

NO. 46140-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KEVIN R. CASE,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Substantial evidence does not support the defendant's conviction for felony violation of a no contact order because the evidence presented at trial fails to prove that the defendant had two prior convictions for violations of no contact orders issued under one or more of the statutes listed in RCW 26.50.110(5).

2. The court violated the defendant and the public's right to a public trial when it held six evidentiary hearings outside the presence of the defendant and the public.

3. Trial counsel's failure to object to the trial court's routine policy of restraining in-custody defendant's during trial and trial counsel's failure to object when a police officer told the jury that the state's witnesses were truthful and the defendant was not denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

4. The trial court erred when the defendant's contested the existence of any of his prior conviction and the court then failed to require the state to present any competent evidence that the defendant had prior convictions.

Issues Pertaining to Assignment of Error

1. Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a conviction for felony violation of a no contact order if the evidence presented at trial proves only that the defendant has two prior convictions for violating a restraining order as opposed to two prior convictions for violating a restraining order listed in RCW 26.50.110(5)?

2. Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, does a trial court violate a defendant and the public's right to a public trial if it holds evidentiary hearings outside the presence of the defendant and the public without considering the factors enumerated in *State v. Bone-Club*?

3. Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, does a trial counsel's failure to object to a trial court's routine policy of restraining in-custody defendant's during trial and does a trial counsel's failure to object when a police officer tells a jury that the state's witnesses were truthful and the defendant is not deny that defendant effective assistance of counsel?

4. Does a trial court err if it includes disputed prior convictions in a defendant's offender score absent any proof that the convictions exist?

STATEMENT OF THE CASE

Factual History

At about 2:00 pm on December 18, 2013, a former police officer by the name of John Sedivec was driving in Olympia when he happened to pass by a white woman with red, curly hair crouched in a doorway with a man he later identified as the defendant Kevin Case standing over her yelling. RP 9-10. Upon seeing this Mr. Sedivec drove around the block, returned to the area, and got out of his vehicle to see what was happening. RP 10-11. As he did he called 911 to report a possible domestic violence situation. *Id.* Mr. Sedivec then walked up to the doorway. The defendant, who was now crouched down by the female, got up and walked off toward and then entered a nearby bus terminal. RP 12-14. At this point Mr. Sedivec noted that the female was crying and visibly shaken. *Id.* He asked if she needed any assistance. *Id.* However, she ignored him and walked off to the bus terminal and entered it. *Id.* Mr. Sedivec then went over to the bus terminal and spoke with a transit security guard as he waited for the police to arrive. RP 18.

Upon receiving Mr. Sedivec's report the transit security guard looked for and found a white woman with red, curly hair. RP 24-25. When he did he offered to give her courtesy passage on one of the buses. *Id.* She accepted and got on one of the buses. *Id.* As she did the security guard saw the defendant approach the bus. *Id.* Although Mr. Sedivec did not see the

woman get on the bus he did see the defendant approach it and then turn around and leave the area when the police arrived. RP 18. At this point the responding officer by the name of Herbig saw the defendant walk off. RP 32-26. He then took a statement from the woman, spoke with the security guard and Mr. Sedivec, and called for assistance in finding and arresting the defendant on the officer's belief that he had violated a protection order that prohibited him from having contact with the woman with the red hair. RP 32-36. Although Officer Herbig had seen the woman on prior occasions he did not know her name. RP 34-36. Within a short time other officers found and arrested the defendant and took him to the local jail. RP 42-43. Officer Herbig then went to the jail and spoke briefly with the defendant. *Id.*

Procedural History

By information filed December 23, 2014, the Thurston County Prosecutor charged the defendant Kevin R. Case with once count of felony violation of a no contact order. CP 3-4. The information alleged the following:

**COUNT I - FELONY VIOLATION OF POST CONVICTION
NO CONTACT ORDER/DOMESTIC VIOLENCE - THIRD OR
SUBSEQUENT VIOLATION OF ANY SIMILAR ORDER,
RCW 26.50.110(5), RCW 10.99.020 AND RCW 10.99.050 -
CLASS C FELONY:**

In that the defendant, KEVIN RAY CASE, in the State of Washington, on or about December 18, 2013, with knowledge that the Olympia Municipal Court had previously issued a no contact order, pursuant to Chapter 10.99 in Olympia Municipal Court on July

15, 2013, Cause No. 3Z0193715, did violate the order while the order was in effect by knowingly violating the restraint provisions therein pertaining to Lindsay R. Prior, a family or household member, pursuant to RCW 10.99.020; and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 16.50.020.

CP 3 (capitalization, bold and underlining in original).

This case later came on for trial before a jury during which the state called three witnesses: John Sedivec, Jose Sanchez (the transit security guard) and Officer Jeff Herbig. RP 9, 22, 29. These witnesses testified to the facts contained in the preceding factual history. *See Factual History.*

At the beginning of trial the court noted that the defendant, who was in custody, was being forced to attend the trial in a leg brace. RP 4. The court stated the following on this issue:

THE COURT: . . . The defendant is in custody I understand, and so I would assume that the defendant is wearing a leg brace; is that correct?

CORRECTIONS OFFICER: Yes, Your Honor.

THE COURT: A recent case in the Court of Appeals from this jurisdiction criticized a judge not being told that an individual was wearing a leg brace and said that there should be on the record that information, and then there should be a weighing of any issues in that regard. I have taken testimony in other cases from the jail, and I'll summarize what I've been told, and that is that because a defendant in our courtrooms has to sit close to the door coming – for witnesses coming in and out, there is a concern for safety of any witnesses, anyone coming through that swinging door. Secondly, the manning situation is often such that there can only be one officer in the

courtroom. So it is their practice in every case in which a defendant is in custody to have the defendant wear a leg brace if not some more substantial restraint. They believe that a leg brace is the least restrictive restraint potential.

RP 4-5.

The defendant's attorney did not object to this procedure even though it restricted the defendant's movement in the courtroom. RP 5. The court stated the following concerning the fact that the leg braces prevented the defendant from leaving counsel table in front of the jury:

THE COURT: All right. Thank you. I don't know that the State needs to say anything in that regard. I'll just go on to say on the record it's my understanding that the leg brace is concealed, that it doesn't show. There's sometimes an issue if a defendant has to walk to the witness stand in front of the jury, and it's my practice to try to accommodate that taking place outside the jury's presence so an individual doesn't have to feel uncomfortable. So we'll cross that bridge if and when we come to it.

RP 5.

During the trial the court held seven unrecorded sidebars in the courtroom presumably at the bench with the jury still present and the defendant apparently sitting at counsel table lest he approach the bench with his counsel and let the jury see he was in leg braces. RP 7-8, 12, 36, 50, 59 and 79. The first two unrecorded sidebars occurred during *voir dire*. RP 7-8. The third unrecorded sidebar involved argument on the admissibility of State's Exhibit No. 3. CP 12. Just prior to that unrecorded sidebar the court made the following statement to the jury:

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THE COURT: I'll see counsel at sidebar. Excuse us, please. Ladies and gentlemen, you know the drill. At sidebar don't try to listen to us. If you want to stand up and stretch, feel free to do that. We'll be back to you in a minute.

RP 12.

The fourth unrecorded sidebar involved argument on the admissibility of State's Exhibit No. 1. CP 36. The fifth unrecorded sidebar involved argument on the admissibility of State's Exhibit No. 4. CP 50. The sixth unrecorded sidebar involved discussion on the admission of a stipulation. CP 59. The seventh and final unrecorded sidebar involved discussion on the correction of the jury instructions the court had just read to the jury. CP 79.

In addition, during Officer Herbig's testimony the following exchange took place upon direct examination concerning the defendant's statement at the jail:

Q. And so after advising him of all these things, he did talk with you then?

A. Very briefly, yes.

Q. And did you tell him why you were arresting him?

A. Yes.

Q. Did he make any statements with regard to his contact with Lindsay Prior?

A. He essentially stated that he denied having any contact with her, and when I pointed out the obvious presence of not only civilian witnesses but security guards and other disinterested parties that would have no basis for, in my opinion, lying or fabricating, he said

that they were essentially lying, and at that point I terminated my questioning because I didn't feel we were going to have any sort of meaningful interaction.

RP 46-47.

The defense made no objection on relevance, vouching or improper opinion of guilt grounds. *Id.*

At the end of the trial in this case the court read a stipulation by the parties concerning the defendant's prior convictions for violating "the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law." CP 66; *see also* Exhibit No. 5, Stipulation. It was the only evidence presented on this issue. RP 1-103. It stated:

The parties have agreed that certain facts are true. You must accept as true the following facts:

The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law.

CP 66; *see also* Exhibit No. 5, Stipulation.

After reading this stipulation the court instructed the jury with neither party voicing any objections or exceptions. RP 65, 68-79; CP 45-55. Following argument the jury retired for deliberation and eventually returned a verdict of guilty. CP 57; RP 99-100.

On April 1, 2014, the court called this case for sentencing. RP 4/4/14

1. At that time the state argued that the defendant had a range 51 to 60

months on an offender score of seven points from seven prior adult felony convictions and one prior juvenile conviction. RP 4/1/14 1-6; CP 70. The defense disputed the entire criminal history claimed by the state and argued that the correct range was 6 to 12 months on an offender score of zero points. RP 4/1/14 6-7, 9. The state presented no evidence to support its claim on the defendant's criminal history other than a summary sheet entitled "Prosecutor's Statement on Prior Record and Offender Score." CP 70; RP 4/1/14 9. In fact, upon hearing that the defendant was disputing the state's claim of his criminal history the state moved for a continuance. RP 4/1/14 10. However, the court refused the continuance and found that the state's rendition of the defendant's criminal history was correct. RP 4/1/14 10-11. The court apparently came to this conclusion from its own research. *Id.* The court stated the following on this issue:

THE COURT: Well, I'm looking in Liberty and I see the last felony conviction it was listed here was April the 15 th of 2009, and I'm going to look that case up and see what criminal history was listed there .

Mr . Taylor, as I said , I was look ing the case up and on July the 30 th , 2009 , in open court there was a felony judgment and sentence for the crime of assault in the third degree, domestic violence , and at that time there were six prior adult felony convictions and one prior juvenile felony conviction. It did not count as criminal history the crime for which he was being sentenced, and so, based upon that, the figures that I have from the state today in this prosecutor's statement would appear consistent. As a matter of fact, I'm looking at the crimes, and they're exactly the same crimes with the exception of assault in the third degree that was being sentenced at that time. So

I'm finding that the criminal history that's been provided today is accurate and complete , that the offender score is seven .

RP 4/1/14 10-11.

After making this finding the court sentenced the defendant to 55½ months in prison. CP 60-69. The defendant thereafter filed timely notice of appeal. CP 76-86, 87-88.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR FELONY VIOLATION OF A NO CONTACT ORDER BECAUSE THE EVIDENCE PRESENTED AT TRIAL FAILS TO PROVE THAT THE DEFENDANT HAD TWO PRIOR CONVICTIONS FOR VIOLATIONS OF NO CONTACT ORDERS ISSUED UNDER ONE OR MORE OF THE STATUTES LISTED IN RCW 26.50.110(5).

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and the United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact

to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

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

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. . . .

RCW 26.50.110(1).

The state also alleged that this offense was a felony because the defendant had two prior convictions for violating no contact orders listed in RCW 26.50.110(5). This subsection of the statute provides:

(5) A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

RCW 26.50.110(5).

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

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

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

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

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

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

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

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

In the case at bar, the evidence presented at trial does not constitute substantial evidence on the charge of felony violation of a no contact order because the record does not contain any evidence to prove that the defendant's prior no contact order violations were qualifying convictions under RCW 26.50.110. The following argument supports this conclusion.

As a review of RCW 26.50.100(5) clarifies, in order to elevate a violation of a protection order under RCW 26.50.110(1) to a felony under RCW 26.50.110(5), the state has the burden of proving that the defendant has two prior qualifying convictions for violating an order issued under one of the listed statutes. Whether or not the state has the burden of proving this to the jury as a matter of fact or to the court as a matter of law has previously been in dispute between Division I and Division II of the Court of Appeals. In *State v. Carmen*, 118 Wn.App. 655, 77 P.3d 368 (2003), Division I of the Court of Appeals unequivocally stated that the issue of what types of orders were previously violated is one the court decides, not the jury. In *State v. Arthur*, 126 Wn.App. 243, 108 P.3d 169 (2005), this court rejected the analysis in *Carmen* and held that the character of the prior convictions as violations of one or more of the listed statutes was an element of the offense that the state had the burden to prove to the jury beyond a reasonable doubt.

In *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), the Washington State Supreme Court addressed a related issue. In that case the defendant appealed a conviction for felony violation of a no contact order under RCW 26.50.110(1)&(5), arguing that the state had the burden of proving that the underlying order and the prior orders violated were “valid.” After discussing both *Carmen* and *Arthur*, the court held that the underlying validity of the order alleged to have been violated or the orders underlying the prior convictions was a legal issue for the court to determine, not an element that the state had the burden of proving to the jury. In *State v. Gray*, 134 Wn.App. 547, 138 P.3d 1123 (2006), a case decided after *Miller*, Division I took the position that the *Miller* decision was a complete vindication of Division I’s position in *Carmen*. Defendant in the case at bar hardly reads the *Miller* decision as so holding, particularly given the fact that (1) *Miller* did not specifically overrule *Arthur*, and (2) the issue in *Miller* was not the same as the issues in *Carmen* and *Arthur*.

Although defendant herein takes the position that the decision in *Arthur* is still good law, what is certain from all four of these cases is that the state still does have the burden of proving that the two or more prior convictions arise from violations of qualifying no contact orders. Absent this evidence, the court cannot sustain a conviction for a felony violation of a no contact order under RCW 26.50.110(5). It matters not whether these facts

must be proven to the court as a matter of law (*Carmen's* position) or the jury as an element of the offense (*Arthur's* position). There must still be evidence in the record to support the conclusions that the prior convictions arose from violations of one or more of the listed statutes.

In the case at bar the only evidence presented concerning the nature of the defendant's prior convictions came in through the following stipulation:

The parties have agreed that certain facts are true. You must accept as true the following facts:

The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law.

CP 66; *see also* Exhibit No. 5, Stipulation.

The problem with this stipulation is that while it proves that the defendant has more than two violations of some type of a protection order issued under Washington Law, there is no evidence in the record to establish what type of a no-contact of protection order the defendant violated. Thus, it is impossible to tell whether or not the defendant's prior convictions arise from violating one of the qualifying orders listed in RCW 26.50.110(5). Absent the admission of the protection orders the defendant was previously convicted of violating, the judgement and sentences or some other evidence indicating the statutes the defendant violated, there is no substantial evidence

to prove that the defendant has two prior convictions for violating protection ordered “granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020.” To hold otherwise would simply erase the phrase “granted under RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020” from the statute. Thus, in the case at bar, the trial court erred when it entered judgement of conviction against the defendant for felony violation of a no contact order. Consequently, this court should vacate the defendant’s judgment and sentence and remand to the trial court for entry of a judgment and sentence for misdemeanor violation of a no contact order.

II. THE COURT VIOLATED THE DEFENDANT AND THE PUBLIC’S RIGHT TO A PUBLIC TRIAL WHEN IT HELD SIX EVIDENTIARY HEARINGS OUTSIDE THE PRESENCE OF THE DEFENDANT AND THE PUBLIC.

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 he/she intended to interview the selected jurors in a jury room.").

For example, in *State v. Heath*, 150 Wn.App. 151, 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*, 167 Wn.2d 140, 217 P.3d 321 (2009) (Court properly balance need for fair trial with need for public trial in

closing part of *voir dire*). 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).

The Washington Supreme Court has reaffirmed the application of these principles in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). In this case, the state charged the defendant with first degree rape of a child, first degree attempted rape of a child, and first degree child molestation. During *voir dire*, the court gave the prospective jurors a confidential juror

questionnaire, which included a question as to whether or not they or someone close to them, had ever been the victim of sexual abuse. At least 11 prospective jurors answered in the affirmative and were taken one at a time into chambers to determine whether or not their past experiences would preclude them from impartiality. The judge, the prosecutor, the defense attorney, and the defendant were the only people allowed into chambers along with the prospective juror. The trial judge held no *Bone-Club* hearing prior to holding this portion of *voir dire* in chambers. Following convictions on all counts, the defendant appealed, arguing that the trial court had denied him the right to a public trial.

On appeal, the state argued that (1) the trial was not closed because it did not begin until after *voir dire*, (2) the court on appeal could itself perform the *Bone-Club* analysis in the place of the trial court, (3) the defendant invited or waived his right to challenge the closure when he failed to object and when he participated in the procedure the court used, and (4) that the error was harmless beyond a reasonable doubt. The court rejected the state's first argument, noting that *voir dire* is part of a jury trial and is subject to the public trial requirements of the state and federal constitutions. The court also rejected the state's second argument, noting that when the trial court did not address any of the *Bone-Club* factors, an appellate court has no basis upon which to perform the analysis itself.

The court then rejected the state's third argument, noting as follows concerning the waiver argument:

[T]he public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. We have held that a "defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver." Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial. The right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.

Additionally, Strode cannot waive the public's right to open proceedings. As we observed in *Bone-Club*, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a *Bone-Club* analysis. The record reveals that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration.

State v. Strode, at 229-230/

Finally, the court rejected the state's fourth argument, finding that the error in closing a trial without a proper *Bone-Club* analysis was a structural error that was conclusively presumed to be prejudicial. Thus, the court reversed the defendant's convictions and remanded for a new trial.

The right to a public trial under Washington Constitution, Article 1, § 22, also includes each defendant's right to "to appear and defend in person" as well as the public's right to open court proceedings. This constitutional

guarantee is embodied in the rule that a defendant has the right to be present at “every critical stage of a criminal proceeding.” *In re the Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). In *State v. Chappel*, 145 Wn.2d 210, 36 P.3d 1025 (2001), the Washington Supreme Court stated this rule as follows:

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause of the Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment. The Washington State Constitution also provides a criminal defendant with “the right to appear and defend in person.” Wash. Const. Art. I, § 22. Additionally, Washington’s criminal rules state that “[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown.” CrR 3.4(a).

State v. Chapple, 145 Wn.2d at 318.

At a minimum, “critical stages” in a criminal trial include any hearing at which “evidence is being presented or whenever the defendant’s presence has a relation, reasonably substantial, to the opportunity to defend against the charge.” *State v. Bremer*, 98 Wn.App 832, 991 P.2d 118 (2000). Normally, conferences about the admissibility of jury instructions are not deemed a “critical stage” in the proceedings that require the defendant’s presence because they only involve the resolution of legal issues. Such discussions many times occur off the record and in chambers outside of the defendant’s presence. For example, in *State v. Bremer, supra*, a defendant convicted of attempted residential burglary appealed, arguing that the court’s decision to

hold a discussion about jury instructions in chambers outside his presence denied him the right to be present in all critical stages of the proceedings. However, noting that the discussion in chambers dealt solely with the legal issues surrounding the use of certain jury instructions, the court found no constitutional violation. The court states as follows on this issue:

The crux of a defendant's constitutional right to be present at all critical stages of the proceedings is the right to be present when evidence is being presented or whenever the defendant's presence has "a relation, reasonably substantial," to the opportunity to defend against the charge. A defendant does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts.

Mr. Bremer contends that he was not allowed to be present when the court, the State and his attorney discussed proposed jury instructions. This was not a hearing at which evidence was being presented. Jury instructions involve resolution of legal issues, not factual issues. In the absence of some extraordinary circumstance in which Mr. Bremer's presence would have made a difference, a discussion involving proposed jury instructions is not a critical stage of the proceedings. Because Mr. Bremer was fully represented by counsel at the hearing, he would not have had an opportunity to speak. As such, Mr. Bremer's presence had no relation to the opportunity to defend against the charge of attempted residential burglary. Pursuant to the holding in *Lord*, Mr. Bremer's absence from the jury instruction hearing was not a violation of his constitutional rights.

State v. Bremer, 98 Wn.App. at 834-35.

In the case at bar appellant claims that the trial court violated both the public right to an open court as well as the defendant's right to be present during every critical stage in the trial when it held eight separate bench

conferences in the court room without allowing the defendant or the public to hear what was discussed. Although the substance of a number of the conferences is unknown, at least a few involved defense objections to the admission of evidence and offers of proof concerning either the admission or exclusion of evidence. Under *Bremer* the discussion concerning the admission or exclusion of evidence constitutes a critical stage in the proceedings during which the defendant and the public have a right to be present. Thus, in the case at bar, the court's decision to call for these unrecorded, secret arguments outside the hearing of the defendant and the public constituted a closure of the courtroom in violation of the defendant and the public's constitutional right to be present. Consequently this court should reverse the defendant's convictions and remand for a new trial.

III. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S ROUTINE POLICY OF RESTRAINING IN-CUSTODY DEFENDANT'S DURING TRIAL AND TRIAL COUNSEL'S FAILURE TO OBJECT WHEN A POLICE OFFICER TOLD THE JURY THAT THE STATE'S WITNESSES WERE TRUTHFUL AND THE DEFENDANT WAS NOT 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 professional 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 (1) trial counsel’s failure to object when the court sanctioned the routine

restraint of the defendant without any particularized need for restraint, and (2) trial counsel's failure to object when a state's witness presented his opinion to the jury that the state's witnesses were telling the truth and the defendant was lying. The following sets out these arguments.

(1) Trial Counsel's Failure to Object to the Trial Court's Routine Decision to Restrain the Defendant without Any Particularized Need.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Part and parcel of this due process right to a fair trial is the right "to appear at trial free from all bonds or shackles except in extraordinary circumstances." *In re the Persona Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Shackling or handcuffing impinges upon the right to a fair trial in a number of ways, the most important of which is that it violates the right to the presumption of innocence. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). In addition, forcing a defendant to appear in restraints also undermines the "right to appear and defend in person" guaranteed under Washington Constitution, Article 1, § 22.

In 1981 the Washington Supreme Court explained this principle,

stating as follows:

The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty.

State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

Although constitutional due process generally guarantees the right to appear and defend free of restraints, this right is not absolute. *State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010). However, restraints may only be ordered for three purposes: “to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.” *State v. Finch*, 137 Wn.2d at 865-866. In addition, the court’s decision to use restraints may only be justified if based upon “specific facts relating to the individual” that are “founded upon a factual basis set forth in the record.” *State v. Finch*, 137 Wn.2d at 866, 233 P.3d 554 (quoting *State v. Hartzog*, 96 Wn.2d at 399–400). Finally, since the right to appear free from restraints derives from both the federal and state constitutions, its violation mandates reversal of conviction and remand for a new trial unless the state proves the error harmless beyond a reasonable doubt. *State v. Damon*, 144 Wn.2d 686, 692, 25 P.3d 418 (2001).

In the case at bar the record reveals that the trial court’s decision to grant the jail’s request to restrain the defendant was not based upon “specific

facts relating to the individual” that were “founded upon a factual basis set forth in the record” as is required in *Finch* and *Hartzog*. Rather, the record is clear that the request for restraints was based solely upon the fact that the local correctional authority apparently did not want to pay to properly staff the courtroom. The court’s own ruling admits that the state failed to prove any one of the three criteria that would justify restraining the defendant. The court held:

THE COURT: . . . The defendant is in custody I understand, and so I would assume that the defendant is wearing a leg brace; is that correct?

CORRECTIONS OFFICER: Yes, Your Honor.

THE COURT: A recent case in the Court of Appeals from this jurisdiction criticized a judge not being told that an individual was wearing a leg brace and said that there should be on the record that information, and then there should be a weighing of any issues in that regard. I have taken testimony in other cases from the jail, and I’ll summarize what I’ve been told, and that is that because a defendant in our courtrooms has to sit close to the door coming – for witnesses coming in and out, there is a concern for safety of any witnesses, anyone coming through that swinging door. Secondly, the manning situation is often such that there can only be one officer in the courtroom. So it is their practice in every case in which a defendant is in custody to have the defendant wear a leg brace if not some more substantial restraint. They believe that a leg brace is the least restrictive restraint potential.

RP 4-5.

The lack of any finding that the defendant had been disruptive, dangerous or would try to escape precludes the use of restraints in the

courtroom, notwithstanding the fact that the local correctional authority apparently didn't want to properly staff trials of in-custody defendants. Thus the trial court's decision to use restraints was made upon an improper basis and constituted an abuse of discretion. *See State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001). (An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds or untenable reasons.) It was error.

In this case the evidence presented at trial, while strong, was not overwhelming on the issue of guilt. The defendant had not been apprehended at the scene and no lineup had been used to assure that the witnesses were identifying the correct person. Although this court might find the remainder of the state's evidence made the state's theory of the case much more likely, the standard for review is not "much more likely." Rather, for this court to find the constitutional error in this case does not warrant reversal, the evidence at trial must overwhelmingly prove guilt beyond a reasonable doubt. This evidence in this case does not meet this high standard.

Given this law and these facts there was no tactical reason for the defense to fail to make a proper objection to the trial court's unsupported decision to allow the jail to put the defendant in leg restraints. Since the evidence was not overwhelming this failure did cause prejudice. Thus, trial counsel's failure to object did deny the defendant effective assistance of

counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

(2) Trial Counsel's Failure to Object to Officer Herbig's Improper Vouching.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt, either directly or inferentially, "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

To the expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v.*

Lopes, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701.

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed, noting that “[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

In the case at bar the state presented similar improper evidence when it elicited the following testimony from Officer Herbig:

Q. And so after advising him of all these things, he did talk with you then?

A. Very briefly, yes.

Q. And did you tell him why you were arresting him?

A. Yes.

Q. Did he make any statements with regard to his contact with Lindsay Prior?

A. He essentially stated that he denied having any contact with her, and when I pointed out the obvious presence of not only civilian witnesses but security guards and other disinterested parties that would have no basis for, in my opinion, lying or fabricating, he said that they were essentially lying, and at that point I terminated my questioning because I didn't feel we were going to have any sort of meaningful interaction.

RP 46-47.

The first half of this testimony was not objectionable as it was simply a factual rendition of what the officer says the defendant said. However, the second half was a bald opinion that the defendant's denial was a lie and that the testimony of the state's witnesses was the truth. As such, its admission violated the defendant's constitutional right to have the jury determine all of the facts relevant at the trial.

In addition, given the critical nature of this testimony in relation to the one fact that was at issue in the case, which was the identify of the man the witnesses saw, there is a reasonable probability that (1) had counsel raised a proper objection to this evidence the court would have sustained the objection, and (2) that had the objection been sustained the jury would have returned a verdict of acquittal. Thus, in this case trial counsel's failure to object denied the defendant effective assistance of counsel. As a result, this court should vacate the defendant's conviction and remand for a new trial.

IV. THE TRIAL COURT ERRED WHEN IT FAILED TO REQUIRE THE STATE TO PRESENT ANY COMPETENT EVIDENCE THAT THE DEFENDANT HAD PRIOR CONVICTIONS.

The procedures used for the imposition of standard ranges sentences are set out in RCW 9.94A.530(2). This statute states:

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

RCW 9.94A.530(2).

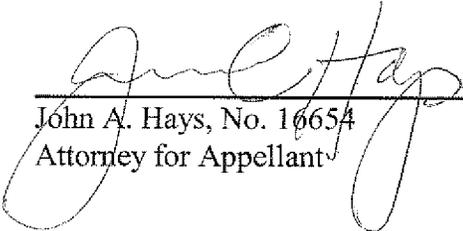
In the case at bar the defense specifically disputed the defendant's prior convictions during the sentencing hearing. Thus, the defendant did not "acknowledge" the correctness of the state's criminal history statement. Given this dispute, the trial court should either have refused to consider the disputed convictions or should have ordered an evidentiary hearing. The trial court did neither in this case and the state did not request an evidentiary hearing. Thus the trial court erred when it included the defendant's disputed prior convictions when calculating the defendant's offender score.

CONCLUSION

This court should vacate the defendant's conviction and remand for entry of judgement for misdemeanor violation of a no contact order because substantial evidence does not support the conclusion that the defendant had two or more prior convictions for violations of one or more of the statutes listed in RCW 26.50.110. In the alternative, the court should vacate the defendant's conviction and remand for a new trial based upon (1) the denial of the defendant and the public's right to a public trial and (2) the denial of effective assistance arising from trial counsel's failure to object to the trial court's decision to require that the defendant wear restraints during trial and trial counsel's failure to object to improper vouching by one of the state's witnesses. In the second alternative this court should vacate the defendant's sentence and remand for a new sentencing hearing.

DATED this 26th day of September, 2014.

Respectfully submitted,



John A. Hays, No. 16654
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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, § 10**

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

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**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,
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 9.94A.530
Standard Sentence Range

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h).

RCW 26.50.110
Violation of order – Penalties

(1)(a) Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;

(ii) A provision excluding the person from a residence, workplace, school, or day care;

(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;

(iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or

(v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

(b) Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person

from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 46140-4-II

vs.

**AFFIRMATION OF
OF SERVICE**

KEVIN R. CASE,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Carol Laverne
Thurston County Prosecutor's Office
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502
lavernc@co.thurston.wa.us
2. Kevin R. Case, No.966662
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Dated this 26th day of September, 2014, at Longview, WA.



Diane Hays

HAYS LAW OFFICE

September 26, 2014 - 2:47 PM

Transmittal Letter

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Case Name: State v. Kevin R. Case

Court of Appeals Case Number: 46140-4

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Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

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