

COURT OF APPEALS  
DIVISION II  
CASE NO. 16654  
FILED  
BY [Signature]  
11/17

NO. 38467-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**MICHAEL JEROME GEMAR,**

**Appellant.**

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**BRIEF OF APPELLANT**

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**John A. Hays, No. 16654  
Attorney for Appellant**

**1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084**

**ORIGINAL**

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## ***ASSIGNMENT OF ERROR***

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

The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment of conviction against him for felony violation of a no contact order because substantial evidence does not support this charge.

### ***Issues Pertaining to Assignment of Error***

Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction on a charge unsupported by substantial evidence?

## STATEMENT OF THE CASE

During the morning of December 11, 2007, Pamela Thiery and her husband Bill stopped by her mother Joyce Gemar's house at 937 Olsen Road in Longview to check on Joyce. RP 108-110. As they drove up to the house, they noticed the Defendant Michael Gemar's vehicle in the driveway. RP 120-122. Michael is one of Joyce Gemar's other children. RP 118-120. At the time, there was a valid no contact order in place that prohibited the defendant from having contact with his mother or coming to her house on Olsen Road. Exhibit 16.

Upon entering the house, Pamela walked into the living room and saw the defendant get up from the couch where he had been sleeping. RP 120-122. Pamela then spoke with the defendant for a minute about the fact that he was not supposed to be at the house since there was a no contact order that prohibited him from having contact with his mother. *Id.* After this brief conversation, the defendant went out into the garage to retrieve some of his property, and as he did so Bill Thiery called the police. *Id.* About 10 minutes after Mr. Thiery made his telephone call, Deputy Tonissen from the Cowlitz County Sheriff's Office arrived at the house, entered the garage, and arrested the defendant. RP 175-181.

By information filed December 14, 2007, the Cowlitz County Prosecutor charged the defendant Michael Gemar with one count of felony

violation of the no contact order that Judge Warning entered against him on May 30, 2007. CP 1-2. The information also alleged that the defendant had at least two prior convictions for violating qualifying no contact orders. *Id.*

This portion of the information reads as follows:

The defendant . . . has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 7.90, 10.29, 26.09, 26.10, 26.26, 74.34, or a valid foreign protection order as defined in RCW 26.52.020; contrary to RCW 26.50.100(5) and against the peace and dignity of the State of Washington.

CP 1.

The state later amended this information to add a charge of bail jumping, alleging that on April 30, 2008, the defendant, having been released upon a promise to appear, failed to appear as ordered by this court. CP 43-44.

Prior to trial, the defendant repeatedly informed the court that he wished to proceed *pro se*. See Hearings on August 26, 2008 and August 28, 2008. RP 44-63, 71-97. On September 23, 2008, the defendant again appeared and demanded his right to proceed *pro se*. RP 71-97. At this hearing, the defendant filed a written waiver of the right to counsel that included a recitation of the charges filed against him, the standard ranges should he be convicted on both charges, and the statutory maximums for each charge. CP 25-29. This written waiver also included a statement by the

defendant concerning his education history and concerning the complexity of representing himself. *Id.* After entering a colloquy with the defendant confirming the information contained in the waiver, the court granted the defendant's request to proceed *pro se*, although the court did order his court-appointed attorney to continue as "standby" counsel. RP 71-97.

Finally, on October 22, 2007, this case was called for trial before a jury, during which the state called four witnesses, including Pamela Thiery, Bill Thiery, and Deputy Sheriff J. Tonissen. RP 108, 127, 175. These witnesses testified to the facts surrounding the defendant's presence at his mother's house on December 11, 2007. RP 108-194.

While on the witness stand, Deputy Tonissen also identified Exhibit 15 as a copy of a no contact order that Cowlitz County Superior Court Judge Stephen Warning entered on May 30, 2007. RP 191-192. This order, entered pursuant to RCW 10.99, prohibited the defendant Michael Gemar from having contact with his mother Joyce Gemar, or going to her house at 937 Olsen Road in Longview. Exhibit 15. The court admitted this exhibit without objection. RP 191-192. In addition, the court also admitted the following exhibits into evidence without objection:

*Exhibit 7:* Citation in Cowlitz County District Court Cause No. 67405 alleging that a "Michael Gemar" committed the following crime: "Violation of DV Order for Protection - Did enter Residence at 937 Olson Road 06-2-01965-3" on 12/5/06.

*Exhibit 8: Judgment and Sentence in State of Washington v. Michael Jerome Gemar, Cowlitz County District Court Cause No. 67405 CCS showing that on 12/21/06, a “Michael Gemar” was found guilty of the crime of “PROTECTION ORDER VIOLATION.”*

*Exhibit 9: Citation in Cowlitz County District Court Cause No. 67247 alleging that a “Gemar, Michael Jerome” committed the following two crimes: “Violation DV Protection Order 12/20/06” and “Violation DV Protection Order 1/09/07.”*

*Exhibit 10: Judgment and Sentence in State of Washington v. Michael Jerome Gemar, Cowlitz County District Court Cause No. 67247 CCS showing that on 4/19/07, a “Gemar, Michael Jerome” was found guilty of the following crimes: “Count 1 - PROTECTION ORDER VIOLATION,” and “Count 2 - PROTECTION ORDER VIOLATION.”*

*Exhibit 11: Citation in Cowlitz County District Court Cause No. 66892 alleging that a “Michael Gemar” committed the following crime: “VIOLATION PROTECTION ORDER #06 2 01965 3” on 1/28/07.*

*Exhibit 12: Judgment and Sentence in State of Washington v. Michael Jerome Gemar, Cowlitz County District Court Cause No. 66892 CCS showing that on 1/29/07, a “Gemar, Michael Jerome” defendant was found guilty of the following crime: “Count 1 – PROTECTION ORDER VIOLATION.”*

*Exhibit 13: Amended information in State of Washington v. Michael Jerome Gemar, Cowlitz County Superior Court Cause No. 07-1-00392-1 alleging that on two separate occasions on 2/24/07, that a “Michael Jerome Gemar” violated the provisions of the protection order entered in Cause No. 06-2-01965-3.*

*Exhibit 14: Judgment and Sentence in State of Washington v. Michael Jerome Gemar, Cowlitz County Superior Court Cause No. 07-1-00392-1, showing that on 5/16/07, a “Michael Jerome Gemar” was sentenced for the following two crimes: “Count I VIOLATION OF A PROTECTION ORDER” and “Count II VIOLATION OF A PROTECTION ORDER.”*

*See* Exhibits 7, 8, 9, 10, 11, 12, 13, and 14.

Prior to the beginning of the trial, the state and the defendant entered into the following “Stipulations”:

THIS MATTER having come before the undersigned judge of the above-entitled court and the State being represented by MIKE NGUYEN, Deputy Prosecuting Attorney for Cowlitz County, and Defendant being present and represented by TERRY MULLIGAN, and the Defendant stipulates and agrees that:

1. The Michael Jerome Gemar, DOB 5/27/53, as identified in any court admitted Judgment and Sentence is the defendant, Michael Jerome Gemar, DOB 5/27/53, in the Superior Court of Washington for Cowlitz County Cause Number 07-1-01557-1.

2. The Michael Jerome Gemar, DOB 5/27/53, as identified in any court admitted Domestic Violence No-Contact Order is the defendant, Michael Jerome Gemar, DOB 5/27/53, in the Superior Court of Washington for Cowlitz County Cause number 07-1-01557-1.

3. The Michael Jerome Gemar, DOB 5/27/53, as identified in any court admitted Complaint/Citation, Information, or Amended Information is the defendant, Michael Jerome Gemar, DOB 5/27/53, in the Superior Court of Washington for Cowlitz County Cause Number 07-1-01557-1.

CP 41-42.

Both the defendant and the prosecutor signed this document, as well as the judge, although the defendant’s “standby” attorney did not. CP 41-42. However, at no point during the trial was this document read into the record as evidence for the jury to consider. RP 1-346. Neither was this document marked as an exhibit and admitted into evidence. *See* Exhibits.

Following the close of the state case, the defendant called three witnesses and then took the stand on his own behalf. RP 192, 209, 214, 233. In his testimony, the defendant admitted that he knew there was a no contact order in place prohibiting him from having contact with his mother or going to her house, but he claimed that he did both of these things on December 11<sup>th</sup> because he feared for her safety. RP 233-239. After his testimony, the state called three witnesses in rebuttal. RP 259, 266, 279. The court then instructed the jury, with the defendant objecting to the use of Instruction No. 12, which stated the following:

#### INSTRUCTION NO. 12

It is not a defense to the crime of Violation of a No-Contact Order that the person protected by the order consented to or allowed the contact. The defendant has the sole responsibility to avoid or refrain from violating the order.

CP 65.

Following argument by counsel, the jury retired for deliberation and later returned verdicts of “guilty” to violation of a no contact order, and “not guilty” to bail jumping. CP 72-73. The jury also returned a special verdict finding that the defendant had two or more previous convictions for violation of a protection order issued under RCW 10.99 or 26.50. CP 75. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 77-89, 93.

## ARGUMENT

**THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT OF CONVICTION AGAINST HIM FOR FELONY VIOLATION OF A NO CONTACT ORDER BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE.**

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 state charged the defendant with felony violation of a no contact order under RCW 26.50.110(1)&(5). The first subsection of this statute states as follows in relevant part:

(1) Whenever an order is granted under this chapter, chapter 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. . . .

RCW 26.50.110(1).

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 subsection of the 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).

Thus, in order to sustain a conviction for a felony violation of no contact order, the state had the burden of proving the following elements:

(1) that an order was granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020 was entered,

(2) that the order prohibits the defendant from having contact with the protected party,

(3) that the language of the order informs the defendant that a violation of the order is a crime,

(4) that the defendant got notice of the order, prior to the violation,

(5) that the defendant then knowingly violated the provisions of the order, and

(6) that the defendant had two prior convictions for violating an

order granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020.

In the case at bar, the evidence presented at trial does not constitute substantial evidence on the charge of felony violation of a no contact order because (1) the record does not contain any evidence proving that the defendant was the person named in Exhibit 7 through 14, and (2) the record does not contain any evidence to prove that the no contact order violations listed in the judgments the court admitted into evidence were qualifying convictions under RCW 26.50.110. The following presents these arguments.

***(1) The Record Does Not Contain Substantial Evidence that the Defendant Was the Person Named in Exhibits 7 to 14.***

In *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), the court addressed the issue of what constitutes substantial evidence on this issue of identity. In this case the state charged the defendant Dallas E. Hunter with attempted escape, alleging that he had tried to leave the Cowlitz County Jail where he was being incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held “pursuant to a felony conviction,” as was required under the statute, the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named “Dallas E. Hunter” as the defendant. Following conviction, the defendant appealed, arguing in part that the trial court erred when it admitted the judgments because the state failed to present evidence that he was the person

identified therein.

In addressing this argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant's name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction. The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n.1, 572 P.2d 734 (1977).

*State v. Hunter*, 29 Wn.App at 221.

In *Hunter*, the state had also presented the evidence of a Probation Officer from the Department of Corrections who had revoked the defendant from his work release program and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County Felony Convictions. Based upon this "independent" evidence to prove that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the judgments. The court stated:

We hold that [the Probation Officer's] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments

and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents. *State v. Brezillac, supra.*

*State v. Hunter*, 29 Wn.App. At 221-222.

In the case at bar, the state charged the defendant with felony violation of a no contact order. Thus, the state had the burden of proving both that the defendant was the person listed in the prior judgments and that he was the person restrained in the no contact orders entered into evidence. The only evidence the state presented on these two critical elements was the identity of names. No witness testified that the defendant was the person named in the no contact order and no witness testified that the defendant was the person listed in the judgment and sentences. As the court in *Hunter* clarifies, “identity of names alone” is not substantial evidence. Thus, the fact that Exhibits 7 through 14 contain citations, informations, and judgments for a person with the same name as the defendant it is insufficient to prove that the defendant was the same person. As a result, the trial court erred when it entered judgment against the defendant for felony violation of a no contact order.

***(2) There Is No Evidence that the Defendant’s Prior Convictions Constitute Qualifying Prior Convictions under RCW 26.50.110.***

As the foregoing analysis clarified, 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 *State v. Carmen*, 118 Wn.App. 655, 77 P.3d 368 (2003), 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), this court 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), arguing 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 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 in the record to support the existence of the character of the underlying orders violated.

In the case at bar, the state introduced Exhibits 7 through 14 in an attempt to prove that the defendant had "two prior convictions for violating an order granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020." Exhibits 7, 9, and 11 were citations alleging that the defendant had committed the crime

of “Violation of a Protection Order” on a number of occasions. Exhibit 13 was an amended information charging the defendant with two misdemeanor violations of the no-contact order issued in Cowlitz County Superior Court Cause No. 06-2-01965-3. Exhibit 8, 10, 12, and 14 are copies of judgments showing that the defendant was convicted of the charges alleged in Exhibits 7, 9, 11, and 14.

The problem with these exhibits is that while it appears that the defendant has more than two violations of some type of a protection order entered in Cowlitz County Superior Court Cause No. 06-2-01965-3, there is no evidence in the record to establish what type of a no-contact protection order was issued in this case. Just why the state did not get a copy of the protection order issued in this cause number is unclear, but what is clear is that absent the introduction of that order, it is impossible to tell whether or not the defendant’s prior convictions arise from violating one of the qualifying orders listed in RCW 26.50.110(5).

In fact, there are other types of protection orders extant under Washington law other than protection orders “granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020,” the prior violation of which elevates a misdemeanor to a felony under RCW 26.50.110(5). For example, RCW 9A.46.040 allows for the issuance of protection orders under certain

circumstances. This statute reads as follows:

(1) Because of the likelihood of repeated harassment directed at those who have been victims of harassment in the past, when any defendant charged with a crime involving harassment is released from custody before trial on bail or personal recognizance, the court authorizing the release may require that the defendant:

(a) Stay away from the home, school, business, or place of employment of the victim or victims of the alleged offense or other location, as shall be specifically named by the court in the order;

(b) Refrain from contacting, intimidating, threatening, or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named by the court in the order.

(2) An intentional violation of a court order issued under this section is a misdemeanor. The written order releasing the defendant shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 9A.46 RCW. A certified copy

RCW 9A.46.040.

This statute allows the court to set a "no contact" provision as a condition of release for a person alleged to have committed a harassment charge. While the intentional violation of this statute is itself a crime, as well as justification for revoking pretrial release, it is not an order "granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020." Thus, a conviction for violating an order entered under this statute would not constitute a qualifying conviction under RCW 26.50.110(5) sufficient to raise a misdemeanor

violation of a no contact order to a felony.

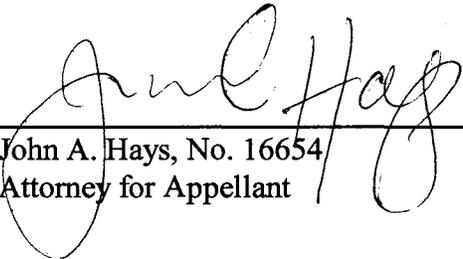
In the case at bar, the defense does not necessarily argue that the defendant's prior convictions for violation of a protection order arose out of RCW 9A.46.040, although they might well have been. However, the defense does argue that absent the admission of the protection order or orders that the defendant was previously convicted of violating, there is no substantial evidence to prove that the defendant has two prior convictions for violating protection orders "granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020." Thus, in the case at bar, the trial court erred when it entered judgement of conviction against the defendant for felony violation of a no contact order. Consequently, this court should vacate the defendant's judgment and sentence and remand his case to the trial court for entry of a judgment and sentence for misdemeanor violation of a no contact order.

**CONCLUSION**

The trial court erred when it entered judgement of conviction against the defendant for felony violation of a no contact order because substantial evidence does not support this charge. This court should vacate the defendant's judgment and sentence and remand his case to the trial court for entry of a judgment and sentence for misdemeanor violation of a no contact order.

DATED this 29th day of May, 2009.

Respectfully submitted,



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 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.

**INSTRUCTION NO. 12**

It is not a defense to the crime of Violation of a No-Contact Order that the person protected by the order consented to or allowed the contact. The defendant has the sole responsibility to avoid or refrain from violating the order.

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY Cathy Russell  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  
Respondent

vs.

GEMAR, Michael Jerome  
Appellant

NO. 07-1-01557-1  
COURT OF APPEALS NO:  
38467-1-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON )  
County of Cowlitz ) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On May 29<sup>th</sup>, 2009 , I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIDAVIT OF MAILING

to the following:

ARTHUR D. CURTIS  
CLARK COUNTY PROSECUTING ATTY  
1200 FRANKLIN ST.  
P.O. BOX 5000  
VANCOUVER, WA 98666-5000

MICHAEL J. GEMAR #269597  
STAFFORD CREEK CORR CTR.  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

Dated this 29<sup>TH</sup> day of MAY, 2009 at LONGVIEW, Washington.

Cathy Russell  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS

AFFIRMATION OF SERVICE - 1

John A. Hays  
Attorney at Law  
1402 Broadway  
Longview, WA 98632  
(360) 423-3084