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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37146-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLINTON ALLEN PRATHER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James Warne, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

- 1. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS EVIDENCE DISCOVERED DURING AN UNLAWFUL SEARCH OF MR. PRATHER'S CAR, A TOYOTA MR2.**
- 2. ALTERNATIVELY, THE TRIAL COURT ERRED WHEN IT ENTERED GUILTY FINDINGS AGAINST MR. PRATHER AS HIS TRIAL COUNSEL FAILED TO PROPERLY ARGUE AND PRESERVE WHAT WOULD HAVE BEEN A SUCCESSFUL SUPPRESSION MOTION, I.E., THAT THE WARRANTLESS DOG SNIFF OF PRATHER'S MR2 WAS AN ILLEGAL SEARCH.**
- 3. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT MR. PRATHER'S MOTION TO DISMISS THE SECOND DEGREE ASSAULT AS A VIOLATION OF DOUBLE JEOPARDY.**
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- 5. THE TRIAL COURT ERRED WHEN, IN CALCULATING PRATHER'S OFFENDER SCORE ON THE SECOND DEGREE ASSAULT, IT COUNTED A PRIOR ATTEMPTED ASSAULT IN THE SECOND DEGREE AS TWO POINTS INSTEAD OF ONE POINT.**
- 6. THE TRIAL COURT ERRED BY IMPOSING A TEN YEAR HARASSMENT NO-CONTACT ORDER ON THREE CLASS C FELONIES WITH FIVE-YEAR STATUTORY MAXIMUMS.**

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. DID USING A TRAINED DOG TO SNIFF FOR NARCOTICS OUTSIDE THE CAR CONSTITUTE A SEARCH THAT, ABSENT A WARRANT, VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION?**
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- 6. CRIMINAL PENALTIES CANNOT EXCEED THE STATUTORY MAXIMUM FOR THE CONVICTED OFFENSE. CLINTON PRATHER WAS CONVICTED OF THREE CLASS C FELONIES EACH WITH A STATUTORY MAXIMUM OF FIVE YEARS. DID THE TRIAL COURT EXCEED PRATHER'S MAXIMUM PUNISHMENT WHEN IT IMPOSED A 10-**

**YEAR HARASSMENT NO-CONTACT ORDER ON
EACH OF THESE OFFENSES?**

C. STATEMENT OF THE CASE

1. Trial Facts.

(i) First Trial.

Clinton Prather and Joshua Bryant have known each other for fifteen years. 2RP 91. On July 28, 2007, Mr. Bryant had celebrated his birthday with some friends. 2RP 91-92. He'd returned in the early morning hours to the Kelso house he shares with his girlfriend, Angelina Hogman. Id.

Mr. Bryant and Ms. Hogman hadn't been home long before Mr. Prather arrived with two women. 2RP 93. Mr. Bryant hadn't seen Mr. Prather in about a year. 2RP 94. Mr. Prather had never met Ms. Hogman. After spending a few minutes talking, Mr. Prather had one of the two women he arrived with bring two guns, a pistol and a shotgun, to the house. 2RP 94. Mr. Prather explained that he'd gotten into some trouble and needed to stash the guns. 2RP 95-96. He asked to leave them at Mr. Bryant's house. Id. Mr. Bryant and Ms. Hogman, who had young children in the home, told Mr. Prather to take the guns elsewhere. 2RP 96. Mr. Prather

seemed surprised at the answer but had the guns taken back to the car he arrived in. 2RP 97.

Mr. Prather asked to use Mr. Bryant's cell phone. 2RP 99. Mr. Bryant gave Mr. Prather his cell phone. Id. Mr. Bryant overheard parts of Mr. Prather's call and didn't like the content so he told Mr. Prather to give him back the phone and to leave. 2RP 99-100. Mr. Prather became angry. 2RP 100. As he was leaving, he threw a beer bottle at Mr. Bryant's truck breaking the windshield. 2RP 101. Mr. Bryant followed Mr. Prather and the two scuffled in the street. 2RP 102-03. Mr. Prather broke away and kept going. Id. Mr. Bryant and Ms. Hogman returned to their house. Id.

A few minutes later, while Mr. Bryant and Ms. Hogman were still out in front their house, Mr. Prather pulled up in a car. 2RP 105. He got out of the car carrying a sawed off shotgun. Id. When Mr. Prather pulled the barrel of the shotgun upward, Ms. Hogman moved behind Mr. Bryant's truck. 2RP 144. Mr. Prather pointed the gun directly at Mr. Bryant's head and neck. 2RP 106. Mr. Prather screamed that he would kill Mr. Bryant, Ms. Hogman, and burn their house down. 2RP 106. Ms. Hogman heard the threat. 2RP 146. Ms. Hogman called 911 and spoke with a dispatcher while Mr. Prather was still yelling. Id. Both Ms. Hogman and Mr.

Bryant interpreted Mr. Prather's threat as a threat to kill them as well as kill the two children asleep in the house. 2RP 106, 144. Both Ms. Hogman and Mr. Bryant believed that Mr. Prather would carry out the threat. Id. Mr. Bryant, in part, based his belief in the validity of the threat on two prior instances he knew about where Mr. Prather had been involved with gun violence.¹ 2RP 106.

Mr. Prather left shortly before the police arrived. 2R 146. After providing information to the police, Mr. Bryant and Ms. Hogman packed up their children and went to a motel where they stayed for two nights. 2RP 148-49. They were both fearful of Mr. Prather and were concerned about returning home. Id.

Mr. Prather was arrested later the same day at an apartment rented by a woman named Tracy Pavone. 3RP 182, 186. The police found Mr. Prather lying under a rug. 3RP 186. Laying underneath a love seat adjacent to Mr. Prather was a pistol. 3RP 189. The police seized the pistol. Id. The police also searched a Toyota MR2 parked in the parking lot of Mr. Prather's apartment building. 3RP 224. The police located a sawed off shotgun behind the driver's seat. Id. Ms. Hogman was shown pictures of both

¹ The two incidents were admitted under ER 404(b) and over Mr. Prather's objection. The State had asked the court's permission to offer the two allegations under ER 404(b) as evidence to support the subjective reasonableness of Mr. Bryant's fear. 2RP 67-72.

guns. She identified the guns as those that Mr. Prather had had at their home. 2RP 152.

(ii) Second Trial.

The testimony in the second trial was essentially the same as in the first trial. The only notable difference was that the court did not allow testimony about the two prior instances of gun violence by Mr. Prather and known to Mr. Bryant. 4RP 352- 5RP 554.

2. Procedural Facts.

(i) Suppression Motion.

Prior to trial, Mr. Prather moved to suppress the discovery of the pistol and the shotgun. CP 10-20; 1RP 9-64. The pistol was found under a love seat at the apartment of Tracy Pavone, 900 North Sixth Street, Kelso. 1RP 18. When Mr. Prather was arrested, he was lying under a rug next to the love seat. 1RP 17. By his motion, Mr. Prather argued that he was a co-tenant of the residence and did not give his consent to search the apartment that lead to the discovery of the pistol.² 1RP 49. The court held that there was no evidence that Prather was a co-tenant and that

² See *State v. Morse*, 156 Wn. 2d 1, 123 P.3d 832 (2005) (police must have consent to search from all co-tenants present at a residence)

consent for the search had been given to the police by the only tenant present, Ms. Pavone. 1RP 59.

The shotgun was located in a Toyota MR2 parked at 206 Theresa Way, Kelso. 1RP 29, 34. The testimony relied upon by the court established that while Mr. Prather was being arrested, he told the police that he wanted them to take care of his MR2 and to make sure it wasn't towed. 1RP 30. The police retrieved the keys to the MR2 from another man who was arrested at the same place and time as Mr. Prather. 1RP 29. The police followed up on Mr. Prather's request and located the MR2. 1RP 29. Kelso police Officer Hines saw what he suspected were marihuana flakes on the passenger seat. He thought he smelled the odor of marihuana from inside the car through a cracked window. 1RP 31. Officer Hines contacted Deputy Prusa, the handler for drug detection dog Annie. 1RP 32. Annie alerted for drugs in the trunk of the car. 1RP 33. Deputy Prusa obtained a search warrant based only on the enhanced sniff by Annie. See Supp. Designation of CP. Deputy Prusa assisted in the search of the car. No marijuana was located in the MR2. 1RP 40. Instead, a nylon bag with syringes were located in the car's trunk. 1RP 33. A sawed off shotgun was located wrapped in a t-shirt behind the driver seat. Id. Mr. Prather

moved in his pleadings to suppress the warrant arguing that it was issued as a result of an illegal dog sniff of the car. CP 15-18. The issue of the enhanced-sense dog sniff was discussed at the suppression motion and the court ruled that it had no problem with it and declined to suppress the shotgun evidence. 1RP 59.

(ii) The Trials and Verdicts.

Mr. Prather was tried twice, both times before a jury and both times presided over by Cowlitz County Superior Court Judge James Warne. In the first trial, the information was amended on the second day of trial to reflect the following charges:

Count I – Second degree assault against Joshua Bryant by use of a shotgun as a deadly weapon³;

Count II – Attempted second degree against Angelina Hogman by use of a shotgun as a deadly weapon, a shotgun⁴;

Count III – Felony harassment (threat to kill) against Joshua Bryant⁵;

Count IV – Felony harassment (threat to kill) against Angelina Hogman⁶;

Count V - Felony harassment (threat to kill) against A.C., a minor child⁷;

³ RCW 9A.36.020(1)(c), a class B felony

⁴ RCW 9A.36.020(1)(c) & 9.28.020(1), a class C felony

⁵ RCW 9A.46.020(1)(a)(i), (2)(b)(ii), a class C felony

⁶ RCW 9A.46.020(1)(a)(i), (2)(b)(ii), a class C felony

⁷ RCW 9A.46.020(1)(a)(i), (2)(b)(ii), a class C felony

Count VI - Felony harassment (threat to kill) against G.B., a minor child⁸;

Count VII – Second degree malicious mischief⁹;

Count VIII – Use of drug paraphernalia¹⁰.

CP 21-23. Counts I-V all included firearm enhancements.¹¹ CP 21-24.

In the first trial, the court dismissed Count VIII, the drug paraphernalia charge, at the end of the State's case. 3RP 241. The jury acquitted on Count II, the attempted second degree assault on Ms. Hogman, and on Count V and VI, the felony harassment against the children. CP 68, 75, 77. The jury convicted Mr. Prather on Counts III and IV, the felony harassment of Mr. Bryant and Ms. Hogman, and on Count VII, the second degree malicious mischief. CP 71, 73. The court declared a mistrial when the jury could not reach a verdict on Count I, the second degree assault on Mr. Bryant. 4RP 341; CP 39. The jury also returned with all both felony harassments enhanced by the firearm enhancement. CP 72, 74,

⁸ RCW 9A.46.020(1)(a)(i), (2)(b)(ii), a class C felony

⁹ RCW 9A.48.080(1)(a), a class C felony

¹⁰ RCW 69.50.412(1), a simple misdemeanor

¹¹ RCW 9.94A.602 & 9.94A.533(3)

Two weeks later, Mr. Prather was retried on the second degree assault against Mr. Bryant. 4RP 352- 5RP 554. This time, the jury returned a guilty verdict on the assault and the firearm enhancement. CP 100, 101.

(iii) Double Jeopardy Motion.

Before the second trial, Mr. Prather moved to dismiss the second degree assault charge arguing that it was barred by double jeopardy. Specifically, Mr. Prather argued that the facts of the second degree assault were relied upon in finding guilt on the felony harassment charge where Mr. Bryant was the victim (count III). The court denied this motion. 4RP 348-351.

(iv) Sentencing.

Several issues arose at sentencing. First, although Mr. Prather agreed that he had the prior felony convictions asserted by the State, he argued that he scored as an “8” prior to the addition of the current offenses rather than as “9” as the State argued. 5RP 560-61; See Supp. Designation of CP for Mr. Prather’s sentencing memorandum. The difference of opinion was based on whether a prior attempted second degree assault should be considered a violent offense and scored as two points, or considered a non-

violent offense and scored as one point. *Id.* The court adopted the State's argument. 5RP 561.

Mr. Prather also argued the second degree assault and the felony harassment of Mr. Bryant, counts I and III, were the same criminal conduct. See Supp. Designation of CP for Mr. Prather's sentencing memorandum. Although the court did not specifically address this at sentencing, it implicitly did so as it did not calculate the offender score as same criminal conduct. CP 103-104.

The court also signed an harassment no-contact-order prohibiting Mr. Prather from having contact with Mr. Bryant or Ms. Hogman for 10 years. The order did not specify which charges it applied to. CP 116.

D. ARGUMENT

1. USING A TRAINED DOG TO SNIFF FOR NARCOTICS OUTSIDE A CAR CONSTITUTED A SEARCH THAT, ABSENT A WARRANT, VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

Kelso police officer Ralph Hines wanted to search Mr. Prather's car, a Toyota MR2. Officer Hines believed that he saw and smelled the odor of marijuana through the car's window. Without first getting a warrant to allow an enhanced-scent search of the car, Officer Hines contacted a drug sniffing dog handler who, in

turn, had her dog sniff the car. The dog alerted on the car's trunk. Based only on the dog's warrantless enhanced-scent search of the car, the handler obtained a search warrant and assisted in a search of the car. A sawed off shotgun was discovered during the search. The shotgun should have been suppressed because it was the fruit of a warrant issued only on facts gleaned during an illegal warrantless search.

Article I, Section 7 of the Washington Constitution declares: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This section of our constitution provides greater protection to an individual's right of privacy than the Fourth Amendment. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Our courts have held that using a trained dog to sniff for narcotics outside a dwelling constitutes a search that, absent a warrant, violates both the Fourth Amendment and Article I, Section 7 of the Washington Constitution. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). The *Young* court observed:

With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation

that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door.... Because of [the] defendant[s] heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search....

Young, 123 Wn.2d at 194, 867 P.2d 593 (quoting *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir.), cert. denied, 474 U.S. 819, 106 S.Ct. 66, 67, 88 L.Ed.2d 54 (1985)).

The *Young* court also noted Washington appellate court cases where warrantless dog sniffs were approved. *Young*, 123 Wn.2d at 188 (citing *State v. Stanphill*, 53 Wn. App. 623, 769 P.2d 861 (1989) (dog sniff of package at post office); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (dog sniff of safety deposit box at bank); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979) (dog sniff of parcel in bus terminal not a search), review denied, 93 Wn.2d 1008 (1980)). In each of these cases, the courts acknowledged a dog sniff might constitute a search if the object or location of the search were subject to heightened constitutional protection. *Young*, 123 Wn.2d at 188.

Washington courts have long held that freedom from governmental intrusion into one's "private affairs" includes automobiles and their contents. *Parker*, 139 Wn.2d at 494. Accordingly, our state provided for greater privacy rights in

automobiles than guaranteed by the Fourth Amendment. *Parker*, 139 Wn.2d at 495. To date, it appears our appellate courts have not ruled on whether a dog sniff of a vehicle under circumstances similar to the present case would constitute a search. However, since our state has greater privacy rights in automobiles than guaranteed by the Fourth Amendment, and since our Supreme Court has indicated that a dog sniff might constitute a search if the object or location of the search were subject to heightened constitutional protection, it follows that the dog sniff of Mr. Prather's car was in fact a search. *Young*, 123 Wn.2d at 188.

Warrantless searches, even of automobiles, are unreasonable *per se*. *Parker*, 139 Wn.2d at 496. Because courts consider this a strict rule, they limit and narrowly construe exceptions to the warrant requirement. *Parker*, 139 Wn.2d at 496. When challenged, the State bears the heavy burden to prove that a warrantless search falls within an exception. *Parker*, 139 Wn.2d at 496.

The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view,

and *Terry* investigative stops. See generally Robert F. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U. PUGET SOUND L.REV. 411, 528-80 (1988).

Moreover, the facts of this case do not fall under any of the other categories of warrant exceptions. Therefore, since the dog sniff was a search, and was conducted without a warrant, it was unlawful. The evidence discovered during the subsequent search, because it was seized based on an improperly issued warrant, must be suppressed as fruit of the poisonous tree.

2. ALTERNATIVELY, TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE ENHANCED SCENT SEARCH BY THE DRUG DOG DENIED MR. PRATHER HIS CONSTITUTIONALLY GUARANTEED RIGHT TO COUNSEL.

Alternatively, this court may find that Mr. Prather's counsel did not sufficiently object to the warrantless drug dog search. This could be the case because although the warrantless search was raised and argued in counsel's suppression motion pleadings, it was not the main focus of the suppression hearing. And while the drug dog search was discussed before the court at the suppression hearing, it could be argued that it wasn't argued thoroughly enough to preserve the issue for appeal. If it wasn't preserved sufficiently

for appeal, trial counsel was ineffective in failing to do so. The following examines that failure.

- (i) Trial counsel's failure to move to suppress the drug dog search is a manifest error of constitutional magnitude that can be raised for the first time on appeal.**

Issues raised for the first time on appeal will generally not be considered unless the error is a “manifest error affecting a constitutional right.” *State v. Contreras*, 92 Wn. App. 307, 311, 966 P.2d 915 (1998) (quoting RAP 2.5(a)(3)). To show that an error is manifest, the defendant must demonstrate “how, in the context of the trial, the alleged error actually affected [his] rights.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). “It is not enough that the defendant allege prejudice – actual prejudice must appear in the record.” *Id.* at 334. Succinctly, Mr. Prather bears the burden of proving prejudice due to his trial counsel's failure to challenge enhanced-scent drug dog search of his car, the Toyota MR2. Mr. Prather meets this test. As argued above, the trial court would likely have granted a motion to suppress had his trial counsel properly and effectively argued it.

- (ii) Had trial counsel moved to suppress the enhanced-scent dog sniff search, his motion would have been granted. Without the sawed off shotgun in evidence, Mr.**

Prather would likely have prevailed on the harassment and assault charges against him. Trial counsel's failure to bring the suppression motion denied Mr. Prather effective counsel.

The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel. Const. Art. I, Sec. 22; U.S. Const. Amend. VI. To prove that counsel was ineffective by constitutional standards, the defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McKinnon*, 110 Wn. App. 1, 5, 38 P.3d 1015 (2001).

(iii) Trial counsel would have been successful had he moved to suppress the shotgun by arguing that the warrantless enhanced-scent search was illegal.

As noted under the arguments articulated in section 1 above, the warrantless search by a drug dog of the exterior of Mr. Prather's car was illegal. See Argument I. There was no legitimate trial

strategy in failing to bring the suppression motion. A criminal defendant receives constitutionally ineffective assistance of counsel where no legitimate strategic or tactical explanation can be found for a particular trial decision. *State v. Meckleson*, 133 Wn. App. 431, 433, 135 P.3d (2006), *review denied*, 154 Wn.2d 919 (2007)..

(iv) A successful suppression motion translated into a much weaker case against Mr. Prather.

Had the sawed off shotgun been suppressed, the case against Mr. Prather would have been reduced to a he-said, she-said sort of case. It would have made the case much weaker and likely resulted in not guilty verdicts on the felony harassments and the second degree assault.

3. MR. PRATHER'S CONVICTION FOR SECOND DEGREE ASSAULT VIOLATED HIS RIGHT TO BE FREE OF DOUBLE JEOPARDY AND MUST BE VACATED.

Mr. Prather was twice-tried for assault in the second degree against Joshua Bryant. In his first trial, the jury convicted Mr. Prather of felony harassment for threatening to kill Bryant while pointing a shotgun at him. But a mistrial was declared after the jury failed to reach a verdict on the intertwined second degree assault. Mr. Prather objected to the retrial on the second degree assault

arguing that to do so would twice put him in jeopardy for the same act - threatening Mr. Bryant with a gun while simultaneously threatening to kill him. The trial court disagreed with Mr. Prather's jeopardy claim and he was convicted of the assault at the second trial. On appeal, Mr. Prather maintains that his conviction placed him twice in jeopardy for the same offense.

Article 1, Section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. *Calle*, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses "clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment." *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (citing *Calle*, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishment as it will,

The “same evidence” test, however, is not always dispositive. *In re Burchfield*, 111 Wn. App. at 897; *In re Personal Restraint of Percer*, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. *Id.* This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. *State v. Frohs*, 83 Wn. App. 803, 811, 9243 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy...”. *Id.* The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. *Calle*, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* (emphasis added). *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, the evidence presented to the jury was that Mr. Prather pointed a shotgun at Mr. Bryant while threatening to kill him. This court should construe this as evidence that the first crime (felony harassment – threat to kill) was not completed as the second crime (second degree assault) was in progress thereby making the assault *incidental to, a part of, or coexistent with the felony harassment*, with the result that the second conviction (second degree assault) will not stand under the reasoning in *State v. Johnson, supra*. This seems especially true given the court’s definitional instruction of second degree assault from the second trial and the definitional instruction of felony harassment from the first trial:

An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Instruction 8 (second trial), CP 92. Compare,

A person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury by killing another person immediately or in the future and when he by words or conduct places the person threatened, or any other person, in reasonable fear that the threat will be carried out.

Instruction 19 (first trial), CP 48.

In essence, as instructed, these two crimes are the same and retrial and conviction on the second degree assault after the conviction for felony harassment in the first trial twice put Mr. Prather in jeopardy for what was the same offense.

The Washington Supreme Court has observed that “(t)he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” *Adel*, 136 Wn.2d at 635. Accordingly, if this court determines that felony harassment against Mr. Bryant (count III) “w(as) incidental to, a part of, or coexistent” with the second degree assault (Count I), then Mr. Prather’s conviction in count I cannot be sustained on these facts and must, therefore, be reversed.

4. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO FIND THAT THE SECOND DEGREE ASSAULT AND THE FELONY HARASSMENT OF JOSHUA BRYANT WERE NOT SAME CRIMINAL CONDUCT.

At sentencing, through a sentencing memorandum, Mr. Prather argued that counts I and III, the second degree assault and the felony harassment of Joshua Bryant should be treated as same criminal conduct at sentencing. See Supp. Designation of CP. The court read the memorandum prior to the sentencing. Although the

court did not specifically mention same criminal conduct at sentencing, it implicitly did not find same criminal conduct as reflected both in the offender score and in the court's failure to note that they were same criminal conduct on the judgment and sentence. The court's finding was error.

(i) The trial court abused its discretion.

Pursuant to RCW 9.94A.589, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. However, if the Court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses are counted as one crime. Same criminal conduct means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). A trial court's determination of what constitutes same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. *State v. Tili*, 139 Wn.2d 107, 122, 985 P.3d 365 (1999). In Mr. Prather's case, the trial court abused its discretion because each of the

requirements of the same criminal conduct analysis were satisfied as to the Joshua Bryant second degree assault and felony harassment.

(ii) Mr. Prather acted on both charges with the same criminal intent.

To determine if two or more crimes share criminal intent, the focus is on whether the defendant's intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988). Courts shall also consider whether one crime furthered the other, *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992), and whether the two or more crimes were part of the same scheme or plan and whether the criminal objective changed. *State v. Maxfield*, 125 Wn.2d 378, 402-03, 886 P.2d 123 (1994). Mr. Prather's criminal intent was the same on both cases: to scare Joshua Bryant because Mr. Prather was angry at him.

Guidance for our case is found in *State v. Calvert*, 79 Wn.App. 569, 903 P.2d 1003 (1995). Defendant Calvert pled guilty to various charges to include five counts of forgery. *Id.* at 572. At sentencing, the Court asked the parties to address whether any two or more of the forgeries constituted the same criminal conduct. *Id.*

at 574. Both of the parties agreed that two of the checks were presented to the bank on the same day. The State argued that they could not have been forged or deposited at the same moment. *Id.* at 573. The trial court found that the two checks could be counted as one forgery and calculated Calvert's offender score on that point using a same criminal conduct analysis. *Id.* at 574.

On appeal, the State challenged the trial court's holding that the two forgeries were the same criminal conduct. *Id.* at 577. In denying the State's challenge, the court acknowledged that although possession and presentation of one forged check did not further the possession or presentation of the other, both were deposited in Calvert's account on the same day as part of the same scheme with the same criminal objective: to defraud. As such, the court affirmed the trial court's use of its discretion. *Id.* at 578.

Similarly, the facts of *State v. Walden*, 69 Wn.App. 183, 847 P.2d 956 (1993), also provide guidance under our facts. Defendant Walden was convicted of one count of rape in the second degree and one count of attempted rape in the second degree. *Id.* at 184. Thirteen year-old D.K. was riding a bike when Walden approached him and asked to use his bike. When D.K. stepped off of his bike, Walden took the bike behind a nearby store. D.K. followed

whereupon Walden dragged him up a hill and forced him to masturbate and then performed fellatio upon him. Walden then unsuccessfully attempted to perform anal intercourse on D.K. *Id.* at 184. The trial court found that the rape (fellatio) and the attempted rape (anal intercourse) were not the same criminal conduct for scoring purposes. *Id.* at 187. On review, the court determined that the trial court abused its discretion in applying its same criminal conduct analysis. The Court of Appeals found that the same criminal intent viewed objectively in both instances was the same – sexual intercourse. *Id.* at 188.

State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), is distinguishable and is helpful to that end. L.S. went with Grantham to an apartment after a party. In a bedroom, Grantham attempted to kiss L.S. She resisted and asked to go home. In response, Grantham repeatedly slammed her head into the wall and forcibly undressed her. He then anally raped her. *Id.* at 856. When Grantham finished, he started kicking L.S. and calling her names. He also threatened her not to tell. L.S. pleaded to go home. Grantham then forced L.S. to perform oral sex on him using force to get her to comply with his request. *Id.* at 856. Grantham was convicted of two counts of rape in the second degree. *Id.* at

857. At sentencing, the trial court made a finding that the two acts – anal intercourse and fellatio - did not constitute the same criminal conduct. *Id.* at 857. The court focused on the fact that between the first and second rape, Grantham had the presence of mind to threaten L.S. not to tell, that in between the two crimes she begged him to stop and to take her home, and that Grantham had used new physical force to obtain sufficient compliance to accomplish the second rape. Based upon this, the court found that Grantham had the time and the opportunity to pause, reflect and either cease his criminal activity or proceed to commit a further criminal act. The fact that he chose the latter indicated that he had formed a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. Moreover, the evidence supported the trial court's conclusion that each act of sexual intercourse was complete in itself. One did not depend upon or further the other. *Id.* at 859.

By comparison, in Mr. Prather's case, the act of pointing the gun at Mr. Bryant while threatening to kill him tie the assault and harassment charges together and make them dependent on each other. Assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in

another reasonable apprehension and imminent fear of bodily injury. Harassment is an act that by words or conduct places the person threatened, or any other person, in reasonable fear that the threat will be carried out. Where does one crime begin and the other end? They are inextricably linked and the trial court erred in not finding so.

(iii) Both crimes were committed at the same time and place.

The second degree assault and the felony harassment occurred simultaneously on July 28, 2007.

(iv) The crimes involved the same victim.

This goes without saying. Joshua Bryant was the same victim on both crimes in this simultaneous incident.

5. MR. PRATHER'S PRIOR CONVICTION FOR ATTEMPTED SECOND DEGREE ASSAULT WAS NOT A VIOLENT FELONY FOR PURPOSES OF DETERMINING HIS OFFENDER SCORE.

In calculating Mr. Prather's offender score on the second degree assault, the trial court scored a prior attempted second degree assault as counting for two points rather than one point. Mr. Prather objected to this calculation. The court did this after concluding that the prior attempted assault was a "violent offense." The trial court's determination was in error and Mr. Prather is entitled to resentencing.

(i) Mr. Prather may challenge the sentencing court's offender score.

This Court reviews a sentencing court's offender score calculation de novo. *State v. Mitchell*, 81 Wn. App. 387, 914 P.2d 771 (1996); *State v. McCraw*, 127 Wn.2d 281, 898 P.2d 838 (1995); *State v. Roche*, 75 Wn. App. 500, 878 P.2d 497 (1994). The general rule is that a sentencing court acts without statutory authority when imposing a sentence based on a miscalculated offender score. *Matter of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997); *Roche*, 75 Wn. App. at 513. Attempted assault in the second degree is not a "violent offense" as defined in the SRA.¹² The sentencing court nonetheless included Mr. Prather's prior attempted second degree assault conviction as a prior "violent offense," and the adjudication therefore counted as two points rather than one in determining his offender score and standard ranges. Because the definition of a "violent offense" applies throughout the SRA, this Court should interpret RCW 9.94A.525(4) to exclude attempted offenses from the doubling provisions appropriate for violent crimes.

¹² Sentencing Reform Act of 1981 (SRA), RCW 9.94A.020.

(ii) Mr. Prather's prior conviction for an anticipatory offense should not be subjected to doubling under the SRA.

The SRA defines a violent felony at RCW 9.94A.030(50) to include assault in the second degree but not attempted assault in the second degree. RCW 9.94A.030(50). The sentencing court, however, treated the attempted second degree assault as a violent offense in computing Mr. Prather's offender score, presumably relying on Division One's opinion in *State v. Becker*, 59 Wn. App. 848, 801 P.2d 1015 (1990).

Because *Becker* misapplies the relevant principles of statutory construction, it should be rejected by this Court. At issue in *Becker* was whether the doubling provision of RCW 9.94A.360(9) applies to a prior conviction for attempted second degree robbery even though the crime is not a "violent felony." The statute, now codified at RCW 9.94A.525(8), requires that the court sentencing a defendant for a violent offense count each prior "violent offense" as two points rather than one point in determining the offender score. *Becker*, 59 Wn. App. At 850-51; former RCW 9.94A.360; current RCW 9.94.525(8).

If the present conviction is for a violent offense and not covered in subsections (9), (10), (11), (12), or (13) of this section count two points for each prior adult and juvenile

ordinary meaning.” *Id.*, quoting *National Electric Contractor Ass’n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). When the plain language is unambiguous, there is no need for the court to construe the statute. *J.P.*, 149 Wn.2d at 450. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless.” *Id.*

Here, the statutes at issue are each clear and unambiguous. But the statutory definition of a “violent felony” and the general scoring statutes appear to be in conflict. *Becker*, 59 Wn. App. at 852-53. When statutes covering the same subject matter appear to be in conflict, the courts attempt to construe them together in order to give effect to each statute as well as the statutory scheme. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). If, however, two statutes are in conflict, the court must resolve the conflict using the canons of statutory construction. *J.P.*, 149 Wn.2d at 453, 455.

A key in interpreting statutes is giving effect to the definition of a term provided by the Legislature. Here, the Legislature defined a “violent felony,” and provided that the definition apply throughout the chapter unless the context clearly requires otherwise. RCW 9.94A.030(50). The Legislature’s definition of a term normally

controls the use of the term throughout the act. *Regional Disposal Co. v. City of Centralia*, 147 Wn.2d 69, 77, 51 P.3d 81 (2002); *Senate Republican Campaign Committee v. Public Disclosure Commission*, 133 Wn.2d 452, 458, 832 P.2d 1301 (1992); 2A Norman J. Singer, *Statutes and Statutory Construction* 47:07 at 227-28 (6th ed. 2002 revision). The definition is essentially embedded in later statutes utilizing the term. *J.P.*, 149 Wn.2d at 453.

Definitions are integral to the statutory scheme and of the highest value in determining legislative intent. To ignore a definition section is to refuse to give legal effect to part of the statutory law of the state.

State v. Taylor, 30 Wn. App. 89, 95, 632 892, *review denied*, 96 Wn.2d 1012 (1981).

RCW 9.94A.030 begins by explaining the statutory definition control throughout the chapter. ("Unless the context clearly requires otherwise, the definitions in this section apply throughout the chapter.") It then states what the term "violent offense" means. RCW 9.94A.030(50). When the Legislature states what a term means, it excludes any definition not stated. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921 (2001); *Singer*, *supra* 47:07 at 232-33. Thus, because attempted second degree

assault is not included in the definition of a violent offense, it is not a violent offense for purposes of the SRA. When statutes conflict and cannot be harmonized, the more specific or the more recently enacted will generally prevail unless such reading undermines the obvious legislative intent. *Hallauer v. Spectrum Properties*, 43 Wn.2d 126, 146, 18 P.3d 540 (2001); *Tunstall v. Bergeson*, 141 Wn.2d 201, 211 5 P.3d 691 (2000), *cert. denied*, 121 S. Ct. 1356 (2001). Here, 9.94A.030(50) is more specific and should control the general score rule.

Moreover, when a sentencing statute is subject to more than one interpretation, the courts utilize the rule of lenity to adopt the interpretation more favorable to the defendant. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005); *Post-Sentencing Review of Charles*, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). The *Becker* court recognized the statutes were susceptible to more than one reasonable interpretation, yet adopted the reading that was more favorable to the State, not the defendant. This construction violated the rule of lenity and should not be adopted by this Court.

Mr. Prather's prior attempted second degree assault was not a "violent felony" as defined by RCW 9.94A.030(50). That specific definition should control over the more general scoring provision of

RCW 9.94A.525(4). His attempted second degree assault should not have been subject to the doubling provisions of RCW 9.94A.525(8), and his sentence should be vacated and remanded for a new sentencing hearing.

6. THE LIFETIME NO CONTACT ORDER IMPROPERLY EXCEEDED THE STATUTORY MAXIMUM OF FIVE YEARS ON PRATHER'S FELONY HARASSMENT AND SECOND DEGREE MALICIOUS MISCHIEF CONVICTIONS.

As a condition of Mr. Prather's sentence, the trial court imposed a ten-year harassment no-contact order with Hogman and Bryant. CP 116. While a ten-year condition of sentence may be appropriate for a class B felony with a statutory maximum of ten years, no contact orders cannot exceed the statutory maximum for the underlying offense. *State v. Armendariz*, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007). Mr. Prather was convicted of second degree assault, a class B felony, two counts of felony harassment, class C felonies, and second degree malicious mischief, a class C felony. The no contact order failed to specify which charge or charges it applied to. CP 116. Without this distinction, the order seemingly applies to all of the charges even though it is error to enter it on the three class C felonies. Mr. Prather's case must be

remanded for clarification of his judgment and sentence. *State v. Taylor*, 111 Wn. App. 519, 527, 45 P.3d 1112 (2002), *review denied*, 148 Wn.2d 1005 (2003).

E. CONCLUSION

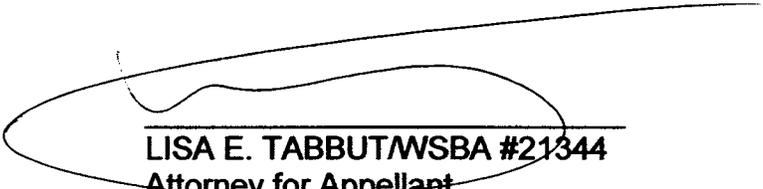
Mr. Prather is entitled to a re-trial on all his convictions. The trial court should have suppressed the warrantless enhanced-scent drug dog search of Mr. Prather's car. Without the warrantless search, no warrant could have been issued to search the car and the sawed off shotgun would not have been found and subsequently admitted into evidence.

In the alternative to a retrial, Mr. Prather's second degree assault conviction, count 1, should be dismissed as it violated his right to be free of double jeopardy. His case will need to be remanded for resentencing with a recalculated offender score. If the second degree assault is not dismissed, there will still need to be a recalculation of the offender score because of the error in determining that Mr. Prather's prior attempted second degree assault was a violent offense thereby adding two points to his score calculation. Only one point should be added because it was not a violent offense.

Remand for resentencing is also necessary because of the need to correct the offender score due to the same criminal conduct error on the felony harassment and second degree assault of Joshua Bryant, counts III and I.

Finally, remand is necessary to correct and clarify which counts the harassment no-contact order applies to and how long the order will be in effect for each count.

Respectfully submitted this 16th day of July, 2008.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

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3 (1) APPELLANT'S BRIEF
4 (2) AFFIDAVIT OF MAILING (PA ONLY)
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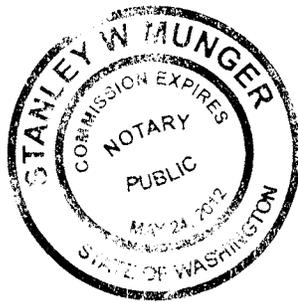
6 Dated this 17th day of July 2008,

7
8 LISA E. TABBUT, WSBA #21344
9 Attorney for Appellant

10 SUBSCRIBED AND SWORN to before me this 17th day of July 2008.

11 Stanley W. Munger

12 STANLEY W. MUNGER
13 Notary Public in and for the
14 State of Washington
15 Residing at Longview, WA 98632
16 My commission expires 05/24/12



AFFIDAVIT OF MAILING - 2 -

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