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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 40093-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Alan Niemi,**

Appellant.

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Thurston County Superior Court Cause No. 09-1-01463-2

The Honorable Judge Richard D. Hicks

**Appellant's Opening Brief**

*Corrected Copy*

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 339-4870  
FAX: (866) 499-7475

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## ASSIGNMENTS OF ERROR

1. Mr. Niemi's felony conviction for violation of a no contact order infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The state failed to prove that Mr. Niemi was the restrained party in a no contact order.
3. The state failed to prove that a valid restraining order remained in effect on the alleged violation dates.
4. Mr. Niemi's convictions were obtained in violation of his right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Section 21 of the Washington Constitution.
5. Detective Adams invaded the province of the jury by expressing his opinion on Mr. Niemi's guilt.
6. Detective Adams's opinion testimony on an ultimate issue violated Mr. Niemi's constitutional right to a jury trial.
7. Since Detective Adams did not know Mr. Niemi and Ms. Bennett, he should not have opined that theirs were the voices on the recorded telephone conversations admitted into evidence.
8. The trial court erred by admitting irrelevant and prejudicial evidence that the caller on the recordings had an outstanding arrest warrant.
9. The trial court erred by failing to give the jury an instruction limiting their consideration of information contained on the telephone recordings.
10. Mr. Niemi was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Defense counsel was ineffective for failing to object to Detective Adams's improper opinion testimony.
12. Defense counsel was ineffective for failing to object to inadmissible evidence under ER 404(b).

13. Defense counsel was ineffective for failing to request a limiting instruction for evidence admitted under an exception to ER 404(b).

14. The community custody portion of Mr. Niemi's sentence (for all charges except Count I) must be vacated and the case remanded for correction of the judgment and sentence.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Conviction for Violation of a No Contact Order requires proof that the accused person was restrained by a no contact order. The state did not present independent evidence (beyond identity of names) establishing beyond a reasonable doubt that Mr. Niemi was the person restrained by the order introduced into evidence at trial. Did Mr. Niemi's convictions violate his Fourteenth Amendment right to due process because they were based on insufficient evidence?

2. Pretrial no-contact orders issued under RCW 10.99 expire at arraignment or within 72 hours (if ordered prior to charging), or upon dismissal of charges. Here, the state did not produce evidence proving when the no contact order was issued in relation to the filing of charges, and did not establish the status of the charges on the offense dates. Did Mr. Niemi's convictions violate his Fourteenth Amendment right to due process because they were based on insufficient evidence?

3. A "nearly explicit" or "almost explicit" opinion on an ultimate issue violates an accused person's constitutional right to a jury trial. Here, Detective Adams, who did not know Mr. Niemi or Ms. Bennett, opined that they were the parties to a recorded telephone conversation. Did the detective's opinion testimony invade the province of the jury and violate Mr. Niemi's constitutional right to a jury trial?

4. ER 402, ER 403, and ER 404(b) require exclusion of evidence that is irrelevant, unfairly prejudicial, or submitted to establish criminal propensity. Here, the trial court admitted evidence (over

defense objection) that the male party to the recorded telephone conversations had an outstanding arrest warrant, and did not give a limiting instruction. Did the trial court's erroneous admission of evidence and failure to give a limiting instruction prejudice Mr. Niemi?

5. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to object to inadmissible opinion testimony on an ultimate issue. Was Mr. Niemi denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

6. ER 404(b) excludes evidence of an accused person's prior bad acts. Here, defense counsel failed to object to evidence of Mr. Niemi's prior bad acts. Was Mr. Niemi denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

7. Where evidence is admitted under an exception to ER 404(b), the trial court must give an instruction limiting the jury's consideration of such evidence. Here, defense counsel failed to request an instruction limiting the jury's consideration of evidence admitted under an exception to ER 404(b). Was Mr. Niemi denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

8. Effective July 26, 2009, a sentencing court must reduce an offenders term of community custody so that the total sentence will not exceed the statutory maximum for the offense. Here, the court imposed a sentence equal to the statutory maximum, as well as 9-18 months of community custody. Must the community custody terms for all counts occurring after July 26, 2009 be vacated and the case remanded for correction of the Judgment and Sentence?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

The state charged Alan Niemi with nine counts of Felony Violation of a Domestic Violence No Contact Order.<sup>1</sup> CP 2-6. The prosecution alleged that while in the Thurston County Jail, Mr. Niemi called his girlfriend Dorothy Bennett, the protected party, nine times. CP 2-6; RP<sup>2</sup> 3-256.

At trial, the state relied on a pretrial order, naming “Alan A. Niemi” and listing a date of birth as November 22, 1966. The order bore the signature of a prosecutor as well as a judge, but not a defendant. RP 57-60; Exhibit 1, Supp. CP. To prove that Mr. Niemi knew of the restraining order, the prosecution played a recording from a District Court hearing where the district court judge is heard to admonish a person named “Alan Niemi” regarding the import of the order. RP 218-232.

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<sup>1</sup> The state also charged three counts of Tampering with a Witness. CP 2-6. After the verdict, the state moved to dismiss all three counts, since the court’s instructions did not match the charge. RP (12/2/09) 3. The court dismissed the charges with prejudice. RP (12/2/09) 4.

<sup>2</sup> The Verbatim Report of Proceedings from the trial is numbered sequentially and so citations to that record will not include the date. Cites to hearings other than the trial will include the date of the hearing.

The state did not present any independent evidence identifying the person on trial in the case as the same person listed in the order or admonished by the district court judge. RP 38-232.

To prove that Mr. Niemi had contact with Ms. Bennett, the prosecutor submitted recordings of calls made from the Thurston County jail. RP 23-25. The jail's recording system tracks where calls originate and what number is dialed, and records the content of each call. RP 51.

To identify the parties to the phone conversations, the state introduced the testimony of Detective Louise Adams. Detective Adams had never met Ms. Bennett or Mr. Niemi, had never spoken with either of them on the phone, and could not identify them by voice. Despite this, she opined that the voices on the recordings belonged to Ms. Bennett and Mr. Niemi. RP 65, 215-216. She told the jury that the content of some of the conversations led her to this conclusion, and that the caller identified himself as "Alan." She also gave her opinion that the same two voices appeared on all of the recordings. RP 65, 70-71, 156-157.

Recordings of nine telephone calls were played for the jury. In these calls, the caller and recipient express love and affection, and discuss the possibility of getting married. RP 78-79, 97, 114, 160, 170-173, 176, 180.

The parties also use coarse language, confer about the caller's DOC hold as well as an outstanding warrant, refer to drug use and distribution, discuss a friend who'd been arrested and jailed on an assault charge, and talk about the theft of their property by people they know. RP 81, 82, 85-89, 94, 107, 109-111, 120-125, 135-138, 140-142, 147-148, 162, 167-171, 180-181, 187, 199-205, 209-211. In addition, the male caller says he'd be willing to assault a corrections officer to ensure that he'd be sent to prison rather than doing time in a local jail. RP 170-171. He also describes a fight in which the other person was a "bitch" and so he had no choice but to "crack on him." RP 182-183. The female reports that the caller's truck was involved in an accident (possibly a hit and run) and impounded, after she'd lent it to someone. RP 195-198, 202.

Defense counsel objected to the inclusion of references to the caller's outstanding arrest warrant, and argued that these references were not relevant and prejudicial. RP 30. The prosecutor responded that the format of the recording rendered it very difficult to excise portions of it, and that the references were part of the relevant context of the calls. RP 30, 32. Defense counsel suggested that the prosecutor could turn down the volume during irrelevant portions of the calls, but the prosecutor said she wasn't sure she could. RP 32-33.

The court overruled the objection, holding that evidence of the outstanding warrant would not be prejudicial in light of a stipulation that Mr. Niemi had two prior convictions. The court also opined that turning down the volume during portions of the calls would prejudice Mr. Niemi by inviting jurors to speculate about those portions. RP 31, 33-36.

Other than this objection to evidence about the outstanding arrest warrant, defense counsel did not object to other material discussed in the telephone calls and did not ask for any redactions. Nor did he request an instruction limiting the jury's consideration of the content of the calls. RP 26, 74-213.

The state did not call Dorothy Bennett as a witness. RP 38-232.

The jury convicted Mr. Niemi of all nine counts.<sup>3</sup> RP 259-267. He was sentenced to 60 months on each charge, with an additional 9-18 months of community custody. RP (12/2/09) 27, 30-31; CP 7-19. He timely appealed. CP 20-24.

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<sup>3</sup> As previously noted, additional charges of Tampering with a Witness were subsequently dismissed with prejudice. CP 2-6; RP (12/2/09) 3-4.

## ARGUMENT

**I. MR. NIEMI'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF THE CHARGED CRIME BEYOND A REASONABLE DOUBT.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

B. The Fourteenth Amendment's due process clause requires the state to prove the crime charged beyond a reasonable doubt.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because

it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *Id.*

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *Id.*, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the [reviewing] court to conclude that the allegations are 'highly probable.'" *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991), *citation omitted*.

The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

- C. The prosecution failed to establish beyond a reasonable doubt that Mr. Niemi was the same person named in the restraining order.

Conviction for violating a restraining order issued under RCW 10.99 requires proof beyond a reasonable doubt that the accused person is restrained by a valid order. *See* RCW 26.50.110. To establish that the accused person is the same person restrained by the order, the prosecution must introduce evidence beyond mere identity of names:

To sustain this burden when criminal liability depends on the accused's being the person to whom a document pertains ... the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt "that the person named therein is the same person on trial." Because "in many instances [people] bear identical names," the State cannot do this by showing "identity of names alone." Rather, it must show, "by evidence independent of the record," that the person named therein is the defendant in the present action.

*State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (citations and footnotes omitted).

At Mr. Niemi's trial, the prosecution introduced a pretrial "Domestic Violence No-Contact Order" issued pursuant to RCW 10.99. Exhibit 1, Supp. CP. The order named "Alan A. Niemi," and provided a date of birth of November 22, 1966. Exhibit 1, Supp. CP. The order was signed by a prosecutor and a judge, but not by a defendant. Exhibit 1, Supp. CP. No independent evidence was introduced to prove beyond a

reasonable doubt that the person named in the order was the same person charged in this case. RP 38-232.

Because the prosecution failed to follow the requirements of *Huber, supra*, the evidence was insufficient as a matter of law to establish that Mr. Niemi was the same person named in the order. *Huber, supra*. Accordingly, his convictions violated his Fourteenth Amendment right to due process. *Winship, supra*. The convictions must be reversed and the case dismissed with prejudice. *Smalis, supra*.

- D. The prosecution failed to prove beyond a reasonable doubt that a valid restraining order remained in effect on the alleged violation dates.

Exhibit 1 is designated a pretrial order, rather than a post-conviction order. Exhibit 1, Supp. CP. By law, pretrial orders expire upon the occurrence or nonoccurrence of certain events. Orders entered prior to charging expire at arraignment or (if charges are not filed) within 72 hours. RCW 10.99.040(5). Orders entered after charges are filed (including those issued at arraignment) “terminate if the defendant is acquitted or the charges are dismissed.” RCW 10.99.040(3). The state produced no evidence proving when the order was issued in relation to the filing of charges; nor did the prosecution establish the status of the charges on the offense dates alleged in the Second Amended Information. CP 2. In the absence of such evidence, the state failed to prove, even as a

preliminary matter, that the order was in effect on the date of the alleged violation.

Because the evidence was insufficient to prove the existence of an order restraining Mr. Niemi on the offense dates charged, his conviction violated his Fourteenth Amendment right to due process. *Winship, supra*. The conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

**II. MR. NIEMI'S CONVICTION WAS OBTAINED IN VIOLATION OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 21 OF THE WASHINGTON CONSTITUTION.**

**A. Standard of Review**

Constitutional violations are reviewed *de novo*. *Martin*, at 506. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant “must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant’s] rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to

determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).<sup>4</sup>

B. Impermissible opinion testimony on an accused person’s guilt violates the constitutional right to a jury trial.

A criminal defendant has a constitutional right to a jury trial.

Under Article I, Section 21 of the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Impermissible opinion testimony on the accused person’s guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue is forbidden if it is a

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<sup>4</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

“nearly explicit” or “almost explicit” statement by the witness that the witness believes the accused is guilty. *Kirkman*, at 937.

- C. Detective Adams’s opinion (that the recorded telephone conversations were between Mr. Niemi and Ms. Bennett) was a “nearly explicit” or “almost explicit” statement that she believed Mr. Niemi is guilty.

To convict Mr. Niemi, the prosecution was required to establish beyond a reasonable doubt that he violated the terms of the restraining order by having contact with the protected party. RCW 26.50.110. In this case, the state alleged that he had telephone numerous telephone conversations with Ms. Bennett. CP 2-6. In support of this allegation, the prosecution submitted recordings of calls made from the jail. RP 65-213.

To identify the parties to each telephone conversation, the state introduced the opinion of Detective Adams, who told the jury that the recorded voices belonged to Mr. Niemi and Ms. Bennett. RP 65. The basis for this opinion was (1) in some conversations the male identified himself as “Alan,” (2) in some conversations the female identified herself as “Dorothy,” (3) the two voices in all the conversations sounded the same to her (although she could not identify the voices as belonging to Mr. Niemi and Ms. Bennett), and (4) she believed their conversations related to information she claimed to know about the two of them. RP 65, 70-71, 156-157.

The detective’s opinion—that the two voices belonged to Mr. Niemi and Ms. Bennett—was a “nearly explicit” or “almost explicit” opinion that she believed Mr. Niemi was guilty. *Kirkman*, at 937. This deprived Mr. Niemi of his constitutional right to a jury trial under both the state and federal constitutions. *Id.*

D. The violation of Mr. Niemi’s constitutional right to a jury trial was not harmless beyond a reasonable doubt.

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. The detective’s opinion testimony was

the primary evidence establishing that Mr. Niemi had contact with Ms. Bennett. The state did not produce the testimony of any witness(es) who could identify either party's voice. RP 38-232. Although Mr. Niemi had access to the phone from which the calls were made, the prosecutor did not prove that he had exclusive access, or that no one else with a similar name had access.

Under the circumstances of this case, the error was not trivial, formal, or merely academic; it prejudiced Mr. Niemi and likely affected the final outcome of the case. *Lorang*, at 32. A reasonable juror could have entertained a reasonable doubt about the identity of either or both parties to any of the recorded conversations. Because the error was not harmless, the conviction must be reversed and the case remanded for a new trial. *Id.*

### **III. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE.**

#### **A. Standard of Review**

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This

includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

B. The trial judge abused his discretion by admitting evidence that was irrelevant, prejudicial, and inadmissible under the rules of evidence.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Under ER 404(b), “[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Before evidence of prior acts may be admitted, the trial court is required to analyze the evidence and must “(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.” *State v. Asaeli*, at 576 (quoting *State v. Pirtle*, 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.<sup>5</sup> *Asaeli*, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wn.App. 727, 733, 25 P.3d 445 (2001).

Here, the trial court erroneously overruled Mr. Niemi’s objection to those portions of the recordings that referred to the caller’s outstanding arrest warrant. RP 30-36. The evidence did not relate to any element of the charged crimes, and painted Mr. Niemi in a bad light by implying that he had attempted to evade justice. Furthermore, the court failed to

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<sup>5</sup> However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

conduct an adequate analysis on the record, and did not identify any purpose for which the evidence could properly be used. *Asaeli, supra*. Finally, the court failed to give the jury a limiting instruction. *See State v. Russell*, \_\_\_ Wn.App. \_\_\_, 225 P.3d 478 (2010) (reversal required where trial court failed to provide a limiting instruction.).

The error requires reversal because it is prejudicial. *Asaeli, supra*. There is a reasonable probability that the court's failure to exclude the evidence or to give a limiting instruction materially affected the outcome of the trial. *Id.*, at 579. Accordingly, Mr. Niemi's convictions must be reversed and the case remanded for a new trial, with instructions to exclude those portions of the recordings that are irrelevant to the charges and prejudicial to the defense. *Id.*

#### **IV. MR. NIEMI WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

##### **A. Standard of Review**

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Mr. Niemi was entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

C. Defense counsel was ineffective for failing to object to Detective Adams's improper opinion testimony.

In this case, the detective's opinion—that the recorded voices belonged to Mr. Niemi and Ms. Bennett—provided the only evidence identifying the parties to each telephone conversation. Because the testimony was a "nearly explicit" or "almost explicit" opinion that Mr.

Niemi was guilty, a proper objection would have been sustained.

*Kirkman*, at 937.

No legitimate strategy explains defense counsel's failure to object: without the detective's testimony, the state would not have been able to establish that Mr. Niemi violated the restraining order. Accordingly, the failure to object constituted deficient performance. Furthermore, Mr. Niemi was prejudiced by the error: had counsel objected, the prosecution would have stalled and Mr. Niemi would have been acquitted.

If the improper admission of the detective's opinion testimony cannot be reviewed as a manifest error affecting Mr. Niemi's constitutional right to a jury trial, the convictions must be reversed for ineffective assistance. *Reichenbach, supra*. The case must be remanded for a new trial. *Id.*

- D. Defense counsel was ineffective for failing to object to inadmissible evidence under ER 402, ER 403 and ER 404(b) and for failing to request a limiting instruction.

In this case, defense counsel failed to object to evidence that should have been excluded under ER 402, ER 403, and ER 404(b).

Defense counsel should have objected to those portions of the telephone recordings that included (1) coarse language, (2) information about the

DOC hold and outstanding warrant,<sup>6</sup> (3) references to drug use and distribution, (4) discussions about the friend who'd been arrested and jailed for assault, (5) discussions about theft of property by friends and acquaintances, (6) the caller's claim that he'd be willing to assault a corrections officer to ensure he'd be sent to prison, (7) references to the caller's involvement in a fight, and (8) information about the accident/hit-and-run involving the caller's truck. RP 81, 82, 85-89, 94, 107, 109-111, 120-125, 135-138, 140-142, 147-148, 162, 167-171, 180-183, 187, 195-198, 199-205, 209-211.

Although some of this evidence may have been admissible for "other purposes" under ER 404(b), a proper objection would have required the trial judge to balance the evidence on the record and to give an appropriate limiting instruction. *Russell, supra*. Counsel's failure to object constituted deficient performance. *Saunders, supra*.

The admission of this testimony as substantive evidence, without limitation, served no legitimate strategy. Instead, by failing to object and request a limiting instruction, defense counsel permitted the jury to use the evidence for any purpose, including as propensity evidence. Proper

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<sup>6</sup> Although defense counsel did raise an objection relating to the outstanding warrant, the objection may not have been sufficiently specific to preserve the issue for review under ER 402, ER 403, and ER 404(b).

objections would likely have been sustained, or resulted in limitations on the jury's use of the evidence, and would have altered the outcome of the trial. *Id.* Accordingly, Mr. Niemi's convictions must be reversed and the case remanded for a new trial. *Id.*

**V. THE COMMUNITY CUSTODY PORTION OF MR. NIEMI'S SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR CORRECTION OF THE JUDGMENT AND SENTENCE.**

Mr. Niemi was convicted of nine counts of felony violation of a restraining order under RCW 26.50.110(5). CP 7-8. His statutory maximum for each offense is 60 months incarceration; this amount was imposed on each count. RCW 9A.20.021; CP 11, 13. Because the court also imposed 9-18 months of community custody on each count, Mr. Niemi's total sentence has the potential to exceed the statutory maximum.

In 2009, the legislature amended RCW 9.94A.701, which governs the imposition of community custody. Laws 2009 Ch 375 Sec. 5. Under the amended statute (effective July 26, 2009), the community custody term "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." RCW 9.94A.701(8).

Here, the statutory maximum is 60 months. RCW 9A.20.021; CP 11. Accordingly, Mr. Niemi's community custody period for those

offenses occurring after July 26, 2009 should have been set at zero months,<sup>7</sup> pursuant to RCW 9.94A.701(8). This includes Counts III, IV, V, VI, VIII, X, XI, and XII. CP 7-8.<sup>8</sup> The community custody terms set forth for these counts must be vacated, and the case remanded for correction of the judgment and sentence. RCW 9.94A.701(8).

### CONCLUSION

For the foregoing reasons, Mr. Niemi's convictions must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

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<sup>7</sup> Under the amended statute, a 12-month period of community custody is added for offenders sentenced to the Department for any crimes against persons (including violation of an order under RCW 26.50.110). RCW 9.94A.701(3)(a); RCW 94A.411(2). Here, the trial court erroneously imposed a community custody range of 9-18 months under *former* RCW 9.94A.701(1)(c). This error is irrelevant, however, since any period of community custody would exceed the statutory maximum, contravening RCW 9.94A.701(8).

<sup>8</sup> The community custody term for Count I complies with the Supreme Court's decision in *In re Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009). In that case, the Court held that "when a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." *Id.*, at 675. Mr. Niemi's Judgment and Sentence includes language to this effect; accordingly, no change is required for Count I.

If the convictions are not reversed, the community custody terms for all charges except Count I must be vacated, and the case remanded for correction of the Judgment and Sentence.

Respectfully submitted on August 22, 2010.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

  
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Manek R. Mistry, WSBA No. 22917  
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief, Corrected Copy, to:

Alan Niemi, DOC #746087  
Coyote Ridge Corrections Center  
P. O. Box 769  
Connell, WA 99326-0769

and to:

Thurston County Prosecutor's Office  
2000 Lakeridge Dr. SW, Bldg. 2  
Olympia, WA 98502

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

All postage prepaid, on August 22, 2010.

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

Signed at Olympia, Washington on August 22, 2010.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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