

original

STATE OF WASHINGTON  
BY Chm

NO. 35598-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JEFF LEROY HARP,

Appellant.

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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. Issue Pertaining to Assignment of Error .....   | 1         |
| C. STATEMENT OF THE CASE   |           |
| 1. Factual History .....   | 2         |
| 2. Procedural History .....  | 4         |
| D. ARGUMENT  |           |
| <b>I. THE TRIAL COURT ERRED WHEN IT ADMITTED<br/>    EXHIBITS 4 AND 4A OVER DEFENSE OBJECTION<br/>    BECAUSE THE EXHIBITS WERE IRRELEVANT .....</b>   | <b>7</b>  |
| <b>II. THE TRIAL COURT VIOLATED THE DEFENDANT’S<br/>    RIGHT TO DUE PROCESS UNDER WASHINGTON<br/>    CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES<br/>    CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT<br/>    FOUND HIM GUILTY OF FELONY VIOLATION OF A NO<br/>    CONTACT ORDER BECAUSE THE STATE FAILED TO<br/>    PRESENT SUBSTANTIAL EVIDENCE THAT HE HAD<br/>    TWO PRIOR QUALIFYING CONVICTIONS .....</b> | <b>14</b> |
| <b>III. THE TRIAL COURT VIOLATED THE<br/>    DEFENDANT’S RIGHT TO DUE PROCESS UNDER<br/>    WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND<br/>    UNITED STATES CONSTITUTION, FOURTEENTH<br/>    AMENDMENT WHEN IT FOUND HIM GUILTY OF<br/>    POSSESSION OF METHAMPHETAMINE BECAUSE THE<br/>    STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE<br/>    ON THIS CHARGE .....</b>                                       | <b>18</b> |

|   |    |
|---|----|
| E. CONCLUSION .....                                       | 22 |
| F. APPENDIX   |    |
| 1. Washington Constitution, Article 1, § 3 .....          | 23 |
| 2. United States Constitution, Fourteenth Amendment ..... | 23 |
| 3. RCW 10.99.020 .....                                    | 23 |
| 4. RCW 26.50.110 .....                                    | 26 |
| 5. ER 401 .....   | 28 |
| 6. ER 402 .....   | 28 |

**TABLE OF AUTHORITIES**

Page

*Federal Cases*

*In re Winship*,  
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) . . . . . 14, 18

*Jackson v. Virginia*,  
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) . . . . . 15

*State Cases*

*State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005) . . . . . 16-18

*State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983) . . . . . 14, 18

*State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984) . . . . . 19, 20

*State v. Carmen*, 118 Wn.App. 655, 77 P.3d 368 (2003) . . . 10, 12, 16-18

*State v. Dickamore*, 22 Wn.App. 851, 592 P.2d 681 (1979) . . . . . 19, 20

*State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) . . . . . 8

*State v. Gray*, 134 Wn.App. 547, 138 P.3d 1123 (2006) . . . . . 17

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) . . . . . 15

*State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974) . . . . . 15

*State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005) . . . . . 17

*State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972) . . . . . 15

*State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) . . . . . 15

*State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986) . . . . . 8

*State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951) . . . . . 8

*Constitutional Provisions*

Washington Constitution, Article 1, § 3 ..... 14, 18  
United States Constitution, Fourteenth Amendment ..... 14, 18

*Statutes and Court Rules*

ER 401 ..... 8  
ER 402 ..... 8  
RCW 26.50.110 ..... 9-12, 15-17

## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it admitted Exhibits 4 and 4a over defense objection because the exhibit was irrelevant.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it found him guilty of felony violation of a no contact order because the state failed to present substantial evidence that he had two prior qualifying convictions.

3. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it found him guilty of possession of methamphetamine because the state failed to present substantial evidence on this charge.

*Issues Pertaining to Assignment of Error*

1. Does a trial court err when it admits exhibits into evidence over defense objection when those exhibits are irrelevant?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction for felony violation of a no contact order when the state fails to present substantial evidence that the defendant has two prior qualifying prior convictions?

3. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction for possession of methamphetamine when the state fails to present substantial evidence that the substance the defendant possessed was methamphetamine?

## STATEMENT OF THE CASE

### *Factual History*

In September of 2006, Alisha Hanley was living at 337 29th Street in Longview, Washington with the two minor children she had with the defendant Jeff Leroy Harp. RP 20-22.<sup>1</sup> On the morning of September 11th she woke up to the smell of something burning. RP 24. When she went to investigate she found that the oldest of her two young children had tried to cook popcorn by putting it in the microwave for 100 minutes. *Id.* When asked why she had done this, the child replied that she was making breakfast “for daddy.” *Id.* Alisha then looked into the living room to find the defendant sitting on the couch. *Id.* At that time there was a no contact order in place that prohibited the defendant from having contact with Alisha. RP 22, 36, 76, 78, Exhibit 5. The Cowlitz County Superior Court had issued this order following the defendant’s 2004 conviction for felony harassment and two counts of violating a no contact order. *Id.* According to Alisha she had previously spoken with the defendant about the existence of this order. RP 22.

When Alisha saw the defendant in the living room she angrily asked why he had allowed the child to try to cook popcorn. RP 23-24. The

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<sup>1</sup>The record in this case includes the verbatim report of the trial contained in one volume and designated herein as “RP”.

question started a short argument, which ended with the defendant calling Alisha a "Bitch" saying, "F— this, I am out of here. I am leaving." RP 24. The defendant then went into the garage. RP 25. When he did this Alisha locked the door and called the police. *Id.* Within a few minutes, Longview Officer Ralph Webb responded to the residence and walked around to the back yard where he saw the defendant sitting on a bicycle holding a duffel bag. RP 33-34. Officer Webb first ordered the defendant to stop, and then he went to the back porch to speak with Alisha, who had just walked out the back door. RP 43-44. After speaking with her for a moment, Officer Webb walked over to the defendant, ordered him to put the backpack down, and placed him under arrest. RP 37, 43-46. Officer Webb then handcuffed the defendant and took him to the patrol car, which was parked on the street in front of the house. RP 44-49.

About the time Officer Webb and the defendant walked up to the patrol vehicle another officer arrived, eventually taking custody of the defendant. *Id.* Officer Webb then returned to the back yard, seized the duffel bag, and searched it. RP 47-49. Inside the duffel bag the officer found tools and three pieces of mail addressed to a Mr. Karnofsky, including a bank statement and an employment security letter. RP 53-54. The officer also found a bag containing a glass pipe, cotton balls, a metal spoon, a rubber strap, and a plastic baggie containing a white crystalline substance. RP 38-

39, 53-54, 67-69. Officer Webb found nothing in the duffle identified as belonging to the defendant. RP 49. Officer Webb was also unable to find a telephone number for Mr. Karnofsky and while Officer Webb did send the baggie with the white powder to the crime lab for analysis, he did not request any fingerprint analysis on any items in the bag. 50-55.

### ***Procedural History***

By information filed September 14, 2006, the Cowlitz County Prosecutor charged defendant Jeff Leroy Harp with one count of felony violation of a no contact order and one count of possession of methamphetamine. CP 1-2. In the information the state alleged that the protection order violation was a felony because the defendant had two prior convictions for violating a protection order issued under one of the qualifying statutes listed under RCW 26.50.110. CP 1. The case later came on for trial with the state calling four witnesses: Alisha Hanley, Officer Ralph Webb, John Dunn, a forensic scientist who tested the alleged methamphetamine, and Michelle Shaffer, a deputy prosecuting attorney who testified concerning the defendant's prior convictions and the no contact order issued following those convictions. RP 19, 31, 59, 73.

During trial and over lengthy defense objection, the court allowed the state to introduce a number of documents into evidence, including Exhibits

4, 4A, and 5.<sup>2</sup> RP 72-75. Exhibit 5 was a Judgment and Sentence in Cowlitz County Cause Number 04-1-00921-6. *See* Exhibit 5. During trial Ms. Shaffer identified the defendant in the courtroom and testified that she had prosecuted the defendant on this cause number. RP 78-79. Ms. Hanley identified the defendant in the courtroom and testified that Exhibit 5 bore his signature as the defendant, a signature she recognized. RP 25. Exhibit 4 was a post-conviction no contact order issued in Cowlitz County Cause Number 04-1-00921-6, the same cause number as Exhibit 5. *See* Exhibit 4. This order prohibits a “Jeffrey Leroy Harp” from having any contact with Alicia Hanley and one other person. *Id.* Ms. Shaffer testified that the superior court entered this order under RCW 10.99 following the defendant’s conviction in that case. RP 76-78. Ms. Hanley testified that it bore the defendant’s signature on the “Copy Received by Defendant” line. RP 25.

The no contact order admitted as Exhibit 5 states that it is effective until December 14, 2009, and it is the order the state alleged in the information that the defendant violated in the case at bar. CP 1, Exhibit 5.

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<sup>2</sup>The record at the trial level and on appeal is somewhat confusing as to just what exhibits the court gave to the jury to consider during deliberations. The defendant’s prior judgment and sentence was admitted as both Exhibit 4, and unredacted copy, and Exhibit 4A, a redacted copy omitting certain irrelevant and prejudicial facts from the document. From the discussion among the court, defense counsel, and the state, it appears that the court admitted all of the exhibits but only allowed the bailiff to give the redacted copies to the jury for consideration during deliberation.

Exhibit 4 states that on December 14, 2004, the defendant pled guilty and was sentenced on two counts of "VIOLATION OF A PROTECTION ORDER DOMESTIC VIOLENCE (GROSS MISDO)." Exhibit 4 (all capitals in original). Exhibit 4 does not state the authority under which the order or orders the defendant violated were issued. Exhibit 5. In fact, the state did not seek to admit those orders and did not present any evidence as to just what type of protection order or orders the defendant pled guilty to violating. RP 1-81, Exhibits 1-5.

Finally, Exhibit 8 was a baggie containing a small amount of powder. RP 39, 60. The forensic scientist tested this powder and found it to contain methamphetamine. RP 67-69. However, when the state handed this baggie to Officer Webb, he was unable to identify it as the baggie he found in the duffle the defendant was holding at the time of his arrest. RP 60.

Following instruction, argument, and deliberation in this case the jury returned verdicts of guilty on both counts. CP 29-30. The jury also returned a special verdict form indicating that the defendant had "twice been previously convicted for violating the provisions of a no-contact order." CP 31. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 34-45, 49.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT ADMITTED EXHIBITS 4 AND 4A OVER DEFENSE OBJECTION BECAUSE THE EXHIBITS WERE IRRELEVANT.

Under ER 401, “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 402, “all relevant evidence is admissible” with certain limitations. By contrast, under this same rule “[e]vidence which is not relevant is not admissible.” Thus, before testimony or exhibit can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the “existence of any fact” as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) .

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery, and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant

then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant's arguments, the court first noted that lay witnesses may testify concerning the mental capacity of a defendant so long as the witness' opinion is based on facts the witness personally observed. The court then noted that the trial court did not abuse its discretion when it excluded the defendant's proposed witness because she did not meet these criteria as she had never observed the defendant when it was abusing drugs.

In the case at bar the state charged the defendant in Count I with violation of a no contact order issued under RCW 10.99. The state also alleged that this offense was a felony because the defendant had two prior convictions for violating no contact orders listed in RCW 26.50.110(5). This statute provides:

(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.

RCW 26.50.110(5).

In order to prove that the defendant had "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,” the state offered the testimony of Alisha Hanley, the testimony of Deputy Prosecuting Attorney Michelle Shaffer and Exhibit 4. Ms. Shaffer testified that Exhibit 4 was a Cowlitz County Superior Court Judgment showing that Jeff Leroy Harp was previously convicted of two separate violations of a no contact order. Ms. Hanley also testified that she was familiar with the defendant’s signature and that Exhibit 4 bore the defendant’s signature as the defendant in the case. The problem with the admission of this evidence was that (1) the defense objected to its introduction, and (2) it was not relevant to any issue in the case at bar because the state failed to present any evidence that the no contact orders the defendant violated had been issued under “this chapter [RCW 26.50,] chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW.” The decision in *State v. Carmen*, 118 Wn.App. 655, 77 P.3d 368 (2003), supports this conclusion.

In *Carmen, supra*, the defendant appealed his conviction for felony violation of a no contact order, arguing that substantial evidence did not support a finding that the no contact orders that he previously violated were of the type found in RCW 26.50.110(5). During the jury trial in this case, the court admitted certified copies of the judgments into evidence without objection. However, these judgments did not state the underlying bases for the no contact orders violated. At sentencing, the court examined the records

of the convicting municipal court and determined that the convictions arose out of violations of an order of the type listed in RCW 26.50.110(5). The court examined these records again without the objection of the defendant.

On review, Division I of the Court of Appeals undertook an examination of RCW 26.50.110, and held that (1) the fact of the two convictions, and (2) the determination of what type of no contact orders had been violated were questions of law that the court had to determine from the evidence presented. The court then found that substantial evidence did support the court's finding that the defendant did have two prior convictions for violation of a no-contact order of the type listed in RCW 26.50.110(5).

The court held:

Because Carmen does not challenge the timing of the trial court's examination of the municipal court records to determine that the predicate convictions were based on violations of no-contact orders issued under chapter 10.99 RCW, and because he waived any objection by failing to object to the admission into evidence of the certified copies of his prior convictions on grounds of their statutory validity, and because the trial court's post-trial examination of the records cured the evidentiary gap in any event, we affirm Carmen's conviction. We suggest, however, that in future cases, where the judgment and sentence for one or more of the predicate convictions does not reflect the statutory authority for issuance of the no-contact order that was violated, the State be prepared to prove the underlying statutory authority to the trial court before requesting admission of the evidence of the conviction(s). Such may prevent unnecessary trials if that evidence is not in fact available in the records of the courts of conviction, and will assist busy trial courts in the efficient processing of such evidentiary objections as may arise, and in determining whether to submit the matter to the jury as a misdemeanor or a felony.

*State v. Carmen*, 118 Wn.App. 668.

In *Carmen* the court did hold that the added element from RCW 26.50.110(5) that elevates a conviction from a misdemeanor to a felony is a question of law for the court to determine. However, the court in *Carmen* did not hold that it was not an element at all. Rather, the court held that there must be substantial evidence in the record from which the trial court could find that there are two convictions of the nature listed.

In *Carmen* the court found such substantial evidence specifically because (1) the trial court admitted copies of the prior convictions, and (2) the trial court itself examined the records of the convicting court to determine the basis of the underlying orders. By contrast, in the case at bar, the state did not offer, and the court did not admit copies of documents setting out what types of orders the defendant previously violated. Neither does the record before the trial court present any proof at all concerning the nature of the underlying convictions. Thus, in the case at bar, unlike *Carmen*, the evidence, seen in the light most favorable to the state, does not prove that the defendant had two prior convictions “for violating the provisions of an order issued under this chapter, chapter 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.” As a result, this court should vacate the conviction and remand for entry of a judgment for a misdemeanor violation of a no-contact order.

In this case the state may argue that there is substantial evidence that the two prior convictions qualified under RCW 26.50.110(5) because Exhibit 4 lists the defendant's two convictions as "VIOLATION OF A PROTECTION ORDER DOMESTIC VIOLENCE (GROSS MISDO)" along with the notations "26.50.110(4) & 10.99.020(1)." The problem with this argument is that the statutory notations are cryptic at best and they do not explain what types of orders the defendant violated. First "RCW 26.50.110(4)" is not a type of protection order. Rather, it is a section of RCW 26.50 that elevates a misdemeanor violation of a qualified no contact order to a felony if committed concurrently with an assault. It states:

(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.

RCW 26.50.110(4).

Similarly RCW 10.99.020(1) is not a type of protection order. Rather, it is one of the subsections in RCW 10.99.020, which is the definitional section for RCW 10.99. This specific statute states:

(1) "Agency" means a general authority Washington law enforcement agency as defined in RCW 10.93.020.

RCW 10.99.020(1).

Although not necessarily in the record on appeal, the defendant anticipates that the state will stipulate that the secretarial staff in the Cowlitz County Prosecutor's Office prepared Exhibit 4 and all typed portions thereof prior to the court signing it on December 14, 2004. Just exactly what the state's secretarial staff meant by putting these two statutory references on page one of the judgment and sentence is unknown. However, what is certain is that they do nothing to prove what types of protection orders the defendant was convicted of violating.

**II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF FELONY VIOLATION OF A NO CONTACT ORDER BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE THAT HE HAD TWO PRIOR QUALIFYING CONVICTIONS.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth 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 in Count I with Felony Violation of a No Contact Order under RCW 26.50.110(1)&(5). The latter

subsection of this statute states:

(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.

RCW 26.50.110(5).

As is clear from this statute, in order to elevate a violation of a protection order under RCW 26.50.110(1) to a felony under RCW 26.50.110(5), the state has the burden of proving that the defendant has two prior qualifying convictions for violating an order issued under one of the listed statutes. Whether or not the state has the burden of proving this to the jury as a matter of fact or the court as a matter of law is still very much up in question. In *Carmen, supra*, Division I of the Court of Appeals unequivocally states that the issue of what types of orders were previously violated is one the court decides, not the jury. In *State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005), Division II of the Court of Appeals rejected the analysis in *Carmen* and held that the character of the prior convictions as violations of one or more of the listed statutes was an element of the offense that the state had the burden to prove to the jury beyond a reasonable doubt.

In *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), the Washington State Supreme Court addressed a related issue. In this case the defendant appealed a conviction for felony violation of a no contact order under RCW 26.50.110(1)&(5) that the state had the burden of proving that the underlying order and the prior orders violated were “valid.” After discussing both *Carmen* and *Arthur*, the court held that the underlying validity of the order alleged to have been violated or the orders underlying the prior convictions was a legal issue for the court to determine, not an element that the state had the burden of proving to the jury. In *State v. Gray*, 134 Wn.App. 547, 138 P.3d 1123 (2006), a case decided after *Miller*, Division I has taken the position that the *Miller* decision was a complete vindication of Division I’s position in *Carmen*. Defendant in the case at bar hardly reads the *Miller* decision as so holding, particularly given the fact that (1) *Miller* did not specifically overrule *Arthur*, and (2) the issue in *Miller* was not the same as the issues in *Carmen* and *Miller*.

Although defendant herein takes the position that the decision in *Arthur* is still good law, what is certain from all four of these cases is that the state still does have the burden of producing evidence to prove that the two or more prior convictions arise from violations of qualifying no contact orders. Absent this evidence the court cannot sustain a conviction for a felony violation of a no contact order under RCW 26.50.110(5). It matters

not whether the these facts must be proven to the court as a matter of law (*Carmen's* position) or the jury as an element of the offense (*Arthur's* position). There must still be evidence to support the existence of the character of the underlying orders violated.

As was mentioned in the previous argument, in the case at bar there is no evidence in the trial record to prove what types of protection orders the defendant violated. Thus, regardless of the ultimate resolution of the issues created in *Carmen* and *Arthur*, the judgment for felony violation of a no contact order cannot be sustained under the due process provisions in Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

**III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF POSSESSION OF METHAMPHETAMINE BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.**

As was mentioned in Argument II, a part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth 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). In cases of possession of illegal

drugs under the Uniform Controlled Substances Act found in RCW 69.50, this includes the duty to present substantial evidence that the substance the defendant possessed was the controlled substance alleged. This follows from the requirement that before a physical object relevant to an issue before the court may be admitted into evidence, the proponent of the evidence must satisfactorily identify the object and show it to be in substantially the same condition as when the relevant event alleged occurred. *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984) (citing *Brown v. General Motors Corp.*, 67 Wn.2d 278, 407 P.2d 461 (1965)). “Factors to be considered ‘include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.’” *State v. Campbell*, 103 Wn.2d at 21 (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)).

For example, in *State v. Dickamore*, 22 Wn.App. 851, 592 P.2d 681 (1979), the defendant was charged with possession of marijuana found in a car he had been driving. Following conviction he appealed, arguing that the trial court had erred in admitting the marijuana into evidence because the state had failed to sufficiently identify the substance tested as that taken out of the car he was driving. Specifically, the defense argued that in order to properly identify the evidence, the state should have called an Officer Knudson, who had transferred the evidence to the crime lab. However, the

court disagreed, stating as follows.

The rule is that an exhibit is sufficiently identified when it is identified as being the same object and when it is declared to be in the same condition as at the time of its initial acquisition by the State. *State v. Potts*, 1 Wn.App. 614, 616, 464 P.2d 742 (1969), citing *State v. Russell*, 70 Wn.2d 552, 424 P.2d 639 (1967). Deputy Gray, the officer who seized the marijuana, testified:

Q. Now, is this the same evidence that you inventoried that night?

A. It is, it has the same tags on it that I put on it that night.

Q. Have there been any changes or anything, or does it look the same to you?

A. It appears to have been reopened and resealed. Each one of them has got tape with someone's initials when they have been opened and resealed.

Q. Can you read those initials?

A. It looks like a G.S. . . .

Gordon Sly, a state trooper who tested the evidence to determine whether it was, in fact, marijuana, also testified at trial. His testimony, combined with that of Deputy Gray, was sufficient to identify the evidence. Deputy Knudsen's testimony would have been cumulative.

*State v. Dickamore*, 22 Wn.App. at 857.

As the courts in both *Campbell* and *Dickamore* clarify the state must present some evidence on two subjects in order to properly identify a physical object: (1) that it is the same object originally seized, and (2) that it appears in the same condition as when seized. In the case at bar the state failed on

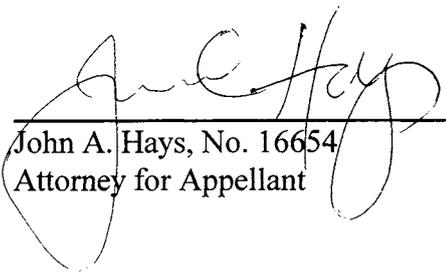
both of these requirements. It is true that the state had charged the defendant with possession of methamphetamine. However, the state presented no evidence at trial that the substance the forensic scientist tested was the substance that Officer Webb claimed he found in a container in the duffle bag that he testified the defendant was holding at the time of his arrest. In fact when the state handed the baggie the forensic scientist tested to Officer Webb, the officer admitted that he could not testify that it was the item that he found in the backpack. Neither did the officer testify that there was anything unique about this particular baggie, or that it bore any marks that he put on it for future identification. As this court is well aware and as the forensic scientist implied in his testimony, small baggies of suspected drugs are ubiquitous in our criminal justice system. The state crime lab tests thousands, if not tens of thousands annually. Thus, absent some means of identification, there was no substantial evidence that the substance the defendant allegedly possessed was either the substance that the forensic scientist tested or that it was methamphetamine. As a result, the trial court violated the defendant's right to due process when it entered judgment on the jury's verdict of guilty of possession of methamphetamine.

## CONCLUSION

The trial court erred when it overruled the defendant's objection to the admission of irrelevant evidence. Since substantial evidence does not support either conviction without this incorrectly admitted evidence this court should reverse the convictions and remand with instructions to dismiss with prejudice. In addition, substantial evidence does not support the conviction for felony violation of a no contact order even with the admission of the disputed evidence. As a result and in the alternative, this court should reverse the defendant's conviction for Count I and remand with instructions to enter a judgement of conviction for a misdemeanor violation of a no contact order.

DATED this 8<sup>th</sup> day of May, 2006.

Respectfully submitted,



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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.

**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 10.99.020**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Agency" means a general authority Washington law enforcement agency as defined in RCW 10.93.020.

(2) "Association" means the Washington association of sheriffs and police chiefs.

(3) "Family or household members" means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older

with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

(4) "Dating relationship" has the same meaning as in RCW 26.50.010.

(5) "Domestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:

- (a) Assault in the first degree ( RCW 9A.36.011);
- (b) Assault in the second degree ( RCW 9A.36.021);
- (c) Assault in the third degree ( RCW 9A.36.031);
- (d) Assault in the fourth degree ( RCW 9A.36.041);
- (e) Drive-by shooting ( RCW 9A.36.045);
- (f) Reckless endangerment ( RCW 9A.36.050);
- (g) Coercion ( RCW 9A.36.070);
- (h) Burglary in the first degree ( RCW 9A.52.020);
- (i) Burglary in the second degree ( RCW 9A.52.030);
- (j) Criminal trespass in the first degree ( RCW 9A.52.070);
- (k) Criminal trespass in the second degree ( RCW 9A.52.080);
- (l) Malicious mischief in the first degree ( RCW 9A.48.070);
- (m) Malicious mischief in the second degree ( RCW 9A.48.080);
- (n) Malicious mischief in the third degree ( RCW 9A.48.090);
- (o) Kidnapping in the first degree ( RCW 9A.40.020);

(p) Kidnapping in the second degree ( RCW 9A.40.030);

(q) Unlawful imprisonment ( RCW 9A.40.040);

(r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location ( RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);

(s) Rape in the first degree ( RCW 9A.44.040);

(t) Rape in the second degree ( RCW 9A.44.050);

(u) Residential burglary ( RCW 9A.52.025);

(v) Stalking ( RCW 9A.46.110); and

(w) Interference with the reporting of domestic violence ( RCW 9A.36.150).

(6) “Employee” means any person currently employed with an agency.

(7) “Sworn employee” means a general authority Washington peace officer as defined in RCW 10.93.020, any person appointed under RCW 35.21.333, and any person appointed or elected to carry out the duties of the sheriff under chapter 36.28 RCW.

(8) “Victim” means a family or household member who has been subjected to domestic violence.

## RCW 26.50.110

(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.

**EVIDENCE RULE 401  
DEFINITION OF “RELEVANT EVIDENCE”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**RULE 402  
RELEVANT EVIDENCE GENERALLY ADMISSIBLE;  
IRRELEVANT EVIDENCE INADMISSIBLE**

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

STATE OF WASHINGTON  
BY Cmm

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

7 STATE OF WASHINGTON, )  
8 Respondent, )  
9 vs. )  
10 JEFF LEROY HARP, )  
 Appellant. )

NO. 06-1-001172-1  
COURT OF APPEALS NO:  
35598-1-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON )  
12 COUNTY OF COWLITZ ) ss.

13 CATHY RUSSELL, being duly sworn on oath, states that on the 8<sup>th</sup> day of MAY, 2007,  
14 affiant deposited into the mails of the United States of America, a properly stamped envelope  
directed to:

15 SUSAN I. BAUR  
16 COWLITZ COUNTY PROSECUTING ATTY  
312 S.W. 1ST STREET  
17 KELSO, WA 98626

JEFF LEROY HARP #877783  
STAFFORD CREEK CORR. CTR  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

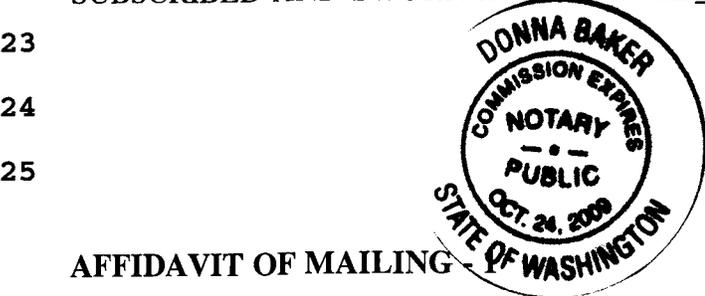
18 and that said envelope contained the following:

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

21 DATED this 8<sup>th</sup> day of MAY, 2007.

Cathy Russell  
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 8th day of MAY, 2007.



[Signature]  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 10-24-09

AFFIDAVIT OF MAILING

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Attorney at Law  
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