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NO. 69614-9-I

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

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REC'D  
 APR 29 2013  
 King County Prosecutor  
 Appellate Unit

STATE OF WASHINGTON,  
 Respondent,  
 v.  
 MYLES HILLS,  
 Appellant.

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

The Honorable Carol Schapira, Judge

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BRIEF OF APPELLANT

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STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it changed the law of the case on counts 5 and 6 (Violation of a Court Order) during jury deliberations.

2. Under the original law of the case, the evidence was insufficient to prove Violation of a Court Order.

3. The sentencing court erred when it placed appellant on community custody.

Issues Pertaining to Assignments of Error

1. Appellant was charged with two counts of violating a no-contact order based on alleged violations of two separate court orders. Without objection, the trial court instructed jurors they could only consider the orders for whether the State had established their existence. Based on this limitation, during closing arguments, defense counsel argued jurors could not use the orders – or their content – to prove any other essential element of the offenses, including whether appellant knew about the orders. After deliberations had begun, and in response to a jury question, the trial judge reversed course and instructed jurors they could consider the orders to prove appellant's knowledge of them. Did the court err, and deny appellant a fair trial, when it changed the

law of the case in this manner?

2. Under the original law of the case, there was insufficient evidence to prove appellant knew about the orders. Therefore, should appellant's convictions be dismissed with prejudice?

3. The sentencing court mistakenly believed some of appellant's crimes required community custody. Should appellant's 12-month community custody term be stricken?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Myles Hills with four counts of Tampering With A Witness – Domestic Violence (counts 1-4) and two counts of Domestic Violence Misdemeanor Violation of Court Order (counts 5-6). CP 9-12. A jury convicted Hills on all counts, and the Honorable Carol Schapira imposed a standard-range composite sentence of 51 months' confinement to be followed by 12 months' community custody. CP 19-20, 50, 56-57. Hills timely filed his Notice of Appeal. CP 63-75.

2. Trial Evidence

At trial, the State submitted two court orders prohibiting Hills from contacting Dori Castleberry, the mother of Hills' two children.

3RP<sup>1</sup> 114, 126, 128. The first order was issued by King County District Court on March 13, 2012. Exhibit 1. The second order was issued by King County Superior Court on May 15, 2012. Exhibit 2.

The tampering charges in counts 1 through 4 were based on recorded telephone calls from an inmate at the King County Jail to Castleberry on May 14, June 1, June 7, and June 10, 2012, respectively. During these calls, the speaker can be heard encouraging Castleberry not to cooperate with law enforcement and prosecutors. 3RP 115-121; exhibits 5-7; CP 9-11. The violation of court order charges in counts 5 and 6 were based on additional recorded phone calls to Castleberry on May 20 and June 16, 2012. Exhibits 5-7; CP 11-12. Castleberry testified that the female voice on the recordings was hers and the male voice belonged to Hills. 3RP 129.

### 3. Instructions and Closing Arguments

Instruction 14, the “to convict” instruction for count 5, Misdemeanor Violation of a Court Order, required the prosecution to prove:

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 8/21/12; 2RP – 9/10/12; 3RP – 9/11/12; 4RP – 9/12/12; 5RP – 11/16/12.

(1) That on or about May 20, 2012, there existed a no-contact order which had been issued by the King County District Court, South Division, on March 13, 2012, and it was applicable to the defendant;

(2) That the defendant knew of the existence of this order;

(3) That on or about May 20, 2012, the defendant knowingly violated a provision of this order which was a restraint provision prohibiting contact with a protected party; and

(4) That the defendant's act occurred in the State of Washington.

CP 43. Instruction 16, the "to convict" instruction for count 6, was identical except as to date of violation and the applicable no-contact order. CP 44.

In an attempt to prevent jurors from using the two no-contact orders as propensity evidence, Judge Schapira proposed and used a limiting instruction based on her assessment that the orders were only relevant to element (1) in counts 5 and 6. 4RP 178-179.

Instruction 16 provides:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of two no contact orders which may be considered by you only for the purpose of determining whether there existed a no-contact order in Count V or Count VI. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 45.

During closing argument, the prosecutor suggested jurors could find that Hills had notice of the no-contact orders (element (2) in counts 5 and 6) because his signature was found on both orders. 4RP 189, 191-192.

Defense counsel premised her response on instruction 16's limitation. Specifically, she noted the State had failed to present any court recording or other evidence establishing that Hills was present when the no-contact orders were issued or that he ever received them thereafter. And, regarding the signatures on the orders, there was no evidence establishing them as Mills' signature. 4RP 196.

Regarding instruction 16, counsel argued:

You have – you will also receive a limiting instruction, an instruction from the judge, I think it's instruction number 16, that tells you, you can only consider the no contact order for the limited purpose of whether or not a no contact order existed. You cannot consider the no contact order for whether or not he had notice of it, whether or not he knew about it, whether or not he knowingly violated it. You cannot consider the no contact order at all when you're considering the other charges, the witness tampering charges, Counts I through IV.

4RP 196-197; see also 4RP 202 (reminding jurors they may only consider exhibits 1 and 2 for "whether a no contact order existed").

In rebuttal, the prosecutor again mentioned the signatures on the orders, indicating that “apparently [Hills] acknowledged receipt” of the orders. 4RP 215. The prosecutor did not, however – prior to jurors beginning their deliberations – ask Judge Schapira to modify instruction 16 and its limitation restricting jurors’ use of the orders to proof of their existence.

During deliberations, jurors sent out an inquiry, which reads: “May Exhibits 1 and 2 be considered, in reference to instruction 16, for answering question two (2) in instruction 14 and 15.” CP 24; 4RP 220. Jurors wanted to know whether – as instruction 16 stated – they truly could only consider exhibits 1 and 2 as proof the no-contact orders existed or whether they also could consider the exhibits in deciding element (2) in instructions 14 and 15, *i.e.*, whether Hills knew about the orders he was accused of violating. 4RP 221-222.

Defense counsel objected to telling jurors anything beyond “they’ve been given all the instructions they will be given.” 4RP 222. She noted that she had already crafted her closing argument around the restriction contained in instruction 16 and it would be prejudicial to change the applicable law after the fact without any opportunity to address the modification with jurors. 4RP 224-225. Jurors had been

instructed that they could consider exhibits 1 and 2 for whether orders existed and for no other purpose, and counsel objected to any new, contradictory advisement. 4RP 231-232.

The State argued the exhibits were properly considered for any purpose related to counts 5 and 6 and, therefore, the answer to the jurors' question was "yes." 4RP 220-222. To tell them anything else, argued the prosecutor, would be to leave them with an incorrect understanding of the law. 4RP 223-224. He suggested jurors be told they could consider exhibits 1 and 2 for counts 5 and 6 without any further limitation. 4RP 230-232.

Agreeing with the prosecutor, Judge Schapira responded to the jury question as follows: "Please read the instructions as a whole. Instruction 16 limits use of exhibits 1 and 2 to the elements of Counts V and VI." CP 25; 4RP 233. About 30 minutes later, jurors reached guilty verdicts on all counts. CP 25; Supp. CP \_\_\_\_ (sub no. 49A, Minutes, at 7).

Hills now appeals

C. ARGUMENT

1. JUDGE SCHAPIRA ERRED WHEN SHE UNFAIRLY MODIFIED THE LAW OF THE CASE DURING DELIBERATIONS.

“[J]ury instructions not objected to become the law of the case.” State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Neither party objected to instruction 16 and its limitation that jurors could only consider exhibits 1 and 2 in deciding the existence of the no contact orders. Trial judges have discretion to provide, in response to jury questions, additional instructions on the law. State v. Becklin, 163 Wn.2d 519, 529-530, 182 P.3d 944 (2008); State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988); CrR 6.15(f)(1).<sup>2</sup> But this authority is not without limitation.

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<sup>2</sup> CrR 6.15(f)(1) provides, in pertinent part:

The jury shall be instructed that any questions it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. . . .

“[S]upplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury.” State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). The defense has the right to rely on the State’s failure to offer appropriate instructions consistent with its theory of the case. Supplemental instructions may not add a theory defense counsel had no opportunity to argue. Id.; see also State v. Jasper, 158 Wn. App. 518, 542-543, 245 P.3d 228 (2010) (trial court could not have given supplemental instruction addressing new defense theory where parties had no opportunity to address theory in closing), aff’d, 174 Wn.2d 96, 271 P.3d 876 (2012). Moreover, a change in the applicable law after deliberations have begun denies defense counsel an opportunity to re-think its cross-examination strategy. State v. Hobbs, 71 Wn. App. 419, 425, 859 P.2d 73 (1993).

At Hills’ trial, instruction 16 prohibited jurors from considering exhibits 1 and 2 in deciding whether Hills knew about the orders. Although the prosecutor nonetheless encouraged jurors to look at the signatures on the exhibits as proof of knowledge, defense counsel correctly responded that instruction 16 did not allow consideration of the exhibits for that purpose. By supplementing – and directly contradicting – instruction 16 with a response that

jurors could consider exhibits 1 and 2 for any of the elements in counts 5 and 6, Judge Schapira changed the law of the case to add a theory not previously available to the prosecution. This was error.

Improperly altering the law of the case requires reversal where it results in prejudice to the defense. Hobbs, 71 Wn. App. at 422 n.2. By amending instruction 16 during deliberations, Judge Schapira directly undermined defense counsel's closing argument. Everything counsel said about the jury's inability to look to exhibits 1 and 2 for proof of Hills' knowledge was rendered incorrect. Jurors were now free to look to the exhibits, including the signatures purported to be Hills', in deciding the knowledge element. Defense counsel was left with no opportunity to address the new instruction or its significance in relationship to the trial evidence. Nor was counsel able to re-think her cross-examination strategy. She had not asked Ms. Castleberry any questions concerning Hills' knowledge of the order. 3RP 144-146.

Because Judge Schapira improperly changed the law of the case after deliberations had begun, this Court should reverse Hills convictions on counts 5 and 6 for violating a court order. Moreover, the reversal should be with prejudice because, without jurors' ability

to consider the exhibits for all elements on those counts, there was insufficient evidence to prove the crimes. See Hickman, 135 Wn.2d at 102-103 (sufficiency of evidence turns on whether evidence, in light most favorable to prosecution, is sufficient based on law of the case). Under the original law of the case – even in the light most favorable to the prosecution – no rational trier of fact could have found beyond a reasonable doubt that Hills knew about the court orders.

2. HILLS SHOULD NOT HAVE BEEN PLACED ON COMMUNITY CUSTODY.

Sentencing courts must impose 12 months' community custody whenever an individual is convicted of a "crime against persons under RCW 9.94A.411(2)." RCW 9.94A.701(3)(a). Judge Schapira imposed 12 months' community custody as part of Hills' sentences for Witness Tampering based on her belief that crime qualifies as a crime against persons. CP 57. It does not. RCW 9.94A.411(2) lists Tampering With A Witness under "Crimes Against Property/Other Crimes." Thus, the term of community custody must be stricken.<sup>3</sup>

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<sup>3</sup> Even if there were authority for community custody, Hills' sentence would have exceeded the statutory maximum. Witness

D. CONCLUSION

Judge Schapira erred when she answered the jury's question in a manner that unfairly modified the law of the case. Under the law of the case as originally given, there was no evidence that Hills knew about the no-contact orders and his convictions for violating those orders should be dismissed with prejudice. Even if this Court were to conclude there was sufficient evidence of knowledge under the original law of the case, reversal and remand for a new trial would still be required.

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Tampering is a class C felony with a statutory maximum sentence of 60 months. RCW 9A.20.021(1)(c); 9A.72.120(2). For counts 1 through 4, Judge Schapira imposed concurrent standard-range sentences of 51 months' confinement followed by 12 months' community custody. CP 56. Thus, confinement plus community custody equals 63 months.

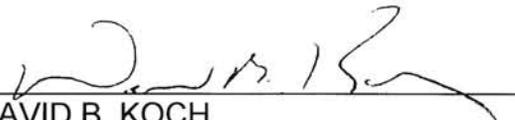
"The term of community custody . . . shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." RCW 9.94A.701(9). Judge Schapira would have been required to reduce Hills' sentence so that the combination of confinement and community custody did not exceed 60 months. State v. Boyd, 174 Wn.2d 470, 471-473, 275 P.3d 321 (2012).

In addition, community custody was not authorized for Hills' felony offenses. The requirement that he serve 12 months on community custody must be stricken.

DATED this 29<sup>th</sup> day of April, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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WSBA No. 23789  
Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69614-9-I
	)	
MYLES HILLS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 29<sup>TH</sup> DAY OF APRIL 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL

[X] MYLES HILLS  
DOC NO. 994987  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF APRIL 2013.

X *Patrick Mayovsky*

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