

63664-2

63664-2

NO. 63664-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW D. GARNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

COURT OF APPEALS
STATE OF WASHINGTON
2010 APR 26 AM 3:41

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	7
1. THE TRIAL COURT VIOLATED GARNER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND AN IMPARTIAL JURY TRIAL BY ADVISING JURORS THE "THREE STRIKES" LAW DID NOT APPLY.....	7
2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT GARNER "CONTACTED" HIS WIFE AS ALLEGED IN COUNT TWO.....	14
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Personal Restraint of Jeffries,
110 Wn.2d 326, 752 P.2d 1338,
cert. denied, 488 U.S. 948 (1988) 12

State v. Benn
120 Wn.2d 631, 845 P.2d 289 (1993)..... 12

State v. Bowman,
57 Wn.2d 266, 356 P.2d 999 (1960)..... 8

State v. Depaz,
165 Wn.2d 842, 204 P.3d 217 (2009)..... 7

State v. Engel,
166 Wn.2d 572, 210 P.3d 1007 (2009)..... 14

State v. Gerdts,
136 Wn. App. 720, 150 P.3d 627 (2007)..... 12

State v. Golliday,
78 Wn.2d 121, 470 P.2d 191 (1970)... 10

State v. Green
94 Wn.2d 216, 616 P.2d 628 (1980)..... 14

State v. Hickman
135 Wn.2d 97, 954 P.2d 900 (1998)..... 16

State v. Hicks,
163 Wn.2d 477, 181 P.3d 831 (2008)..... 9, 11-13

State v. Mason,
160 Wn.2d 910, 162 P.3d 396 (2007)..... 9

TABLE OF AUTHORITIES

Page

State v. Murphy,
86 Wn. App. 667, 937 P.2d 1173 (1997),
review denied, 134 Wn.2d 1002 (1998).....9, 11-12

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987)..... 14

State v. Todd,
78 Wn.2d 362, 474 P.2d 542 (1970).....10

State v. Townsend,
142 Wn.2d 838, 15 P.3d 145 (2001)..... 8-11, 13

State v. Ward
148 Wn.2d 803, 64 P.3d 640 (2003)..... 16-17

FEDERAL CASES

Jackson v. Virginia
443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 14

Miller v. United States,
37 App. D.C. 138 (1911)8

Pope v. United States,
298 F.2d 507 (5th Cir. 1962)8

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....12,14

United States v. Frank,
956 F.2d 872, 879 (9th Cir. 1991),
cert. denied, 506 U.S. 932 (1992) 7-8

TABLE OF AUTHORITIES

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9A.16.020	16
RCW 10.99.050	16
RCW 26.50.110	16
RCW 69.52.020	15

A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional rights to a fair trial and trial by an impartial jury when it announced to the venire that the appellant could not be punished under the "three strikes" law.

2. Defense counsel violated the appellant's constitutional right to effective representation by failing to object to the trial court's announcement to the venire.

3. The state failed to prove beyond a reasonable doubt that the appellant violated the no-contact order as alleged in count two.

Issues Pertaining to Assignments of Error

1. In response to a prospective juror's expressed reluctance to send someone charged with a domestic-related crime to prison under the three strikes law for the rest of his life, the trial court sua sponte announced to the entire venire the three strikes law did not apply. Did the trial court violate the appellant's due process right to a fair trial and right to an impartial jury?

2. Did defense counsel violate the appellant's constitutional right to effective representation by failing to object to the trial court's announcement?

3. With respect to count two, the state proved only that the appellant dialed the protected party's telephone number and that the protected party saw the number on her caller identification function and did not answer the call. The appellant hung up, leaving no voice message. Did the appellant "contact" the protected party in violation of a domestic violence no-contact order?

B. STATEMENT OF THE CASE

1. *The evidence*

The state charged the appellant, Matthew D. Garner, with two counts of felony violation of a no-contact order issued by a Whatcom County Superior Court judge on behalf of Garner's wife, Christi Garner. CP 50-52. Garner stipulated he had been twice previously convicted of violating no-contact orders. CP 47; 2RP 193-94.¹

Garner and his wife were married for nearly 13 years at the time of trial. They had two children. They separated in June 2006. 2RP 101-02. Garner's wife obtained a no-contact order against Garner in September 2008. RP 102-03; Ex. 1 (attached as appendix). The order prohibited Garner from having all contact, including telephone contact, with his wife

¹ Garner cites to the verbatim report of proceedings as follows: 1RP – 5/4/2009 (CrR 3.5 hearing); 2RP 5/5/2009 - 5/6/2009 (trial); 3RP – 6/8/2009; 4RP 5/4/2009 (voir dire).

except for standard mail or email solely for the purpose of facilitating visitation. 2RP 104, 126, 213; Ex. 1.

The no-contact order made it difficult to facilitate visitation. 2RP 126-29, 134, 213-16, 251-52. Ms. Garner testified she wanted the visitation to work so her children could see their father. 2RP 134-35. Soon after the order issue, Garner desired to move to modify to permit telephone contact. His wife was more hesitant about such a motion and the order was never modified. 2RP 126, 137-38.

Instead, the Garners mutually and routinely violated the order by arranging visitation via telephone. 2RP 119-23, 138, 142-44, 148, 218-21. They also mutually violated the order by meeting each other to transfer the children for the visits. 2RP 133-34, 217, 251-54. Garner visited the children weekly or biweekly between the time the order issued and the incidents giving rise to the charges. 2RP 118-19, 217.

Despite this longstanding agreed procedure, Garner's wife decided to call police on March 7, 2009, to report Garner had violated the order. 2RP 104-05. Ms. Garner said there were two reasons for her report. The first was that her friend called and told her Garner was sitting in his van, which was parked in front of a school near her residence. 2RP 105-07. He was not violating the order by parking where he did, but Ms. Garner

did not know why her husband would be parked there. 2RP 107, 2RP 114-15, 237. Garner testified he parked in front of the school hoping he might be able to visit with his children because he had tried without success to arrange a visit. 2RP 238-39, 243-44.

Garner left after a few minutes and drove to the home of mutual friends, where he thought his children might be visiting. 2RP 108-09, 239-40. When he arrived he saw his daughter playing outside. 2RP 239-40. He requested to visit his children, but the adults at the home refused and ordered him off the property. 2RP 240-42. One of them called Ms. Garner and told her that Garner was there and wanted to take the children. 2RP 109. Because Garner did not tell her he was going to go there, Ms. Garner called the police. 2RP 109-110, 117, 131-32.

Meanwhile, Garner called police to report the hostile treatment he received when attempting to visit his children. 2RP 240-42. While waiting for police to arrive, Garner called his wife to inform her what was happening. 2RP 242. By that time, Ferndale Police Department officers had arrived at Ms. Garner's home in response to her report of a no-contact order violation. She told them her husband was calling and showed them the phone. 2RP 110-11, 181-82. She also showed them a copy of the no-contact order. Ms. Garner did not answer the phone. 2RP 111, 183-84.

Ms. Garner also told the officers Garner had called her the day before and left a voice message asking her if she wanted to go to lunch and to call him back. 2RP 111-14. Later that day, Garner called their daughter's cell phone, spoke with the girl, and then spoke with Ms. Garner. 2RP 139-40, 247.

The officers determined they had probable cause to believe Garner violated the no-contact order. When they contacted their dispatcher, they learned Whatcom County sheriff's deputies had been dispatched to Garner's location. 2RP 183-84. They advised the deputies of their determination and asked them to detain Garner until they arrived to arrest him. 2RP 184-85. One of the two Ferndale officers left Ms. Garner, drove to Mr. Garner's location, and arrested him. After initially denying he had just called his wife, Garner admitted he had done so. 2RP 186-88.

2. *Voir dire*

During voir dire, prospective juror number 3 said he wanted to know what the final punishment would be before he could make a decision as to Garner's guilt. 4RP 84. The prosecutor announced jurors would not be told the range of punishment, which prompted a series of related questions from several different panel members. 4RP 84-88.

Prospective juror number 29 asked whether Washington has a "three strikes" provision that results in life imprisonment. When the prosecutor confirmed the existence of such a law, juror 29 explained she would "have a hard time living with" being responsible for "sending somebody away for life in prison because of an awkward situation, say, if it was a domestic divorce with your kids or whatever" 4RP 89. The judge then announced, "I think we can safely tell you that this offense is not one that in and of itself would make a person eligible for three strikes." 4RP 89. Juror 29 responded, "Then I would be okay, with based on the facts." 4RP 89.

At this point defense counsel requested and received a sidebar conference. 4RP 89-90. The conversation during the sidebar was not contemporaneously reported, nor set forth thereafter on the record.

3. *The result*

The jury found Garner guilty on each count. CP 29. The trial court imposed concurrent standard range sentences. CP 15-26; 3RP 25-26.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED GARNER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND AN IMPARTIAL JURY TRIAL BY ADVISING JURORS THE "THREE STRIKES" LAW DID NOT APPLY.

During voir dire, the trial court told the venire Garner's charges did not implicate Washington's serious "three strikes" provision. Because jurors have nothing to do with punishment, the court's announcement was error. Prejudice resulted because such error makes jurors less careful and less inclined to hold out for acquittal. Garner's convictions should be reversed.

The Washington Constitution protects a criminal defendant's right to due process and a unanimous verdict by an impartial jury. Const. art. I, §§ 3, 21, 22; State v. Depaz, 165 Wn.2d 842, 852-53, 204 P.3d 217 (2009). Jurors must decide cases based solely on the evidence and the law. “[I]t is inappropriate for a jury to consider or be informed of the consequences of their verdict” or anything that diminishes the jurors’ sense of responsibility. United States v. Frank, 956 F.2d 872, 879 (9th Cir. 1991), cert. denied, 506 U.S. 932 (1992); accord In Personal Restraint of Jeffries, 110 Wn.2d 326, 340-43, 752 P.2d 1338, cert. denied, 488 U.S. 948 (1988) (reference to availability of appellate review).

As recognized by the Ninth Circuit Court of Appeals, the injection of additional considerations into jury deliberations has dire consequences:

'While it is permissible for the trial court to caution the jury not to be influenced by the probable consequences of their verdict, as all responsibility after the verdict is with the court, it is error for the court to put before the jury any considerations outside the evidence that may influence them, and lead to a verdict not otherwise possible of attainment. The deliberations of the jury should revolve around the evidence before them, and should be uninfluenced by other considerations or suggestions. The moment other suggestions or considerations find lodgment in their minds, that moment they stray from the path which the law has marked out, and their verdict, in consequence, does not rest solely upon the evidence.'

Frank, 956 F.2d at 879 (quoting Miller v. United States, 37 App. D.C. 138, 143 (1911)). One of the primary dangers associated with outside considerations is the prospect of a compromised verdict. Frank, 956 F.2d at 879 (citing Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962)).

Frequently, violations of this bedrock principle involve telling jurors that a conviction will or will not involve a particular sentencing consequence. This aspect of the law is well established in Washington. "The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). In a first-degree murder case, therefore, it is error to tell jurors the death penalty is not involved. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145

(2001); State v. Murphy, 86 Wn. App. 667, 668, 671, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998).

This is a “strict prohibition” that “ensures impartial juries and prevents unfair influence on a jury’s deliberations.” Townsend, 142 Wn.2d at 846. Specifically, “if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.” Townsend, 142 Wn.2d at 847. See also, State v. Hicks, 163 Wn.2d 477, 478, 181 P.3d 831 (2008) (“[I]n response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing.”); State v. Mason, 160 Wn.2d 910, 929-31, 162 P.3d 396 (2007) (trial court erred by revealing to inquiring prospective juror that case did not involve death penalty), cert. denied, 128 S. Ct. 2430 (2008).

The rationale underlying the above authority applies with equal force in Garner's case. Telling prospective jurors the "three strikes" law does not apply raises the same concern as telling them execution is not a possibility – that jurors may be less attentive, less careful, and less inclined to hold out if they know the defendant will eventually be released from prison.

Washington jurors have nothing to do with sentencing. Townsend, 142 Wn.2d at 846. Therefore, the trial court should have simply told jurors, consistent with the jury instructions, that sentencing considerations were out of bounds at this stage except to the extent it made them careful. CP 33 (“You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.”). By doing the opposite, the trial court erred.

When a trial court instructs jurors in a manner that injects improper considerations into the deliberative process, reversal is automatic unless the error is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” Townsend, 142 Wn.2d at 848 (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)). It was prejudicial here.

It is bad enough when attorneys inject improper considerations into deliberations. But this came from the court. By announcing Garner's case would not result in life in prison, the court suggested jurors consider this impossibility during deliberations. This is wrong. See State v. Todd, 78 Wn.2d 362, 376, 474 P.2d 542 (1970) (instructing the jury concerning

matters not properly considered suggests to the jury that it should give great weight to such matters in reaching its verdict).

Here the trial court told jurors that regardless of their verdicts, Garner would eventually be released from custody. The court's announcement clearly put juror 29 at ease; as it naturally would have with the other jurors, the court's disclosure removed a moral and practical barrier to acquittal. The statement also signaled the case was less serious than other cases, which would cause the entire panel to be less careful in deliberating over the evidence. And less careful jurors are necessarily more prone to convict based on shaky, uncertain, or incomplete evidence. As the Townsend Court recognized, such jurors are less likely to hold out for acquittal. 142 Wn.2d at 847.

Which was the case here. Not only did the jury find Garner guilty of count 1, but it also convicted him of count 2 despite a reasonable doubt as to whether he actually "contacted" his wife (see argument 2).

This distinguishes Garner's case from Hicks and Murphy, where it was apparent the confirmed absence of the death penalty was harmless because jurors did not convict the defendants on the most serious charges (aggravated murder and attempted murder in Hicks and first-degree

murder in Murphy). Hicks, 163 Wn.2d at 488-489; Murphy, 86 Wn. App. at 672-673.

Under the circumstances presented in Garner's case, the trial court's error was neither trivial nor academic. Instead, it was prejudicial and this Court should reverse the convictions.

Garner anticipates the state will assert he waived the trial court's prejudicial error by failing to object to the court's announcement. Because an ineffective assistance claim raises an issue of constitutional magnitude, Garner may raise the issue for the first time on appeal. State v. Gerds, 136 Wn. App. 720, 726, 150 P.3d 627 (2007).

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

No reasonable attorney would have allowed jurors to learn that the "three strikes" penalty did not apply. In Townsend, defense counsel failed to object when the court informed jurors of the death penalty was not an option. Addressing that failure, the Supreme Court recognized that, considering the longstanding prohibition against revealing that information, the failure to object fell below prevailing professional norms. Townsend, 142 Wn.2d at 847; see also Hicks, 163 Wn.2d at 488 ("[W]e hold that the defense counsel's performance was deficient insofar as counsel informed the jury that the case was noncapital and failed to object when the trial court and prosecution made similar reference.").

The Townsend Court also rejected any argument that revealing this information was part of a legitimate strategy:

There was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner.

Townsend, 142 Wn.2d at 847. As stated, the same is true regarding the court's comment about the absence of a three strikes penalty. There was no tactical advantage when Garner's own attorney permitted jurors to learn that, at most, Garner would eventually be released from prison, even if jurors found him guilty of both counts.

Furthermore, for the reasons the trial court's error was not harmless, counsel's failure to object was prejudicial. Put simply, there is a reasonable probability that the mistake affected the jury's verdicts, especially with respect to count 2. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94). When a trial court tells jurors a case is less serious, confidence in the verdicts is compromised. Garner has therefore established reversible error on this alternative ground as well. His convictions should be reversed.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT GARNER "CONTACTED" HIS WIFE AS ALLEGED IN COUNT TWO.

Due process requires the State prove every element of an offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Where a defendant challenges the sufficiency of the evidence, the question is whether, when viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

To prove the offense alleged in count two, the evidence must have been sufficient to prove that on March 7, Garner "knowingly violated a provision" of the order admitted as Exhibit 1. CP 43 (instruction 11, "to-convict" instruction for count 2). As applied to the evidence, the prohibited conduct at issue was "having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly . . . with" Ms. Garner. Ex. 1.

The evidence did not prove Garner made "contact" with his wife. When the phone rang on March 7 in the Ferndale police officer's presence, Ms. Garner saw Garner's phone number on her caller identification function but did not answer. Garner did not leave a message. 2RP 104-05, 110-11, 135-36.

The state thus proved at most that Garner attempted to contact his wife, i.e., he attempted to violate the court order. Had the Legislature intended to treat violations of a court order and attempted violations the same, it would have said so. For instance, under the statute relating to the delivery of imitation controlled substances, the Legislature defined distribute to mean "the actual or constructive transfer (or attempted transfer) or delivery or dispensing to another of an imitation controlled substance." RCW 69.52.020(2) (emphasis added); see also RCW

9A.16.020 (“The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases . . .”).

In the present case, however, the Legislature elected not to include the word attempt in the statutes criminalizing the violation of a court order. See RCW 10.99.050; RCW 26.50.110(1). Nor was it included in the “to convict” instruction. Garner’s conviction on count 2 must be reversed and dismissed. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

State v. Ward² does not change this result. In Ward, the court order at issue prohibited co-petitioner Ricky Baker from having contact with the complainant “in person, by telephone or letter, through an intermediary, or in any other way.” Ward, 148 Wn.2d at 809. The State alleged Baker violated the order when he telephoned the complainant’s home. The complainant’s wife, who also lived at the home, answered the call. Baker told the wife the complainant had been asking him to call. The complainant’s wife thanked Baker and hung up the phone. Ward, 148 Wn.2d at 809.

A jury convicted Baker of violating the order by calling the complainant’s home and on appeal, he contended the evidence was

² 148 Wn.2d 803, 64 P.3d 640 (2003).

insufficient to sustain the conviction. Ward, 148 Wn.2d at 809-10. Baker argued he did not contact the complainant but merely attempted to do so because there was no evidence his message was conveyed to the complainant. Ward, 148 Wn.2d at 815-16.

The Supreme Court disagreed, finding it was not necessary to determine whether the complainant learned of Baker's message. Instead, "[t]he no-contact order prohibited Baker from contacting [the complainant] by telephone or through an intermediary, and the evidence shows that Baker telephoned [the complainant's] home and conveyed information about [the complainant] to his wife." Ward, 148 Wn.2d at 816.

Importantly, the Ward Court did not hold the call itself constituted a violation. The crime was instead completed only because Baker conveyed information about the complainant to the complainant's wife, i.e., an "intermediary," as forbidden by the order.

In contrast, Garner did not convey information or contact with his wife at all. He attempted to do that, but fell short because Ms. Garner did not answer the phone and Garner hung up without leaving a message. The state thus failed to prove beyond a reasonable doubt that Garner violated the no-contact order as alleged in count 2. The judgment for count 2

should be reversed and the charge dismissed with prejudice.

D. CONCLUSION

The trial court violated Garner's constitutional right to verdict by an impartial trial when it told the venire the case did not implicate the "three strikes" law. Alternatively, defense counsel deprived Garner of his right to effective assistance by failing to object to the trial court's announcement to the prospective jurors. This Court should reverse Garner's convictions and remand for a new trial. But that won't be necessary regarding count 2 because the state failed to prove each element beyond a reasonable doubt. This Court should reverse Garner's conviction for that count and remand for dismissal with prejudice.

DATED this 26 day of April, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,)	No. 08-1-00898-6
)	
Plaintiff,)	APPENDIX "F" - DOMESTIC VIOLENCE NO-
)	CONTACT ORDER (ORNC)
vs.)	
)	[XX] Post Conviction
MATTHEW D. GARNER, DOB: August 23, 1972)	[XX] Clerk's Action required
)	
Defendant.)	

1. Based upon the certificate of probable cause and/or other documents contained in the case record, testimony, and the statements of counsel, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to chapter 10.99 RCW. This order protects:

CHRISTI L. GARNER DOB 5/10/64

2. The court further finds that the defendant's relationship to a person protected by this order is: **current or former spouse.**

IT IS ORDERED THAT Defendant is RESTRAINED from:

- A. Causing or attempting to cause physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking the protected person(s).
- B. Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by defendant's lawyers with the protected person(s)
- C. Entering or knowingly coming within or knowingly remaining within 500 FEET (distance) of the protected person(s) [XX] residence, [] school, [XX] place of employment, [] daycare, [XX] other: **DEFENDANT MAY CONTACT PROTECTED PARTY VIA EMAIL OR U.S. MAIL ONLY FOR THE PURPOSES OF SETTING UP THE EXCHANGE OF CHILDREN FOR SUPERVISED VISITATION. **NO TEXT MESSAGING****
- D. Obtaining, owning, possessing or controlling a firearm, if conviction for an offense listed in RCW 9.41.040(2)(j)(14).

IT IS FURTHER ORDERED THAT:

- E. [] (Special Assistance from Law Enforcement Agencies). The law enforcement agency where the protected person lives shall standby for a limited period of time while the defendant removes essential personal property at the protected person's residence. Personal property shall be limited to defendant's personal effects, personal clothing and tools of the trade.

WARNINGS TO THE DEFENDANT: Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

Willful violation of this order is punishable under RCW 26.50.110. Violation of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if the defendant has at least two previous convictions for violating a protection order issued under Titles 10, 26 or 74.

If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, the defendant may be subject to criminal prosecution in federal court under 18 U.S.C. § 2261, 2261A or 2262.

In addition to the state and federal prohibitions against possessing a firearm upon conviction of a felony or a qualifying misdemeanor, upon the court issuing a no-contact order after a hearing at which the defendant had an opportunity to participate, the defendant, if a spouse or former spouse, a parent of a common child, or current or former cohabitant as intimate partner of a person protected by this order, may not possess a firearm or ammunition for as long as the contact order is in effect. 18 U.S.C. § 922(g). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. If the defendant is convicted of an offense of domestic violence the defendant will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9); RCW 9.41.040.

YOU CAN BE ARRESTED EVEN IF THE PERSON OR PERSONS WHO OBTAINED THE ORDER INVITE OR ALLOW YOU TO VIOLATE THE ORDER'S PROHIBITIONS. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to: **Ferdale Police Department**, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

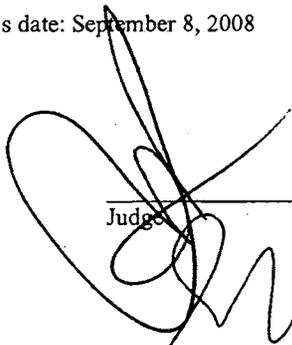
THIS NO CONTACT ORDER EXPIRES ON: September 8, 2009

Done in Open court in the presence of the defendant this date: September 8, 2008

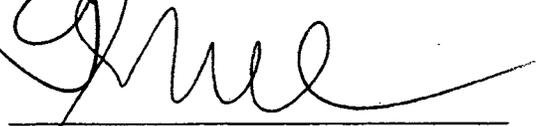
I have read or have had read to me and understand the contents of this order, and have received a copy.



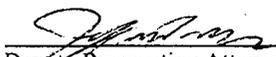
Defendant



Judge



Attorney for Defendant
WSBA # 91001
Print name: GERALDINE R. COLEMAN



Deputy Prosecuting Attorney
WSBA# 27740
Print name JEFFREY D. SAWYER

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63664-2-1
)	
MATTHEW GARNER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JEFFREY SAWYER
WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

[X] MATTHEW GARNER
DOC NO. 331502
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 98331

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*