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NO. 59457-5

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JAN 30 PM 3:44

CITY OF TUKWILA,

Petitioner,

vs.

KELLAS GARRETT,

Respondent.

PETITIONER CITY OF TUKWILA'S MOTION FOR
DISCRETIONARY REVIEW

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WSBA No. 28310
Kenyon Disend, PLLC
11 Front Street South
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(425) 392-7090
Attorneys for Petitioner City of Tukwila

ORIGINAL

I. IDENTITY OF PETITIONER

The City of Tukwila (“the City”), asks this Court to accept review of the decision designated in Part B of this Motion.

II. DECISION

The City seeks review of the decision of the Honorable Douglass A. North of the King County Superior Court entered December 15, 2006, under King County Superior Court Cause No. 06-1-03180-2SEA, reversing Kellas Garrett’s (“Garrett”) conviction.

This case arose after the Honorable Scott Stewart of the Tukwila Municipal Court denied Garrett’s motion to dismiss his conviction for Violation of a Temporary Protection Order (“TPO”) based upon an alleged improper jury pool. Garrett appealed his conviction to the King County Superior Court sitting in its appellate capacity pursuant to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (“RALJ”) arguing that the jury pool was invalid based upon the trial court summoning jurors from outside the City limits. The superior court agreed with Garrett and reversed Garrett’s conviction. A copy of the RALJ decision is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

Did the superior court err in finding that there was a material departure from the jury selection procedure required by law where the

City used the same procedure upheld by the Washington Supreme Court in *State v. Twyman*, 143 Wn.2d 115, 121, 17 P.3d 1184 (2001)?

IV. STATEMENT OF THE CASE

The City charged Garrett with the crime of Violation of a Temporary Protection Order - Domestic Violence (“TPO”). On September 1, 2005, Garrett was tried before a jury in Tukwila Municipal Court for Violation of a TPO for an incident that occurred on June 27, 2004. The trial court selected the jury pool from three King County zip codes (specifically 98168, 98178, and 98188) that roughly paralleled the City of Tukwila’s boundaries, excluding residents living in Tukwila and including residents outside the City limits. *See* Declaration of Amy Bell attached as Appendix B at 2, ¶ 7. This was the exact same process the City utilized every time it selected jurors through a contract the City had with King County to summons jurors from the King County jury pool. *See* Appendix B at 2, ¶ 6.

Before the jury was sworn, Garrett objected that the jury included jurors who did not live within the City limits. The trial court denied the objection. Following a guilty verdict, Garrett moved to dismiss the case based on his earlier objection to the jury pool. The trial court again denied Garrett’s motion, but invited legal briefing on the matter. *See* Defense Trial Transcript, attached as Appendix C.

On January 19, 2006, the trial court heard argument regarding the validity of the underlying order and composition of the jury pool. On February 6, 2006, the trial court denied Garrett's Motions to Dismiss. *See* Report of Proceedings 2, attached as Appendix D. The trial court then sentenced Garrett.

Garrett subsequently filed a Notice of Appeal with the King County Superior Court, alleging that the trial court erred in denying his Motions to Dismiss. On December 15, 2006, the Honorable Douglass A. North reversed Garrett's conviction. This Motion for Discretionary Review followed.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept discretionary review because several grounds for accepting review under Rules of Appellate Procedure ("RAP") 2.3(d) have been satisfied.

A. Standards for Accepting Discretionary Review.

This Court may accept discretionary review on any one or more of four grounds. These are contained in RAP 2.3(d) which provides:

Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

- (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
- (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

This case presents grounds for review under RAP 2.3(d)(1) because the decision of the superior court is in direct conflict with a decision of the Washington Supreme Court. RAP 2.3(d)(3) also provides a basis for review because the superior court, by reversing the decision of the municipal court, raises an issue of public interest in regard to the appropriate composition of a jury pool in municipal misdemeanor cases.

B. Judge North's Decision Conflicts With a Decision of the Washington Supreme Court.

This Court should accept discretionary review of this matter because the superior court's decision conflicts with a Washington Supreme Court decision. The RALJ decision attached states that "there was a material departure from the jury selection procedure required by law." *See* Appendix A. The superior court held that Tukwila had no authority to summon jurors from outside of Tukwila and its electoral district. This decision is in direct conflict with the Washington Supreme Court's

decision in *State v. Twyman*, 143 Wn.2d 115, 121, 17 P.3d 1184 (2001).

In *State v. Twyman*, petitioners alleged the court violated the statute governing jury selection by drawing jurors from three zip codes that only imprecisely paralleled the actual boundaries of the district. The result of drawing jurors from three zip codes excluded prospective jurors who lived in the electoral district and included some from outside the electoral district. *Id.* Petitioners in *Twyman* argued that jurors should have been selected from all of King County, or, in the alternative, only from within the *exact* electoral district of the Shoreline Division. *Id.* at 118. The State noted that the trial court worked from a list randomly selected from the entire county, and then selected jurors from the zip codes closest to the division. *Id.* at 121.

The Court held that this procedure was a “fair approximation” of the division’s electoral district, i.e. the “population of the area served by the court.” *Id.* In support of this holding, the Supreme Court explained that the jury selection statute is merely directory, and need only be substantially complied with. *Id.* at 122. The Court further noted that prejudice would only be presumed when there was a *material* departure from the jury selection statutes. *Id.* Ultimately, the Court held that there had been no gross departure from the statute, and as a result, the burden was on the petitioners to show prejudice, which they failed to do. *Id.*

Here, the City used the same procedure to summon jurors as used and ultimately found acceptable in *Twyman*. King County Superior Court, through a contract with the City, worked from a list randomly selected from the entire county and then selected jurors from three zip codes (98168, 98178, and 98188) provided by the City. According to the United States Postal Service, these three zip codes are designated for the City of Tukwila. These three zip codes cover residences in the City, as well as surrounding areas. According to the analysis set forth in *Twyman*, the procedure used by the Superior Court was a “fair approximation” of the City’s boundaries, i.e. the “population of the area served by the court.” *Twyman*, 143 Wn.2d at 121.

Pursuant to *Twyman*, the City substantially complied with the requirements set forth in the jury selection statute. Therefore, Garrett failed to show that the trial court made a gross *material* departure from the jury selection statute. With no gross departure from the statute, the burden was on Garrett to show prejudice. Garrett failed to show any prejudice as result of the jury selection process. Accordingly, the superior court’s decision reversing Garrett’s conviction is in direct conflict with the *Twyman* decision and, therefore, this Court should accept review.

C. How Municipalities Summon Jurors is an Issue of Public Interest.

This Court also should accept review because this case presents an issue of public interest as a municipality's ability to summon jurors affects local government, criminal defendants, jurors, courts and the community.

Public interest: Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government.

Black's Law Dictionary, Abridged Fifth Edition (1983).

Because jurors are selected from the community and the community has a right to ensure that its' local jury pools are selected appropriately, the community has a compelling interest in this issue. Additionally, defendants have an interest by which their legal rights are affected. Moreover, jury selection is not just an interest of the particular locality, it is a common issue among all municipal and district courts in the State of Washington.

In assessing whether appellate review is appropriate the Supreme Court has analyzed the criteria for public review as a three-prong determination. It has stated that:

In deciding whether a case presents issues of continuing and substantial public interest: Three factors in particular are determinative: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.

In re Marriage of Horner, 151 Wn.2d 884, 891-892, 93 P.3d 124 (2004).

In the instant case, the superior court's determination that "there was a material departure from the jury selection procedure required by law" reversing the trial court's decision is an issue of public interest. The composition of a jury pool is of a public nature because it involves a government body and a criminal proceeding, which are clearly not of a private nature. It also is necessary for this Court to provide future guidance to public officers such as trial courts, court administrators, prosecutors, and judges on the way in which jury pools should be summoned and selected. Finally, the issue of proper jury composition is likely to recur, not only in Tukwila Municipal Court, but other municipalities and district courts. Accordingly, this Court should accept review to decide this issue of substantial public interest.

VI. CONCLUSION

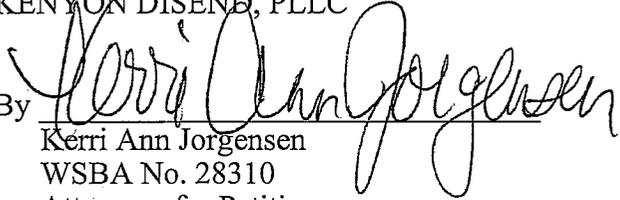
This Court should accept review for the reasons indicated in Part E of this Motion, reverse the decision of the superior court, and affirm

Garrett's conviction.

RESPECTFULLY SUBMITTED this 15th day of January, 2007.

KENYON DISENB, PLLC

By



Kerri Ann Jorgensen
WSBA No. 28310
Attorneys for Petitioner

DECLARATION OF SERVICE

I, Terry Cox, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 30 day of January, 2007, I served a true copy of the foregoing Petitioner City of Tukwila's Motion for Discretionary Review on the following counsel of record using the method of service indicated below:

Robert Boruchowitz	<input type="checkbox"/> First Class, U.S. Mail, Postage
Visiting Clinical Professor	Prepaid
Seattle University School of Law	<input checked="" type="checkbox"/> Legal Messenger
Ronald A. Peterson Law Clinic	<input type="checkbox"/> Overnight Delivery
1112 E. Columbia St.	<input type="checkbox"/> Facsimile:
Seattle, Washington 98122-4458	<input type="checkbox"/> E-Mail:

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29 day of January, 2007, at Issaquah, Washington.


Terry Cox

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APPENDIX A

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

Kellas Garrett

Appellant,

NO. 06-1-03180-2 SEA

vs.

City of Tukwila

Respondent

DECISION ON RALJ APPEAL

CLERK'S ACTION REQUIRED

This appeal came on regularly for oral argument on Dec. 15, 2006 pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Reasoning Regarding Assignment of Error: There was a Material Departure from The Jury Selection procedure required by Law; There was no agreement between Tukwila and King County; Tukwila had No Authority to Summon Jurors from outside of Tukwila AND ITS ELECTORAL DISTRICT.

IT IS HEREBY ORDERED that the above cause is:

[] AFFIRMED; [X] REVERSED; [] MODIFIED;

COSTS

REMANDED to Tukwila Municipal Court Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

DATED: December 15, 2006

Douglas A. North
JUDGE

Robert C. Orr 4563
Counsel for Appellant

[Signature]
Counsel for Respondent

DECISION ON RALJ APPEAL (DCRA)

APPENDIX B

The Honorable Scott Stewart
November 7, 2005
2:30 p.m.

IN THE MUNICIPAL COURT FOR THE CITY OF TUKWILA
STATE OF WASHINGTON FOR KING COUNTY

CITY OF TUKWILA,

NO. CR 44173

Plaintiff,

DECLARATION OF AMY BELL
IN SUPPORT OF PLAINTIFF
CITY OF TUKWILA'S
RESPONSE TO DEFENDANT'S
MOTION TO DISMISS

vs.

KELLAS W. GARETT,

Defendant.

AMY BELL declares and states as follows:

1. I am over the age of eighteen years, make this declaration on personal knowledge of the facts stated, and am competent to testify herein.

2. I am the lead clerk for the Tukwila Municipal Court. I am responsible for overseeing the jury process and ensuring there are an adequate number of jurors for scheduled jury trials.

3. On October 1, 2003, Tukwila Municipal Court entered into a Memorandum of Understanding (the "Agreement") with King County Superior Court for trial court coordination of jury services pursuant to RCW 2.36. The Agreement provided that King County Superior Court would be responsible for processing jury summonses, maintaining juror information in the jury management database prior to the actual term of service, and processing responses/non-responses from jurors. See The Agreement, attached hereto as

DECLARATION OF AMY BELL IN SUPPORT OF
PLAINTIFF CITY OF TUKWILA'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS - 1

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Attorney\KERRIN\Tukwila\Pleadings\PLD - Garrett - Dec. of Amy Bell.doc\C/10/21/05

KENYON DISEND, PLLC

THE MUNICIPAL LAW FIRM

11 FRONT STREET SOUTH

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1 Exhibit A.

2 4. The Agreement was effective from October 1, 2003, through April 30, 2005.
3 Upon expiration of the Agreement, the Honorable Kimberly A. Walden communicated to
4 me that she verbally agreed with King County to renew the Agreement. King County
5 Superior Court has continued to provide and charge Tukwila Municipal Court for trial court
6 coordination of jury services.

7 5. On October 13, 2005, Tukwila Municipal Court received an invoice for jury
8 summons processing from King County Superior Court in the amount of \$992.50. The
9 invoice states that the amount due in reference to an interlocal agreement for jury
10 summoning and pooling services provided to Tukwila Municipal Court by King County
11 Superior Court. See Invoice, attached hereto as Exhibit B.

12 6. Pursuant to the Agreement, King County Superior Court randomly selects jurors
13 from three zip codes (98168, 98178, and 98188) as directed by Tukwila Municipal Court.
14 Tukwila Municipal Court has been selecting jurors from these three zip codes since at least
15 1997.

16 7. According to the United States Postal Service website, zip codes 98168, 98178,
17 and 98188 are listed as zip code matches for Tukwila, WA. See United States Postal
18 Service Website Print-out, attached hereto as Exhibit C.

19 I declare under penalty of perjury under the laws of the State of Washington that the
20 foregoing is true and correct.

21 DATED this 21st day of October, 2005 at Tukwila, Washington.

22
23 
24 Amy Bell

25
DECLARATION OF AMY BELL IN SUPPORT OF
PLAINTIFF CITY OF TUKWILA'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS - 2

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Attorney\KERRIT\Tukwila\Pleadings\PLD - Garrett - Dec. of Amy Bell.doc/C/10/21/05

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APPENDIX C

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KELLAS GARRETT

Appellant,

No. 06-1-03180-2 SEA

v.

CITY OF TUKWILA,

Respondent..

**TRANSCRIPT FROM TRIAL
COURT**

1 **City v. Garrett: September 2005**

2 **CD begins at 8:16:15 with *voir dire*. Hearing and transcription of hearing
begins at 1:32:00.**

3 **Ms. ^eBurglen: City**
4 **Ms. Este: ~~EADS~~ Defense**
5 **Mr. Boruchowitz: Co-Defense**

6 **JUDGE:** Ah, please be seated. I have, ah, City's jury instructions. Do I
7 have Defense?

8 **CO-DEFENSE:** You will in one second.

9 **JUDGE:** Um. Even in absentia, let me, ah, go through, the reason I came out
10 is cause I anticipate that you client will be here, but, um, let me, ah,
11 just read on to the record the various rulings that I've made
12 throughout the course of the morning. If you have any issues, ah,
13 with those, we'll go through 'em after I make my reading. Sound
14 good?

15 Before we commenced any courtroom procedures, we hadn't-

16 Is this turned on, do we know. Is it to me or away from me; I can't
17 remember.

18 **BAILIFF:** Towards you.

19 **CITY:** You're on.

20 **JUDGE:** We had conference, ah, chambers discussion where the defendant
21 was present, but did not verbally take, ah, part. Um. We had a
22 Defense motion to reconsider the, um, motion on, um, Mr.
23 Boruchowitz, the name of the motion?

24 **CO-DEFENSE:** It was to dismiss, your Honor, because the Superior Court,
25 temporary protection order was invalid.

26 **JUDGE:** I did not entertain the motion to reconsider that and I've instructed
27 Counsel that, if they do not receive a favorable verdict at the close
28 of today, hopefully, that, ah, they should make that motion, ah,

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1 before *pro tem*, Scott Stewart, and that they should make it in
2 writing and support it with any written documents such as
3 declarations, in the same format and timing format as they might a
4 motion for summary judgment, since it is a dispositive motion. So,
5 you can do that, um, and make it to the previous *pro tem* who ruled
6 on that in writing if you are in disagreement with verdict rendered
7 today.

8 There was, ah, a motion *in liminae* with regard to what statements,
9 ah, Officer Mitchell, ah, may or may not be able to speak to, what
10 evidence he can, ah, speak to and decided to excise, that is
11 eliminate, the fact that he had responded to the residence as a result
12 of trying to serve a Clark County warrant. He can merely say that
13 he responded to the, ah, residence, but, ah, not to mention that he
14 was doing so to serve, ah, out-of-county warrant. And, also, ah,
15 that, the fact that he had knowledge that there was a no contact
16 order associated with this, ah, with the defendant, it is okay to elicit
17 from him if that is, indeed, the fact. Um.

18 The testimony of Trisha Clay was also discussed because of the
19 fact that this case is one where the violation of protection order
20 doesn't involve contacting her, it involves violation of the 500 foot
21 restriction from going to certain location. Um. I heard motions
22 from Defense and Prosecutor and, um, I'm going to allow the
23 testimony of Trisha Clay insofar as that when she came to the, ah,
back to the residence, after this, ah, defendant/officer incident on
June 27th, that she did find, um, certain physical things of the
defendant at her house. And that she can testify to those. She can
testify that she called the officer report and she can testify that she
showed the temporary protection order to the officer. Um.

I'm gonna be hesitant to going to much farther a field than that, but
we didn't get too heavily into the exact pieces of evidence and so,
um, those are just my generalizations at this point.

Um. So, those were the in chamber discussions. Does Counsel
have anything to, ah, comment at or modify in that regard.

CO-DEFENSE: Ah, your Honor, just to make sure the record is clear on, I'm
handing to the Clerk and I've showed Counsel, ah, written motion
to exclude testimony from Trisha Clay. And, um, something that

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we did not ask you about [inaudible] was to exclude evidence of any prior convictions, other charges, or other warrants. I think we touched on it by talking about other warrants that there might have been and I want formally move to exclude any reference, any other charges, convictions or warrants.

JUDGE: Madam Prosecutor, we have, ah, a ER 609 motion here being brought anew. I, we might as well handle it now, I suppose. Do you have any prior conv- ah, bad acts or convictions of the defendant if he should so testify?

CITY: Um. One second. The Court didn't provide us with a DCH, a current DCH. I'm not recalling off hand that he got any theft convictions.

JUDGE: Let me just throw that out to you and I'll go on with my-

CITY: Okay.

JUDGE: things as we go. During, ah, *voir dire* process, there was a for cause challenge by the City, um, for Juror #34 who is in position number 4, I granted that. There was a for cause challenge by Defense to Juror in position number 8, who is Juror #29, I granted that. There was-

CO-DEFENSE: Excuse me, your Honor.

CITY: Juror-

CO-DEFENSE: Excuse me. Excuse me, your Honor.

CITY: Your Honor, juror's are present. [inaudible].

BAILIFF: [inaudible]. Sorry.

JUDGE: And, wasn't there one more?

CITY: Ah, there was the City's motion for, ah, Juror #11 because of his medical condition and the Court denied that.

JUDGE: Right. I have the denial ones. But, didn't I grant, um?

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CITY: Seat number four and seat number 8, did you get those?

JUDGE: Is that- Yeah. Are those the only two? Okay.

CITY: Yes.

JUDGE: Um. Now, the Defense motion to for cause Juror #11 who was seated in number, position number 6, I denied that. Defense motion to for cause challenge Juror #10 who is seated in position number twelve, I denied that. City motioned to for cause challenge Juror #20 who is in position number eleven and I denied that. Defense also motioned at sidebar, ah, for additional *voir dire* time. I felt as though Counsel had ample opportunity and so I denied additional, ah, *voir dire* minutes, so to speak.

Does anybody have anything to comment or modify on those series?

CO-DEFENSE: Just briefly, your Honor. Um. The reason I asked for more time was, ah, to be able to develop more effectively our challenges for cause, and [inaudible] challenges, ah, in particular with regard to challenge to cause that you denied that sidebar the Juror, Miss Haines, had indicated a number of statements that indicated she might not be able to be fair and that she would be unable to tell your Honor if she found that she was unable to be fair. Ah, we would have, ah, have liked to pursue that further. In addition, a number of jurors indicated toward the end of our questioning that they would expect Mr. Garrett to testify, they would want him to testify and we have liked more time to address those, ah, ah, issues as well.

JUDGE: Very well. And, and with that, I think that the, ah, back and forth recitations are sufficiently on the record, um, to describe those, so. Any other issues?

All right. What's that?

BAILIFF: [inaudible].

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1 JUDGE: Oh. 404B and 609, um, should Mr. Garrett choose to testify, does
2 Madam Prosecutor, um, have any evidence to impeach his
3 credibility?
4 CITY: No, your Honor.
5 JUDGE: So, with that, the written motion, ah, I'll make a finding that
6 there'll be no ER 609 or 404B evidence - 609 being past
7 convictions and 404B being past bad acts.
8 CO-DEFENSE: And, just to be clear, so the, ah, former and [inaudible] Officer,
9 again, Mitchell, um, is clear that he's not to talk about any warrants
10 that he may know about.
11 CITY: Yes. And, I've discussed that with him, your Honor. He's not to
12 mention the warrant.
13 JUDGE: All right. Um. What I'd like to do is bring the jurors in and swear
14 them in and read the colloquy and then, go to opening statements.
15 Okay?
16 CITY: Yeah.
17 CO-DEFENSE: Sure.
18 JUDGE: Um. And then, ah, I tell you, I don't, I don't ask Defense whether
19 or not they're going to make their opening or reserve it. Um. I
20 think it's just appropriate that I turn to you and say, "would you
21 make it now or later".
22 CO-DEFENSE: We're gonna make it now and Ms. Eves will make it.
23 JUDGE: Okay. Very well. Let's have the jurors.
CO-DEFENSE: Well, your Honor, there is one other thing I wanted to mention
quickly. I'm sorry. Um. I've never ran into this before and so I
wasn't prepared.
JUDGE: Can you hold on? Amy, can you- Can you hang on for a second?
BAILIFF: Sure.

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CO-DEFENSE: So, I haven't researched and I'm trying to get my staff to do it while I'm down here. But, I would object to there being jurors from outside the City of Tukwila. A number of the jurors said that they live outside of the City of Tukwila. It seems to me that a juror [inaudible] from the jurisdiction of [inaudible] and I've not a chance to research that [inaudible]. If we get a guilty verdict, I will present in writing and ask you to consider that, but I think the jury needs to come from the jurisdiction of the Court. I recognize in District Court it is legal to call people from all over the county, I don't know if the City can do that.

JUDGE: I, ah, that thought crossed my mind when I was hearing people say they were from SeaTac and whatever, but I don't know the case law and so, you're gonna have to present more at this point.

CO-DEFENSE: Ah, the basic argument is the Constitution requires a jury of the locale and I understand there's case law allowing Shoreline District Court to call people from South King County, but I don't think there's any case law that authorizes the City to call jurors from outside of the City. And, a number of the jurors testi- or spoke under oath that they lived in Greenwood, they're living here, they're living there.

JUDGE: Understood.

BAILIFF: We haven't assigned them any particular seating arrangement. Mmm. Can they just sit down and then, is that all right with everybody?

JUDGE: I think-

CO-DEFENSE: It's fine with me.

BAILIFF: Have a seat.

JUDGE: At your leisure.

BAILIFF: Okay. When I bring you in and out, though, make sure you sit in your same seats that you're sitting in.

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JUDGE: I'm gonna have you stand up right away, so you might as well just keep standing. Tha- Thank you. And to the six of you, would you please raise your right hand for me. Do you solemnly swear or affirm that you will well and truly try the case and declare a true verdict according to the evidence and the instructions of the Court? If you do, please say "yes".

JURORS: Yes.

JUDGE: Thank you. And, let's all have a seat.

Ladies and gentlemen, my next sort of colloquy to you will go as follows, all right. Is everybody comfortable? We're all doing okay. Okay. Let me know if you have any questions.

It is important that you keep your minds open and attentive throughout the trial. Do not discuss this case amongst yourselves or with anyone else. Do not permit anyone to discuss it with you or in your presence. A violation of this order is serious. It may involve a personal penalty to you and result in a mistrial, which would cause great injury to the parties in the case and to the City. You will not be sequestered and kept during, kept together during this trial. Um. Because of this you are admonished not to read, view or listen to any report in the newspaper, radio or television on the subject of this trial. Do not permit anyone to read or comment on it to you or in your presence. It is important that you keep your mind free of extraneous influences so that you may decide the case in the, on the evidence and under the Court's instructions on the law. If your family and friends ask you about the case, you should tell them that you are under the Court's instruction not to discuss it. When the trial is over, you will be released from the instruction and will then be free to discuss the case and your experiences as a juror.

The lawyers, the defendants, and the witnesses are not permitted to talk to you during the trial. Even a discussion which has no relation to the case will give a bad appearance. For this reason, the participants in the trial will not greet or converse with you during the trial.

While you are not to be sequestered during the trial, you will take all your recesses in the jury deliberation room. And, when we

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1 recess for the noon period and for the day, you will depart the jury
2 deliberation room and precede directly out of the courthouse.
3 When you return, come directly to the jury deliberation room, thus
4 avoiding any inadvertent contact with anyone who may be a
5 witness from who you are not able to identify by sight.

6 Y- You as a juror should never seek out evidence or do any
7 research. You should not inspect the scene of an event involved in
8 a case as conditions may not be the same. There are many other
9 reasons why the case must be decided only on proper evidence
10 admitted in the courtroom. If your normal coming and going from
11 the court sessions would result in passing or seeing the scene, do
12 not stop and investigate and please advise the bailiff or clerk so that
13 he or she can advise the Court.

14 The Court may repeat or refer to these instructions from time to
15 time during the trial. These instructions continue to apply to
16 conduct throughout the trial, at every recess, until the matter is
17 submitted to you for decision whether or not the Court specifically
18 repeats them or refers to them again.

19 The functions and duties of jurors, the Court, the lawyers, and the
20 procedure to be followed during trial. The lawyers remarks,
21 statements and arguments are intended to help you understand the
22 evidence and apply the law. They are not evidence, however, and
23 you should disregard any remarks, statements or arguments which
are not supported by the evidence or by the law as the Court gives
it to you. The law does not permit me to comment on the evidence
in any way and I will not intentionally do so. By commenting on
the evidence I mean some expression or indication from me as to
my opinion on the value of the evidence or the weight of it. If it
appears to you that I do comment on the evidence, you are to
disregard that comment entirely. The lawyers may make objections
to questions and evidence. They have the right and duty to make
any objections which they deem appropriate. Such objection
should not influence you and you should make no presumptions
because of their objections. The evi- the evidence you are to
consist, um, consider consists of the testimony of the witnesses and
the exhibits admitted into evidence. It will be my duty to rule on
the admissibility of evidence. You must not concern yourselves

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with the reasons for these findings, you will disregard any evidence which either is not admitted or which may be stricken by the Court.

Case will proceed in the following order. First, the plaintiff, who's the City's, their lawyer may make an opening statement outlining the evidence to be presented on behalf of the, their case. The Defense lawyer may make an opening statement outlining the defendant's case immediately after the plaintiff's statement or the defendant's lawyer may reserve opening statement until the conclusion of the plaintiff's case.

Second, the plaintiff will introduce evidence. At the conclusion of the plaintiff's evidence, the defendant may introduce evidence. Rebuttal evidence may, also, be introduced by either side. At the conclusion of all the evidence, further instructions will be given to you, after which the lawyers will have the opportunity to make closing arguments. Then you will select a fore-person and deliberate your verdict.

You are officers of the Court and must act judiciously and with an earnest to desire to determine and declare a proper verdict. Throughout the trial, you should be impartial and permit neither sympathy nor prejudice to influence you.

Members of the jury will you please give your attention to Ms. Burglen, the City Attorney for the opening statement.

CITY:

Good afternoon, ladies and gentlemen. Again, my name is Kerry Berglen and I'm the Prosecutor for the City of Tukwila. Today, you're gonna hear the case of the City of Tukwila v. Kellis Garrett. This is Cause Number CR-44173.

You're going to hear the City's evidence in this case, um, from Officer Mitchell and the number of exhibits that the City is introducing, which will indicate to you that on June 27th of this, of 2004, last year, um, that Officer Mitchell responded to the address of 3515 South 146th Street, #107, in the City of Tukwila. Officer Mitchell was employed as a Tukwila police officer at that time. And, when he responded to that scene, he contacted Kellis Garrett, the defendant in this case, at that address. You will hear from, ah, Officer Mitchell that there was a protection order in place at that

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1 time and that that protection order prohibited Mr. Garrett from
2 being at that residence that he was at on that occasion. Um.
3 Officer Mitchell will, also, testify for you that on the next day on
4 June 28th, 2004, he again contacted that residence where he
5 contacted Trisha Clay, the named petitioner in the protection order,
6 again, at that residence. And, Ms. Clay specifically showed him a
7 copy of the protection order in this case. Officer Mitchell testified,
8 um, as to, ah, his contact with those individuals. You will, also, see
9 from the City a copy of that protection order with expli- with the
10 explicit provisions, um, which indicate in fact that Mr. Garrett was
11 prohibited from going to that residence. He's prohibited, in fact,
12 from being within 500 feet of the residence. And, you will hear
13 from the testimony that he was at that residence in violation of that
14 specific provision.

9 The City would ask that you listen very attentively to the testimony
10 that you'll hear, that you view the evidence very carefully. And,
11 the City believes that after hearing all the of the evidence that you
12 will find Mr. Garrett, Mr. Kellis Garrett, violated a protection order
13 in the City of Tukwila on June 27th, 2004, that that order had been
14 issued by Superior Court on June 18th, 2004 and it prohibited him
15 from having contact with [inaudible]. After listening to all of the
16 evidence, I would ask that you find Mr. Garrett guilty of this
17 offense. And, I thank you very much for your time and attention.

14 JUDGE: Miss Eete?

15 DEFENSE: Thank you, your Honor. Good afternoon, ladies and gentlemen.
16 Um. I am [inaudible], earlier. I am [inaudible], Mr. Garrett in this
17 case. And, this case is a very simple case, with very simple facts.
18 Officer Mitchell went to Mr. Garrison's, Mr. Garrett's - I keep
19 mixing up his name - Kellis Garret - Mr. Garrett's residence. He
20 found Mr. Garrett there, alone, and he arrested him. Now there are
21 many different types of court orders. Today Mr. Garrett is being
22 charged with violating a temporary domestic violence order for
23 protection. Now in order for the temporary domestic violence
order for protection and I'm just gonna call it a protection order
from now on, the [inaudible] breath. Um. In order for that order to
be valid, a court has to find that a domestic relationship exists.

22 CITY: Objection, your Honor. She's arguing the legal basis for the order.

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1 DEFENSE: Your, your Honor, I'm just simply saying that the order on its face,
2 which we're allowed to challenge based on factual basis.
3 CITY: Again, that's a legal-
4 DEFENSE: It's not to-
5 CITY: that's a legal challenge, your Honor, it's not a factual one.
6 DEFENSE: What- what I'm saying is that on the face there are no words to
7 indicate a finding by the Court that a domestic relationship existed.
8 CITY: That's not an issue presented to the jury.
9 DEFENSE: In Stave v. Lloyd, Stave v. Lloyd-
10 JUDGE: Okay.
11 DEFENSE: specifically said that factual challenges, that's
12 JUDGE: I-
13 CITY: [inaudible], your Honor?
14 JUDGE: Let me, let- No. Let me rule on this. You- The opening statement
15 is for the evidence that will be adduced in Court, it's not in
16 argument. So, as long as you reduce yours to, um, the evidence
17 that will be presented, you'll be fine.
18 DEFENSE: Okay. Um. So, today, because Mr. Garrett has been charged with
19 violating his protection order, the City has the burden to prove
20 three things, three things to you: that it was a valid order, that Mr.
21 Garrett knew about the valid order, and that he violated that order.
22 And, you cannot find him guilty without all three of these elements
23 being proven beyond a reasonable doubt. Because the order is a
domestic violence order, domestic relationship needs to be found
by the Court. And, the Court cannot be mistaken by not finding
that. Therefore, today, we will ask you to return a verdict of not
guilty, cause Mr. Garrett did not violate a valid message, ah,
protection order. Thank you.

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JUDGE: All right. The City have their first witness?

CITY: Yes, your Honor. The City would first call Officer Mitchell.

JUDGE: Do you solemnly swear to tell the whole truth in this matter?

MITCHELL: Yes, your Honor.

JUDGE: Thank you. And, ah, please have a seat there and we'll make sure that.

CITY: Can you please your full name and spell your last name for the record.

MITCHELL: Richard A. Mitchell. M-I-T-C-H-E-L-L.

CITY: And, how are you employed currently?

MITCHELL: I'm currently employed as a Executive Protection and Corporate Security Specialist for Balkan Incorporated.

CITY: Okay. And, how were you employed prior to that?

MITCHELL: Ah, for 11 ½ years prior to my current job, I worked as a police officer in the City, and a police detective in the City of Tukwila.

CITY: Okay. And what training and experience do you have in regards to that job you had, held in Tukwila?

MITCHELL: Ah, I have over 2000 hours of training in various aspects of law enforcement to include basic law enforcement academy. I have training in, ah, detectives and investigation, surveillance, ah, numerous ar- just about every area of law enforcement I have training in.

CITY: Okay. Were you employed by the City of Tukwila as a police officer on June 28th of 2004?

MITCHELL: Yes, I was.

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1 CITY: And, were you equally employed, um, as such on June 27th of
2004?
2 MITCHELL: Yes.
3 CITY: And, on June 27th of 2004, um, did you have reason to come into
4 contact with anyone in the courtroom?
5 MITCHELL: Yes, I did.
6 CITY: And, who was that individual?
7 MITCHELL: Um. The defendant, Kellis Garrett.
8 CITY: Let, let the record reflect the officer's identified the defendant.
9 CO-DEFENSE: Has he?
10 DEFENSE: Objection, your Honor. He has not identified the defendant
11 CITY: Where's the defendant seat- Or, where's the individual you
12 contacted that day seated?
13 MITCHELL: The, that individual is seated directly in front of me. He's wearing
a grey sweater, grey pants and black collar shirt.
14 CITY: Okay. And, is that the same individual you contacted on June 27th?
15 MITCHELL: Yes, he is.
16 CITY: Okay. Let the record now reflect that the officer has identified the
17 defendant. And, on that day, um, do you recall approximately what
time that was?
18 MITCHELL: On June 27th?
19 CITY: Yes.
20 MITCHELL: Ah, I contacted him at about 2:00 in the afternoon.
21 CITY: Okay. And, where did you contact him at?
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1 MITCHELL: At 3515 South 146th Street in the City of Tukwila.
2 CITY: Okay. And, um, as an officer, is this an area that you are familiar
3 with?
4 MITCHELL: Yes, it is.
5 CITY: Okay. And, is that location within the City limits?
6 MITCHELL: Yes, it is.
7 CITY: Okay.
8 DEFENSE: Objection. Lack of foundation.
9 JUDGE: Overruled.
10 CITY: Do you recall specifically what apartment you went to on that
11 occasion?
12 MITCHELL: I went to apartment 107.
13 CITY: Okay. And, on that occasion, um, did you have any familiarity with
14 Mr. Garrett?
15 MITCHELL: I went there to contact him and I was aware of a protection order-
16 CITY: Okay.
17 MITCHELL: that was in place.
18 CITY: And, how were you aware of that protection order?
19 MITCHELL: Um. I, I viewed it, ah, in doing my research before going there.
20 CITY: Okay. And-
21 DEFENSE: Objection, your Honor. Hearsay?
22 JUDGE: Um. I think [inaudible]. I'm gonna overrule the objection.
23

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CITY: Okay. And, how was it that you came into contact with Mr. Garrett at that scene? How did- When you arrived at the residence, ah, what did you do?

MITCHELL: I knocked on the door to apartment 107. Um. He answered the door and I contacted and identified him there.

CITY: Okay. And, and, ah, what did you do, how did you identify him, do you recall?

MITCHELL: I don't recall, no.

CITY: Okay. And, what did you do after you contacted him?

MITCHELL: I arrested him and transported him to jail.

CITY: Okay. Um. On June 28th, were you, again, dispatched to that apartment?

MITCHELL: Yes, I was.

CITY: Okay. And, what for?

MITCHELL: Um. A Trisha Clay, ah, wanted to report a violation of a no contact order; I was dispatched to that call.

CITY: Okay. And, did you contact, um, a Trisha Clay there?

MITCHELL: I did, yes.

CITY: Okay. And, did you identify her?

MITCHELL: Yes, I did.

CITY: Okay. And, what did you do when you were there?

MITCHELL: Um. I took the report and the information she gave me; took a written statement from her and, ah, gathered her information and left that location.

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1 CITY: Officer Mitchell, when you contacted, um, Ms. Clay at that
2 residence, did she provide you with any documentation?
3 MITCHELL: She showed me a copy of the DVPA or protection order.
4 CITY: Okay. And, um, at that time, did you look at that copy?
5 MITCHELL: Yes, I did.
6 CITY: Let me show you what's marked Plaintiff's Exhibit 1 and, and
7 before you, before you look at that; are you familiar with protection
8 orders?
9 MITCHELL: Yes, I am.
10 CITY: And, are you familiar with [inaudible]?
11 MITCHELL: Yes.
12 CITY: And, how are you familiar with them?
13 MITCHELL: Ah, I, we, I, we serve not only do we serve protection orders, we
14 also enforce them when they're violated. Um. It goes through, ah,
15 just years of experience in handling them and then as well as our
16 training on domestic violence issues.
17 CITY: I'm gonna show you what's been marked as Plaintiff's Exhibit 1.
18 And, are you familiar with that document?
19 MITCHELL: Yes, I am.
20 CITY: And, how is it that you're familiar with it?
21 MITCHELL: Ah, this is a certified copy of a, ah, protection order from S- from
22 King County Superior Court.
23 CITY: And, does it identify the parties?
MITCHELL: Yes, it does.
CITY: And, how does it identify them?

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1 CITY: Again, that's a legal argument, not a, it's not [inaudible].
2 JUDGE: Ri- ri- And, I'm gonna deny the objection at that, on those
3 grounds.
4 CITY: Officer Mitchell, um, looking at that document, um, can you tell by
5 looking at the document what date it was issued?
6 DEFENSE: Objection. Hearsay.
7 CITY: No, no, it's a [inaudible] document; it's already been admitted. I'm
8 asking the officer to articulate the information within it.
9 DEFENSE: The jury will get a chance to view the document.
10 JUDGE: Overrule. Go ahead and re-ask the question.
11 CITY: What date was that document issued, ah, Officer Mitchell?
12 MITCHELL: Um. It was filed in King Cou- King County Superior Court on
13 June 18th of 2004.
14 CITY: And, looking at that order, does it list an address for the parties?
15 On page 2.
16 MITCHELL: Yes, it does.
17 CITY: Okay. And, what address is listed?
18 MITCHELL: 3515 South 146th Street, apartment 107, in City of Tukwila,
19 Washington 98168.
20 CITY: And, in that specific, um, provision, ah, Provision 3 is what I'm
21 referring to, what does it indicate?
22 MITCHELL: Provision 3 indicates *respondent is restrained from going on to the*
23 *grounds of or entering petitioners residence, work place, school,*
the daycare or school.
CITY: Okay. And, um, Subsection 4, what does it indicate?

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MITCHELL: Subsection 4 indicates petitioner shall have exclusive right to the residence petitioner and the respondent's share. The respondent shall immediately vacate the residence. The respondent may take respondent's personal clothing and respondent's tools of trade from the residence while law enforcement officer is present.

CITY: And, Provision 5, what does it indicate?

MITCHELL: The respondent is prohibited from knowingly coming within or knowingly remaining within 500 feet of petitioner's residence, work place, school, the daycare or school of mother's residence.

CITY: I'm gonna show you what's been marked Plaintiff's Exhibit 2.

DEFENSE: Objection, your Honor. Ah, as far as I'm aware of-

CO-DEFENSE: [inaudible].

DEFENSE: Um. May I have a sidebar, please.

JUDGE: Sure. Ready. Wanna do that right here?

Sidebar.

CITY: The City would first move to admit Plaintiff's Exhibit 2, your Honor.

CO-DEFENSE: Objection has been noted, your Honor.

JUDGE: Um. Well, we haven't had any testimony on it, even as to what it is. So, let's forward with that.

CITY: Okay. Officer Mitchell, can you identify what that is in front of you?

MITCHELL: This document in front of me is, is what we call in the police profession "return of service".

CITY: Okay. And, are you familiar with that type of document?

MITCHELL: Yes, I am.

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1 CITY: And, have you ever completed one of those before?
2 MITCHELL: Yes, I have.
3 CITY: Okay. And, um, the City would now move to admit, ah, the
4 document, your Honor. It's a certified public record.
5 CO-DEFENSE: Objection, your Honor. And as, we'll make a record note of what
6 was said at sidebar.
7 JUDGE: Objection noted. Document admitted Number 2.
8 CITY: And, what does that document indicate in regards to Mr. Garrett?
9 MITCHELL: This document indicates that, um, Mr. Garrett was served the
10 protection- temporary order for protection and notice of hearing on
11 June 18th 2004 at 7:15 p.m. in the evening; he was served a copy of
12 this.
13 CITY: Okay. And, does it indicate where he was at when he was served
14 that copy?
15 MITCHELL: Yes, it does.
16 CITY: Where is that?
17 MITCHELL: This was served to him at 3515 South 146th number 107, Tukwila,
18 Washington.
19 CITY: Okay. And, is that same residence that you contacted Mr. Garrett
20 at?
21 MITCHELL: Yes, it is.
22 CITY: I'm gonna show you what's been marked as Plaintiff's Exhibit 4.
23 And, are you familiar with what that is?
MITCHELL: Yes, I am.
CITY: What is it?

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MITCHELL: This is, ah, it's a Department of Licensing copy of Mr. Garrett's driver's license.

CITY: Okay.

DEFENSE: Objection. What's the relevance of this?

CITY: Your- can, can we approach or do you want me on the record?

JUDGE: Go ahead and tell me.

CITY: There certainly is relevance, your Honor, because the I- the document both identifies Mr. Garrett and identifies the location as his place of residence.

JUDGE: Um. Overruled. Please continue.

CITY: And, is that, is that photograph, is that a photograph of Mr. Garrett, the individual who you contacted that day and who's in Court today?

MITCHELL: Yes.

CITY: And, what does it indicate that address of that individual was?

MITCHELL: The address on his Identification Card is 3515 South 146 107, Tukwila, Washington, 98168.

CITY: And, is that the same, ah, address that you contacted Mr. Garrett at?

MITCHELL: Yes, it is.

CITY: The City would move to admit that document, your Honor.

JUDGE: No objection the document be admitted?

DEFENSE: (Response?)

CITY: The City's gonna hand the officer City's Exhibit Number 5. Again, can you identify that document for the record?

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MITCHELL: It's a Department of Licensing photocopy of a Identification Card.
CITY: Okay.
DEFENSE: Objection. Irrelevant.
CITY: Same relevance, your Honor.
JUDGE: Goes to-
CITY: Identifies both parties as-
JUDGE: Goes to ID, I'll allow it.
CITY: Who is the individual on that document?
MITCHELL: This is a photocopy of an identification card of Trisha Ann Clay.
CITY: Okay. And, is that the same individual that you contacted on June 28th-
MITCHELL: Yes, it is.
CITY: of last year?
MITCHELL: Yes.
CITY: Okay. And, what does it indicate her address is?
MITCHELL: 3515-
DEFENSE: mmm. Hearsay.
JUDGE: I'm going to allow him to read from the document that's been adduced.
MITCHELL: 3515 South 146, number 107, Tukwila, Washington 98168.
CITY: At this time, City move to admit Plaintiff's Exhibit Number 5.

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1 CO-DEFENSE: Objection as before, your Honor.
2 JUDGE: Noted. Document admitted.
3 CITY: Can we have a sidebar for moment, your Honor?
4 JUDGE: Sure.
5 Sidebar.
6 CITY: Officer Mitchell, you indicated that you worked for the City of
7 Tukwila for 11 years, is that correct?
8 MITCHELL: Yes. About a 11 ½ years.
9 CITY: Okay. And, in that term of service with the City, are you familiar
10 with the boundaries of the City?
11 MITCHELL: Yes, I am.
12 CITY: And, how are you familiar with them?
13 MITCHELL: Ah, just through training and experience.
14 CITY: Okay. And, um, and do you have, when you're working for the
15 City, do you have any, um, are you assigned to an area within the
16 City?
17 MITCHELL: Yes, I am.
18 CITY: Okay. And, what area are you typically assigned to?
19 MITCHELL: Well, most-
20 CITY: Or, were you typically assigned to?
21 MITCHELL: Ah, most of my career, I've been assigned to the Highway 99 area
22 and the particular district I've been in is the Patrol Tom 5 District
23 or the 5 District. It runs from South 144 Street, around Larry's
Market, all the way down to Lewis & Clarke at the South Center
Mall.

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1 CITY: Okay. And, um, is one or - I'm sorry - 3515 South 146th Street
2 within, ah, a district within the City of Tukwila?

3 MITCHELL: Yes, it is.

4 CITY: Okay. Is it within that district you normally work?

5 MITCHELL: Yes, it's in my district, the Tom 5.

6 CITY: Okay. And, in your experience-

7 DEFENSE: Objection.

8 CO-DEFENSE: We-

9 CITY: Oh. Withdrawn. And, in your experience, are, are you when
10 you're assigned to a district initially, do they give you information
in regards to the area that that encompasses?

11 MITCHELL: I'm not su- I don't understand your question.

12 CITY: When you're assigned to the Tom 5, do they, do they advise you
13 what area that is? And, the boundaries of that area?

14 MITCHELL: Yes, they do.

15 CITY: Okay. And, in, in that capacity are you familiar with the
boundaries of Tukwila?

16 MITCHELL: Yes, I am.

17 CITY: Okay. And, was this address within the City of Tukwila?

18 MITCHELL: Yes, it is.

19 CO-DEFENSE: Your Honor, could I just [inaudible] in light of the Court's, ah-

20 JUDGE: Sure.

21 CO-DEFENSE: discussion with us?

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JUDGE: Sure.

CO-DEFENSE: Excuse me, Officer. Ah, has the boundaries of Tukwila changed in the last number of years?

MITCHELL: Ah, it depends. You know, you'll have to, it, it, it has changed, but not- It changes every year cause there, there are always hand-[inaudible] areas. Ah, you'd have to be a little more specific.

CO-DEFENSE: Okay. So, let me ask you this. During the time that you've been a police officer, the boundaries of Tukwila have changed, is that correct?

MITCHELL: Yes.

CO-DEFENSE: And, the address that you're telling us today is within those City limits, that's very close to the boundary of the current City?

MITCHELL: Yes, it is.

CO-DEFENSE: And you're, you're not trained in geog- geography?

MITCHELL: Yes, we are trained in geography.

CO-DEFENSE: Who trained you in geography?

MITCHELL: Ah, you mean when we're new?

CO-DEFENSE: Well, did you go to geography class or [inaudible] Washington?

MITCHELL: Geography of the City or?

CO-DEFENSE: No. Geography- Well, let me back up.

MITCHELL: I'm sorry. I'm not understanding the question, sir.

CO-DEFENSE: Have you taken any classes in geography at the University?

MITCHELL: I'd have to think about it. I have a four year degree. I can't remember all of- I may have, yes.

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CO-DEFENSE: Thank you. Nothing further. We would object to his testimony.

JUDGE: I, the, I think a proper foundation has been laid. [inaudible]. Um. Admit. Well, I'll let the evidence, ah, stand on the [inaudible].

CITY: Now, the City's introduced four exhibits and I'll refer you back to those for a moment. I'm gonna refer you back to the temporary order for protection and the DOL [inaudible]. Now, referring to those documents in front of you that you've already reviewed, are those individuals that are the same individuals that are identified in the DOL photos and that you had contact with on that, those two dates?

MITCHELL: Yes.

CITY: And, when you contacted Mr. Garrett at that residence, um, where was he located within the residence?

MITCHELL: My first contact of him he answered the door, so, ah, the entry way or hallway area.

CITY: Nothing further at this time, your Honor.

CO-DEFENSE: Your Honor, can we have a two-minute recess? So, if we can just have two minutes, real, literally two minutes.

JUDGE: Sure.

Recess - 2 minutes.

DEFENSE: Good afternoon.

MITCHELL: Good afternoon.

DEFENSE: You found Mr. Garrett alone at his residence?

MITCHELL: Yes.

DEFENSE: Okay. And, today you've been referring to your police report?

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1 MITCHELL: Yes.

2 DEFENSE: And, you need that police report to refresh your memory regarding
3 details and time?

4 MITCHELL: Yes.

5 DEFENSE: Okay. And, earlier today you testified that you viewed the no
6 contact order or the protection order?

7 MITCHELL: Yes.

8 DEFENSE: And, it's, isn't it true that you reviewed that protection order after
9 Mr. Garrett was arrested?

10 MITCHELL: Yes.

11 DEFENSE: And, before he was arrested all you read is a computer printout that
12 did not indicate what the protection order was for or where it
13 [inaudible]?

14 MITCHELL: That's correct.

15 DEFENSE: All right. Thank you.

16 JUDGE: [inaudible]?

17 CITY: Your Honor, can we briefly have a sidebar?

18 JUDGE: Sure.

19 **Sidebar.**

20 CITY: Um. The City having admitted, just confirming that I've admitted
21 Plaintiff's Exhibit 1, 2, 4 and 5. Um. The City would excuse this
22 witness and ask to publish those documents to the jury, your
23 Honor.

JUDGE: Um. You may be excused.

MITCHELL: Thank you.

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1 JUDGE: Those are the admitted documents publishing.
2 CO-DEFENSE: I don't think it's appropriate at this time, but I don't have a good
3 argument there.
4 JUDGE: Let's, um, go ahead and publish them to the jurors. Thank you.
5 MITCHELL: Thank you, your Honor.
6 JUDGE: Ladies and gentlemen, um, the word "publishing" as used in the
7 courtroom context means just to show them to you. And, um, these
8 exhibits, numbered exhibits, you'll find the numbers on the back
9 side of each exhibit and they or be a single page or they may be, ah,
10 duplicate pa- or they may be a number of pages, but at any rate,
11 these are exhibits that have been admitted so they will go to you to
12 the jury deliberation room. So, you do not need to memorize them
13 or, or anything in particular at this point. This is just to familiarize
14 you with that evidence. So, we'll take a moment for that, but I
15 don't anticipate more than just a couple of minutes. And, you can
16 pass them betwixt yourself.
17 Pause.
18 Okay. Does the City have additional witnesses?
19 CITY: No, your Honor. However, at this time, the City would, ah, ask the
20 Court's, um, to go on the record in regards to Exhibit Number 3,
21 ah, the certified copy of the docket in this case.
22 JUDGE: You wanna make my, ah, you want me to make my rulings part of
23 the record, is that it?
CITY: Yes, your Honor. [inaudible] certified copy of the docket.
JUDGE: Okay.
CITY: The City would move to admit that docket as a public record.
JUDGE: The Number 3?

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CITY: Yes, your Honor.

JUDGE: Okay.

CO-DEFENSE: [inaudible].

JUDGE: My ruling on Exhibit, the, ah, admission of Exhibit Number 3, um, and I'll not describe that, I'll let it describe itself, um, is that while I do find that it would be admissible, I do not find that it would be necessarily helpful and I do find that it would be duplicative evidence. And so, at this point, I am going to decline the admission of the evidence subject to what may further heard during the trial or not. So, at this point, I'm gonna provisionally, provisionally deny the admission of Number 3.

CITY: Thank you, your Honor. At this time, the City rests.

JUDGE: Very well.

CO-DEFENSE: We have a matter to take up with the Court. We would have a matter to take up with the Court, your Honor.

JUDGE: Okay. Do you wanna excuse the jury to the jury deliberation room and we'll take up matters.

Jurors being excused.

Go ahead.

CO-DEFENSE: Thank you, Judge. We make a motion to dismiss at this time. There really are, ah, three issues I'd like you to recognize and I realize you may not address all of them including the jury being from outside the City, but I wanna renew that as a reason to dismiss. Um. I think there's two elements for you to consider at this point. One, is knowledge - whether Mr. Garrett knowingly, um, whether the City has proven that Mr. Garrett knowingly violated the order, that he knew there was a valid order and he knowingly violated it. And then, secondly, I really think it's important for the Court, at this point, to consider the validity of the order.

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The State v. Joy Cassen, it's a new case-

JUDGE: Can I- Can I slow you down a little bit on that. I, my, my ruling was clear in regards to, um, the previous *pro tem* heard that issue, denied the Defense's motion, and um, while I understand you're raising it as a motion to reconsider, I've already addressed that particular issue, um, decided not to decide at this point, gave you an avenue of relief that I do think is a legal, ah, avenue. And, um, I, I think we should just let it go at that. I think I've already made my ruling. I don't think I'm gonna change my mind. I think we've already been through this frame up.

CO-DEFENSE: (Sigh.)

JUDGE: Keep talking to me, though. I'm not frustrated. I just wanted to let you know what I'm thinking. "

CO-DEFENSE: Well, I appreciate the opportunity to finish, ah, my brief argument.

JUDGE: Go.

CO-DEFENSE: Um. State v. Joy is a recent case from the Court of Appeals, which the City argued effectively with Judge Stuart. I think it's important for the Court at least to look at the case, if, if you would this afternoon, because there's a key paragraph that basically says this: *The defendant has a right to challenge the face of validity of the protection order. This is ordinarily a legal question for the Trial Court. If a defendant raises a factual dispute bearing on an attribute of facial validity it is for the jury to decide.* So, either at this point we get to argue to you that because there is no finding of any kind of domestic relationship on the order, none whatsoever, the order is invalid. And, you can agree with us. Or, we get to argue to the jury. We can't be excluded from doing both. And, under this Court of Appeal's opinion from a couple of months ago, we have to be able to do one or the other. And, so, if we're not able to challenge the face of validity, then we've gotta be able because we've raised a factual dispute about it, be able, ah, to present to the jury. And, this is not as I think, perhaps, Judge Stuart misunderstood, we were not attacking the sufficiency of the evidence presented to the Court Commissioner. I think that's one reason that perhaps he thought Joy was persuasive, because what

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1 Joy was trying to do was to attack the sufficiency of the evidence.
2 In other words, the testimony presented wasn't good enough.

3 We're saying the Judge just didn't make the right finding. The
4 order, on its face, doesn't have the finding that he needed to make
5 of a domestic relationship. And, you can't just order people to stay
6 away from each other. You've gotta have some, ah, finding that
7 allows you to make the conclusion of law. What basically this
8 document has, that you're gonna let the jury see, that you've
9 already shown to the jury, is conclusions of law. There are no
10 findings related to the, to the domestic relationship. And so, that's
11 why I think that at this point, based on what you have in front of
12 you, those Exhibits that have been admitted and the testimony you
13 have, you do not have a facially valid protection order. Since
14 we've raised a question about, I think we get to raise it with the
15 jury, if not with you. But, I think it's appropriate for you to do it.
16 I, also think that the evidence is not sufficient on, on the knowledge
17 element. Um. And, I thank you for listening to me.

18 And the citation of Joy I could give you this print out.

19 DEFENSE: It's a brand new case from July, I believe, your Honor.

20 CO-DEFENSE: It's 114 P.3d 1228.

21 CITY: And, if the Court were to review that, I think that-

22 JUDGE: Go ahead.

23 CITY: the City's argument would be entirely opposite. Joy, in fact, says
that: *the Defense does not get to argue in a violation of a no
contact order or protection order case, the underlying basis for the
order.* And, that's, in fact, exactly what they're doing, is they're,
they're saying that the Superior Court judge made some error and
in that, you know, in that because he made some error they're not
gonna challenge it there; they're gonna challenge it here. And Joy,
in fact, says that you cannot do that.

CO-DEFENSE: Well, it might be better for the Court to read it, because I think
what Joy says is you can't challenge the sufficiency of the evidence
in your criminal prosecution. And, you should have taken an

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appeal. Mr. Garrett, of course, wasn't able to do that because he was in jail thanks to Officer Mitchell and not able to go to Court.

CITY: [inaudible] felony warrant, your Honor.

CO-DEFENSE: I was just being- I appreciate, by the way, Officer Mitchell's professionalism during this case. Um. And, he was in jail and not able to do that, but that doesn't matter because Joy talks about sufficiency. And, we're talking about on the face of the order, and that's what Joy specifically says you can challenge, the face of validity. We're not gonna allow you to go back and, and address the sufficiency of the evidence presented to the Commissioner, but we will allow you to address the, ah, facial validity, and they give certain examples.

I do have an excerpt of the case printed out if you wanna see it.

JUDGE: I have it right here and I hesitate to, to reading the whole case. Oh, it's not that long, is it?

CO-DEFENSE: No. It's very short.

DEFENSE: It's, it's, yeah, it's real short.

CO-DEFENSE: Page 1230, ah, in the Pacific, third citation, is the, is the page that I would ask you to look at. It's basically the last page of this.

JUDGE: So, you're saying that, that the order is facially invalid because there's no underlying facts to support that it, that it was, um, a domestic relationship?

CO-DEFENSE: There's no finding of whether or not there were facts presented, doesn't matter, and that's what Joy says we [inaudible] challenge in terms of sufficiency.

JUDGE: Right.

CO-DEFENSE: But, the judge made [inaudible] of finding. All he does is issue orders. And there's no finding-

JUDGE: Well-

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1 CO-DEFENSE: [inaudible] order. So, that's why it's facial invalid. Just as the
2 other examples they give [inaudible] there's no finding of domestic
3 relationship.

4 CITY: And, there's been no case law that says that the Court make a
5 finding of a domestic violence relationship on the face of an order
6 either. Facial validity challenges involve things like orders that are,
7 were never dated, that had no expiration date. Um. Orders that
8 were never signed. Um. Facial validity are things that are truly on
9 the face of the order. Counsel's asking that the Court indicate that
10 the commissioner or judge had to make an additional finding that's
11 not on the face of the order, which would not be a facial validity
12 challenge.

13 JUDGE: Essentially, they had to have findings of fact and these are the
14 order. It would have to have a whole nother separate document of
15 findings?

16 CO-DEFENSE: Well, not necessarily separate documents, but as the Court's well
17 aware, after a series of motions or hearing in a civil case, the Court
18 will issue a document and the first part of it is findings of fact and
19 the second is conclusion of law - that's standard routine. If the
20 Court will look on the, the Washington Courts web page to look at
21 the new versions of, of domestic violence protection orders, in
22 particular the, the permanent ones, there are sections for the
23 findings. Regardless of what's done in, in those situations, to be a
valid order that's subject appellate review there's gotta be findings
of conclusions and that's simple appellate review law. Without
findings, there's no way for the appellate court to review the valid-
validity of that order of whether the court made, ah, proper
conclusions. Whenever a reviewing court is, is testing a
conclusions of law that were issued by the trial court, it looks to the
findings that were made. In this case, there are no oral findings;
there's only the written order, and there's no written findings. So,
you have conclusion of law that orders basically Mr. Garrett to
leave his home or be subject to arrest, then subject to criminal
prosecution from being in his home without the requisite finding.

24 JUDGE: Okay. Um. I am- Mr. Boruchowitz, I'm not gonna rule on your
25 motion. Um. I'm gonna stick with, cause I don't wanna be, ah, on

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1 the record as denying your motion at this point, since what I've
2 already said before is that, um, you should do a post-trial relief
3 motion in writing, um, on that facial invalidity issue. I'm not
4 gonna rule on it. I am standing by my admission of Exhibits 1, 2, 4
5 and 5. Um.

6 Now, I do wanna make clear what my thought process is on the
7 definition of certain things here. Um. There's 2650070 says,
8 speaks at Prin 1, Prin C, speaks to "knowingly violate an order".
9 And, it's my interpretation of that statute that to knowingly violate
10 an order doesn't mean that you have to understand the terms of that
11 order, it just means that you are knowing ling in a place. It doesn't
12 mean that you know the terms and that you're knowingly violating
13 the terms. It just says that you are knowingly in a place.

14 The other is, is the, ah, 2650115 Prin 1, speaks to the other issue,
15 which is the defendant knows of the order. And, that speaks to
16 knows of the existence of the order and there's a jury instruction
17 that has been proffered to me that says "knows of an existence and
18 terms" and that's your proffered instruction under 2650115. I don't
19 see that and its terms, those three words, in this statute. I just see
20 the 2650115 requires that a person knows of its terms and that
21 that's an issue of service not that the whole document has been
22 explained and as if it was some plea colloquy or something of that
23 nature.

So, I have the word, ah, "know" broken two completely separate,
um, categories in this particular case. Um. So, with that, let me
say, I'm, I'm denying the Defense motion on the jury panel as, ah,
we, obviously we have jurors who are outside the City of Tukwila,
but I'm not presented with anything persuasive to say that that's,
um, um, incorrect since they are within King County and the City
of Tukwila is within King County, um, and the issue on notice of
the order - I've just defined that as my interpretation of it. And I
think that the City's, ah, proffered evidence gets beyond an
[inaudible] motion essentially on, and, ah, there is sufficient
evidence at this point to put the case before the jury in its entirety.
Um. Including with the admission of the Exhibits 4 and 5 on the
issue of whether or not, um, the special verdict form proffered is,
ah, sufficient. So, I think that the City's case can go forward at this
point.

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1 CO-DEFENSE: Thank you. Thank you, your Honor. Are you suggesting that the
2 fact that they had ID cards at the same residence is enough
3 evidence as a domestic relationship to go to the jury?

4 JUDGE: Yes.

5 CO-DEFENSE: Well, we object to that.

6 JUDGE: Understood. Is anybody else have anything?

7 CO-DEFENSE: Your Honor, for logistical convenience-

8 CITY: We do that during [inaudible], is that what you were gonna say?

9 CO-DEFENSE: I was gonna say we're, we're gonna rest. So, ah, it might make
10 sense to do the jury instructions and then allow Counsel to take a
11 brief recess, ah, since the jury's had one. Um. And then come
12 back for closing arguments.

13 JUDGE: Okay. You want me to speak on the issue of jury instructions at
14 this point?

15 CO-DEFENSE: Yeah.

16 JUDGE: Okay. I would expect a lively debate on this jury instruction, so
17 express yourselves as you wish. Um. I've read through the City's,
18 um, jury instructions and, um, one, in my first reading through 'em
19 and I still think that they're, they're appropriate and fine and in,
20 quite frankly, in the right order. Um. The, I'll treat the Defense
21 proffered instructions as, ah, insert type instructions. And, thank
22 you, for doing that in that matter, too. I, I don't like a whole
23 complete set from both sides myself. Um. Okay. The first
Defense proffered instruction under RCW 2650070 Joy and Snapp
cases, I think that that instruction dovetails right back to your
motion on the facial validity of, of a protection order in and of
itself. That is a legal issue that's been ruled on previously and so,
um, no I don't think that the City's required to prove, um, that it's
facially valid. I think that they need to prove that it was, but I think
that the word "facial validity" is, ah, is not well expressed in this
and it's already been taking up in a legal matter. So, um, I, I agree

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with a bit of it, but I don't, I don't think that this instruction necessarily should be given to the jury so I'm gonna deny that one.

Um. As a matter of the record, Madam Bailiff, um, do you want me to give you a packet of the, um, these any instructions I deny?

BAILIFF: [inaudible].

JUDGE: How were we gonna make a record of the exact instruction that I deny? Would you like me to read that orally?

BAILIFF: [inaudible].

JUDGE: Okay. So, the instruct- the instruction I tend to deny, um, begins with "*The law requires that a temporary order for protection be facially valid.*" Um. Argument from Defense?

CO-DEFENSE: Well, we [inaudible] to the failure to give that, your Honor, for the sentence [inaudible].

JUDGE: Very well. Instruction proffered number 22650115, "*The law requires that the person subject to an order for protection had knowledge of the order and its terms. The State bears [prov-] burden of proving beyond a reasonable doubt that subject to the order of protection had knowledge of the order.* Well, I think that's correct except for the statement and its terms. But, I also think that that requirement is adequately reflected in the to convict instruction. So, I would deny that at this point.

CO-DEFENSE: We would accept [inaudible] did that, as well. Ah, it could be given without and its terms and it would make clearer to the jury what the [inaudible] is.

JUDGE: Okay. My comment stands. Next one. Under RCW 2650070 Prin 4, "*The law requires that a person subject to an order for protection be served with no notice of the order and its terms. The State bears the burden of proving beyond a reasonable doubt that the persons subject to the no contact order was properly served.*" City?

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1 CITY: Your Honor, in this case, ah, I think that the "to convict"
2 instructions that the City provided indicate that, ah, the defendant
3 be served, you know, have knowledge. I, I don't know that this is
4 necessary. I think it is repetitive in then there's the concern about
5 having notice of its terms. It, I think it just adds too much, too
6 much, it's unnecessary. It's repetitive and, it could create
7 confusion. And the terms, again, is-

8 JUDGE: Right.

9 CO-DEFENSE: Well, your Honor, I'd be happy for purposes of trying to
10 compromise to take out "and its terms", but, ah, as the Court may
11 have been looking at 2650070, ah, Subsection 4, it clearly states
12 "the respondent shall be personally served with a copy of the
13 [inaudible] order". And, so we're simply asking that that, I mean,
14 the State's case is pretty skinny here. They're, they're relying
15 totally on documents. Officer Mitchell didn't serve the defendant.
16 He didn't even have a copy of the order when he arrested him for a
17 different reason. And, Miss Clay apparently showed him a copy of
18 the order after the arrest was made. The statutes are pretty clear on
19 the protection - we're talking about a temporary ex-[inaudible]
20 order to, to move somebody out of their house. And, now, we're
21 talking about punishing him criminally because he didn't do it, he
22 didn't leave his house. And, it seems that the, ah, the requirement
23 of this statute that the respondent should be personally should be,
ah, included in this instruction as we've outlined it - take away
"and its terms", I understand the Court's position but that the State
has to prove that he was in fact served. They tried to do that to
show the element of knowledge. They have no proof other than the
service which wasn't by this officer and so, seems to me that the
jury needs to ask itself is this proof beyond a reasonable that he
knew this order existed. We have somebody that we don't know
signing a document and some clerk saying certified copy and that's
what we have on the knowledge element. And, I think it needs to be
clear that the State, we, we [inaudible] State and I apologize. The
City has the burden to prove that he was served and I think that's
what 070 requires.

JUDGE: I'm gonna stand on what I said about the "to convict" instruction
adequately covering this element and, um, regardless of the "and its
terms" issue, um, I, I think that it's, ah, somewhat duplicative and I

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1 do, as I said before, think that the City has enough to go to the jury
2 with this, ah, and that that might be your closing argument. But,
3 ah, I think there's enough to go to the jury on the issue. Um. Let
me be clear, too, is that I understand the Defense is excepting to me
not using this instruction with or without "and its terms" in.

4 CO-DEFENSE: Thank you.

5 JUDGE: Next one, proffered 2650115 State v. Edwards, State v. Marking, is
6 "*Defense's charge of violation been ordered for protection that a*
7 *person did not know that the order was valid and enforceable*", um,
8 and it reads on. I, I would not give that order. I don't think that,
um, I'm, I haven't heard any per- ah, presented with anything that I
think that that is actually a defense and it's certainly not a statutory
defense.

9 CO-DEFENSE: Well, your Honor, I think the case law that we've been discussing,
10 it doesn't talk about [inaudible] defense, but we've kind of flipped
11 everything around and I appreciate the Court's analysis. But, what
we're saying is, if he doesn't know that there's a valid order that
12 he's supposed to, ah, observe, then he's not guilty. So, we're,
we're realigning, perhaps, the, ah, language of this case as
[inaudible].

13 JUDGE: Right. For the reasons I've, I've spoken to, that'll be denied. Ah,
14 let me see the, let me take a closer look to the Defense proffered.
Ah, these, do you want your "to convict"?

15 CO-DEFENSE: Yeah.

16 JUDGE: Yeah, I just, ah, I don't think element 2, is, um, actually, well, it's
17 a, it's a legal issue that's already been ruled on, and, ah, I don't
18 think that [inaudible] order or protection was valid. Sure that's a,
that's an element but that's already been ruled on. Um.

19 CITY: In addition, your Honor, he doesn't include the language if you are,
20 ah, "*if after weighing you have [you have] no reasonable doubt*
that you should find him guilty", that's specifically excluded from
21 that.

22 JUDGE: Okay.

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1 CITY: The first paragraph "[inaudible] each of the elements has been
2 proved beyond a reasonable doubt and then it will be your duty to
3 return a verdict of guilty", that language is [inaudible].

4 JUDGE: The, ah, Mr. Boruchowitz, any particular articulation before I deny
5 that?

6 CO-DEFENSE: (Laughing)

7 JUDGE: I mean, just for the record. All right.

8 CO-DEFENSE: That's just a clever way of phrasing it, Judge. I, I- The order's
9 gotta be valid. I mean, I think we probably have a stronger
10 argument on this than on anything else that we've made regarding
11 this particular dimension of the case, because if the order's invalid,
12 you can't be convicted of disobeying. And, I, I understand the
13 Court's ruling, there's no point in re-emphasizing it. But, I, I really
14 think a Court order does have to be valid in order to punish
15 somebody for not following it.

16 JUDGE: Okay. I, I'm kind of seeing this as an analogy and I hate to make
17 too many analogies in any particular case, but, um, ah, ah, PC
18 motion, you know, that's been denied, you know, probable cause to
19 stop, leading due additional evidence, well, it's simply not
20 something that goes before the jury once the judge decides on it.

21 CO-DEFENSE: Right. But this is an element in defense. And, whether evidence is
22 legally seized or not is not an element of defense. The element of
23 defense [inaudible] possess this stuff. And, maybe you can exclude
it cause it's a bad search. This is an element in defense, the order is
part of the cru-[inaudible] of the case and the validity order it flows
naturally, it has to be valid. If it's not valid, then he can't be
convicted of it, there's no element - it doesn't exist. So that, I
think, it really is different from your example. I appreciate, ah, the
Court's analysis. But, I, I really think we need to be able to talk to
the jury about the validity of the case, which is part of this valid,
this order is not valid. Otherwise you're taking away the closing
argument.

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1 JUDGE: Yeah, I don't think that he needs to, that, that he's aware of the
2 terms of the validity of the order is, is the, ah, factual dispute with
3 the jury.
4 CO-DEFENSE: Just to be clear, so I don't wanna engender objections in front of
5 the jury.
6 JUDGE: At closing.
7 CO-DEFENSE: Are, are you directing that we cannot talk about the validity of the
8 order?
9 JUDGE: Um. And that's why I elaborated on the issue of knowingly, ah,
10 violated means "knowingly be in a certain place and knows of the
11 order". Um. And, the statute doesn't appear to me say "knows of
12 the order" um, "knows of the terms in the order and knows that it's
13 a valid order", it just says "*knows of the order*".
14 CO-DEFENSE: Right.
15 JUDGE: So, I don't- No. I, I, what you're getting at is what I've been
16 trying to get at was that, that, ah, I don't think that the, um, the
17 validity of the order, um, is a, ah, jury question. This-
18 CO-DEFENSE: Well, in the Court's "to convict", I just wanna make sure so we
19 don't step on over the line. Um. In the Court's "to convict", one of
20 the element is that a temporary order was in effect. Now, our
21 position is [inaudible]. But, it sounds to me like you don't want us
22 to talk, use the word "validity".
23 JUDGE: Use it at, at your peril. Um. Because I certainly won't tell you to
use or not use certain words. But, in this context, I think that the
only requirement of the, ah, proof element is that, ah, defendant had
knowledge of the existence of the order.
CO-DEFENSE: Okay. Could we have a recess?
JUDGE: Yeah. Let me, let me, ah, number these. Um. Madam Bailiff, here
are the, ah-
BAILIFF: Notes?

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1 JUDGE: The notes, the, and Defense has taken objection to those. Here's
2 their cover sheet which might be helpful on that. Let me, let me,
3 ah, number the, these and did we get six copies, one for each or do
we just give 'em two packets?

4 BAILIFF: We give them, we typically give them a set, unless the Court wants
to give them six copies.

5 JUDGE: Well, it's, ah, it's open question to me. So, we'll give the jury one
6 copy after we read them to 'em. It's not a read along. This isn't a
read along book.

7 BAILIFF: No.

8 JUDGE: So, jury, question number 1, as I'm going through now begins "*It is*
9 *your duty*", and please, well, let me know if before I start using my
10 pen, if you have a problem. Number 2, "*Evidence may be*".
Number 3 "*The defendant has entered*".

11 CO-DEFENSE: Well, Judge, there is one thing I, I do object on this instruction.
12 Um. And, I'd ask that this sentence be removed, in the third
13 paragraph, "*There are very things in this world that we know with*
absolute certainty and in criminal cases the law does not require
proof that overcomes every possible doubt." That's not, ah,
14 required and I think it's, it's, ah, almost an editorial [inaudible].

15 JUDGE: It's-

16 CITY: It's part of the standard WPIC, your Honor.

17 JUDGE: Is, is that part of the?

18 CO-DEFENSE: Whether it is or not, I think it's inappropriate.

19 JUDGE: Yeah. I, I mean, I've seen it a bunch of times, I just didn't know if
it's a standard.

20 CITY: It is, your Honor.

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1 JUDGE: I'm gonna leave it in there because the WP- WPIC committee put it
2 in there.
3 CO-DEFENSE: In all its wisdom.
4 JUDGE: Yes. Number 4 "*A person commits*". Number 5 "*A person knows*".
5 Number 6 "*To convict*". Number 7 "*Defendant is not*".
6 CO-DEFENSE: You, ah, you, yeah. You've taken out the [inaudible] statement
7 [inaudible].
8 DEFENSE: The next one would be "he didn't make any- there's no
9 statements".
10 CITY: So, what is Number 7?
11 DEFENSE: The next, the very next instruction, you may give such weight and
12 credibility to any alleged out of court statements that the defendant
13 - he didn't make any statements.
14 CO-DEFENSE: So, Number 7 is "*not compelled to testify*"?
15 JUDGE: Right.
16 CO-DEFENSE: Okay.
17 JUDGE: So, hang with me here. Number 7, "*Defendant is not compelled to*
18 *testify*". Number 8 "*You may give such weight and credibility*".
19 CO-DEFENSE: That's what we object.
20 CITY: There were no out of Court statements, your Honor.
21 JUDGE: Okay. So, it's agreed that that will not be given?
22 CITY: Yes.
23 JUDGE: Number 8 "*As jurors*". Number 9 "*Upon retiring*". Followed by a
special verdict, ver- verdict form. Excuse me, not "special" -
verdict form. And, Number 10 "*You will also be*". Number 11
"*Family or household member*". And, followed by special verdict

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1 form. Um. Mine prints these without citations. Do you have a
2 little whiteout that I can take back.
3 BAILIFF: Sure.
4 JUDGE: Do you have one of those fancy roll-ons.
5 CO-DEFENSE: I just wanted to make sure that the record is clear we're objecting to
6 the special verdict.
7 JUDGE: Yeah. Um. You're objecting to the, ah,
8 CO-DEFENSE: [inaudible] at all.
9 JUDGE: Oh, at all?
10 CO-DEFENSE: Yes.
11 JUDGE: Because what?
12 CO-DEFENSE: Because there's no evidence that they had a domestic family
13 household relationship.
14 CITY: And, your Honor, the, the City would tell the Court that the reason
15 for this special verdict form is based upon new case law, any, any
16 penalty enhancement requires that the jury make a finding. So, for
17 that reason, because it's a domestic violence case, in order for Mr.
18 Garrett's right to possess firearms to be taken away, the jury or the
19 Court need make a finding in that regard.
20 JUDGE: And, as I said before, I think that, ah, City's evidence is particularly
21 contained in, ah, Exhibits 4 and 5, [inaudible] go to the jurors. Um.
22 Here are the exhibits. Um. One, two, three, four, five. So, at least
23 a total- 1, 2, 3, 4, 5. All right. While you make some - yeah - do
you wanna come back at quarter-after?
CITY: Okay.
CO-DEFENSE: [inaudible].
JUDGE: Is everybody okay with that? I'm sorry?

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1 CO-DEFENSE: Can we have till 20 after?

2 JUDGE: Sure. Okay.

3 Recess.

4 JUDGE: Okay. So, instructions and then, ah, closings. All right. Okay.

5 CO-DEFENSE: You may want us to save the rest, also.

6 CITY: Oh, you should rest, yes.

7 JUDGE: Do we have to say that in front of the jury?

8 CITY: I think so.

9 CO-DEFENSE: Probably.

10 JUDGE: Yeah. Let's, let's do that. You've already said that, right?

11 CITY: Yes.

12 JUDGE: Ladies and gentlemen, when we adjourned - and, please have a seat
13 - ah, when we adjourned it was the Defense's case. So, I will
14 inquire with the Defense.

15 CO-DEFENSE: Your Honor, we rest.

16 JUDGE: Very well. Defense having rested at this point, I will read the
17 instructions. You'll get a copy of these to read for yourself. But, at
18 this point, I will read them to you. Then, there will be a closing
19 argument and you'll deliberate.

20 Jury Instructions read.

21 CITY: Your Honor, the City would like to address Instruction Number 6.
22 There's a Scribner's error as to the address. It should be 3515
23 South 146th. There's an additional number in there.

JUDGE: So, we'll excise the "5".

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1 CITY: Please, your Honor.

2 CO-DEFENSE: And, your Honor, did, did the Court make, ah, an editing of
3 Number 11?

4 JUDGE: Yes. Okay. So, I've done a-

5 CO-DEFENSE: [inaudible]?

6 JUDGE: What's that?

7 CO-DEFENSE: Can we just take a look at 11?

8 JUDGE: Yeah. I've, I've got more for you.

9 CO-DEFENSE: Okay.

10 JUDGE: I've done a hand edit of Number 6. I've done a hand edit of the
11 verdict form, excising "without citations". I've done a hand edit of
12 Number 10 last sentence "reasonable doubt". And then, which
13 one?

14 CO-DEFENSE: I thought maybe you were marking on 10 when I thought you were
15 marking 11.

16 CITY: Yeah, it was 10.

17 JUDGE: Did it, did you have a need to mark on 11?

18 CO-DEFENSE: No, I, I was trying to figure out what you were doing.

19 JUDGE: Right.

20 CO-DEFENSE: But you were doing 10 and I thought you were on 11.

21 JUDGE: So, I've done hand edits on two and if we can. Madam Bailiff, if
22 you'll just make multiple copies, I'll re-slip those into here, so that
23 we don't have to have an entirely. And we can go to closing
argument at this point.

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1 CITY:

2 Good afternoon, ladies and gentlemen. Again, My name is Kerry
3 Berglen, I'm the Prosecutor for the City of Tukwila. You've now
4 heard all the evidence that you're going to hear. This is a very
5 simple and straightforward case. You heard that Mr. Kellis Garrett
6 [inaudible] temporary protection order was issued against him.
7 Um. The Court issued a protection order [inaudible] Mr. Garrett
8 was not to have any contact. And the Court specific- ah, the order
9 had specific prohibitions. Mr. Garrett was not to have contact with
10 the residence that they share. And, specifically, Mr. Garrett was not
11 supposed to be within 500 feet of that shared residence. You heard
12 testimony from Officer Mitchell that, in fact, he went to that
13 residence at 3515 South 146th Street, apartment number 107, in the
14 City of Tukwila, on June 27th, 2004. He went to that apartment and
15 Mr. Garrett answered the door. Mr. Garrett was there in violation
16 of the no contact order, or, I'm sorry, the protection order in this
17 case. You, ah, have published for you and will get an opportunity
18 to look at, again, when you go back to deliberate, a copy of the
19 temporary order for protection, as well as the return of service in
20 this matter. And, in this matter, the City would, would, would say
21 that this is very straightforward. There was an order. He wasn't
22 allowed to go there. He went there. That was a violation of the
23 order. Very straightforward.

13 I'm gonna go through a couple of the jury instructions with you and
14 not read them entirely. But, just point out a couple of things that I
15 think, um, are [inaudible]. And the first one I wanna talk about,
16 um, is probably, ah, the most important, and one that we talked
17 about in *voir dire* - reasonable doubt. And, reasonable doubt is
18 defined in Instruction Number 3. And, I'm gonna, ah, refer to a
19 couple of lines in there. And it says that pr- "*Proof beyond a
20 reasonable doubt is proof that we [inaudible] firmly convince of
21 the defendant's. There are very few things in this world that we
22 know with absolute certainty and in criminal cases the law does not
23 require proof that overcomes every possible doubt. If based upon
your consideration of the evidence, you are firmly convinced that
the defendant is guilty of the crime charged, you must find him
guilty.*" There's a couple of other instructions that tell you what the
elements of the crime are, those are the things that I have to prove
beyond a reasonable doubt.

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1 **Instruction Number 4 tells you how a person [inaudible]. “When**
2 **after receiving notice, he or she knowingly violates a restraint**
3 **provision of the protection order” and, by restraint provision, we’re**
4 **talking about the things he’s not allowed to do. He’s not allowed to**
5 **go to the residence. He’s not allowed to be within 500 feet of the**
6 **residence. He’s not allowed to have contact with Trisha Clay.**
7 **Those are restraint provisions. That’s what we’re talking about.**
8 **Did he violate a term of the order.**

9 **Instruction Number 5 tells you how a person acts knowingly. In**
10 **other words, it’s, it’s a common sense version. You know you did**
11 **something when you have knowledge of it, when you did it**
12 **deliberately. Intentionally. If a person has information which**
13 **would lead a reasonable person to think [inaudible] which are**
14 **described by laws, again, [inaudible] jury is permitted but not**
15 **required to find that he or she acted with knowledge.**

16 **Instruction Number 6, this is the “to convict” instruction. These are**
17 **the things that I have to prove the elements of this offense. The**
18 **elements that must be proved beyond a reasonable doubt are:**

19 **1. That on or about the 27th day of June 2004, a temporary order**
20 **for protection was in effect. And that is demonstrated by the**
21 **temporary order for protection that you’ll get as a, one of your**
22 **exhibits, the 1st exhibit, which indicates that this order was issued**
23 **on June 18th, 2004, and it indicates that it was in effect until the**
 next hearing date, which is relayed on this order as July 2nd, 2004.
 So, on June 27th, was it in effect? That the defendant had
 knowledge of the existence of a temporary order for protection.
 Exhibit Number 2 is a return of service document. This document
 tells you that on that same day, on June 18th, the same day that the
 order was issued, an officer served Mr. Garrett with a copy of that
 order telling him the terms of the order. And, the officer indicates
 here that Mr. Garrett was served, personally, with these documents
 - the documents being the petition for the order of protection and a
 temporary order for protection and notice of hearing. And, he was
 served on June 18th at 19:15, which would be military time 7 p.m.,
 a couple hours later that day, at the address in question, 3515 South
 146th Street, apartment number 107.

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1 3. That the defendant willfully disobeyed a condition of that order
2 by coming to the residence at 3515 South 146th Street, apartment
3 number 107. Again, the order specifically states in it "that Mr.
4 *Garrett is not allowed, is restrained from going on to the grounds*
5 *of or entering [ah] petitioner's residence.* Petitioner being Trisha
6 Clay, and she lists her residence as that - 3515 South 146th Street,
7 apartment 107. It also tells you that he is prohibitive in Subsection
8 5 from "*knowingly coming within or [inaudible] 500 feet*" of that
9 same residence. So, again, not only was he there, he was
10 prohibited from not, not only being there, but from coming within
11 500 feet of that residence. And, that the act occurred in the City of
12 Tukwila. Clearly the residence is within the City of Tukwila, as the
13 officer [inaudible].

14 The next section of this "to convict" instruction tells you, if you
15 find from the evidence that each of the elements has been proved
16 beyond a reasonable doubt, then it will be your duty to return a
17 verdict of guilty. As I relayed clearly there is evidence for each of
18 these elements of this offense, very straightforward. There was an
19 order. He knew of the order. He violated the order.

20 There is in this case a verdict form that tells you, um, when you go
21 back there and deliberate, you get to enter a finding on the verdict
22 form. The City would ask when you go back there, you enter a
23 finding of guilt. But, then there's more. If you find Mr. Garrett
guilty of this offense, you have to go what's called the special
verdict form. And, and the instructions 10 and 11 explain to you
what that's about. It indicates that, if you find him guilty, then you
must go on to the special verdict form which asks you to find that
Mr. Garrett and Miss Clay were family or household members,
defining this domestic violence relationship. When you go to
family household or household members, instruction number 11,
you will see a whole list of definitions of things that could apply.
In this case, um, you'll see from both the DOL photos that were
admitted in this case and, as well as the order, itself, it defines these
individuals as adults. They are individuals over 18. So, when
looking at the definition of family or household members, it
indicates that adult persons were presently residing together or who
have presided together in the past.

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1 So, in this case, that's what we're talking about. Ms. Clay and Mr.
2 Garrett resided together, and that is evidenced by both the order
3 itself listing that as their joined residence. In Subsection 4 of the
4 order, it says "*The petitioner shall have exclusive right to the
5 residence petitioner and respondent share. The respondent shall
6 immediately vacate the residence.*" And, this is the residence,
7 again, that we're referring to at 3515 South 146th Street. Ah, she
8 lists that as their joint residence. It's also evidenced by the driver's
9 license, um, identification card which both of them indicated to the
10 Department of Licensing that that was their residence. And, it's
11 also evidenced by Officer Mitchell, who contacted first Mr. Garrett
12 there, who, Mr. Garrett answered the door and then the next day
13 Miss Clay there. Ah, both of those individuals have, um, the
14 officer, ah, witness them answering the door there; there as no one
15 else around.

9 In this case, the City would ask that you review the evidence.
10 Again, it's a very straightforward, use your common sense. Was
11 there an order? Did he know about it? And, did he violate it?

11 I'm asking that you consider all of the evidence in this case and
12 when looking at these documents very closely, you will see the
13 terms of the peti- or terms of the order, ah, and look at all of the
14 exhibits, look at them closely. You'll have an opportunity to do
15 that [inaudible]. I'm asking you to fairly consider all of the
16 evidence. And, when you do so, to find Mr. Garrett guilty of the
17 offense of violation of temporary protection order.

15 And then, to go on and find that Mr. Garrett and Ms. Clay are, in
16 fact, family household members, define [inaudible].

17 And, thank you very much for your time.

18 JUDGE: Miss Eetes.

19 DEFENSE: All the evidence in this case that you have to, to examine and think
20 about is testimony from Officer Mitchell and papers. This does not
21 give you the proof beyond a reasonable doubt. Now, when it, when
22 thinking about all the evidence, where are you supposed to start. I
23 would say that you're supposed to start with the presumption of

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innocence. And, [inaudible] put this in a place where you can see it?

JUDGE: No, thank you.

DEFENSE: No. Okay. Our law requires that we start with a presumption of innocence. And, just as you always see the scales balancing, but when you start a jury trial, when you start a criminal trial, you start with the scales tipped entirely in favor of Mr. Garrett. And, in order to return a verdict of guilty, you have to tip the scales entirely in favor of the State. You have to find that beyond a reasonable doubt, every element of the crime has been proven, has been proven.

Now, beyond a reasonable doubt is not the kind of decision that you make every day. You don't have to buy a car beyond a reasonable doubt that it's gonna work, you can return it. There're always ways to change your mind. The decision you make today, you cannot change. The decision you make today is not one that you can decide, come back later and say, you know what, I decided there was a reason to doubt, I was wrong. The decision you make today is permanent and it'll last forever. Now, beyond a reasonable doubt is not a hunch. If you have a hunch that a, regarding every single element of this crime, you have a hunch that he did that or that he knew about the, knew about the protection order, you have to find that he's not guilty. The scales are still tipped in favor of Mr. Garrett. If you think that maybe he did it, he's not guilty. If you think that there's a preponderance of the evidence that he did he, he's still not guilty.

Clear and convincing evidence, which is the standard we use to impeach presidents, clear and convincing evidence is a standard where we use to remove children from the homes of their parents still requires you to return a verdict of not guilty. Only if you find every element beyond a reasonable doubt can you return a verdict of guilty.

Now, instruction number 6 has four elements to the crime. Element 1, 2 and 3 are all based on papers. There's no other evidence. Papers. Now, papers do not tell you what a person knows. It doesn't tell you what they are willfully doing. A paper is just a

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1 paper. It doesn't prove beyond a reasonable doubt what Mr.
2 Garrett knew or didn't know.

3 Now, instruction number 7, which I won't read to you, but
4 instruction number 7 has to do with, oh gosh, [inaudible], anyways-

4 CO-DEFENSE: Here.

5 DEFENSE: it has to do with Mr. Garrett's right not to testify. And during *voir*
6 *dire* I asked all of you if you would hold it against him if he didn't
7 testify and all of you said "no". And during *voir dire* we asked you
8 if you would be able to follow the judge's instructions and
9 everybody agreed. And, today, he did not testify and today the
10 judge is instructing you in instruction number 7 to not hold that
11 against him.

9 Going on to instruction number 10. On top of all of this, the, the
10 City is asking you to find that a domestic relationship existed based
11 upon papers, based upon copies of the Department of Licensing
12 identification. And, the Officer Mitchell, Officer Mitchell's
13 testimony where he saw both individuals there on separate
14 occasions. None of this is proof beyond a reasonable doubt, and
15 we ask you to return a verdict of not guilty.

13 CITY: Counsel would have you believe that this is just paper. In fact, this
14 is a Court order. This order tells Mr. Garrett what he can and
15 cannot do. He cannot contact Trisha Clay. He cannot go to that
16 residence. He cannot be within 500 of that residence. This isn't
17 just a piece of paper that we've thrown something down on, this is
18 evidence in this case. And, this is very strong evidence. This is
19 what he was served with. This is what he was told. This paper
20 tells Mr. Garrett what, in fact, he's not permitted to do. And, it
21 says, he's not permitted to go to 3515 South 146th Street, apartment
22 number 107, that's what it says. This evidence does establish that
23 there was [inaudible]. That order prohibited him from having
contact with not only Ms. Clay, but that residence, from being
within 500 feet of that residence. That order was served on him by
a police officer at that residence. That order tells him he has to
leave.

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1 CITY: I can-

2 **Recording stopped.**

3 CO-DEFENSE: Your Honor, I understand that the jury has reached a verdict but,
4 um, I've just started doing a little research and there's a case called
5 State v. Twiman, which I'll hand up to the Court. It's 143
6 [inaudible].^{2nd} 115. And, in that case [inaudible] cause it's a
7 District Court case, but, ah, in that case the Court allowed the
8 Shoreline District Court, ah, to pick from, ah, areas within the
9 electoral district. But, it talks about the population area served by
10 the Court, ah, it's a, it's a [inaudible]. And, I would argue that the
11 population area served by the Court in Tukwila Municipal Court,
12 it'd be Tukwila because the judge has chosen that the people of
13 Tukwila [inaudible], people of Greenwood, Skyway-

9 ? : Judge [inaudible].

10 CO-DEFENSE: [inaudible] by the officials who are elected by the City population
11 [inaudible] representatives, people who choose the judge are
12 representatives of the people of Tukwila, not of Greenwood or
13 Skyway.

13 CITY: And, I haven't reviewed the case, your Honor, but if the Court's
14 gonna hear further arguments, the City ask to be able to respond
15 with research and something submitted to the Court.

15 CO-DEFENSE: I think we should do that, if there's a conviction.

16 JUDGE: The manner of making up the jury list in- indicated by the statutes
17 merely discretionary or directory and need be only substantially
18 complied with the purpose of all these statutes to provide a fair and
19 impartial jury and if that end has been attained [inaudible] benefit
20 of such a jury it ought not to be held that the whole proceeding
21 must be annulled because of some slight irregularity. I don't know
22 about the word "slight" in there, but, um. I, I'm not gonna find that
23 there's a problem with this, in a sense. And, ah, as part of, well, I
shouldn't, I shouldn't, um, make findings on the record as to what I
think the pool is. I have a strong belief as to what I think the pool
is, but I don't know that that's evidence. And so, um, absent any
evidentiary hearing as to exactly how this Court creates their jury

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1 pool, um, I don't think, I cannot, we haven't had any evidence on
2 that. I don't think I can make a finding. Um. This certainly seems
3 to me that the, that methodology, the selection methodology is, ah,
4 appropriate.

5 CO-DEFENSE: Ah, let me just indicate as I did earlier that I was surprised, I've
6 never run into a Court that [inaudible] City court could pick its
7 jurors from outside the City and I was unprepared to, to address
8 that. Um. But, if there's a conviction, we will have a motion.

9 JUDGE: Well, I think you're gonna have to, there's gonna have to be
10 evidence though as to how this Court does that, cause otherwise
11 you would come up with-

12 CO-DEFENSE: Well-

13 JUDGE: no evidence.

14 CO-DEFENSE: Ideally, but we have, ah, the jurors testifying and saying under oath
15 that they don't live in Tukwila. So, it almost doesn't matter what
16 the pool is if you have jurors who don't live in Tukwila served on a
17 Tukwila jury. It's nice to know and, ah, it appears that everyone
18 off the record thinks that this Court's drawing from the District
19 Court list, but and we can certainly get declarations from somebody
20 who, who sent out the summons. Um. But we have a record from
21 jurors saying that they don't live in Tukwila.

22 JUDGE: Okay. City - before we move on?

23 CITY: Your Honor, I, I guess I would just say that I, I know that there is,
um, there's a basis for the way we, ah, request for jury pool. Um. I
don't, I, I don't know the exact procedures for how that occurs, but
without the ability to be able to do some research on my own, I
can't give the court a real substantive response to, um, their
[inaudible].

Judge: I'm gonna [inaudible] before trial type of motion that you didn't
know about is understandable, but-

CO-DEFENSE: Well, I raised it before you sat the jury. And, I think that that's
[inaudible].

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1 JUDGE: Motion [inaudible]. So, any other issues before we call upon the
2 jury verdict. All right.
3 Um. Please be seated. And, ladies and gentlemen of the jury, I
4 understand that you have a verdict. Do you have a foreperson.
5 (WOMAN): Yes.
6 JUDGE: All right. Madam Bailiff do you or I or
7 BAILIFF: [inaudible].
8 JUDGE: Okay. If you, um, Madam Bailiff, you can receive the verdict form
9 from the foreperson, that would be great.
10 (WOMAN): [inaudible].
11 JUDGE: Yes. We'll take all that back from you. Thanks.
12 And, let me ask the, the jury - has the foreperson been selected?
13 (WOMAN): Yes.
14 JUDGE: And, is that you?
15 FOREPERSON: It is.
16 JUDGE: And, you were juror number?
17 FOREPERSON: 26.
18 JUDGE: 2-6. Thanks. Madam Bailiff go ahead and read from the verdict
19 form.
20 BAILIFF: Verdict form - City of Tukwila vs. Kellis Garrett CI44173. We the
21 jury in the above-titled case find the defendant guilty of the crime
22 of violation of a temporary protection order as charged. Dated this
23 1st day of September 2005. Special verdict form - City of Tukwila
vs. Kellis Garrett CI44173. We the jury in the above-entitled case
return a special verdict by answering as follows: Were the

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1 defendant Kellis Garrett and Trisha Clay family or household
2 members as defined in these instructions, answer "yes".
3 JUDGE: All right. Well, ah, would either party like the, um, jury polled?
4 CITY: Yes, your Honor.
5 JUDGE: Okay. I'll ask each and every one of you two separate questions,
6 so, um, if you can give me your, your juror number, that would be
7 great. And, starting with you, ma'am.
8 JUROR 26: 26.
9 JUDGE: Juror 26. Is this your individual verdict?
10 JUROR 26: Yes.
11 JUDGE: Is this the verdict of the jury?
12 JUROR 26: Yes.
13 JUDGE: Okay. Ma'am, your number?
14 JUROR 31: 31.
15 JUDGE: Is this your individual verdict?
16 JUROR 31: Yes.
17 JUDGE: Is this the verdict of the jury?
18 JUROR 31: Yes.
19 JUDGE: Sir?
20 JUROR 20: Ah, 20.
21 JUDGE: Is this your verdict?
22 JUROR 20: Yes.
23

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1 JUDGE: Is this the verdict of the jury?
2 JUROR 20: Yes.
3 JUDGE: Thank you. Ma'am.
4 JUROR 35: 35.
5 JUDGE: Is this your verdict?
6 JUROR 35: Yes.
7 JUDGE: Is this the verdict of the jury?
8 JUROR 35? Yes.
9 JUDGE: Thank you.
10 JUROR 23: 23.
11 JUDGE: Is this your verdict?
12 JUROR 23: Yes.
13 JUDGE: Is this the verdict of the jury?
14 JUROR 23: Yes.
15 JUDGE: Thank you.
16 JUROR 25: Number 25.
17 JUDGE: Is this your verdict?
18 JUROR 25: Yes.
19 JUDGE: And is it, Is this your verdict?
20 JUROR 25: Yes.

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1 JUDGE: Thank you. Well, I'd like to thank you very much for serving on
2 the, on the jury, um, panel. You will now be relieved of all your
3 obligations to not talk to anybody and stay mum and quiet and all
4 that stuff and behave. And, um, I just wanna thank you for coming
5 in and participating in the, in the process. Um. They don't, do they
6 come back tomorrow?

7 ?: [inaudible].

8 JUDGE: Okay. You're done. All right. And, ah, I guess that's it. Um.
9 Now-

10 FOREPERSON: Where do we drop these off?

11 JUDGE: With Madam Bailiff. And, ah, you're welcome to stay for the
12 remainder of the proceedings, um, and it's an open public forum if
13 you wish. Or, you can leave if you wish. Um. We'll do a brief, I
14 don't know if we're gonna do sentencing at this point. I suspect
15 that we probably will, but we'll see what the lawyers have to say.
16 Um. Also, I'll have you know that often times the lawyers want to
17 talk to the jurors after, um, the case, just to get a feel for how things
18 went, what they could have done better, what they did right, what
19 they did wrong and how you feel about it. Also, you can ask them
20 questions as you wish, you know, about the process and how things
21 go and what you didn't hear that you thought you should have
22 heard, that's a pretty common juror question. Um. So, you can
23 talk to them if you wish, they do find it helpful. On the other hand,
you need give no reason whatsoever for not talking to them and if
you wanna leave without giving any excuse and just leave, that's
fine; they won't stop you. If you wanna tell them why you're
leaving, that's fine. It's all up to you. Okay. All right. Thanks
very much.

24 JUDGE: So, do we want to do sentencing at this time?

25 CO-DEFENSE: Well, Judge, I, I, I really think we should do the post-trial motions,
and I think we have two of them. And, I'm not sure how you want
to go forward, whether you wanna hear the jury one or have Judge
Stuart hear both of them. Either way is fine with me. Ah.

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1 CITY: The City has no objection to Judge Stuart just for the ease of
2 convenience, um, hearing them all if, unless the Court feels as
3 though you need to-
4 JUDGE: No.
5 CITY: preside over those?
6 JUDGE: Um. Well, we have three separate issues here. One is that, um,
7 being sentenced by your trial judge-
8 CITY: Mmhmm.
9 JUDGE: which can be waived. Um. And then, the, the, ah, facial validity
10 motion, which I've already sent you back to Judge Stuart. And
11 then, you have the juror pool one, which it would be my opinion to
12 you that any judge could hear that. Um. Perhaps you might wanna
13 set that in front of Judge Walden, but perhaps Judge Stuart would
14 hear it just all the same.
15 CITY: Judge Walden recuse herself in this case-
16 JUDGE: Oh, that's right.
17 CITY: because of the withdrawal of the verdict we have.
18 JUDGE: Oh, that's, so that's not probably-
19 CITY: [inaudible], so, that's why we're in the position where we're at.
20 JUDGE: Okay.
21 CITY: Or, I don't wanna-
22 JUDGE: Well-
23 CITY: you know, have a motion with Judge Stuart and then have a motion
with yourself and, you know.
JUDGE: Okay. Do we have a [inaudible] by the defendant to be sentenced
in front of Judge Stuart?

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CO-DEFENSE: Yes.

JUDGE: All right.

CITY: City has no objection just for the ease of.

JUDGE: Okay. So, let's set a, um-

CITY: Sentencing and motions hearing?

CO-DEFENSE: Well, motions and potential sentencing.

JUDGE: Right. Um. And, I've already put you on the summary judgment schedule for the, um, for the, I just said it, um, facial validity motion. Do you wanna-

CO-DEFENSE: I'm gonna have to look that up, Judge, since I don't normally do civil cases.

JUDGE: Yeah. And, I can't cite it off the top of my head. So, let's just make it up right now. Um. Do you have a date for motions?

BAILIFF: Ah, I could set a tentative date today, um, because [inaudible] Judge Stuart and see [inaudible]. It'll be, um, I would imagine [inaudible].

DEFENSE: Yeah, that'll be great.

BAILIFF: A Tuesday afternoon, you wanna just set a tentative date?

CO-DEFENSE: Yeah, that's just the worst day of the week for me, so if it's-

CITY: Do you want a Monday afternoon?

CO-DEFENSE: Monday afternoon would be better depending on-

CITY: We could maybe do like a 3:00?

BAILIFF: Sure.

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1 DEFENSE: I mean, if, assuming Scott's available.

2 JUDGE: Okay.

3 ?: [inaudible].

4 JUDGE: So,-

5 CO-DEFENSE: Could we do- Oh.

6 JUDGE: No, go ahead, set your schedule..

7 CO-DEFENSE: Ah, I was gonna say, ah, the 19th of September is the first, first
8 Monday I could do.

9 BAILIFF: [inaudible] and I will call Scott Stuart's office either this afternoon
[inaudible].

10 CO-DEFENSE: 19th of September.

11 CITY: So, 19th at 3. You wanna do 3?

12 BAILIFF: [inaudible]-

13 CITY: I think- Yeah. Because, ah, I think this should be fine.

14 JUDGE: And, I was gonna suggest that you have all your evidence
15 submitted 10 days before the motion.

16 CITY: For-

17 CO-DEFENSE: Well, the-

18 CITY: or motions - whatever. I guess [inaudible] by the 9th of September.

19 CO-DEFENSE: Labor Day is off, that's-

20 JUDGE: Really. And, that's convenience of the prosecutor. Do you wanna
21 shorten that time period? Are you- If they set a motion hearing for
the 19th, do you wanna have, um, evidence submitted by say
22 Tuesday the 13th, six days beforehand?

23

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CITY: Probably. If it's gonna be on a Monday, if I can have a week at least, just because.

CO-DEFENSE: How about the 12th?

CITY: Yeah.

JUDGE: Monday the 12th before Monday the 19th. Okay. So, um, Defense evidence in support of their, um, in support of their motions, seven days before, ah, in by the 12th. Can you do- can you do your argu- your brief at the same time?

CO-DEFENSE: Yes.

JUDGE: Okay. And, brief.

CO-DEFENSE: Mmhhh.

JUDGE: So, evidence and brief by the 12th.

CO-DEFENSE: I'd like to ask a logistical question - what the best way to get materials to Judge Stuart is?

CITY: I think if you fax them to the Court and then also fax them to his office, to [inaudible].

CO-DEFENSE: Do you know his fax number?

CITY: [inaudible].

CO-DEFENSE: Okay.

BAILIFF: 253.

CO-DEFENSE: 253.

BAILIFF: 851.

CO-DEFENSE: 85?.

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1 BAILIFF: 221?

2 CO-DEFENSE: I would ask the Court to consider one other thing. Mr. Garrett is on
3 a \$5,000 bail and he's been to his hearings now for some period of
4 time, a number of hearings. We'd ask the Court to consider
5 reducing that, the, he has a friend who has basically put up a credit
6 card with the bonding company who's paying interest that is
7 significant [inaudible] on that \$5,000 every month. And, it would
8 be great if the friend could stop doing that.

9 JUDGE: Um. I, you know, he, he warranted not once, but, ah, at least a
10 couple of times on this case. I mean, I'm, I'm thinking that it was
11 at \$5,000 for just by reason so, um, and now we have a finding of
12 guilt, so, no I can't disturb that. I'm not precluding you from
13 raising that issue again on the 19th, but I think if we just get this
14 case over with that, ah, that'll be a done issue [inaudible].

15 CO-DEFENSE: Is there anything further, your Honor?

16 JUDGE: Not from me.

17 CO-DEFENSE: All right.

18 CITY: Thank you, your Honor.

19 JUDGE: I wanna thank you.

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CERTIFICATION

I, Deborah H. Birrane, declare under penalty of perjury under the laws of the State of Washington that the foregoing is a true and accurate transcription in accordance with RCW 9A.72.085 or any law amendatory thereof.

June 6, 2006
Date

Deborah H. Birrane
Deborah H. Birrane

APPENDIX D

TUKWILA MUNICIPAL COURT

In re the matter of:)
 CITY OF TUKWILA,)
 Plaintiff,) CR 44173
 vs.)
 KELLAS W. GARRETT,)
 Defendant.)

ORIGINAL

HEARING

heard before
 THE HONORABLE SCOTT STEWART

Tukwila, Washington
 January 19, 2006

DATE TRANSCRIBED: November 26, 2006

TRANSCRIBED BY: Marjorie Jackson
 Notary Public
 Court-Certified Transcriptionist

A P P E A R A N C E S

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FOR THE CITY: KERRI A. JORGENSEN
 Kenyon Disend, PLLC
 11 Front Street South
 Issaquah, Washington 98027

FOR THE DEFENDANT: ROBERT C. BORUCHOWITZ
 The Defender Association
 810 Third Avenue
 8th Floor
 Seattle, Washington 98104

SARAH BOWMAN
Rule 9 Intern
The Defender Association
810 Third Avenue
8th Floor
Seattle, Washington 98104

1 January 19, 2006

2 -oOo-

3

4 THE COURT: Be seated.

5 MS. JORGENSEN: Good afternoon, Your Honor.

6 Kerri Jorgenson on behalf of the City of Tukwila this
7 afternoon. We're present on Kellas Garrett.

8 Mr. Garrett is present on CR 44503. Actually, I take
9 that back. It's CR 44173, is the case before the Court.

10 MR. BORUCHOWITZ: (Inaudible). I have two
11 preliminary matters before we get into (inaudible).

12 Mr. Garrett (inaudible). Is that a problem?

13 THE BAILIFF: It is actually, I already spoke
14 to the sergeant, (inaudible).

15 MR. BORUCHOWITZ: Well, Judge --

16 THE COURT: I didn't (inaudible).

17 THE BAILIFF: (Inaudible) the procedure of the
18 jail is irrelevant (inaudible). Unless the (inaudible)
19 that he's a danger (inaudible) somebody, (inaudible) he
20 should not be in chains. I realize (inaudible). If I
21 want him to write something down or he wants to write
22 something down, it's just -- it's just not okay.

23 (Inaudible) he should be able to (inaudible).

24 THE COURT: (Inaudible).

25 MR. BORUCHOWITZ: I'd ask the court to tell the

1 officer to let me (inaudible).

2 THE COURT: (Inaudible).

3 MS. JORGENSEN: You know, I don't have a
4 particular problem. I think the only issue is going to
5 be with that particular shirt, that it may have to be
6 undone to put it on properly.

7 MR. BORUCHOWITZ: I will put it over his
8 shoulders. How's that?

9 THE COURT: Works for me.

10 MS. JORGENSEN: Okay.

11 MR. BORUCHOWITZ: Judge.

12 (Inaudible colloquy)

13 MS. JORGENSEN: He's going to need a mike.

14 THE COURT: I have (inaudible) parties. The
15 last time (inaudible).

16 MS. JORGENSEN: It was early November, I
17 believe, when we were here last. It's been quite a
18 time, Your Honor.

19 THE COURT: (Inaudible) possibly more prepared
20 than I am now. (Inaudible) Monday (inaudible).

21 MS. JORGENSEN: Oh, sorry.

22 THE COURT: (Inaudible) did read them
23 (inaudible).

24 MR. BORUCHOWITZ: Your Honor, I sent you an
25 e-mail the day before yesterday.

1 THE COURT: (Inaudible).

2 MS. JORGENSEN: I have a copy of that case, if
3 you want me to --- it's State v. Miller, it's a U.S. --
4 not U.S. -- Washington State Supreme court En Banc case
5 that counsel referred to.

6 THE COURT: I think Miller is referencing
7 (inaudible).

8 MS. JORGENSEN: Yes.

9 MR. BORUCHOWITZ: No, no, well --

10 MS. JORGENSEN: That's the lower court --

11 THE COURT: (Inaudible) court of appeals.
12 (Inaudible).

13 MS. JORGENSEN: Yes.

14 MR. BORUCHOWITZ: Your Honor, I'm going to hand
15 up the e-mail (inaudible) have that (inaudible).

16 MS. BOWMAN: Can I just give you a case
17 (inaudible)?

18 MS. JORGENSEN: I was going to give him Twyman,
19 too. Do you want to switch it?

20 THE COURT: (Inaudible).

21 MR. BORUCHOWITZ: Your Honor, Ms. Bowman is
22 going to argue that issue.

23 Go ahead.

24 MS. BOWMAN: Your Honor, until the State v.
25 Miller decision came out, there was no consensus among

1 the courts regarding whether or not it should be treated
2 as an element, whether the validity of the underlying
3 temporary order of protection should be treated as an
4 implied element or an element of a crime. The State v.
5 Miller decision highlights that it's to be treated as
6 neither. And, in fact, as a threshold matter, the Court
7 is to determine whether or not the temporary order for
8 protection is applicable or inapplicable. Inapplicable
9 orders are invalid and therefore inadmissible in
10 evidence.

11 THE COURT: (Inaudible) on its face.

12 MS. BOWMAN: Yes.

13 THE COURT: (Inaudible) the evidence
14 (inaudible). My concern is (inaudible). In Martin, the
15 Court says that Martin is, on its face, (inaudible).
16 The Court says that's appropriate (inaudible) to say,
17 look, we understand that the lower court issued this
18 order, we understand that we signed off on the order.
19 (Inaudible). The order is invalid on its face and
20 therefore (inaudible).

21 MS. BOWMAN: And we're making that same
22 argument, Your Honor.

23 THE COURT: (Inaudible) sufficiency. And I
24 read the (inaudible), and also in looking at the Miller
25 case, they appear to indicate that the (inaudible)

1 whether the evidence in front of the trial court was
2 sufficient to justify (inaudible). The Court issued the
3 order, the protection order (inaudible). Whether the
4 evidence (inaudible) the Court issued the protection
5 order was sufficient was an issue to resolve either on
6 appeal or a motion for reconsideration. (Inaudible).

7 MS. BOWMAN: Your Honor, that's not the
8 argument that we're making. In Joy, they were arguing
9 the sufficiency of the evidence to determine that there
10 was, in fact, a harm that was imminent, a stalker or
11 domestic violence harm.

12 THE COURT: Right.

13 MS. BOWMAN: What we're arguing here is that
14 the form is the only document that we have that provides
15 the Court's findings, there is no finding on the face of
16 the document that establishes domestic violence has been
17 found. And therefore, the Court --

18 THE COURT: Domestic violence (inaudible)
19 domestic relations (inaudible).

20 MS. BOWMAN: Domestic violence, as you know,
21 Your Honor, the temporary protection order can only be
22 issued after certain predicate findings have been
23 established.

24 One is that an emergency situation must exist.
25 And the emergency situation must exist with respect to

1 domestic violence.

2 If we turn to the definitional section of the
3 statute, "Domestic Violence" is defined as "harm" --
4 among other things -- "between" -- quote/unquote --
5 "family and household members."

6 Family and household member relationships
7 include dating relationships, and that is the
8 relationship that Ms. Clay alleged in her petition.
9 We're not arguing that there was no sufficiency of the
10 evidence -- or we're not challenging sufficiency of the
11 evidence establishing the relationship. We're arguing
12 that that relationship was never established. The Court
13 never issued a finding.

14 Under subsection 3 of the definitional section
15 of the statute, a dating relationship is defined -- but,
16 as you know, Your Honor, a dating relationship is an
17 inherently subjective categorization, so the legislature
18 has provided three factors that the Court may consider
19 in determining whether or not a dating relationship has
20 been established.

21 That evinces, Your Honor, legislative intent
22 that the Court make a finding as to whether or not the
23 type of relationship that is governed by the Domestic
24 Violence Prevention Act has been established, and once
25 that has been determined and once the emergency

1 situation has been determined, an ex parte temporary
2 order for protection may issue.

3 Until that is established, however, Your Honor,
4 the Court has no jurisdiction.

5 Does that answer your question with regards --

6 THE COURT: Certain (inaudible).

7 MS. BOWMAN: It's attached to the City's
8 response to the defense motion to dismiss. There is a
9 copy of the order attached.

10 MS. JORGENSEN: I also have a copy in my hand
11 if you would like to take a look at it.

12 THE COURT: (Inaudible).

13 MS. BOWMAN: Mine, too.

14 THE COURT: (Inaudible) that indicates that
15 there is a dating relationship?

16 MS. BOWMAN: No, no.

17 THE COURT: (Inaudible) and that's what your
18 argument (inaudible) also on the record that indicates
19 (inaudible).

20 MS. BOWMAN: That's correct, Your Honor.

21 THE COURT: The City.

22 MS. JORGENSEN: Your Honor, as previously
23 argued in the City's briefing in this case, essentially,
24 they're not making a facial validity challenge. What
25 they're challenging is the reasoning or the rationale

1 behind the Court's issuance of the order. And there's
2 certainly sufficient documentation in this case that
3 these were co-habitants, residents, people with a dating
4 relationship, based largely upon the attachments to the
5 order indicating that they lived at the same residence,
6 that he was served at that same residence. There
7 certainly is a sufficient basis in the record to
8 determine that they did have this dating relationship,
9 as defined by the definition.

10 However, in this case, they're challenging the
11 underlying basis for the Court's issuance of the order.
12 They're not looking at the face of the order and saying
13 that there's something wrong here, there's something
14 innately wrong, there's a date missing, there's
15 something missing. There's no requirement that there be
16 a finding indicated on the face of this order.

17 And ultimately, when resolving these cases, as
18 indicated by Miller and Joy and such, the Court doesn't
19 get to review the basis for the Court's issuance of the
20 order. The Court gets to look at the facial validity of
21 the order. And in the cases, they refer to orders that
22 did not include mandatory language, mandatory
23 definitional information, and in this case, that is not.

24 The courts -- the Court, especially in Miller,
25 indicated that this is not -- this is not -- when

1 charging a violation of an order, this is not the place
2 to look into what reasons or what rationale the Court
3 did it. And you don't even have to agree with it, but
4 in this case, clearly there was an order. The order was
5 valid, it had all the proper information, it had the
6 dates and sufficiency. There is nothing on this order
7 that would suggest that it was invalid at the time.

8 And so the jury has found the defendant guilty
9 of violating this order, as is indicated in Miller, as
10 they're supposed to do. And if they're challenging,
11 essentially, the rationale the Court made in issuing the
12 order, that is not proper here. If they want to go
13 challenge the underlying order, they need to go back to
14 King County Superior Court and they need to challenge
15 that order appropriately there.

16 MS. BOWMAN: Your Honor, if I may.

17 I just want to make clear the defense's
18 argument. We're not challenging whether or not there
19 was sufficient evidence to establish a dating
20 relationship. That is not what we're doing here. What
21 we're doing is looking at the very face of the document.
22 On the document, even though she is correct that
23 there is no explicit language requiring that a finding
24 of a dating relationship be on the form, it is clearly
25 implied by the nature of the statute that governs the

1 issuances of ex parte temporary protection orders.

2 THE COURT: Do you have a cite?

3 MS. BOWMAN: Sure, it's 26.50.070(1).

4 THE COURT: You're arguing that (inaudible)
5 dates on the record, (inaudible) in order, (inaudible)
6 make a finding (inaudible).

7 MS. BOWMAN: To be clear, Your Honor, it does
8 say that it can issue, when there is imminent or
9 irreparable harm that can be caused from domestic
10 violence. Domestic violence, as we discussed, is
11 defined as including only statutorily enumerated
12 relationships, one of those being a dating relationship.
13 We don't argue that the petition didn't allege a dating
14 relationship, and we don't argue that there wasn't
15 sufficient evidence to find a dating relationship.

16 What we are arguing, however, Your Honor, is
17 that a dating relationship must be established before a
18 domestic violence protection order can issue. And if
19 you'll notice on the face of the order, they do make a
20 finding as to the emergency, that is one of the
21 requirements, predicate requirements before issuing a
22 temporary order for protection.

23 However, it makes no finding as to whether or
24 not the harm of domestic violence exists. And a
25 reasonable construction of the statute, Your Honor, we

1 assert, is that that must be included as mandatory
2 language on the face of the statute. I'm sorry, on the
3 face of the order. Otherwise, it is invalid and, as
4 such, is inadmissible under the new decision in Miller.

5 THE COURT: (Inaudible).

6 MS. JORGENSEN: I guess I would just say in
7 regards to that, counsel is indicating that the Court
8 has to indicate the basis for the imminent harm. And
9 the challenge -- and in this case, there simply is no
10 basis. The Court cannot review an underlying order.
11 The Court simply needs to look at the order, determine
12 it's facially valid and let the jury determine whether
13 or not the defendant has violated that order.

14 In this case, the City has established that
15 beyond a reasonable doubt, and the order in front of the
16 Court is a valid protection order in this case.

17 THE COURT: (Inaudible).

18 MR. BORUCHOWITZ: I would like to speak --

19 THE COURT: I think there's two main ones. One
20 is that (inaudible).

21 MR. BORUCHOWITZ: Right. I mean, there is no
22 proper jury for many different reasons, and I think the
23 Court has identified the two primary ones.

24 This is a situation, Your Honor, that defense
25 lawyers love to be in: Where the facts are overwhelming

1 on our side and the law is clear. We have a situation
2 where, by statute, this court can do, -- can get jurors
3 two ways.

4 It can issue the summons itself, which it
5 didn't do, so we don't have to worry about that.

6 Or it can hire the County to do it.

7 It did do that, but that agreement has expired
8 long before this trial. It's never properly been
9 renewed, and the evidence that we presented from the
10 county was, as far as they were concerned at the time of
11 this trial, it had not been renewed.

12 The County did, nevertheless, issue summonses,
13 and they issued summonses to zip code, people in zip
14 codes that include but are not exclusively Tukwila. The
15 result, which stunned me and I think that the judge that
16 was sitting, is that none of the jurors who sat on the
17 case live in Tukwila.

18 The one case that is in the ballpark on that
19 issue is Twyman. In that case, it was a little bit
20 backwards, and it's not fully applicable in terms of its
21 facts because that was a county district court and this
22 is a municipal court. But the language that is key from
23 Twyman and from the statute is that the electoral
24 district is the relevant district and that the key
25 language is that the jurors should come from the

1 population of the area served by the court.

2 Now, counsel makes a suggestion that, well, one
3 of the statutes says "may." And that's true, but
4 there's another statute just a paragraph down in the
5 same statute that says, the policy of the state is that
6 they shall come from the population of the area served
7 by the court. So we have -- but we really --

8 THE COURT: (Inaudible).

9 MR. BORUCHOWITZ: Yes.

10 THE COURT: (Inaudible) books outs there
11 (inaudible).

12 MR. BORUCHOWITZ: Well, I have both, Your
13 Honor. On page 4 of my opening memo, RCW 2.36.080 is
14 "The policy of the state that all persons selected for
15 jury service be selected at random from a fair cross
16 section of the population of the area served by the
17 court."

18 The area served by this court is Tukwila. It
19 can't possibly be argued that this court serves anything
20 other than Tukwila. But we really don't even have to
21 get there, because there is only two ways for jurors to
22 be summoned. One wasn't followed, and the other was not
23 followed either, because there was no valid agreement
24 with King County.

25 But getting to the substance of the jurors not

1 being in the area served by the court, there's several
2 problems. There's statutory problems and there's due
3 process problems. And because of that, it leads to a
4 Sixth Amendment and Article One problem. It comes down
5 a little bit to the integrity of the court because, in
6 the case that we cite in our brief that refers to U.S.
7 Supreme Court Sixth Amendment cases, it talks about the
8 idea of the jury is, in part, that the community have
9 respect for what goes on in court. And if the Court
10 doesn't follow its own rules and the statutory
11 requirements of how to bring jurors in -- what this
12 court did was bring people in from -- this one guy from
13 Greenwood in Seattle who is at risk of criminal
14 prosecution for not responding to the jury summons. And
15 I realize we don't do that, but the law provides for
16 that. It's a misdemeanor not to show up for jury
17 service.

18 And so what this court did was brought people
19 in, mostly not from Tukwila, at risk of criminal
20 prosecution for failure to respond, to sit in a court in
21 a city that they have nothing to do with. They don't
22 live here; they don't work here; they don't vote here.
23 They have nothing to do with the selection of the city
24 attorney or the judge or passing the laws that the city
25 counsel passes or anything else. They have nothing to

1 do with it. And the idea of the jury, as outlined in
2 the Supreme Court cases, is that we want the jury to be
3 from the area that the person lives in so that everybody
4 is engaged in that.

5 And, of course, to the extent that the idea of
6 jury nullification, for example, is involved, the jurors
7 aren't from that community. And if it's that we want
8 the jurors to be able to tell the city attorney and the
9 court, "Hey, we don't like what's going on," they can't
10 unelect those people, they can't have anything to do
11 with it because they don't have any rights in this city.

12 So all those principles that are constitutional
13 principles that buttress the statutory issues here are
14 violated, and due process is violated because the
15 statutory requirements were not followed. So
16 Mr. Garrett is at risk of losing his liberty which, of
17 course, is the fundamental part of due process, because
18 the State, the City, did not follow its own legal
19 requirements.

20 So we have a juror -- a jury that are
21 unqualified people because they are not from the
22 population of the area that are served by the court. We
23 have an improper summons procedure, following an invalid
24 agreement that had expired. And the jurors come from a
25 population that's outside the area served by the court,

1 so there is no way that this jury can stand.

2 And Twyman is on our side, even though the
3 facts are somewhat different because it's a district
4 court, because the principles are that it has come from
5 the electoral district, Tukwila, and the population of
6 the area served by the court, Tukwila.

7 This court does not serve Seattle. And if this
8 were a situation where we had people living in Thurston
9 County who were sitting on this jury, we wouldn't have
10 any question about that. If they were from Portland, we
11 wouldn't have any problem with that.

12 Similarly, there should be no problem here in
13 following our reasoning because we have got the City of
14 Tukwila bringing jurors in from other cities. Yes, they
15 happen to be in King County, and that's how you got them
16 from the King County pool, but they are not from the
17 population of the area served by the court. They are
18 not from the electoral district. I think you don't have
19 to get that far because the summons procedure itself was
20 deficient.

21 There is only two ways to do it: The City does
22 it itself, or you hire the County by agreement under the
23 statute.

24 There was no agreement. The agreement was
25 invalid. The City claims that the judge told the clerk

1 that at some unspecified date she renewed it orally. I
2 don't know when that happened, if it happened. The
3 reality is that King County says we didn't have an
4 agreement at the time that we issued these summonses.
5 We did it anyway, but we didn't have an agreement.

6 The agreement itself on its terms cannot be
7 renewed orally; it has to be done in writing. So this
8 claim that the judge made a phone call or talked to
9 somebody may be interesting, but it doesn't make a valid
10 agreement. And of course, if it's for more than one
11 year, then it has to be in writing anyway. And the
12 original agreement was for 18 months.

13 So in short, the summonses were no good. We
14 win on that.

15 If you don't like that argument, the jury was
16 not from the population of the area served by the court,
17 and they were not from the electoral district, and so
18 the jury was invalid and the case should be dismissed.

19 Thank you.

20 THE COURT: (Inaudible).

21 MS. JORGENSEN: Your Honor, in this case, when
22 you look at Twyman, and I can give you a copy of it if
23 you need to review it, but counsel is correct that
24 Twyman is different because it involves a county case
25 and a county jurisdiction, a county court versus a

1 municipal court. But Twyman is directly on point in
2 that it assesses almost an identical situation, where a
3 jury pool is selected from zip codes within the district
4 and jurors are, you know, as closely as one can parallel
5 the district, and jurors are selected from that
6 district.

7 Twyman doesn't go into the facts in regards to
8 how many members were from Shoreline and how many were
9 from Kenmore and how many were from where. But in this
10 case, you have jurors that were selected from zip codes
11 that closely parallel the City of Tukwila. And, in
12 fact, three zip codes, the same as Twyman. And these
13 are all zip codes when you look in, you know, the post
14 office, they tell you that these are Tukwila zip codes.
15 They also encompass both inside and outside the city
16 limits of Tukwila, obviously.

17 But according to counsel's argument, he would
18 have you believe if somebody didn't live within the city
19 limits even, then that wouldn't work, that wouldn't
20 work, because even though they had a Tukwila address,
21 they weren't within the city limits. And according to
22 counsel's argument, that's the factor, they have to be
23 within the city.

24 In this case, the City has substantially
25 complied with the statute governing jury selection. We

1 did, in fact, contract with King County to handle our
2 jury summons and to bring in our juries from the
3 selected zip codes that we picked within the city that
4 represent the citizens of the city of Tukwila. And it
5 indicates -- the case law the City refers -- or the RCW
6 the City referred to, 2.36.050 indicates that the jurors
7 for the panel may be selected at random from the
8 population of the area served by the court. And that's
9 clearly what we did, we substantially complied with the
10 statute. We worked through King County through a
11 contract we had for them to provide our jury summons to
12 select zip codes within our area.

13 Counsel refers to the fact of somebody in
14 another zip code. We don't know why that was. Perhaps
15 that individual moved and had his mail forwarded. We
16 don't know what the basis for that individual being on
17 our jury pool was. All we know was that at the point
18 when the service was sent out in regards to where he
19 lived when he signed in, he indicated that address. For
20 all we know, that may be his business address. We just
21 don't know that.

22 But, frankly, in this case, the jurors -- jury
23 was made up of a pool which closely represented the city
24 of Tukwila. And we have substantially complied with the
25 statute, as Twyman requires.

1 In regards to the agreement and whether or not
2 that was still valid or not, the City is not aware that
3 counsel has any standing to challenge an underlying
4 contract. I mean, ultimately what we have is the City
5 had a contract with King County. It was essentially
6 renewed. And because there is not a new contract, a new
7 written contract in place, counsel would argue that the
8 City can't summons people and can't bring them into the
9 jury pool. But when you look at the case law in regards
10 to the composition of juries, it's intended to bring in
11 a fair and impartial jury of a defendant's peers,
12 essentially.

13 A jury is supposed to fair and impartial. And
14 the fact that whether or not our contract was oral or
15 written renewal of that contract with King County
16 ultimately has no bearing on the fact that Mr. Garrett
17 got a jury of his peers. He was found guilty by them.
18 He has not established any prejudice to Mr. Garrett
19 simply because of the fact that the jurors that
20 ultimately sat on his case were not citizens of the City
21 of Tukwila, living within the city boundaries.

22 And in this case, because of that, because he
23 hasn't shown that we did not substantially comply with
24 the statute and because he hasn't shown any prejudice to
25 the defendant, there is not a basis to dismiss this

1 charge. And counsel would ask the Court to dismiss the
2 charge based upon any violation of the jury pool, and
3 the City doesn't know that there is any statute that
4 indicates that a dismissal is the appropriate remedy,
5 were it so.

6 THE COURT: (Inaudible) arguing that the remedy
7 then would be?

8 MS. JORGENSEN: Reversal and retrial. Thank
9 you, Your Honor.

10 THE COURT: Before you reply, (inaudible).

11 One, City's argument is (inaudible) essentially
12 says (inaudible) superior court and they may (inaudible)
13 the area served by the court. My understanding of the
14 City's argument is that, essentially, the legislature is
15 saying (inaudible). That was the first argument.

16 The second argument is (inaudible) county.
17 (Inaudible).

18 Why does your client, Mr. Garrett have any
19 (inaudible)? (Inaudible).

20 MR. BORUCHOWITZ: Well, Your Honor, this is the
21 first time I have heard the standing argument, and I
22 haven't researched it, but I will tell you what I think.

23 Two things.

24 One is, under some of the case law which is in
25 my brief, a defendant and a juror both have standing to

1 challenge an improper selection process, and so, by
2 analogy, I would suggest that the Supreme Court would
3 accept that we have standing, if that's an issue.

4 But I think what underlies that is, is there
5 agreement or not? And the reason that we get to argue
6 about that is that we have a right to have a jury chosen
7 according to law. The law says there's two ways to do
8 it: The City summons or they hire the County. By
9 agreement.

10 If there is no agreement, then that was done
11 without authority of law. The summons were issued
12 without authority of law. I think that counsel
13 overstates my position, both under the theory that -- or
14 the requirement that jurors have to come from the
15 electoral district and that they have to come from the
16 area served by the court. If they have a Tukwila
17 address and the Court serves people in Tukwila
18 addresses, and people in Tukwila addresses get to vote
19 for Tukwila officials, then that's fine. I don't know
20 what the city limits means to the City.

21 THE COURT: Your argument (inaudible).

22 MR. BORUCHOWITZ: Well, and that's what I'm
23 trying to explain that I -- you know, we had a big
24 issue -- well, a small issue in trial about whether this
25 incident occurred within the city of Tukwila.

1 THE COURT: Right.

2 MR. BORUCHOWITZ: Because the map has changed
3 in the last few years, and the officer testified it was
4 right on the edge within the city of Tukwila. I don't
5 know whether the City of Tukwila municipal court serves
6 people and allows people to vote for Tukwila officials
7 who don't live in Tukwila but have a Tukwila address. I
8 have no idea, but that's the measurement. If they get
9 to vote and if the Court hears cases from them, then
10 they're in -- they can be in the pool. So if you live
11 in Renton -- if you don't live in Renton but you have a
12 Renton address, but you vote for Renton officials. If
13 you don't vote for them, and if you have a burglary or a
14 misdemeanor that happens and the Renton municipal court
15 will hear your case, then you're in the --

16 THE COURT: I think the (inaudible) have to
17 live in the city in order to (inaudible) city of Tukwila
18 (inaudible).

19 MR. BORUCHOWITZ: Well, then the issue is: Are
20 they in the electoral district and does the Court serve
21 them or not? That's the issue. It doesn't matter
22 whether they're considered in the city.

23 I want to emphasize two things about the
24 prejudice as well as what could have happened that's
25 very easy to do.

1 Two things.

2 ~~The City can issue its own summonses to people~~
3 who have Tukwila addresses and live in the city and are
4 in the electoral district.

5 Or they can hire the county, have a valid
6 agreement, which this was not, and say to the County,
7 "Screen out, with your fancy computer, people who don't
8 have a Tukwila address."

9 Or they could --

10 THE COURT: The second one, I don't think would
11 satisfy your requirement (inaudible) within the city of
12 Tukwila.

13 MR. BORUCHOWITZ: Well, again, I don't know
14 whether Tukwila -- whether this court would hear a case
15 that occurred in this zone of Tukwila addresses that
16 don't live in Tukwila. To me that's the issue: Do they
17 serve that area or not. If you have a Tukwila address
18 and you have a misdemeanor on your property and the
19 Tukwila police say, "We're not going to take care of
20 that" --

21 THE COURT: (Inaudible).

22 MR. BORUCHOWITZ: Well, then, they should not
23 sit here, right.

24 THE COURT: (Inaudible).

25 MR. BORUCHOWITZ: Okay. But that's easily done

1 if you get a handful of those people, the judge inquires
2 and sends them home. Or the County could send the list
3 of the people being summoned to this court and this
4 court could screen out people that are inappropriate.
5 None of that happened. And so instead, we end up with a
6 jury, none of whom has anything to do with Tukwila, and
7 one of whom, as counsel emphasized, lives in Greenwood.

8 So I think I want to conclude by responding to
9 the prejudice -- two points about counsel's argument.

10 She says we haven't demonstrated prejudice. We
11 don't have to demonstrate prejudice. The case law is
12 clear that prejudice is presumed when there is a
13 material departure from the statutory procedure.

14 And here there clearly was, on two grounds.

15 The summons procedure did not comply with the
16 statute and the jurors who were summoned did not comply
17 with the statute. They're not from the area served by
18 the Court and they're not in the electoral district.
19 And that's the presumption, that's where prejudice is
20 presumed because there is a material departure.

21 You can't say that you have materially complied
22 with the statute when there was no agreement, people
23 were summoned without authority of law, and the people
24 summoned don't live in the right place. It's clearly a
25 material departure, and when that happens, prejudice is

1 presumed.

2 ~~On the question of appropriate remedy, when we~~
3 ~~get there, I would argue that we brought to the Court's~~
4 ~~attention prior to the swearing of the jury, that this~~
5 ~~jury was not okay. The government went ahead; the Court~~
6 ~~went ahead. Jeopardy attached. We have, arguably, it's~~
7 ~~analogous to governmental misconduct that occurs after~~
8 ~~jeopardy attached. You can't try them again. So~~
9 ~~that -- we can brief that for you if we need to, but --~~

10 THE COURT: (Inaudible) jeopardy.

11 MR. BORUCHOWITZ: Thank you, Judge.

12 THE COURT: Anything else?

13 MS. JORGENSEN: Your Honor, there was a valid
14 contract, and the City did substantially comply. And
15 counsel's discussion about what we could do to get
16 appropriate jurors is exactly the City's point.
17 Ultimately, there would be tests we would have to give
18 jurors in terms of what services they received and from
19 whom and how and where.

20 THE COURT: (Inaudible) assuming (inaudible).

21 MS. JORGENSEN: Well, assuming the firm
22 boundaries of the city limits.

23 THE COURT: (Inaudible) outside of (inaudible).

24 MS. JORGENSEN: Sure. But when you talked
25 about how easy it would be for the courts to assess and

1 review, I think that just demonstrates the fact that we
2 do have, you know, residences that have that address. I
3 mean, the same as Your Honor has a Renton address and
4 doesn't live there. I mean, there are serious --
5 obviously in this day and age, a lot of considerations
6 in regards to that idea, but the City does believe that
7 we have substantially complied with the statute
8 governing jury selection, and we did have a valid
9 contract at the time. And there has been no showing of
10 prejudice to the defendant in this case. The fact that
11 he had a jury trial, that he went through a jury trial,
12 is not a showing of prejudice.

13 THE COURT: (Inaudible) I do have (inaudible) I
14 did not read (inaudible). I read through (inaudible).

15 MR. BORUCHOWITZ: Well, Your Honor, he's being
16 held on what amounts to a probation review out of Clark
17 county, but they're not going to take him until he's
18 free on this.

19 THE COURT: (Inaudible) I'm assuming that
20 (inaudible).

21 MR. BORUCHOWITZ: Can I just have a minute?

22 THE COURT: (Inaudible) prejudice to the
23 defense (inaudible).

24 MR. BORUCHOWITZ: Judge, I have never done this
25 before, had a conditional sentencing. And I'm not quite

1 sure what you have in mind. I mean, you wouldn't sign a
2 judgment and sentence today. I mean, I could see that
3 you would reach -- I mean, what I would propose that you
4 do, and Mr. Garrett would like to resolve the matter
5 today as much as -- so he doesn't have to return, but I
6 -- I mean, I guess what I'm asking is, what you're
7 contemplating is that you would say "If I deny the
8 motions, I would issue the following sentence"?

9 THE COURT: (Inaudible).

10 MR. BORUCHOWITZ: No, but certainly the
11 practice contemplates that post-trial motions that are
12 going to result either in a new trial or dismissal,
13 should be brought before sentencing.

14 THE COURT: My only concern (inaudible). I
15 don't know that that's not the case (inaudible)
16 appropriate or not, but I don't want to (inaudible).

17 MR. BORUCHOWITZ: Right. You could PR him.

18 THE COURT: (Inaudible).

19 MR. BORUCHOWITZ: Well, Judge, here's what I
20 suggest: I suggest that you hear from us on sentencing,
21 that you tell us what you would do, make a note to
22 yourself, we'll all hear it, if you deny the motions.
23 And then if you do deny the motions, then you issue a
24 judgment and sentence that complies with that. We could
25 even draft one that counsel and I agree on, but you

1 don't enter it. I don't want you to enter a sentence.

2 ~~I don't think it looks good, for one thing, but~~
3 I understand the Court and I appreciate the Court's
4 willingness to minimize Mr. Garrett's custody so I'm
5 willing to go forward, but I would ask that you not sign
6 the judgment and sentence, so we don't have to get it
7 set aside and all that.

8 MS. JORGENSEN: The City asks to set it for
9 sentencing, Your Honor.

10 MR. BORUCHOWITZ: I think it makes sense to
11 hear from us today.

12 MS. JORGENSEN: Because, ultimately, the Court
13 shouldn't be entering a judgment and sentence without
14 the defendant's presence. And if counsel is asking us
15 to set over the imposition of the sentence, then
16 certainly his client and he would be entitled, and
17 certainly demand to be present at that time.

18 MR. BORUCHOWITZ: Well, if we had what amounts
19 to an agreed conditional order that's only going to be
20 entered under certain circumstances, Mr. Garrett can
21 waive his presence at that.

22 THE COURT: How long (inaudible)?

23 MS. JORGENSEN: He's being held on a felony as
24 well, so...

25 MR. BORUCHOWITZ: He's being held on a parole

1 violation.

2 THE COURT: (Inaudible).

3 MR. BORUCHOWITZ: Yes. And he's been held for
4 three weeks.

5 MS. JORGENSEN: I don't know about that.

6 THE COURT: (Inaudible).

7 MR. BORUCHOWITZ: Yes, yes. And it's basically
8 an allegation that he has not complied with his
9 conditions, so he's looking at a maximum most likely of
10 60 days on the single violation alleged. I have not
11 seen the CCO Rec, but -- so, as soon as he's clear on
12 this, he will be taken to Clark County.

13 And it's possible, Your Honor, that if you --
14 well, if you issue a sentence today, you're going to
15 have to set the sentence aside when you grant our
16 motions.

17 THE COURT: (Inaudible).

18 MR. BORUCHOWITZ: You could, well...

19 MS. JORGENSEN: I just think practically, it's
20 impossible to impose a sentence that -- a judgment and
21 sentence ultimately has to be signed by the defendant
22 and counsel and the judge, and I think imposition after
23 the fact is a little bit worrisome for the City in
24 regards to...

25 MR. BORUCHOWITZ: Well, Judge, here's what I

1 would propose since everybody is such good faith around
2 here. I propose that you go ahead and sign the judgment
3 and sentence, and we just all understand that you're
4 going to set that aside when you grant the motions, and
5 that way --

6 THE COURT: (Inaudible) take the matter under
7 advisement (inaudible).

8 MR. BORUCHOWITZ: \$5100.

9 THE COURT: \$500 (inaudible).

10 MS. JORGENSEN: Bail has already been forfeited
11 in this case as well, Your Honor.

12 THE COURT: (Inaudible) bail. (Inaudible).

13 MR. BORUCHOWITZ: Yes.

14 THE COURT: (Inaudible).

15 MS. JORGENSEN: Two weeks or something.

16 THE COURT: (Inaudible) Mr. Garrett is serving
17 (inaudible) in Clark County (inaudible).

18 MR. BORUCHOWITZ: Yes, sir. So \$500 bail on
19 this matter. And what court date are you looking at?

20 THE COURT: (Inaudible).

21 MS. JORGENSEN: And, Counsel, you said Mondays
22 are better for you, correct?

23 MR. BORUCHOWITZ: They're better than Tuesdays
24 except it depends what Monday you're talking about.

25 MS. JORGENSEN: Are they better for you or not?

1 THE COURT: Wednesday (inaudible).

2 MS. JORGENSEN: ~~Wednesday I can't do either,~~
3 because I'm here all day anyways.

4 THE COURT: (Inaudible).

5 MR. BORUCHOWITZ: I could do Monday the 6th.

6 MS. JORGENSEN: Afternoon?

7 MR. BORUCHOWITZ: As long as I'm out of here by
8 4:15.

9 MS. JORGENSEN: We could probably do Monday the
10 6th at 3:00. It shouldn't be a -- I mean, we have
11 already argued ultimately, so...

12 THE COURT: (Inaudible) grant the motion or
13 deny the motion. (Inaudible).

14 MS. JORGENSEN: Okay. And we can submit by
15 fax. Would fax be best for you, any issues in regards
16 to standing and remedy?

17 THE COURT: (Inaudible) I suspect that
18 (inaudible).

19 MS. JORGENSEN: And that's why I say, we can.

20 THE COURT: (Inaudible).

21 MR. BORUCHOWITZ: Yes. And I appreciate the
22 clerk scheduling it when I asked it to be scheduled.
23 And if you grant the motions, the pleadings, then we
24 don't have to come back.

25 THE COURT: So (inaudible).

1 MR. BORUCHOWITZ: And that would be much easier
2 for everybody.

3 MS. JORGENSEN: It's not nearly as much fun.

4 THE COURT: (Inaudible). Thank you.

5 MS. JORGENSEN: Thank you, Your Honor.

6 MR. BORUCHOWITZ: Thank you.

7 (End of Hearing)

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STATE OF WASHINGTON)
)
COUNTY OF SNOHOMISH)

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 28th day of November 2006.

NOTARY PUBLIC in and for the State of Washington, residing at Lynnwood. My commission expires 4-27-10.



NO. 59457-5

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF TUKWILA,

Petitioner,

vs.

KELLAS GARRETT,

Respondent.

NOTICE FOR MOTION

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JAN 30 PM 3:44

To: Robert Boruchowitz
Visiting Clinical Professor
Seattle University School of Law
Ronald A. Peterson Law Clinic
1112 E. Columbia St.
Seattle, Washington 98122-4458

To: The Clerk of the Court.

On March 9, 2007, at 9:30 a.m. or as soon thereafter as possible,
Petitioner, the City of Tukwila, will bring on for hearing a Motion for
Discretionary Review. The hearing will be held at One Union Square, 600
University Street, Seattle, WA 98101-4170.

ORIGINAL

RESPECTFULLY SUBMITTED this 29th day of January, 2007.

KENYON DISEND, PLLC

By Kerri Ann Jorgensen WSBA No. 36889
for Kerri Ann Jorgensen
WSBA No. 28310
Attorneys for Petitioner