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**NO. 38868-5-II**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**WILLIAM GLEN SMITH,**

**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***

1. The trial court violated the defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held 13 separate arguments during trial on the admissibility of evidence in proceedings closed to the public and closed to the defendant. RP 204-205, 218-221, 229, 255-260, 270-272, 294-297, 311-315, 326-328, 346-347, 399-403, 446-450, 451-452, 544-546.

2. Trial counsel's failure to cross-examine the complaining witness about her statement that the defendant had not raped her denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. RP 487-495.

3. The perjury conviction is unsupported by substantial evidence and violates the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. RP 1-563.

4. The trial court erred when it entered a community custody condition unrelated to the crime, and when it entered a community custody condition that requires the defendant to waive his right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. CP 116-130.

5. The trial court erred when it entered sexual assault protection orders on an offense for which the defendant was acquitted and on an offense the state did not charge. CP 131-136.

*Issues Pertaining to Assignment of Error*

1. Does a trial court violate a defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it holds 13 separate arguments during trial on the admissibility of evidence in proceedings closed to the public and closed to the defendant?

2. Does a trial counsel's failure to cross-examine the complaining witness concerning her admission that the defendant had not raped her deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the admission of that evidence would have resulted in a verdict of acquittal?

3. Does entry of judgment against a defendant for an offense unsupported by substantial evidence violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

4. Does a trial court err if it enters a community custody condition unrelated to the crime or if it enters a community custody condition that requires the defendant to waive the right to silence under Washington

Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment?

5. Does a trial court err if it enters sexual assault protection orders on an offense for which the defendant was acquitted and on an offense the state did not charge?

## STATEMENT OF THE CASE

### *Factual History*

In December of 2007, 22-year-old Angel Crowl and her infant son left the house they shared with her estranged husband and mother-in-law in Lewis County and moved into the defendant William Glen Smith's house at 229 Washburn Road in Kelso. RP 164-167. The defendant is Angel's paternal uncle. RP 161-164. He lived at the 229 Washburn Road address with his wife, their three minor children, his brother and sister-in-law, and Angel's sister Patricia. RP 164-167. The defendant's family lived downstairs, the defendant's brother and sister-in-law lived upstairs, and Angel's sister lived in a small trailer behind the house. RP 168-172. For the first week Angel stayed at the defendant's house, she slept on the couch. *Id.* She then moved into the small travel trailer behind the house after her younger sister moved out. *Id.*

Not long after Angel moved into the defendant's house, she entered into a written contract with him whereby he would provide her with clothing, help with her child, and help with her divorce, in return for sexual favors for 10 years. RP 168-172; Exhibit 5. In the contract, Angel purported to give up the right to refuse consent to sexual contact, gave up her right to claim that he had committed a crime, and agreed to pay the defendant \$10,000.00 in pro-rated damages if she broke the contract. *Id.* According to Angel, over the

next couple months after signing this contract, the defendant had sexual intercourse with her on many occasions. RP 172-184. On the first few occasions, she claimed that she told him “no.” RP 172-177, 184-186. However, he would point out that under the contract he had the right to have sex with her when he wanted. *Id.* Eventually, she quit saying “no” because he just ignored her anyway. RP 170-179. The only threat she claimed he ever made was to make her pay the \$10,000.00 under the contract if she refused to have sex with him. RP 196-202.

In fact, the defendant had prepared two very similar contracts, one for Angel’s sister Patricia, and one for Pauline Johnson-Junkert, a 20-year-old daughter of a family friend. RP 210-218, 234-239; Exhibit 5 & 6. According to Angel’s sister Patricia, she signed the contract, but only after telling the defendant that she would not agree to having sex with him or letting her touch her sexually. RP 210-218. However, he did buy her clothing and lingerie, which she modeled for him, and on one occasion in the car he grabbed her breast. RP 215-218, 222-223.

The contract with Pauline Johnson-Junkert was different from the contracts with Angel and Patricia because in it the defendant agreed to pay for breast augmentation surgery, which she wanted. RP 234-239. However, as with the other contracts, the defendant bought Pauline clothing and lingerie, which she modeled for the defendant, but only with her mother

present. *Id.* According to Pauline and her mother, on one occasion they were at the Kelso Sheri's Restaurant and went outside with the defendant to smoke. RP 236-239, 246-248. While outside, the defendant reached over and fondled Patricia's breast. *Id.*

By the end of February, Angel told her sister and Pauline's mother about her claims that the defendant had raped her. RP 186-192. They called the police, who interviewed Angel and took her to the hospital for an examination. RP 263-270. The medical personnel at the hospital verified that she was pregnant. RP 396-409. Angel later underwent an abortion. RP 186-191. DNA testing of the fetus confirmed that there was a 99.97% probability that the defendant was the father. RP 410-427.

On March 11, 2007, a number of deputies from the Cowlitz County Sheriff's Office went to the defendant's home to execute a search warrant. RP 286-290. Prior to the execution of the warrant, two of the deputies asked the defendant to come with them to answer some questions. RP 335. The defendant agreed, and the two deputies took him to an interview room at the Sheriff's office in West Kelso. RP 335, 381. During the majority of this interview, the defendant denied that he had engaged in a sexual relationship with his niece Angel. RP 342, 381-386. He also denied ever writing or entering into any contract with Angel or anyone else in which he would be entitled to sexual services. *id.*

During this almost five hour interview, the deputies asked the defendant if he would provide them with a written statement. RP 343-346. In response to this request, the defendant dictated a statement which Deputy Joe Reiss wrote on a preprinted form created by the sheriff's office. *Id.* The bottom portion of this form contains the following printed statement:

I, \_\_\_\_\_, do certify (declare) under penalty of perjury under the laws of the State of Washington that I have read the forgoing statement or it has been read to me and I know the contents of the statement, and that the foregoing statement is true and correct. (RCW 9A.72.085).

Exhibit 34.

According to Deputy Reiss, he wrote the defendant's statement on the form as the defendant dictated it. RP 343-346. He also wrote the defendant's name in the blank provided at the bottom of the form, and read the statement to the defendant in its entirety. *Id.* The defendant then signed the statement, which says in relevant part that he did not have a sexual relationship with his niece Angel. RP 350-353; Exhibit 34. After the defendant signed this statement, both deputies continued to confront the defendant with the evidence that they had that indicated that he did have a sexual relationship with his niece. RP 353-358.

After about five continuous hours of interrogation, the defendant asked for a smoke break. RP 353-358. In response, Deputy Reiss took the defendant outside the building where they both smoked cigarettes. *Id.* While

taking this smoke break, Deputy Reiss told the defendant that he would be better off if he just admitted that he had a consensual sexual relationship with Angel. *Id.* In response, the defendant admitted that he had engaged in a consensual sexual relationship with his niece. *Id.* After this admission, Deputy Reiss told the defendant that he was under arrest, handcuffed him, and took him to the jail. *Id.*

### ***Procedural History***

By amended information filed November 17, 2008, the Cowlitz County Prosecutor charged the defendant William Glen Smith with 10 counts of third degree rape against Angel Crowl, one count of fourth degree assault against Patricia Smith, and one count of second degree perjury. CP 56-61. The perjury charge alleged the following:

The defendant, in the County of Cowlitz, State of Washington, on or about March 11, 2008, with intent to mislead a public servant in the performance of his duty, to-wit: Detectives Joe Reiss and Bruce Haebe who were conducting an official investigation, did make a materially false statement, to-wit: did deny he had sexual intercourse with his niece, Jane Doe, knowing such statement was false, under an oath required or authorized by law, contrary to RCW 9A.72.030(1) and against the peace and dignity of the State of Washington.

CP 60.

Following a hearing under CrR 3.5, the case came to trial before a jury with the state calling 16 witnesses, including Angel Crowl, Patricia Smith, Pauline Johnson-Junkert, Pauline's mother, and Detectives Reiss and

Haebe, among others. CP 161-493. These witnesses testified to the facts contained in the preceding factual history. *See Factual History*. During cross-examination of Angel Crowl, the defense failed to ask her whether or not she had visited a family friend by the name of Lois Lindfeldt in February, and whether or not she had told Ms Lindfeldt that the defendant had never raped her. RP 161-208.

In addition, on thirteen separate occasions during the testimony of witnesses before the jury, the court held arguments on the admissibility of certain testimony outside the presence of the public and outside the presence of the defendant. RP 204-205, 218-221, 229, 255-260, 270-272, 294-297, 311-315, 326-328, 346-347, 399-403, 446-450, 451-452, 544-546. This happened during both the testimony of state's witnesses and the testimony of defense witnesses. *Id.* At no point prior, during, or after these closed hearings did the court present any analysis as to why it was holding these private arguments, other than to avoid the apparent inconvenience of sending the jury out of the courtroom so the public and the defendant could hear the various arguments on the admissibility of the testimony that was then subject to an objection by either the state or the defendant. *Id.*

Following the close of the state's case, the defense proposed to call Lois Lindfeldt as a witness, and the state objected, arguing that her testimony concerned statements Angel Crowl had made to her and were inadmissible

hearsay. RP 494-503. The defense responded that her testimony would rebut the evidence of Angel Crowl with prior inconsistent statements. *Id.* Following argument, the defense called Ms Lindfeldt to the stand to make an offer of proof outside the presence of the jury. *Id.* During this offer of proof, Ms Lindfeldt testified that she was a friend of the defendant's family, that she was acquainted with Angel Crowl, that in February of 2008, Angel Crowl had occasion to visit Ms Lindfeldt's house, and that during that visit, Angel Crowl had specifically stated that the defendant had never raped her. *Id.* After this offer of proof, the court ruled that her testimony was inadmissible hearsay, and could not be used to rebut the evidence of Angel Crowl because the defense had not cross-examined Angel Crowl about this alleged statement. *Id.* Following this ruling, the defense spoke about the possibility of calling Angel Crowl as a witness to get her to admit the substance of her statement to Ms Lindfeldt. RP 191-561.

After the defense closed its case, the court instructed the jury on all counts, with neither party making any objections. RP 562, 563-578. Both parties then presented closing argument and the jury retired for deliberations. RP 578-607. The jury later returned verdicts of "guilty" to four counts of third degree rape (counts I, II, III and IV), "guilty" to second degree perjury (count XII), and "not guilty" to seven counts of third degree rape (counts V, VI, VII, VIII, IX, X, and XI). RP 612-615, CP 96-107. Following the

preparation of a presentence investigation report by the Department of Corrections, the court sentenced the defendant within the standard range on all counts, and imposed 36 to 48 months community custody, which included the following conditions, among others:

- [X] Submit to, and at your expense, a polygraph examination . . . as directed by corrections officer or treatment provider.
- [X] Have no unsupervised contact with male/female/any children under the age of eighteen . . .
- [X] The defendant shall not live or stay in the residence where (minor child/females) are present unless granted specific permission by your community corrections officer or the court.

CP 123.

The court also imposed “Additional Conditions of Sentence” in an appendix to the judgment and sentence. These “additional conditions” included the following:

3. Submit to polygraphs at own expense for the purpose of monitoring conditions.

CP 127.

As part of the judgment and sentence in this case, the court issued a “post-conviction” sexual assault protection order prohibiting the defendant from having contact with Angel Crowl. CP 135-136. However, in spite of the fact that the defendant was not convicted of committing any crime against either Patricia Smith or Pauline Johnson-Junkert, the court also issued “post-

conviction” sexual assault protection orders prohibiting the defendant from having contact with these two women. CP 131-134.

Following imposition of the sentence, the defendant filed timely notice of appeal. CP 152.

## ARGUMENT

### I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT HELD 13 SEPARATE ARGUMENTS DURING TRIAL ON THE ADMISSIBILITY OF EVIDENCE IN PROCEEDINGS CLOSED TO THE PUBLIC AND CLOSED TO THE DEFENDANT.

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, every person charged with a crime is guaranteed the right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006). In addition, Washington Constitution, Article 1, § 10, also guarantees the public the right to open accessible proceedings. *Id.* This latter constitutional provision states: “Justice in all cases shall be administered openly.” *State v. Easterling*, 157 Wn.2d at 174. The right to a public trial under these constitutional provisions ensures the defendant a fair trial, reminds officers of the court of the importance of their functions, encourages witnesses to come forward, and discourages perjury.” *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Although a defendant's right to a public trial is not absolute, the “protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Thus, under the decision in *Bone-Club*, a court must weigh the following five factors to

determine whether it may properly close a portion of a trial:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

*State v. Bone-Club*, 128 Wn.2d at 258-59.

When ordering a hearing closed, the court must also enter specific findings of fact justifying the decision to close the courtroom. *State v. Easterling*, 157 Wn.2d at 175. These rules also apply when the plain language or the effect of the trial court's ruling imposes a closure, and the burden is on the State to overcome the strong presumption that the courtroom was closed. *State v. Brightman*, 155 Wn.2d at 516; *see e.g.*, *State v. Duckett*, 141 Wn.App. 797, 807 n. 2, 173 P.3d 948 (2007) (On appeal, the burden is on the state to show that the closing did not occur where the "trial judge stated she intended to interview the selected jurors in a jury room.").

For example, in *State v. Heath*, — Wn.App. —, 206 P.3d 712 (2009),

the state charged the defendant with two counts of unlawful possession of a firearm. When the case came on for trial before a jury, the court held portions of pretrial motions and portions of voir dire in chambers without performing any analysis under *Bone-club*. The judge, the prosecutor, the defense attorney, and the defendant, were the only persons present in chambers during these hearings (except for the various prospective jurors who were examined). At one point, the defense attorney stated that he had no objection to this procedure. Following conviction, the defendant appealed, arguing that the trial court had violated her right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held portions of the pretrial motions and portions of voir dire in chambers to the exclusion of those sitting in the courtroom.

The state responded to these claims by arguing that no *Bone-Club* analysis was necessary because (1) the trial court did not explicitly close the hearings, and (2) neither party had moved to close the hearings. The State also argued that even if there was a closure, the defendant either invited the error or waived her right to public hearings. In addressing these arguments, this division of the Court of Appeals first addressed the standard of review that applied, and the claim of waiver. This court held:

Whether a trial court procedure violates the right to a public trial

is a question of law we review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The remedy for such violation is reversal and remand for new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). A defendant who fails to object at the time of the closure does not waive the right.

*State v. Heath*, 206 P.3d at 714.

The court then went on to address the applicability of *Bone-Club* by first noting that in *State v. Erickson*, 146 Wn.App. 200, 11, 189 P.3d 245 (2008), the court specifically held that conducting *voir dire* out of the courtroom constitutes a “closure” that mandates a *Bone-Club* analysis even when the trial court has not explicitly closed the proceedings. The court also noted the Division III was in accord but that Division I was contrary. See *State v. Frawley*, 140 Wn.App. 713, 720, 167 P.3d 593 (2007) (Division III holding the same); *but see State v. Momah*, 141 Wn.App. 705, 714, 171 P.3d 1064 (2007), *review granted*, 163 Wn.2d 1012, 180 P.3d 1291 (2008) (Division I holding that conducting *voir dire* outside of the courtroom absent an explicit order does not constitute a “closure”). In accordance with its prior ruling in *Erickson*, the court held that *Bone-Club* applied. As a result, it reversed the defendant’s convictions and remanded for a new trial. The court also held the following on the state’s claim that (1) the trial court’s *sua sponte* decision to close a portion of the trial did not invoke *Bone-Club*, and (2) that the defense attorney’s statement that he did not object to the procedure constituted a waiver by the defendant. The court stated:

The State argues that the trial court was not required to engage in a *Bone-Club* analysis because neither party moved to close the hearings, thereby triggering the need for such an analysis. This argument fails because a trial court's sua sponte decision to close public hearings triggers the need for a *Bone-Club* analysis.

The State also argues that Heath waived her right to public hearings on the disputed issues. But a defendant, by failing to object, does not waive her constitutional rights to a public trial. Heath did not waive the right by failing to object.

We conclude that the trial court violated Heath's right to a public trial by hearing pretrial motions and interviewing juror eight in chambers without first engaging in a *Bone-Club* analysis. Because we presume prejudice, we reverse and remand for a new trial.

*State v. Heath*, 206 P.3d at 716 (citations and footnote omitted).

Although the case at bar did not deal with the exclusion of the public during portions of *voir dire*, the record on this case shows that the court held thirteen hearings outside the presence of the public during trial testimony in order to determine the admissibility of evidence or the propriety of certain questions propounded to the witness on the stand. While the court in *Heath* spoke primarily in terms of holding portions of *voir dire* in private, the court was also addressing the issue of holding pretrial motions in private. Thus, in the same manner that the trial court in *Heath* violated the defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, by holding portions of *voir dire* and pretrial motions outside the presence of the public, so the trial court in the case at bar violated the defendant's right to a public trial under Washington

Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held thirteen hearings outside the presence of the public and the defendant. As a result, the defendant is entitled to a new trial.

**II. TRIAL COUNSEL’S FAILURE TO CROSS-EXAMINE THE COMPLAINING WITNESS CONCERNING HER ADMISSION THAT THE DEFENDANT HAD NOT RAPED HER DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a

reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to cross-examine Angel Crowl about the fact that in February she had told Ms Lindfeldt that the defendant had not raped her. Defense counsel's failure to ask this question kept this critical piece of evidence from the jury in one of two alternate ways. First, had Angel Crowl admitted that she made this statement, then it would have seriously uncut her claim that she had not consented to sexual intercourse, which the defendant claimed in his testimony. Second, as the following explains, had Angel Crowl denied making the statement, then the defense would have been free to call Ms Lindfeldt as a witness to testify to the jury that Angel Crowl had indeed made the statement.

Under ER 801(d)(1)(i), prior inconsistent statements by a witness are

not hearsay when: “[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.” A witness’s prior statement is “inconsistent” when it has been compared with, and found different from, the witness’s trial testimony. *See State v. Horton*, 116 Wn.App. 909, 919 n. 33, 68 P.3d 1145 (2003). Therefore, “to the extent that a [witness’s] own prior inconsistent statement is offered to cast doubt on his or her credibility, it is not offered to prove the truth of the matter asserted, it is nonhearsay, and it may be admissible ‘to impeach.’” *Horton*, 116 Wn.App. at 919, 68 P.3d 1145 n .33 (quoting *State v. Williams*, 79 Wn.App. 21, 26, 902 P.2d 1258 (1995)).

Subject to this rule, had the defense asked Angel Crowl if she had told Ms Lindfeldt in February that the defendant had never raped her, and had Angel denied making the statement, then the defense would have been free to call Ms Lindfeldt to rebut this claim. However, since the defense failed to cross-examine Angel Crowl on this point, Ms Lindfeldt’s testimony on the subject became inadmissible hearsay, as the trial court correctly ruled. Under the facts of this case, this failure fell below the standard of a reasonably prudent attorney. First, this admission by Angel Crowl dealt with the heart of her claim that the defendant had raped her and it was perhaps the best

piece of evidence that the defense had to rebut the state's case. Second, as the argument on the admissibility of this evidence reveals, and as the presentation of Ms Lindfeldt's testimony by an offer of proof also reveals, the defense had intended to present this evidence to the jury. Thus, trial counsel's failure to effectively cross-examine Angel Crowl fell below the standard of a reasonably prudent attorney.

In the case at bar, the only evidence the state had of lack of consent was Angel Crowl's claims that she said "no" prior to the first few incidents of intercourse. While the contract may be argued as evidence of her lack of consent, it can just as easily be argued as evidence that every incident of intercourse was consensual, as the defendant claimed, else why would she have signed the contract. The point is that the state's case was far from overwhelming. Indeed the verdicts of four convictions and seven acquittals on the same charges also point to the equivocal nature of the evidence in the minds of the jury. Under these circumstances, it is more likely than not that had defense counsel properly elicited Angel Crowl's February denial of rape, either through her admission on cross-examination or through Ms Lindfeldt's testimony, the jury would have acquitted on the first four counts, just as it did on the remaining seven counts. As a result, the defendant is entitled to a new trial based upon the denial of effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution,

Sixth Amendment.

**III. THE PERJURY CONVICTION IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND VIOLATES THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

As a part of the due process rights guaranteed under both 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 trial court charged the defendant in count XII with second degree perjury under RCW 9A.72.030(1), which states as follows:

(1) A person is guilty of perjury in the second degree if, in an examination under oath under the terms of a contract of insurance, or with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement, which he or she knows to be false under an oath required or authorized by law.

RCW 9A.72.030(1).

However, under RCW 9A.72.060, a charge of perjury cannot be sustained if the person making the false statement retracts it in the “same proceeding” in which it was made. This statute states the following on this subject.

No person shall be convicted of perjury or false swearing if he retracts his false statement in the course of the same proceeding in which it was made, if in fact he does so before it becomes manifest that the falsification is or will be exposed and before the falsification substantially affects the proceeding. Statements made in separate hearings at separate stages of the same trial, administrative, or other official proceeding shall be treated as if made in the course of the same proceeding.

RCW 9A.72.060.

In determining the application of this statute to the facts of the case at bar, a review of the charging document is necessary to determine just what statement the state claimed was perjurious. This count in the information alleged the following:

The defendant, in the County of Cowlitz, State of Washington, on or about March 11, 2008, with intent to mislead a public servant in the performance of his duty, to-wit: Detectives Joe Reiss and Bruce Haebe who were conducting an official investigation, did make a materially false statement, to-wit: did deny he had sexual intercourse with his niece, Jane Doe, knowing such statement was false, under an oath required or authorized by law, contrary to RCW 9A.72.030(1) and against the peace and dignity of the State of Washington.

CP 60.

As the information clarifies, the state charged the defendant for second degree perjury for signing a written affirmation in which the defendant “did deny he had sexual intercourse with his niece.” Seen in the light most favorable to the state, the record reveals that during the official investigation of the case, the defendant lied to Deputy Reiss and claimed he

did not have sexual relations with his niece. For the purposes of the perjury statute, this statement was material to the investigation, the defendant knew it to be false, he made it with the intent of misleading Deputy Reiss, who qualified as a “public servant in the performance of his . . . duty.” Finally, the defendant made this statement as part of an affirmation, which constitutes a sworn statement “authorized by law.” Thus, the defendant’s statement constituted a violation of law unless he retracted the statement under RCW 9A.72.060.

As the uncontested testimony of Deputy Reiss explained, after the defendant signed the statement, Deputy Reiss and Haebe continued to confront the defendant with their belief that he was lying. Finally, during the cigarette break, the defendant admitted that he had, in fact, had a sexual relationship with his niece. Since this retraction was made as a part of the same “proceeding” and was made “before it becomes manifest that the falsification” was exposed and “before the falsification substantially affect[ed] the proceeding, the statutory prohibition to a perjury conviction found in RCW 9A.72.060 applied. As a result, the trial court erred when it entered judgment against the defendant for second degree perjury because substantial evidence does not support this charge.

**IV. THE TRIAL COURT ERRED WHEN IT ENTERED A COMMUNITY CUSTODY CONDITION UNRELATED TO THE CRIME, AND WHEN IT ENTERED A COMMUNITY CUSTODY CONDITION THAT REQUIRES THE DEFENDANT TO WAIVE HIS RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT.**

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant argues that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete

alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar, the jury found the defendant guilty of four counts of third degree rape under RCW 9A.44.060. Under RCW 9.94A.030(41)(a)(i), the term "sex offense" is defined to include any "felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11)." Thus, a violation of RCW 9A.44.060 is a sex offense. The imposition of community custody for sex offense sentences of confinement for one year or

more is controlled by RCW 9.94A.715. This statute states in part:

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712. . . . committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. . . .

RCW 9.94A.715(1).

As this statute explicitly states it applies to when the court sentences a person “to the custody of the department for a sex offense not sentenced under RCW 9.94A.712.” Thus the trial court in the case at bar had authority to impose community custody. Subsection 2 of this statute states the following concerning the conditions of community custody the trial court may impose:

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender’s risk of reoffense and may establish and modify additional conditions of the offender’s community custody based upon the risk to community safety. In addition, the department may require the

offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(2).

As RCW 9.94A.715(2)(a) states, “the conditions of community custody shall include those provided for in RCW 9.94A.700(4).” In addition, “[t]he conditions may also include those provided for in RCW 9.94A.700(5).” Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of

community placement.

RCW 9.94A.700(4).

Section (5) of this same statute provides the trial court with authority to impose further conditions. It states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5).

Under these provisions, no causal link need be established between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8<sup>th</sup> ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Julian*, 102 Wn. App. 296, 304,

9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar, the court imposed 36 to 48 months community custody, which included the following conditions, among others:

- [X] Submit to, and at your expense, a polygraph examination . . . as directed by corrections officer or treatment provider.
- [X] Have no unsupervised contact with male/female/any children under the age of eighteen . . .
- [X] The defendant shall not live or stay in the residence where (minor child/females) are present unless granted specific permission by your community corrections officer or the court.

CP 123.

The court also imposed “Additional Conditions of Sentence” in an appendix to the judgment and sentence. These “additional conditions” included the following:

3. Submit to polygraphs at own expense for the purpose of monitoring conditions.

CP 127.

The first error that the defendant argues from these conditions is the

prohibition from having contact with minors or living with minors. This is a condition that has no relationship to the facts of the case at bar at all. The victim in this case was an adult, and there was no claim or evidence that the defendant was involved in any improper conduct with a minor. Since this condition is unrelated to the crime, the trial court erred when it imposed this prohibition as a part of community custody.

The other error in the community custody conditions lies in the trial court's failure to limit the polygraph requirement in the community custody conditions in the same manner that it did in the additional conditions. In the additional conditions, the trial court specifically requires the defendant to "[s]ubmit to polygraphs at own expense for the purpose of monitoring conditions." There is no problem with this condition because it is a reasonable and necessary part of monitoring the defendant's compliance with the judgment and sentence. The problem is that the trial court did not include this limitation as part of the community custody conditions. Rather, the court simply ordered the defendant to submit to polygraphs at the discretion of his corrections officer or treatment provider. In so doing, the court authorized both the corrections officer and the treatment provider to require that the defendant undergo polygraph examinations on any subject desired, including other crimes that the defendant might have committed prior to his conviction in the case at bar.

The imposition of periodic polygraphs to help determine compliance with sexual deviancy treatment or community custody conditions is specifically allowed under RCW 9.94A.700(5)(c) as “crime-related treatment or counseling services.” Periodic polygraphs are certainly an integral part of that treatment. They can also be an aid in determining compliance with community custody conditions. The decision in *State v. Combs*, 102 Wn.App. 949, 10 P.3d 1101 (2000), illustrates this point.

In *Combs*, the defendant pled to a charge of child molestation. As part of the judgment and sentence the court ordered the defendant to submit to periodic polygraph examinations in order to monitor his compliance with his conditions of community custody. He then appealed, arguing that the trial court erred when it ordered the polygraph examinations because the order does not state the purpose or limit the subject matter of the examinations. The defendant maintained that under the decision in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), the scope of the polygraph examination must be limited to the authorized purpose of monitoring his compliance with the court’s order and that it could not be used by the state to search for other criminal violations. In addressing this argument, the court held as follows:

Relying on *Riles*, we conclude that the language of Mr. Combs’s judgment and sentence, taken as a whole, impliedly limits the scope of polygraph testing to monitor only his compliance with the community placement order and not as a fishing expedition to discover evidence of other crimes, past or present. While not

discouraging the use of pre-printed sentencing forms, we want to take this opportunity to strongly encourage the parties to carefully tailor them to conform to the particular nuances of each case. Here, Mr. Combs's judgment and sentence should have explicitly contained the monitoring compliance language. As a policy matter, cautious attention to detail in the sentencing forms will serve to better inform offenders of their rights, insure protection of those rights, and prevent confusion amongst judges, defendants and community corrections officers regarding the applicable legal standard.

*State v. Combs*, 102 Wn.App. at 952-953.

In the case at bar, the specific polygraph language in the judgment and sentence does contain appropriate limiting language. In fact, the failure to use limiting language in the community custody conditions as was used in the additional conditions invites the conclusion that the court did not intend such a limitation as part of the community custody conditions. Thus, a reasonable sexual deviancy treatment provider and a reasonable community corrections officer would interpret the first polygraph condition to require the defendant to reveal all of his prior deviant sexual acts, including those unknown to the state and which will subject him to further criminal liability. In essence then, these two provisions seen in conjunction to each other will require the defendant to waive his right against self-incrimination under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. To the extent these provisions do require such a waiver, they exceed the court's statutory and constitutional authority.

**V. THE TRIAL COURT ERRED WHEN IT ENTERED SEXUAL ASSAULT PROTECTIONS ORDERS ON AN OFFENSE FOR WHICH THE DEFENDANT WAS ACQUITTED AND ON AN OFFENSE THE STATE DID NOT CHARGE.**

Under RCW 7.90.150, the court has authority to issue sexual assault protection orders prohibiting “any person charged with or arrested for a sex offense” from “having any contact with the victim” of the person’s crime. Under this statutory scheme, the “pre-charge” protection order ceases to exist at arraignment and may be replaced by a “post-charge” protection order, which itself ceases to exist at the time the case is resolved. Subsection (2)(b) of RCW 7.90.150 states the following on this subject:

(2)(b) A sexual assault protection order issued by the court in conjunction with criminal charges shall terminate if the defendant is acquitted or the charges are dismissed, unless the victim files an independent action for a sexual assault protection order. If the victim files an independent action for a sexual assault protection order, the order may be continued by the court until a full hearing is conducted pursuant to RCW 7.90.050.

RCW 7.90.150(2)(b).

By contrast, if the accused is convicted of the charged sex offense, the court has the authority to renew the “sexual assault protection order” and extend it to up to two years beyond the expiration of the sentence the court imposes on the defendant. Section (6)(a) of RCW 7.90.150 extends this authority to the court, and states as follows:

(6)(a) When a defendant is found guilty of a sex offense as defined in RCW 9.94A.030 . . . and a condition of the sentence

restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order.

RCW 7.90.150(6)(a).

Under this statutory scheme, the adjudication is the ultimate determiner of the court's authority to issue a permanent sexual assault protection order as part of the criminal case. An acquittal or dismissal takes this authority away from the court, and a conviction creates the authority. While the court has discretion to impose such a protection order as part of the sentence of a person convicted of a "sex offense," it has no discretion to impose such a protection order as part of the criminal case of one acquitted of the crime. Of course, under RCW 7.90.050, the complaining witness may seek a protection order against an acquitted person, but such orders are issued as part of a civil proceeding completely separate from the criminal case.

In the case at bar, the state presented evidence at trial that the defendant had committed sex offenses against three women: Angel Crowl, Patricia Smith, and Pauline Johnson-Junkert. This evidence tended to prove that the defendant had committed multiple rapes against Angel Crowl, and that he had committed fourth degree assaults with sexual motivation against both Patricia Smith and Pauline Johnson-Junkert. However, the state did not choose to charge the alleged offense committed against Patricia Smith. The jury found four of the eleven sex offense charges involving Angel Crowl

proven beyond a reasonable doubt. By contrast, the jury found the defendant “not guilty” of the charge against Pauline Johnson-Junkert.

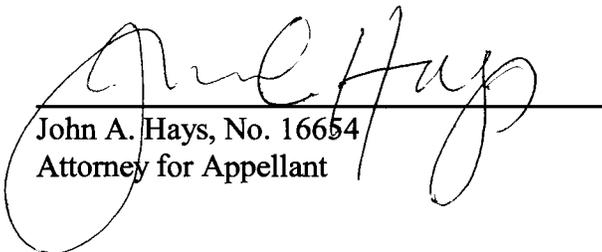
Under RCW 7.90.150(6)(a), the court had authority to impose a sexual assault protection order prohibiting the defendant from having contact with Angel Crowl, since he was convicted of a sex offense against her. The court exercised its discretion and imposed such an order. CP 135-136. However, under RCW 7.90.150(2)(b), the court had no authority to impose a sexual assault protection order prohibiting the defendant from having contact with either Pauline Johnson-Junkert or Patricia Smith. In the former case, it had no authority because the defendant was acquitted of the offense charged, and in the latter case, it had no authority because the defendant was not even charged with committing an offense against this person. In spite of this fact, the court did issue “post-conviction” protection orders prohibiting contact with Pauline Johnson-Junkert or Patricia Smith. CP 131-134. In so ruling, the court acted without authority. This court should order the Cowlitz County Superior Court to vacate these orders.

**CONCLUSION**

This court should order a new trial based upon the denial of the defendant's right to a public trial and the defendant's right to effective assistance of counsel and should vacate the defendant's conviction for perjury and remand with instructions to dismiss based upon the lack of substantial evidence. In the alternative, the court should strike the community custody condition unrelated to his crime, limit one of the community custody conditions, and should vacate the two protection orders the trial court entered without statutory authority.

DATED this 14<sup>th</sup> day of August, 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.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 10**

Justice in all cases shall be administered openly, and without unnecessary delay.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**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 7.90.150**  
**Court Initiated Issuance of Sexual Assault Protection Orders**  
**Terms, Conditions, Requirements, Etc.**

(1)(a) When any person charged with or arrested for a sex offense as defined in RCW 9.94A.030, a violation of RCW 9A.44.096, a violation of RCW 9.68A.090, or a gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030, is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim. The jurisdiction authorizing the release shall determine whether that person should be prohibited from having any contact with the victim. If there is no outstanding restraining or protective order prohibiting that person from having contact with the victim, the court authorizing release may issue, by telephone, a sexual assault protection order prohibiting the person charged or arrested from having contact with the victim or from knowingly coming within, or knowingly remaining within, a specified distance of a location.

(b) In issuing the order, the court shall consider the provisions of RCW 9.41.800.

(c) The sexual assault protection order shall also be issued in writing as soon as possible.

(2)(a) At the time of arraignment or whenever a motion is brought to modify the conditions of the defendant's release, the court shall determine whether a sexual assault protection order shall be issued or extended. If a sexual assault protection order is issued or extended, the court may also include in the conditions of release a requirement that the defendant submit to electronic monitoring. If electronic monitoring is ordered, the court shall specify who shall provide the monitoring services, and the terms under which the monitoring shall be performed. Upon conviction, the court may require as a condition of the sentence that the defendant reimburse the providing agency for the costs of the electronic monitoring.

(b) A sexual assault protection order issued by the court in conjunction with criminal charges shall terminate if the defendant is acquitted or the charges are dismissed, unless the victim files an independent action for a sexual assault protection order. If the victim files an independent action for

a sexual assault protection order, the order may be continued by the court until a full hearing is conducted pursuant to RCW 7.90.050.

(3)(a) The written order releasing the person charged or arrested shall contain the court's directives and shall bear the legend: "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

(b) A certified copy of the order shall be provided to the victim at no charge.

(4) If a sexual assault protection order has been issued prior to charging, that order shall expire at arraignment or within seventy-two hours if charges are not filed. Such orders need not be entered into the computer-based criminal intelligence information system in this state which is used by law enforcement agencies to list outstanding warrants.

(5) Whenever an order prohibiting contact is issued pursuant to subsection (2) of this section, the clerk of the court shall forward a copy of the order on or before the next judicial day to the appropriate law enforcement agency specified in the order. Upon receipt of the copy of the order, the law enforcement agency shall enter the order for one year or until the expiration date specified on the order into any computer-based criminal intelligence information system available in this state used by law enforcement agencies to list outstanding warrants. Entry into the computer-based criminal intelligence information system constitutes notice to all law enforcement agencies of the existence of the order. The order is fully enforceable in any jurisdiction in the state.

(6)(a) When a defendant is found guilty of a sex offense as defined in RCW 9.94A.030, any violation of RCW 9A.44.096, or any violation of RCW 9.68A.090, or any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030, and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order.

(b) The written order entered as a condition of sentencing shall contain the court's directives and shall bear the legend: "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

(c) A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.

(d) A certified copy of the order shall be provided to the victim at no charge.

(7) A knowing violation of a court order issued under subsection (1), (2), or (6) of this section is punishable under RCW 26.50.110.

(8) Whenever a sexual assault protection order is issued, modified, or terminated under subsection (1), (2), or (6) of this section, the clerk of the court shall forward a copy of the order on or before the next judicial day to the appropriate law enforcement agency specified in the order. Upon receipt of the copy of the order, the law enforcement agency shall enter the order for one year or until the expiration date specified on the order into any computer-based criminal intelligence information system available in this state used by law enforcement agencies to list outstanding warrants. Entry into the computer-based criminal intelligence information system constitutes notice to all law enforcement agencies of the existence of the order. The order is fully enforceable in any jurisdiction in the state. Upon receipt of notice that an order has been terminated under subsection (2) of this section, the law enforcement agency shall remove the order from the computer-based criminal intelligence information system.

**RCW 9A.72.030**  
**Perjury in the Second Degree**

(1) A person is guilty of perjury in the second degree if, in an examination under oath under the terms of a contract of insurance, or with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement, which he or she knows to be false under an oath required or authorized by law.

(2) Perjury in the second degree is a class C felony.

**RCW 9A.72.060**  
**Perjury and False Swearing – Retraction**

No person shall be convicted of perjury or false swearing if he retracts his false statement in the course of the same proceeding in which it was made, if in fact he does so before it becomes manifest that the falsification is or will be exposed and before the falsification substantially affects the proceeding. Statements made in separate hearings at separate stages of the same trial, administrative, or other official proceeding shall be treated as if made in the course of the same proceeding.

CO MP ...  
STATE ...  
BY ...

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

STATE OF WASHINGTON,  
Respondent

vs.

SMITH, William Glen  
Appellant

NO. 08-1-00302-4  
COURT OF APPEALS NO:  
38868-5-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 August 14<sup>th</sup>, 2009 , I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
- 3. AFFIRMATION OF SERVICE

SUSAN I. BAUR  
COWLITZ COUNTY PROS. ATTY.  
312 S.W. FIRST AVE.  
KELSO, WA 9862

WILLIAM G. SMITH - DOC #325318  
STAFFORD CREEK CORR CTR.  
191 CONSTANTINE WAY  
ABERDEEN, WA 98502

Dated this 14<sup>TH</sup> day of AUGUST, 2009 at LONGVIEW, Washington.

*Cathy Russell*  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS