

NO. 63718-5-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

JOSE SANCHEZ-FLORES

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

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**RESPONDENT'S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

Mr. Jose Sanchez-Flores was convicted by a jury of one count of Felony Violation of a No Contact Order. The jury also found that the State had proven that Mr. Sanchez-Flores had committed the additional aggravated offense of committing the crime against an individual who was a family or household member and within the sight or sound of a minor child. Mr. Sanchez-Flores claims that the trial court erred in allowing a certified copy of the no contact order in question into evidence when the document was two-sided, rather than containing all the necessary language on one side. Mr. Sanchez-Flores also alleges that the prosecutor committed prosecutorial misconduct during his closing argument when he made reference to a judge having wisdom when ordering the no contact order in the instant case. Mr. Sanchez-Flores also contends that the trial court impermissibly commented on the evidence when it read into the record the jury instructions and those jury instructions included the term "victim" in the to-convict portion of the aggravator instruction. Mr. Sanchez-Flores now timely appeals the court's ruling.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court properly admitted a certified copy of a no contact order when it contained information on two sides rather than on one side.
2. Whether the prosecutor committed prosecutorial misconduct during his closing statement.
3. Whether the trial court impermissibly commented on the evidence when the term "victim" was used in an aggravator to-convict instruction.

## **III. STATEMENT OF THE CASE**

### **1. Statement of Procedural History**

<sup>1</sup>The appellant was charged with Felony Violation of a No Contact Order via information that was filed on January 6, 2009. CP 1-2. On May 19 and 20, 2009, a jury trial was held before the Honorable David R. Needy. 5/19/2009 RP 4-139; 5/20/2009 4-45.

At the close of appellant's jury trial the appellant was found guilty of Felony Violation of a No Contact Order, and additionally, the appellant was found guilty of an aggravated domestic violence offense because the jury found that the act was committed against a

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

family or household member and within the sight and sound of a minor child. CP 56-57. The appellant filed a timely notice of appeal. CP 70.

## **2. Statement of Facts**

On December 31, 2008, Brittani Martinez, Jose Sanchez-Flores, Kim Coggins and Hippolito Hernandez spent the evening together in Ms. Martinez's apartment. 5/19/2009 RP 29, 36-38. Ms. Martinez and the appellant share three children in common. 5/19/2009 RP 36. Ms. Coggins is Ms. Martinez's mother and Mr. Hernandez is Ms. Coggins's boyfriend. 5/19/2009 RP 29, 36. Around 10:00 p.m. Ms. Martinez, who was eight months pregnant at the time, decided to retire to her bedroom after putting her children to bed. 5/19/2009 RP 37. Ms. Martinez went to sleep with her two year old son, Emilliano, by her side. 5/19/2009 RP 37-38. As the night wore on, Mr. Sanchez-Flores drank vodka and started to appear affected by the alcohol. 5/19/2009 RP 37. Mr. Sanchez-Flores eventually went upstairs and started to curse and yell at his sleeping girlfriend. 5/19/2009 RP 38, 66. Mr. Hernandez and Ms. Coggins went upstairs and interrupted the commotion telling Mr. Sanchez-Flores to go to sleep. 5/19/2009 RP 67-68. Moments later, in the presence of Mr. Hernandez and Ms. Coggins, Mr. Sanchez-Flores

struck Ms. Martinez in the nose causing her nose to immediately bleed. 5/19/2009 RP 69. Ms. Coggins immediately went to a neighbor's apartment and the police were contacted. 5/19/2009 RP 88. At the time of the incident, a no contact order that had been issued by the Mount Vernon Municipal Court had been put in place by a judge protecting Ms. Martinez from Mr. Sanchez-Flores. 5/19/2009 RP 29.

At trial, the State sought to introduce the no contact order that was in place at the time of the alleged assault and the trial court agreed to allow the admission of the no contact order over defense objection. 5/19/2009 RP 23. Prior to its admission, defense counsel objected because the language of the no contact order was on both the front and back pages of one sheet of paper, rather than having all of the information on the face of one document. 5/19/2009 RP 16-23.

At trial, the defense also objected to a portion of the closing argument proffered by the prosecutor. 5/20/2009 RP 6. During closing argument the prosecutor stated the following:

You learned that the judge was right.  
We learned that the judge knew that  
Brittani wasn't safe around Jose  
Sanchez-Flores. And the wisdom of the  
judge's order is proving  
overwhelmingly...  
5/20/2009 RP 6.

Defense counsel objected to the argument at that point in time and the Honorable David R. Needy instructed the jury with the following:

Ladies and Gentlemen, this is closing argument. You don't have your notebooks because this is not evidence. I'm going to overrule the objection but simply remind you to rely on the facts in evidence as it came in through the testimony and the exhibits.  
5/20/2009 RP 6.

The appellant also brings into question whether the jury instructions were proper. At trial, defense counsel made no objection to any aspect of the jury instructions offered to the court. One of the jury instructions used the term "victim." Specifically, jury instruction number thirteen stated the following, in pertinent part:

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:

1. That the victim and the defendant were family or household members; and
2. That the offense was committed within the sight or sound of the victim's and/or defendant's child who were under the age of 18 years;

CP 31-54; Exhibit A, instruction thirteen.

The term "victim" was not used in other portions of the jury instructions, nor does the appellant take exception to any other

portion of the instructions. Jury instruction number thirteen would have been considered by the jury after having deliberated as to guilty in regard to the offense charged—Felony Violation of a No Contact Order. Jury instruction number thirteen was specifically an instruction in regard to the additional allegation or aggravated offense of having committed a crime of domestic violence within the sight or sound of a minor child. The appellant now timely appeals. CP 70.

#### **IV. ARGUMENT**

##### **A. THE VALIDITY OF THE NO CONTACT ORDER IS NOT AN ELEMENT OF THE OFFENSE OF VIOLATION OF A NO CONTACT ORDER AND THE EVIDENCE WAS SUFFICIENT TO CONVICT SANCHEZ-FLORES.**

Validity of a no contact order is not an element of the offense of violation of a no contact order. Validity is for the trial court to decide on for the purpose of admissibility.

We respectfully disagree with the Court of Appeals and hold that the validity of the no-contact order is not an element of the crime. To the extent the cited cases are inconsistent, they are overruled. First, as discussed above, "valid" does not appear in relevant sections of the statute, RCW 26.50.110. Accordingly, the existence of a valid court order is not a statutory element of the crime. The legislature likely did not include validity as an element of the crime because issues concerning the validity of an order normally turn on questions of law. Questions of law

are for the court, not the jury, to resolve. *Hue*, 127 Wn. 2d at 92, 896 P.2d 682.

We also decline to find that the validity of the order is an implied element of the crime

*State v. Miller*, 156 Wn. 2d 23, 31, 123 P.3d 827 (2005).

Since Mr. Sanchez-Flores's assignment of error is to sufficiency of the evidence; this Court must apply the applicable standards.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

*State v. McNeal*, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. *Hutton*, 7 Wn. App. at 728, 502 P.2d 1037.

*State v. Prestegard*, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001).

Mr. Sanchez-Flores does not contest the adequacy of the contents of the information printed on the no contact order, rather; Mr. Sanchez-Flores's claim on appeal boils down to the argument that GR 14 requires that all pleadings filed with the Court shall appear only on one side of the page and the fact that the legend portion of the no contact order was present on the back side of the order renders the order invalid.

*State v. Miller* describes that the issue of applicability of the order is for the trial court to determine in the criminal case.

While we are inclined to believe that the Court of Appeals reached appropriate results in *Marking* and *Edwards*, issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court. **Collectively, we will refer to these issues as applying to the "applicability" of the order to the crime charged. An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order.** The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged. [FN4] Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed.

**FN4. We do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge.**

*State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

It is important to note in Footnote 4 that the *Miller* court provided that the validity of the no contact order was a matter to be considered by the court issuing the no contact order, not for the court reviewing the applicability of the order in a subsequent trial.

RCW 10.99.040 does require that the no contact order contain a particular legend.

**RCW 10.99.040. Duties of court--No-contact order**

...

(4)(a) Willful violation of a court order issued under subsection (2) or (3) of this section is punishable under RCW 26.50.110.

(b) The written order releasing the person charged or arrested shall contain the court's directives and shall bear the legend: **"Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."**

(c) A certified copy of the order shall be provided to the victim.

...

RCW 10.99.040 (bold reference to legend added).

Here, the order did contain that legend, just on the reverse side of the order. The statutory reference to RCW 10.99.040 was on the front side of the order which linked to the statutory reference on the reverse side of the order.

Mr. Sanchez-Flores's argument is based upon the language of Washington General Rule 14.

**RULE 14. FORMAT FOR PLEADINGS AND OTHER PAPERS**

**(a) Format Requirements.** All pleadings, motions, and other papers filed with the court shall be legibly written or printed. The use of letter-size paper (8-1/2 by 11 inches) is mandatory. The writing or printing shall appear on only one side of the page. The top margin of the first page shall be a minimum of three inches, the bottom margin shall be a minimum of one inch and the side margins shall be a minimum of one inch. All subsequent pages shall have a minimum of one inch margins. Papers filed shall not include any colored pages, highlighting or other colored markings. This rule applies to attachments unless the nature of the attachment makes compliance impractical.

GR 14. Mr. Sanchez-Flores did not argue for application of GR 14 at the trial court. The addition of the language to GR 14 pertaining to one sided documents, margins and colored pages was added by amendment to the rule effective September 1, 2000. Amendments to Rules of Court, 141 Wn.2d 1108-9 (2000). By the language of the amendment, it applies to pleadings filed with the court, not for forms prepared by the court. The amendment was to assist in the

ability to scan and save documents in an electronic format. One treatise notes that the change was not intended to apply to court generated documents.

The order adopting the new requirements stated that the requirements were recommended by the Court Management Council. A more detailed explanation found at the Supreme Court's website said the new requirements were designed "to assist courts which scan documents filed in the trial courts." The website also stated that the new requirements were "not intended to apply to court generated documents," nor were they intended to be "an impediment to parties filing pleading with the courts."

2 Karl B. Tegland, *Washington Practice: Rules Practice*, GR 14 at 14 (6<sup>th</sup> ed.2004). In addition, there is no remedy provided under GR 14 for failure to comply with the terms of GR 14.

Mr. Sanchez-Flores is using a change in the court rules that was intended to assist in converting documents filed with the court by the parties to electronic format to invalidate a court generated order. The appellant's request for reversal and dismissal should be denied.

**B. THE APPELLANT WAS AFFORDED A FAIR TRIAL AS THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING HIS CLOSING STATEMENT.**

Courts of appeal review allegedly improper comments by a prosecutor in the context of the entire argument. *State v. Fisher*, 165 Wn.2d 727, 746-747, 202 P.3d 937, 947 (2009). Prosecutorial

misconduct generally requires a new trial when there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Copeland*, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). A trial court's denial of a defense request for a mistrial is reviewed for abuse of discretion. See *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial, but not a trial free from error. *State v. Fisher*, 165 Wn.2d 727, 746-747, 202 P.3d 937, 947 (2009). To prevail on his claim of prosecutorial misconduct, the appellant bears the burden of proving, first, that the prosecutor's comments were improper and, second, that the comments were prejudicial. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359, 392 (2007); See *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor's improper comments are prejudicial "only where there is a substantial likelihood the misconduct affected the jury's verdict." *Id.* (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546). A reviewing court does not assess "[t]he prejudicial effect of a prosecutor's improper comments ... by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions

given to the jury.” *Id.* (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546).

In determining whether a trial irregularity influenced the jury, a court may look at the seriousness of the irregularity, whether the statement in question was cumulative of other evidence properly admitted, and whether the irregularity could be cured by an instruction to disregard the remark. *In re Det. of Smith*, 130 Wn. App. 104, 113, 122 P.3d 736 (2005). Once proved, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. *Id.* at 841. In the context of closing arguments, the prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 746-747, 202 P.3d 937, 947 (2009)(citing *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)). If defense counsel failed to request a curative instruction, the court is not required to reverse. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

In the instant case, the prosecutor did not commit misconduct because the overall prejudicial affect was de minimis given the context of the statement and the other evidence properly admitted at

trial, coupled with the fact that the appellant did not deny the existence or violation of the no contact order in place. In this case, the prosecutor made reference to the fact that a judge had issued a pre-trial no contact order protecting Brittani Martinez from the appellant, Jose Sanchez-Flores. The prosecutor stated the following in his closing argument:

You learned that the judge was right.  
We learned that the judge knew that  
Brittani wasn't safe around Jose  
Sanchez-Flores. And the wisdom of the  
judge's order is proving  
overwhelmingly...  
5/20/2009 RP 6.

At this point, defense counsel objected to the prosecutor's argument and the trial judge stated the following to the jury:

Ladies and Gentlemen, this is closing  
argument. You don't have your  
notebooks because this is not evidence.  
I'm going to overrule the objection but  
simply remind you to rely on the facts in  
evidence as it came in through the  
testimony and the exhibits.  
5/20/2009 RP 6.

The judge's instruction to the jury that the prosecutor's statements were argument eliminated any possible prejudice to the appellant. Furthermore, the prosecutor's comments were not so flagrant as to warrant a mistrial or reversal of the verdict. The

appellant points to *State v. Boehning* as a prime example of similar conduct on the part of the prosecutor as in the instant case. In *State v. Boehning*, the defendant was charged with three counts of child molestation and during closing argument the prosecutor made clear reference to the fact that the defendant had been charged with three other like-charges, but that due to the reluctance of the victim to further testify, those charges were not currently before the jury. *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). *Boehning* is clearly distinguishable from the instant case. In *Boehning*, the prosecutor committed flagrant misconduct by commenting on charges brought against the defendant at one time, but then dismissed and not currently before the jury. *Id.* The prosecutor also made it clear that but for the victim being reluctant to further cooperate, the State would have pursued those charges more fully. *Id.* Such comment during closing is extremely prejudicial toward a defendant because it not only brings up prejudicial information not admitted into evidence, but it brings up information to the jury that is not relevant to the case and not admissible for their consideration. Here, the prosecutor made reference to an order that was at issue at trial and that had already been deemed admissible by the trial court judge.

It is important to note that the appellant, through his attorney, admitted to violating the no contact order referenced by the prosecutor. The true issue at trial was whether or not the appellant committed an assault in violation of the no contact order in place—not whether a no contact order existed or whether the appellant violated that order. In fact, in closing, the appellant’s trial attorney stated the following:

Right now what I’m asking you for is to hold the State to their burden, to find Mr. Sanchez-Flores guilty only of what he is guilty of. Yes. He violated the no-contact order.  
5/20/2009 RP 21.

Later on in her closing, counsel for the appellant re-iterated the violation of the no contact order.

We are arguing that there was definitely a crime committed in violation of a no-contact order, wrong acts were committed. Inviting someone to violate a no-contact order is not a defense to it, but it’s not necessarily okay either.  
5/20/2009 RP 29-30.

In the instant case, the appellant has failed to bear the burden of proving that both the prosecutor’s comments were improper and that the comments were prejudicial to the point where there is a

substantial likelihood that the misconduct affected the jury's verdict. While the prosecutor's reference to a judge's wisdom in granting a no contact order is inartful and unwise, it does not rise to the level of prosecutorial misconduct and does not warrant reversal.

**C. THE TRIAL COURT DID NOT IMPERMISSIBLY COMMENT ON THE EVIDENCE WHEN IT INCLUDED THE TERM "VICTIM" IN THE AGGRAVATOR INSTRUCTIONS; ANY ERROR WAS HARMLESS.**

A party is generally required to take exception to a jury instruction at trial in order to preserve the issue for appellate review. *State v. Jacobson*, 74 Wn. App. 715, 724, 876 P.2d 916 (1994). If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction and, if the court fails to give the instruction, take exception to that failure. If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it. *Jacobson*, 74 Wn. App. at 724. An exception to this rule is recognized for those claims that involve a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Kronich*, 160 Wn.2d 893 899, 161 P.3d 982 (2007).

The United States Supreme Court has held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 9, 119

S.Ct. 1827, 144 L.Ed.2d 35 (1999); See *State v. Brown*, 147 Wn.2d 330, 340-341, 58 P.3d 889, 895 (2002). In order to conduct its analysis, the *Neder* court set forth the following test for determining whether a constitutional error is harmless: “[W]hether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” *Neder*, 527 U.S. at 15, 119 S.Ct. 1827 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. *Neder*, 527 U.S. at 18, 119 S.Ct. 1827.

Furthermore, the determination of whether a particular comment is prohibited depends upon the facts and circumstances of each case. *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980). In the context of a criminal trial, the trial court’s use of the term “victim” has ordinarily been held not to convey to the jury the court’s personal opinion of the case. See *Lister v. State*, 226 So.2d 238, 239 (Fla. DCA 1969). Although neither encouraged nor recommended, courts have concluded that one reference to “the victim” by the trial judge, did not, under the facts and circumstances of this case, prejudice the defendant’s right to a fair trial by

constituting an impermissible comment on the evidence. *State v. Alger*, 31 Wn. App. 244, 249, 640 P.2d 44, 47 (1982).

In the instant case, the trial court did not impermissibly comment on the evidence when it allowed the term “victim” in the to-convict instruction for the aggravated offense of whether Ms. Martinez was a family or household member of the appellant. First, the appellant’s trial counsel did not object to any aspect of the jury instructions. Furthermore, the issue of using the term “victim” one time in the aggravator to-convict instructions does rise to the level of manifest error affecting a constitutional right, thus reversal is not appropriate. Finally, before the jury even considered this instruction they had to have found the appellant guilty of the crime of assault in violation of a no contact order. (See Exhibit A, jury instructions). The term “victim” was not used in the jury instructions prior to the instruction in regard to the aggravated finding. While it is true that the trial judge would have read the entire packet to the jury before deliberation, there is no case law on point to sustain the appellant’s contention that the trial court impermissibly commented on the evidence. In fact, the appellant does not proffer what term would have been more appropriate than “victim,” especially when the jury would only have read that particular instruction in the deliberation

room once they had decided that—yes, Brittani Martinez was in fact a victim of an assault in violation of a no contact order. Any error on the judge's part in this instance should be deemed harmless error as the appellant was not prejudiced by the wording in the jury instructions.

#### V. CONCLUSION

For the forgoing reasons, this Court should hold that the trial court did not err in holding that the no contact order was valid and applicable and affirm the conviction. This Court should also find that the prosecutor did not commit misconduct during his closing statements and that the trial court did not impermissibly comment on the evidence when it allowed the aggravator to-convict instruction to contain the word "victim." This Court should affirm the conviction of Felony Violation of a No Contact Order and deny the appellant's requests.

DATED this 16<sup>th</sup> day of April, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
MELISSA W. SULLIVAN, WSBA#38067  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ] United States Postal Service; [ ] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: DANA M. LIND, addressed as 1908 E. Madison Street, Seattle, Washington 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 16<sup>th</sup> day of April, 2010.



KAREN R. WALLACE, DECLARANT

# EXHIBIT A

CERTIFIED COPY

OK  
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SKAGIT COUNTY, WA

2009 MAY 20 PM 2:06

SUPERIOR COURT OF WASHINGTON  
COUNTY OF SKAGIT

STATE OF WASHINGTON,  
Plaintiff,

NO. 09-1-00022-0

v.

JOSE \* SANCHEZ-FLORES,

Defendant.

INSTRUCTIONS OF THE COURT

24  
Submitted to the jury this 20<sup>th</sup> day of May, 2009.

Dave Needy  
JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored

one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any

conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

INSTRUCTION NO. 5

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 6

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 7

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result, when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 8

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 9

It is not a defense to a charge of violation of a court order that a person protected by the order invited or consented to the contact.

INSTRUCTION NO. 9a

A person commits the crime of assault in violation of a court order when he or she knows of the existence of a no-contact order and knowingly violates a provision of the order, and the person's conduct was an assault.

INSTRUCTION NO. 10

To convict the defendant of the crime of assault in violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about January 1<sup>st</sup>, 2009, there existed a no-contact order applicable to the defendant;

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

(3) That on or about said date, the defendant knowingly violated a provision of this order;

(4) That the defendant's conduct was an assault that did not amount to assault in the first or second degree; and

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

If you find from the evidence elements (1), (2), (3) (4) and (5) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10a

To convict the defendant of the crime of assault in violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 1<sup>st</sup>, 2009, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant's conduct was an assault; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence elements (1), (2), (3) (4) and (5) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

For purposes of this case, "family or household members" means spouses or former spouses or persons who have a child in common, regardless of whether they have been married or have lived together at any time or adult persons related by blood or marriage or adult persons who are presently residing together or who have resided together in the past.

INSTRUCTION NO. 12

If you find the defendant guilty of Assault in Violation of Protection Order, Restraining Order, or No Contact Order, as charged in Count 1, then you must determine if the following aggravating circumstance exist:

Whether the crime is an aggravated domestic violence offense.

INSTRUCTION NO. 13

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:

- (1) That the victim and the defendant were family or household members; and
- (2) That the offense was committed within the sight or sound of the victim's and/or defendant's child who were under the age of 18 years;

If you find from the evidence that elements (1) and (2), and the element has been proven beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer "no" on the special verdict form.

INSTRUCTION NO. 14

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Assault in Violation of a No Contact Order necessarily includes the lesser crime of Violation of a No Contact Order.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

INSTRUCTION NO. 15

A person commits the crime of violation of a court order when he or she knows of the existence of a no-contact order and knowingly violates a provision of the order.

INSTRUCTION NO. 16

To convict the defendant of the crime of violation of a no-contact order, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 1, 2009 the defendant knowingly had contact with Brittani M. Martinez.
- (2) That such contact was prohibited by a no-contact order;
- (3) That the defendant knew of the existence of the no-contact order;
- (4) That the acts occurred in Skagit County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the baliff. I will confer with the lawyers determine what response, if any, can be given.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and two Verdict Forms, A and B, and a Special Verdict Form.

When completing the verdict forms, you will first consider the crime of Assault in Violation of a No Contact Order, as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on Verdict Form A, do not use Verdict Form B.

If you find the defendant not guilty of the crime of Assault in Violation of a No Contact Order in Count I, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Violation of a No Contact Order. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdicts to express your decision. The foreperson will sign them and notify the bailiff, who will conduct you into court to declare your verdicts.

INSTRUCTION NO. 18

You will also be given a special verdict form for the crime of Assault in Violation of Protection Order, Restraining Order, or No Contact Order, for the crime charged in count 1. If you find the defendant not guilty of this crime of Assault in Violation of Protection Order, Restraining Order, or No Contact Order, do not use the special verdict form. If you find the defendant guilty of this crime of Assault in Violation of Protection Order, Restraining Order, or No Contact Order, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".