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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38001-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bow Star Hall,

Appellant.

Lewis County Superior Court Cause No. 08-1-00267-0
The Honorable Judges Nelson E. Hunt and James Lawler

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Mr. Hall’s convictions on Counts I and II were based on insufficient evidence..... 1

A. The evidence was insufficient to prove that Mr. Hall either knew of the May 25th restraining order (which was the order in effect on the date of the alleged violation), or that he violated the May 4th restraining order (which was not in effect on the date of the alleged violation). 1

B. Mr. Hall’s burglary conviction must be reversed because the evidence was insufficient to prove an unlawful entry and intent to commit a crime, and the trial judge did not find that he intended to commit a crime against a person or property within the residence. 4

II. Mr. Hall was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments because his attorney failed to object to the admission of statements under the *corpus delicti* rule..... 5

CONCLUSION 6

TABLE OF AUTHORITIES

FEDERAL CASES

Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116
(1986)..... 4

WASHINGTON CASES

Coluccio Constr. v. King County, 136 Wn. App. 751, 150 P.3d 1147
(2007)..... 2

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

Stella Sales, Inc. v. Johnson, 97 Wn. App. 11, 985 P.2d 391 (1999)..... 4

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI..... 5

U.S. Const. Amend. XIV 5

WASHINGTON STATUTES

RCW 26.50.110 1, 2, 4

OTHER AUTHORITIES

Ballentine's Law Dictionary..... 3

Merriam-Webster's Dictionary of Law..... 3

Random House Dictionary..... 3

ARGUMENT

I. MR. HALL'S CONVICTIONS ON COUNTS I AND II WERE BASED ON INSUFFICIENT EVIDENCE.

- A. The evidence was insufficient to prove that Mr. Hall either knew of the May 25th restraining order (which was the order in effect on the date of the alleged violation), or that he violated the May 4th restraining order (which was not in effect on the date of the alleged violation).

Under RCW 26.50.110, “Whenever an order is granted under this chapter... and the respondent or person to be restrained knows of *the order*, a violation of any [restraint provision] of *the order* is a gross misdemeanor...” RCW 26.50.110 (emphasis added). Conviction requires proof that the accused person knew of “the order,” and violated “the order.” The use of the definite article (“the”) instead of an indefinite article (“an”) indicates the legislature’s intent to impose criminal liability when the defendant knows of the specific order she or he is accused of violating. Liability does not attach under the statute where the person knows of one order but violates another.

Here, the state did not prove that Mr. Hall knew of “the order” in effect on the violation date—the Revised Temporary Restraining Order entered on May 25, 2007. Similarly, the prosecution failed to establish that Mr. Hall violated the May 4th order, since it had been superseded as of

May 25th. Accordingly, the evidence was insufficient for conviction under RCW 26.50.110.

Without citation to authority, Respondent asserts that the May 4th order formed the basis for the charge. Brief of Respondent, pp. 2-3. Respondent does not explain how an order that was not in effect on the date of the alleged violation can justify prosecution under the statute. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

An order that is expired, superseded, or otherwise no longer in effect cannot support a charge under RCW 26.50.110. The statute requires proof that the defendant violated a restraining order, and there can be no violation of a restraining order after it has ceased to restrain. To avoid this problem, Respondent seeks to reframe the issue as one relating to the *validity* of the May 4th order. Brief of Respondent, pp. 4-5 (citing *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005)). Respondent's argument is based on a misreading of *Miller*.

First, the issue here is not one of "validity" under *Miller*. In that case, the Supreme Court outlined the problems that could give rise to an issue of validity: "whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order

complied with the underlying statutes.” *Miller*, at 31. The May 4th order is not deficient for any of these reasons.

Second, the Supreme Court specifically “recognize[d] that there may... be issues of the sufficiency of the evidence of a violation of an order based upon the specific facts of the case,” and that such “[i]ssues of sufficiency relating to the order may be argued and resolved in the same manner as any other question relating to the sufficiency of the evidence.” *Miller*, at 31-32. The facts of this case raise just such an issue: the state did not present sufficient evidence to prove that Mr. Hall had knowledge of one order and violated a restraint provision of that same order.

Respondent concedes that the May 25th order “amends and supersedes’ the May 4th order,” but argues that the meaning of this phrase is ambiguous. Brief of Respondent, p. 7. This argument lacks merit for two reasons.

First, the phrase “amends and supersedes” is not ambiguous. To amend is to change, alter, or modify (often for the better). *See, e.g., entries in Ballentine’s Law Dictionary, Merriam-Webster’s Dictionary of Law, or Random House Dictionary.* To supersede is to replace, or to remove in making way for another. *See, e.g., entries in Ballentine’s Law Dictionary, Merriam-Webster’s Dictionary of Law, or Random House Dictionary.* The phrase “amends and supersedes” as used in the May 25th

order provides notice that the order makes changes to the earlier order and replaces it. Revised Temporary Order, filed 5/25/07, Exhibit.

Second, even if the phrase is considered ambiguous, it should be strictly construed in favor of the accused. *See, e.g., Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 20, 985 P.2d 391 (1999) (If a contempt finding “is based upon the violation of an order, the order must be strictly construed in favor of the contemnor.”)

The trial court could have maintained the May 4th order as the order in effect. To do so, the trial judge should have issued an “Order Amending” the May 4th order, limited to the terms she wished to alter. She did not do this; instead, she issued a new order on May 25th, amending and superseding the prior order. It was this second order that was in effect on the violation date.

Whether the prosecution was based on the May 4th order or the May 25th order, the state failed to prove that Mr. Hall both “[knew] of the order” and violated “any [restraint provision] of the order.” RCW 26.50.110. Accordingly, the conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

B. Mr. Hall’s burglary conviction must be reversed because the evidence was insufficient to prove an unlawful entry and intent to

commit a crime, and the trial judge did not find that he intended to commit a crime against a person or property within the residence.

1. The evidence was insufficient to prove an unlawful entry, because the state failed to establish Mr. Hall knew of the May 25th restraining order.

Mr. Hall rests on the arguments set forth in the Opening Brief and in the preceding sections.

2. The state failed to prove that Mr. Hall intended to commit a crime against persons or property within the residence, and the trial judge did not find such intent.

Mr. Hall rests on the argument set forth in the Opening Brief and in the preceding sections.

II. MR. HALL WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BECAUSE HIS ATTORNEY FAILED TO OBJECT TO THE ADMISSION OF STATEMENTS UNDER THE *CORPUS DELICTI* RULE.

Mr. Hall rests on the argument set forth in his Opening Brief and in the preceding sections.

CONCLUSION

Counts I and II were based on insufficient evidence. Accordingly, they must be reversed and dismissed with prejudice. In the alternative, the case must be remanded to the superior court for a new trial.

Respectfully submitted on March 5, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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129 Beck Rd.
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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 5, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 5, 2009.



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