criticized and limited to their peculiar facts. Where there is less risk of costly, repeated trials, courts have declined to use the alienage cases as authority for applying collateral estoppel offensively against a criminal defendant. See Pelullo, 14 F.3d at 891 (courts that have permitted the application of collateral estoppel against the accused have subordinated “the defendant’s constitutionally guaranteed right to a jury trial to concerns for efficient judicial administration and judicial perceptions of expeditious public police.”); Harnage, 976 F.2d at 636 (rejecting arguments that judicial efficiency and economy requires the use of collateral estoppel against criminal defendants).

Moreover, the Ninth Circuit has since changed course in alienage cases. See United States v. Smith-Baltiher, 424 F.3d 913, 920 (9th Cir. 2005) (State cannot collaterally estop a defendant from challenging his alienage status based on previous guilty pleas in which he was found to be a non-citizen); United States v. Bejar-Matrecios, 618 F.2d 81, 84 (9th Cir. 1980) (introduction of a prior judgment for illegal entry was too prejudicial to admit in a later trial for reentry into the United States after a prior deportation). The Smith-Baltiher and Bejar-Matrecios decisions undercut the viability of the Hernandez-Uribe decision, which relied heavily on the earlier Ninth Circuit position.

The only case the Allen court found sanctioning the offensive use of collateral estoppel in a criminal non-alienage case is People v. Ford, 65 Cal.2d 41, 52 Cal.Rptr. 228, 416 P.2d 132 (1966). In that case, the California Supreme Court held that on retrial for felony murder the court was permitted to instruct the jury that Ford had been convicted of the underlying felonies and it need only determine whether the felonies were committed during the homicide. Ford, 416 P.2d at 137-38.

But in Gutierrez v. Superior Court, 24 Cal.App.4th 153, 29 Cal.Rptr.2d 376, 385-86 (1994), the California Court of Appeals questioned the viability of Ford, noting that: (1) Ford did not raise a constitutional claim, and (2) Ford was decided before Ashe, 397 U.S. 436 and Simpson v. Florida, 403 U.S. 384, 91 S. Ct. 1801, 29 L. Ed. 2d 549 (1971) in which the United States Supreme Court questioned the government's ability to invoke collateral estoppel against a criminal defendant. Ashe, 397 U.S. at 443, 464-65 (C.J. Burger, dissenting); Simpson, 403 U.S. at 386. Accord United States v. Arnett, 353 F.3d 765 (9th Cir.2003) (accepting government's concession that in federal criminal trials it may not use collateral estoppel to establish as a matter of law an element of an offense or to conclusively rebut an affirmative defense on which the Government bears the burden of proof beyond a reasonable doubt).

As demonstrated above, while Washington courts have not explicitly addressed the use of collateral estoppel to direct a verdict on an element of a crime, the majority of courts that have addressed the issue prohibit such practice on constitutional grounds.

- b. The introduction of the judgment and sentence, combined with preclusion of defense argument as to an element of the crime, resulted in collateral estoppel.

While the above decisions prohibit prior convictions from establishing elements of a crime as a matter of law, not all prohibit the introduction of the underlying conviction as *evidence* of an element of a crime.

For example, while the Pelullo court concluded the lower court erred in instructing the jury, it nonetheless held that evidence of a defendant's prior conviction might be admissible to prove an element of the charged offense, provided the trial court determined the risk of unfair prejudice did not substantially outweigh the probative value. Pelullo, 14 F.3d at 888. The court reasoned:

Admitting a judgment of conviction into evidence as one of the many pieces of evidence to prove a case is very different from according a judgment collateral estoppel effect. As an ordinary piece of evidence, a judgment is subject to evaluation by the fact finder, who can accept or reject such evidence as it deems appropriate.

Id. Thus, on remand, Pelullo directed the lower court to “conduct a balancing analysis [under Fed.R.Evid. 403], and state its reason in the record for admitting or excluding the judgment of conviction.” Id. at 889; accord State v. Scarbrough, 181 S.W.3d 650 (Tenn. 2005); Allen, 192 Md.App. at 649.

In contrast, the Ingenito court held evidence of a prior conviction is not admissible because it is not merely evidential in character but rather amounts to de facto collateral estoppel. 432 A.2d at 920-22.

Here, the court did more than admit the conviction as an “ordinary piece of evidence” against Polo; rather, it admitted the conviction and then prohibited Polo from arguing he was not driving the truck. This was unconstitutional collateral estoppel as condemned in Pelullo, Allen, and the other cases discussed above. Because the trial court violated Polo’s right to a jury trial on each element of the offense, this court should reverse his conviction.

- c. Even if the Sixth Amendment does not prohibit the use of collateral estoppel to remove an element of a crime from jury consideration, the broader jury trial protections of the state constitution prohibit such practice.

Article I, section 21 of the state constitution provides that the right to jury trial shall remain “inviolable.” Webster’s defines “inviolable” as “free from change or blemish: pure, unbroken . . . free from

assault or trespass: untouched, intact.” Webster's Third International Dictionary 1190 (1993), cited in State v. Smith, 150 Wn.2d 135, 150, 75 P.3d 934 (2003). “The term ‘inviolable’ connotes deserving of the highest protection.” Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

Moreover, article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury.” Although the Sixth Amendment and article I, section 22 are comparable, Washington courts have previously found that article I, section 21 has no federal equivalent.

It is well settled that the Washington Constitution offers broader protection of the right to a jury trial, at least during the guilt phase of proceedings. See, e.g., Smith, 150 Wn.2d at 156 (holding that, in contrast to broader protections afforded during guilt phase, state jury trial right does not extend to consideration of sentencing matters).

Where, as here, prior cases firmly establish broader protections under the state constitutional provision, a full analysis under Gunwall is not required to establish that that broader protections apply. State v. Williams-Walker, 167 Wn.2d 889, 896 n. 2, 225 P.3d 913 (2010) (citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)). Nonetheless, it is worth noting again that Polo could locate no Washington case permitting

the use of “offensive” collateral estoppel in criminal proceedings. See Smith, 150 Wn.2d at 151 (factors three and four of the six-step Gunwall test provide that the extent of the right must be determined from the law and practice that existed in Washington at the time of our constitution's adoption in 1889). The oldest related case located by Polo, State v. Dye, 81 Wash. 388, 142 P.873 (1914), permits such use only by the *accused* in a criminal trial.

Thus, even if this Court determines, contrary to the weight of the authority, that the federal constitution permits proof of an essential element by collateral estoppel, the broader protections of the state constitution – requiring that the jury trial right remain “inviolable” – prohibit the practice even based on considerations of judicial economy.

d. The State cannot show the violations were harmless beyond a reasonable doubt.

The burden is always on the State to establish every element of the crime charged by proof beyond a reasonable doubt. State v. Roberts, 88 Wn.2d 337, 340, 562 P.2d 1259 (1977) (finding evidentiary presumption unconstitutional because it relieved State of burden of proving all elements of the charged crime). “It is reversible error to instruct the jury in a manner that would relieve the State of this burden.” State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995).

The error here is subject to automatic reversal. See State v. Jackson, 87 Wn. App. 801, 813-15, 944 P.2d 403 (1997) (“Some instructional omissions or misstatements are so fundamental that verdicts upon which they are based are altogether unsusceptible of harmless error analysis.”), aff’d, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999); see also State v. Williams, 22 Wn. App. 197, 201, 588 P.2d 1201 (1978) (directed verdict as to an element of taking a motor vehicle without owner’s permission was prejudicial error).

Assuming, *arguendo*, the error is subject to constitutional harmless error analysis, the omission of an essential element from the jury instructions will be deemed harmless only when the State can prove beyond a reasonable doubt the omission did not contribute to the verdict. State v. Schaler, 169 Wn.2d 274, 288, 236 P.3d 858 (2010) (citing State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002)). This is clear, for example, when the omitted element is supported by uncontroverted evidence. Schaler, 169 Wn.2d at 288; Brown, 147 Wn.2d at 341. On the other hand, the error cannot be considered harmless when the evidence and instructions raise the possibility the jury could have convicted on improper grounds. Id. at 341-43 (holding erroneous accomplice liability instructions were not harmless for any charges against the defendants

because the jury might have convicted on an improper understanding of the law).

There are difficulties with applying the Brown harmless error analysis to this case. The court did more than omit an element: It informed jurors how they should decide the facts as to that element. Instructions that direct a verdict, rather than omitting an element, may require automatic reversal. Jackson, 87 Wn. App. at 813-15; Williams, 22 Wn. App. at 201. Moreover, assuming the State argues the evidence was “uncontroverted,” it could only be considered such because Polo was prohibited from presenting evidence, which likewise undermined his right to present a defense. See State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (accused has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible) (citing Taylor v. Illinois, 484 U.S. 400, 404-10, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).

In any event, the State cannot establish the error was harmless. Removal of the possession element from the jury’s consideration reduced the case to a single disputed element: whether Polo knew the truck was stolen. And while Polo denied driving the truck, counsel could not present this denial as fact. See RP 166 (State’s closing argument); RP 170-73 (defense closing); RP 173-75 (rebuttal argument); see also RP 178

(explaining to court Polo's decision not to testify was based on court's ruling precluding denial). Based on the court's ruling, the jury had had no choice but to assume Polo was a liar when he told the officer at the scene he had not driven the truck. The unchallenged characterization of Polo as deceptive invited jurors to infer he also must have known the truck was stolen. It also permitted the State to argue that, despite Polo's extreme intoxication, he had the wherewithal to commit deception and therefore to form the necessary knowledge/intent to commit the crime. RP 173-75 (defense argument and State's response).

Under these circumstances, the State cannot show the error was harmless beyond a reasonable doubt. Brown, 147 Wn.2d at 341. Reversal is, therefore, required. Byrd, 125 Wn.2d at 713-14.

2. THE TRIAL COURT ERRED IN DENYING MR. POLO'S MOTION FOR A MISTRIAL BASED ON A SERIOUS TRIAL IRREGULARITY THAT OCCURRED DURING JURY SELECTION.

The right to a trial by jury includes the right to an unbiased and unprejudiced jury. U.S. Const. amend. VI, XIV; Wash. Const. art. I, §§ 3, 22; State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). A trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial. State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds, State v. Fire, 145 Wn.2d 152, 34 P.3d

1218 (2001). “[M]ore important than speedy justice, is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.” Parnell, 77 Wn.2d at 508.

The statement made in voir dire by the DOC employee identifying his occupation and stating he knew Polo’s name from DOC files is best described as a trial irregularity, because such irregularities include the jury seeing or hearing that which it should not. See State v. Bourgeois, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997) (spectator misconduct); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (outburst from defendant’s mother); State v. Mak, 105 Wn.2d 692, 700-01, 718 P.2d 407 (answer to improper question), cert. denied, 479 U.S. 995 (1986); State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987) (statement that defendant had a record); see also State v. Rempel, 53 Wn. App. 799, 800-802, 770 P.2d 1058 (1989) (juror’s tardy disclosure of information regarding fitness to serve treated as irregularity), rev’d on other grounds, 114 Wn.2d 77, 785 P.2d 1134 (1990).

While defense counsel properly challenged juror 714 for cause, removal from the venire did nothing to mitigate the harmful impact of his

statements.¹³ When examining a trial irregularity, the question is whether the incident so prejudiced the jury that the defendant was denied his right to a fair trial. If it did, a mistrial is required. Escalona, 49 Wn. App. at 254. Courts examine (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. Johnson, 124 Wn.2d at 76; Escalona, 49 Wn. App. at 254.

In Polo's case, application of these factors shows the trial court erred by denying the mistrial motion. First, the irregularity was serious. A DOC officer shared with the venire that he knew Polo from DOC files. Like that juror, every member of the jury was then aware Polo had been in prison.

The second factor, whether the irregularity involved cumulative information, also supported a mistrial. While the jurors heard Polo had been convicted of DUI, jurors would not necessarily assume that he was subject to DOC supervision for such a common offense.

Third, it appears from the court's minutes that no limiting instruction was given. In Escalona, moreover, this Court noted that "no

¹³ It appears from the minutes the juror was removed for cause. Supp. CP ___ (sub no. 48, supra, at 3-4). After defense counsel challenged juror 714 for cause, the State objected. The minutes then state the court excused "Juror #657 for cause." However, "657" had already been excused for cause. Id.

instruction can remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. " 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). As in Escalona, the juror's disclosure was highly prejudicial.

In Bourgeois, on the other hand, the Supreme Court concluded that a curative instruction sufficiently mitigated any prejudice resulting from a spectator who had glared at and made a hand gesture as if pointing a gun at a state's witness. Bourgeois, 133 Wn.2d at 397-398, 408. In so finding, the Court focused on the fact most jurors were apparently unaware of either incident before rendering their verdicts. Id. at 408-10. The opposite is true here. Every individual that ultimately served on Polo's jury was present and available to hear the juror's comments.

Because these comments were a serious irregularity, were not cumulative of any proper evidence, were heard by all jurors, and could not be mitigated with a jury instruction, the trial court should have granted the motion for mistrial.

3. THE ORIGINAL JUDGMENT AND SENTENCE SHOULD BE CORRECTED CONSISTENT WITH THIS COURT'S PRIOR OPINION, AND ANY SENTENCING CONDITION RELATED TO COUNT 3 SHOULD BE DELETED FROM THE AMENDED JUDGMENT AND SENTENCE.

Section 5.7 of the original judgment and sentence contains a scrivener's error requiring correction. The trial court erroneously found the DUI count was a felony "in the commission of which a motor vehicle was used" for purposes of license revocation under RCW 46.20.285. CP 56.

Polo raised this issue in his first appeal, the State conceded error, and this Court ordered that the condition be stricken. It appears, however, that no amended judgment and sentence was entered as to the remaining DUI conviction. The judgment and sentence entered following re-conviction of count 1, moreover, retains this reference. CP 17.

RCW 46.20.285 provides for a one-year driver's license revocation based on conviction for such a felony,¹⁴ other enumerated felonies, and other crimes. On the other hand, that statute provides for revocation for a DUI "for the period prescribed in RCW 46.61.5055." RCW 46.20.285(3).

Here, even assuming that count 1 was such a felony, count 3 is not a felony but a gross misdemeanor. RCW 46.61.502(1). Moreover, RCW

¹⁴ RCW 46.20.285(4).

46.61.5055 controls as to count 3, and the proper period of license revocation would be 90 days. RCW 46.61.5055(9)(a)(i).

This Court should therefore have corrected the correct the judgment and sentence. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); see also State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal). Consistent with the State's concession and this court's opinion and mandate, the court's section 5.7 finding should be stricken and the appropriate action taken regarding any Abstract of Court Record that was sent to the Department of Licensing. CP 17, 39-40; BOR, case no. 63339-2-I.

In addition, because count 3 was not challenged on appeal, this Court should delete all references to count 3 from the amended judgment and sentence. This includes reference to the supervision period for count 3. CP 16 (section 4.6). Removing references to such a period of supervision may have the salutary effect of preventing confusion that might result as to the date that condition took effect.

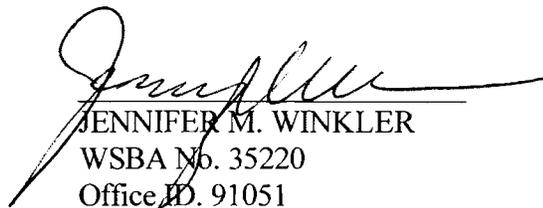
D. CONCLUSION

This Court should reverse Polo's conviction because the trial court violated Polo's state and federal constitutional rights to a jury verdict on each element of the charged crime, as well as his right to present a defense. Moreover, the trial court erred in denying his motion for a mistrial based on the serious trial irregularity that occurred during jury selection. Finally, this Court should remand for correction of the scrivener's error on the original judgment and sentence (as this Court previously ordered) and for deletion of references to supervision related to the unchallenged count 3 conviction on the amended judgment and sentence.

DATED this 18TH day of April, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER M. WINKLER
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Office ID. 91051

Attorneys for Appellant

APPENDIX A

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements *	TOTAL STANDARD RANGE (standard range including enhancements)	MAXIMUM TERM
I	1	II	2 to 6 Months		2 to 6 Months	10 yrs/\$20,000
III	1		0 to 365 Days		0 to 365 Days	1 yr/\$5,000

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW.94A.533(9).

[] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 [] EXCEPTIONAL SENTENCE. The court finds substantial and compelling reasons that justify an exceptional sentence:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are as follows:

III. JUDGMENT

		Sheriff service fees	\$	SFR/SFS/SFW/WRF
		Jury demand fee	<u>\$250</u>	JFR
PUB	<u>\$1,500.00</u>	Fees for court appointed attorney		RCW 9.94A.760
WFR	<u>\$</u>	Court appointed defense expert and other defense costs		RCW 9.94A.760
FCM	<u>\$866.00</u>	Fine		RCW 9A.20.021

507 520

LDI	\$	VUCSA Fine	<input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
MTH	\$	Meth Lab Cleanup	<input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.401	RCW 69.50
CDF/LDI/ FCD/NTF/ SAD/SDI	\$	Drug enforcement fund		RCW 9.94A.760
CLF	\$	Crime lab fee	<input type="checkbox"/> Suspended due to indigency	RCW 43.43.690
RTN/RJN	\$	Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum)		RCW 38.52.430
	\$	TOTAL		RCW 9.94A.760

[XX] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

- shall be set by the prosecutor
- is scheduled for _____.

[XX] RESTITUTION. Schedule attached

All payments shall be made in accordance with the policies, procedures and schedules of the Whatcom County Clerk as supervision of legal financial obligations has been assumed by the Court. RCW 9.94A.760

PAYMENT IN FULL: Defendant agrees and is hereby ordered to make payment in full within _____ days after the imposition of sentence to the Whatcom County Clerk for the amount due and owing for legal financial obligations and restitution.

[XX] MONTHLY PAYMENT PLAN: The defendant agrees and is hereby ordered to enter into a monthly payment plan, with the Whatcom County Clerk for the amounts due and owing for legal financial obligations and restitution, immediately after sentencing. The Court hereby sets the defendant's monthly payment amount at **\$100.00**, which will remain in effect until such time as the defendant executes a payment plan negotiated with the Collections Deputy. The first payment of **\$100.00** is due immediately after imposition of sentence or release from confinement, whichever occurs last.

During the period of repayment, the Whatcom County Clerk's Collections Deputy may require the defendant to appear for financial review hearings regarding the appropriateness of the collection schedule. The defendant will respond truthfully and honestly to all questions concerning earning capabilities, the location and nature of all property or financial assets and provide all written documentation requested by the Collections Deputy in order to facilitate review of the payment schedule. RCW 9.94A. The defendant shall keep current all personal information provided on the financial statement provided to the Collections Deputy. Specifically, the defendant shall notify the Whatcom County Superior Court Clerk's Collection Deputy, or any subsequent designee, of any material change in circumstance, previously provided in the financial statement, i.e. address, telephone or employment within 48 hours of change.

[XX] DEFENDANT MUST MEET WITH COLLECTIONS DEPUTY PRIOR TO RELEASE FROM CUSTODY.

[XX] The defendant shall pay the cost of services to collect unpaid legal financial obligations, which include monitoring fees for a monthly time payment plan and/or collection agency fees if the account becomes delinquent. (RCW 36.18.190)

In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here: _____ (JLR) RCW 9.94A.760

53

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.2 [XX]DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

4.3 **NO CONTACT ORDER/ORDER PROHIBITING CONTACT**

[XX]The defendant shall not have contact with **BRIAN ZENDER** including, but not limited to, personal, verbal, telephonic, written or contact through a third party for **10 years** (not to exceed the maximum statutory sentence).

**** Defendant has read and acknowledges above

Defendant's Signature

[] **NO POST-CONVICTION ORDER PROHIBITING CONTACT IS BEING ENTERED OR EXTENDED. ANY PRIOR ORDER ENTERED, HAVING THIS CAUSE NUMBER, TERMINATES ON THE DATE THIS JUDGMENT IS SIGNED.**

4.4 **OTHER:**

[] Defendant is to be released immediately to set up jail alternatives.

[] DEPORTATION. If the defendant is found to be a criminal alien eligible for release to and deportation by the United States Immigration and Naturalization Service, subject to arrest and reincarceration in accordance with law, then the undersigned Judge or Prosecutor consent to such release and deportation prior to the expiration of the sentence. RCW 9.94A.280

4.5 **JAIL ONE YEAR OR LESS.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the county jail:

4 MONTHS for Count I, 120 DAYS for Count III

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data above)

OTHER: _____

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA, in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above in section 2.3, and except for the following which shall be served CONSECUTIVELY:

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence IMMEDIATELY unless otherwise set forth here: _____
between 1:00 p.m. and 4:00 p.m.

[XX] **PARTIAL CONFINEMENT.** Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions:

[XX] WORK CREW

[XX] WORK RELEASE

54 120

CONVERSION OF JAIL CONFINEMENT (Nonviolent and Nonsex offenses). RCW 9.94A.680(3). The county jail is authorized to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.

ALTERNATIVE CONVERSION. RCW 9.94A.680. ___ days of total confinement ordered above are hereby converted to ___ hours of community service (8 hours = 1 day, nonviolent offenders only, 30 days maximum) which are to be completed within ten (10) months of sentencing at a non-profit organization of the defendant's choice. Proof of completion of community service hours must be submitted to the court on or before a review hearing set for _____ at _____ am. Failure to provide proof of compliance on or before the afore-noted date will result in all hours being converted immediately to straight jail time. In addition thereto, an additional thirty (30) days shall be served consecutive to the straight jail time as a sanction for failure to comply with the Court's order. Failure to appear at the review hearing will result in the issuance of a bench warrant.

(c) The defendant shall receive **credit for time served prior to sentencing, including time spent in transport**, if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

4.6 **SUPERVISION:** Community PLACEMENT/Community CUSTODY/Community SUPERVISION, as determined by DOC, for 5 years, for Count III, (up to 12 months);

[On or after July 1, 2003, the court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of Chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime.]

Defendant shall report to the Department of Corrections, 1522 Cornwall Avenue, Bellingham, WA 98225 not later than 72 hours after release from custody and the defendant shall comply with the instructions, rules and regulations of the Department for the conduct of the defendant during the period of community supervision or community custody, shall obey all laws, perform affirmative acts necessary to monitor compliance with the orders of the court as required by the Department, and shall comply with any other conditions of community supervision or community custody stated in this Judgment and Sentence or other conditions imposed by the court or Department during community custody:

remain in prescribed geographic boundaries specified by the community corrections officer:
 notify the community corrections officer of any change in defendant's address or employment

Other conditions: 90 days of license suspension, DUI victim panel, 1 year ignition interlock device.

The defendant shall undergo an evaluation for treatment for the concern noted below AND FULLY COMPLY with all recommended treatment.

- Domestic Violence
- Substance Abuse
- Mental Health
- Anger Management

The defendant shall not consume any alcohol.

Defendant shall comply with the No Contact provisions stated above.

The defendant shall participate in the following crime related treatment or counseling services:

The defendant shall comply with the following crime-related prohibitions:

For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

The community supervision or community custody imposed by this order shall be served consecutively to any term of community supervision or community custody in any sentence imposed for any other offense, unless

otherwise stated. The maximum length of community supervision or community custody pending at any given time shall not exceed 24 months, unless an exceptional sentence is imposed. RCW 9.94A.589

The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: _____

- 4.7 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections:

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional ten years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5)

- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606

- 5.4 **RESTITUTION HEARING.**

Defendant waives any right to be present at any restitution hearing (sign initials): _____

Defendant refuses to waive any right to be present at any restitution hearing.

- 5.5 **COMMUNITY CUSTODY VIOLATION.**

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).

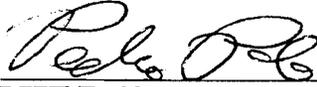
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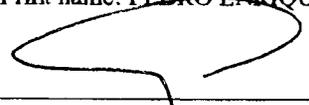
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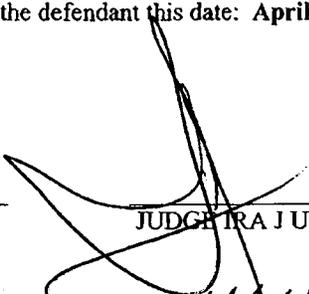
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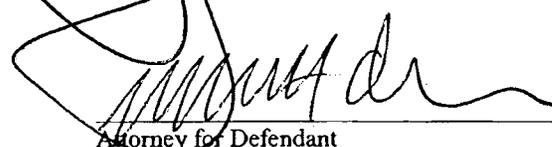
5.9 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: April 6, 2009.

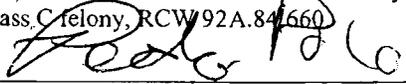

DEFENDANT
Print name: PEDRO ENRIQUE POLO


Deputy Prosecuting Attorney
WSBA # 22860
Print name: ERIC J. RICHEY


JUDGE IRA JUHRIG


Attorney for Defendant
WSBA # 91001
Print name: ROBERT E. OLSON

Voting Rights Statement: I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: 

57 1/2

CAUSE NUMBER of this case: **09-1-00121-1**

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: **April 6, 2009**.

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. _____
(If no SID take fingerprint card for State Patrol)

Date of Birth: 04/15/66

FBI No. _____
PCN No. **891936231**

Local ID No. _____

Other _____

Alias name, SSN, DOB:

Race: Hispanic

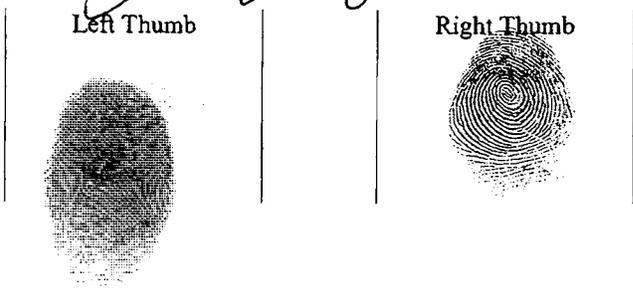
Sex: Male

Defendant's Last Known Address: Transient

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his fingerprints and signature thereto.

Clerk of the Court: Joan R. [Signature], Deputy Clerk. Dated: April 6, 2009

DEFENDANT'S SIGNATURE: [Signature]



124 260

APPENDIX B

SCANNED 9

FILED IN OPEN COURT
11-18-2010
WHATCOM COUNTY CLERK
By [Signature]
Deputy

SUPERIOR COURT OF WASHINGTON
COUNTY OF WHATCOM

Amended

STATE OF WASHINGTON, Plaintiff,

No. 09-1-00121-1
09-9-01276-0

vs.

JUDGMENT AND SENTENCE (FJS)

PEDRO ENRIQUE POLO, Defendant.

JAIL ONE YEAR OR LESS
[XX] CLERK'S ACTION REQUIRED-para 4.1 (LFO'S),
4.3 (NCO), 5.7 (DOL)

DOB: April 15, 1966

I. HEARING

1.1 The court conducted a sentencing hearing November 18, 2009 and the defendant, Pedro Enrique Polo, the defendant's lawyer, ALAN CHALFIE, and the Deputy Prosecuting Attorney, Eric J. Richey, were present.

II. FINDINGS

There being no reason why judgment should not be pronounced in accordance with the proceedings in this case, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant is guilty of the following offenses based upon a JURY VERDICT:

COUNT	CRIME	TYPE OF DRUG	RCW	DATE OF CRIME
1	POSSESSION OF A STOLEN VEHICLE	NOT APPLICABLE ON THIS COUNT	9A.56.068	January 24, 2009

as charged in the Amended Information.

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	A or J	TYPE OF CRIME
ASSAULT 3RD	07/19/06	S17	A	Class C felony

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525
- The following prior offense require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570):
- The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

ORIGINAL

See 93

cc: DOL

[Signature]

60

12

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements *	TOTAL STANDARD RANGE (standard range including enhancements)	MAXIMUM TERM
1	I	II	2 to 6 Months		2 to 6 Months	10 yrs/\$20,000

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW.94A.533(9).

[] Additional current offense sentencing data is attached in Appendix 2.3.

2.4]] EXCEPTIONAL SENTENCE. The court finds substantial and compelling reasons that justify an exceptional sentence:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are as follows:

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE

\$18,000.00	Restitution to: BRIAN ZENDER
-------------	------------------------------

RTN/RJN

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV	\$500.00	Victim Assessment	RCW 7.68.035
CRC	\$450.00	Court costs, including:	RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
		Criminal filing fee	\$200.00 FRC
		Witness costs	\$ WFR
		Sheriff service fees	\$ SFR/SFS/SFW/WRF
		Jury demand fee	\$250 JFR
PUB	\$1,500.00	Fees for court appointed attorney	RCW 9.94A.760
WFR	\$	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM	1250.00	Fine	RCW 9A.20.021

LDI	\$	VUCSA Fine	<input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
MTH	\$	Meth Lab Cleanup	<input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.401	RCW 69.50
CDF/LDI/ FCD/NTF/ SAD/SDI	\$	Drug enforcement fund		RCW 9.94A.760
CLF	\$	Crime lab fee	<input type="checkbox"/> Suspended due to indigency	RCW 43.43.690
RTN/RJN	\$	Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum)		RCW 38.52.430
	\$	TOTAL		RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
 shall be set by the prosecutor
 is scheduled for _____.

RESTITUTION. Schedule attached

All payments shall be made in accordance with the policies, procedures and schedules of the Whatcom County Clerk as supervision of legal financial obligations has been assumed by the Court. RCW 9.94A.760

PAYMENT IN FULL: Defendant agrees and is hereby ordered to make payment in full within _____ days after the imposition of sentence to the Whatcom County Clerk for the amount due and owing for legal financial obligations and restitution.

MONTHLY PAYMENT PLAN: The defendant agrees and is hereby ordered to enter into a monthly payment plan, with the Whatcom County Clerk for the amounts due and owing for legal financial obligations and restitution, immediately after sentencing. The Court hereby sets the defendant's monthly payment amount at \$100.00, which will remain in effect until such time as the defendant executes a payment plan negotiated with the Collections Deputy. The first payment of \$100.00 is due immediately after imposition of sentence or release from confinement, whichever occurs last.

During the period of repayment, the Whatcom County Clerk's Collections Deputy may require the defendant to appear for financial review hearings regarding the appropriateness of the collection schedule. The defendant will respond truthfully and honestly to all questions concerning earning capabilities, the location and nature of all property or financial assets and provide all written documentation requested by the Collections Deputy in order to facilitate review of the payment schedule. RCW 9.94A. The defendant shall keep current all personal information provided on the financial statement provided to the Collections Deputy. Specifically, the defendant shall notify the Whatcom County Superior Court Clerk's Collection Deputy, or any subsequent designee, of any material change in circumstance, previously provided in the financial statement, i.e. address, telephone or employment within 48 hours of change.

DEFENDANT MUST MEET WITH COLLECTIONS DEPUTY PRIOR TO RELEASE FROM CUSTODY.

The defendant shall pay the cost of services to collect unpaid legal financial obligations, which include monitoring fees for a monthly time payment plan and/or collection agency fees if the account becomes delinquent. (RCW 36.18.190)

In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here: _____ (JLR) RCW 9.94A.760

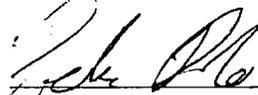
The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.2 [XX]DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

4.3 **NO CONTACT ORDER/ORDER PROHIBITING CONTACT**

[XX]The defendant shall not have contact with **BRIAN ZENDER** including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 10 years (not to exceed the maximum statutory sentence).

**** Defendant has read and acknowledges above



Defendant's Signature

[] **NO POST-CONVICTION ORDER PROHIBITING CONTACT IS BEING ENTERED OR EXTENDED. ANY PRIOR ORDER ENTERED, HAVING THIS CAUSE NUMBER, TERMINATES ON THE DATE THIS JUDGMENT IS SIGNED.**

4.4 **OTHER:**

[] Defendant is to be released immediately to set up jail alternatives.
[] **DEPORTATION.** If the defendant is found to be a criminal alien eligible for release to and deportation by the United States Immigration and Naturalization Service, subject to arrest and reincarceration in accordance with law, then the undersigned Judge or Prosecutor consent to such release and deportation prior to the expiration of the sentence. RCW 9.94A.280

4.5 **JAIL ONE YEAR OR LESS.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the county jail:

4 MONTHS for Count I

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data above)

OTHER: **TIME HAS ALREADY BEEN SERVED**

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA, in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above in section 2.3, and except for the following which shall be served CONSECUTIVELY:

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence **IMMEDIATELY** unless otherwise set forth here: _____

between 1:00 p.m. and 4:00 p.m.

[] **CONVERSION OF JAIL CONFINEMENT (Nonviolent and Nonsex offenses).** RCW 9.94A.680(3). The county jail is authorized to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.

[] **ALTERNATIVE CONVERSION.** RCW 9.94A.680. _____ days of total confinement ordered above are hereby converted to _____ hours of community service (8 hours = 1 day, nonviolent offenders only, 30 days maximum) which are to be completed within ten (10) months of sentencing at a non-profit organization of the defendant's choice. Proof of completion of community service hours must be submitted to the court on or before a review hearing set for _____ at _____ am. Failure to provide proof of compliance on or before the afore-noted date will result in all hours being converted immediately to straight jail time. In addition thereto, an additional thirty (30) days shall be

served consecutive to the straight jail time as a sanction for failure to comply with the Court's order. Failure to appear at the review hearing will result in the issuance of a bench warrant.

- (c) The defendant shall receive **credit for time served prior to sentencing, including time spent in transport**, if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

4.6 **SUPERVISION:** [XX]Community PLACEMENT/Community CUSTODY/Community SUPERVISION, as determined by DOC, for 5 years, for Count III, (up to 12 months);

[On or after July 1, 2003, the court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of Chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime.]

Defendant shall report to the Department of Corrections, 1522 Cornwall Avenue, Bellingham, WA 98225 not later than 72 hours after release from custody and the defendant shall comply with the instructions, rules and regulations of the Department for the conduct of the defendant during the period of community supervision or community custody, shall obey all laws, perform affirmative acts necessary to monitor compliance with the orders of the court as required by the Department, and shall comply with any other conditions of community supervision or community custody stated in this Judgment and Sentence or other conditions imposed by the court or Department during community custody:

- [] remain in prescribed geographic boundaries specified by the community corrections officer:
[XX] notify the community corrections officer of any change in defendant's address or employment

Other conditions: ~~90 days of license suspension, BUT Victim Panel 1 was limited on interlock device.~~

[XX] The defendant shall undergo an evaluation for treatment for the concern noted below AND FULLY COMPLY with all recommended treatment.

- [] Domestic Violence
[XX] Substance Abuse
[] Mental Health
[] Anger Management

- [XX] The defendant shall not consume any alcohol.
[XX] Defendant shall comply with the No Contact provisions stated above.
[] The defendant shall participate in the following crime related treatment or counseling services:
[XX] The defendant shall comply with the following crime-related prohibitions:

[] For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

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The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: _____

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5.4 **RESTITUTION HEARING.**

[XX] Defendant waives any right to be present at any restitution hearing (sign initials): _____

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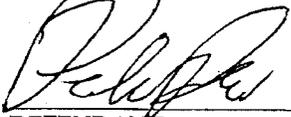
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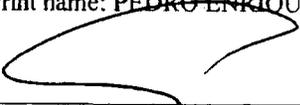
5.9 **OTHER:** _____

DONE in Open Court and in the presence of the defendant this date: **November 18, 2010**



DEFENDANT

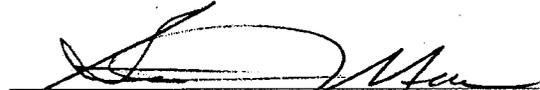
Print name: PEDRO ENRIQUE POLO



Deputy Prosecuting Attorney

WSBA # 22860

Print name: ERIC J. RICHEY



JUDGE ~~IRVING~~ STEVEN MURA

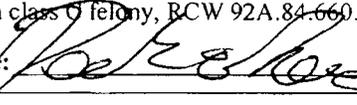


Attorney for Defendant

WSBA # 91001

Print name: ALAN CHALFIE

Voting Rights Statement: I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: 

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY**

THE STATE OF WASHINGTON,)	
)	
Plaintiff.)	No. 09-1-00121-1
)	
vs.)	JUDGMENT AND SENTENCE
)	(FELONY) – APPENDIX E
PEDRO ENRIQUE POLO,)	SCHEDULE OF RESTITUTION
)	
Defendant.)	

4.1 (c) The defendant is to make restitution to the following person(s) in the following amounts and sequences, payable in installments approved by (the Community Corrections Officer) (and) (or) (the Court):

BRIAN ZENDER 3050 Sundown View Lane Bellingham, WA. 98226	\$18,000.00
--	--------------------

TOTAL	\$18,000.00
--------------	--------------------

Said restitution shall be paid through the registry of the Clerk of the Whatcom County Superior Court, who shall disburse the same to the above-named person as funds become available.

Restitution may be amended at a future date should there be additional damages, loss or medical claims.

Pedro Enrique Polo

CAUSE NUMBER of this case: 09-1-00121-1

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: November 18, 2010.

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. _____
(If no SID take fingerprint card for State Patrol)

Date of Birth: 04/15/66

FBI No. _____

Local ID No. _____

PCN No. 891936231

Other _____

Alias name, SSN, DOB:

Race: Hispanic

Sex: Male

Defendant's Last Known Address: Transient

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his fingerprints and signature thereto.

Clerk of the Court: _____, Deputy Clerk. Dated: November 18, 2010

DEFENDANT'S SIGNATURE: *[Signature]*

Left Thumb

Right Thumb

