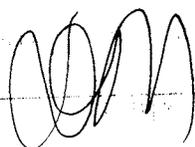


COURT OF APPEALS

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BY: 

NO. 34272-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GREGORY NEIL FREUND,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENT OF ERROR

 1. Assignment of Error 1

 2. Issues Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE

 1. Factual History 3

 2. Procedural History 4

D. ARGUMENT

**I. THE TRIAL COURT VIOLATED THE DEFENDANT’S
RIGHT TO DUE PROCESS UNDER WASHINGTON
CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES
CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT
ENTERED JUDGMENT OF CONVICTION BECAUSE THE
STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE
ON THE CHARGED CRIME 8**

**II. THE TRIAL COURT’S USE OF A “TO CONVICT”
INSTRUCTION THAT OMITTED AN ELEMENT OF THE
OFFENSE CHARGED VIOLATED THE DEFENDANT’S
RIGHT TO DUE PROCESS UNDER WASHINGTON
CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES
CONSTITUTION, FOURTEENTH AMENDMENT 13**

**III. TRIAL COUNSEL’S FAILURE TO PROPOSE AN
INSTRUCTION ON THE DEFENSE OF NECESSITY
VIOLATED THE DEFENDANT’S RIGHT TO EFFECTIVE
ASSISTANCE OF COUNSEL UNDER WASHINGTON
CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES
CONSTITUTION, SIXTH AMENDMENT 17**

E. CONCLUSION	23
F. APPENDIX	
1. Washington Constitution, Article 1, § 3	24
2. Washington Constitution, Article 1, § 22	24
3. United States Constitution, Sixth Amendment	24
4. United States Constitution, Fourteenth Amendment	25
5. RCW 26.50.110	25
6. Jury Instruction No. 7	26

TABLE OF AUTHORITIES

Page

Federal Cases

Church v. Kinchelse,
767 F.2d 639 (9th Cir. 1985) 18

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 8, 13

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 9

Strickland v. Washington,
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) 18

State Cases

State v. Arthur, 126 Wn.App. 243, 108 P.3d 169 (2005) 15

State v. Aver, 109 Wn.2d 303, 745 P.2d 479 (1987) 19

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 8, 13

State v. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978) 18

State v. Diana, 24 Wn.App. 908, 604 P.2d 1312 (1979) 19, 20

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) 17

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 9

State v. Hunter, 29 Wn.App. 218, 627 P.2d 1339 (1981) 10-13

State v. Johnson, 12 Wn.App. 40, 527 P.2d 1324 (1974) 9

State v. Johnson, 29 Wn.App. 807, 631 P.2d 413 (1981) 18

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 8

State v. Salas, 74 Wn.App. 400, 873 P.2d 578 (1994) 14

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988) 13

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 9

Constitutional Provisions

Washington Constitution, Article 1, § 3 8, 13

Washington Constitution, Article 1, § 22 17

United States Constitution, Sixth Amendment 8, 17

United States Constitution, Fourteenth Amendment 13

Statutes and Court Rules

RCW 10.99 10, 16, 17

RCW 26.50.110 9, 10, 14, 15

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 7 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction because the state failed to present substantial evidence on the charged crime.

2. The trial court's use of a "to convict" instruction that omitted an element of the offense charged violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

3. Trial counsel's failure to propose an instruction on the defense of necessity violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 7 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction when the state fails to present substantial evidence on the charged crime?

2. Does a trial court's use of a "to convict" instruction that omits an element of the offense charged violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

3. Does a trial counsel's failure to propose an instruction on the defense of necessity violate a defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when the defense is factually available and the jury would have returned a verdict of acquittal had the defense been presented?

STATEMENT OF THE CASE

Factual History

On July 27, 2005, Vance Gravley was inside his home at 14211 N.E. 117th in Vancouver was distracted when he heard a woman screaming outside. RP 130-131.¹ When he looked out a window, he saw what appeared to be two people on the ground by a yellow truck about 100 yards away. *Id.* Upon seeing this, Mr. Gravley exited his house and ran over to the truck and the people. RP 130-135. As he arrived at the truck Mr. Gravley saw the defendant Gregory Freund sitting atop his ex-wife Shirley Freund. RP 135-136. The defendant was flailing his arms about and his ex-wife was screaming. RP 135-138. As Mr. Gravley approached the defendant got up, stated something about his ex-wife having stolen his property, and then left in the pickup. RP 137-138, 145. Shirley Freund refused any form of help from Mr. Gravely and refused to stay until the police arrived. RP 138-139. Within 90 seconds of the beginning of the encounter Ms. Freund left on a bicycle. *Id.*

In fact, the defendant's side of the story was that as he drove home from work that day he noticed a person on a bicycle about a mile from his

¹The record in this case includes four continuously number verbatim reports referred to herein as "RP x" with x being the appropriate page number.

house. RP 191-198. The bicycle looked like one he had purchased. *Id.* The defendant did not immediately recognize the person on the bicycle. *Id.* When he got home he immediately discovered that his bicycle was missing, that someone had broken into his house, and that a number of items of personal property had disappeared. RP 198-199. Realizing that the person he had just seen was on his bicycle had burglarized his home and stolen his bicycle, the defendant got back in his truck and drove back to where he thought the bicyclist might be. *Id.*

After the defendant reached the bicyclist he realized that the rider was his ex-wife Shirley and that she had a number of items of his personal property in two bags she was carrying. RP 199-204. In fact, according to the defendant, his ex-wife had repeatedly broken into his house in the past and stolen or damaged his property. RP 191-198. Once the defendant saw that his ex-wife had his property, he stopped the truck and tried to get the property back from her. *Id.* When Mr. Gravley ran up to them the defendant left the scene, having recovered his mother's jewelry box and his checkbook. RP 206-207. Although the defendant admitted that there had been an old no contact order prohibiting him from having contact with his ex-wife, he believed it had expired. RP 127-128, 163, 235-236.

Procedural History

By information filed August 30, 2005, the Clark County Prosecutor

charged the defendant with one count of felony violation of a no contact order alleging that on July 27th the defendant had knowingly violated a no contact order that prohibited him from having contact with his ex-wife and that he had intentionally assaulted his ex-wife during that violation. RP 1-2.² The case later came on for trial before a jury with the state calling two police officers and Mr. Gravley. RP 104, 130, 155. The defendant then testified on his own behalf, after which the state called a brief rebuttal witness. RP 190-242. These witnesses, including the defendant, testified to the facts mentioned in the preceding *Factual History*.

In addition, upon the stipulation of the defense that the document was authentic, the court admitted Exhibit No. 1, which purported to be a copy of a Domestic Violence Protection Order signed by a Superior Court Judge from Douglas County Washington. *See* Exhibit 1. The document named “Shirley Scott Freund” as the protected party and “Gregory Neil Freund” as the defendant. *Id.* However, the defendant was unable to identify any of the signatures on the exhibit. RP 209. Neither did the state offer any evidence that the defendant was the named party in the document or that his ex-wife was the protected party from the document. RP 166-167.

Following the reception of evidence in this case, the court instructed

²The state also charged a second misdemeanor count on a different day. CP 1-2. The court later dismissed that count upon the state’s motion.

the jury with neither party making objection or taking exception. RP 253.

The "to convict" instruction the court used stated as follows:

Instruction No. 7

To convict the defendant of the crime of violation of a domestic violence court order each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 27th of July, 2005, the defendant willfully had contact with Shirley Scott-Freund;

(2) That such contact was prohibited by a Domestic Violence Protection Order;

(3) That the defendant knew of the existence of the Domestic Violence Protection Order;

(4) That Shirley Scott-Freund is a family or household member;
and

(5) That the acts occurred in the State of Washington, County of Clark.

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.

CP 59.

Following argument by counsel the jury retired for deliberation. RP 254-281. After a number of jury questions and one claim that the jury was deadlocked on the special verdict question, the jury returned a verdict of

guilty to violation of a no contact order. CP 79. However, the jury returned a finding of "no" on the special verdict question whether or not the defendant had committed an assault when he committed the violation of the no contact order. CP 40. The court later sentenced the defendant to 365 days in jail with 335 days suspended for 24 months on a number of conditions. CP 87-94. The defendant thereafter filed timely notice of appeal. CP 95-96.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THE CHARGED CRIME.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Sixth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact

to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the defendant was charged with Felony Violation of a No Contact Order under RCW 26.50.110(1)&(5). The first subsection of this statute states as follows in relevant part:

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. . . .

RCW 26.50.110(1).

Under this subsection, the state must prove the following elements in order to secure a conviction:

(1) that an order was granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020 was entered,

(2) that the order prohibits the defendant from having contact with the protected party,

(3) that the language of the order informs the defendant that a violation of the order is a crime,

(4) that the defendant get notice of the order, prior to the violation, and

(5) that the defendant then knowingly violate the provisions of the order.

In the case at bar the only element upon which the state presented substantial evidence is the first. Exhibit 1 does prove that the Douglas County Superior Court entered a no contact order under RCW 10.99. However, the evidence presented at trial does not prove that the defendant's ex-wife was the named protected party or that the defendant was the named restrained party. The reason is that the state failed to present any evidence of identification. The decision in *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), illustrates a similar lack of evidence on this issue of identity.

In *Hunter, supra*, the state charged the defendant with attempted escape, alleging that he had tried to escape from the Cowlitz County Jail

where he was being incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held “pursuant to a felony conviction,” as was required under the statute, the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named “Dallas E. Hunter” as the defendant. Following conviction, the defendant appealed, arguing in part that the trial court erred when it admitted the judgments because the state failed to present evidence that he was the person identified therein.

In addressing this argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant’s name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction. The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n.1, 572 P.2d 734 (1977).

State v. Hunter, 29 Wn.App at 221.

In *Hunter*, the state had also presented the evidence of a Probation Officer from the Department of Corrections who had revoked the defendant

from his work release program and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County Felony Convictions. Based upon this “independent” evidence to prove that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the judgments. The court stated:

We hold that [the Probation Officer’s] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents. *State v. Brezillac, supra.*

State v. Hunter, 29 Wn.App. At 221-222.

In the case at bar, the state charged the defendant with violation of a no contact order. Thus, the state had the burden of proving the existence of a valid no contact order. The state attempted to meet this burden by offering a certified copies of a Douglas County no contact order for a person with the same or a similar name to the defendant, with the protected party having a name of Shirley Freund.

However, as is clear under *Hunter*, since both the identity of the defendant and his ex-wife as the named parties in the no contact order was an element of the offense charged, the “identity of the names alone is not sufficient proof of the identity of [the] person to warrant the court in submitting to the jury” the document upon which the state relied. In this

case, unlike *Hunter*, the state failed to call any witness to present any evidence to prove that the defendant sitting before the jury was the person named in the no contact order, or that his ex-wife with whom he had contact was the named protected party. Absent such corroborating evidence there is a want of substantial evidence to support the verdict. Consequently the court's decision to accept the verdict violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

II. THE TRIAL COURT'S USE OF A "TO CONVICT" INSTRUCTION THAT OMITTED AN ELEMENT OF THE OFFENSE CHARGED VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and the United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza, supra; In re Winship, supra*. Under this rule, the court must correctly instruct the jury on all of the elements of the offense charged. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). The failure to so instruct the jury constitutes constitutional error that may be raised for the first time on appeal. *Id.*

For example, in *State v. Salas*, 74 Wn.App. 400, 873 P.2d 578 (1994), the defendant was charged with vehicular homicide under an information alleging all three possible alternatives for committing that offense. At the end of the trial, the court, without objection from the defense, instructed the jury that to convict, the state had to prove that (1) the defendant drove while intoxicated, and (2) that the defendant's driving caused the death of another person. The court's instruction did not include the judicially created element that intoxication be a proximate cause of accident that caused the death.

Following deliberation, the jury returned a verdict of guilty, and the defendant appealed, arguing that the court's instructions to the jury violated his right to due process because it did not require that the state prove all the elements of the offense charged. The state replied that the defendant's failure to object to the erroneous instruction precluded the argument on appeal. However, the Court of Appeals rejected the state's argument, holding that (1) the court had failed to instruct on the judicially created causation element, and (2) the defense could raise the objection for the first time on appeal because it was an error of constitutional magnitude. Thus, the court reversed the conviction and remanded for a new trial.

In the case at bar, the state charged the defendant with violation of a no contact order under RCW 26.50. As was mentioned in the previous argument, this statute states:

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. . . .

RCW 26.50.110(1).

As this statute clarifies, in order to sustain a verdict of guilty the state has the burden of proving that the defendant violated one of the specific types of protection orders. The decision in *State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005), illustrates this point.

In *Arthur* the defendant was convicted of violation of a no contact order under RCW 26.50.110(1) with two prior convictions of RCW 26.50.110 being the facts that elevated the offense to a felony under RCW 26.50.110(5). The defendant then appealed, arguing that the state had failed to present substantial evidence that the two prior convictions were for violations of no contact orders of the types listed in RCW 26.50.110. The Court of Appeals agreed and reversed, finding that both the current offense as well as the prior offenses must be for violations of no contact order entered under the types of orders listed in RCW 26.50.110.

In the case at bar the information alleges that the defendant violated a no contact order issued under RCW 10.99. However, the “to convict” instruction did not require that the state proved that the no contact order violated had been issued under RCW 10.99 or any one of the other listed types. The “to convict” instruction stated:

Instruction No. 7

To convict the defendant of the crime of violation of a domestic violence court order each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 27th of July, 2005, the defendant willfully had contact with Shirley Scott-Freund;

(2) That such contact was prohibited by a Domestic Violence Protection Order;

(3) That the defendant knew of the existence of the Domestic Violence Protection Order;

(4) That Shirley Scott-Freund is a family or household member; and

(5) That the acts occurred in State of Washington, County of Clark.

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.

CP 59.

By failing to instruct the jury that the state had the burden of proving that the order allegedly violated was issued under RCW 10.99, the court relieved the state of the burden of proving one of the essential elements of the crime charged. As an error of constitutional magnitude this court is compelled to reverse and grant a new trial unless the state can meet the burden of proving the error harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). In this case the error was not harmless beyond a reasonable doubt because Exhibit 1, which purports to be a no contact order, fails to state the authority under which it was issued. In addition, the state failed to present any other evidence to answer this question. Thus the error was not harmless and the defendant is entitled to a new trial.

III. TRIAL COUNSEL'S FAILURE TO PROPOSE AN INSTRUCTION ON THE DEFENSE OF NECESSITY VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper

functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsels failure to propose an appropriate jury instruction on the defense of necessity. The following explains this argument. The common

law has long recognized a defense of necessity or justification. *State v. Diana*, 24 Wn.App. 908, 914, 604 P.2d 1312 (1979). Under this doctrine, an otherwise criminal act is deemed justified if the harm the defendant sought to avoid was greater than the harm caused by the act itself. *Id.* In *State v. Diana, supra*, Division III of the Court of Appeals held that the defense of necessity was also available under Washington law. Citing to this case, the Washington Supreme Court later adopted this view, stating as follows:

The necessity doctrine provides that an act is justified if it by necessity is taken in a reasonable belief that the harm or evil to be prevented by the act is greater than the harm caused by violating the criminal statute.

State v. Aver, 109 Wn.2d 303, 311, 745 P.2d 479 (1987) (citing *State v. Diana, supra*).

In *State v. Diana*, the defendant was charged and convicted of marijuana possession. On appeal the defendant argued that the trial court had erred when it refused to allow him to present a necessity defense. Specifically, the defendant argued that he used marijuana to treat his multiple sclerosis and that no other medical treatment was as effective. The Court of Appeals agreed with the defendant's argument, stating as follows concerning necessity as a defense: "Generally, necessity is available as a defense when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems

greater than the harm resulting from a violation of the law.” *State v. Diana*, 24 Wn.App. at 913. The court then reversed the conviction with the following instructions.

We believe that the defendant here should be given the opportunity to demonstrate the alleged beneficial effect, if any, of marijuana on the symptoms of multiple sclerosis. Accordingly, we remand his case to the trial court, here the trier of fact, for determination of whether medical necessity exists.

In making that determination, the court should refer to the authorities cited in this opinion. To summarize, medical necessity exists in this case if the court finds that (1) the defendant reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease. To support the defendant’s assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required. In reaching its decision, the court must balance the defendant’s interest in preserving his health against the State’s interest in regulating the drug involved. Defendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence. If the court determines by a preponderance of the evidence that the defendant’s actions were justified by medical necessity, the conviction should be set aside. On the other hand, if the defense is not proved, the conviction shall stand.

State v. Diana, 24 Wn.App. at 916.

In the case at bar the Defendant took the witness stand and admitted that he had contract with his ex-wife. Although he argued that he thought the old no contact order had been terminated, the facts he described really set out a defense of necessity. Specifically, the defendant argued that he had just been the victim of a burglary, that his ex-wife had perpetrated the burglary,

and that at the time he discovered that it was ex-wife he had to act to save his property from damage or destruction. This property included his deceased mother's jewelry box and his checkbook. Under these facts the harm the defendant was trying to prevent (the destruction or loss of his property) far exceeded the harm that resulted from his short violation of the protection order. Given the fact that the defendant was admitting to violating the order, there was absolutely no tactical reason for the defense to not present a necessity defense. Indeed, under these facts no reasonable attorney would fail to make such a claim. Thus, trial counsel's failure fell below the standard of a reasonably prudent attorney.

In this case trial counsel's failure also caused prejudice. It is very apparent from a number of facts that the jury believed the defendant's claim as to what his actions were and what his motivation was. This conclusion flows from the jury's decision on the special verdict. Under the facts as the defendant admitted them and as the state's witnesses alleged, the only way the jury could find that the defendant did not commit an assault was for the jury to find that the defendant was justified in his actions in that his only motivation was to take reasonable steps to recover his property. The fact that this event occurred in a rural setting close to the defendant residence and far from the normal place the defendant's ex-wife traveled clearly support this conclusion. Thus, it is highly likely that had the defense merely presented an

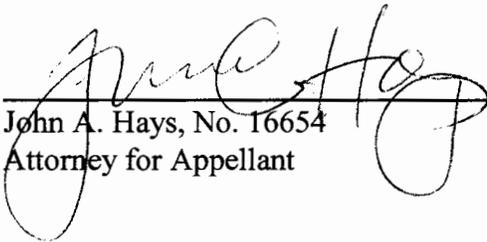
appropriate instruction on the defense of necessity and given the jury the opportunity to acquit him on the no contact order violation the jury would have taken this action. Thus, trial counsel's failure to present an appropriate necessity defense instruction caused prejudice and denied the defendant his right to effective assistance of counsel.

CONCLUSION

The defendant's conviction should be reversed and the case remanded with instructions to dismiss because the state failed to present substantial evidence of the crime charged. In the alternative, the defendant should be given a new trial based upon the trial court's error in failing to instruct the jury on all of the elements of the crime charged and based upon the fact that trial counsel's failure to propose an instruction on a necessity defense denied the defendant his right to effective assistance of counsel.

DATED this 20TH day of July, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

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, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 26.50.110(1)

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. . . .

Instruction No. 7

To convict the defendant of the crime of violation of a domestic violence court order each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 27th of July, 2005, the defendant willfully had contact with Shirley Scott-Freund;

(2) That such contact was prohibited by a Domestic Violence Protection Order;

(3) That the defendant knew of the existence of the Domestic Violence Protection Order;

(4) That Shirley Scott-Freund is a family or household member; and

(5) That the acts occurred in State of Washington, County of Clark.

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.

FILED
COURT OF APPEALS

05 JUL 26 PM 12:15

STATE OF WASHINGTON

BY _____
CATHY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 GREGORY NEIL FREUND,)
10 Appellant,)

**CLARK CO. NO.05-1-01885-2
APPEAL NO: 34727-3-II
AFFIDAVIT OF MAILING**

11 STATE OF WASHINGTON)
12 COUNTY OF CLARK) vs.)

13 CATHY RUSSELL, being duly sworn on oath, states that on the 20TH day of JULY, 2006,
14 affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
17 1200 FRANKLIN ST.
VANCOUVER, WA 98668

GREGORY NEIL FREUND
15902 N.E. CAPLES RD.
BRUSH PRAIRIE, WA 98605

17 and that said envelope contained the following:

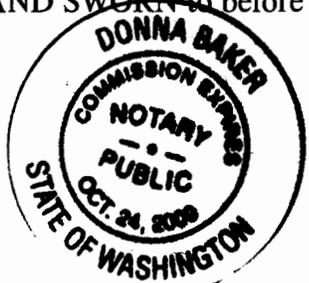
- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 20TH day of JULY, 2006.

Cathy Russell

CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 20th day of JU, 2006.



Donna Baker

NOTARY PUBLIC in and for the
State of Washington,
Residing at: Kelso WA. 98626
Commission expires: 10-24-09