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STATE OF WASHINGTON, Respondent,

v.

MARK ANTHONY RUESGA, Appellant.

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APPELLANT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The State violated double jeopardy by charging Mr. Ruesga with and convicting him of two counts of violating a protection order where his continuous residence with his girlfriend was one continuing unit of prosecution.
2. Mr. Ruesga's two convictions for violation of a protection order violate double jeopardy where the State never proved and the jury never found that Mr. Ruesga had left the prohibited protection zone following the "first violation" before commencing the "second violation."

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

1. Whether Mr. Ruesga's continuous residence with his girlfriend for a period of three weeks constituted two units of prosecution for violation of a protection order where there is no evidence that he was ever outside the protected zone identified in the order.

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

Mark Ruesga and Deanna Lowell had been involved with each other since both were in high school. RP3 48. They had three children together, the youngest of which were 7 years old. RP3 47.

On April 8, 2007, Ms. Lowell called 911, then hung up. RP3 49. According to Ms. Lowell, the call was not to report an altercation with Mr. Ruesga, but it was about him. RP3 52. When police arrived, they found Mr. Ruesga inside the house and arrested him for violation of a protection order. RP3 65-67, 78.

Ms. Lowell testified that Mr. Ruesga had been living with her for 3 weeks at the time of his arrest. RP3 50. She testified that, in the week preceding April 8, Mr. Ruesga had left the house each day to go to his probation officer. RP3 51. She did not say whether she went with Mr. Ruesga to these appointments.

Mr. Ruesga was charged with two counts of violation of a court order (protection). CP 7-9.

Mr. Ruesga testified that he was living at Ms. Lowell's house on April 8, 2007. RP5 125. He said that he had not understood that he could not have any contact with Ms. Lowell, but rather believed he was only prohibited from having "hostile" contact with her. RP5 125, 127.

The jury found Mr. Ruesga guilty of violating a court's protection order on April 8, 2007, CP 21, 35; and guilty of violating a court's protection order between April 1 and April 7, 2007, CP 22, 36. The jury also found by special verdict that Mr. Ruesga had twice been convicted of violating a protection order and that he and Ms. Lowell were members of the same family. CP 37.

Mr. Ruesga was given an offender score of seven<sup>1</sup> and sentenced to the middle of the standard range, 56 months, concurrent, on each count. CP 41, 44. This appeal timely followed.

#### IV. ARGUMENT

**ISSUE 1: MR. RUESGA'S TWO CONVICTIONS FOR VIOLATION OF A PROTECTION ORDER VIOLATE DOUBLE JEOPARDY BECAUSE HIS CONTINUOUS RESIDENCE WITH HIS GIRLFRIEND FOR A THREE WEEK PERIOD CONSTITUTED ONE UNIT OF PROSECUTION.**

The legal foundation for the unit of prosecution analysis rests on double jeopardy protections. The double jeopardy clauses provide three different protections for defendants, "one of which protects against multiple punishments for the same offense." *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). This is a question of law, which is reviewed de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40

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<sup>1</sup> This score included one point for the other current offense. CP 40-41. With only one offense, the offender score would have six, and the standard

(2007). Vacating convictions that violate double jeopardy is the appropriate remedy for double jeopardy violations. *See Womac*, 160 Wn.2d at 658-60.

While the unit of prosecution issue is one of constitutional magnitude on double jeopardy grounds, the analytical framework centers around a question of statutory interpretation and legislative intent. *See State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

The proper question is to determine what act or course of conduct the legislature has defined as the punishable act. When the legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects against multiple convictions for committing just one unit of the crime. *Adel*, 136 Wn.2d at 634 (*citing Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955)).

In a unit of prosecution case, the first step is to analyze the statute in question to determine the legislative intent as to unit of prosecution. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). Then, the court looks to the facts of the case in question “because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one ‘unit of prosecution’ is present.”

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range would have been 41-54 months. *Adult Sentencing Manual 2005*, III-79.

*Varnell*, at 168 (citing *State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000)).

The relevant portion of the statute at issue in this case provides:

(1)(a) Whenever an order is granted under this chapter . . . and the respondent or person to be restrained knows of the order, a violation of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

...

(5) A violation of a court order issued under this chapter . . . is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter . . . . The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

RCW 26.50.110. The legislature entered an intent finding, stating that:

The legislature finds this act necessary to restore and make clear its intent that a willful violation of a no-contact provision of a court order is a criminal offense and shall be enforced accordingly to preserve the integrity and intent of the domestic violence act.

2007 C 173.

The evil that the legislature has criminalized in this statute is the violation of the terms of a protection order. In this case, Mr. Ruesga was living with Ms. Lowell continuously for the three weeks in violation of a protection order. RP3 50. The statute does not impliedly permit the State to divide a continuous course of conduct into separate, discrete units of prosecution. The question in this case is, under the statute, when is the

crime of violation of a protection order complete, such that a new violation can arise.

In a prior case, the court held that violation of a no contact order is a “continuing crime,” which commences when the defendant enters the prohibited zone and is not completed until he departs from the prohibited zone. *State v. Spencer*, 128 Wn. App. 132, 137, 114 P.3d 1222 (2005). “As long as the defendant remains within the prohibited zone, he continues to violate the no-contact order.” *Spencer*, at 137. *Spencer* does not address unit of prosecution because the court in that case was concerned only with whether intent to violate a protective order could serve as the predicate felony for residential burglary. Mr. Spencer violated the protection order only once. Therefore, it was not necessary in that case for the jury to make a finding about when the defendant had completed the crime.

In this case, the uncontroverted evidence was that Mr. Ruesga lived with Ms. Lowell for three weeks, which violated a court’s protection order. During those three weeks, Mr. Ruesga never moved out, but rather left for only short periods of time. RP3 51. Ms. Lowell did not say if she went with Mr. Ruesga when he left the house, or if they were ever apart during the three weeks. There is no evidence that this was anything but a continuing violation of the protection order under the terms of the statute.

Under *Spencer*'s holding that violation of a protective order is a continuous crime, in order to show more than one unit of prosecution, the State had to prove that one unit of prosecution was complete before the second commenced. *Spencer* held that the crime was complete when the defendant leaves the protected zone. 128 Wn. App. at 137. In this case, the jury instructions told the jury to convict on count one if it found: Mr. Ruesga had willful contact with Ms. Lowell "on or about the 8<sup>th</sup> day of April, 2007"; such contact was prohibited by a no-contact order; Mr. Ruesga knew of the existence of the order; and the acts were committed in Washington. CP 21. The instructions on count two were to convict if it found that: Mr. Ruesga had willful contact with Ms. Lowell "at some point between the 1<sup>st</sup> day of April, 2007 and the 7<sup>th</sup> day of April, 2007"; such contact was prohibited by a no-contact order; Mr. Ruesga knew of the existence of the order; and the acts were committed in Washington. CP 22.

The jury in this case was not instructed to find that one act of violation of a protective order was complete before another violation of the protective order began. At minimum, if the State is permitted to divide Mr. Ruesga's continuous residence at Ms. Lowell's home into separate units of prosecution, they must prove and the jury must find that Mr. Ruesga left the protected area and completed one violation before the

second violation commenced. There was no evidence presented as to whether Mr. Ruesga was ever outside the prohibited zone identified in the order. The only evidence that Mr. Ruesga ever left the house was when Ms. Lowell testified that the week before April 8, Mr. Ruesga left every day to go to his probation officer. RP3 51. She never said where Mr. Ruesga's appointment was, how many feet from her Mr. Ruesga went, if he was indeed away from her at all (they may have gone together for all the evidence shows), or how long he was absent before returning.

In short, the State did not prove in this case that two units of prosecution occurred. The jury was never asked to decide the facts necessary to prove that one violation of the order was completed before the other commenced. Therefore it is a violation of double jeopardy for Mr. Ruesga to be convicted of two separate offenses for his continuous conduct. The remedy for this violation of double jeopardy is that one of his convictions must be vacated. *See Womac*, 160 Wn.2d at 658-60.

## **V. CONCLUSION**

Mr. Ruesga was placed in jeopardy and convicted of two offenses for the same course of conduct. He lived with his girlfriend continuously for three weeks in violation of a court's protection order. There is no evidence that he was ever outside the zone of protection during those three weeks and, consequently, no evidence that two units of prosecution arose.

Thus, the State proved only one count of violation of a protection order.  
Therefore, Mr. Ruesga was twice placed in jeopardy for the same offense  
and one of his convictions must be vacated.

DATED: April 17, 2008

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CERTIFICATE OF SERVICE

I certify that on April 17, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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