

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	1
C. STATEMENT OF THE CASE	2
D. 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	7
E. CONCLUSION	16
F. APPENDIX	
1. Washington Constitution, Article 1, § 3	17
2. United States Constitution, Fourteenth Amendment	17
3. RCW 26.50.110	17

TABLE OF AUTHORITIES

Page

Federal Cases

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 7

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 8

State Cases

State v. Arthur, 126 Wn.App. 243, 108 P.3d 169 (2005) 10, 11

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 7

State v. Carmen, 118 Wn.App. 655, 77 P.3d 368 (2003) 10, 11

State v. Gray, 134 Wn.App. 547, 138 P.3d 1123 (2006) 11

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 8

State v. Johnson, 12 Wn.App. 40, 527 P.2d 1324 (1974) 8

State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005) 11

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 7

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 8

Constitutional Provisions

Washington Constitution, Article 1, § 3 7

United States Constitution, Fourteenth Amendment 7

Statutes and Court Rules

RCW 9A.46.040 14
RCW 26.50.110 8-11, 14

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 guilt on a charge unsupported by substantial evidence?

STATEMENT OF THE CASE

On January 5, 2008, Deputy Sheriff Pat Schallert was on routine patrol when she was dispatched to a disturbance at 937 Olsen Road in Longview. RP 67-68.¹ At the time, this address was the residence of Joyce Gemar, the defendant Michael Gemar's mother. RP 59. As Deputy Schallert parked in the driveway, she saw the defendant come out of the front door, enter and start a vehicle in the driveway, and begin to back out. RP 70-71. As he did, Deputy Schallert ordered the defendant to stop the vehicle, get out, and walk back to her. RP 72-73. Although the defendant did stop the vehicle and get out, he did not walk back to the Deputy. *Id.* Rather, he walked back toward the front door. *Id.* At about this time, a second Deputy arrived on the scene, and he and Deputy Schallert placed the defendant under arrest for violation of a no contact order. RP 73-74.

In fact, on May 30, 2007, Judge Stephen Warning of the Cowlitz County Superior Court had issued a post-conviction Domestic Violence No-Contact Order under RCW 10.99, prohibiting the defendant Michael Gemar from having contact with his mother, or coming within 100 yards from 937 Olsen Road in Longview. *Exhibit 9.* This no-contact order, which the

¹The record in this appeal includes one, continuously numbered verbatim report of the hearing from 6/11/08, the jury trial from 6/13/08; and the sentencing hearing from 10/30/08. It is referred to herein as "RP [Page#]."

defendant signed, expires on May 17, 2009. *Id.*

By information filed January 9, 2008, 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 two prior convictions for violating no contact orders. CP 1. This portion of the information reads as follows:

[A]nd furthermore, 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 RCW 10.99.020 and against the peace and dignity of the State of Washington.

CP 1.

This case later came on for trial before a jury, during which the state called two witnesses, including Deputy Schallert. RP 55, 65. These witnesses testified to finding the defendant at 937 Olsen Road in Longview on the day in question and placing him under arrest. RP 61, 67-73. One of these witnesses also identified Exhibit 9, which was a copy of the order Judge Warning entered on May 30, 2007. RP 79. The court admitted this exhibit without objection. *Id.* In addition and at the state's request, the court also admitted the following exhibits into evidence in this case:

Exhibit 1: Citation in Cowlitz County District Court Cause No. 67405 alleging that 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 2: 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, the defendant was found guilty of the crime of “PROTECTION ORDER VIOLATION.”

Exhibit 3: Citation in Cowlitz County District Court Cause No. 67247 alleging that Michael Gemar committed the following two crimes: “Violation DV Protection Order 12/20/06” and “Violation DV Protection Order 1/09/07.”

Exhibit 4: 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, the defendant was found guilty of the following crimes: “Count 1 - PROTECTION ORDER VIOLATION,” and “Count 2 - PROTECTION ORDER VIOLATION.”

Exhibit 5: Citation in Cowlitz County District Court Cause No. 66892 alleging that Michael Gemar committed the following crime: “VIOLATION PROTECTION ORDER #06-2-01965-3” on 1/28/07.

Exhibit 6: 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, the defendant was found guilty of the following crime: “Count 1 – PROTECTION ORDER VIOLATION.”

Exhibit 7: 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, the defendant Michael Gemar violated the provisions of the protection order entered in Cause No. 06-2-01965-3.

Exhibit 8: 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, the defendant was sentenced for the following two crimes: “Count I VIOLATION OF A PROTECTION ORDER” and “Count II VIOLATION OF A

PROTECTION ORDER.”

See Exhibits 1, 2, 3, 4, 5, 6, 7, and 8; RP 74-94.

In addition, the court also admitted Exhibit 11, which was a stipulation of the parties that the defendant Michael Gemar was the person named and identified in Exhibits 1 through 8. *See* Exhibit 11. However, the state did not offer, and the court did not admit, a copy of the protection order or orders that the defendant was charged with violating and was convicted of violating in Exhibit 1 through 8. *See* Exhibits 1 through 11 and RP 1-125.

Following the presentation of the state’s case, the defendant took the stand and acknowledged the existence of the no contact order. RP 99-116. However, he stated that he had gone to his mother’s house because she was an invalid and needed his help. *Id.* After the defense closed its case and the state presented brief rebuttal evidence, the court instructed the jury, with the defense objecting the court’s decision to give Instruction No. 11, which stated as follows:

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

CP 29; RP 127.

Following instruction and argument by counsel, the jury retired for deliberation. RP 149. The jury later returned a verdict of “guilty” to the

crime charged in the information. RP 150-155; CP 32. The jury also returned a special verdict, finding that the defendant had two prior convictions for violation of a no contact order. CP 34. At a later hearing, the court sentenced the defendant to 41 months in prison on a standard range of from 41 to 54 months. CP 36-48. The defendant thereafter filed timely notice of appeal. CP 52.

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 and the United States Constitution, 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 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.

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 1 through 8 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 1, 3, and 5 were citations alleging that the defendant had committed the crime of “Violation of a Protection Order” on a number of occasions. Exhibit 7 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. In fact, the citations constituting Exhibit 1 and 5 also include this latter number, although the citation in Exhibit 3 does not. Exhibit 2, 4, 6, 8 are copies of judgements showing that the defendant was convicted of the charges alleged in Exhibits 1, 3, 5, and 7.

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 of 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 qualify as 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 ordered “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

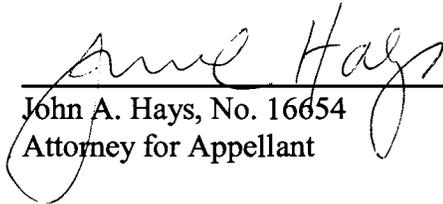
conviction against the defendant for felony violation of a no contact order. Consequently, this court should vacate the defendant judgment and sentence and remand his case to the trial court for entry of a judgment and sentence for misdemeanor violation of a no contact order.

CONCLUSION

Substantial evidence does not support the finding that the defendant had two or more convictions for violating the type of protection order listed in RCW 25.50.110(5). As a result, the court should vacate the defendant's conviction and remand for entry of judgment on the crime of misdemeanor violation of a no contact order.

DATED this 8th day of April, 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.

COURT OF APPEALS
DIVISION II
09 APR 10 PM 12:50
STATE OF WASHINGTON
BY
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

STATE OF WASHINGTON,
Respondent

vs.

GEMAR, Michael Jerome
Appellant

NO. 08-1-00025-4
COURT OF APPEALS NO:
38477-9-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON)
) : ss.
County of Cowlitz)

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 April 8th, 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 8TH day of APRIL, 2009 at LONGVIEW, Washington.

Cathy Russell
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS