

NO. 63607-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

FREDERICK BROWN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY YU

---

**BRIEF OF RESPONDENT**

---

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**A. ISSUES PRESENTED**

1. For double jeopardy purposes, is the unit of prosecution under the violation of a no-contact order statute each separate and distinct contact with the protected person?

2. For purposes of charging and instructing the jury, did the defendant's multiple contacts with the protected person listed in a no-contact order constitute but a single offense that was a "continuing course of conduct," thus negating the necessity of the court to provide the jury with a "Petrich" or "unanimity" jury instruction?

3. Did the trial court abuse its discretion in allowing the prosecutor to argue what the court believed was a reasonable inference based on the evidence? Specifically, where the defendant's new girlfriend, Tanya Webster, claimed she could not remember either her home number or cell phone number, but the defendant's phone records showed he called two numbers multiple times, could a reasonable judge have found it was a reasonable inference that the numbers called belonged to Webster?

4. Was trial counsel constitutionally ineffective for failing to raise a sentencing issue--an issue that would have required the sentencing court to make factual determinations and to exercise its

wide discretion? Specifically, was counsel ineffective for failing to argue that the defendant's violation of a no-contact order convictions constituted the "same criminal conduct" for sentencing purposes?

5. Did the trial court properly rule that the defendant's two prior violation of a no-contact order convictions were proper predicate offenses that the jury could use to elevate his current violations of a no-contact order to felony offenses?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged as follows:

- Count I: First-Degree Burglary  
Date of Violation (DOV) 4/7/07
- Count II: Felony Violation of a No-Contact Order  
(FVNCO)  
DOV 10/27/07
- Count III: First-Degree Burglary  
DOV 10/28/07
- Count IV: FVNCO  
DOV 10/28/07
- Count V: FVNCO  
DOV 11/20/07
- Count VI: FVNCO  
DOV 12/7/07

Count VII: FVNCO  
DOV 12/9/07

Count VIII: Interfering with Domestic Violence  
Reporting  
DOV 12/9/07

CP 26-30. All counts involved the same victim, Denise Apodaca. Id. Each of the felony violation of a no-contact order charges was based on the defendant contacting Apodaca in violation of a no-contact order, with the charges being elevated to a felony because the defendant has two prior misdemeanor convictions for violation of a no-contact order. Id.

The defendant proceeded to trial, with the jury acquitting the defendant of the burglary charges and convicting the defendant as charged on all other counts. CP 204-14.

With an offender score of four, the defendant received concurrent standard range sentences of 29 months on each count of felony violation of a no-contact order, concurrent with a 12-month suspended sentence on the misdemeanor count of interfering with domestic violence reporting. CP 497-509.

## **2. SUBSTANTIVE FACTS**

30-year old Denise Apodaca works for a company called ER Solutions and lives at the Fairwood Apartments in Renton. 13RP<sup>1</sup> 108, 112. The defendant is her ex-boyfriend. 13RP 110. The two met one night in 2005, they exchanged numbers, and soon began dating. 13RP 110-11. Shortly thereafter, they began living together. 13RP 111. However, in late 2006, Apodaca moved into her mother's house. 13RP 111. Apodaca then moved into her Fairwood apartment in early 2007. 13RP 112, 114.

### **a. Count I, First-Degree Burglary (DOV 4/7/07)**

After Apodaca moved into her own apartment, she and the defendant continued to try and work things out. 13RP 115. On April 7, 2007, the two went out for the evening together, but upon returning to the apartment, they began to argue. 13RP 115. Apodaca told the defendant to leave, but he initially refused to do so. 13RP 115.

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--3/25/08, 2RP--3/9/08, 3RP--7/25/08, 4RP--8/11/08, 5RP--8/12/08, 6RP--8/19/08, 7RP--8/27/08, 8RP--9/2/08, 9RP--9/4/08, 10RP--9/8/08, 11RP--9/9/08, 12RP--9/10/08, 13RP--9/11/08, 14RP--9/16/08, 15RP--9/17/08, 16RP--9/18/08, 17RP--9/22/08, 18RP--9/29/08, 19RP--9/30/08, 20RP--10/1/08, 21RP--10/2/08, 22RP--11/5/08, 23RP--11/14/08, 24RP--12/12/08, 25RP--4/24/09, and 26RP--5/15/09.

Later, after the defendant finally did leave the apartment, Apodaca heard a car alarm go off and opened her door to see what was going on, only to find the defendant standing outside her door. 13RP 115-16. The defendant then shoved his way inside and threw Apodaca across the room. 13RP 116. Apodaca then ran next door and called 911. 13RP 116. When officers arrived, the defendant was gone.<sup>2</sup> 13RP 70-72, 99. Apodaca confessed that the defendant resided at her apartment at times and that he had some of his possessions there. 13RP 117-18. The jury acquitted the defendant on this count.

**b. A No-Contact Order Is Issued**

On September 4, 2007, a no-contact order was issued that prevented the defendant from having any contact with Apodaca. 15RP 108; 16RP 132.

**c. Count II, FVNCO (DOV 10/27/07)**

Later in September, despite the issuance of the no-contact order, Apodaca and the defendant began seeing each other again.

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<sup>2</sup> It appears officers responded to the apartment twice that night with the defendant present during the first visit, but no arrests were made as the police were unaware any crime had been committed. 13RP 118-19; 15RP 29-31, 48.

13RP 147-49. However things did not go smoothly, and in October Apodaca again called the police on the defendant. 13RP 149.

On October 27, 2007, the defendant repeatedly called Apodaca and asked her to come pick him up--Apodaca refused. 13RP 150. Some of the calls were from a pay phone, some were blocked calls. 13RP 150-51. Phone records show that on the 27<sup>th</sup>, there were 86 calls placed from a cell phone registered to the defendant (253-486-6666) to Apodaca's home phone (206-850-7552). 14RP 54; 18RP 55, 57. For the same day, there was a three-page list of calls from the defendant's cell phone to Apodaca's cell phone. 14RP 20; 18RP 61-62. The defendant was convicted as charged on this count.

**d. Count III, First-Degree Burglary (DOV 10/28/07) And Count IV, FVNCO (DOV 10/28/07)**

In the early morning hours of October 28, 2007, the defendant showed up at Apodaca's apartment and began knocking on her door. 14RP 130. Apodaca did not let the defendant in or call 911 as she hoped the defendant would just leave. 14RP 134. A while later, the defendant kicked in the front door. 13RP 152. He then pushed Apodaca down on the bed and searched the

apartment looking to see if there was another man inside. 13RP 152-53. He then left. 13RP 153. Attempts to locate the defendant--including a K-9 track--were unsuccessful. 16RP 88-91.

While officers were still present investigating the alleged burglary, numerous calls (every 30 seconds) were coming into Apodaca's home and cell phones. 15RP 68, 71, 98, 101. The officers answered a few of the calls, but after announcing themselves, they obtained no response. 15RP 71, 101-02. Officers noted that the incoming calls were listed as blocked calls. 15RP 104. Phone records showed that 45 calls were placed from the defendant's cell phone to Apodaca's cell phone on October 28, 2007. 18RP 59. Phone records showed that there were two pages of calls made from the defendant's cell phone to Apodaca's home phone on October 28, 2007. 18RP 62-63. The jury acquitted the defendant of the burglary count and found the defendant guilty of FVNCO.

**e. Count V, FVNCO (DOV 11/20/07)**

As Apodaca was getting ready for work, she received a number of calls from the defendant wanting to talk. 14RP 28. Phone records show that there were pages of calls made from the

defendant's cell phone to Apodaca's cell phone and home phone, starting on the evening of the 19<sup>th</sup> and going into the 20<sup>th</sup>. 18RP 65-68. Apodaca told the defendant she did not want to talk to him, after which he stopped calling. 14RP 28. However, shortly thereafter, the defendant began ringing her doorbell. 14RP 28. He said he wasn't leaving until Apodaca came out. 14RP 33. Apodaca called 911 as she peeked out her window blinds and observed the defendant now seated in the driver's seat of a white van. 14RP 29-31.

When the officers arrived on scene, they spotted a white van parked approximately 200 to 300 feet from Apodaca's apartment. 15RP 145-47; 16RP 108. As the officers approached, the defendant tried to drive away in the van, but he was stopped and placed under arrest. 15RP 146, 170-71. The defendant was convicted as charged on this count.

**f. Count VI, FVNCO (DOV 12/7/07)**

On Friday, December 6, 2007, Apodaca went out to dinner with her friend and co-worker, Nimensio Rivera. 17RP 7-9. When they returned to Apodaca's apartment, Apodaca began receiving a

number of hang-up calls. 17RP 10. Apodaca would answer the calls, saying "I know it's you, you need to stop calling." 17RP 10.

The next evening, on December 7, 2007, at approximately 11:35 p.m., officers responded to Apodaca's apartment after she called 911 to report that she was again receiving a number of phone calls from the defendant. 15RP 184-86, 201. Calls continued to come in as the officers were present. 15RP 186. Officers answered one of the calls--a blocked call received on Apodaca's cell phone--but the caller would not respond. 15RP 186. Phone records showed that on December 7, 2007, a number of calls were made from the defendant's cell phone to Apodaca's cell phone and home phone. 18RP 69, 70-71. The defendant was convicted as charged on this count.

**g. Count VII, FVNCO (DOV 12/9/07) And  
Count VIII, Interfering With Domestic  
Violence Reporting (DOV 12/9/07)**

Officers again responded to Apodaca's apartment, this time at approximately 2:00 a.m. on December 9, 2007, after the defendant had confronted Apodaca outside her apartment. 15RP 191-92. On the evening of the 8<sup>th</sup>, Apodaca and Rivera had gone to a friend's birthday party at the Muckleshoot Casino. 17RP 13.

When they got back to Apodaca's apartment complex, Rivera got out of the car and walked around the car to open the door for Apodaca when he ran into the defendant. 17RP 15. The defendant kept repeating, "Are you kidding me," over and over. 17RP 15. When Apodaca tried to call 911 on her cell phone, the defendant grabbed the top of the phone and broke it off. 14RP 43; 17RP 16. Rivera then stepped between the defendant and Apodaca, at which point the defendant fled the scene. 17RP 16. Apodaca then ran to her apartment and called 911. 17RP 17.

Officers documented that Apodaca's cell phone was broken in half. 15RP 195. Apodaca also gave the officers a call log she had been keeping that showed calls she had received on December 7<sup>th</sup>, the 8<sup>th</sup> and the 9<sup>th</sup>. 15RP 188. At approximately 2:40 a.m., officers went to the defendant's home but he was not there. 15RP 197, 199. Phone records showed that there were multiple calls placed from the defendant's cell phone to Apodaca's home phone and cell phone on December 9, 2007. 18RP 70-72. The defendant was convicted as charged on these two counts.

#### **h. Prior Convictions**

The defendant had two prior convictions for violating a no-contact order. Admitted into evidence were a 2005 conviction out of the City of Kent (trial exhibit 40) and a 2005 conviction out of the City of Edmonds (trial exhibit 41). 16RP 135-36. These two convictions elevated the defendant's no-contact order violations to felony offenses.

Additional facts are included in sections they are applicable.

#### **C. ARGUMENT**

##### **1. EACH SEPARATE AND DISTINCT CONTACT WITH A PROTECTED PERSON IN A NO-CONTACT ORDER IS A SEPARATE PUNISHABLE OFFENSE.**

The defendant contends that imposing convictions on counts II and IV violates double jeopardy, and convictions on count VI and VII violates double jeopardy. Specifically, the defendant contends that violation of a no-contact order is a continuing offense, that the unit of prosecution for violation of a no-contact order encompasses the counts occurring on subsequent days--counts IV and VII. This is incorrect. What constitutes a "unit of prosecution" is a pure question of legislative intent. The legislature could not have intended to allow a defendant to continue

to commit separate and distinct contacts with a protected person with impunity, facing but a single charge regardless of the number of separate and distinct acts committed. The unit of prosecution for violation of a no-contact order is each separate and distinct contact with the protected person.

The double jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to twice be put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution offers the same protection. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

When a defendant is convicted of violating one statute multiple times, the proper double jeopardy inquiry is what "unit of prosecution" has the legislature intended as the punishable act under the specific criminal statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998); Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). When the legislature defines the scope of a criminal act, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime, or "unit of prosecution." Adel, 136 Wn.2d at 634. Thus, the question here is what act or course of

conduct has the legislature defined as the punishable act for violation of a no-contact order.

The principal focus in determining whether the legislature intended multiple acts to constitute but one crime is whether the legislature intended the punishable offense to be a continuing offense. See Ex parte Snow, 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658 (1887). This is in contrast to statutes aimed at offenses that can be committed *uno actu*, or in a single act. Snow, 120 U.S. at 286.

In Snow, the defendant was convicted of three counts of bigamy, each count identical in all respects except that each count covered a different time span that was part of a continuous period of time. Snow, at 276. The Court noted that bigamy is "inherently a continuous offense, having duration, and not an offense consisting of an isolated act." Snow, at 281. Because bigamy is a continuing offense, the Court held that the defendant committed but one offense. The Court specifically distinguished between statutes aimed at offenses continuous in character versus statutes violated *uno actu*. Snow, at 286.

In contrast, in Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915), the Court found that the defendant's

seven counts of feloniously injuring a mail bag were not one continuous offense, noting that each offense was complete irrespective of any attack upon any other mail bag. Morgan, 237 U.S. at 629. The Court distinguished "continuous offenses where the crime is necessarily, and because of its nature, a single one, though committed over a period of time." Morgan, at 629-30.

In determining the unit of prosecution for a particular statute, the court must examine the language of the statute at issue. State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005). In pertinent part, the violation of a no-contact order statute provides as follows:

Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, **a violation** of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

RCW 25.50.110(1) (emphasis added) (since amended, amendments not relevant here, see Laws 2007, ch. 173, § 1; Laws 2009, ch. 288, § 3; Laws 2009, ch. 439, § 3).

RCW 26.50.110(1) punishes "a violation" of a no-contact order. Use of the word "a" unambiguously defines the unit of prosecution as each single violation of a no-contact order. The Supreme Court "has consistently interpreted the legislature's use of the word 'a' in a criminal statute as authorizing punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously." Ose, 156 Wn.2d at 147 (each possession of an access device is one "unit of prosecution," even where the defendant possesses multiple access devices at one time).

Violation of a no-contact order is a choate crime, complete when a single violation of a no-contact order is completed. This is exactly the determination reached in State v. Allen, wherein the court held that two e-mails sent to the victim constitute two counts of violating a no-contact order. 150 Wn. App. 300, 207 P.3d 483 (2009). There is nothing in the statutory language or in the nature of the crime that suggests the crime is a continuing offense encompassing multiple violations of a no-contact order.

Had the legislature intended violation of a no-contact order to be a continuing offense, it certainly could have written the statute to convey such a purpose. For example, the legislature could have

dictated a punishable offense as someone "who engages in" violations of a no-contact order.<sup>3</sup> See State v. Anderson, 141 Wn.2d 357, 368-69, 5 P.3d 1247 (2000) (use of certain language in one instance, and different language in another, evidences different legislative intent); also State v. Alvarez, 74 Wn. App. 250, 260, 872 P.2d 1123 (1994) (omission of "course of conduct" language in criminal anti-harassment statute indicated legislature consciously chose to criminalize a single act rather than a course of conduct), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995).

As applied here, each separate act that violated the no-contact order was a punishable act. This means that each separate phone call or each separate time the defendant physically confronted Apodaca was a chargeable offense. While the defendant here did not face the number of charges his conduct supported, the number of charges any defendant potentially faces is based on the number of criminal acts he engages in. The potential severe consequences the defendant faced based on his

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<sup>3</sup> The legislature could also have used the words and phrases "repeatedly," "pattern" or "course of conduct," but chose not to do so. See e.g., RCW 9A.32.055 Homicide by Abuse (using phrase "engages in a pattern or practice of assault against a child"); RCW 9.46.0269 Professional Gambling (using phrase "engages in" gambling activity); RCW 9.46.110 Stalking (using phrase "repeatedly harasses or repeatedly follows").

multiple criminal acts was ameliorated by the application of the doctrine of "continuing course of conduct," discussed in the following section. See State v. Handran, 113 Wn.2d 11, 17-18, 775 P.2d 453 (1989).<sup>4</sup>

**2. THE TRIAL COURT PROVIDED THE JURY WITH CORRECT, COMPLETE AND ACCURATE JURY INSTRUCTIONS--NO ADDITIONAL UNANIMITY INSTRUCTION WAS REQUIRED.**

The defendant argues that the trial court was required to provide a "Petrich" or "unanimity" instruction in regards to each count of felony violation of a no-contact order, except for count V. This is incorrect. No such instruction was required. As charged and proven here, for each count the defendant's multiple acts of violating the no-contact order constituted a "continuous course of conduct," i.e., his actions amounted to a single act wherein no unanimity instruction was required. Further, even were such an instruction required, under the facts of this case, any error would have been harmless.

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<sup>4</sup> The defendant incorrectly cites to cases involving this "continuing course of conduct" concept in making his "unit of prosecution" argument. As stated above, the unit of prosecution under a particular statute is a pure question of legislative intent. As will be discussed in the section to follow, the concept of a "continuing course of conduct" is related to charging and jury instruction issues and is based on the facts of a particular case, not legislative intent.

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crime charged has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the prosecutor presents evidence of several acts which could form the basis of a single count, the State must tell the jury which act to rely on in its deliberations to support the charge (referred to as an election), or the court must instruct the jury that it must agree on a specific criminal act to support the charge. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). Such an instruction is commonly referred to as a "unanimity" or "Petrich" instruction. See State v. Huckins, 66 Wn. App. 213, 836 P.2d 230 (1992), rev. denied, 120 Wn.2d 1020 (1993).

However, an election or unanimity instruction is not required in all cases where there are multiple acts, each of which could support the charge. Where the State presents evidence of multiple acts that constitute a "continuing course of conduct," no election or unanimity instruction is required. Handran, 113 Wn.2d at 17.

To determine whether criminal conduct constitutes but one continuing act, the court reviews the facts in a commonsense manner. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); State v. Spencer, 128 Wn. App. 132, 114 P.3d 1222 (2005).

A few examples illustrate this commonsense "continuing course of conduct" approach.

In State v. Marko,<sup>5</sup> the court found that multiple separate threats made over an hour and a half time period constituted a single continuing act of intimidating a witness. In Handran,<sup>6</sup> the Supreme Court held that the defendant's unwanted kissing of the victim, and his later striking of her in the face, was a continuous single act of assault. In both of the above cases, the reviewing courts agreed that the "acts," although multiple, really constituted but a single act or continuing course of conduct, and thus no Petrich or unanimity instruction was required.

Here, each count involved the same restraint provision of the no-contact order--the contact provision--and involved multiple contacts on the same day. For example, as charged in count II, the jury was instructed that the State was required to prove that "on or about October 27, 2007, the defendant willfully had contact with Denise Apodaca," "[t]hat such contact was prohibited by a no-contact order," and "[t]hat the defendant knew of the existence

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<sup>5</sup> 107 Wn. App. 215, 220-21, 27 P.3d 228 (2001).

<sup>6</sup> 113 Wn.2d at 17.

of that order." CP 190.<sup>7</sup> Instead of charging the defendant with multiple counts, the State, in a commonsense manner, grouped all of the defendant's contacts with Apodaca, for each individual day, into single counts, single continuing courses of conduct. This was an appropriate way to charge the defendant, and viewed in a commonsense manner, the acts of each day constituted a continuing course of conduct, and thus no unanimity instruction was required. There was no error here.

The defendant contends that the State cannot have it both ways--his multiple convictions either violate double jeopardy under a unit of prosecution analysis, or there is a unanimity problem. The defendant is incorrect. The two concepts deal with different legal concepts and are not mutually exclusive. As stated in the section above, a unit of prosecution analysis is a question of legislative intent. The issue of whether multiple acts constitute a continuing course of conduct is a fact based determination, not dependent on legislative intent, and focuses on the commonsense way acts should be charged, prosecuted and the jury instructed.

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<sup>7</sup> The jury was similarly instructed as to count IV, with a date of violation of October 28, 2007 (CP 192); count V, with a date of violation of November 20, 2007 (CP 193); count VI, with a date of violation of December 7, 2007 (CP 194); and count VII, with a date of violation of December 9, 2007 (CP 195).

In any event, even if this Court were to find that each of the defendant's contacts with Apodaca constituted a separate and distinct act, and that a Petrich or unanimity instruction was required, the failure to provide one would be harmless. In multiple act cases, when the State fails to elect which incident it relies on for the conviction, or the trial court fails to instruct the jury that it must agree that the same underlying act has been proved beyond a reasonable doubt, the error is harmless if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. Crane, 116 Wn.2d at 325.

Here, every contact with Apodaca was either witnessed by another individual or was supported by phone records. Thus, any failure to give a unanimity instruction was harmless.

**3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE PROSECUTOR TO ARGUE A REASONABLE INFERENCE BASED ON THE EVIDENCE.**

The defendant contends that the trial court abused its discretion in ruling that the prosecutor could make the inference that two phone numbers listed in the defendant's phone records

belonged to his alibi witness, his new girlfriend, Tanya Webster. This argument should be rejected. The defendant fails to show that no reasonable person would have ruled as the trial judge did here.

**a. Relevant Facts**

The defendant presented an alibi defense to count II, III and IV--acts that occurred on October 27 and 28 of 2007, and count VII and VIII--acts that occurred on December 9, 2007. Tanya Webster testified that she was the defendant's new girlfriend and that she was with the defendant during these time periods. 18RP 165-67, 172-73, 175-79. Webster testified that she never saw the defendant make a single phone call during the relevant time periods. 19RP 13, 17.

The prosecutor attempted to impeach Webster by admitting evidence that the defendant had called Webster multiple times during these same relevant time periods they were supposed to be together, with the conclusion being if the defendant was with Webster at all times, there would be no reason for the defendant to be calling Webster on the phone.

The prosecutor asked Webster if her cell phone number at the time was 253-876-5471. Webster proclaimed, "I don't

remember the phone number." 19RP 45-46. Webster then volunteered that she did not remember her home phone number either. 19RP 46.

A portion of a recorded jail phone call from the defendant to Webster was then played, with Webster identifying both her and the defendant's voices on the CD. 19RP 54. The CD had the above phone number written on it, although no witness testified how the number came to be written on the CD. 19RP 47. After identifying that it was her and the defendant on the CD, Webster was asked again about her recollection of her phone number.

Prosecutor: So you agree that the cell phone number 253-876-5471 belongs to you, correct?

[overruled asked and answered objection]

Webster: It could be possible, but like I said, I don't remember the phone number.

19RP 57.

This exchange was repeated using a CD of another jail phone call, with the CD having the number listed on it of 225-639-3301. 19RP 62-63. Webster, after identifying her and the

defendant as the two people heard on the CD, again professes not to know her home phone number.<sup>8</sup> 19RP 62-63.

Phone records for the cell phone registered to the defendant were introduced at trial. As outlined in section B 2, above, during the relevant time periods, there were multiple calls from the defendant's cell phone to Apodaca. However, those records also show that during the time periods Webster claims to have been with the defendant--a time during which Webster claims the defendant did not make any calls--the records show multiple calls made to the two numbers purported to belong to Webster. 18RP 64-65.

Prior to closing argument, the defendant made a motion to prevent the State from arguing that the phone calls documented in the defendant's phone records were calls he placed to Webster. 20RP 3. The court denied the defense motion, stating the circumstantial evidence supported the inference that the calls were made to Webster. 20RP 5-6.

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<sup>8</sup> The defense also presented the testimony of Webster's roommate, Rebecca Moreland. She too professed not to remember what their home phone number was or Webster's cell phone number at the time. 19RP 75.

**b. No Abuse Of Discretion**

A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). A trial court's decision in this regard will be reversed only upon a finding that the trial court abused its discretion. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). While reasonable minds might disagree with the trial court's ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). An abuse of discretion is shown only when a reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." 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)).

In closing argument, a prosecutor is free to argue all reasonable inferences that can be drawn from the evidence. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The logical inferences drawn from the facts of any case are a matter for the finder of fact, not a reviewing court. State v. Baker, 136 Wn. App. 878, 882, 151 P.3d 237 (2007) (citing State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)). An appellate tribunal is

generally not entitled to weigh either the evidence or the credibility of witnesses even though the court may disagree with the trial court in either regard. In re Palmer, 81 Wn.2d 604, 606, 503 P.2d 464 (1972). The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are. Id.

Here, there was sufficient evidence for the trial court to allow the prosecutor to argue the reasonable inference that the calls made to two specific phone numbers from the defendant's phone were calls he made to Webster. Even ignoring the CD's, the trial court--and jury--were in the position to determine whether Webster and Moreland's testimony was credible, that neither of them could remember whether the two phone numbers were Webster's home and cell numbers. It is a perfectly reasonable inference--the type of inference that the trial court makes after viewing the witnesses--that Webster and Moreland were lying and that the two numbers did belong to Webster. This inference is also supported by the fact that the phone records show not only calls to Webster, but to Apodaca, despite Webster's claim that the defendant did not make any calls during the relevant time period.

Whether the actual phone number written on the CD's was evidence or not is debatable, but not dispositive of the issue. Based on the evidence that was admitted, the trial court did not abuse its discretion in allowing the prosecutor to make the argument she did. To prevail on appeal, the defendant would have to prove that no reasonable judge would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). The defendant cannot meet that standard.

**4. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL WAS NOT RENDERED CONSTITUTIONALLY INEFFECTIVE SIMPLY BECAUSE HE DID NOT RAISE A "SAME CRIMINAL CONDUCT" SENTENCING ISSUE.**

The defendant contends that his trial counsel was constitutionally ineffective because he did not raise a "same criminal conduct" sentencing issue, an issue that involves trial court discretion and factual determinations. Specifically, the defendant contends that no reasonably competent attorney would have failed to argue that his convictions for felony violation of a no-contact order in counts II and IV, and counts VI and VII, constituted the "same criminal conduct" under RCW 9.94A.589(1)(a). This claim

should be rejected. The defendant, realizing the issue has been waived, is simply trying to bootstrap the issue by raising a claim of ineffective assistance of counsel. In any event, the defendant cannot show that no reasonable judge would have found that his violations of the no-contact order, occurring on different days, did not constitute the "same criminal conduct."

If two current offenses encompass the same criminal conduct, they count as one point in calculating a defendant's offender score. RCW 9.94A.589(1)(a). Crimes are considered the "same criminal conduct" if the trial court determines the crimes require the same criminal intent, are committed at the same time, the same place, and involve the same victim. RCW 9.94A.589(1)(a); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

A defendant can waive an alleged same criminal conduct issue. The Supreme Court has stated "that waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Shale, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (citing In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)).

In Shale, the defendant was informed when he pled guilty that the State calculated his offender score as a nine, like here, based solely on his current convictions. Shale, 160 Wn.2d at 495. Shale argued on appeal that the sentencing court erroneously failed to treat some of his crimes as the "same criminal conduct," even though he never asked the sentencing court to make this part factual, part discretionary, determination. Id. The Supreme Court rejected Shale's claim that he could raise a "same criminal conduct" claim for the first time on appeal. Shale, at 495; see also, State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, rev. denied, 141 Wn.2d 1030 (2000) (cited with approval in Shale at 494-95, the same criminal conduct inquiry involves factual determinations and the exercise of discretion, and the "failure to identify a factual dispute for the court's resolution and... [the] failure to request an exercise of the court's discretion," waives the challenge to the offender score); State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (Jackson's failure to raise a same criminal conduct issue at sentencing constitutes waiver of the right to appeal), rev. denied, 167 Wn.2d 1007 (2009).

Shale, Nitsch, and Jackson are directly on point. A defendant cannot raise a same criminal conduct claim on appeal

when he agreed to his offender score or did not alert the sentencing court to the factual discretionary issues involved. That is exactly what occurred here. The defendant never asked the sentencing court to make any "same criminal conduct" determination. Instead, he sought a first-time offender waiver, or in the alternative, a low-end 22-month sentence--thus agreeing with the State's calculation of a standard range of 22 to 29 months and an offender score of four. See CP 498; 26RP 7.

In an attempt to avoid the clear waiver, the defendant claims his trial counsel was constitutionally ineffective for failing to raise this single issue that if raised below would have involved a factual discretionary determination by the trial court. The defendant should not be able to raise a waived issue merely by recasting the single issue under the pretext of a claim of ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first element is met by showing that counsel's conduct fell below an objective standard of reasonableness based on the

entire record. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceedings would have been different. If the defendant fails to prove either element, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

In making this determination, a reviewing court will not "second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim." In re Personal Restraint of Stenson, 142 Wn.2d 710, 733-34, 16 P.3d 1 (2001) (citing Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)). Nothing in the Constitution requires such a rigorous standard. Id.; see also, City of Tacoma v. Durham, 95 Wn. App. 876, 882, 978 P.2d 514 (1999) ("Just as an appellate lawyer is not considered ineffective for failing to raise every conceivable non-frivolous claim of error, a trial lawyer cannot be faulted for failing to make a record of every such allegation").

A finding that two crimes do not arise from the same criminal conduct--necessarily a partly factual determination--will not be disturbed on appeal absent an abuse of discretion. State v. Eliot, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990). An abuse of discretion is shown when the reviewing court is

satisfied that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284. Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A reviewing court must narrowly construe the language of RCW 9.94A.589 to disallow most assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000), rev. denied, 143 Wn.2d 1014 (2001); State v. Palmer, 95 Wn. App. 187, 191 n.3, 975 P.2d 1038 (1999).

Here, while the defendant's no-contact order violations involved the same intent and victim, the violations did not occur at the same time. The violations supporting each count occurred on different days. In the case of the December crimes, counts VI and VII, the crimes occurred two days apart, count VI occurring on December 7 and count VII occurring on December 9. See CP 26-30, 194-95.

It is true that crimes do not have to occur simultaneously to meet the "same time" requirement of the same criminal conduct test. See State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Still, the crimes must be of a continuous, uninterrupted

sequence of conduct over a very short period of time. Porter, 133 Wn.2d at 183 (two drug sales "occurred as closely in time as they could without being simultaneous"). As the Supreme Court has noted, having time "to pause and reflect" between acts can defeat a claim of same criminal conduct. State v. French, 157 Wn.2d 593, 613-14, 141 P.3d 54 (2006). Having time to reflect shows that the crimes are "sequential, not simultaneous or continuous." French, 157 Wn.2d at 613.

Here, the defendant certainly had time to pause and reflect between his many contacts with his victim over the course of four separate days. Certainly, it would not have been an abuse of discretion for a sentencing judge to so rule. As such, trial counsel can not be said to have been constitutionally ineffective for deciding not to raise this single issue involving a factual discretionary determination.

In addition, regarding the prejudice component of an ineffective assistance claim, a defendant must show that if his lawyer had raised the motion, there is a reasonable probability that the motion would have been granted. Durham, 95 Wn. App. at 882 (citing State v. McFarland, 127 Wn.2d 322, 337 n.4, 889 P.2d 1251 (1995)). The defendant cannot meet that standard here. At best,

the defendant can argue a judge "could" have so ruled. This is insufficient to support his claim.

**5. THE DEFENDANT'S PRIOR CONVICTIONS FOR VIOLATING A NO-CONTACT ORDER ARE VALID CONVICTIONS.**

A violation of a no-contact order is a felony offense if the perpetrator has two prior convictions for violating a no-contact order. RCW 26.50.100(5). The defendant claims that his two prior convictions supporting his felony conviction are not valid offenses, that his conduct that led to those convictions was not criminal under RCW 26.50.110, and therefore the convictions can not be used to support a felony offense. But this Court has previously ruled that all violations, including the type committed by the defendant here, are criminal offenses under the language of the statute. State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008), rev. granted, 165 Wn.2d 1003 (2008). The defendant admits that this issue is controlled by this Court's decision. The defendant raises the issue merely to preserve the issue pending the Supreme Court's decision.<sup>9</sup>

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<sup>9</sup> The Supreme Court heard argument on February 23, 2010.

D. CONCLUSION

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

DATED this 14 day of May, 2010.

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 Dana Lind, 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. BROWN, Cause No. 63607-3-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.



Name  
Done in Seattle, Washington

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Date

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