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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficient evidence.
2. The trial court erred in failing to give a unanimity instruction on felony violation of a no contact order where the State failed to elicit sufficient evidence of both of the charged alternatives.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Stromberg's conviction beyond a reasonable doubt of felony violation of a no contact order? [Assignment of Error No. 1].
2. Whether the trial court erred in failing to give a unanimity instruction on felony violation of a no contact order where the State failed to elicit sufficient evidence of both of the charged alternatives? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Michael A. Stromberg, (Stromberg) was charged by first amended information filed in Mason County Superior Court with one count of felony violation of a no contact order. [CP 39-40].

No pretrial motions regarding CrR 3.5 and CrR 3.6 were made or heard. Stromberg was tried by a jury, the Honorable Toni A. Sheldon presiding. Stromberg had no objections and took no exceptions to the court's instructions—the court did not give a unanimity instruction. [CP 26-37; RP 79]. The jury found Stromberg guilty as charged also finding

by special verdict that the crime was committed against “a family or household member.” [CP 24, 25; RP 100-101]. Thereafter, the jury was given additional evidence and supplemental instructions regarding whether Stromberg had two prior convictions for violating a no contact order with the jury returning a special verdict so finding. [CP 21, 22-23; RP 101-106]

The court sentenced Stromberg to a standard range sentence of 17-months based on an undisputed offender score of 2. [CP 5-20; RP 113-114].

Notice of appeal was timely filed on January 7, 2008. [CP 4].

This appeal follows.

2. Facts

In the early morning hours of October 18, 2007, Mason County Sheriff Byron Baty (Baty) responded to a disturbance call at 782 East Coulter Creek Road in Mason County regarding an unwanted person on the premises—Stromberg. [RP 41-44, 47-49]. The address was the residence of the Zweg family including Marsha Zweg, who lived in a trailer on the property. [RP 34-35, 41, 44-45]. Baty confirmed that there was a no contact order prohibiting Stromberg from contact with Marsha Zweg. [RP 49, 53-55]. After arriving at the residence, Baty located

Stromberg, who seemed to be intoxicated, under a shed about 40 feet from Marsha Zwieg's trailer and arrested Stromberg. [RP 49-51, 58, 70-71].

Marsha Zwieg testified that Stromberg was her ex-boyfriend and that she had called him asking him to come over winterize her trailer, which he apparently did. [RP 35-38]. She acknowledged that there was a no contact order prohibiting him from contact with her. [RP 35]. Absent from her testimony was any evidence of actual contact between the two.

Stromberg testified in his defense explaining that he had come to the Zwieg property at the request of Wally Zwieg (Marsha Zwieg's brother) to do some work to earn some money and that he did not know that Marsha was living on the property. [RP 61-65]. He further explained the reason he was found under the shed by Baty was because he had been sheltering from the weather. [RP 66, 70, 73]. He did not testify that he had any actual contact with Marsha Zwieg on the date in question. [RP 60-73].

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT STROMBERG WAS GUILTY OF FELONY VIOLATION OF A NO CONTACT ORDER.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Stromberg was charged with and convicted of one count of felony violation of a no contact order. As instructed by the court in

Instruction No. 8, [CP 35], the State bore the burden of proving beyond a reasonable doubt the following:

- (1) That on or about the 18<sup>th</sup> day of October, 2007, the defendant willfully violated the provisions of a no contact or protections order that excluded him from a residence or having contact with Marsha Zwieg;
- (2) That the defendant knew of the existence of the no contact or protection order; and
- (3) That the acts occurred in the State of Washington.

[Emphasis added]. The court did not give a unanimity instruction regarding the alternative means of committing this crime—contact with Marsha Zwieg and exclusion from her residence.

As charged and instructed, the State bore the burden of proving beyond a reasonable doubt that Stromberg had contact with Marsha Zwieg on the date in question and/or the alternative of willfully (knowingly) was at her residence on the date in question. This is a burden that the State cannot satisfy given the record in this case.

With regard to the alternative of contact with Marsha Zwieg, the sum of the evidence presented at trial establishes that Marsha Zwieg, according to her testimony, called Stromberg and asked him to winterize her trailer. What is lacking from her testimony is any evidence that Stromberg in fact saw or spoke to her when he was at the 782 East Coulter Creek Road address. While Marsha Zwieg testified that Stromberg never

went into her home—he remained outside, and that she and Stromberg did not argue—Stromberg was behaving normally, she did not answer the crucial question of whether the two ever had actual contact. [RP 36]. This crucial question could have been answered with a single question by the State, but the State failed to make any such inquiry. Moreover, the remainder of the evidence elicited at trial does not satisfy the State’s burden—Walter Zwiég, Marsha Zwiég’s father, did not testify to any contact between Stromberg and his daughter; Baty, the officer who found Stromberg on the property, did not testify to any contact between Marsha Zwiég and Stromberg; and Stromberg did not testify to any contact between himself and Marsha Zwiég. Absent any evidence of actual contact between Marsha Zwiég and Stromberg, the State has failed to elicit sufficient evidence of this alternative of felony violation of a no contact order with the result that Stromberg’s conviction should be reversed and dismissed.

With regard to the alternative of Stromberg’s willful/knowing presence at Marsha Zwiég’s residence, here too the State has failed to elicit sufficient evidence to prove beyond a reasonable doubt that Stromberg was guilty of felony violation of a no contact order. The sum of the State’s evidence regarding this alternative is the fact that Stromberg was found at the 782 East Coulter Creek Road address about 40 feet from

Marsha Zwieg's trailer. However, Stromberg testified that he had gone to the address at the request of Wally Zwieg, Marsha Zwieg's brother, for a job and that he had no idea where Marsha Zwieg was living. Absent evidence that Stromberg in fact knew where Marsha Zwieg was living it cannot be said that he was willfully/knowingly at her residence. Again under this alternative, the State has failed to elicit sufficient evidence necessary to sustain a conviction for felony violation of a no contact order with the result that Stromberg's conviction should be reversed and dismissed.

- (2) STROMBERG'S CONVICTION FOR FELONY VIOLATION OF A NO CONTACT ORDER SHOULD BE REVERSED WHERE THE COURT FAILED TO GIVE A UNANIMITY INSTRUCTION AND THE STATE FAILED TO ELICIT SUFFICIENT EVIDENCE TO SUPPORT BOTH OF THE CHARGED ALTERNATIVES.

Art. 1, sec. 21 of the Washington Constitution guarantees a criminal defendant the right to a unanimous jury verdict. "The right to a unanimous verdict is derived from the fundamental constitutional right to a fair trial by a jury, it may be raised for the first time on appeal." State v. Gooden, 51 Wn. App. 615, 617, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988); State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995). Issues of constitutional magnitude may be raised for

the first time on appeal. State v. Peterson, 73 Wn. App. 303, 306, 438 P.2d 183 (1968); State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *see also* RAP 2.5(a)(3).

In alternative means cases, a single offense that may be committed in more than one way, the jury must unanimously agree on guilt for the single crime charged but not on the means by which the crime was committed so long as there is sufficient evidence to support each alternative. State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994); State v. Hursh, 77 Wn. App. at 248.

Here, as argued in the preceding section of this brief, the State charged Stromberg and the jury was instructed on alternative means of committing felony violation of a no contact order— that Stromberg had contact with Marsha Zwieg on the date in question and/or the alternative of willfully (knowingly) was at her residence on the date in question. [CP 35, 39-40]. Thus, the State bore the burden of eliciting sufficient evidence to prove beyond a reasonable doubt both charged alternatives. The court did not give a unanimity instruction. Again, as argued above, the State failed to elicit sufficient evidence of the alternatives charged as required. The evidence presented does not constitute sufficient evidence to establish either that Stromberg had actual contact with Marsha Zwieg or that Stromberg was willfully/knowingly at her residence on the date in

question, and it was the State's burden to do so. Having failed to elicit the requisite evidence to prove beyond a reasonable doubt all the alternatives given the court's failure to give a unanimity instruction, this court should reverse Stromberg's conviction for felony violation of a no contact order.

E. CONCLUSION

Based on the above, Stromberg respectfully requests this court to reverse and dismiss his conviction.

DATED this 21<sup>st</sup> day of May 2008.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 21<sup>st</sup> day of May 2008, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 21<sup>st</sup> day of May 2008.

Patricia A. Pethick  
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