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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 34706-7-II

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

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH MICHAEL SCIMEMI,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

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1. WHETHER THERE WAS SUFFICIENT EVIDENCE OF ASSAULT IN THE THIRD DEGREE, FELONY VIOLATION OF A NO CONTACT ORDER, AND INTERFERING WITH REPORTING OF DOMESTIC VIOLENCE WHEN THE ONLY OCCURRENCE WITNESS, ALISA CLEMENTS, FAILED TO GIVE SPECIFIC

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III. STATEMENT OF THE CASE

(1) Procedural History.

By amended information, Joseph Michael Scimemi faced the following charges.

COUNT 01 - ASSAULT IN THE THIRD DEGREE (DOMESTIC VIOLENCE A.36.031(1)(d)/9A.36.031(1)(f)

That he, JOSEPH MICHAEL SCIMEMI, in the County of Clark, State of Washington, on or about November 28, 2005, with criminal negligence, did cause bodily harm to another person, to wit: Alisa Clements, by means of a weapon or other instrument or thing likely to produce bodily harm and did cause bodily harm accompanied by

substantial pain that extended for a period sufficient to cause considerable suffering to another person, to wit: Alisa Clements; contrary to Revised Code of Washington 9A.36.031(1)(d) and 9A.36.031(1)(f).

COUNT 02 - FELONY DOMESTIC VIOLENCE COURT ORDER VIOLATION (ASSAULT) 26.50.110(4)

That he, JOSEPH MICHAEL SCIMEMI, in the County of Clark, State of Washington, on or about November 28, 2005, with knowledge that the Clark County District Court, had previously issued a no contact order pursuant to Chapter 10.99 RCW in Cause No. 14182V, did violate the order while the order was in effect by knowingly violating the restraint provisions therein, and/or by knowingly violating a provision excluding him or her from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location, and furthermore, the defendant did intentionally assault, Alisa Clements, contrary to Revised Code of Washington 26.50.110(4).

COUNT 03 - MALICIOUS MISCHIEF IN THE THIRD DEGREE (DAMAGE EXCEEDING \$50) (DOMESTIC VIOLENCE) - 10.99.020/9A.48.090(1)(a)/9A.48.090(2)(a)

That he, JOSEPH MICHAEL SCIMEMI, in the County of Clark, State of Washington, on or about November 28, 2005, did knowingly and maliciously cause physical damage in an amount exceeding \$50.00 to the property of another, to wit: Alisa Clements; contrary to Revised Code of Washington 9A.48.090(1)(/9A.48.090(2)(a).

COUNT 04 - INTERFERENCE WITH REPORTING OF
DOMESTIC VIOLENCE - 9A.36.150

That he, JOSEPH MICHAEL SCIMEMI, in the County of Clark, State of Washington, on or about November 28, 2005, did commit a crime of domestic violence against a family or household member, as defined in RCW 10.99.020, to wit: Assault in the Third Degree - Domestic Violence, Felony Domestic Violence Court Order Violation(Assault) and Malicious Mischief - Domestic Violence, and did prevent or attempt to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or make a report to any law enforcement official; contrary to Revised Code of Washington 9A.36.150(1).

CP 6-7.

Scimemi was tried on February 15-16, 2006. 1ARP & 1BRP, 2RP¹. The state called Alisa Clements, and two police officers in its case-in-chief. 1ARP 34-143, 1BRP 144-46. Scimemi did not present any evidence. 1BRP 167.

Scimemi did not object to any of the court's jury instructions. 1BRP 167-68.

¹ "1ARP" and "1BRP" refer to the two volumes of verbatim report of proceedings for the trial testimony taken on February 15, 2006. "2RP" refers to the second day of trial including closing argument.

Scimemi was convicted on all four counts as charged in the amended information. 2RP 240-42; CP 42-46.

At sentencing, the trial court included three Oregon convictions as felonies in determining Scimemi's offender score. 6RP² 297-98; CP 92. Scimemi agreed with the comparability of Oregon's first degree theft to a Washington felony. He did, however, challenge the comparability of the Oregon criminal possession of a forged instrument and identity theft. CP 58-60. The court agreed that Scimemi's current convictions for assault in the third degree and felony violation of a no contact order were same criminal conduct. 6RP 300-01. Based upon an offender score calculation of "3" the court sentenced Scimemi to 12 months on the assault in the third degree and 17 months on the felony violation of a no contact order. CP 82.

² "6RP" refers to a continued sentencing hearing held on April 13, 2006.

Scimemi filed a timely notice of appeal. CP 66.

(2) Factual History.

In November 2005, Joseph Scimemi and Alisa Clements were a couple and shared an apartment in Vancouver, Washington. 1ARP 47-48. On November 28, 2005, the couple argued; the argument became physical. 1ARP 56. Scimemi's head connected with Clements' face causing bruising and blackened both eyes. 1ARP 55. At some point in the argument, Scimemi took Clements' cell phone away from her. 1ARP 64. Scimemi also knocked a hole through a bedroom door. 1ARP 66. Clements was on the other side of the door when Scimemi did this. The cost to repair two doors in her apartment was somewhere between \$50-\$100.

The couple continued to argue after leaving the apartment as they drove to Beaverton, Oregon. 1ARP 85-86. While driving in Beaverton, Scimemi slapped Clements' face. 1ARP 85-86.

Clements did not report any of this to the police; someone else called the police. 1ARP 51. The police investigated the next day and took pictures of the bruising on Clements' face. 1ARP 34, 37.

Clements did not want to testify at Scimemi's trial but she did so. 1ARP 50. She believed at the time of this incident there was a no contact order in effect prohibiting Scimemi from having contact with her. 1ARP 49. She thought that Scimemi might be aware of the order. 1ARP 49-50. A copy of a no contact order ordering Joseph Scimemi not to have contact with Alisa Clements from October 25, 2005, through October 25, 2007, was admitted into evidence as Exhibit 4. CP 122-23.

IV. ARGUMENT

- I. JOSEPH SCIMEMI SHOULD NOT STAND CONVICTED OF ASSAULT IN THE THIRD DEGREE, FELONY VIOLATION OF A NO CONTACT ORDER, OR INTERFERING WITH REPORTING OF DOMESTIC VIOLENCE. THE EVIDENCE FOR ALL CHARGES IS INSUFFICIENT.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, 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); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). "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 at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). 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, review denied, 141 Wn.2d 1023 (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, the court cannot rely upon guesswork, speculation, or conjecture. Hutton, 7 Wn. App. at 728.

(a) Insufficient proof of the assault in the third degree.

As charged and instructed³, assault in the third degree required proof that Scimemi (1) with criminal negligence caused bodily harm to Alisa Clements and that (2) the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering. Alisa Clements was a reluctant witness and the only occurrence witness called by the state.

³ The state also charged Scimemi with negligently causing bodily harm to Alisa Clements by means of a weapon or other instrument or thing likely to produce bodily harm. The state, however, dropped this alternative when instructing the jury. CP 6, 15 (Instruction 5).

Clements testified that on November 28, 2005, she and her boyfriend, Scimemi, argued at their shared apartment in Vancouver. They struggled. "I kinda moved, and he kinda moved, and I thought at the time that he head-butted me, but I don't know that he meant to." 1ARP 55. Later that day, while driving in Oregon, Scimemi slapped Clements' face after she threw his glass pipe from the car window.⁴ Clements' face was bruised and she had two black eyes the next day. She experienced a lot of pain which lasted for a significant amount of time causing her to miss work.

In essence, that was all of the substantive evidence of the assault provided by Clements. The trial court did allow the state to impeach Clements with contradictory statements made to Vancouver police officer Day, but those statements were admitted as impeachment only and

⁴ The state argued in closing that the physical contact between Scimemi and Clement was a continuance act. 2RP 236.

for no other purpose. Jacqueline's Wash. v. Mercantile Stores Co., 80 Wn.2d 784, 788, 498 P.2d 870 (1972)(as a general rule impeaching evidence affects only the credibility of the witness and is incompetent to prove the substantive facts encompassed therein).

Clements' testimony about the nature and extent of her facial injury is sufficient evidence of bodily harm. But Clements' testimony does not prove that Scimemi acted with criminal negligence. Criminal negligence requires proof that a person fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care a reasonable man would exercise in the same situation. RCW 9A.08.010(1)(d). The only substantive evidence is that of an argument and a

struggle. Without more, the evidence of Scimemi's culpability is insufficient.⁵

(b) Insufficient proof of the felony violation of a no-contact order.

As instructed, the state has to prove that Scimemi (1) willfully had contact with Alisa Clements (2) in violation of a no-contact order he knew of and (3) assaulted Clements in violation of the order. The state offered insufficient evidence that Scimemi knew of the no contact order. The jury also disagreed by special verdict that Scimemi intentionally assaulted Clements as charged.

(i) There is insufficient proof that Scimemi knew of the order.

The state's only evidence that Scimemi knew of the order was Clements' testimony that, "I think he may have known" and an illegible

⁵ It is anticipated that the state may argue Scimemi acted recklessly, knowingly, or intentionally in causing Clements' facial injury. RCW 9A.08.010. But the same argument holds true for any of the greater levels of culpability; the scant record fails to establish sufficient facts of criminal culpability.

signature on a no-contact order admitted as Exhibit 4. No one - including Clements - identified the signature as that of Scimemi. To sustain the burden of proof when criminal liability depends on the accused being the person to whom a document pertains, the state must do more than authentication and admit the document. State v. Huber, 129 Wn. App. 499,502, 119 P.3d 388 (2005). Here, that is all the state did and that is insufficient.

(ii) The jury specifically found no intentional assault.

With specific exceptions, a violation of a no-contact order is generally a gross misdemeanor. An exception - as charged here - is when the order violation is an assault in the third or fourth degree.

Any assault that is a violation of an order issued under this chapter . . ., and that does not amount to assault in the first or second degree under RCW 9A.36.011 or RCW 9A.36.021 is a class C felony, and any conduct in violation of

such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

RCW 26.50.110(4). Under our facts, the state specifically charged Scimemi with committing an intentional assault in violation of the order. CP 6 (also see text of statute above in Procedural History). The jury disagreed with the state's proof. In the jury instructions, the court gave a general "to convict" for the order violation (instruction 12⁶) and followed later with a special verdict for the assault. The special verdict form reads,

We, the jury, return a special verdict by answering as follows:

Was the conduct that constituted a violation of the no-contact order an assault which did not amount to an assault in the third or fourth degree:

ANSWER: NO

Was the conduct that constituted a violation of the no-contact order reckless and did it

⁶ CP 22

create a substantial risk of death or serious physical injury to another person?

ANSWER: YES.

CP 46.

The state did not charge Scimemi with a reckless form of an assault; it charged him with an intentional form of assault. As instructed in the special verdict, the jury failed to find Scimemi guilty of an intentional assault. It was error for the trial court to enter a finding of guilt on a felony violation of the order based upon an intentional assault the jury specifically declined to find.

(iii) Insufficient proof of interfering with reporting of domestic violence.

As charged and instructed, Scimemi could only be convicted of this offense if he first committed and then prevented, or attempted to prevent, Alisa Clements from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement officer after having committed any of

these crimes: assault in the third degree (DV⁷), felony domestic violence order violation (assault), or malicious mischief in the third degree (DV). As noted under the discussion of the third degree assault above, Alisa Clements was a reluctant witness. The only thing she testified to substantively about her inability to access a phone was that Scimemi took her cell phone for some period of time while they argued. It is completely unknown from the record if Scimemi took the phone from Clements as soon as they began to argue or after anything else occurred. Without more, a conviction for interfering with reporting of domestic violence cannot be sustained.

II. OREGON'S CRIMINAL POSSESSION OF A FORGED INSTRUMENT IS NOT A COMPARABLE FELONY TO WASHINGTON'S FORGERY; OREGON'S CHARGE, UNLIKE WASHINGTON'S CHARGE, DOES NOT REQUIRE AN INTENT TO DEFRAUD.

The Sentencing Reform Act of 1981 (SRA) creates a grid of standard sentencing ranges

⁷ domestic violence

factored by the defendant's "offender score" and the "seriousness level" of the current offense. State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994); RCW 9.94A.505, .510, .517, .525, .530. The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses. State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998); RCW 9.94A.525, .530. Where a defendant's criminal history includes out-of-state ("foreign") convictions, the SRA requires these convictions be classified "according to the comparable offense definitions and sentences provided by Washington law". State v. Ford, 137 Wn.2d, 472, 480, 973 P.2d 452 (1999) (quoting RCW 9.94A.525(3)).

In the past, Washington courts had ruled that if the foreign statute lacked some of the elements of a purportedly comparable Washington statute; or if the foreign statute contained

alternative elements, some of which are missing from the supposedly comparable Washington crime; then the Washington court could review portions of the foreign conviction record to figure out which alternative and what facts actually applied to the defendant. See State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).

But that has changed. In In re the Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005), the Washington Supreme Court ruled that the comparability analysis is based, first and foremost, on a side-by-side comparison of the elements of the Washington and out-of-state crimes. Any comparison of the facts allegedly underlying the conviction is at best “problematic,” according to that Court, given the practical consideration that a person who pled guilty to a prior foreign offense did not necessarily have any incentive to litigate the specifics of the allegations that the State of

Washington now sought to use against him. Id.,
154 Wn.2d at 255.

We therefore compare the elements of criminal possession of a forged instrument in Oregon with the elements of forgery in Washington, to see if the former is comparable to the latter. A person commits the Oregon crime of criminal possession of a forged instrument in the first degree if, knowing it to be forged and with intent to utter same, the person possesses a forged instrument. ORS 165.022. In Washington, a person commits forgery if, with intent to injure or defraud, he falsely makes, completes, or alters a written instrument or he utters, offers, disposes of, or puts off as true a written instrument which he knows to be true. RCW 9A.60.020. Washington's law is broader in that it requires the intent to injure or defraud while the Oregon crime does not. Challenges to the classification of a foreign conviction are

reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 997 P.2d 941, review denied, 141 Wn.2d 1006 (2000). Here, it is apparent that the trial court erred in finding the Oregon crime comparable to the Washington crime. As such, Scimemi's offender score was miscalculated.

III. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT ORDERED THAT SCIMEMI NOT USE OR POSSESS AMMUNITION OR DEADLY WEAPONS WHILE ON MISDEMEANOR PROBATION.

(a) The trial court lacked authority to prohibit SCIMEMI from possessing or using ammunition or deadly weapons.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). A trial court may only impose a sentence which is authorized by statute. State v. Barnett, 139 Wn.2d 462, 987 P.2d 626 (1999); In re Personal Restraint Petition of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980). Here, the trial court exceeded its legal authority when it punished Scimemi beyond the statutory authority.

Special condition 11 of Scimemi's misdemeanor judgment and sentence prohibits Scimemi from use or possession of firearms, ammunition, and deadly weapons.

CP 74.

While RCW 9.41.040 does make it illegal for Scimemi, as a convicted felon or misdemeanor domestic violence offender, to use or possess a firearm, there is no law in Washington prohibiting him from using or possessing ammunition or deadly weapons per se. Because the ammunition and deadly weapon prohibition of special condition 11 exceed the court's authority, it should be stricken.

(b) The possession and use of a deadly weapon provision of special condition 11 is also void for vagueness.

The probation against use or possession of deadly weapons is unconstitutionally vague as applied. The due process vagueness doctrine serves two important purposes: first, to provide

citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement. State v. Sansone, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005); State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). However, a statute or condition is presumed to be constitutional unless the party challenging it proves that it is unconstitutional beyond a reasonable doubt. Id. at 639. The constitution does not require impossible standards of specificity or mathematical certainty because some degree of vagueness is inherent in the use of our language. State v. Riles, 135 Wn. 2d 326, 348, 957 P.2d 655 (1998).

Sansone is illustrative of unconstitutional vagueness. Sansone had a condition of community placement prohibiting him from possessing or perusing pornographic material unless given prior permission from his sexual deviancy treatment provider or community corrections officer.

During an office visit, the community corrections officer saw that Sansone was in possession of photographs she felt were inappropriate so she filed a probation violation. The court found that Sansone had willfully violated his community placement condition. On appeal, Sansone challenged the sentencing as being unconstitutionally vague in violation of his due process rights. The court agreed that the term "pornographic" was unconstitutionally vague especially as Sansone had to show the material to the probation officer just to get a determination if the material was pornographic.

Here, Scimemi is prohibited from possessing or using a deadly weapon. "Deadly weapon" means an instrument which has the capacity to inflict death and from the manner in which it is used is likely to produce or may easily and readily produce death. State v. C.Q., 96 Wn. App. 273, 277-78, 979 P.2d 473 (1999). This definition does not make the term "deadly weapon" any less

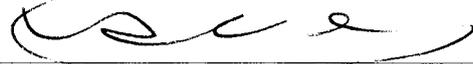
vague as it pertains to Scimemi's possession - actual or constructive - or use of a deadly weapon. Can Scimemi actually or constructively possess a kitchen knife, a tire iron, an ice pick, a screw driver, or other common household items? Or is he only in violation if he uses any of the above items in a manner likely to produce death? An ordinary person cannot tell what conduct is prohibited thus leaving the way for arbitrary enforcement. The possession or use of a deadly weapon prohibition condition is simply too vague and must be stricken.

V. CONCLUSION

Scimemi is entitled to dismissal of the assault in the third degree, the felony violation of a no contact order, and the interfering with reporting of domestic violence. None of these charges were supported by sufficient evidence at trial. Alternatively, if either of the felony charges are affirmed, Scimemi is entitled to be resentenced without the Oregon criminal

possession of a forged instrument included in his offender score. Finally, the prohibition on possession of ammunition and deadly weapons should be stricken from Scimemi's misdemeanor judgment and sentence.

Respectfully submitted this 23rd day of October, 2006.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

APPENDIX

RCW 9.41.040

Unlawful possession of firearms – Ownership, possession by certain persons – Penalties.

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or

excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, *71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-fact-finding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other

equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

(4) Notwithstanding subsection (1) or (2) of this section, a person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(a) Under RCW 9.41.047; and/or

(b)(i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in

the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

(ii) If the conviction or finding of not guilty by reason of insanity was for a non-felony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 and the individual has completed all conditions of the sentence.

(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) or (2) of this section or to have committed an offense while armed with a firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW 46.20.265.

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any

other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

(7) Each firearm unlawfully possessed under this section shall be a separate offense.

RCW 9A.08.010

General requirements of culpability.

(1) Kinds of Culpability Defined.

(a) **INTENT.** A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) **KNOWLEDGE.** A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) **RECKLESSNESS.** A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

(2) Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

(3) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

(4) Requirement of Willfulness Satisfied by Acting Knowingly. A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

RCW 9A.36.031

Assault in the third degree.

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a fire fighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

(h) Assaults a peace officer with a projectile stun gun; or

(i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.

RCW 9A.36.150

Interfering with the reporting of domestic violence.

(1) A person commits the crime of interfering with the reporting of domestic violence if the person:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication

system, obtaining medical assistance, or making a report to any law enforcement official.

(2) Commission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence.

(3) Interference with the reporting of domestic violence is a gross misdemeanor.

RCW 9A.48.090

Malicious mischief in the third degree.

(1) A person is guilty of malicious mischief in the third degree if he or she:

(a) Knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree; or

(b) Writes, paints, or draws any inscription, figure, or mark of any type on any public or private building or other structure or any real or personal property owned by any other person unless the person has obtained the express permission of the owner or operator of the property, under circumstances not amounting to malicious mischief in the first or second degree.

(2)(a) Malicious mischief in the third degree under subsection (1)(a) of this section is a gross misdemeanor if the damage to the property is in an amount exceeding fifty dollars.

(b) Malicious mischief in the third degree under subsection (1)(a) of this section is a misdemeanor if the damage to the property is fifty dollars or less.

(c) Malicious mischief in the third degree

under subsection (1)(b) of this section is a gross misdemeanor.

RCW 9A.60.020
Forgery.

(1) A person is guilty of forgery if, with intent to injure or defraud:

(a) He falsely makes, completes, or alters a written instrument or;

(b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.

(2) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(3) Forgery is a class C felony.

RCW 26.50.110
Violation of order – Penalties.

(1) Whenever an order is granted under this chapter, chapter 7.90, 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. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.90, 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, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order

that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, 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, chapter 7.90, 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. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.90, 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, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

ORS § 165.022 (2006)

Oregon Revised Statute 165.022 Criminal possession of a forged instrument in the first degree.

(1) A person commits the crime of criminal possession of a forged instrument in the first degree if, knowing it to be forged and with intent to utter same, the person possesses a forged instrument of the kind and in the amount specified in ORS 165.013 (1).

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STATE OF WASHINGTON

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

STATE OF WASHINGTON,
Respondent,

vs.

JOSEPH MICHAEL SCIMEMI,
Appellant.

) Clark County No. 05-1-02816-5
) Court of Appeals No. 34706-7-II
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)
) AFFIDAVIT OF MAILING
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LISA E. TABBUT, being sworn on oath, states that on the 23rd day of October
2006, affiant deposited in the mails of the United States of America, a properly stamped
envelope directed to:

Camara Jones
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

And

Joseph M. Scimemi/DOC# 877401
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362-1065

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT
ATTORNEY AT LAW

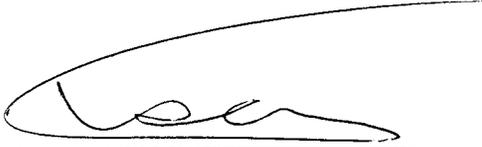
1402 Broadway • Longview, WA 98632
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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) AFFIDAVIT OF MAILING

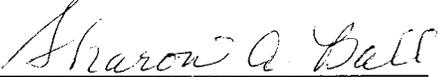
Dated this 23rd day of October 2006.



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 23rd day of October 2006.




 Sharon A. Ball
 Notary Public in and for the
 State of Washington
 Residing at Longview, WA 98632
 My commission expires 06/10/07