

NO. 62916-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER CARTER,

Appellant.

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

APPELLANT'S OPENING BRIEF

FILED
STATE OF WASHINGTON
2009 AUG 31 PM 4:59

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT	1
B. ASSIGNMENTS OF ERROR.....	2
C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
D. STATEMENT OF THE CASE.....	4
E. ARGUMENT	6
1. WITHOUT SUFFICIENT PROOF OF A PERTINENT PRIOR CONVICTION, THE COURT IMPROPERLY DENIED CARTER’S MOTION TO DISMISS FOR LACK OF EVIDENCE THAT HE COMMITTED FELONY VIOLATION OF A NO CONTACT ORDER.....	6
a. The prosecution must prove that a prior conviction required to prove a felony violation of a no contact order was an eligible predicate to the offense	6
b. By failing to prove a validly entered prior conviction, the prosecution did not present sufficient evidence	9
2. WHERE DEFENSE COUNSEL FAILED TO OBJECT TO INHERENTLY PREJUDICIAL AND INADMISSIBLE CRIMINAL HISTORY EVIDENCE, MISAPPREHENDED HIS OBLIGATION TO OBJECT TO CONTESTED EVIDENCE, AND NEGLECTED TO SEEK THE ONLY JURY INSTRUCTION AVAILABLE TO SUPPORT HIS THEORY OF DEFENSE, CARTER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL	14
a. Carter had the right to effective assistance of counsel	14
b. Counsel’s inexplicable failure to object to an exhibit listing Carter’s otherwise inadmissible criminal history constitutes deficient performance.....	16

c. Counsel’s failure to object to Ex. 7, despite his intent to seek dismissal of the conviction based on its inadequacy, constitutes deficient performance	20
d. A necessity instruction would have been given if offered	22
e. Carter was prejudiced by his attorney’s deficient performance	29
3. WHERE THE CHARGING DOCUMENT OMITTED FACTS NECESSARY TO THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSE, IT IS INADEQUATE AND REQUIRES REVERSAL.....	32
a. The charging document must include the facts necessary to all essential elements.....	32
b. Felony violation of a no contact order requires specific factual information about the existence of two prior convictions.....	34
c. The insufficient charging document actually prejudiced Carter	36
F. CONCLUSION.....	38

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Personal Restraint of Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004)	28
<u>Leonard v. Territory</u> , 2 Wash.Terr. 381, 7 P. 872 (1885)	33
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995)	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	7
<u>State v. Jones</u> , 101 Wn.2d 113, 677 P.2d 113 (1984)	29
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991)	32, 33, 36
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989).....	33, 35, 36
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1998).....	15
<u>State v. Miller</u> , 156 Wn.2d 23, 123 P.3d 827 (2005).....	11, 12, 20
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005)	29
<u>State v. Oster</u> , 147 Wn.2d 141, 52 P.3d 26 (2002).....	8, 34
<u>State v. Rice</u> , 102 Wn.2d 120, 683 P.2d 199 (1984)	31
<u>State v. Theroff</u> , 25 Wn.App. 590, 608 P.2d 1254, <u>aff'd</u> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	7
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.2d 735 (2003).....	16

Washington Court of Appeals Decisions

<u>City of Seattle v. Termain</u> , 124 Wn.App. 798, 103 P.3d 209 (2004)	34, 35
<u>In re Pers. Restraint of McCready</u> , 100 Wn.App. 259, 263, 996 P.2d 658 (2000).....	21
<u>State v. Carmen</u> , 118 Wn.App. 655, 77 P.3d 368 (2003), <u>rev.</u> <u>denied</u> , 151 Wn.2d 1039 (2004).....	13, 20, 21
<u>State v. Clowes</u> , 104 Wn.App. 935, 18 P.3d 596 (2001).....	35
<u>State v. Gallegos</u> , 73 Wn.App. 644, 871 P.2d 621 (1994)	23
<u>State v. Ginn</u> , 128 Wn.App. 872, 117 P.3d 1155 (2005), <u>rev.</u> <u>denied</u> , 157 Wn.2d 1010 (2006).....	23
<u>State v. Gray</u> , 134 Wn.App. 547, 148 P.3d 1123 (2006) ..	12, 20, 21
<u>State v. Ibsen</u> , 98 Wn.App. 214, 989 P.2d 1184 (1989)	33
<u>State v. Jeffrey</u> , 77 Wn.App. 222, 889 P.2d 956 (1995)	24
<u>State v. Johnson</u> , 90 Wn.App. 54, 950 P.2d 981 (1998).....	18
<u>State v. Kruger</u> , 116 Wn.App. 685, 67 P.3d 1147, <u>rev. denied</u> , 150 Wn.2d 1024 (2003).....	22, 27, 31, 32
<u>State v. Prestegard</u> , 108 Wn.App. 14, 42-43, 28 P.3d 817 (2001)..	8
<u>State v. Saunders</u> , 91 Wn.App. 575, 958 P.2d 364 (1998).....	20
<u>State v. Woods</u> , 138 Wn.App. 191, 156 P.3d 309, 314 (2007).....	21
<u>State v. Young</u> , 129 Wn.App. 468, 119 P.3d 870 (2005), <u>rev.</u> <u>denied</u> , 157 Wn.2d 1001 (2006).....	17

United States Supreme Court Decisions

<u>In re Winship</u> , 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	7
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)	7
<u>Michelson v. United States</u> , 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed.2d 168 (1948)	18
<u>Old Chief v. United States</u> , 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 474 (1997)	18
<u>Recuenco v. Washington</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)	8
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)	15
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	15
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)	15
<u>Wiggins v. Smith</u> , 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)	15

Federal Decisions

<u>United States v. Bautista-Avila</u> , 6 F.3d 1360 (9 th Cir. 1993)	7
<u>United States v. Lopez</u> , 74 F.3d 575 (5 th Cir. 1996)	7

United States Constitution

Fifth Amendment..... 7
Fourteenth Amendment 7
Sixth Amendment..... 8, 14

Washington Constitution

Article I, § 3 14
Article I, § 22 14

Statutes

RCW 26.50.110 8, 9, 10, 12, 14
RCW 69.51A.040 24
RCW 9A.36.041 9, 11, 20
RCW 9A.76.170 24

Court Rules

RPC 1.1 21

Other Authorities

11A <u>Washington Practice: Washington Pattern Jury Instructions Criminal</u> , 18.02 (1998 pocket part)	24
American Bar Association, <u>Standards for Criminal Justice: Prosecution and Defense Function</u> , Standard 4-4.1(a) (3 rd ed. 1993)	28
Laura Schulkind, <u>Applying the Necessity Defense to Civil Disobedience Cases</u> , 64 N.Y.U. L. Rev. 79 (1989)	23
Shaun P. Martin, <u>The Radical Necessity Defense</u> , 73 U. Cin. L. Rev 1527 (2005)	23

A. SUMMARY OF ARGUMENT.

When Sylvester Carter's teen-age daughter ran away from home, he took all available measures to find her. He heard his daughter might be at his former girlfriend's home and drove there. Without getting out of his car, Carter spoke with his ex-girlfriend, learned his daughter was at her home and safe, and left. Because this visit to his ex-girlfriend's house violated a no contact order issued several years earlier and which Carter thought had expired, the prosecution charged Carter with one count of felony violation of a no contact order predicated on having two prior convictions for violating court orders.

At his trial, Carter's attorney moved to dismiss the charges based on the inadequate proof of the applicability of one of the prior convictions. The court ruled Carter waived the objection by failing to object to the admission of the evidence showing the prior conviction.

Carter's attorney also failed to object to the admission of a Judgment and Sentence showing Carter's criminal history or ask for an available stipulation to limit the inherent prejudice in detailing the specifics of his prior offenses. The attorney further neglected to seek a jury instruction on the necessity defense despite Carter's

testimony describing the necessity underlying his actions. Finally, the charging document never apprised Carter of the prior convictions underlying his felony violation of a no contact order, which denied him the necessary notice to prepare a defense.

B. ASSIGNMENTS OF ERROR.

1. The prosecution failed to prove Carter was previously conviction of an eligible violation of a no contact order, which is an essential element of felony violation of a no contact order.

2. The court misapprehended the law and abused its discretion by denying Carter's motion to dismiss based on the prosecution's failure of proof.

3. Carter was denied his right to effective assistance of counsel.

4. The charging document did not provide Carter with the required notice of all essential factual and legal elements of felony violation of a no contact order.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. An essential element of felony violation of a no contact order as charged in this case is that the accused have two prior convictions for specified offenses. Here, the defense objected to the prosecution's proof of one prior conviction but the court refused

to entertain the motion because it ruled the motion should have been brought before trial. Did the prosecution fail to meet its burden of proof and did the court err by refusing to consider a motion properly raised in the trial court?

2. The right to effective assistance of counsel encompasses a defense attorney who knows the law, investigates the case, presents available defenses, and limits the jury's exposure to inherently prejudicial and inadmissible evidence. Here, without any legitimate tactical strategy, defense counsel let the jury hear that Carter had numerous serious and some violent felony convictions despite the uncontested inadmissibility of this information; waived his objection to evidence proving an element of the crime while simultaneously arguing there was inadequate proof of the prior conviction; and never asked the court for a jury instruction defining the defense of necessity even though Carter's testimony made this instruction available and persuasive. Was Carter denied his right to effective assistance of counsel based on the prejudicial effect of counsel's unreasonable errors?

3. The charging document in a criminal prosecution must include the elements of the crime and the conduct which is alleged to have constituted that crime. Here, the charging document

tracked the statutory language pertaining to having a prior conviction for violating a no contact order but did not include any information about what prior convictions the prosecution alleged. When Carter's defense largely rested on the inapplicability of a prior conviction, did the inadequate charging document both deprive Carter of his due process right to notice but also cause actual prejudice in his ability to prepare a defense?

D. STATEMENT OF THE CASE.

Sylvester Carter lived with his teen-aged daughter Jennifer. 10/1/08RP 46-47.¹ In July 2008, Jennifer ran away from home, first staying with her aunt before leaving for an unknown location. Id. Carter was very concerned about his daughter's welfare. Id. at 52. He reported her missing to the police and searched for her as best he could. Id. at 47.

On July 8, 2008, Carter heard that Jennifer might be at the home of his former girlfriend, Michelle Baker. He also heard that child protective services (CPS) had been to Baker's home. Id. at 48. Carter and Baker had a child together, Mary, who lived with Baker. Id. at 46.

¹ The verbatim report of proceedings is referred to herein by the date of proceeding followed by the page number.

Carter drove to Baker's home. Baker was outside and Carter spoke with her for several minutes. Id. at 48. Carter stayed inside his car during the conversation.

Baker told Carter that his daughter was safe and was in her house. Once Carter was assured of her well-being, he left.

Baker appeared upset after her contact with Carter. 9/30/08RP 26. A friend of Baker's who was present during the conversation reported the incident to the police after he learned that there was a no contact order between Carter and Baker. Id. at 28-29.

Baker did not appear at Carter's trial for felony violation of a no contact order. She also did not contact the police or respond to their inquiries. 10/1/08RP 29.

Carter testified that he knew of a no contact order issued in 2006, but thought it had expired. Id. at 56. He explained that he only went to Baker's home to check on his daughter's safety and left as soon as he was assured of her safety.

The prosecution offered two sentencing documents as evidence of Carter's prior convictions, which were an element of

the felony violation of a no contact order. CP 43, Exs. 6 & 7.² One exhibit included an unredacted list of Carter's prior convictions, including first degree robbery and second degree theft. Ex. 6. The other exhibit indicated Carter had been convicted under the statute defining fourth degree assault, as opposed to a no contact order. Ex. 7. The trial court refused to consider Carter's motion to dismiss for insufficient evidence of a prior conviction after the prosecution rested its case. 10/1/08RP 37.

Carter was convicted of one count of felony violation of a no contact order and received a standard range sentence. Pertinent facts are discussed in more detail in the argument sections below.

E. ARGUMENT.

1. WITHOUT SUFFICIENT PROOF OF A PERTINENT PRIOR CONVICTION, THE COURT IMPROPERLY DENIED CARTER'S MOTION TO DISMISS FOR LACK OF EVIDENCE THAT HE COMMITTED FELONY VIOLATION OF A NO CONTACT ORDER

a. The prosecution must prove that a prior conviction required to prove a felony violation of a no contact order was an eligible predicate to the offense. As a matter of due process of law, the State bears the burden of proving every essential element of a

² Ex. 6 is attached herein as Appendix A, and Ex. 7 is attached as Appendix B.

charged crime. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); U.S. Const. amends. 5 & 14; Wash. Const. art. I, § 22. On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not have found all the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the truth of the State's evidence is presumed as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a

guilty verdict. State v. Prestegard, 108 Wn.App. 14, 42-43, 28 P.3d 817 (2001).

As charged in the case at bar, the essential elements of felony violation of a no-contact order were that Carter violated the terms of a no-contact order and he had been convicted on two previous occasions of violating no-contact orders. State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002); RCW 26.50.110.³ “The prior convictions function as an element of felony violation of a no contact order.” Oster, 147 Wn.2d at 146. These prior convictions must they be proven to the jury beyond a reasonable doubt. Id.

Facts which increase the penalty for an offense beyond the statutory maximum, other than the fact of a prior conviction, are elements of the offense which must be found by a jury and proved beyond a reasonable doubt. Recuenco v. Washington, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (“[w]e have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.”); U.S. Const. amend. 6.

³ RCW 26.50.200(5) provides in pertinent part, “A violation of a court order issued under this chapter ... is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter....”

b. By failing to prove a validly entered prior conviction, the prosecution did not present sufficient evidence.

Felony violation of a no contact order expressly requires a particular type of prior convictions to establish the offense. RCW 26.50.110(5). The prosecution was required to prove that Carter had:

two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

Id.; CP 43 (amended information).

In its case-in-chief, the prosecution's evidence showing Carter's prior convictions consisted of two Judgment and Sentences, Exs. 6 & 7. Ex. 7 was the Judgment and Sentence from a 1996 conviction for a crime described as "violation of a post sentence court order." The only further description of the offense was a statutory citation, RCW 9A.36.041. RCW 9A.36.041 is the statute defining assault in the fourth degree.

After the prosecution rested its case, Carter objected to the insufficiency of evidence proving the two necessary prior convictions, based on the facial invalidity of Ex. 7. 10/1/08RP 35-36, 38. He argued that Ex. 7 was at best ambiguous as to what

offense Carter had been convicted, because it cited fourth degree assault as the statute on which the conviction was based. Id. Further, the title of the offense, “violation of a post-sentence court order,” was capable of multiple interpretations and on its face did not establish Carter had the mandatory prior conviction required by RCW 26.50.110. It did not show that Carter had a prior conviction for violating the provisions of chapter 26 RCW, or “chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.” RCW 26.50.110(5). Defense counsel asked to dismiss the felony offense charged.

The court ruled that it was the defendant’s motion was in part a legal motion that should have been brought before trial. It concluded Carter had not met his burden of showing he was in fact convicted of fourth degree assault and not violation of a court order. 10/1/08RP 37, 39. The court further ruled that Carter had waived his objection by failing to object to the admission of the exhibit. Id. at 40.

The court also refused to let the jury consider the sufficiency of the evidence regarding this element. Carter offered a jury instruction explaining the legal definition of a violation of a court

order that qualified as a predicate offense for felony violation of a no contact order. CP 41. He offered another instruction stating that RCW 9A.36.041 was fourth degree assault. CP 42. The court refused to give either instruction. 10/1/08RP 41.

Instead the court's instructions contained no explanation whatsoever of the requirements of the predicate offenses. The court only asked the jury to decide whether Carter had "twice been convicted for violating the provisions of court orders." CP 13 (Special Verdict Form). The jury never heard that the prior convictions must be obtained under specific statutes.

The existence of a pertinent no contact order underlying an accusation of violation of a no contact order is a question of fact for the jury. State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). On the other hand, the validity of a no contact order is a matter of law settled by the trial court Id. Issues relating to validity include whether the order was issued by a competent court, sufficiently complied with the statute, was "vague or inadequate on its face," or "otherwise will not support a conviction of violating the order. Id. A question of validity is divorced from the sufficiency of evidence establishing the prior conviction element of the crime and that must be proven to the jury beyond a reasonable doubt. Id. at 31-32.

In State v. Gray, 134 Wn.App. 547, 148 P.3d 1123 (2006), the defense objected to the prosecution's failure to prove that the prior convictions in a felony violation of a no contact order case were issued under the necessary statutes set forth in RCW 26.50.110(5). The appellate court ruled that the issue went solely to admissibility of evidence, which were sentencing exhibits from the prior convictions, and not the sufficiency of the prosecution's proof. The court held that a party waives any objection to the admissibility of evidence by failing to object at the earliest opportunity. Id. at 556.

The court in Gray also decided the merits of the claim of insufficient evidence, and found sufficient proof presented that the prior convictions were issued under the necessary statutes. Id. at 558-59. The Gray Court's insistence that a defendant object to the proof of prior conviction before the admission of evidence relating to the prior conviction extends Miller beyond its holding. Miller did not expressly mandate an objection to the validity of a prior conviction upon the admission of the evidence. 156 Wn.2d at 31. Rather, Miller required the court to decide the legal question pertaining to validity as opposed to the jury. Under Miller, Carter timely raised his objection and the court erred by refusing to

consider it and by holding Carter to the burden of disproving the prior conviction's validity. 156 Wn.2d at 31.

At the least, the court was required to find that the predicate convictions were for applicable prior convictions sometime before sentencing. State v. Carmen, 118 Wn.App. 655, 77 P.3d 368 (2003), rev. denied, 151 Wn.2d 1039 (2004). In Carmen, the defense did not object to the evidence proving the applicability of the prior convictions upon their admission, and the reviewing court faulted counsel for failing to do so. Id. at 663-64. But the trial judge reviewed evidence establishing the source of the prior convictions at sentencing, and the appellate court relied on the trial court's determination that the prior convictions qualified for the enhanced sentence. Id. at 664.

In Carmen, the court emphasized that the validity of a predicate conviction is an evidentiary issue that must be addressed to and resolved by the court, not the jury. Id. at 667. Here, the trial court refused to exercise its authority in resolving the question of the validity of the prior convictions. Instead it berated counsel for raising the issue after the prosecution rested its case. 10/1/08RP 37, 41. While it may have been possible or preferable for counsel to have objected to the admission of the exhibits, at the time of

Carter's motion to dismiss none of the exhibits had been presented to the jury. They had not been discussed on the trial record in any way other than being admitted outside the presence of the jury.

9/30/08RP 5. There was no impediment to the court considering the issue at that time. Thus, the court abdicated its role to decide this critical legal question.

Without proof that the prior convictions were valid and applicable, the prosecution did not meet its burden of proving all essential statutory elements of felony violation of a no contact order. Ex. 6 does not show Carter was convicted of a violation of a court order as required by RCW 26.50.110(5), and thus, there was insufficient evidence of the felony offense presented.

2. WHERE DEFENSE COUNSEL FAILED TO OBJECT TO INHERENTLY PREJUDICIAL AND INADMISSIBLE CRIMINAL HISTORY EVIDENCE, MISAPPREHENDED HIS OBLIGATION TO OBJECT TO CONTESTED EVIDENCE, AND NEGLECTED TO SEEK THE ONLY JURY INSTRUCTION AVAILABLE TO SUPPORT HIS THEORY OF DEFENSE, CARTER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

a. Carter had the right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22. Counsel's critical role in the adversarial system

protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

To prevail in a claim of ineffective assistance of counsel, a defendant must show, "First, [that] counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," quoting Strickland, 466 U.S. at 688).

While an attorney's decisions are treated with deference, his or her actions must be reasonable based on all circumstances. Wiggins, 123 S.Ct. at 2541; State v. Tilton, 149 Wn.2d 775, 72

P.2d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney's conduct altered the result of the case. Tilton, 149 Wn.2d at 784.

b. Counsel's inexplicable failure to object to an exhibit listing Carter's otherwise inadmissible criminal history constitutes deficient performance. Before trial, the prosecution indicated it did not intend to elicit any of Carter's prior criminal convictions under ER 609, or otherwise, aside from the prior convictions for violating a court order that were elements of the offense. 9/25/08RP 27; Supp. CP __, sub. no. 24B, p. 5 (State's Trial Memorandum). When Carter testified, none of his prior criminal convictions were discussed. 10/1/08RP 46-64. The prosecution did not even ask whether he was the person convicted of the prior no contact order offenses.

But defense counsel voiced no objection to the admission of Ex. 6, the Judgment and Sentence from Carter's 1997 conviction for felony violation of a no contact order. 9/30/08RP 5. Ex. 6 informed the jury that Carter had been previously convicted of the very same offense as charged in the instant case. It is inherently prejudicial for a jury to learn that an accused person has been

previously convicted of the same offense. State v. Young, 129 Wn.App. 468, 475, 119 P.3d 870 (2005), rev. denied, 157 Wn.2d 1001 (2006). The “risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged . . . is especially great when the prior offense is similar to the current charged offense.” Id.

More egregiously, Ex. 6 was an unredacted Judgment and Sentence. It included a list of four prior felonies of which Carter had been convicted. In Ex. 6, the jury learned that Carter had been convicted of first degree robbery. He had been separately convicted of theft in the second degree. He was also convicted of “VUCSA Del.” and “FVNCO.” The jury may or may not have understood that “VUCSA Del.” is shorthand for delivery of a controlled substance, or that “FVNCO” refers to yet another conviction for felony violation of a no contact order, but the jury surely would know to what crimes “Robbery 1st” and “Theft 2nd” refer. The jury did not receive any limiting instruction directing them to disregard this information or use it only for a certain purpose, and thus had no cautionary words warning against using this information to infer Carter is a dangerous person with a serious history of violent or disreputable acts.

Not only was Carter's criminal history otherwise inadmissible, defense counsel had a ready mechanism available for excluding this information from the jury. The jury did not even need to know Carter had been convicted of the same offense as charged. All the jury needed to hear was that Carter had been convicted of two prior violations of no contact orders.

It is well-established by federal and state caselaw that where an element of the charged crime involves a prior conviction, courts must accept the defense's offer to stipulate to the prior conviction's existence as a qualifying crime. Old Chief v. United States, 519 U.S. 172, 174, 117 S.Ct. 644, 136 L.Ed.2d 474 (1997); State v. Johnson, 90 Wn.App. 54, 950 P.2d 981 (1998). As the Supreme Court explained in Old Chief:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge

519 U.S. at 181 (quoting Michelson v. United States, 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed.2d 168 (1948)). Therefore, when a

crime contains a prior conviction as an element, the prosecution may not insist upon establishing the specific background of the conviction because it is simply something the jury need not know. Id. at 190-91. Instead, the court must accept an offer to stipulate to the qualifying nature of the prior conviction.

Here, Carter's attorney neither offered nor sought a stipulation. He did not try to redact the prejudicial criminal history contained in Ex. 6, or ask that the jury not be told the specific name of the qualifying offense because the similarity to the charged crime would be unduly prejudicial. The jury did not see the exhibits until the close of trial and it would not have been too late to simply stipulate to the existence of the prior convictions after the court rejected counsel's argument that one of the prior convictions was not a valid qualifying offense. But counsel never asked to stipulate and never tried to redact the very prejudicial information of Carter's criminal history. Counsel's neglect of his obligation to shield the jury from unnecessary and clearly prejudicial information constitutes deficient performance for which there was no conceivable tactical advantage.

c. Counsel's failure to object to Ex. 7, despite his intent to seek dismissal of the conviction based on its inadequacy, constitutes deficient performance. An attorney's tactical reasons underlying an action must be reasonable, or they are no defense to a claim of ineffective assistance of counsel. State v. Saunders, 91 Wn.App. 575, 578-79, 958 P2d 364 (1998).

Defense counsel objected to the sufficiency of the evidence contained in Ex. 7, because on its face it said Carter had been convicted under RCW 9A.36.041, fourth degree assault, and not a no contact order violation. 10/1/08RP 35-36, 38. But he said "No objection," when the prosecution asked to admit the exhibits showing Carter's prior convictions. 9/30/08RP 5. The trial court rejected counsel's motion to dismiss because counsel did not timely object to the admission of the evidence. 10/1/08RP 40.

In Gray, this Court ruled that an attorney must object upon the admission of exhibits demonstrating prior convictions in a felony violation of a no contact order prosecution. 134 Wn.2d at 557-58. Gray relied on language from Miller, and Carmen, supra, indicating that an objection must be lodged to the admission of evidence if the defendant contests the applicability of a prior conviction in a felony violation of a no contact order prosecution.

Failing to object upon admission waives any later objection to the sufficiency of the evidence. Defense counsel's actions in the case at bar are exactly those faulted in Gray.

A competent attorney must remain familiar with the law. See State v. Woods, 138 Wn.App. 191, 156 P.3d 309, 314 (2007) (in light of case law on issue, "there was no strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law."); In re Pers. Restraint of McCready, 100 Wn.App. 259, 263, 996 P.2d 658 (2000) (attorney ineffective for failing to accurately understand sentencing laws); RPC 1.1, cmt. 6 ("a lawyer should keep abreast of changes in the law and its practice.").

Here, the defense attorney had no reasonable tactical strategy for failing to object to Ex. 7 upon its admission, because he would necessarily waive the only real defense to the charge he presented. Case law made counsel's strategy unreasonable and deficient. When asked for legal analysis, defense counsel only cited a civil case that warned against relying on speculative evidence. 10/1/08RP 38. Counsel made no attempt to comply with the mandates of Carmen or Gray, and instead waived his objection

to the lack of proof, which cannot be a legitimate strategy or reasonable performance by an attorney expected to know the law.

d. A necessity instruction would have been given if offered. Although Carter testified that he went to the complainant's home, he told the jury that he did so out of necessity. 10/1/08RP 52. But Carter's attorney did not ask to instruct the jury on the available defense of necessity, further constituting ineffective assistance of counsel.

To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily reviews three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical; and (3) did the failure to offer the instruction prejudice the defendant. State v. Kruger, 116 Wn.App. 685, 690-91, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003).

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed on a defense that is supported by substantial evidence. Thomas, 109 Wn.2d at 228; Kruger, 116 Wn.App. at 691. The court must review the record in the light most favorable to the defendant to determine if the instruction is appropriate, keeping in mind that the jury, not the

court, weighs the evidence and determines witness credibility.

State v. Ginn, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006).

Necessity is a common law defense that excuses otherwise criminal conduct when it is necessary to avoid a greater harm.

State v. Gallegos, 73 Wn.App. 644, 650-51, 871 P.2d 621 (1994);

Shaun P. Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev 1527 (2005).

The necessity defense essentially permits an accused to admit the elements of an offense but avoid punishment if her illegal acts were designed to obtain a greater good. A driver may exceed the speed limit to rush an injured person to the hospital. An onlooker is permitted to destroy a home to prevent a fire from spreading. A prisoner may leave a burning jail. A captain may enter an embargoed port in a storm.

Martin, 73 U. Cin. L. Rev. at 1727-28. The necessity defense is a long-standing component of the Anglo-American criminal law that has been adopted in every American jurisdiction. Id. at 1532-33, 1535-36; Laura Schulkind, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L. Rev. 79, 83 (1989).

Washington's common law defense of necessity is included in the pattern jury instructions. 11A Washington Practice:

Washington Pattern Jury Instructions Criminal, 18.02 (1998 pocket

part). The pattern instruction reads:

Necessity is a defense to the charge of (fill in appropriate offense) if

- (1) the defense reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law;
- (3) the threatened harm was not brought about by the defendant; and
- (4) no reasonably [equally effective] legal alternative existed.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

Id. A more specific statutory defense may be available for some offenses. RCW 9A.76.170(1) (uncontrollable circumstances defense to bail jumping); RCW 69.51A.040 (qualifying patient and physician exemptions to possession of marijuana); see State v. Jeffrey, 77 Wn.App. 222, 225, 889 P.2d 956 (1995) (more specific necessity instruction should be used in prosecution for unlawful possession of firearm).

The doctrine requires the harm the defendant sought to avoid was greater than the harm resulting from the law violation;

the defendant reasonably believed his actions were necessary to avoid the greater evil; the defendant did not himself cause the threatened harm; and the defendant had no reasonable legal alternative. WPIC 18.02; Jeffrey, 77 Wn.App. at 224. The defense is unavailable if the defendant has a reasonable, legal alternative to violating the law. Jeffrey, 77 Wn.App. at 224.

Viewing the evidence in the light most favorable to Carter, he was acting based upon what he perceived as an absolute necessity to prevent a greater harm. Ginn, 128 Wn.App. at 879. His teen-age daughter had run away from home and he feared she was on the streets and in danger. 10/1/08RP 47. He reported her missing to the police and called relatives. Id. When he heard she was at Baker's home, he needed to verify her whereabouts and ascertain her safety.

Carter took a family friend with him and drove to Baker's home. He saw Baker outside her home surrounded by several friends, including a man Carter believed Baker was dating. 10/1/08RP 58-59. Carter remained inside his car and spoke with Baker for several minutes. Id. at 50. After receiving Baker's assurance his daughter was in her home and safe, Carter left. He

did no more than what appeared to him to be necessary; he verified his daughter was safe and left the scene.

Carter did not perceive any viable alternative. He had already contacted the authorities and he was very concerned that his daughter was in danger.

Carter admitted violating the no contact order, although he believed it had expired as it was issued close to two years earlier. 10/1/08RP 48, 56. But rather than argue to the jury that Carter's conduct should be excused because he acted based upon a necessity, Carter's attorney never presented any such theory to the jury.

Instead of arguing Carter acted only out of necessity, Carter's attorney Daniel Felker told the jury that Carter "incriminated himself" when he testified. 10/1/08RP 86. His argument to the jury was that Carter was presumed innocent and the jurors should consider "there's an element of wilfulness, there's an element of proximity to the house. Twelve people are a lot smarter than one. I'll leave that up to you to make that determination." Id. Felker's closing argument was stunningly brief and devoid of coherent legal theory. 10/1/08RP 85-87.

Felker never even asked the jury to consider Carter's circumstances, his feeling of helplessness when his daughter had disappeared, his justifiable fear for her well-being, or his lack of unreasonable actions when seeking information on his daughter's whereabouts from his former girlfriend. Baker did not appear or testify at trial and her unexplained absence could have been used to garner sympathy for Carter, to implicitly indicate Baker's support for Carter's actions, or to exploit the State's failure to fully investigate its case. Rather than argue necessity or even play to juror sympathies, counsel essentially conceded the case against Carter.

Defense counsel is ineffective if he fails to propose an instruction that assists the jury in understanding a critical component of the defense. For example, where the defendant's intent was the focus of the defense in a prosecution for assaulting a police officer, it was ineffective assistance to fail to propose a diminished capacity instruction. Kruger, 116 Wn.App. at 693-94. Although the issue of the defendant's intoxication was before the jury, the jury was not apprised of the law and thus the defense was "impotent." Id. at 695. Similarly, where defense counsel raised a diminished capacity defense based upon intoxication in a

prosecution for felony flight, it was ineffective to fail to propose an instruction that explained the subjective elements of that offense. Thomas, 109 Wn.2d at 226-27. The Thomas Court reasoned the defendant was entitled to jury instructions that correctly state the law and “a reasonably competent attorney would have been sufficiently aware of the relevant legal principles to enable him or her to propose an instruction based on pertinent cases.” Id. at 229.

Here, too, a reasonably competent attorney would have been sufficiently aware of the common law necessity defense to enable him to propose a necessity defense instruction, which is a pattern criminal instruction. Defense counsel must, “at a minimum, conduct a reasonable investigation” in order to make informed decisions about how to best represent his client. In re Personal Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). (Emphasis deleted). “This includes investigating all reasonable lines of defense.” Davis, 152 Wn.2d at 721; see American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3rd ed. 1993).

Carter’s attorney should have been aware of his client’s testimony prior to trial and asserted the defense of necessity from the inception. Notably, defense counsel had very little

communication with Carter, a topic Carter complained about before trial. 9/24/08RP 10-11. Carter sought a new lawyer based on his attorney's failure to communicate with him about the case or prepare a defense. Carter's motion for a new lawyer before the trial further indicated counsel's failure to offer a necessity defense was not tactical. If not due to ignorance of the law, it was due to lack of preparation and failure to talk to Carter about the case. Defense counsel had not worked with his client to fashion a necessity defense and was unprepared to present this available and persuasive theory of defense.

e. Carter was prejudiced by his attorney's deficient performance. Prior criminal history has an "inherent prejudicial effect." State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415 (2005). "The danger of prior conviction evidence is its tendency to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality." State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 113 (1984).

Here, the jury learned plainly inadmissible details of Carter's criminal history. In a case that largely rested on Carter's credibility, defense counsel inexplicably let the jury know Carter had numerous serious felony convictions, including several convictions

for the same offense as charged. Ex. 6. Without this substantially and inherently prejudicial information, the jury would have likely credited Carter's claim that he thought the no contact order had expired. 10/1/08RP 48, 56. Carter's testimony was sympathetic and the complainant did not even appear at the trial or follow up with the police, thus leaving a wide avenue to find Carter credible, responsible, and sympathetic if they had not heard of his numerous convictions for violent or serious offenses.

Furthermore, counsel incompetently waived his objection to the validity of the prior conviction from 1996 by failing to raise it at the proper time. The prosecution had no further documentary proof of the prior conviction and, if counsel had timely objected, it is reasonably probable the court would have found the evidence inadmissible and the prosecution unable to prove the felony offense charged.

Not only was Carter entitled to have all of his criminal history redacted and presented in the least prejudicial manner of a stipulation, he was also entitled to a necessity instruction. Viewed in the light most favorable to the defense, he admitted contacting Baker, but explained he did so because of his extreme concern about his daughter's safety. If the jury had been instructed on

necessity, it could have concluded by a preponderance of the evidence that Carter's actions fit that defense because (1) Carter reasonably believed he needed to go to Baker's home to see if his daughter was there and he had no viable alternative, as any contact would violate the order, and if he had the police check on Jennifer in Baker's home, it may have caused greater harm to Jennifer, Baker, and their young child who lived with Baker; (2) Carter's actions arose in order to stop a far greater harm that would result if Carter's teenage daughter was on the street without anyone caring for her, (3) Carter did not create the harm, and (4) no reasonable alternatives existed.

The jury did not have the opportunity to determine if Carter's actions were for the greater social good, as he testified, because they were not provided with instructions on the defense of necessity. Defense counsel did not even seek an instruction that would support the only possible theory of defense Carter had. "The jury, without the instruction, was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory." Kruger, 116 Wn.App. at 694-95, quoting State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

Carter did not receive a fair trial because his attorney did not prepare a defense, did not object to patently prejudicial and readily redacted information of Carter's criminal history and did not understand his defense or propose an instruction that permitted the jury to consider it. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232; Kruger, 116 Wn.App. at 695.

3. WHERE THE CHARGING DOCUMENT
OMITTED FACTS NECESSARY TO THE
ESSENTIAL ELEMENTS OF THE CHARGED
OFFENSE, IT IS INADEQUATE AND
REQUIRES REVERSAL

a. The charging document must include the facts necessary to all essential elements. Due process of law requires the State properly inform an accused person of the charges against him. U.S. Const. amends. 5, 6,⁴ 14. Wash. Const. art. I, section 22.⁵ A charging document must contain, "[a]ll essential elements of a crime." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); see CrR 2.1(a)(1) (charging document "shall be a plain,

⁴ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . ."

⁵ Wash. Const. art. I, section 22 provides in pertinent part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, . . ."

concise, and definite written statement of the essential facts constituting the offense charged.”).

The information must contain the statutory and non-statutory elements of the crime. Kjorsvik, 117 Wn.2d at 1001. The “essential elements” required in the charging document requires not only the elements of the crime but also “the conduct of the defendant which is alleged to have constituted that crime.” Id.; see also Leonard v. Territory, 2 Wash.Terr. 381, 392, 7 P. 872 (1885) (“Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime.”); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (“essential elements” rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” (emphasis in original)).

When challenged for the first time on appeal, a charging document is construed liberally. State v. Ibsen, 98 Wn.App. 214, 216, 989 P.2d 1184 (1989). This liberal construction requires the court to first determine whether the necessary facts appear in any form in the charging document. Id. at 216. Only after the court

finds the necessary information could be inferred from the face of the charging document will the court require the defendant to show he or she had been actually prejudiced from the inartful language. Id.

As charged in the case at bar, the essential elements of felony violation of a no-contact order were that Carter violated the terms of a no-contact order and he had been convicted on two previous occasions of violating no-contact orders. Oster, 147 Wn.2d at 146. Not only are the prior convictions an element that must be proven to the jury beyond a reasonable doubt and clearly set forth as elements in the jury instructions, the charging document must contain sufficient factual information to provide notice to the accused person.

b. Felony violation of a no contact order requires specific factual information about the existence of two prior convictions. In City of Seattle v. Termain, 124 Wn.App. 798, 103 P.3d 209 (2004), this Court found a complaint for violation of a no contact order was constitutionally defective because it failed to identify the actual order he was charged with violating. The charging document in Termain simply traced the language of the ordinance governing the violation of the no-contact order. Id. at

803. The Court of Appeals ruled, “The charging document here is awkwardly worded and vague. Frankly, it is gooblygook.” Id. at 806.

Here, the charging document alleged in pertinent part that Carter, “did have at least two prior convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26, 74.34 or a valid foreign protection order as defined in RCW 26.52.020.” CP 43.

The charging document did not give any factual explanation of these prior convictions. It did not provide a date of offense or sentence, the court in which they were issued, or any other facts that would explain what offenses on which the prosecution relied.

Merely reciting the statutory language is not always sufficient to provide the necessary factual notice. Termain, 124 Wn.App. at 803; State v. Clowes, 104 Wn.App. 935, 941, 18 P.3d 596 (2001). In Termain, the Court faulted the charging document for failing to identify the underlying no-contact order with any degree of specificity. Termain relied on Leach, whose “core holding” was that a defendant must be apprised not only of the legal elements but also “of the conduct of the defendant which is alleged to have

constituted the crime.” Id. (citing Leach, 113 Wn.2d at 688-89; Kjorsvik, 117 Wn.2d at 98).

The same reasoning extends to the failure to identify the prior convictions underlying felony violation of a no contact order. Absent specific factual allegations, Carter could not “fairly imply” the factual predicate for the essential element of prior convictions. Identifying the specific underlying convictions was not merely academic in Carter’s case, as he sought dismissal of the case at trial based on the ambiguous nature of one of the prior convictions. 10/1/08RP 35-36, 38. The court rejected Carter’s motion to dismiss because it claimed he should have objected earlier and he had the burden of proving the nature of the underlying conviction if he was challenging it. Id. at 37. But without proper notice, Carter could not have been expected to marshal evidence to disprove and successfully challenge the prior convictions.

c. The insufficient charging document actually prejudiced Carter. The prosecution’s failure to provide mandatory factual notice of an essential element of the crime prejudiced Carter’s ability to prepare and present a defense. The court would not let Carter argue to the jury that one of the prior convictions appeared not to meet the legal criteria, and would not grant his

motion to dismiss without Carter presenting additional evidence explaining the nature of the contested prior conviction.

As discussed above, Carter argued that the sentencing exhibit offered as proof of his 1996 conviction did not establish he had the necessary prior conviction for violating an applicable court order. The court refused to consider the argument because he did not object to the exhibit upon its admission at the inception of the trial. 9/30/08RP 5; 10/1/08RP 37.

Without receiving adequate advance notice of the facts underlying the essential element of two prior convictions, Carter could not prepare a defense. Without requiring the prosecution to specify the underlying convictions on which it relies, the defense cannot know whether it can defend against the charge based on the lack of proof of a prior conviction. Carter could not investigate the prior convictions on which the accusations rest or properly contest the State's proof. Omitting this critical factual information from the charging document denied Carter his ability to meaningfully prepare and present his defense. Thus, Carter was actually prejudiced by this deficiency.

F. CONCLUSION.

For the reasons stated above, Mr. Carter respectfully asks this Court to reverse his conviction based on the lack of proof, inadequacy of the charging document, and denial of the right to competent counsel. Mr. Carter also asks that no costs be awarded in the event that he does not substantially prevail on appeal.

DATED this 31st day of August 2009.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

CERTIFIED

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

COPY

FILED

STATE OF WASHINGTON

Plaintiff,

v.

SYLVESTER CARTER

Defendant.

No. 97-1-02248-3 KNT

JUDGMENT AND SENTENCE

97 NOV -3 AM 10:03

KING COUNTY SUPERIOR COURT CLERK KENT, WA

COPY TO SENTENCING GUIDANCE BOARD COMMITTEE NOV 1997

JUDGMENT NUMBER 4-2-97-004-00

I. HEARING

- 1.1 The defendant, the defendant's lawyer, DENNIS HOUGH, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were:
1.2 The state has moved for dismissal of count(s)

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on (date): 08-26-97 by jury verdict of:

Count No.: 1 Crime: FELONY VIOLATION OF A COURT ORDER
RCW 10.99.050 Crime Code 06010
Date of Crime 03-25-97 Incident No.

Table with 2 columns: Category (C/PROC, CUST, CASH, JUDG, DISB, CPM, AOCCTG, EXH) and Status (checked/unchecked)

Count No.: Crime:
RCW Crime Code
Date of Crime Incident No.

Count No.: Crime:
RCW Crime Code
Date of Crime Incident No.

Additional current offenses are attached in Appendix A.

SPECIAL VERDICT/FINDING(S):

- (a) A special verdict/finding for being armed with a Firearm was rendered on Count(s):
(b) A special verdict/finding for being armed with a Deadly Weapon other than a Firearm was rendered on Count(s):
(c) A special verdict/finding was rendered that the defendant committed the crimes(s) with a sexual motivation in Count(s):
(d) A special verdict/finding was rendered for Violation of the Uniform Controlled Substances Act offense taking place in a school zone, in a school, on a school bus, in a school bus route stop zone, in a public park, in public transit vehicle, in a public transit stop shelter in Count(s):
(e) Vehicular Homicide, Violent Offense (D.W.I. and/or reckless) or Nonviolent (disregard safety of others)
(f) Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score (RCW 9.94A.400(1)(a)) are:

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

000056

Handwritten signature and initials

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a) Robbery 1 st	4.10.91	Adult	90-1-01007-9	Sno. Co.
(b) VUCSA - Del.	4.10.91	Adult	90-1-00395-1	Sno. Co.
(c) Theft 2 nd	5.31.91	Adult	91-1-00311-1 SEA	King Co.
(d) FVPCO	9.13.96	Adult	96-1-05147-7 KNT	King Co.

- Additional criminal history is attached in Appendix B.
- Prior convictions (offenses committed before July 1, 1986) served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)(c)):
- One point added for offense(s) committed while under community placement for count(s) _____

2.4 **SENTENCING DATA:**

SENTENCING DATA	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENT	TOTAL STANDARD RANGE	MAXIMUM TERM
Count 1	0	UNRANKED			0 TO 12 MONTHS	5 YRS AND/OR \$10,000
Count						
Count						

Additional current offense sentencing data is attached in Appendix C.

2.5 **EXCEPTIONAL SENTENCE:**

- Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____ Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

- The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 **RESTITUTION AND VICTIM ASSESSMENT:**

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 - Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.142(2), sets forth those circumstances in attached Appendix E.
 - Restitution to be determined at future hearing on (Date) _____ at _____ m. Date to be set.
 - Defendant waives presence at future restitution hearing(s).
- Defendant shall pay Victim Penalty Assessments pursuant to RCW 7.68.035 in the amount of \$100 if all crime(s) date prior to 6-6-96 and 6500 if any crime date in the Judgment is after 6-5-96.

4.2 **OTHER FINANCIAL OBLIGATIONS:** Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived;
- (b) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104; Recoupment is waived (RCW 10.01.160);
- (c) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA; VUCSA fine waived (RCW 69.50.430);
- (d) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived;
- (e) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (f) \$ _____, Incarceration costs; Incarceration costs waived (9.94A.145(2));
- (g) \$ _____, Other cost for: _____

4.3 **PAYMENT SCHEDULE:** Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 500.00. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:

- Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer. : _____ The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from date of sentence or release from confinement to assure payment of financial obligations.

4.4 ^{UNDER} CONFINEMENT ~~OR ONE YEAR~~ R: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: Immediately, (Date): 4:00 pm by 12/5/97
Adult Detention

12 months on Count I _____ months on Count _____ months on Count _____
_____ months on Count _____ months on Count _____ months on Count _____

WORK RELEASE AUTHORIZED
ENHANCEMENT time due to special deadly weapon/firearm finding of _____ months is included for Counts _____

The terms in Count(s) _____ are concurrent/consecutive.
The sentence herein shall run concurrently/consecutively with the sentence in cause number(s) _____
_____ but consecutive to any other cause not referred to in this Judgment.

Credit is given for 43 days served days as determined by the King County Jail solely for conviction under this cause number pursuant to RCW 9.94A.120(15).

4.5 NO CONTACT: For the maximum term of 5 years, defendant shall have no contact with Margaret Carter
Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.

4.6 BLOOD TESTING: (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) Appendix G is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

4.7 ^{SUPERVISION} COMMUNITY PLACEMENT, RCW 9.94A.120(9): ^{for a period of 12 months.} Community Placement is ordered for any of the following eligible offenses: any "sex offense", any "serious violent offense", second degree assault, any offense with a deadly weapon finding, any CH. 69.50 or 69.52 RCW offense, for the maximum period of time authorized by law. All standard and mandatory statutory conditions of community placement are ordered.
 Appendix H (for additional nonmandatory conditions) is attached and incorporated herein.

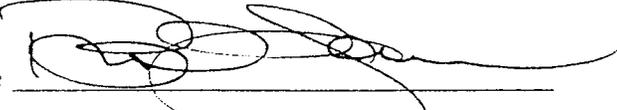
4.8 WORK ETHIC CAMP: The court finds that the defendant is eligible for work ethic camp and is likely to qualify under RCW 9.94A.137 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the Department shall convert the period of work ethic camp confinement at a rate of one day of work ethic camp to three days of total standard confinement and the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.120(9)(b).
 Appendix K for additional special conditions, RCW 9.94A.120(9)(c), is attached and incorporated herein.

4.9 SEX OFFENDER REGISTRATION (sex offender prime conviction): Appendix J is attached and incorporated by reference into this Judgment and Sentence.

4.10 ARMED CRIME COMPLIANCE, RCW 9.94A.103,105. The state's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 10/31/97

Judge: 
Print Name: Brian Lewis

Presented by: 
Deputy Prosecuting Attorney, Office WSBA ID #91002
Print Name: Drew Cavatone

Approved as to form:
Dennis W. Hough 11487
Attorney for Defendant, WSBA #
Print Name: Dennis W. Hough

FINGERPRINTS



RIGHT HAND
FINGERPRINTS OF:

SYLVESTER CARTER

DEFENDANT'S SIGNATURE: Sylvester Carter
DEFENDANT'S ADDRESS: 500 MONROE AVE. #C-5
RENTON, WA. 98050

DATED: 10-31-97

[Signature]
JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY:
M. JANICE MICHELS, SUPERIOR COURT CLERK
BY: Patsy Ann McBrook
DEPUTY CLERK

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

CLERK

BY: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

S.I.D. NO. WA14534588
DATE OF BIRTH: JANUARY 31, 1964
SEX: M
RACE: BLACK

APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NO. 96-1-05147-7 KNT

JUDGMENT AND SENTENCE

SEP 13 11:17:47
COMMUNITY
SUPERIOR COURT CLERK
SEATTLE, WA.

SEP 17
COMMITMENT ISSUED

COPY TO SENTENCING GUIDELINES COMMISSION SEP 16 1996

STATE OF WASHINGTON

Plaintiff,

v.

SYLVESTER CARTER

Defendant.

I. HEARING

1.1 The defendant, the defendant's lawyer, MARK FLORA *Kathy Lynn* and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Cheryl *96* Carter

1.2 The state has moved for dismissal of count(s) II

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on (date): 08-13-96 by plea of:

Count No.: I Crime: VIOLATION OF POST SENTENCE COURT ORDER
RCW 9A.36.041 Crime Code 01037
Date of Crime 07-17-96 Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code _____
Date of Crime _____ Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code _____
Date of Crime _____ Incident No. _____

Additional current offenses are attached in Appendix A.

SPECIAL VERDICT/FINDING(S):

- (a) A special verdict/finding for being armed with a **Firearm** was rendered on Count(s): _____
- (b) A special verdict/finding for being armed with a **Deadly Weapon** other than a **Firearm** was rendered on Count(s): _____
- (c) A special verdict/finding was rendered that the defendant committed the crimes(s) with a **sexual motivation** in Count(s): _____
- (d) A special verdict/finding was rendered for **Violation of the Uniform Controlled Substances Act** offense taking place in a school zone in a school on a school bus in a school bus route stop zone in a public park in public-transit vehicle in a public transit stop shelter in Count(s): _____
- (e) **Vehicle Homicide** **Violent Offense (D.W.I. and/or reckless)** or **Nonviolent (disregard safety of others)**
- (f) Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score (RCW 9.94A.400(1)(a)) are: _____

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

1
96 9 22834

POSTED
18A

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a)				
(b)				
(c)				
(d)				

- Additional criminal history is attached in Appendix B.
- Prior convictions (offenses committed before July 1, 1986) served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)(c)):
- One point added for offense(s) committed while under community placement for count(s)

2.4 **SENTENCING DATA:**

SENTENCING DATA	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENT	TOTAL STANDARD RANGE	MAXIMUM TERM
Count I	0	UNRANKED			0 TO 12 MONTHS	5 YRS AND/OR \$10,000
Count						
Count						

Additional current offense sentencing data is attached in Appendix C.

2.5 **EXCEPTIONAL SENTENCE:**

- Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s)

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 **RESTITUTION AND VICTIM ASSESSMENT:**

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
- Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.142(2), sets forth those circumstances in attached Appendix E.
- Restitution to be determined at future hearing on (Date) at .m. Date to be set.
- Defendant waives presence at future restitution hearing(s).
- Defendant shall pay Victim Penalty Assessments pursuant to RCW 7.68.035 in the amount of \$100 if all crime(s) date prior to 6-6-96 and \$500 if any crime date in the Judgment is after 6-5-96.

4.2 **OTHER FINANCIAL OBLIGATIONS:** Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ 100, Court costs; Court costs are waived;
- (b) \$ w, Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104; Recoupment is waived (RCW 10.01.160);
- (c) \$, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA; VUCSA fine waived (RCW 69.50.430);
- (d) \$, King County Interlocal Drug Fund; Drug Fund payment is waived;
- (e) \$, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (f) \$, Incarceration costs; Incarceration costs waived (9.94A.145(2));
- (g) \$, Other cost for:

4.3 **PAYMENT SCHEDULE:** Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 600. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:

- Not less than \$ per month; On a schedule established by the defendant's Community Corrections Officer. The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from date of sentence or release from confinement to assure payment of financial obligations.

4.4 CONFINEMENT ONE YEAR OR LESS: Defendant shall serve a term of total confinement in the King County Jail or if applicable under RCW 9.94A.190(3) in the Department of Corrections as follows, commencing: Immediately; (Date): _____ by no later than _____, m.

80 months/days on Count I _____ months/days on Count _____
_____ months/days on Count _____ months/days on Count _____

Work release is authorized if eligible.

Home detention pursuant to RCW 9.94A.030(42) is ordered if defendant is eligible for _____ day(s), the last one-third of the term of confinement, _____

The terms in Count(s) No. _____ are concurrent/consecutive.

The sentence herein shall run concurrently/consecutively with the sentence in cause number(s) _____ but consecutive to any other term of confinement not referred to in this Judgment.

Credit is given for 59 day(s) served days determined by the King County Jail solely for conviction under this cause number pursuant to RCW 9.94A.120(15). Jail term is satisfied; defendant shall be released under this cause.

(a) ALTERNATIVE CONVERSION PURSUANT TO RCW 9.94A.380: _____ days of total confinement are hereby converted to:

- _____ days of partial confinement to be served subject to the rules and regulations of the King County Jail.
- _____ days/hours community service under the supervision of the Department of Corrections to be completed as follows: on a schedule established by the defendant's community corrections officer. _____

Alternative conversion was not used because: Defendant's criminal history, Defendant's failure to appear, Other: _____

(b) COMMUNITY SUPERVISION, RCW 9.94A.383: Defendant shall serve 12 months in community supervision. Community supervision shall commence immediately but is tolled during any period of confinement. The Defendant shall report to the Dept. of Corrections, Intake Officer, 2401 4th Avenue, 6th Floor, Seattle, WA, 98121-1435 (phone 464-7055) no later than 72 hours of the commencement of community supervision. The defendant shall comply with all rules and regulations of the Department created for community supervision and shall not own, use, or possess any firearm or ammunition.

Defendant shall comply with special "crime related prohibitions" defined in RCW 9.94A.030 and set forth in Appendix F.

4.5 NO CONTACT: For the maximum term of 5 years, defendant shall have no contact with victims

Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.

4.6 BLOOD TESTING: (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) Appendix G is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

4.7 OFF-LIMITS ORDER: (known drug trafficker) Appendix I is an off limits order that is part of and incorporated by reference into this Judgment and Sentence.

4.8 SEX OFFENDER REGISTRATION: (sex offender crime conviction) Appendix J covering sex offender registration, is attached and incorporated by reference into this Judgment and Sentence.

Violations of the conditions or requirements of this sentence are punishable for a period not to exceed sixty (60) days of confinement for each violation. (RCW 9.94A.200(2))

Date: 9/13/96

Presented by:

Kathleen C. Van Orst
Deputy Prosecuting Attorney, Office WSBA ID #91002
Print Name: Kathleen C. Van Orst

W. Downing
Judge
Print Name: W. Downing

Approved as to form:

[Signature]
Attorney for Defendant, WSBA # 17398
Print Name: Kathy Lynn Fu
Mark Flora

FINGERPRINTS



RIGHT HAND
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE: Sylvester Carter
DEFENDANT'S ADDRESS: 500 MONROE AVE. "C-5"
RENTON, WA

SYLVESTER CARTER

DATED: 13 September 1996

[Signature]
JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY:
M. JANICE MICHELS, SUPERIOR COURT CLERK
BY: [Signature]
DEPUTY CLERK

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

S.I.D. NO. WA14534588
DATE OF BIRTH: JANUARY 31, 1964
SEX: M
RACE: BLACK

CLERK

BY: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

CARTER, Sylvester L., Jr.

Defendant,

No. 96-1-05147-7

JUDGMENT AND SENTENCE
(FELONY) - APPENDIX F,
ADDITIONAL CONDITIONS
OF SENTENCE

CRIME-RELATED PROHIBITIONS:

1. Do not purchase, possess or use alcohol (beverage or medicinal) and submit to testing and reasonable searches of your person, residence, property and vehicle by the Community Corrections Officer to monitor compliance.
- ~~2. Do not enter any business where alcohol is the primary commodity for sale.~~
3. Do not have direct or indirect contact with Margaret Carter, Jack Roth, or Leif Boots, until further order of the Court.

Date: 9/13/96

W. J. Downing

JUDGE, KING COUNTY SUPERIOR COURT

APPENDIX F

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62916-6-I
v.)	
)	
SYLVESTER CARTER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF AUGUST, 2009, 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	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
<input checked="" type="checkbox"/> SYLVESTER CARTER	(X)	U.S. MAIL
979258	()	HAND DELIVERY
MONROE CORRECTIONAL COMPLEX	()	_____
PO BOX 777		
MONROE, WA 98272		

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF AUGUST, 2009.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710