SUPREME COURT NO. 98457-3
COA NO. 79128-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KAILEN EARL HALL,

Petitioner.

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

The Honorable David Keenan, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Kailen Hall asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Hall requests review of the decision in State v. Kailen Earl Hall, Court of Appeals No. 79128-1-I (slip op. filed March 23, 2020), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the evidence is insufficient to convict Hall of violating the no-contact order because the State failed to prove (a) the order was "applicable" to Hall or (b) Hall knowingly violated a provision of the order?

2. Whether the expiration date set forth in the post-conviction domestic violence no-contact order must be shortened to account for pre-sentence credit for time served?

D. STATEMENT OF THE CASE

The State charged Hall with two counts of violating a no-contact order. CP 43-44. As elected by the prosecutor, count 1 involved an event

that took place at 6:30 p.m. on June 3, 2018. RP[1] 653. Count 2 involved an event that occurred later that night at around 8:50 p.m. RP 653.

A no-contact order between Hall and Shalina Mays was admitted into evidence, identifying Mays as the protected party and specifying an expiration date of May 14, 2019. Ex. 12; RP 553. The order includes the following provisions: "do not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means" and "do not knowingly enter, remain or come within 500 feet . . . of the protected person's residence, school, workplace[.]" Ex. 12.

On June 3, 2018 at 6:30 p.m., Sergeant Constant was dispatched to 22707 114th Place Southeast in response to a 911 call. RP 503-04, 514. A person identifying herself as Mays had called 911 and reported Hall broke a window at a house in Kent. Ex. 7. Mays told the sergeant that he told her to open the door using derogatory language, tried to get in, and ran off when the sergeant approached. RP 523-24, 559.

At around 8:50 p.m., police responded to a second 911 call. RP 533, 586-87. In this 911 call, Mays reported that Hall had returned and was outside the residence. Ex. 10 (recording of 911 call).[2] Police stopped

[1] This brief cites to the verbatim report of proceedings as follows: RP - eight consecutively paginated volumes consisting of 9/10/18, 9/11/18, 9/12/18, 9/13/18, 9/1/7/18, 9/18/18, 9/28/18, 10/31/18.

[2] There is no transcript for the call.

a vehicle driving out of the neighborhood and detained the two people inside, Hall and Brandy LaHue. RP 547, 589-92, 600-01, 608.

Hall told an officer that he parked at the mailboxes near the residence, he never got out of the car, he did not know of any court order that precluded him from being at the residence, and he never broke any window. RP 602-03, 614. Hall also made statements to Sergeant Constant. RP 547. With reference to the first alleged incident, Hall denied being at the residence and denied breaking the window. RP 547, 569. When asked if he had gone up to the house a second time, Hall said no, he hung out by the mailboxes. RP 548. There was a woman with him, and he sent her to go to the house to ask for the clothing. RP 548. He was aware of a court order between himself and Mays but maintained he did not violate the order because he stayed at the mailboxes. RP 548. Constant believed Hall was referring to the mailboxes in the cul-de-sac near the residence, about 60 feet away. RP 550, 572-74, 576, 582.

The jury could not reach a unanimous verdict on count 1 and the court declared a mistrial on that count. CP 74-76. The jury returned a guilty verdict on count 2. CP 77. The court imposed a standard range sentence of 60 months confinement and entered a post-conviction domestic violence no-contact order. CP 110, 134.

On appeal, Hall argued the evidence was insufficient to convict and the expiration date in the post-conviction no-contact order exceeded the statutory maximum. The Court of Appeals rejected these arguments and affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION BECAUSE THE STATE FAILED TO PROVE EVERY ELEMENT OF THE CRIME.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State failed to prove Hall violated an order "applicable" to him, which must be treated as an element of the crime under the law of the case doctrine because it was included in the to-convict instruction. Alternatively, the State did not prove that Hall knowingly violated a

provision of the no-contact order, one of the elements of the offense. Hall seeks review under RAP 13.4(b)(3).

a. The evidence is insufficient to prove Hall violated an "applicable" order.

The to-convict instruction required the State to prove "on or about June 3, 2018, there existed a protection order or a no-contact order applicable to the defendant." CP 66. The State failed to prove that the no-contact order was "applicable to the defendant." A no-contact order that does not contain the warnings required by RCW 10.99.040(4)(b) is not a valid order. Because the order admitted at trial did not contain the mandatory warnings, the State failed to prove one of the essential elements of the crime, namely, that Hall violated a valid order applicable to him.

"The existence of a no-contact order that is in effect is an element of the crime of felony violation of that order." State v. Turner, 156 Wn. App. 707, 710, 235 P.3d 806 (2010). "A charge of violation of a no-contact order must be based on an 'applicable' order." Id. at 712 (quoting State v. Miller, 156 Wn.2d 23, 31-32, 123 P.3d 827 (2005)). "An order is not applicable to the charged crime if it is not issued by a competent court, *is not statutorily sufficient*, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order." Turner, 156 Wn. App. at 712-13 (emphasis added) (quoting Miller, 156 Wn.2d at 31).

By statute, a no-contact order must bear a legend warning that violation is a criminal offense, that a violation occurs even when contact is invited, and only the court can change the order. RCW 10.99.040(4)(b). A no-contact order must contain the legend requirement to be statutorily sufficient and thus a valid order applicable to the charged crime. Turner, 156 Wn. App. at 714-15, 718-19. The no-contact order admitted at trial in Hall's case did not contain the mandatory legend. Ex. 12. The State thus failed to present sufficient evidence to the jury that Hall violated a valid order applicable to him.

Generally, whether a no-contact order is valid, and thus applicable to the charged crime, is a question of law for the court to decide, not a question of fact for the jury. Miller, 156 Wn.2d at 31-32. But here, the to-convict instruction required the State to prove "there existed a protection order or a no-contact order applicable to the defendant." CP 66.

Under the law of the case doctrine, "jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal" and are used to delineate the State's burden of proof. State v. Johnson, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (quoting Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). In criminal cases, "the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in

the 'to convict' instruction." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Proving applicability of the order is not a statutory element of the crime, but it became an element through its inclusion in the to-convict instruction.

According to the Court of Appeals, Miller, upon which Turner relied, "reveals that the term 'applicability,' as used in the context of that case, refers not to applicability in the *factual* sense, but to an order's legal validity." Slip op. at 9-10. The Court of Appeals contrasted applicability in the legal sense with applicability in the factual sense, i.e., the existence an order applicable to Hall at the relevant time. Slip op. at 8, 10.

What the Court of Appeals failed to grasp is that the inclusion of the applicability element in the to-convict instruction necessarily made that element a factual issue for the jury to decide as trier of fact. The law of the case doctrine is built on this unshakable premise. When a to-convict instruction contains a superfluous element, that element becomes an issue of fact for the jury to decide under the law of the case doctrine. State v. Johnson, 188 Wn.2d 742, 755, 399 P.3d 507 (2017). The to-convict instruction in this case made applicability of the no-contact order an issue of fact for the jury to decide.

The distinction drawn by the Court of Appeals between applicability in the legal sense and applicability in the factual sense is

nowhere found in the to-convict instruction. As shown by cases like Miller and Turner, applicability is a technical term, its meaning supplied by common law. A term may be technical even when not defined by statute. In re Detention of Pouncy, 168 Wn.2d 382, 391, 229 P.3d 678 (2010). The question is whether the term "has a meaning that differs from common usage." Id. (quoting State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997)). Turner and Miller show applicability of a no-contact order has a specialized meaning applied by the courts that differs from common usage.

The jury does not get to decide the meaning of undefined technical terms for itself. State v. Allen, 101 Wn.2d 355 (1984) (reversing because jury not instructed on technical definition of "intent"). The meaning of an element, and whether sufficient evidence supports that element, is a matter for the courts to decide. State v. Veliz, 176 Wn.2d 849, 865, 298 P.3d 75 (2013) (existence of a "court ordered parenting plan" as an element of the custodial interference offense is a technical term, proof of which was insufficient to convict); State v. Smith, 72 Wn. App. 237, 239-43, 864 P.2d 406 (1993) (the term "instrument" as used in the forgery statute was undefined by statute and so the court looked to common law definition in deciding the evidence was insufficient to support conviction). And here, the State failed to prove the element understood as a technical term.

b. The evidence is insufficient to prove Hall knowingly violated a provision of the no-contact order.

The to-convict instruction required the State to prove "on or about June 3, 2018, there existed a protection order or a no-contact order applicable to the defendant," "on or about said date, the defendant knew of the existence of this order," "the defendant knowingly violated a provision of this order," and "at the time of the violation, the defendant had twice been previously convicted for violating the provisions of a court order." CP 66.

The State did not prove Hall knowingly violated "a provision of this order." CP 66. The no-contact order does not prohibit Hall from coming within 500 feet of Mays. Rather, the no-contact order prohibits Hall from coming within 500 feet of "the protected person's residence." Ex. 12. To the jury, the State argued Hall violated the distance provision by coming within 500 feet of Mays's residence. RP 652, 677-78. The evidence is insufficient to prove Hall knowingly violated the condition that prohibited him from coming within 500 feet of the protected person's residence because it did not prove Mays was at her residence. The State did not dispute this on appeal and the Court of Appeals did not find Hall violated this provision in the order.

Rather, the Court of Appeals held the evidence was sufficient to show Hall knowingly contacted Mays by telephoning her multiple times. Slip op. at 11. Mays told the 911 operator that Hall called "like four times." Ex. 10 at 1:09. But the conviction is not based on any phone call contact. Instead, the trial prosecutor elected to rely on Hall's action in coming back to the house a second time later in the day at around 8:50 p.m. as the basis for count 2. RP 653, 658, 677-78. The prosecutor's election structures juror deliberation on what act the State relied on to prove its case. See State v. Bland, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (State's closing argument, clarifying the particular act for each count, is one means by which the State elects to tell the jury which act it relied on for a conviction), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

In assessing whether the right to jury unanimity was protected, the premise is that jury relies on the prosecutor's election of which act forms the basis for conviction. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). It follows that the jury relied on the elected act in deciding whether sufficient evidence supports it.

The Court of Appeals also held evidence that Hall talked to May upon arrival established a knowing violation of the order. Slip op. at 11.

Hall disagrees. The State elected the physical act of going to house as the basis to convict, not any verbal contact when he got there.

Moreover, Hall is never identified as the speaker in the 911 call. The Court of Appeals recited the following exchange as occurring in the 911 call: "The dispatcher later asked, 'Can he see you from where . . . he is?' The caller responded, 'Yes, yes.' When the dispatcher asked, 'What is he doing,' the caller responded, 'Talking.' The dispatcher asked, 'Talking to you, or talking to someone else?' The caller responded, "I don't know.'" Slip op. at 4. In actuality, Mays told the dispatcher that her baby was talking, but the operator apparently misconstrued and asked if "he" was talking to her or someone else, to which Mays responded, "I don't know." Ex. 10 (3:35-3:40). Someone other than Mays can be heard in the background saying, "don't threaten me, keep away from my fucking window" and talking about the broken window. Ex. 10 (4:12, 4:20-38, 5:40-6:20). Mays was not part of that interaction. At one point, Mays talks to someone other than the 911 operator, but the person she is talking to is never identified. Ex. 10 (4:38-4:44).

The Court of Appeals also suggested simply being outside the house with no attendant communication could constitute prohibited contact. Slip op. at 11-12. It cited no authority for this proposition. Appellate counsel is unaware of any decisional authority that has defined

contact in such an expansive manner. The no-contact order does not preclude Hall from being within a certain distance from Mays. Ex. 10. The evidence is insufficient to show Hall contacted Mays in violation of the court order.

2. THE EXPIRATION DATE IN THE POST-CONVICTION DOMESTIC VIOLENCE NO-CONTACT ORDER MUST ACCOUNT FOR PRE-SENTENCE CREDIT FOR TIME SERVED.

The post-conviction domestic violence no-contact order is set to expire exactly five years after the sentencing date. CP 134. The expiration date must be shortened because credit for time served prior to sentencing must be taken into account. The Court of Appeals disagreed, holding the expiration date is proper because the duration of the order runs from the date of sentencing. Slip op. at 12-15. This is an issue of first impression. Hall seeks review under RAP 13.4(b)(4).

RCW 10.99.050(1) provides "When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim." RCW 10.99.050(1). A willful violation of a no-contact order issued under RCW 10.99.050(1) subjects the violator to a separate criminal prosecution. RCW 10.99.050(2)(a).

A no-contact order issued under RCW 10.99.050(1) cannot last longer than the sentence imposed by the court. State v. Granath, 190 Wn.2d 548, 554-55, 415 P.3d 1179 (2018). The Supreme Court in Granath agreed with the Court of Appeals that "[t]he only no-contact order the statute authorizes is one that records a no-contact condition of the sentence. It follows that when the no-contact condition of sentence expires, there is no express legislative authority for the continued validity of the no-contact order." Granath, 190 Wn.2d at 554 (quoting State v. Granath, 200 Wn. App. 26, 36, 401 P.3d 405 (2017), aff'd, 190 Wn.2d 548, 554, 415 P.3d 1179 (2018).

Here, the court imposed a statutory maximum five-year sentence of confinement. CP 110. However, Hall's pre-sentence custody time must be taken into account in determining the expiration date because he is entitled to credit for time served. In State v. Navarro, 188 Wn. App. 550, 555, 354 P.3d 22 (2015), review denied, 184 Wn.2d 1031, 364 P.3d 119 (2016), a post-conviction sexual assault protection order was erroneously set to expire exactly 12 years after sentencing. The length of a post-conviction sexual assault protection order is tied to the length of the sentence imposed. Id. The expiration date was erroneous in part because the defendant "is entitled to credit for time served before sentencing." Id.

The length of a post-conviction domestic violence no-contact order is likewise tied to the length of the sentence. Granath, 190 Wn.2d at 554-55. Here, Hall was in custody prior to sentencing. CP 126-27. The post-conviction domestic violence no-contact order is set to expire exactly five years after the date of sentencing. CP 134. That expiration date does not take into account Hall's pre-sentence confinement.

A no-contact order issued under RCW 10.99.050(1) cannot last longer than the sentence imposed by the court. Granath, 190 Wn.2d at 554-55. In the context of a misdemeanor offense, which was at issue in Granath, the no-contact order lasts for the duration of the suspended sentence. Id. at 557. In the context of a felony offense, we likewise look to the duration of the sentence because RCW 10.99.050(1) applies to felony as well as misdemeanor sentences.

Hall received a 60-month sentence of confinement for his class C felony offense, with community custody in lieu of any earned early release time. CP 110-11. The statutory maximum for the offense is five years. RCW 9A.20.021(1)(c); RCW 9.94A.701(9). Credit for time served in detention prior to trial, conviction and sentencing must be applied to the statutory maximum for the crime. Reanier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949 (1974); In re Pers. Restraint of Phelan, 97 Wn.2d 590, 591-92, 647 P.2d 1026 (1982). This is a constitutional as well as a statutory

requirement. State v. Williams, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990); RCW 9.94A.505(6).

There is no dispute Hall spent time in jail prior to sentencing. There is no dispute he is entitled to credit for time served as applied to the statutory maximum term of his sentence. Calculating the expiration date of his sentence is not determined by starting it from five years from the date of sentencing, but rather by taking five years and subtracting any credit for time served prior to sentencing. It follows that, in calculating the expiration date of the domestic violence no-contact order, the expiration date is calculated by taking the five-year sentence and subtracting credit for time served. This must be so because the length of the domestic violence no-contact order is tied to the length of the sentence. "Tying the length of a no-contact order to the length of the sentence actually imposed ensures that a defendant is not subject to criminal penalties for contacting the victim when the defendant is no longer subject to the sentencing condition that gave rise to the order." Granath, 190 Wn.2d at 555.

In deciding against Hall on the matter, the Court of Appeals relied on State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007) for the proposition that the statutory maximum for a no-contact order begins to run from the date of sentencing. Slip op. at 13. Armendariz does not in

fact address when the order begins to run or whether credit for pre-sentence time served factors into the calculation.

Armendariz addressed the duration of a no-contact order imposed as part of a felony sentence, Armendariz, 160 Wn.2d at 121, not the duration of a post-conviction domestic violence no-contact order. The two kinds of orders are governed by different statutory provisions. Under RCW 9.94A.505(9), the trial court has authority to order no contact in the judgment and sentence as a crime related prohibition for the statutory maximum of the offense. Armendariz, 160 Wn.2d at 108, 121 (citing to former RCW 9.94A.505(8), since recodified as RCW 9.94A.505(9)). The no-contact order imposed as part of a sentence is separate from a post-conviction protection order issued under RCW 10.99.050(1), the latter being its own enforceable order. Granath, 190 Wn.2d at 555.

The no-contact order in the judgment and sentence, issued under the authority of RCW 9.94A.505(9), simply states Hall is to have no contact with Mays "[f]or the maximum term of 5 years." This is an accurate statement of the law. But the separate domestic violence no-contact order, in specifying the expiration date as October 31, 2023 — exactly five years from the date of sentencing — is inaccurate because it does not take credit for time served into account. CP 132.

"Failure to allow credit [for time served] violates due process, equal protection, and the prohibition against multiple punishments." State v. Cook, 37 Wn. App. 269, 271, 679 P.2d 413 (1984). As explained in Cook, "the total of the [presentence] detention time plus the imposed sentence might exceed the statutory maximum penalty if credit is not allowed" for presentence time served. Id. at 271. Credit for time served is applied to the statutory maximum. Reanier, 83 Wn.2d at 346; Phelan, 97 Wn.2d at 591-92. Again, the statutory maximum for a class C felony is "confinement in a state correctional institution for five years." RCW 9A.20.021(c). Hall's sentence will not end five years from date of sentencing. It will end five years from date of sentencing *minus pre-sentence credit for time served.* It inexorably follows that the post-conviction no-contact order ends at the same time because the length of such an order is tied to the length of the sentence, Granath, 190 Wn.2d at 554-55,[3] and the length of the sentence is capped by a statutory maximum that must take into account credit for time-served.

[3] In response to Granath, the legislature amended the statute in 2019 to state "An order issued pursuant to this section in conjunction with a felony sentence or juvenile disposition remains in effect for a fixed period of time determined by the court, which may not exceed the adult maximum sentence established in RCW 9A.20.021." RCW 10.99.050(2)(d).

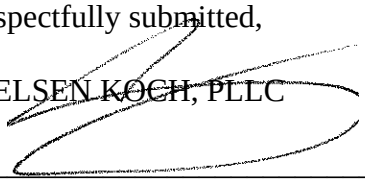
F. CONCLUSION

For the reasons stated, Hall requests that this Court grant review.

DATED this 22nd day of April 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX A

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KAILEN EARL HALL, Appellant.	)	No. 79128-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Kailen Hall appeals his conviction for felony violation of a no-contact order protecting Shalina Mays. He argues that the evidence was insufficient to support his conviction. He also argues that the trial court erred by ordering him to have no contact with Mays for five years. Specifically, he asserts that the trial court, which sentenced him to five years' total confinement but ordered that he receive credit for time served, erred by not also reducing the term of the no-contact condition to account for time served. Finally, Hall argues that because he is indigent, the trial court erred by ordering him to pay Department of Corrections (DOC) supervision fees. We affirm but remand to the trial court to strike the DOC supervision fees.

FACTS

In December 2016, the Pierce County District Court entered a no-contact order (2016 NCO) that identified Hall as the "Defendant." The 2016 NCO directed the "Defendant" as follows with regard to Shalina Mays, the "protected person":

A. [D]o not i) cause, attempt or threaten to cause bodily injury to, assault, sexually assault, harass, stalk or keep under surveillance the protected person or, ii) engage in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, or iii) use, attempt to use or threaten to use physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.
B. [D]o not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers.
C. [D]o not knowingly enter, remain, or come within 500 feet . . . of the protected person's residence, school, [or] workplace.

The second page of the 2016 NCO bore an acknowledgment stating, "I acknowledge receipt of a copy of this order." Below the acknowledgment was a signature line for "Defendant," and a signature appeared on that line. The expiration date of the 2016 NCO was May 14, 2019.

In 2018, the State charged Hall with two counts of domestic violence felony violation of a court order for violating the 2016 NCO. At trial, Sergeant Robert Constant of the Kent Police Department testified that on June 3, 2018, at about 6:30 p.m., multiple police units were dispatched to a house located at 22707 114th Place Southeast in Kent in response to a 911 call. On that call, a part of which was played for the jury, a woman who identified herself as Mays reported that she was at a house in Kent and that "he just busted my . . . window." When the 911 dispatcher asked the caller, "What's his last name," the caller responded, "Hall." The dispatcher then asked the caller, "And his first name?" The caller responded, "Kailen."

Sergeant Constant testified that he was the first to arrive at the house. He ran up to the front door, and just as he was getting to the door, he heard a noise

that he believed was caused by someone jumping over a chain link fence in the backyard. He did not see anyone, but he called out on his radio that someone had gone into the woods behind the house.

Sergeant Constant testified that he then returned to the front door area of the house and spoke with a woman who later identified herself as Mays. The woman told Sergeant Constant that someone had been at the house and "busted the window." She also told Sergeant Constant that the person ran off when Sergeant Constant approached. Three suspects—none of whom was Hall—were later stopped in connection with this incident, which served as the basis for the first count against Hall (count 1).

The second count (count 2) arose from another 911 call made later that same evening. In that call, which also was played for the jury, a woman who identified herself as Mays explained to the dispatcher that "I'm calling because . . . the police just left here . . . . My ex-boyfriend is calling and threatening me right now." The dispatcher asked the caller, "How long ago did you hear from him?" and the caller responded, "Just right before I called you." The dispatcher then asked the caller, "Is he saying he's gonna come back over to the house?" The caller responded, "Yes, and he's in a . . . Subaru Outback, I think it is." The caller then confirmed that she was referring to Hall. When the dispatcher asked the caller again how many minutes ago Hall had called, the caller responded, "About one. He called like four times."

About 15 seconds later, while still on the phone with the dispatcher, the caller said, "Somebody's here," and then, "Yep, it's him, he's here . . . in a

silver . . . Subaru . . . [Forester]." The caller then reported a license plate number to the dispatcher. About 30 seconds later, after describing Hall to the dispatcher, the caller reported, "He got out [of] the car; he's at the window. And my window's . . . busted open." The dispatcher later asked, "Can he see you from where . . . he is?" The caller responded, "Yes, yes." When the dispatcher asked, "What is he doing," the caller responded, "Talking." The dispatcher asked, "Talking to you, or talking to someone else?" The caller responded, "I don't know." Later on the call, a woman's voice could be heard in the background saying, "Don't threaten me. Get away from my fucking window." It is unclear whether that voice belonged to the caller. Later, however, the caller could be heard saying, "Go away. Go away." A man's voice could then be heard in the background, though his words were indiscernible. Over the next minute or so, bits and pieces of a background dialogue could be heard on the call, including the caller's voice saying, "I don't want anything from [indiscernible]," followed by a response from a male voice, and then the caller's voice saying, "No." About six-and-a-half minutes into the call, the caller confirmed to the dispatcher that Hall was still outside. The caller later told the dispatcher that she had moved to the back of the house and did not know whether Hall was still there.

Officer William Morrison was dispatched to the house. He later testified that he drove to the intersection of 116th Avenue Southeast and 227th Place Southeast. From there, he "observed a silver Subaru Forester drive northbound out of 114th Place and turn left westbound onto Southeast 227th Place." He explained that 114th Place is "just a little drive that immediately turns into a cul-

de-sac" and that the Forester exited from the only entry or exit point for a vehicle. Officer Morrison advised via radio that he saw the Forester and that it had turned left and was heading westbound on 227th Place. Officer Morrison testified that he then started following the Forester and, at some point, another officer turned in front of him. The officers then stopped the Forester and detained two subjects, later identified as Hall and his girlfriend, Brandy Lahue.

Sergeant Constant arrived at the scene after Lahue and Hall had been detained. He explained to Hall why he was contacting him and talked to him about the first incident. Sergeant Constant later testified that Hall "denied basically the whole incident." Sergeant Constant then asked Hall questions about going to the house a second time. According to Sergeant Constant, Hall "said, no, he had hung out by the mailboxes, and . . . there was a woman that was with him, [and] he had the woman go up to the house in his place." Sergeant Constant testified that Hall said, "[h]e was aware of the court order between himself and . . . Mays," but "he didn't violate the order because he stayed at the mailboxes."

Before trial, Hall moved in limine to redact parts of the 2016 NCO. He pointed out that because the 2016 NCO was a domestic violence no-contact order, it contained references to his being convicted of a domestic violence crime. He also pointed out that the 2016 NCO "notifies the defendant about possible consequences, such as being charged with a criminal offense, should the order be violated." Hall argued that "[t]his information is clearly more prejudicial than probative in a Violation of No Contact Order trial." The State

opposed the motion, arguing that Hall's redaction request was "too broad." After the parties presented their respective proposed redacted versions to the trial court, Hall again proposed that the warning language in the 2016 NCO be redacted, and the court granted Hall's request. Thus, the version of the 2016 NCO that was later admitted at trial did not include the redacted warning language.

After Hall's case was submitted to the jury, the trial court declared a mistrial on—and later dismissed—count 1 after concluding that the jury was deadlocked. The jury found Hall guilty on count 2.

On October 31, 2018, the trial court sentenced Hall to a total of five years' confinement, with credit for time served as determined by the King County Correctional Facility. The court also ordered that Hall have no contact with Mays "[f]or the maximum term of 5 years." The court entered a separate Domestic Violence No-Contact Order protecting Mays that expires on October 31, 2023, i.e., five years after the sentencing date (2018 NCO). The court also imposed community custody for "0 months, plus all accrued early release time at the time of release" and ordered Hall to pay supervision fees as determined by DOC. Hall appeals.

DISCUSSION

Sufficiency of the Evidence

Hall argues that the evidence was insufficient to support the following findings required by the court's to-convict instruction: (1) "[t]hat on or about June 3, 2018, there existed a protection order or a no-contact order applicable to

[Hall]" and (2) "[t]hat on or about said date, [Hall] knowingly violated a provision of [that] order." We disagree.

To satisfy the Fourteenth Amendment's due process guarantee, the State "bears the burden of proving every element of every crime beyond a reasonable doubt." State v. Chacon, 192 Wn.2d 545, 549, 431 P.3d 477 (2018); U.S. CONST. amend. XIV. When a defendant challenges the sufficiency of the evidence presented to meet this burden, "he or she admits the truth of all of the State's evidence." State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). "In such cases, appellate courts view the evidence in the light most favorable to the State, drawing reasonable inferences in the State's favor." Cardenas-Flores, 189 Wn.2d at 265-66. "Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt." Cardenas-Flores, 189 Wn.2d at 265. For the reasons that follow, a rational trier of fact could find both that there existed a no-contact order applicable to Hall and that Hall knowingly violated a provision of that order.

Existence of Order Applicable to Hall

Hall contends that the evidence was insufficient for a jury to find that the 2016 NCO was applicable to him. We disagree.

Hall was named as the "Defendant" on exhibit 12 (the redacted version of the 2016 NCO that was admitted into evidence), and the no-contact prohibitions in exhibit 12 were expressly directed at "Defendant." Additionally, it is clear from exhibit 12 that the 2016 NCO expressly prohibited the "Defendant" from, among

other things, contacting Mays "directly, indirectly, in person or though others." Finally, it was clear from exhibit 12 that the 2016 NCO's expiration date was May 14, 2019. For these reasons, there was sufficient evidence for the jury to find "[t]hat on or about June 3, 2018, there existed a protection order or a no-contact order applicable to [Hall]."

Hall disagrees and argues that because exhibit 12 did not contain statutorily required warning language because it had been redacted, it was not sufficient to sustain a finding that the order was applicable to him. But Hall's argument conflates the threshold question of an order's validity, which is a question of law decided by the trial court, with the factual question of an order's existence—a jury question. See State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005) ("[I]ssues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court."); see also City of Seattle v. May, 171 Wn.2d 847, 853, 256 P.3d 1161 (2011) ("[T]he validity of the order, *as opposed to its existence*, [is] neither a statutory nor an implied element of the crime. Instead, . . . '[t]he court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged.'" (emphasis added) (third alteration in original) (citation omitted) (quoting Miller, 156 Wn.2d at 31)).

Here, Hall did not—and does not—argue that the 2016 NCO was not valid as a threshold matter of *law* such that it would not support the crime charged.

See Miller, 156 Wn.2d at 31 ("Questions of law are for the court, not the jury, to resolve."). Rather, he argues that exhibit 12 was insufficient for a jury to find, necessarily as a matter of *fact*, that there existed an order applicable to Hall at the relevant time. See State v. Roth, 131 Wn. App. 556, 561, 128 P.3d 114 (2006) ("[I]t is the function and the province of the jury to . . . decide disputed questions of fact."). This argument fails because, as discussed, exhibit 12 was sufficient to support that factual finding.

Hall also contends, relying on the law of the case doctrine, that although the validity of a no-contact order is not an element of the crime of violating a no-contact order,[1] the to-convict instruction given in his case made it an element. Specifically, he asserts that because the court's to-convict instruction required a finding that the 2016 NCO was applicable to him, the State was required—and failed—to prove that the 2016 NCO was valid.[2] Hall relies on State v. Turner, 156 Wn. App. 707, 235 P.3d 806 (2010), to support his assertion, but his reliance is misplaced.

In Turner, we did, as Hall points out, state that "'[a]n order is not applicable to the charged crime if it is not . . . statutorily sufficient.'" 156 Wn. App. at 712-13 (quoting Miller, 156 Wn.2d at 31). But we quoted Miller for that proposition, and a careful reading of Miller reveals that the term "applicability," as used in the

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[1] See Miller, 156 Wn.2d at 31 (holding that "the validity of [a] no-contact order is not an element of the crime" of violating such an order).

[2] Under the "law of the case" doctrine, the State must prove all elements included without objection in the to-convict instruction, whether or not those elements are required by statute. State v. Johnson, 188 Wn.2d 742, 754, 399 P.3d 507 (2017).

context of that case, refers not to applicability in the *factual* sense, but to an order's legal validity. See Miller, 156 Wn.2d at 31 ("[I]ssues relating to *the validity of a court order* (such as whether . . . the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court. *Collectively, we will refer to these issues as applying to the 'applicability' of the order to the crime charged.*" (emphasis added)); cf. May, 171 Wn.2d at 854-55 (distinguishing an order's validity from its applicability and describing an "inapplicable" order as one that "either does not apply to the defendant or does not apply to the charged conduct").

In short, Turner does not, despite its reference to "applicability," support Hall's contention that by using the word "applicable," the to-convict instruction added an element and required the jury to determine the 2016 NCO's validity. Rather, the jury was merely asked to determine whether the order was applicable in the factual sense.[3] And as already discussed, the evidence was sufficient to support the jury's finding that it was.

Knowing Violation of Order

Hall next contends that the evidence was insufficient for the jury to find "[t]hat on or about [June 3, 2018], [Hall] knowingly violated a provision of" the 2016 NCO. Again, we disagree.

The 2016 NCO prohibited Hall from contacting Mays, "directly, indirectly,

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[3] Our conclusion is supported by the fact that the relevant pattern instruction, WPIC 36.51.02, also includes the term "applicable." See 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 36.51.02, at 674 (4th ed. 2016).

in person or through others, by phone, mail, or electronic means." And as discussed, the jury heard a 911 call in which a caller who identified herself as Mays told the dispatcher that Hall had just called her multiple times and then, while still on the phone with the dispatcher, reported that Hall had arrived and was standing at the broken window, talking. Later, a dialogue could be heard in the background between the caller and an unidentified male voice.

A rational juror could reasonably have inferred from the 911 call that the caller was Mays and that Hall had just telephoned Mays multiple times, in violation of the 2016 NCO's prohibition on contacting Mays "directly, indirectly, in person or through others, by phone . . . or electronic means." A juror also could reasonably have inferred that Hall was the man heard talking in the background and that Hall was talking to Mays, also in violation of the 2016 NCO's prohibition on contact. Finally, a juror could reasonably have inferred that Hall's violations were knowing based both on (1) a reasonable inference that the signature on the 2016 NCO was Hall's and (2) Sergeant Constant's testimony that Hall stated he was aware of the court order between himself and Mays.[4] For these reasons, the evidence was sufficient to support a finding that Hall knowingly violated a provision of the 2016 NCO.

Hall disagrees and contends that merely "[b]eing outside the house does not constitute contact with Mays," and the second 911 call did not establish that

[4] The jury was instructed that "[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact."

Hall actually communicated with Mays. But Hall cites no authority to support his contention that standing outside a broken window from which he could see Mays inside the house was not enough to constitute contact. Additionally, and as discussed, reasonable inferences from the second 911 call support a finding that Hall did communicate with Mays, both by telephoning her and talking through the window. Therefore, Hall's argument fails.

Hall also contends that the evidence was insufficient to show that the house from which Mays called 911 was her residence and, thus, the State failed to prove that Hall violated the provision of the 2016 NCO prohibiting him from coming within 500 feet of the protected person's residence. But as discussed, the evidence was sufficient to support Hall's conviction based on the provision of the 2016 NCO prohibiting Hall from contacting Mays. Thus, Hall's contention fails.

2018 NCO

Hall argues that the 2018 NCO's October 31, 2023, expiration date is erroneous because it fails to take into account credit for time served. We disagree.

The trial court issued the 2018 NCO under chapter 10.99 RCW. To that end, RCW 10.99.050(1) provides that "[w]hen a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim." In other words, RCW 10.99.050(1) directs the court to issue a no-contact order "to record a no-

contact condition of the sentence." State v. Granath, 190 Wn.2d 548, 556, 415 P.3d 1179 (2018).

Here, Hall was found guilty of felony violation of a no-contact order. The maximum term for that crime, based on Hall's offender score, was five years. Thus, the trial court was authorized, as part of Hall's felony sentence, to order Hall to have no contact with the victim, Mays, for five years beginning on October 31, 2018, the date of sentencing. State v. Armendariz, 160 Wn.2d 106, 108, 156 P.3d 201 (2007); see also State v. France, 176 Wn. App. 463, 473, 308 P.3d 812 (2013) ("[T]he S[entencing]R[eform A[ct] . . . authorize[s] trial courts to impose crime-related prohibitions as a condition of sentence."). The trial court did so and, consistent with RCW 10.99.050(1), entered the 2018 NCO, with an expiration date of October 31, 2023, to record that condition. There was no error.

Hall disagrees. Relying on State v. Navarro, 188 Wn. App. 550, 354 P.3d 22 (2015), he argues that because he received credit for time served in confinement, that credit also applied to the no-contact condition of his sentence and, thus, the 2018 NCO's expiration date was erroneous. But the part of Navarro on which Hall relies involved sexual assault protection orders. See Navarro, 188 Wn. App. at 555. By statute, sexual assault protection orders expire "'two years following the expiration of any sentence *of imprisonment* and subsequent period of community supervision, conditional release, probation, or parole.'" Navarro, 188 Wn. App. at 554 (emphasis added) (quoting RCW 7.90.150(6)(c)). In other words, the term of the protection orders at issue in Navarro were, by statute, tied to the defendant's term of confinement. We thus

held, in Navarro, that "[b]ecause an offender's actual release date is unknowable at the time of sentencing, a sexual assault protection order should not provide a fixed expiration date." Navarro, 188 Wn. App. at 555-56.

Here, by contrast, the trial court entered a no-contact order, which is not the same as a sexual assault protection order. See Navarro, 188 Wn. App. at 552 ("A sexual assault protection order protects a victim from contact with an offender who is not otherwise restrained. Conviction of the offender is not a prerequisite. No-contact orders, on the other hand, are not limited to victims, and they are entered only after the offender is convicted of a crime. *There are different provisions governing the length of time these orders may remain in effect.*" (emphasis added)). And as discussed, the trial court was authorized to enter a no-contact order for the maximum term of five years. Armendariz, 160 Wn.2d at 108. Therefore, Hall's reliance on Navarro is misplaced.

Hall's reliance on Granath is also misplaced. There, our Supreme Court held that RCW 10.99.050(1) does not give a district court, whose jurisdiction is limited by statute, independent authority to issue no-contact orders. Granath, 190 Wn.2d at 556-57. Rather, RCW 10.99.050(1) merely authorizes a district court to enter a no-contact order that records the no-contact condition of a sentence. Granath, 190 Wn.2d at 556. And because the no-contact condition of the sentence at issue in Granath lasted only two years, the district court erred by entering a five-year no-contact order. Granath, 190 Wn.2d at 557.

Here, the no-contact condition of Hall's sentence was properly ordered to last a maximum of five years from the date of sentencing. Thus, consistent with

Granath, the no-contact order issued to record this condition was set to expire five years after the date of sentencing, on October 31, 2023. This was not error.

DOC Supervision Fees

Hall argues that remand is required for the trial court to strike the DOC supervision fees. We agree.

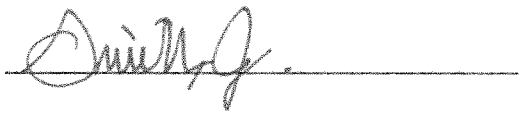
RCW 9.94A.703(2)(d) provides that "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [DOC]." Because supervision fees can be waived by the court, they constitute discretionary LFOs. See RCW 9.94A.030(31) ("'Legal financial obligation' means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include . . . any . . . financial obligation that is assessed to the offender as a result of a felony conviction."); State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018) (costs of community custody are discretionary LFOs). To this end, a trial court's decision whether to impose a discretionary LFO is reviewed for abuse of discretion. State v. Ramirez, 191 Wn.2d 732, 741, 426 P.3d 714 (2018).

Here, the record reflects that the trial court intended to waive all discretionary LFOs. Specifically, when explaining why it was ordering Hall to pay a $500 victim penalty assessment, the trial court stated, "A $500 victim penalty assessment; that's mandatory. *I can't waive that even though I understand you're going to be locked up and you're not going to have any money, but I can't – I don't have any discretion to not impose that.*" (Emphasis added.) Because

the trial court intended to waive all discretionary LFOs but did not waive DOC supervision fees, we remand to the trial court to strike the DOC supervision fees.

The State contends that the trial court properly ordered Hall to pay DOC supervision fees because they are not "costs" that the trial court is prohibited from imposing on an indigent defendant under RCW 10.01.160. But assuming without deciding that DOC supervision fees are not costs within the meaning of RCW 10.01.160, they nonetheless constitute discretionary LFOs. And as we recently observed, "The barriers that LFOs impose on an offender's reintegration to society are well documented . . . and should not be imposed lightly merely because the legislature has not dictated that judges conduct the same inquiry required for discretionary costs." State v. Clark, 191 Wn. App. 369, 376, 362 P.3d 309 (2015). Furthermore, and as discussed, the record in this case reflects that the trial court intended to waive any discretionary LFOs. For these reasons, remand is appropriate. Cf. State v. Dillon, ___ Wn. App. 2d ___, 456 P.3d 1199, 1209 (2020) (striking DOC supervision fee where "[t]he record demonstrate[d] that the trial court intended to impose only mandatory LFOs").

We affirm but remand to the trial court to strike the DOC supervision fees.



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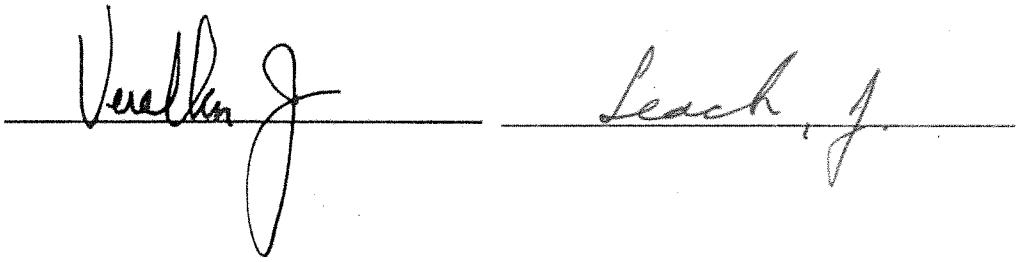

NIELSEN KOCH P.L.L.C.

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