

NO. 62717-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BARNHILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGES DEBORAH FLECK  
AND BRIAN GAIN

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. After the defendant made an absolutely unequivocal request to proceed pro se, did the trial court properly allow the defendant to exercise his constitutional right to self-representation?

2. The State concedes that there is insufficient evidence to support count I, communicating with a minor for immoral purposes. Specifically, there was no evidence the minor received the communication (a letter) from the defendant.

3. The State concedes that there is insufficient evidence to support four of the five counts of witness tampering, counts IV, V, VI and VII.

4. Did the sentencing court properly include the defendant's Texas burglary convictions in his offender score, i.e., are his out-of-state convictions comparable to Washington felony offenses?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged by second amended information as follows:

- Count I:** Communicating with a minor for immoral purposes (CMIP)  
Date of Violation: April 1, 2007 through May 12, 2007
- Count II:** Rape of a child in the second degree  
Date of Violation: January 6, 2007 through February 25, 2007
- Count III:** Tampering with a witness  
Date of Violation: November 19, 2007
- Count IV:** Tampering with a witness  
Date of Violation: November 22, 2007
- Count V:** Tampering with a witness  
Date of Violation: November 30, 2007
- Count VI:** Tampering with a witness  
Date of Violation: December 19, 2007
- Count VII:** Tampering with a witness  
Date of Violation: December 20, 2007
- Count VIII:** Violation of a sexual assault protection order  
Date of Violation: November 21, 2007
- Count IX:** Violation of a sexual assault protection order  
Date of Violation: December 21, 2007
- Count X:** Communicating with a minor for immoral purposes  
Date of Violation: November 22, 2007

CP 169-73. A jury found the defendant guilty as charged.

CP 209-18.

The defendant received an indeterminate standard range minimum term sentence of 175 months on count II, the defendant's conviction for second-degree rape of a child. CP 224. The

defendant received determinate concurrent standard range sentences of 43 months on counts III, IV, V, VI and VII, the defendant's convictions for tampering with a witness. For the remaining counts (counts I, VIII, IX and X--all gross misdemeanors), the defendant received concurrent 12 months sentences. CP 234.

## **2. SUBSTANTIVE FACTS**

When HT met the defendant at a skating rink on January 26, 2007, she was just 13 years old. 14RP<sup>1</sup> 14, 17-18. HT thought the 20-year-old defendant was "cute," and said they "clicked" right away. 14RP 18. The two talked for hours, with HT saying that the defendant "was very polite to me." 14RP 22-23. When HT's mother came to pick her up, the defendant kissed HT on the lips. 14RP 24.

Within days, the defendant was coming over to HT's house, climbing into her bedroom, and secretly spending the night with her.

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--12/21/07; 2RP--12/28/07; 3RP--1/11/08; 4RP--1/16/08; 5RP--1/18/08; 6RP--2/8/08 (Judge Heavey); 7RP--2/8/09 (Judge Mattson); 8RP--3/28/08; 9RP--4/4/08; 10RP--6/13/08; 11RP--8/14/08; 12RP--8/20/08; 13RP--8/21/08; 14RP--8/25/08; 15RP--8/26/08 (starts: "The Court: Good morning"); 16RP--8/26/08 (starts: "Court reconvened"); 17RP--8/27/08; 18RP--11/14/08; and 19RP--12/2/08.

14RP 24-25, 27. The defendant brought HT gifts of "flowers and stuff," and told her she was "sweet, I love you...that type of stuff."

14RP 26, 30. HT professed that the defendant, "made me feel safe and...he was just there for me." 14RP 30.

In early February, Officer Roger Gale responded to the home in regards to a residential burglary. 13RP 57. Steven Thompson, HT's father, reported that a computer had been stolen from his home. 13RP 58. A few days later, the defendant's father called the police to report that his son had the computer. 13RP 59. Subsequently, Officer Gale was able to speak to the defendant on the phone. 13RP 60. The defendant was calling from out of state but he would not disclose his exact location. 13RP 61. The defendant told Officer Gale that he had returned the computer, that he was in love with HT, and that he was coming back to get her. 13RP 61. As a result of this call, Officer Gale interviewed HT and then turned the investigation over to a detective. 13RP 62.

Steven Thompson had never met the defendant and only learned of the relationship between his daughter and the defendant through the police. 13RP 64, 78. Then, in mid April, Steven intercepted three letters sent by the defendant from Ohio to HT. 13RP 66-67, 71; 14RP 102-03; Exh 10. In one of the letters, the

defendant asked HT for more photos of her, talked about the first time they "made love," expressed his love for her, told her how to contact him, and instructed her how to lie to authorities about their relationship. 13RP 67; Exh 7.

One day HT saw her father reading the letters and "went ballistic." 13RP 68. HT tried to take the letters from her father and had to be subdued. 13RP 68. No evidence was presented showing that HT ever obtained the letters, read the letters, or knew of the content of the letters. See 13RP 67-69; 14RP 38, 86. Steven turned the letters over to the police. 13RP 69. Steven also obtained a Sexual Assault Protection Order preventing the defendant from having any contact with HT. 13RP 73; 14RP 115; Exh 12.

While in custody pending trial, the defendant placed approximately 50 phone calls to HT. 14RP 12; Exh 5 (call log with housing location). Thirteen of those calls were completed. 14RP 12. By agreement and stipulation, a redacted CD (Exh 4) was admitted containing excerpts from the phone calls. 11RP 104-08; 13RP 42-45; 14RP 77-78. The stipulation listed seven dates corresponding to the charges that were based on the phone calls (counts III-X). Exh 8; 14RP 7-8. A transcript of the CD

was also provided to the jury. Exh 3; 14RP 77-78. The content of the calls will be discussed further in section C 3 below.

HT's cooperation with the police was sporadic and inconsistent. HT initially told the police that nothing had happened between her and the defendant. 14RP 53. HT then told Officer Gale that she had sex with the defendant five times. 14RP 117. When a joint interview was set up at the prosecutor's office, HT refused to talk. 14RP 31, 98-101. Later, HT told Detective Churchel she had sex with the defendant 15 times. 14PR 117. Later, HT then told the defendant's attorney (subsequently his standby counsel) that she never had sex with the defendant. 14RP 32.

At trial, HT professed her continuing love for the defendant. 14RP 30. She admitted making multiple and contradictory statements about their relationship because she did not want the defendant to get into trouble and she felt pressured by her parents. 14RP 33, 55-56. She testified that she only had sex with the defendant a "couple" times and claimed not to know when the events happened. 14RP 33-34.

HT testified that after her parents found out about her relationship with the defendant, and read the letters he sent her,

they put bars across her window and obtained a protection order. 14RP 38. Still, HT continued to communicate with the defendant, even when he left for Ohio in February. 14RP 40-41. When he was jailed upon his return, HT admitted that the defendant called her from jail a number of times. 14RP 41-44. HT testified that in the days before his arrest, the defendant asked her to marry him, and she agreed. 14RP 57-58. With the defendant, HT testified, "I felt protected." 14RP 39.

The defendant did not testify. Additional facts are included in the sections they apply.

### **C. ARGUMENT**

#### **1. THE TRIAL COURT PROPERLY GRANTED THE DEFENDANT'S UNEQUIVOCAL REQUEST TO EXERCISE HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION.**

The United States Supreme Court recognizes a constitution right of criminal defendants to waive assistance of counsel and to represent themselves at trial. Reviewing courts have recognized that no matter how the trial court rules on a motion to proceed pro se, upon conviction an appeal of the decision will likely follow. Here, the defendant claims the trial court erred in granting him what

he requested, the right to proceed pro se. In other words, the defendant claims the trial court should have rejected his unequivocal and repeated request to exercise his constitutional right to self-representation. This claim should be rejected.

The defendant made multiple, absolutely unequivocal, requests to represent himself. All defendants possess a constitutional right to self-representation. After the defendant's first request, the trial court gave the defendant a week to think about his request, and to again discuss the issue with his trial counsel. A week later, when the defendant again insisted on representing himself, the court properly allowed the defendant to exercise his constitutional right to do so.

On June 25, 2007, a charge of communicating with a minor for immoral purposes was filed against the defendant. CP 1-5. The charging documents listed the charge against the defendant, the elements of the charge, the Revised Code of Washington cite for the charge, the evidence against the defendant, and his known criminal history. CP 1-5.

On July 2, 2007, the defendant was arraigned. CP \_\_\_\_, sub 4. There is no indication in the record that the defendant ever requested that he be represented by counsel. Still, on June 27,

2007, public defender Brent Hart entered a notice of appearance.

CP \_\_\_\_, sub 3.

On August 14, 2007, the defendant obtained a continuance of his trial date when the State added a count of rape of a child in the second degree. CP 6-7; CP \_\_\_\_, sub 20. The amended information listed the charges against the defendant, the elements of the charges, and the Revised Code of Washington cites for the charges. CP 6-7.

On November 30, 2007, the defendant again obtained a continuance of his trial date. CP \_\_\_\_, sub 28. During this time period, the defendant called HT multiple times from the King County Jail. As a result, the State provided additional discovery to the defense and indicated that new charges would be filed against the defendant. CP \_\_\_\_, sub 28. Also during this time period, HT talked to the defense counsel and recanted. CP \_\_\_\_, sub 28.

On December 21, 2007, the defendant made a motion to the court stating that he wanted to represent himself. CP 8; 1RP 3-5. Defense counsel informed the court that she had met with the defendant the prior day and indicated that she did not think representing himself was in his best interest. 1RP 3. When asked why he wanted to represent himself, the defendant replied that "I'd

just like to participate in my own defense, and I mean, I've already attained some knowledge in law practice by just reading and getting involved with other people and I'd just like to go pro se." 1RP 4.

The defendant told the court that he had earned his GED, had read some law books and had a few books currently in his cell about the Washington court rules. 1RP 4.

The court asked the defendant if he understood that if he was allowed to exercise his constitutional right to represent himself, he would be held to the same standard as an attorney. The defendant responded that he understood. 1RP 4.

Despite the defendant's unequivocal request to proceed pro se, the court held the matter over for one week, stating, "I think you need to talk to your attorney about whether it's a good idea. If it is still your wish..." The defendant then interrupted the judge, responding, "it's been my wish for a month." 1RP 5. The court answered back, "Well, I'm not sure it's a good idea, so I think you need to explore that with your attorney in detail because it's not -- because you're facing serious charges that are going to be amended to add additional charges. . .If after discussion with Mr. Barnhill, it is still his wish to go pro se," the matter needs to be reset. 1RP 5.

A week later, on December 28, 2007, the defendant again unequivocally requested that he be allowed to represent himself. 2RP 3-8. Defense counsel informed the court that she had discussed the matter with the defendant and advised him of her opinion about self-representation. 2RP 4. Counsel indicated that her relationship with the defendant was amicable, that there was no communication breakdown, and in short, that dissatisfaction with her was not the reason the defendant was seeking to proceed pro se. 2RP 4. In fact, counsel told the court, the defendant wanted her to continue as standby counsel to help him. 2RP 4.

When asked by the court why he still wanted to proceed pro se, the defendant said, "I just feel I'd rather be more -- more in representing in my defense and sitting first chair versus second chair, due to the fact that it's my case and the seriousness of it. I don't want to put my -- my life in someone else's hands when the seriousness of this is going on." 2RP 6. The defendant again informed the court that he had earned his GED and said that he had "done a lot of studying, especially in the past six months." 2RP 6. He said he was in possession of a number of legal books, including the court rules and rules of evidence. 2RP 6. He said he was reading them and studying them. 2RP 6.

The defendant told the court he had been involved in the criminal justice system before, although he said that his prior cases had resulted in plea bargains. 2RP 7. The defendant said that he understood that he would do all the talking to the jury, that he would be held to the same standards as an attorney, and that his standby counsel's role was limited. 2RP 7. He said he understood when told that standby counsel could provide him with advice, but that he was "stuck with your own...performance at trial." 2RP 7. The defendant said that "I fully understand that, yes, sir." 2RP 7. The court then granted the defendant's motion, stating that "I'm satisfied he's given this a lot of thought this motion to go pro se." 2RP 7.

The defendant's case did not go to trial for another eight months. During that time, the defendant appeared in court pro se multiple times, raising multiple motions, many of which he prevailed.<sup>2</sup> During this time period, the defendant was also

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<sup>2</sup> See Motion for full discovery--granted (3RP 3; CP \_\_\_\_, sub 39); motion for more time out of cell to prepare--granted (3RP 14); motion for copy of unredacted discovery--granted (5RP 3-5); motion to interview victim face to face--granted (5RP 11-14); motion to conduct interviews without arm restraints--granted (5RP 16); motion for funds for an investigator--granted (5RP 17); motion for funds for transcriptionist--granted (5RP 18-22); defendant persuades judge into giving him a trial handbook and court rules (5RP 25); motion to obtain F. Lee Bailey's trial techniques book--granted (5RP 26); motion to exclude his prior convictions--granted (11RP 9); motion to prevent use of term "victim"--granted (11RP 12).

reminded that he would be held to the same standards as an attorney (5RP 18) and that it is said only a fool represents himself (5RP 24).

On August 14, 2008, at the commencement of trial, the court asked the defendant if he wanted to reconsider his request to proceed pro se. The defendant responded unequivocally that "I wish to maintain as pro se and just have him [standby counsel] sit beside me at the table and assist me." 11RP 15. The charges against the defendant were then amended--of which he had prior notice--and the standard range for each charge was provided to the defendant. 11RP 31, 35-36. The prosecutor informed the court that she had previously provided the defendant with written notice of the charges he faced and the associated penalties. 11RP 31. Trial then commenced with the defendant never expressing any desire to change his pro se status.

The State and Federal Constitutions guarantee a criminal defendant the right to self-representation. U.S. Const. amend. VI and XIV; Wash. Const. art. I, § 22; Faretta v. California, 95 S. Ct. 2525, 2540-41, 442 U.S. 806, 45 L. Ed. 2d 562 (1975); State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). This right exists even though a defendant "may conduct his defense ultimately to his

own detriment." Faretta, 95 S. Ct. at 2540-41. In fact, courts recognize that the exercise of the right "will almost surely result in detriment to both the defendant and the administration of justice." State v. Vermillion, 112 Wn. App. 844, 850-51, 51 P.3d 188 (2002); State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978). Still, when a defendant unequivocally requests to exercise his right to self-representation, and he understands the risks involved, this request must be granted. Vermillion, 112 Wn. App. at 858.

There is "no specific formula" for a trial court to determine the validity of a waiver of counsel. State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The preferred method is a colloquy between the trial court and the accused on the record, detailing at a minimum, the seriousness of the charge, the possible maximum penalty involved, and the existence of technical and procedural rules governing the presentation of the accused's defense. State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). The crux of the trial court's decision is to ensure that the accused has his "eyes open to the risks." State v. Hahn, 106 Wn.2d 885, 895, 726 P.2d 25 (1986).

After a trial court makes grants or denies a request to proceed pro se, upon a conviction, it can be assured that there will

be a challenge to the court's decision. After all, there are two diametrically opposed constitutional rights a defendant possesses-- the right to self-representation and the right to counsel. Thus, reviewing courts recognize that no matter how the trial court rules, there is a "probability that a defendant will appeal either decision of the trial judge." State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997).

For example, in one case, defendant Marvin Vermillion argued to this Court that the trial court should have rejected his request to exercise his right to self-representation. State v. Vermillion, 66 Wn. App. 332, 832 P.2d 95 (1992), rev. denied, 120 Wn.2d 1030 (1993). Yet in another case, defendant Marvin Vermillion argued to this Court that the trial court should have accepted his request to exercise his right of self-representation. Vermillion, 112 Wn. App. 844.

The decision of the trial court in granting or denying a request for self-representation is not reviewed *de novo*. Rather, this Court reviews a trial court's granting or denial of the right to self-representation for abuse of discretion. Vermillion, 112 Wn. App. at 855. Even where reasonable minds might disagree with the trial court's ruling, that is not the finding that must be made on

review to overturn a trial court's decision. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). Rather, an abuse of discretion is found only when this Court is satisfied that "no reasonable judge would have reached the same conclusion" as the trial court. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing Sofia v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

Here, while having never gone to trial before, the defendant was no stranger to the criminal justice system. And when charges were filed in this case, he was provided with a charging document that notified him of every single element of the crimes charged, the statutory citations, the facts supporting the charges, and his known criminal history. The defendant was represented by counsel for over six months before he decided to request that he be allowed to represent himself.<sup>3</sup> Then, when he posed this idea with his counsel, he met with counsel, counsel recommended against it. 1RP 3. Still, the defendant was unequivocal in his request and he informed the court that he already possessed some law books,

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<sup>3</sup> It is noteworthy that there is nothing in the record to indicate that the defendant ever requested that he be represented by counsel. Rather, it appears that he was in custody and a public defender was appointed to represent him.

including the Washington State Court Rules, and that he had been studying the law and reading law books for many months. 1RP 4.

The court informed the defendant that the charges against him were "serious charges" and reminded him that there were going to be additional charges added. 1RP 5. The defendant was also informed that he would be held to the same standards as an attorney. 1RP 4. The defendant remained unequivocal in his request. 1RP 5. Still, the judge, in an abundance of caution, refused to grant the defendant's request to exercise his constitutional right to self-representation. 1RP 5. Instead, the court told the defendant that he needed to "explore that with your attorney in detail," and that if it was still his desire to exercise his constitutional right "after discussion" with counsel, the court would grant his request. 1RP 5.

A week later, the defendant renewed his unequivocal request to self-representation. Defense counsel informed the court that they had in fact met as requested, and that counsel advised the defendant against self-representation. 2RP 4. Counsel also informed the court that none of the usual reasons that would call into question the request were present. Counsel told the court that their relationship was amicable and that there had been no

communication breakdown between them. 2RP 4. In fact, the defendant wanted counsel to remain as standby counsel. 2RP 4. Counsel further informed the court that there were no ulterior motives to the defendant's request, such as a desire to see the victim in person. 2RP 4.

The defendant did not dispute any of his counsel's representations. Rather, the defendant stated that due to the very "seriousness" of the charges against him, he wanted his fate to be in his hands. 2RP 6.

The defendant was yet again informed that he would be held to the same standards as an attorney, that he would be the one conducting trial, that standby counsel's role was limited, and that his fate would be left to his own performance. 2RP 7. The defendant indicated he understood all of this and that he had been studying for the past six months. 2RP 6-7. The court, satisfied that the defendant understood the risks of self-representation, granted the defendant's unequivocal request. 2RP 7.

Still, this issue does not stop there. The defendant was by no means pressured or forced into a quick trial. Instead, the defendant represented himself through various court hearings for over eight months before his trial began. When trial did begin, he

was informed on the record of the charges he faced and provided the standard ranges for the offenses.<sup>4</sup> Then, after six months of representing himself, and being told repeatedly that it was generally a bad idea to represent one's self, the trial court asked the defendant if he still wanted to represent himself. In no uncertain terms, the defendant stated that he wanted to continue to exercise his constitutional right, "I wish to maintain as pro se." 11RP 15. Throughout the entire course of trial, the defendant never waived from his position.

While the trial court could have conducted a more thorough colloquy, there is nothing in the record suggesting the defendant did not intelligently understand the risks he sought to undertake. He consulted with counsel twice about the issue of self-representation, he indicated he understood the seriousness of the case against him, the standards he would be held to, and despite being given the opportunity to reconsider, he never waived.

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<sup>4</sup> Post Blakely, and the amendments to the exceptional sentence statutes, the maximum penalty the defendant faced at that time, without proper notice of exceptional sentence allegations, was the standard range. See Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007); RCW 9.94A.535; RCW 9.94A.537(1).

Rather than attempt to show that the defendant did not understand the risks he was undertaking, or that his request was somehow equivocal, appellate counsel attacks the defendant's actual performance at trial and suggests that this shows the trial court's decision was incorrect. This argument is misguided for two reasons.

First, "the inadequacy of the [pro se] defense cannot provide a basis for a new trial or an appeal." DeWeese, 117 Wn.2d at 379. A pro se defendant's performance "will almost surely result in detriment to...the defendant." Vermillion, 112 Wn. App. at 850-51. The very point of informing the defendant about the pros and cons of self-representation is letting the defendant know he will have a fool for a client, that it is unlikely he will be able to match the skill of an attorney practiced in the law. To support a motion to proceed pro se, the record simply must show "that he knows what he is doing and his choice is made with eyes open...but any consideration of a defendant's ability to exercise the skill and judgment necessary to secure himself a fair trial was rendered inappropriate by Faretta." Hahn, 106 Wn.2d at 889, 890 n.2 (internal quotations and citations omitted).

Second, the defendant actually performed quite admirably. As stated above, he successfully raised and argued multiple motions. Through his *voir dire*, he was able to get certain jurors to admit they could not be fair. 12RP 131-32. Most impressive was the defendant's trial strategy. Through the defendant's cross-examination, the defendant was able to demonstrate that HT's father was biased against him, protective of his daughter, and that he possessed no direct evidence of the charges against him. 13RP 77-79, 81. The defendant quite skillfully cornered HT's mother into emphatically insisting that the letter the defendant wrote to HT stated that the two had "sex," only to then have to be impeached by the prosecutor and confess that the letter did not say that. 13RP 98-99.

Most importantly, the defendant attacked the State's case in the only manner realistically possible, by attacking the credibility of HT. The defendant repeatedly questioned HT and Detective Churchel on the many inconsistent contradictory statements HT made. See 14RP 53, 55-56, 61-62, 87, 117. As the defendant then said in closing, "what makes her credibly (sic)."

Had the trial court denied the defendant's request to proceed pro se, the defendant would have raised this issue on appeal. His

unequivocal request to exercise his constitutional right to self-representation was granted. This Court cannot say that no reasonable judge would have granted his unequivocal request.

**2. THE STATE CONCEDES THE CONVICTION FOR COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES, AS CHARGED IN COUNT I, MUST BE SET ASIDE FOR ENTRY OF A LESSER OFFENSE.**

The defendant contends that there is insufficient evidence to support a conviction for communicating with a minor for immoral purposes, as charged in count I. Count I was based on a letter the defendant sent to HT (Exh 7) that was intercepted by her father. 15RP 20-22. Specifically, the defendant claims that because the letter was not received by HT, and HT was never informed of the content of the letter, he did not "communicate with a minor for immoral purposes" as required under the statute. The defendant is correct.

Under RCW 9.68A.090, "a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor." The statute "is designed to prohibit communication with children for the predatory purposes of

promoting their exposure to and involvement in sexual misconduct." State v. Hosier, 157 Wn.2d 1, 9, 133 P.3d 939 (2006) (citing State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)).

The Supreme Court has held that "[u]nless a person's message is both transmitted by the person and received by the minor, the person has not communicated with children." Hosier, 157 Wn.2d at 9 (internal quotations omitted). Hosier left sexually threatening notes in the yard of a minor, MS. MS never received or read the notes. Instead, her father found the notes and described the contents of the notes to MS. On appeal, Hosier claimed that because MS never received his notes, there was insufficient evidence he communicated with a minor for immoral purposes. The Supreme Court disagreed. The Court held when MS's father disclosed the content of the notes to MS, he "was a conduit for Hosier's communication" with her, and therefore there was sufficient evidence to support the conviction. Hosier, at 9-10.

Here, the letter the defendant sent to HT was intercepted by her father. HT testified she never read the letter and there was no evidence presented that she was ever informed of the content or nature of the letter. Without this evidence, the State agrees, there is insufficient evidence to support the defendant's conviction of

communication with a minor for immoral purposes as charged in count I.

What should have been charged here is attempted CMIP, facts necessarily proven here. The remedy on appeal is remand for entry of attempted CMIP. See State v. Mannering, 150 Wn.2d 277, 284, 75 P.3d 961 (2003) (every crime includes an attempt to commit that crime as a lesser); State v. Gilbert, 68 Wn. App. 379, 387-88, 842 P.2d 1029 (1993) (reversing and remanding for entry of judgment on residential burglary when State failed to prove that assault occurred within the dwelling burgled, an essential element of first degree burglary); State v. Robbins, 68 Wn. App. 873, 877, 846 P.2d 585 (1993) (“An appellate court that reverses a conviction of possession with intent to deliver on grounds of insufficiency of the evidence may remand the case for entry of an amended judgment on the lesser included offense of possession”).

**3. THE STATE CONCEDES THERE IS INSUFFICIENT EVIDENCE SUPPORTING COUNTS IV, V, VI, AND VII.**

Eight counts (counts III, IV, V, VI, VII, VIII, IX and X) depended on evidence of the recorded jail phone calls the defendant made to HT. The defendant argues that there is

insufficient evidence supporting four of those counts (counts IV, V, VI and VII). The State agrees.

There are two related problems here. First, the CD, transcript, and stipulation pertaining to the phone calls were inadvertently messed up. The tracking number references and charges simply do not correspond. Second, alternative means of witness tampering were charged for counts IV, V, VII and VIII, without sufficient evidence supporting both alternatives.

The recorded jail phone calls provided the evidence for eight counts. Those counts and corresponding dates are as follows:

- Count III:** Witness Tampering--November 19, 2007
- Count IV:** Witness Tampering--November 22, 2007
- Count V:** Witness Tampering--November 30, 2007
- Count VI:** Witness Tampering--December 19, 2007
- Count VII:** Witness Tampering--December 20, 2007
- Count VIII:** Violation of a protection order--November 21, 2007
- Count IX:** Violation of a protection order--December 21, 2007
- Count X:** CMIP--November 22, 2007

CP 169-73.

A redacted CD of the defendant's jail phone calls was played for the jury. Exh 4; 14RP 92-93. The CD contains eight tracks.

The tracks on the CD do not contain any identifying information in terms of dates or corresponding charges. A stipulation was thus entered that was intended to provide this information. 14RP 77; 15RP 6. In pertinent part the stipulation reads as follows:

The parties agree that State's exhibit 4 are true and accurate excerpts of phone calls made by the defendant, Christopher Barnhill, to Heather R. Thompson (DOB 6/18/93), to phone number 253-347-9375 from the King County Jail. The numbered tracks on Exhibit 4 relate to the following dates:

	<u>Original CD/Track</u>	<u>Date of call</u>
Track 1	CD 1/Track 4	11/19/07
Track 2	CD 1/Track 7	11/22/07
Track 3	CD 1/Track 9	11/30/07
Track 4	CD 2/Track 1	11/21/07
Track 5	CD 2/Tracks 1 & 3	12/19/07
Track 6	CD 2/Track 5	12/20/07
Track 7	CD 2/Track 7	12/21/07

Exh 8.

Also admitted was a transcript of the CD. Exh 3. The transcript included eight tracks. The transcript did not have the 1 through 7 track numbering from the stipulation, or any dates listed.

Rather, the transcript contained the following track numbering:

Disc 1, Track 04  
Track 5  
Track 6  
Track 07  
Track 09  
Disc 2, Track 01

Track 05  
Track 07

Exh 3.

The defendant argues the track numbering was so confusing, and the number of tracks so inconsistent, that he cannot be convicted of witness tampering for the counts mentioned above.<sup>5</sup> Essentially, the defendant argues that there is insufficient evidence to show which calls pertained to each count. The State agrees. As much as counsel on appeal has tried, there does not appear to be any way to reconcile the many discrepancies between the three exhibits. The State also makes this concession in light of the second issue regarding the witness tampering charges.

Witness tampering is regarded as an alternative means crime. State v. Fleming, 140 Wn. App. 132, 135-37, 170 P.3d 50 (2007). Tampering may be committed by inducing a witness to testify falsely, to be absent from official proceedings, or to withhold

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<sup>5</sup> The defendant appropriately concedes that because the first track is consistent throughout, count III is not challenged. Also, because the call logs support convictions without needing to know the content of the calls, the defendant appropriately does not challenge counts VIII and IX--violation of a protection order. Finally, the defendant appropriately does not challenge count X, CMIP, as this call is supported by the records.

information from a law enforcement agency. RCW 9A.72.120. The first two prongs of the statute were charged here. CP 169-73.

A claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court must affirm a conviction if, "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The State agrees that certain tracks wherein the defendant merely asked HT to call his attorney do not provide sufficient facts to convict under the two alternative means charged here. With the added problem of determining which tracks pertain to each count, the State agrees with the defendant that counts IV, V, VI and VII must be vacated.

**4. THE TRIAL COURT PROPERLY COUNTED THE DEFENDANT'S TEXAS BURGLARY CONVICTIONS IN HIS OFFENDER SCORE.**

The defendant's offender score of seven includes two points for his four Texas juvenile burglary of a habitation convictions.<sup>6</sup> CP 228, 265-82. The defendant claims his Texas burglary convictions are not comparable to Washington felony crimes, and therefore the convictions should not have counted in his offender score. This claim should be rejected. The defendant's Texas burglary convictions are comparable to Washington felony vehicle prowling offenses.

The Sentencing Reform Act (SRA) sets forth the standard sentencing ranges for an offense based on both the seriousness level of the offense and a defendant's "offender score." State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The "offender score" is calculated by adding up the defendant's prior adult felonies and certain juvenile offenses. Ford, 137 Wn.2d at 479.

If a defendant has out-of-state convictions, the SRA requires these convictions be classified according to the comparable offense definitions and sentences provided by Washington law. RCW

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<sup>6</sup> Non-violent juvenile convictions count as ½ point. RCW 9.94A.525. Thus, his four juvenile convictions count as two points.

9.94A.525(3); Ford, at 479. To properly classify an out-of-state conviction, the sentencing court must compare the elements of the out-of-state offense with the elements of a comparable Washington crime. Id. at 479. If the elements are comparable, the conviction counts. If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated a comparable Washington offense. Id. at 479. If the defendant's conduct would have violated a comparable Washington offense, the conviction counts.

Here, the State provided the sentencing court with an Order of Adjudication and Judgment of Disposition from Texas. CP 277-79. The document shows the defendant was adjudged guilty, as pertinent here, to four counts as follows:

Christopher Daniel Barnhill, on or about the 30<sup>th</sup> day of May 2002, in the County of Liberty, State of Texas, did then and there, intentionally or knowingly **enter a habitation**, without the effective consent of Craig MacArthur, the owner thereof, and committed there of property, to-wit:, (1) one large stereo "boom box," against the peace and dignity of the state.

Christopher Daniel Barnhill, on or about the 30<sup>th</sup> day of May 2002, in the County of Liberty, State of Texas, did then and there, with intent to commit theft,

intentionally or knowingly **enter a habitation**, without the effective consent of Bill R. Murry, the owner thereof, against the peace and dignity of the state.

Christopher Daniel Barnhill, on or about the 30<sup>th</sup> day of May 2002, in the County of Liberty, State of Texas, did then and there, with intent to commit theft, intentionally or knowingly **enter a habitation**, without the effective consent of Donald Rogers, the owner thereof, against the peace and dignity of the state.

Christopher Daniel Barnhill, on or about the 30<sup>th</sup> day of May 2002, in the County of Liberty, State of Texas, did then and there, with intent to commit theft, intentionally or knowingly **enter a habitation**, without the effective consent of Barry Ford, the owner thereof, against the peace and dignity of the state.

CP 277 (emphasis added).

In pertinent part, in 2002, burglary in Texas was defined as follows:

- (a) A person commits an offense if, without the effective consent of the owner, the person:
- (1) **enters a habitation**, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
  - (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
  - (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

V.T.C.A. § 30.02 (emphasis added). In pertinent part, "'habitation' means a structure or **vehicle that is adapted for the overnight accommodation of persons.**" V.T.C.A. § 30.01 (emphasis added).

Washington's residential burglary statute provides as follows:

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling ***other than a vehicle***.

RCW 9A.52.025 (emphasis added).

The State argued, and the sentencing court agreed, that the defendant's burglary convictions are comparable to Washington burglary offenses. 19RP 33. On appeal, the defendant correctly points out that burglary in Texas can include the burglary of a vehicle, while Washington's burglary statute specifically excludes such an event. The Texas adjudication document does not indicate whether the defendant entered a structure (and thus comparable to a burglary in Washington) or a vehicle. However, as charged and pled, the elements of Texas burglary statute is comparable to Washington's felony vehicle prowling statute. Thus, the defendant's Texas convictions are either comparable to burglary or felony vehicle prowling.

A person is guilty of vehicle prowling in the first degree, a class C felony, if:

with intent to commit a crime against a person or property therein, ***he enters or remains unlawfully in a motor home***, as defined in RCW 46.04.305, or in a vessel equipped for propulsion by mechanical means

or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities

RCW 9A.52.095. In pertinent part, "'motor homes' means motor vehicles originally designed, reconstructed, or permanently altered **to provide facilities for human habitation**, which include lodging and cooking or sewage disposal, and is enclosed within a solid body shell with the vehicle, but excludes a camper or like unit constructed separately and affixed to a motor vehicle." RCW 46.04.305 (emphasis added).

In State v. McCorkle, the Court of Appeals found that Georgia's burglary statute, that includes burglary of a vehicle, was comparable to Washington's vehicle prowling in the first degree statute. State v. McCorkle, 88 Wn. App. 485, 496, 945 P.2d 736 (1997), affirmed, 137 Wn.2d 490, 973 P.2d 4651 (1999). In pertinent part, under the Georgia criminal code a person commits the offense of burglary when:

without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle,

railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof.

GA. Code Ann. § 16-7-1. While not able to determine whether McCorkle's Georgia burglary conviction would be classified as a class B or C felony in Washington, the court stated that Georgia's burglary statute "is broad in scope, encompassing three potentially comparable Washington felonies: burglary in the second degree, residential burglary and vehicle prowl in the first degree. McCorkle, 88 Wn. App. at 496 (citations omitted).

The same is true here. The defendant's Texas convictions were for crimes committed in a habitation, a place that includes vehicles adapted for habitation, overnight accommodation of persons. Trotter v. State, 623 S.W.2d 504, 505 (Tex.App., 1981). Washington's felony vehicle prowling statute makes it unlawful to burglarize a vehicle, a motor home for human habitation. The sentencing court properly included the defendant's Texas burglary convictions in his offender score.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 1 day of ~~August~~<sup>September</sup>, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BARNHILL, Cause No. 62717-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame  
Name  
Done in Seattle, Washington

9/2/09  
Date

2009 SEP -2 PM 4:53  
CLERK OF COURT  
STATE OF WASHINGTON