

No. 67373-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEREMY JERMAINE JACOBS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Jeremy Jacobs received an exceptional sentence but the State did not provide him notice prior to trial of its intent to seek an exceptional sentence, as required by RCW 9.94A.537(1). Also, Mr. Jacobs was not informed he had a right to have a jury determine the existence of the aggravating factor, and therefore he did not knowingly and voluntarily waive his right to a jury trial on the aggravator. For these reasons, the exceptional sentence must be reversed and Mr. Jacobs must be resentenced within the standard range.

In addition, the trial court erred in failing to appoint a new attorney for Mr. Jacobs despite compelling evidence Mr. Jacobs and his attorney had an irreconcilable conflict that prevented them from communicating with each other during the critical trial preparation stage. This error requires reversal of the convictions.

B. ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory authority in imposing an exceptional sentence where the State did not provide notice prior to trial of its intent to seek an exceptional sentence.

2. The following finding is not supported by substantial evidence:
“The parties then proceeded with a bench trial, after stipulating that the Court could consider the testimony given by the Sheriff Deputies under

oath the day before, at the CrR 3.5 hearing, as substantive evidence for trial.” CP 197.

3. Mr. Jacobs did not knowingly and voluntarily waive his right to have a jury determine the existence of the aggravating factor.

4. The following finding is not supported by substantial evidence:

Jacobs waived his right to a jury trial on advice of counsel after being thoroughly advised by the Court of his right to a jury trial. The waiver was both oral in open court, and in writing. The waiver was knowing and intelligent, and there were legitimate strategic reasons for the waiver.

CP 196.

5. The trial court’s failure to appoint a new attorney violated Mr. Jacobs’s Sixth Amendment right to counsel.

6. The following finding is not supported by substantial evidence:

Despite the strained relationship, Jacobs and Osterman [sic] did communicate regarding the charges against Jacobs, the amendments that Osterman [sic] expected would be filed by the State, the evidence that would or could be presented at trial, trial strategy, the likelihood of conviction on the various charges and potential charges, including the deadly weapon enhancement and the domestic violence history aggravating factor, and the sentencing ranges and penalties Jacobs faced in the event he was convicted.

CP 192.

7. The following finding is not supported by substantial evidence:

“Osterman [sic] explained to Jacobs that the aggravator would, if filed and

proved, allow a judge to sentence Jacobs above the standard sentencing range, up to the statutory maximum of ten years.” CP 193.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The court may not impose an exceptional sentence unless the State provides notice prior to trial of its intent to seek an exceptional sentence. Did the court err in imposing an exceptional sentence where the State did not provide notice prior to trial of its intent to seek an exceptional sentence?

2. Although a defendant may waive his constitutional right to have a jury determine the existence of an aggravating factor, the waiver must be knowing, intelligent and voluntary. Was Mr. Jacobs's waiver of his jury trial right for the aggravating factor unknowing, unintelligent and involuntary where he was never informed he had such a right?

3. A criminal defendant is constructively denied his Sixth Amendment right to counsel where he and his attorney have such a conflict-ridden relationship that they cannot communicate with each other and the defendant is thereby prevented from participating in the preparation of his defense. Was Mr. Jacobs denied his constitutional right to counsel where his relationship with his attorney was so full of conflict during the trial preparation stage that he could not effectively communicate with his attorney or participate in preparing his defense?

D. STATEMENT OF THE CASE

1. Background facts. Jeremy Jacobs and Terri Crow began dating in 2007. CP 33. They have one child in common and Mr. Jacobs is a father figure for Ms. Crow's two older children. CP 33. In May 2010, the couple and their children were living in an apartment in SeaTac. CP 33.

On May 15, 2010, at around 1 a.m., a neighbor woke up to the sound of Mr. Jacobs and Ms. Crow arguing in their apartment. 9/30/10RP 41. The neighbor looked through her window and saw Ms. Crow in her bedroom and saw a man hit her with an open hand across the face. 9/30/10RP 42, 47. The neighbor called 911. 9/30/10RP 41.

Police responded and found Ms. Crow crying and distraught. 9/28/10RP 17, 78. She said Mr. Jacobs assaulted and threatened her. 9/28/10RP 17, 78. Police arrested Mr. Jacobs. 9/28/10RP 79-80. As they were leading him out of the apartment, he turned and looked at Ms. Crow and said, "Terri, you better not say anything." 9/28/10RP 19.

Ms. Crow did not have any visible injuries and did not request medical attention. 9/28/10RP 44, 96.

Ms. Crow told police Mr. Jacobs had recorded part of the incident on his cell phone. 9/28/10RP 19, 84. Police recovered a knife and Mr. Jacobs's cell phone from the bedroom. 9/28/10RP 86.

2. Pretrial and trial procedures. On May 19, 2010, the State charged Mr. Jacobs with one count of felony harassment, RCW 9A.46.020(1), (2). CP 1.

On August 10, 2010, Mr. Jacobs filed a motion to dismiss his court-appointed attorney John Ostermann. CP 7-11. He asserted Mr. Ostermann was ineffective for requesting a continuance over Mr. Jacobs's objection, for failing to conduct a reasonable investigation, and for failing to allow himself sufficient time to prepare for trial. CP 8.

A hearing was held before Honorable Brian Gain. Mr. Jacobs complained that Mr. Ostermann had not interviewed witnesses, would not answer his phone calls, and would not provide him with discovery or other information in a timely manner. 8/10/10RP 19-20. Mr. Jacobs's conflict with Mr. Ostermann was so severe that the two could not work together:

I'm not gonna work with this gentleman any longer. Uh, I won't-I won't see him. I will not try to come up with any type of resolution to this with him. He's not-he's not been trying to work with me. Uh, we've had issues throughout this whole time. And I'd rather just move on to a new counsel if you're going to continue to, uh, drag this on.

8/10/10RP 18. Mr. Ostermann agreed "Mr. Jacobs and I have had a . . . difficult attorney/client relationship at times," and "he does not have confidence in me at all." 8/10/10RP 18.

Judge Gain told Mr. Jacobs he was willing to appoint a new attorney, but if he did, the trial would be further delayed. 8/10/10RP 17-

19. The judge also cautioned he would not appoint a third attorney if Mr. Jacobs became dissatisfied with the next one. 8/10/10RP 19-20. Mr. Jacobs agreed to stay with Mr. Ostermann because he did not want further delays. 8/10/10RP 20. The judge told Mr. Jacobs he could renew his motion later if he still could not work with Mr. Ostermann. 8/10/10RP 21.

Mr. Jacobs also filed a *pro se* motion to dismiss, asserting his right to a speedy trial was violated, and Judge Gain heard the motion on August 20. Mr. Jacobs again complained Mr. Ostermann had requested continuances over his objections and had not conducted a timely investigation. 8/20/10RP 27. The court observed, “it sounds like it is deteriorating your relationship [sic] with Mr. Ostermann.” 8/20/10RP 29.

Mr. Jacobs responded,

I guarantee you it is, Your Honor. He has not done anything in any way to-to help me but try to coerce me or, uh, threaten me to-to take a plea bargain. And this is the only reason they con-continuing [sic] my trial in order to try to make me take a plea bargain.

8/20/10RP 29.

On September 9, Mr. Ostermann himself filed a motion to withdraw, which was heard before Honorable Mary Roberts. 9/09/10RP 31. Mr. Ostermann acknowledged Mr. Jacobs did not want to discharge him because that would delay the trial, but he asserted, “I believe quite firmly that our communication has broken down.” 9/09/10RP 31-32. Mr.

Ostermann explained Mr. Jacobs had written numerous letters complaining about him and had even filed a bar complaint. 9/09/10RP 32. He said, “I have a hard time seeing how he and I can effectively work together in a trial at this point, given the . . . difficulty we're having with communication. Mr. Jacobs has made it very clear that he believes I do not have his best interest in mind.” 9/09/10RP 32.

Mr. Jacobs agreed, “I do feel like he has . . . deceived me and . . . coerced me.” 9/09/10RP 32. But he did not want Mr. Ostermann discharged because he “want[ed] to go to trial.” 9/09/10RP 33, 36. The court said, “[t]he best way for you to go to trial is continue on with Mr. Ostermann.” 9/09/10RP 37. Therefore, the court denied Mr. Ostermann's motion to withdraw. 9/09/10RP 37.

On September 28, the State moved to amend the information to add three additional counts. 9/28/10RP 11-12. In addition to felony harassment (now count III), the State charged Mr. Jacobs with first-degree assault, RCW 9A.36.011(1)(a), alleging Mr. Jacobs assaulted Ms. Crow with a means likely to produce great bodily harm or death by trying to throw her out a second-story window (count I); second-degree assault, RCW 9A.36.021(1)(e), alleging Mr. Jacobs intentionally assaulted Ms. Crow with intent to commit felony harassment (count II); and witness tampering, RCW 9A.72.120 (count IV). CP 29-31.

The next day, September 29, the State filed another amended information, adding deadly weapon enhancements to counts II and III, based on Mr. Jacobs's alleged use of a knife. CP 29-31; 9/29/10RP 84-85, 87.

The same date, Mr. Jacobs waived his right to a jury trial. 9/29/10RP 91-92; CP 28.

A bench trial began on September 30, before Honorable Andrea Darvas. Two State witnesses testified that day. 9/30/10RP 14-74.

The next trial day, October 4, the State moved to amend the information once again, to add an aggravating factor in support of an exceptional sentence. 10/04/10RP 4-5. The State alleged counts II and III involved domestic violence and “there is evidence of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time, under the authority of RCW 9.94A.535(3)(h)(i).” 10/04/10RP 5; CP 226-27. The court allowed the amendment. 10/04/10RP 8-9; CP 226-27.

Mr. Jacobs was not informed he had a right to have a jury determine the existence of the aggravating factor and no new jury trial waiver was entered.

3. Ms. Crow's trial testimony. Ms. Crow testified that on the night of May 14, 2010, she got home from work at around midnight to find Mr.

Jacobs in a foul mood. 10/04/10RP 33-34. He was upset about an argument he had with a neighbor; he was drunk and loud. 10/04/10RP 34, 36, 39. He grabbed a knife from the table and poked it at the couch, creating a small hole. 10/04/10RP 37. When Ms. Crow yelled at him for poking a hole in her couch, he grabbed her tie and yanked it and told her not to start with him. 10/04/10RP 39-40. She went to the bedroom to change her clothes. 10/04/10RP 41.

After dinner, Mr. Jacobs was still aggravated about the neighbor incident. When Ms. Crow went into the bedroom to smoke a cigarette, he followed her and the two argued. 10/04/10RP 45-46. Mr. Jacobs said, "If you don't be quiet, . . . I'm going to put you out the window." 10/04/10RP 46. He grabbed her chin and her legs and opened the window further, saying he would throw her out. 10/04/10RP 46-48. She started crying and dropped down so that he could not lift her, scraping her back against the window sill. 10/04/10RP 46-49.

Mr. Jacobs then began videotaping Ms. Crow with his cell phone. 10/04/10RP 50. He threatened to kill her. 10/04/10RP 50. She was crying and hysterical. 10/04/10RP 50.

After about a minute, Mr. Jacobs stopped videotaping and Ms. Crow lay on the bed and got under the covers. 10/04/10RP 52, 54. Mr. Jacobs left the room briefly and then returned. 10/04/10RP 117-18. He

told her to be quiet or he would kill her. 10/04/10RP 52. She could hear him tapping on the top of the dresser what she believed was the knife he had used earlier to poke a hole in the couch. 10/04/10RP 52-53. Before long, the police knocked on the door and Ms. Crow got up to answer it. 10/04/10RP 55.

Ms. Crow also described prior incidents between her and Mr. Jacobs. 10/04/10RP 65-83.

4. Verdict. The court acquitted Mr. Jacobs of first degree assault because “the Court [wa]s unable to conclude beyond a reasonable doubt that Jacobs assaulted Crow with the intent to inflict great bodily harm and that the force or means used by Jacobs were likely to produce great bodily harm or death.”¹ CP 41.

The court found Mr. Jacobs guilty of second degree assault as charged in count II, based on Mr. Jacobs’s attempt to throw Ms. Crow out the window while threatening her. CP 41. But the court acquitted Mr. Jacobs of the deadly weapon enhancement for that count. CP 43.

The court also found Mr. Jacobs guilty of felony harassment as charged in count III, based on his threats to kill after he stopped trying to throw Ms. Crow out the window. CP 44. The court found Mr. Jacobs guilty of the deadly weapon enhancement for count III. CP 44.

¹ A copy of the trial court’s written findings and conclusions following the bench trial is attached as Appendix A.

As for count IV, the court found Mr. Jacobs guilty of witness tampering “with respect to the statement Jacobs made to Crow as he was being taken out of the apartment by the police on May 15, 2010.” CP 45.

Finally, the court found the State proved counts II and III were “part of an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time, pursuant to RCW 9.94A.535(3)(h)(i).” CP 41-42.

5. Post-trial motion. After trial, Mr. Jacobs was appointed new counsel and filed a CrR 7.5 motion for a new trial. CP 72-93. He alleged, among other things, he received ineffective assistance of counsel based on an irreconcilable conflict with his attorney; the final amended information was untimely; and he did not waive his right to a jury trial on the aggravating factor. Id.

A hearing was held before Judge Darvas on February 17, 2011. Mr. Jacobs testified that, prior to trial, he was frustrated with his attorney Mr. Ostermann because he would not visit him, answer his phone messages, or show him the discovery. 2/17/11RP 48-58. Mr. Ostermann requested a continuance without notifying Mr. Jacobs and over Mr. Jacobs's objection. 2/17/11RP 55-57. He would not call the witness or investigate the possible defense that Mr. Jacobs suggested. 2/17/11RP 64, 67. Mr. Jacobs made plain to Mr. Ostermann from the beginning that he

did not want to plead guilty, but Mr. Ostermann persistently pressured him to take the State's plea offer.² 2/17/11RP 61-62, 69, 73. Mr. Jacobs lodged numerous complaints with Mr. Ostermann's supervisor and the Bar Association. 2/17/11RP 50, 54, 58-60, 69-70. He "felt like [he] didn't trust [Mr. Ostermann] at all," that Mr. Ostermann was "lying to [him], . . . that he wasn't on [his] team" and that "he was working for the State." 2/17/11RP 68-69.

During the critical pretrial preparation stage, Mr. Jacobs's relationship with Mr. Ostermann was "always combative. Never a good conversation." 2/17/11RP 69. Mr. Jacobs often spoke with Mr. Ostermann's supervisor because he "couldn't talk to [Mr. Ostermann]"; talking to the supervisor was often "the only way" he could get an answer. 2/17/11RP 70. Mr. Jacobs and Mr. Ostermann often argued about Mr. Jacobs's refusal to take a plea offer. 2/17/11RP 73-74. At the time Mr. Jacobs filed the motion to discharge his attorney, in August 2010, their relationship "was just so damaged that [they] barely ever spoke. [Mr. Jacobs] didn't even want [Mr. Ostermann] to come see [him] anymore." 2/17/11RP 78. They had a complete breakdown of communication, as they "couldn't talk about anything"; the only conversations they had were

² Mr. Ostermann told Mr. Jacobs that the State would add new charges if he did not plead guilty. 2/17/11RP 62.

“either yelling, screaming, hanging up, or calling each other names.”³

2/17/11RP 81-82. Mr. Jacobs elaborated:

He just didn't listen. He didn't listen to anything. All he'd do was threaten me, threaten me and tell me how stupid I was He would never listen to nothing I had to say, nothing I had to say was-I mean, it was my case and he didn't want to hear none of it.

2/17/11RP 79.

Mr. Jacobs also testified he did not learn about the aggravating factor until the State moved to amend the information after trial had already begun. 2/17/11RP 86. Even then, he was not informed and did not understand he had a right to a jury trial on the aggravator. 2/17/11RP 102, 118. Mr. Ostermann did not discuss with Mr. Jacobs how to defend against the prior abuse allegations. 2/17/11RP 101-02.

Mr. Ostermann also testified at the hearing.⁴ He agreed he thought Mr. Jacobs should plead guilty and his discussions with Mr. Jacobs were largely about that. 4/20/11RP 251. He also agreed he did not spend much time talking to Mr. Jacobs about the aggravating factor. 4/20/11RP 253-57, 302. He “did not go into a great deal of detail about what the aggravators [sic] involved . . . other than the possibility of an exceptional sentence or a sentence outside the standard range.” 4/20/11RP 255-56.

³ At one point, Mr. Ostermann called Mr. Jacobs a “fucking asshole.” 2/17/11RP 87.

⁴ Attorney-client confidentiality was waived.

He confirmed he did *not* explain to Mr. Jacobs he had a right to a jury trial on the aggravating factor. 4/20/11RP 283. By the time the possibility of an exceptional sentence arose, Mr. Ostermann had decided, in order to preserve “any bit of attorney/client relationship [they] still had,” not to talk to Mr. Jacobs about potential consequences if they lost at trial, including the likelihood of an exceptional sentence. 4/20/11RP 257, 271-72. Mr. Ostermann agreed he and Mr. Jacobs “went through some very contentious times”; it was only after trial began, when they agreed not to talk about a plea deal, that their relationship improved. 4/20/11RP 273.

The trial court denied the motion for new trial.⁵ CP 191-204. The court found the relationship between Mr. Jacobs and Mr. Ostermann was “strained” and “their communication was poor during part of the representation.” CP 200. But the court also found that, despite the strained relationship, the two managed to communicate about the charges, the evidence that could be presented at trial, trial strategy, and “the likelihood of conviction on the various charges and potential charges, including . . . the domestic violence history aggravating factor.” CP 192. The court found significant that Mr. Jacobs withdrew his motion for new counsel and objected when Mr. Ostermann moved to withdraw, and that the two worked cooperatively once trial began. CP 200.

⁵ A copy of the trial court's written findings and conclusions on the motion for new trial is attached as Appendix B.

The court also found the amendment of the information to add the aggravating factor was not untimely, but the court did not address whether the State violated the statutory notice provision found in RCW 9.94A.537(1). CP 201. Finally, the court found Mr. Jacobs knowingly and intelligently waived his right to a jury trial and no new waiver was required when the State added the aggravator to the information. CP 202.

6. Sentence. Based on the aggravator, the court imposed an exceptional sentence of four months for counts II and III. CP 233.

E. ARGUMENT

1. STANDARD OF REVIEW

In reviewing challenged findings of fact following a bench trial in a criminal case, the Court determines whether substantial evidence supports the findings. State v. Mewes, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). Substantial evidence is that which is sufficient to persuade a fair-minded rational person of the truth of the findings. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are viewed as verities on appeal. Id.; see also State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). “Review is then limited to determining whether the findings support the conclusions of law.” Alvarez, 105 Wn. App. at 220. Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

2. THE COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE WHERE THE STATE DID NOT PROVIDE THE NOTICE REQUIRED BY STATUTE AND MR. JACOBS DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS RIGHT TO A JURY TRIAL ON THE AGGRAVATING FACTOR

a. The trial court exceeded its statutory authority in imposing an exceptional sentence where the State did not provide notice prior to trial of its intent to seek an exceptional sentence.

It is axiomatic that a court's sentencing authority is derived solely from statute and is further constrained by the requirements of the constitution. See Blakely v. Washington, 542 U.S. 296, 305-06, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). A court does not have inherent authority to impose an exceptional sentence. Pillatos, 159 Wn.2d at 469 (“no such inherent authority exists” for court to create own procedures to impose sentence above standard range). It would “usurp the power of the legislature” for the court to create a procedure to impose an exceptional sentence that is not authorized by statute. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Here, the judge exceeded her statutory authority in imposing an exceptional sentence because the State did not provide notice as required by statute.

RCW 9.94A.537(1) provides: “At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.”

The statute “permits the imposition of an exceptional sentence *only* when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range.” State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007) (citing RCW 9.94A.537(1)). If “it is too late for the State to comply with that requirement,” because trial has already begun or the defendant has already pled guilty, the court is without statutory authority to impose an exceptional sentence. Id.

In State v. Edvalds, this Court affirmed that, for aggravating factors that go to the jury, “RCW 9.94A.537(1) permits the imposition of an exceptional sentence . . . only when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range.” 157 Wn. App. 517, 532, 237 P.3d 368 (2010) (citing Womac, 160 Wn.2d at 663), review denied, 171 Wn.2d 1021, 257 P.3d 663 (2011).

Here, the State violated RCW 9.94A.537(1) because it did not provide notice of its intent to seek an exceptional sentence until *after* trial had begun. Trial began on September 30, 2010. Two State witnesses testified that day. See 9/30/10RP 14-74. The State did not provide notice of its intent to seek an exceptional sentence until several days later, on October 4, when it moved to amend the information.⁶ 10/04/10RP 4-8. Therefore, because the State did not provide notice prior to trial, the court was without statutory authority to impose an exceptional sentence Womac, 160 Wn.2d at 663; Edvalds, 157 Wn. App. at 532.

The trial court found that, after the court granted the State's motion to amend the information, "[t]he parties then proceeded with a bench trial, after stipulating that the Court could consider the testimony given by the Sheriff Deputies under oath the day before, at the CrR 3.5 hearing, as substantive evidence for trial." CP 197. To the extent the court impliedly found that trial did not begin until *after* the State moved to amend the information, the court's finding is not supported by substantial evidence.

As stated, trial formally began on September 30, 2010. 9/30/10RP 14. Contrary to the court's finding, the CrR 3.5 and other pretrial hearings were held on September 28 and 29, 2010. See 9/28/10RP 14-143;

⁶ The final amended information was not actually filed until July 8, 2011. CP 225-28. But the record indicates the deputy prosecutor provided a written copy of the amended information to the defendant and the court on October 4, 2010. See 10/04/10RP 8. At that time, defense counsel acknowledged receipt of the amended information. Id.

9/29/10RP 3-103. The State did not move to amend the information until October 4, after trial had already begun. 10/04/10RP 4-8.

When the deputy prosecutor moved to amend the information, he asserted to the court he had informed defense counsel informally of the proposed amendment on the preceding Thursday or Friday. 10/04/10RP 5. But nothing was filed in the court file at that time. Also, nothing in the record indicates that Mr. Jacobs himself received notice of the State's intent until October 4, when the State moved in open court to amend the information. In fact, Mr. Jacobs specifically denied receiving notice before then. 2/17/11RP 86. The prosecutor's informal notice, given to defense counsel only, should not be deemed sufficient to comply with the statutory notice requirement.

This Court has never permitted anything less than written notice, given *to the defendant* prior to trial or entry of a guilty plea, of the State's intent to seek an exceptional sentence. In State v. Berrier, the State filed a written notice, prior to Berrier's guilty plea, of its intent to seek an exceptional sentence. 143 Wn. App. 547, 550, 178 P.3d 1064 (2008), abrogated on other grounds by State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2010). The notice was filed separately from, but concurrently with, the information. Id. The State's written notice of intent, filed prior to

entry of the guilty plea, was sufficient to comply with RCW 9.94A.537(1).
Id. at 558-59.

In State v. Bobenhouse, the prosecutor wrote a letter to defense counsel prior to trial to notify him that the State would seek an exceptional sentence and the lawyer acknowledged, in writing, that he received the prosecutor's notice and *delivered it to the defendant*. 143 Wn. App. 315, 331, 177 P.3d 209 (2008), aff'd on other grounds, 166 Wn.2d 881, 214 P.3d 907 (2009). The record was adequate to show Bobenhouse received advance notice of the State's intent to seek a sentence above the standard range. Id.

Here, there is no showing that Mr. Jacobs received written notice prior to trial of the State's intent to seek an exceptional sentence. Therefore, his statutory right to advance notice was violated. RCW 9.94A.537(1).

A sentence in excess of statutory authority is subject to challenge and the person is entitled to be resentenced. In re Pers. Restraint of Goodwin, 146 Wn.2d 86, 869, 50 P.3d 618 (2002) (and cases cited therein). The court exceeded its statutory authority in imposing an exceptional sentence and Mr. Jacobs is therefore entitled to be resentenced. Because it is too late for the State to comply with the

statutory notice requirement, he must be resentenced within the standard range. Womac, 160 Wn.2d at 663.

- b. Mr. Jacobs did not knowingly and voluntarily waive his right to a jury trial on the aggravating factor.

Absent the defendant's knowing, intelligent and voluntary waiver, a judge exceeds her constitutional authority in imposing a sentence beyond the statutory maximum based on factual determinations that are made by a judge, not a jury, and are not proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 483, 488, 120 S. Ct. 2348, 147 L. Ed. 2d (2000); Hughes, 154 Wn.2d at 133-34; U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22. Any fact—other than the fact of a prior conviction—increasing punishment beyond the standard sentence range constitutes an element that must be proved to a jury beyond a reasonable doubt. Blakely, 542 U.S. at 306-07; Apprendi, 530 U.S. at 490.

Here, the court exceeded its constitutional authority in imposing an exceptional sentence based on judicial fact-finding where Mr. Jacobs did not knowingly and voluntarily waive his right to a jury trial.

A criminal defendant may waive his constitutional right to a jury trial but the waiver must be voluntary, knowing and intelligent. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). The State bears the burden of establishing the validity of a defendant's jury trial

waiver, and the Court must indulge every reasonable presumption against waiver. State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The Court reviews the validity of a defendant's jury trial waiver de novo. State v. Ramirez-Dominguez, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

For a waiver of the right to a jury trial to be valid, the record must affirmatively show the defendant knew he had such a right and voluntarily and intelligently chose to relinquish it. See Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (waiver of right to jury trial is valid only if defendant had “sufficient awareness of the relevant circumstances and likely consequences”); Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (court will not “presume a waiver” of the Sixth Amendment right to a jury trial “from a silent record”); State v. Stegall, 124 Wn.2d 719, 731, 881 P.2d 979 (1994) (court may not infer waiver “[i]n the absence of either a personal expression from the defendant waiving a 12–person jury, or an indication that either counsel or the judge discussed this right with the defendant”).

Here, Mr. Jacobs did not knowingly and voluntarily waive his right to a jury trial on the aggravating factor because there is no affirmative showing in the record that he knew he had such a right. Mr. Jacobs entered a written waiver of jury trial on September 29, 2010, before he received notice that the State would file an amended information adding

an exceptional sentence aggravator. CP 28. The written waiver does not indicate Mr. Jacobs knew he would have a right to a jury trial on any possible future exceptional sentence aggravator. The waiver says only, “I understand that I have a right to trial by jury in this case. I desire to waive that right and to have the case tried by the judge without a jury.” Id.

Similarly, the court’s oral colloquy with Mr. Jacobs does not show he was informed he would have a right to a jury trial if the State later chose to allege an exceptional sentence aggravator. See 9/28/10RP 7-10; 9/29/10RP 91-92.

The trial court found Mr. Jacobs’s earlier jury trial waiver was sufficient to serve as a waiver of his right to a jury trial on the aggravating factor. CP 202. The court found no “new waiver of jury was required when the State added the aggravator for a history of domestic violence in the Third Amended Information.” Id.

But this Court has held that a defendant’s stipulation to judicial fact-finding on the elements of a substantive offense is not alone sufficient to serve as a knowing and intelligent waiver of the right to a jury trial on an exceptional sentence aggravator. See State v. Monroe, 126 Wn. App. 435, 109 P.3d 449 (2005), overruled on other grounds by State v. Clarke, 156 Wn.2d 880, 134 P.3d 188 (2006). In Monroe, the defendant pled guilty to several charges and stipulated that the court could consider the

probable cause statement and any discovery in the case as material facts to support the guilty plea. Id. at 437-38. The sentencing court reviewed that information and found the existence of three aggravating factors in support of an exceptional sentence. Id. On review, this Court held Monroe's stipulation was not sufficient to serve as a waiver of his right to a jury trial on the aggravating factors. Id. at 441-42. Had Monroe "been made aware of his rights under Blakely, his stipulation permitting the sentencing court to consider the probable cause statement and any discovery in the case as material facts would have provided sufficient evidence" of the aggravating factors. Id. at 441. But because Monroe entered the stipulation before Blakely was decided, "Monroe could not have knowingly waived his right to jury fact-finding at sentencing when the only controlling precedent held that he had no such right." Id. at 442; see also State v. Borboa, 124 Wn. App. 779, 792, 102 P.3d 183 (2004) (because Borboa was sentenced before Blakely was decided, he did not know of or agree to forgo his right to have jury find facts needed to support sentence above standard range), rev'd on other grounds, 157 Wn.2d 108, 135 P.3d 469 (2006).

Like the defendant in Monroe, Mr. Jacobs was not informed he had a right to a jury trial on the aggravating factor. His stipulation to judicial fact-finding on the substantive offenses, made before he was even aware

that the State would seek an exceptional sentence, is not sufficient to show he knowingly waived his right to a jury trial on the aggravator.

It is not material that Mr. Jacobs entered his jury trial waiver after Blakely was decided. A defendant may easily understand that he has a right to a jury trial on the elements of the substantive offense without also understanding, as Blakely held, that he has a right to a jury trial on an exceptional sentence aggravator. Indeed, before Blakely was decided, Washington courts long held that a defendant had no right to have a jury decide facts supporting an exceptional sentence. See State v. Gore, 143 Wn.2d 288, 314-15, 21 P.3d 262 (2001), overruled by Hughes, 154 Wn.2d 118. Given this history, it is unreasonable to presume that a criminal defendant who is aware he has a right to have a jury find the facts necessary to establish guilt is also aware he has a right to have a jury determine the facts necessary to impose an exceptional sentence. This Court must indulge every reasonable presumption *against* waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). This Court cannot presume Mr. Jacobs understood and knowingly waived his fundamental constitutional right to a jury trial on the aggravator simply because he waived his right to a jury trial on the elements of the substantive offenses.

Courts should ensure defendants are separately informed of their right to have a jury determine the existence of aggravating factors because a defendant's right to a jury trial on an exceptional sentence aggravator operates independently of his right to a jury trial on the elements of the substantive offense. For example, a defendant has a right to bifurcate the guilt phase of the trial from a determination of aggravating factors if he so chooses. State v. Roswell, 165 Wn.2d 186, 193-94, 196 P.3d 705 (2008). He may opt to waive his right to a jury trial on aggravating factors while at the same time insisting that a jury determine the elements of the substantive offense. Id. By contrast, he is *not* entitled to a bifurcated trial on the elements of the substantive offense, even where evidence supporting an element is particularly prejudicial. Id. at 198. Thus, even if a defendant knowingly waives his right to a jury trial on the elements of the substantive offense, this alone is not sufficient to show he knowingly waived his right to have a jury determine aggravating factors.

Absent a valid jury trial waiver, a judge exceeds her constitutional authority in imposing a sentence enhancement for something the jury did not find and the error can never be harmless. State v. Williams-Walker, 167 Wn.2d 889, 901-02, 225 P.3d 913 (2010) (holding that where judge exceeds her authority and imposes sentence that is not authorized by jury's verdict, error can never be harmless). The remedy is to vacate the

sentence enhancement and remand for correction of the sentence. Id. at 901-02. That is the remedy here.

3. MR. JACOBS WAS CONSTRUCTIVELY DENIED HIS RIGHT TO COUNSEL WHERE A SERIOUS CONFLICT PREVENTED HIM FROM EFFECTIVELY COMMUNICATING WITH HIS ATTORNEY DURING THE CRITICAL TRIAL PREPARATION STAGE

- a. A criminal defendant has a constitutional right to representation by an advocate with whom he can communicate.

The Sixth Amendment of the federal constitution⁷ and article I, section 22 of the Washington constitution⁸ protect an accused's right to counsel at all stages of a criminal proceeding. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); State v. Harrell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). While accused persons are not guaranteed a good rapport with their attorneys, they are guaranteed representation by "an effective advocate." Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). An attorney's effectiveness, in turn, depends upon an ability to communicate with his client. A criminal defendant must be able to "provide needed information to his lawyer and to participate in the making

⁷ The Sixth Amendment protects an accused's right "to have Assistance of Counsel for his defense."

⁸ Article I, section 22 of the Washington Constitution provides that, "in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

of decisions on his own behalf.” Riggins v. Nevada, 504 U.S. 127, 144, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).

Thus, a reviewing court must assess the nature and extent of the conflict and whether that conflict deprived the defendant of representation guaranteed by the Sixth Amendment. Daniels v. Woodford, 428 F.3d 1181, 1196-97 (9th Cir. 2005). “The Supreme Court has repeatedly held that a defendant's Sixth Amendment right to counsel is violated if the defendant is unable to communicate with his or her counsel during key trial preparation times.” Id. at 1197 (citing Riggins, 504 U.S. at 144 (“We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.”) (citations omitted); United States v. Cronin, 466 U.S. 648, 659 n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (“The Court has uniformly found constitutional error without any showing of prejudice when counsel was . . . prevented from assisting the accused during a critical stage of the proceeding.”); Genders v. United States, 425 U.S. 80, 91, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) (holding that trial judge's order that counsel could not communicate with defendant during overnight recess in the middle of trial violated defendant's Sixth Amendment right)).

A trial court may not permit a criminal defendant to be represented by an attorney with whom he has such a serious conflict that the two

cannot effectively communicate with each other. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). A serious breakdown in communication requiring substitution of counsel may occur even when counsel is competently representing an accused person. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) (“Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense.”).

To determine whether an attorney-client conflict required the substitution of counsel, the Washington Supreme Court has adopted the Ninth Circuit's three-part test. Stenson, 142 Wn.2d at 724 (adopting the test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The factors are “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” Id.

In addition, a complete breakdown of communication between attorney and client that may lead to an unjust verdict is a sufficient reason to grant an attorney’s motion to withdraw. State v. Hegge, 53 Wn. App. 345, 351, 766 P.2d 1127 (1989).

The appellate court reviews the trial court's decision on a defendant’s motion for new counsel or counsel’s motion to withdraw for an abuse of discretion. Stenson, 142 Wn.2d at 733; Hegge, 53 Wn. App. at 350. The court’s discretion must be balanced against the accused’s

Sixth Amendment right. Nguyen, 262 F.3d at 1003. The trial court abuses its discretion when its ruling is based on facts that are not supported by the record, an incorrect understanding of the law, or an unreasonable view of the issues presented. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

- b. Mr. Jacobs was denied his Sixth Amendment right to counsel because he could not effectively communicate with his attorney or participate in the preparation of his defense.

In Nguyen, defense counsel told the court that his client would no longer speak with him. Nguyen, 262 F.3d at 1000-01. Nguyen complained his attorney was not representing him adequately, was rude to him, and almost never talked to him about his case. Id. The Ninth Circuit concluded the trial court abused its discretion and deprived Mr. Nguyen of his right to counsel by refusing to substitute counsel. Id. at 1002. The court explained, “in light of the conflict, Nguyen could not confer with his counsel about trial strategy or additional evidence, or even receive explanations of the proceedings. In essence, he was ‘left to fend for himself.’” Id. (quoting United States v. Gonzalez, 113 F.3d 1026, 1029 (9th Cir. 1997)). This inability to communicate alone constituted a denial of Nguyen’s Sixth Amendment right to counsel. Id.

In Daniels, the defendant lacked such trust and confidence in his attorneys that he would no longer speak to them. 428 F.3d at 1190-91, 1198. Although his lack of trust arose in part from his own paranoia, “the court still had an obligation to try to provide counsel that Daniels would trust.” Id. at 1199. The complete breakdown in communication meant Daniels’s attorneys “were unable to discuss possible defense strategies with Daniels or to discover and assess basic information about the case from his perspective so that they might pursue that strategy. As a consequence, the jury never heard Daniels testify to his version of the events.” Id. This serious conflict between Daniels and his trial counsel gave rise to a presumption of prejudice. Id.

In United States v. Adelzo-Gonzalez, the defendant explained to the court that he and appointed counsel were unable to understand each other and animosity had arisen in their relationship. 268 F.3d 772, 774 (9th Cir. 2001). Counsel used offensive language and threatened his client, leading to a serious breach of trust and significant breakdown in communication. Id. at 774-75, 779. The trial court erred in finding there was no break in communication between attorney and client, as “[t]he relationship between Adelzo-Gonzalez and the appointed counsel was antagonistic, lacking in trust, and quarrelsome.” Id. at 779-80. Because

the conflict substantially interfered with the attorney's ability to provide adequate representation, the defendant was denied his right to counsel. Id.

Finally, in Moore, the defendant told the court he could not communicate with his attorney and was dissatisfied with counsel's investigations and preparations. 159 F.3d at 1156, 1159. He described his relationship with his attorney as "one clouded by 'an atmosphere of mistrust, misgivings and irreconcilable differences' resulting from claims of conflicting interests, ineffective assistance, and a breakdown of the attorney-client relationship." Id. at 1159. The court held an irreconcilable conflict existed between Moore and his attorney which undermined confidence in the trial proceedings and constituted reversible error. Id. at 1161.

This case is indistinguishable from the cases cited above. As in Nguyen, Daniels, Adelzo-Gonzalez, and Moore, Mr. Jacobs's relationship with his attorney, during a critical stage of the proceedings, was characterized by animosity, dissatisfaction and mistrust. Mr. Jacobs complained to Judge Gain that his attorney was not representing him adequately. 8/10/10RP 19-20; 8/20/10RP 27. Mr. Ostermann had threatened him and tried to coerce him into entering a plea bargain against his express wishes. 8/20/10RP 29. He did not trust Mr. Ostermann—he

believed Mr. Ostermann had deceived him and did not have his best interest in mind. 9/09/10RP 32.

Mr. Ostermann agreed his relationship with Mr. Jacobs was full of mistrust and animosity. He affirmed Mr. Jacobs “[did] not have confidence in [him] at all.” 8/10/10RP 18.

Later, at the post-trial hearing, Mr. Jacobs elaborated that he did not believe Mr. Ostermann had provided him with adequate representation prior to trial. Mr. Ostermann would not visit him, answer his phone messages, or show him the discovery. 2/17/11RP 48-58. He would not call the witness or investigate the possible defense Mr. Jacobs requested. 2/17/11RP 64, 67. Instead, he persistently pressured Mr. Jacobs to take the State’s plea offer. 2/17/11RP 61-62, 69, 73. Mr. Jacobs did not trust him at all and felt he was working for the State. 2/17/11RP 68-69.

As in Nguyen and Adelzo-Gonzalez, the attorney-client relationship was characterized by open animosity. The relationship was “always combative,” with “[n]ever a good conversation.” 2/17/11RP 69. Attorney and client often argued, their conversations consisting of “yelling, screaming, hanging up, or calling each other names.” 2/17/11RP 81-82. Mr. Ostermann agreed with Mr. Jacobs that the relationship was “difficult” and “contentious.” 8/10/10RP 18; 4/20/11RP 273.

As a result of the serious conflict between Mr. Jacobs and Mr. Ostermann, the two were not able to communicate effectively during the trial preparation stage and Mr. Jacobs was constructively denied the assistance of counsel. The record is undisputed that a significant breakdown in communication occurred. Mr. Jacobs told Judge Gain he would not work with Mr. Ostermann and would not even see him. 8/10/10RP 18. In his motion to withdraw, Mr. Ostermann confirmed that his communication with Mr. Jacobs “had broken down.” 9/09/10RP 31-32. Mr. Ostermann said, given the difficulty he had communicating with Mr. Jacobs, he had “a hard time seeing how [they could] effectively work together.” 9/09/12RP 32.

The testimony at the post-trial hearing made clear the harmful effect this breakdown in communication had on Mr. Ostermann’s ability to represent Mr. Jacobs. Mr. Jacobs testified they “never discussed trial strategy”; Mr. Ostermann would not listen to what he had to say. 2/17/11RP 78-80, 101-02. In particular, Mr. Ostermann did not adequately explain the exceptional sentence aggravator, discuss with Mr. Jacobs how to defend against the allegations of prior abuse, or inform him he had a right to a jury trial on the aggravating factor. 2/17/11RP 86, 101-02, 118. Mr. Ostermann confirmed that, due to the extreme conflict in the attorney-client relationship, he deliberately chose not to discuss the

aggravator with Mr. Jacobs in depth. 4/20/11RP 253-57, 271-72, 302. He could not say whether he had informed Mr. Jacobs he could receive up to 10 years in prison if an exceptional sentence were imposed. 4/20/11RP 279, 283. He knew for sure that he did *not* tell Mr. Jacobs he had a right to have a jury determine the existence of the aggravating factor. 4/20/11RP 283.

As stated, a criminal defendant must be able to participate in the making of decisions on his own behalf. Riggins, 504 U.S. at 144. If he is unable to communicate with his attorney or participate in the preparation of his defense, he is constructively denied his Sixth Amendment right to counsel. Nguyen, 262 F.3d at 1002; Daniels, 428 F.3d at 1199; Adelzo-Gonzalez, 268 F.3d at 779-80; Moore, 159 F.3d at 1159.

Here, the evidence is undisputed that the relationship between Mr. Jacobs and Mr. Ostermann was so full of conflict that they could not effectively communicate with each other. Because of the conflict, Mr. Jacobs was not able to participate fully in making decisions about trial strategy or the preparation of his defense. The existence of this serious conflict, alone, constitutes a denial of Mr. Jacobs's Sixth Amendment right to counsel and gives rise to a presumption of prejudice. Nguyen, 262 F.3d at 1002; Daniels, 428 F.3d at 1199.

- c. The court became aware of the attorney-client conflict sufficiently in advance of trial to justify appointing a new attorney.

In evaluating the timeliness of a motion to substitute counsel, the court balances the resulting inconvenience and delay against the defendant's important constitutional right to counsel. Daniels, 428 F.3d at 1200. Even if the trial court becomes aware of a conflict on the eve of trial, the court must appoint a new attorney if the conflict is serious enough to justify the delay. Id.

In Moore, the court held Moore's motions to substitute counsel, made between a month and two weeks before the start of trial, were timely. 159 F.3d at 1161.

Here, the trial court was informed on three separate occasions of the serious conflict between Mr. Jacobs and Mr. Ostermann: on August 10, August 20, and September 9, 2010. Trial did not begin until September 30. Thus, the trial court became aware of the conflict sufficiently in advance of trial to justify appointing a new attorney.

- d. The convictions must be reversed.

A court's unreasonable or erroneous refusal to substitute counsel requires reversal. Nguyen, 262 F.3d at 1005. That is the remedy here.

F. CONCLUSION

The State did not provide timely notice of its intent to seek an exceptional sentence and Mr. Jacobs did not knowingly and voluntarily waive his right to have a jury determine the existence of the aggravating factor. Therefore, the exceptional sentence must be reversed and Mr. Jacobs must be resentenced within the standard range. In addition, a serious breakdown in communication between Mr. Jacobs and his attorney resulted in a denial of his Sixth Amendment right to counsel, requiring reversal of the convictions.

Respectfully submitted this 24th day of February 2012.


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Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX A

FILED
KING COUNTY, WASHINGTON

OCT 07 2010

SUPERIOR COURT CLERK
BY WENDY VICKERY
DEPUTY

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JEREMY JACOBS,

Defendant.

NO. 10-1-05502-5 KNT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came before the Court on for trial on September 28, 2010 through October 5, 2010. Defendant waived his right to trial by jury, and accordingly, the case was tried to the bench. By stipulation of the parties, the Court considered at trial the testimony of the law enforcement officers who testified pre-trial under oath in connection with the State's and the Defendant's motions in limine, but did not consider their testimony with respect to Terri Crow's statements except to the extent that the Court previously had ruled that those statements were both excited utterances and non-testimonial.

The Court considered testimony from the following witnesses:

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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- 1 • King County Sheriff Deputy Mark Lohse-Miranda
- 2 • King County Sheriff Deputy Ryan Abbott
- 3 • King County Sheriff Deputy James Nelson
- 4 • King County Sheriff Detective Melissa Rodgers
- 5 • Michelle Roberts
- 6 • Terri Crow

7 The Court also considered the exhibits that were admitted into evidence, with the exception of the
8 following: Exhibit 10 (victim statement taken by Deputy Lohse-Miranda)¹.

9 FINDINGS OF FACT

10 1. On May 15, 2010, Defendant Jeremy Jacobs and Terri Crow resided together in an
11 apartment in Seatac, Washington. Jacobs and Crow had been in an intimate romantic relation-
12 ship since at least 2007, and had a child in common who was two years old at the time of the
13 events at issue in this case. In addition to their child in common, Crow had six year old twins
14 who lived with Crow and Jacobs. All of the children looked to Jacobs as their father figure.

15 2. Crow did not wish to testify in this matter. After charges were filed against Jacobs,
16 she wrote a letter to the court in which she downplayed the events underlying the charges against
17 Jacobs, and asked that Jacobs not be incarcerated. Crow's testimony was secured via execution

18 ¹ This exhibit was marked at pretrial and testimony regarding it was elicited from Deputy Lohse-
19 Miranda. While the clerk's record shows the exhibit as having been admitted on September 30,
20 the Court's recollection is that it was not admitted for trial purposes, and that the Court ruled that
21 it would not be admissible at trial absent testimony from Terri Crow, because the statements in
the exhibit were testimonial. The Court did not consider this exhibit at trial, because it was not
re-offered into evidence, and its consideration was not necessary for the Court to decide the case.
This same exhibit also appears to have been marked as Exhibit 15, but not admitted under that
exhibit number.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW – 2

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1 of a material witness warrant. However, when she did appear in court and when she testified,
2 Crow's testimony was credible.²

3 3. On May 14, 2010, Crow was working at her job at the Cheesecake Factory while
4 Jacobs stayed home with the children. Crow finished working around midnight, and returned
5 home in the early hours of May 15, 2010. All subsequent events occurred in King County,
6 Washington.

7 4. When Crow arrived at home, she found Jacobs upset over an altercation that Jacobs
8 had had earlier with a neighbor. This neighbor, who Crow described as being 6'1, very fit, and
9 over 200 lbs, was considerably larger than Jacobs, who Crow testified is approximately 5'8 or
10 5'9, and although he is strong, weighs only approximately 150 lbs. Jacobs had been drinking,
11 and was loudly "going on" about his anger with the neighbor, and Jacobs emphasized his points
12 by poking at Crow's living room sofa with the point of a large butcher knife. He stabbed a small
13 hole in the sofa with the knife, at which point Crow yelled at Jacobs to stop, because she had
14 paid for the sofa, and did not want it to be damaged further.

15 5. Jacobs responded by grabbing the tie that was part of Crow's work uniform. He
16 used the tie to pull Crow close to him, and warned her not to "start with" him, as he was in a bad
17 mood. Crow pulled away and went into the bedroom to change her clothes.

18
19 ² On advice of appointed counsel, Crow declined to answer questions concerning her actions in an
20 altercation that occurred in January of 2009 when she and Jacobs were living together in Oklahoma, and
21 Crow was hospitalized briefly with extensive bruising, a black eye, and other injuries. Because Crow
invoked her Fifth Amendment privilege against self incrimination and declined to testify about her own
actions in that altercation, the parties agreed that the Court should not consider that incident in any respect
at trial, and the Court has disregarded such evidence.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW -- 3

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1 6. Crow wanted to be left alone and to go to sleep, because she was concerned that the
2 argument with Jacobs would escalate if she stayed up. However, Jacobs came into the bedroom
3 and insisted that Crow come out to the kitchen to eat a meal that Jacobs had prepared. Crow
4 acceded to Jacobs' demand that she come to the kitchen to eat. While Crow ate, Jacobs contin-
5 ued to complain about his altercation with the neighbor, and he complained about what he viewed
6 as a lack of support from Crow.

7 7. Crow then went into the bedroom again and began to smoke a cigarette by the bed-
8 room window, which was cracked slightly open. This window was approximately two stories
9 high, and looked out onto a parking lot. A fall from such a height clearly would be capable of
10 causing death or great bodily injury.

11 8. Jacobs came into the bedroom and began yelling and arguing loudly, which
12 prompted Crow to respond in kind. Jacobs told Crow that if she didn't get quiet, he would put
13 her out the window. Jacobs opened the window wide. Crow asked Jacobs to leave her alone.
14 Jacobs grabbed Crow by her chin and her face, as well as by her chest and her throat, and pushed
15 her back against the window while telling her that he was going to throw her out the window.
16 Jacobs pushed against Crow's face and upper body in an attempt to push her out the window for
17 approximately thirty seconds. Jacobs then grabbed at Crow's legs, to try to lift her up to push
18 her out the window. He grabbed her hard enough to leave prints from his thumb and his fingers
19 on Crow's thighs. During this time, Crow believed that the butcher knife with which Jacobs had
20 been stabbing at the sofa when she first returned home was still out in the living room.

21
FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 4

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1 9. To protect herself, Crow dropped her weight down to the floor to prevent Jacobs
2 from pushing her out the window. In doing so, she scraped her back against the window sill,
3 which resulted in some minor scrapes and bruising. In response, Jacobs tried to lift Crow up, but
4 was unsuccessful.³

5 10. At this time, Crow was frightened, upset, crying and hysterical. Jacobs took his
6 cell phone, which had videotaping capability, and began filming Crow, while yelling at her,
7 berating her, and threatening to kill her and to kill the children. The video and audio recording
8 were admitted into evidence.

9 11. After the video recording, Crow lay down on her bed and pulled the covers over her
10 head in an attempt to escape the confrontation with Jacobs. She was still crying. Jacobs left the
11 bedroom, but returned a few seconds later. He told Crow to be quiet or he would kill her. He
12 also threatened to cut Crow. While making these threats, Jacobs was moving about in the
13 bedroom, tapping on the dresser and on the TV with what Crow believed was the point of
14 butcher knife that Jacobs had used earlier to stab at the sofa.⁴ Crow was fearful of this butcher
15 knife, and testified that it had frightened her ever since Jacobs had purchased it, because it
16 reminded her of a "serial killer knife".

17 _____
18 ³ While there was no direct testimony about Crow's size, from her appearance in court, she appears to be
19 close to the defendant in height, and her weight appears to be comparable, or perhaps greater than, the
20 defendant's.

21 ⁴ Crow was unable to see what the defendant was tapping with, as she had her head covered at
the time. The butcher knife was found on the bedroom dresser by Deputy Nelson after the police arrived
a few minutes later, and was admitted into evidence.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW – 5

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1 12. Crow reasonably believed Jacobs' multiple threats to kill her. She was aware that
2 Jacobs had been diagnosed with bipolar disorder and schizophrenia, and that he had taken medi-
3 cations for these conditions, and she felt that he had "snapped". She considered it a "definite
4 possibility" that Jacobs would throw her out the window. While Crow hoped that Jacobs would
5 not kill her, she testified that she was concerned that he might kill her that night, and that at the
6 times he threatened to kill her, she believed the threats.

7 13. While Crow was lying on the bed under the covers, the police knocked on the
8 apartment's front door and announced themselves as police. The police had been called by
9 Michelle Roberts, the apartment manager, who had been awakened from sleep by the yelling
10 from Jacobs' and Crow's apartment, and who observed Jacobs slap Crow in front of the master
11 bedroom window. Roberts testified that she went to get her cell phone and called 911
12 immediately after she saw someone slap Crow inside Crow's and Jacob's apartment. The CAD
13 log shows the 911 call being made at 1:01:28 a.m. on May 15, 2010.

14 14. Jacobs initially told Crow to lie still and not to answer the door, but after the police
15 knocked again, Crow told Jacobs that the police were not going to just go away, and that she'd
16 have to answer the door. Jacobs told her that was fine, but warned Crow not to say anything to
17 the police.

18 15. Crow answered the door, while she was still crying and appeared very upset.
19 Deputy Abbott, who was closest to the front door, asked her where Jacobs was. Crow responded
20 very softly that he was "back there" or "in the bathroom". When Abbott asked Crow if Jacobs
21 had any weapons, Crow responded that he had a knife. Abbott had to repeat Crow's statements

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 6

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1 to Deputy Nelson, who was standing just behind Abbott, because Crow had been speaking too
2 softly for Nelson to understand her words. The CAD log indicates that this exchange of
3 information occurred at 1:20:12 a.m. on May 15, 2010.

4 16. Deputy Abbott and Deputy Nelson entered the apartment, and went toward the
5 back to look for the defendant, who was indeed in the bathroom. Jacobs was arrested without
6 incident. The CAD log indicates that Jacobs was in custody as of 1:33:19, but Jacobs likely was
7 in custody by 1:21:24, which is the time that Deputy Nelson broadcast "open the air" meaning
8 that the potential threat of a suspect who might be armed was no longer a concern.

9 17. While Deputies Abbott and Nelson were apprehending Jacobs, Deputy Lohse-
10 Miranda stayed with Crow. He moved her away from the doorway, into the living room/dining
11 room or kitchen area, and asked her what had happened.

12 18. A few moments later, the other deputies escorted Jacobs out of the apartment in
13 handcuffs. Before he exited the front door, Jacobs stopped, pushed back against the deputies,
14 and yelled at Crow, "Terri, you'd better not say anything!" After this, Jacobs went out the door
15 with the police. When Jacobs was placed in a patrol car, he was read his Miranda rights. Jacobs
16 made no further statements in the presence of the police.

17 19. After Jacobs had been placed in the patrol car, Deputy Nelson returned to the apart-
18 ment. He obtained Crow's permission to search the master bedroom and to take photographs and
19 evidence. He photographed the interior of the bedroom, the window that Crow reported that
20 Jacobs tried to shove her through, the cell phones belonging to Jacobs and to Crow, and the
21 knife, which was lying on the dresser next to Crow's cell phone. Jacobs' cell phone was on the

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 7

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1 window sill. Both Jacobs' cell phone and the knife were seized as evidence. The knife was a
2 butcher-type knife with a blade that was wide at the near end and tapered to a sharp point at the
3 far end. The blade of the knife was more than six inches long.

4 20. The evidence established that there has been an extensive history of domestic
5 violence by Jacobs against Crow over a prolonged period of time.

6 a) Jacobs has punched Crow on numerous occasions in the past, dating back to be-
7 fore January of 2009. Jacobs once punched Crow hard enough to break her tooth and cause a
8 brief loss of consciousness.

9 b) Jacobs has threatened to harm Crow numerous times (more than ten but less than
10 fifty) in the past.

11 c) Jacobs has refused to allow Crow to leave their home on a number of occasions,
12 by grabbing her or by blocking the door. On one occasion when Crow succeeded in getting out
13 of the home when Jacobs did not want her to, he grabbed her by the arm and dragged her back
14 inside.

15 d) On another occasion, Jacobs pushed one of Crow's children hard enough to make
16 her fall, and then kicked the child. When Crow protested, Jacobs warned her to "pick her
17 battles."

18 e) Jacobs routinely restricted Crow's access to money, and would hold onto her
19 ATM card.

20 f) Jacobs discouraged Crow from having friends. When she did have a friend over,
21 Jacobs would offend the visitor and discourage the friend from visiting again.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 8

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1 g) At one time, while Crow and Jacobs were living in Oklahoma, and after the
2 couple had had a physical altercation, Crow petitioned for an order of protection against Jacobs
3 because she was afraid of him. An emergency order was granted. Following this, Jacobs took
4 the couple's child away from Crow's home without Crow's prior knowledge or permission, and
5 refused to return him until Crow had the protection order recalled.⁵

6 Having made the foregoing Findings of Fact, the Court now makes the following

7 **CONCLUSIONS OF LAW**

8 1. This Court has jurisdiction over the parties and the subject matter.

9 **COUNT I**

10 2. As to Count I, Assault in the First Degree, Domestic Violence, the State has the
11 burden of proving the following elements beyond a reasonable doubt:

- 12 (1) That on or about May 15, 2010, the defendant assaulted Terri Crow;
13 (2) That the defendant acted with intent to inflict great bodily harm;
14 (3) That the assault was committed by a force or means likely to produce great bodily
15 harm or death;
16 (4) That this act occurred in the State of Washington; and
17 (5) That Jacobs and Crow were in a dating relationship or were family or sharing a
18 household at the time.

16 WPIC 35.08.

18
19 ⁵ The evidence was unclear as to whether the emergency protection order was served on Jacobs,
20 but Crow's testimony established that he acknowledged that he was aware of the existence of the
21 order. Subsequently, Jacobs left Oklahoma sometime shortly after the physical altercation that
occurred in January of 2009, and came to Washington State. Crow later moved to Washington
state with her children, and resumed living with Jacobs.

1 the victim manifested by multiple incidents over a prolonged period of time, pursuant to RCW
2 9.94A.535(3)(h)(i). To establish this aggravating factor, the State must prove the following
3 elements beyond a reasonable doubt:

4 (1) That the victim and the defendant were household members and/or in a dating
relationship; and

5 (2) That the offense was part of an ongoing pattern of psychological, physical, or sexual
6 abuse of the victim manifested by multiple incidents over a prolonged period of time. An
7 "ongoing pattern of abuse" means multiple incidents of abuse over a prolonged period of
time. The term "prolonged period of time" means more than a few weeks.

8 WPIC 300.17.

9 7. The Court finds that the State has met its burden of proving each of these
10 elements beyond a reasonable doubt.

11 8. The State also has alleged as an aggravating factor that Jacobs committed Assault
12 in the Second Degree while armed with a deadly weapon -- a knife -- under the authority of
13 RCW 9.94A.602 and 9.94A.533(4). To sustain this aggravating factor, the State has the burden
14 of proving the following beyond a reasonable doubt:

- 15 1. That the defendant was armed with a deadly weapon (in this case, a knife with a
blade longer than three inches) at the time of the commission of the crime in Count II,
16 2. That the weapon was easily accessible and readily available for offensive or defensive
use,
17 3. That there was a connection between the weapon and the defendant and
18 4. That there was a connection between the weapon and the crime, including considera-
tion of the nature of the crime and the circumstances surrounding the commission of the
crime, including the location of the weapon at the time of the crime.

19 WPIC 2.07.01.
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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 11

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1 12. However, the threat to push Crow out the window was not the only threat to kill
2 made by Jacobs to Crow on May 15, 2010. After Jacobs had stopped his physical assault on
3 Crow (his attempt to push her out the window), he continued to berate and scream at her, and
4 during this time (both on and off the video) Jacobs threatened to kill Crow. At one point, while
5 Crow was lying in bed with her head under the covers, Jacobs was tapping what Crow reason-
6 ably believed was the blade of his knife against the dresser and the TV in the bedroom while he
7 threatened to cut and to kill Crow. Jacobs' words and conduct placed Crow in reasonable fear
8 that Jacobs' threats would be carried out. The defendant is GUILTY of the crime of Felony
9 Harassment -- Domestic Violence, as charged in Count III.

10 13. The State also has alleged as an aggravating factor that Jacobs committed Felony
11 Harassment -- Domestic Violence as part of an ongoing pattern of psychological, physical or
12 sexual abuse of the victim manifested by multiple incidents over a prolonged period of time,
13 pursuant to RCW 9.94A.535(3)(h)(i). The Court finds that this aggravating factor has been
14 proved beyond a reasonable doubt.

15 14. The State also has alleged as an aggravating factor that Jacobs committed Felony
16 Harassment -- Domestic Violence while armed with a deadly weapon -- a knife -- under the
17 authority of RCW 9.94A.602 and 9.94A.533(4). With respect to the crime of felony harassment,
18 the Court finds that each of the elements (as set forth in ¶15 above), has been proved beyond a
19 reasonable doubt with respect to the threats Jacobs made to cut and to kill Crow while she was
20 lying in bed with the covers over her head.

21
FINDINGS OF FACT AND
CONCLUSIONS OF LAW – 13

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COUNT IV

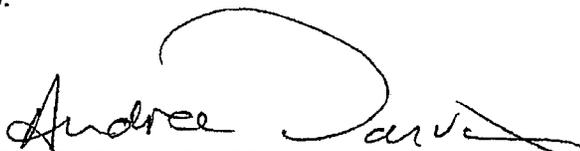
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2 15. As to Count IV, Tampering with a Witness – Domestic Violence, the State must
3 prove the following elements beyond a reasonable doubt:

- 4 (1) That on or about May 15, 2010, the defendant attempted to induce a person to
5 withhold from a law enforcement agency information which he or she had relevant to a
6 criminal investigation; and
7 (2) That the other person was a witness or a person whom the defendant had reason to
8 believe might have information relevant to a criminal investigation; and
9 (3) That any of these acts occurred in the State of Washington,

10 in addition to proving beyond a reasonable doubt that the defendant and Crow were in a dating
11 relationship, or were family or household members. WPI 115.81.

12 16. The Court finds that the State has proved each of these elements beyond a
13 reasonable doubt with respect to the statement Jacobs made to Crow as he was being taken out of
14 the apartment by the police on May 15, 2010. The defendant is GUILTY of the crime of
15 Tampering with a Witness – Domestic Violence, as charged in Count IV.

16 DATED this 6th day of October, 2010.

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HONORABLE ANDREA DARVAS

FINDINGS OF FACT AND
CONCLUSIONS OF LAW – 14

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APPENDIX B

FILED

11 MAY 31 PM 3:43

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CASE NUMBER: 10-1-05502-5 KNT

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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff

v.

JEREMY JACOBS,

Defendant.

NO. 10-1-05502-5 KNT

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER ON DEFENDANT'S
MOTION FOR NEW TRIAL

THIS MATTER came on for determination upon Defendant's Motion for New Trial.

Several hearings were held on this matter, and the Court heard testimony from the defendant, Jeremy Jacobs, and from defendant's trial counsel, Jon Osterman, King County Sheriff Deputy James Nelson, and the defendant's mother, Earnice Jacobs.

The Court having considered the testimony of the above witnesses, having reviewed all of the pleadings submitted by the parties, and having considered the arguments raised by counsel, NOW THEREFORE, the Court enters the following:

FINDINGS OF FACT

1. Defendant originally was charged with felony harassment, domestic violence against his live-in girlfriend, Terri Crow, committed on May 15, 2010. Defense attorney Jon Osterman was appointed to represent the defendant. After reviewing the discovery in the case,

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER ON DEFENDANT'S MOTION
FOR NEW TRIAL - 1

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1 performing his preliminary investigation, and talking with his client, Osterman felt that the
2 defendant would likely be convicted of felony harassment, and advised Jacobs to plead guilty to
3 the original charge in exchange for the State's agreement to recommend credit for time served.
4 Jacobs was adamant that he did not wish to consider a plea, and wanted to go to trial.

5 2. Thereafter, the relationship between Jacobs and Osterman became strained. Jacobs
6 maintained his adamant opposition to any sort of plea deal regardless of the penalties he faced in
7 the event of conviction of the more serious charges that the State indicated it would file if the
8 case was set for trial. Jacobs was dismayed that Osterman did not share his belief that he would
9 be acquitted of all charges at trial, and was upset that his trial date was continued several times.
10 Osterman was frustrated that Jacobs was angry and abusive toward him and was unwilling to
11 listen to his advice.

12 3. Jacobs made a motion for new counsel, but withdrew his motion after being
13 advised by the presiding judge that appointment of new counsel would undoubtedly delay the
14 trial considerably. Osterman also made a motion to withdraw based on his perception that he
15 and his client were at odds and unable to communicate effectively. However, Jacobs opposed
16 the motion, and it was denied.
17

18 4. Despite the strained relationship, Jacobs and Osterman did communicate regarding
19 the charges against Jacobs, the amendments that Osterman expected would be filed by the State,
20 the evidence that would or could be presented at trial, trial strategy, the likelihood of conviction
21 on the various charges and potential charges, including the deadly weapon enhancement and the
22 domestic violence history aggravating factor, and the sentencing ranges and penalties Jacobs
23 faced in the event he was convicted. The Court finds Osterman's testimony on these matters
24 considerably more credible than Jacobs' testimony.
25

1 5. The only piece of investigation that Jacobs wanted Osterman to do was to investi-
2 gate whether Jacobs' mother, Earnice Jacobs, should be called to testify at trial. Osterman spoke
3 with Earnice Jacobs, and concluded that her testimony was unlikely to be helpful, as she was not
4 a witness to the crime(s) charged, and any admissions that Crow may have made to Earnice
5 Jacobs had readily been admitted to by Crow in her interview with Osterman, as well as in a
6 letter she had written to the Court.

7 6. Osterman also met with Jacobs to discuss his interview with Crow. Osterman
8 played the recording of his interview with Crow for Jacobs approximately two weeks before the
9 trial, and discussed with Jacobs the likelihood that the State would add an aggravator for
10 domestic violence history once the State had an opportunity to review the recorded interview
11 with Crow. Osterman explained to Jacobs that the aggravator would, if filed and proved, allow a
12 judge to sentence Jacobs above the standard sentencing range, up to the statutory maximum of
13 ten years.

14 7. By the time the case was assigned out for trial before the undersigned, the relation-
15 ship between Jacobs and Osterman had improved considerably. Jacobs and his attorney were
16 able to, and did, communicate effectively, and Jacobs commented to his mother over the
17 telephone that he believed that Osterman was indeed acting effectively on Jacobs' behalf during
18 pretrial motions and at trial. The undersigned also observed that the interactions between Jacobs
19 and Osterman during the pretrial hearings and during the course of the ultimate bench trial
20 appeared to be uniformly cordial, positive, and cooperative. There was no indication in the
21 undersigned's presence that there was hostility or conflict of any sort between Jacobs and Oster-
22 man. Jacobs never brought any perceived conflict to the attention of the trial judge. Osterman
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1 also testified that he felt he had a good working relationship with his client during the course of
2 the trial.

3 8. When the parties initially appeared before the trial judge on September 28, 2010,
4 Osterman announced that Jacobs had elected to waive jury.

5 9. Osterman had advised Jacobs to elect a bench trial for two reasons. First, Osterman
6 rightly believed that the State would have difficulty producing the crime victim, Terri Crow, to
7 testify, and felt that a shorter bench trial, without time being taken up in jury selection and in the
8 other jury trial procedures which are not needed during bench trials, would minimize the State's
9 ability to locate Crow and compel her appearance at trial. Second, Osterman believed that the
10 video recording that Jacobs had made on the night of the crimes at issue would likely offend
11 jurors to such a degree that they would be more likely to convict Jacobs of the crimes he was
12 charged with, whereas he believed a judge would approach the evidence more analytically and
13 with less emotion.
14

15 10. Jacobs accepted Osterman's advice to waive jury. However, after a lengthy
16 colloquy and full explanation by the Court of his right to a jury trial, Jacobs was asked by the
17 Court whether he wished to take some additional time to discuss the issue with his attorney.
18 Jacobs stated that he did, and a recess was taken. After the recess, Jacobs stated that he had
19 changed his mind and decided to proceed with a jury trial.

20 11. The State then moved to amend the Information to charge Jacobs with Count I,
21 assault in first degree, DV, Count II, assault in the second degree, DV, Count III, felony harass-
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1 ment, DV, and Count IV, tampering with a witness, DV. The amended information¹ also alleged
2 that Jacobs was armed with a deadly weapon (a knife) in the commission of Counts II and III.
3 The Court granted the motion to file the amended information, and defense counsel did not
4 object. Formal reading was waived, and pleas of not guilty were entered for the defendant.

5 12. Thereafter, the Court heard pretrial motions and held a CrR 3.5 hearing, at which
6 three King County Sheriff deputies testified, and motions in limine were heard and decided.
7 Osterman did not make a CrR 3.6 motion to suppress a large knife and Jacob's cell phone, which
8 the police had found and seized in Jacobs' bedroom. The cell phone contained a video recording
9 that was a key component of the State's evidence against Jacobs.

10 13. The following morning, the State requested leave to file a Second Amended
11 Information, which added a deadly weapons enhancement to Count II (assault 2) and Count III,
12 Felony Harassment. The defense did not object, and the Court allowed the amendment. The
13 defense waived formal reading of the amended information, and pleas of not guilty were entered
14 for the defendant on each charge.

15 14. After a venire had been summoned but before they were brought into the
16 courtroom, Jacobs notified the Court that he had decided again to waive jury. The Court
17 cautioned Jacobs that once the venire panel was released, he would not be allowed to change his
18 mind again, and the Court asked Jacobs if he was sure of his decision to waive jury. Jacobs
19 stated that he was sure. The Court asked Osterman whether he was satisfied that Jacobs was
20 making a knowing, intelligent, and voluntary waiver of his right to jury trial, and Osterman
21
22

23 _____
24 ¹ The Amended Information was captioned "2nd Amended Information", (although the footer refers to it
25 as the "First Amended Information"), but it appears to be the first time the original charging document
was amended.

1 responded in the affirmative. Thereafter, Jacobs signed a Waiver of Right to Jury Trial
2 document, which stated that Jacobs was waiving his right to a jury trial "for this case".

3 15. Jacobs waived his right to a jury trial on advice of counsel after being thoroughly
4 advised by the Court of his right to a jury trial. The waiver was both oral in open court, and in
5 writing. The waiver was knowing and intelligent, and there were legitimate strategic reasons for
6 the waiver.

7 16. Pursuant to the State's demand, Osterman provided the prosecuting attorney with a
8 copy of Osterman's recorded interview with Crow. This interview contained claims by Crow of
9 prior incidents of domestic violence against her, committed by Jacobs, and descriptions of those
10 events.

11 17. On October 4, 2010, in open court, the State informed the Court that it had just
12 learned that the police had located Crow and that she was on her way to court pursuant to a
13 material witness warrant.

14 18. The State then requested leave to file a Third Amended Information, which added
15 an aggravating factor alleging a prior history of abuse with regard to Count II, Assault 2, and
16 Count 3, Felony Harassment. The prosecutor indicated that he had learned of the prior incidents
17 of abuse which formed the basis for the requested aggravating factor by reviewing the defense
18 interview with Crow over the previous weekend. The prosecutor also stated that he had inform-
19 ed Osterman of his intent to seek this amendment late the previous week. Defense counsel
20 objected on the grounds of vagueness regarding what needed to be proved to establish the
21 aggravator, but did not object to the timeliness of the amendment. The Court granted the motion
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1 to file the Third Amended Information, defense counsel waived formal reading and not guilty
2 pleas were entered for the defendant on each count.²

3 19. The parties then proceeded with a bench trial, after stipulating that the Court could
4 consider the testimony given by the Sheriff Deputies under oath the day before, at the CrR 3.5
5 hearing, as substantive evidence for trial.

6 20. At the trial, the State was successful in compelling Crow's attendance via a material
7 witness warrant. Crow was appointed counsel, and she exercised her Fifth Amendment right not
8 to testify concerning one incident of alleged domestic violence between herself and Jacobs, but
9 Crow did testify concerning the events that formed the basis of the charges against Jacobs, and
10 she also testified about other prior incidents of domestic violence that she alleged were committ-
11 ed against her by Jacobs.

12 21. After the State rested, Osterman requested a few moments, after which he stated on
13 the record, "The defense will not present evidence."

14 22. The Court hereby adopts its prior Findings of Fact from the underlying trial, and
15 incorporates those findings as though fully set forth herein. The Court also makes the following
16 additional Findings of Fact:
17

18 23. Crow and her children were cohabitants with the defendant in his apartment. Crow
19 and the defendant shared a bedroom.
20

21
22 ² This last amendment of the information does not appear to have been filed in the court file, although the
23 court order allowing its filing was filed on October 4, 2010. Neither party brought this omission to the
24 attention of the Court during briefing or argument on the defendant's motion for a new trial. Should the
25 lack of filing of the "third amended information" have legal significance, the Court will entertain a
timely motion for reconsideration regarding the aggravator alleged in the last amended information.

1 In *State v. Grier*, 171 Wn.2d 17 (2011), the Supreme Court recently reaffirmed the
2 *Strickland* test for determining when a defendant is entitled to a new trial on the grounds of
3 ineffective assistance of counsel. Under the holding of *Strickland v. Washington*, 466 U.S. 668,
4 691, (1984), a claim of ineffective assistance requires the court to engage in a two-pronged
5 inquiry:

6 First, the defendant must show that counsel's performance was deficient.
7 This requires showing that counsel made errors so serious that counsel
8 was not functioning as the 'counsel' guaranteed the defendant by the Sixth
9 Amendment. Second, the defendant must show that the deficient
10 performance prejudiced the defense. This requires showing that counsel's
11 errors were so serious as to deprive the defendant of a fair trial, a trial
12 whose result is reliable. Unless a defendant makes both showings, it
13 cannot be said that the conviction ... resulted from a breakdown in the
14 adversary process that renders the result unreliable.”

15 *State v. Grier*, 171 Wn.2d 17, 32-33 (2011), citing *Strickland, supra*. “To prevail on an ineffec-
16 tive assistance claim, a defendant alleging ineffective assistance must overcome ‘a strong pre-
17 sumption that counsel's performance was reasonable.’” *State v. Greer* at 33., citing *State v. Kyllo*,
18 166 Wn.2d 856, 862 (2009).

19 Arguably, Osterman should have brought a 3.6 motion to suppress the video recording
20 and the knife, as there was no strategic or tactical reason not to bring such a motion. However,
21 in this case the failure to bring a motion to suppress does not warrant a new trial, because the
22 motion would not have been granted. As a co-habitant of the apartment, and specifically of the
23 bedroom at issue, Crow had authority to give consent to the police to search the bedroom and to
24 seize the cell phone and the knife. *State v. Morse*, 156 Wn.2d 1, 15 (2005). The defendant's
25 consent was not required -- he had been removed from the premises by the police because they
had probable cause to believe that he had assaulted and threatened Crow.

Nor was a *Ferrier* advisement required in this case. The Washington Supreme Court
recently reaffirmed that the *Ferrier* requirement is “limited to situations where police request

1 entry into a home to conduct a warrantless search.” *State v. Schultz*, 170 Wn.2d 746, 759 (2011),
2 citing *State v. Khounvichai*, 149 Wn.2d 557, 563 (2003). Here, the police had exigent
3 circumstances justifying their entry into the defendant’s home. Therefore, even if Osterman's
4 failure to bring a motion to suppress were “deficient”, defendant is unable to demonstrate any
5 prejudice that resulted from that “deficiency”.

6 **2. Defendant was provided with effective assistance of counsel.**

7 It is true that “if the relationship between lawyer and client completely collapses, the
8 refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective
9 assistance of counsel.” *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 722 (2001), citing
10 *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir.1998). It does appear that the relationship
11 between Jacobs and Osterman became strained, and that their communication was poor during
12 part of the representation. It appears that much of the strain in the relationship stemmed from
13 Osterman’s frustration over Jacobs’ refusal to even discuss the possibility of a plea deal, Jacobs’
14 angry, hostile and abusive responses to Osterman’s attempts to discuss the penalties Jacobs faced
15 as a result of the amendments Osterman expected the State to file, and Jacobs’ presumption that
16 Osterman’s initiation of such discussions meant that Osterman would not conduct a vigorous
17 defense.

18 However, Jacobs withdrew his motion for new counsel at the hearing on August 20,
19 2010. While Jacobs did make another motion for new counsel on August 30, 2010, his motion
20 was denied without prejudice, and Jacobs was told by the Court that he could renew his motion,
21 with the implication that it would be granted if Jacobs chose to renew it. Not only did Jacobs not
22 renew his motion for new counsel, he objected when Osterman moved to withdraw.

23 Beyond this history, it appears by all accounts that Jacobs worked cooperatively and well
24 with Osterman once the case was finally sent out for trial. Jacobs' testimony at the hearing on
25

1 the motion for new trial that his conflicts with Osterman continued throughout the course of the
2 representation are not credible and are not consistent with all of the other evidence. The Court
3 saw no signs of hostility or conflict between Jacobs and Osterman at any point during the trial.
4 Jacobs never brought any perceived conflict to the attention of the trial judge. In fact, Jacobs
5 commented to his mother via telephone call during the trial that he felt Osterman was doing a
6 good job representing him at trial. Osterman also testified that he felt he had a good working
7 relationship with his client during the course of the trial.³

8 Under these circumstances, the Court is unable to find that the relationship between
9 Jacobs and Osterman constituted a denial of the right to effective assistance of counsel.

10 **3. The Timing of the State's Third Amended Information did not deprive the**
11 **defendant of his constitutional right to a fair trial.**

12 Under CrR 2.1(d), the trial court may permit the State to amend the information at any
13 time before a verdict or findings are entered if the defendant's substantial rights are not
14 prejudiced. The burden is on the defendant to prove that he was prejudiced by the timing of any
15 amendments. Jacobs was unable to show any such prejudice.

16 Osterman had discussed with Jacobs the likelihood of such an aggravator being added by
17 the State when Osterman played the recorded interview with Crow for Jacobs, which was weeks
18 before the trial. Osterman also discussed with Jacobs that this aggravating factor would, if
19 proved, allow a judge to sentence Jacobs beyond his standard sentencing range under the SRA,
20 up the statutory maximum. Therefore, both defendant and defense counsel were aware of these
21 possibilities well before the trial. Osterman testified credibly that he expected the State to add
22

23 ³ Cf *Stenson, supra* at 729, where a disagreement between attorney and client over trial strategy was held
24 not to be sufficient to find a cognizable conflict even after counsel told the court that he "can't stand the
25 sight of" his client.

1 the aggravator for a history of domestic violence once the prosecutor heard Osterman's recorded
2 interview with Crow, expected that this aggravator might be proved if the State could get compel
3 Crow to testify at trial, and discussed these issues with Jacobs. Thus, the timing of the amend-
4 ment was not prejudicial to the defendant, and his attorney was not unprepared for it.⁴

5 **4. Defendant knowingly and voluntarily waived his right to trial by jury.**

6 As found above, the defendant knowingly and intelligently waived his right to a jury trial
7 **on this case** on advice of counsel after being thoroughly advised by the Court of his right to jury
8 trial. Defendant has cited no authority for the proposition that a new waiver of jury was required
9 when the State added the aggravator for a history of domestic violence in the Third Amended
10 Information. The aggravating factor arose from information that Osterman had discussed with
11 Jacobs well before Jacobs made the decision to waive jury. It was not a surprise to Jacobs or to
12 his lawyer. Jacobs never demanded a jury for trial of this aggravating factor. A new trial on this
13 ground is not legally warranted.

14 **5. Defendant was not deprived of his right to testify.**

15 The defendant cites no authority for the proposition that the Court must undertake a
16 colloquy or any other inquiry for there to be a valid waiver of the right to testify. Indeed, the
17 law is to the contrary. *State v. Thomas*, 128 Wn.2d 553, 559 (1996).

18 Osterman testified credibly that he discussed Jacobs' right to testify in his own defense,
19 and that he told his client that it was Jacobs' decision whether to take the stand.⁵ Osterman did
20

21
22 ⁴ Cf *State v. Earl*, 97 Wn. App. 408, 409 (1999), where the State amended the information on the day set
23 for trial by adding a second count of rape involving a different victim, which defense counsel had not
24 been prepared to defend against before trial began.

25 ⁵ Osterman testified at the motion for new trial, and stated that his answers to questions posed by the
26 prosecutor during his interview on January 25, 2011 were truthful, and that he would so testify under
27 oath.

1 advise Jacobs against testifying, based on Osterman's belief that Jacobs' testimony would be
2 unlikely to benefit him, and because Osterman felt such testimony was likely to be harmful to the
3 defense, because Jacobs was volatile and Osterman believed that the prosecutor likely would be
4 able to get Defendant to lose his temper and say or do something while testifying that might
5 harm his defense. Osterman stated that Jacobs never expressed much interest in testifying in his
6 own behalf.

7 Jacobs' testimony that he wanted to testify is not credible. His behavior at pretrial and
8 during trial made it clear that Jacobs had no hesitancy speaking up on his own behalf when he
9 felt that his rights were being impinged on in any way. Moreover, Jacobs' testimony on this
10 matter was inconsistent, which itself is consistent with his conduct at pretrial, at trial, and in
11 post-trial proceedings, where he would frequently make decisions which he later would disavow,
12 or he would simply change his mind..

13
14 Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters
15 the following **Order**:

16 Defendant's Motion for New Trial is DENIED.

17 IT IS SO ORDERED this 31st day of May, 2011.

18
19 s/ _____
20 Judge Andrea Darvas

King County Superior Court
Judicial Electronic Signature Page

Case Number: 10-1-05502-5
Case Title: STATE OF WASHINGTON VS JACOBS, JEREMY
JERMAINE
Document Title: ORDER FFCL & ORD ON MOT FOR NEW TRIAL
Signed by Judge: Andrea Darvas
Date: 5/31/2011 3:43:09 PM

A handwritten signature in black ink, appearing to read "Andrea Darvas", written over a horizontal line.

Judge Andrea Darvas

This document is signed in accordance with the provisions in GR 30.
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67373-4-I
v.)	
)	
JEREMY JACOBS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24th DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JEREMY JACOBS 3725 124 TH E. AVE TULSA, OK 74147	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 24th DAY OF FEBRUARY, 2012.

X _____ 

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