No. 44963-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FAGALULU FILITAULA,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 12-1-01750-0

BRIEF OF RESPONDENT

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2. Whether the to-convict jury instruction for the charge of felony violation of a post-conviction no contact order omitted an essential element of the crime.

3. Whether there was sufficient evidence presented at trial to prove beyond a reasonable doubt that the defendant violated the post-conviction no contact order.

4. Whether the court erred in entering a 12-month period of community custody for the conviction for felony violation of a post-conviction no contact order.

B. STATEMENT OF THE CASE.

1. Substantive facts.

A domestic violence no contact order issued by a Grays Harbor County court ordered Filitaula to have no contact with Faufau I. Boyd. The order was in effect from July 12, 2012, to July 12, 2014. Filitaula signed the order. RP 110-12.[1] On the evening of December 16, 2012,[2] Boyd went to the residence of her cousin, Anna Hartman, and Anna's husband, Stanley Hartman. RP 52. Filitaula had been living with the Hartmans for several months. RP

1 Unless otherwise specified, all references to the Verbatim Report of Proceedings are to the one-volume trial transcript dated May 7, 8, and 16, 2013.
2 Although none of the witnesses could recall the date, it was agreed that the incident occurred shortly before Filitaula's arrest, which was established through jail booking documents as December 17, 2012. RP 33, 52.

74, 79. Boyd went to the Hartman's residence with the intent of confronting Filitaula because she believed he had been unfaithful to her. She knew the no contact order was in place. RP 60. The two had a conversation; Boyd left for a few moments and then returned, whereupon the two resumed their conversation. RP 54-56, 86. Boyd estimated they were together for a total of about 45 minutes. RP 53. Stanley Hartman was under the impression that Boyd and Filitaula arrived at his residence together. RP 86.

At some point while the two were together, Boyd telephoned her mother, Tammie Boyd, who was at work at the Lucky Eagle Casino. RP 52-53. Tammie Boyd testified that her daughter was anxious and frightened, and Tammie Boyd could hear Filitaula yelling, screaming, and cursing in the background . RP 64-67. Filitaula and Faufau Boyd had two small children together. RP 51,62. While Tammie Boyd was on the phone with Faufau Boyd, she could hear the children crying. Tammie Boyd contacted tribal law enforcement, who located Anna and Stanley Hartman, who were in the casino, and obtained permission to go to their residence. RP 87. When the Hartmans returned home some time later, law enforcement was there and Filitaula was taken into custody. RP 87-88.

2. Procedural facts.

Filitaula was charged with one count of violation of a post conviction no contact order, domestic violence, third or subsequent violation of a similar order. CP 6. When he failed to appear for a pretrial hearing, a bench warrant was issued and some months later Filitaula appeared before the court, after the trial date had passed. RP 102, 106-108. A first amended information was filed, adding a charge of bail jumping, CP 7, and Filitaula went to trial on both charges. He was found guilty of both. CP 20-21.

C. ARGUMENT.

1. The language of the charging document included every essential element of the charge of violation of a post-conviction no contact order.

Filitaula argues that the charging document failed to include all of the essential elements of the offense of violation of a post-conviction no contact order because it did not use the word "willfully." Appellant's Opening Brief at 10-12. The charging language reads as follows:

> COUNT I—FELONY VIOLATION OF POST CONVICTION NO CONTACT ORDER/DOMESTIC VIOLENCE—THIRD OR SUBSEQUENT VIOLATION OF ANY SIMILAR ORDER, RCW 26.50.110(5), RCW 10.99.020 AND RCW 10.99.050—CLASS C FELONY:

> In that the defendant, FAGALULU FEAU FILITAULA, in the State of Washington, on or about December 16, 2012, with knowledge that the Grays Harbor County District Court had previously issued a no contact order, pursuant to Chapter 10.99 in Grays Harbor District Court on July 12, 2012, Cause No. CR48176, did violate the order while the order was in effect by knowingly violating the restraint provision therein pertaining to Faufau I. Boyd, a family or household member, pursuant to RCW 10.99.020; and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

RCW 10.99.050, which addresses post-conviction no contact orders provides, in relevant part:

> (2)(a) Willful violation of a court order issued under this section is punishable under RCW 26.50.110.

The State does not dispute that the information must contain all of the essential elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of the charging document is raised for the first time on appeal, the court will engage in a liberal construction of the document in order to determine its validity. Under that liberal analysis, the appellate court determines: (1) whether the essential elements of the alleged crime appear in any form in the charging document, or whether they can be found by fair construction; and if so, (2) whether the

defendant can show that he was nonetheless actually prejudiced by the inartful language used in the document. Kjorsvik, 117 Wn.2d at 93.

It is not necessary to use the exact words of a statute in a charging document. It is sufficient if words conveying the same meaning are used. A court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result. State v. Moavenzadeh, 135 Wn.2d 359, 262, 956 P.2d 1097 (1998).

Filitaula asserts that a knowing contact is different from a willful contact. Appellant's Opening Brief at 12. RCW 9A.08.010(4), however, provides:

> Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if the person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.[3]

"A defendant acts willfully if he acts knowingly with respect to the material elements, including the contact element." State v. Sisemore, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002). In State v. Snapp, 119 Wn. App. 614, 82 P.3d 252 (2004), the court held that

3 The Washington Pattern Jury Instructions use the word "knowingly in the instruction defining the crime of violation of a no-contact order as well as in the elements instructions. WPIC 35.51, 35.51.01, and 36.51.02.

the phrase "unlawfully and feloniously" was the equivalent of "knowingly." Id. at 621. Even construing that charging language under the more stringent standard which applies when the challenge occurs before the verdict, that information included all of the essential elements of felony violation of a no-contact order.

The charging language in this case adequately informed Filitaula of every essential element of the offense.

> 2. The jury instructions did not omit an essential element of the offense of felony violation of a post-conviction no contact order.

Filitaula contends that Jury Instruction No. 8, the elements instruction relating to the charge of felony violation of a post-conviction no contact order, CP 14, omitted the essential element of willfulness. Appellant's Opening Brief at 7. The State does not disagree that the to-convict instruction must include all of the essential elements of the offense. Here, Instruction No. 8 read as follows:

> To convict the defendant of the crime of violation of a no contact order as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about December 16, 2012 there existed a no contact order applicable to the defendant regarding a family or household member;
>
> (2) That the defendant knew of the existence of this order;

> (3) That on or about said date, the defendant knowingly violated a provision of this order against a family or household member;
>
> (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
>
> (5) That the defendant's act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 15.

Filitaula again argues that knowledge does not substitute for willfulness, but, as explained in the preceding section, it does. Instruction No. 8 properly advised the jury of the essential elements of the offense.

> 3. There was sufficient evidence presented at trial to support Filitaula's conviction for violation of a post-conviction no contact order.

Filitaula argues that because Boyd initiated the contact with him, he did not willfully violate the no contact order. Appellant's Opening Brief at 5. He particularly takes issue with the proposition that he was required to leave the residence, if necessary, to avoid having contact with Boyd. Appellant's Opening Brief at 5.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, supra, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical

probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

The jury in this case was instructed that it was not a defense to the charge that the victim invited or consented to the contact. Instruction No. 11, CP 16. That instruction is WPIC 36.53.01, verbatim. Both RCW 10.99.040(4)(b) and RCW 26.50.035(1) require that protection orders issued in domestic violence situations specifically inform the person who is restrained that he or she is subject to arrest even of the protected party initiates or permits contact. *See also* State v. Dejarlais, 136 Wn.2d 939, 969 P.2d 90 (1998), finding consent is not a defense to a charge of violating a court order. In Sisemore, the court held that knowingly continuing

contact with the protected party, even if contact had first occurred accidentally, is a willful violation of a no contact order.

> A defendant acts willfully if he acts knowingly with respect to the material elements, including the contact element. Thus, Sisemore violated the no-contact order if he knowingly acted to contact or continue contact after an original accidental contact. He did not violate the no-contact order of he accidentally or inadvertently contacted [the protected party] but immediately broke it off. In essence, this means Sisemore must have intended the contact. This is consistent with the Supreme Court's definition of "willful" as requiring a purposeful act. *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982)

Sisemore, 114 Wn. App. at 78.

The evidence presented at trial was that, although Boyd initiated the contact by going to the residence where Filitaula lived, he did nothing to terminate that contact. Boyd estimated they spent about 45 minutes together, and at no time did Filitaula leave the room or the house. He did not tell her he could not talk to her, and there was no evidence that he asked her to leave. RP 53-555. He did not call the police and report that she came to his home. The evidence was sufficient to prove that Filitaula knowingly, and thus willfully, continued contact with the victim, which is a violation of the no contact order.

Filituala finds it unfair that the protected person should be required to "flee his rural home on a dark winter night." Appellant's Opening Brief at 5. But that was not the issue before the jury. The legislature presumably contemplated that protected parties would sometimes initiate contact with the restrained party, or it would not have provided in the statutes cited above that it is not a defense that the protected party did so. A no contact order restrains only the person at whom it is directed, not the protected party. Nor was fleeing into a dark winter night the only option. It seems reasonable that if Filitaula had called the police and told them Boyd was there, refused to speak with her, and/or told her to leave, he would not have been guilty of violating the order. However, the jury was not required to find whether it was fair or unfair, only whether the elements of the offense were proved beyond a reasonable doubt. The proof was sufficient.

4. The court correctly imposed twelve months of community custody after imposing an exceptional sentence below the standard range.

Filitaula claims the trial court erred by imposing twelve months of community custody in addition to an exceptional sentence of 48 months in confinement. CP 34. The statutory maximum for felony violation of a post-conviction no contact order

is 60 months because it is a class C felony. RCW 26.50.110(5); RCW 9A.20.020(1)(c). Because Filitaula's offender score was more than nine, his standard range was not really a range at all, but was a flat 60 months. CP 31. On that charge, the court imposed an exceptional sentence below the standard range of 48 months in confinement. CP 33. The court based this sentence on the mitigating factor that the contact was initiated by the victim. CP 31; 06/05/13 RP 11. That factor is authorized by RCW 9.94A.535(1)(a).

Filitaula bases his argument on RCW 9.94A.701(9), which reads:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Interpretation of the Sentencing Reform Act (SRA) is a question of law and review is de novo. State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). The objective of the inquiry is to determine the legislative intent behind the statute. If the meaning of the statute is apparent from the language, that meaning is given

effect. If it is not, courts look to the text, the context, related statutes, and the overall statutory scheme. Id.

RCW 9.94A.701(3)(a) requires a sentencing court to impose one year of community custody when the defendant is being sentenced for a crime against persons as defined in RCW 9.94A.411(2). A violation of a domestic violence court order is a crime against persons. Id. Filitaula argues that because his standard range was 60 months, which is the statutory maximum, even though the court imposed an exceptional sentence below the standard range it lacked the authority to impose any community custody. Rather than being a plain reading of the statute, that interpretation strains the statutory language to make it say something the legislature did not mean. Rather, it appears that RCW9.94A.701(9) does not apply to Filitaula's case at all. He was not given a standard range sentence.

RCW 9.94A.535 permits the court to sentence either above or below the standard range if the necessary circumstances exist. The court in this case found that there was a mitigating circumstance and sentenced below the standard range. RCW 9.94A.701(3)(a) requires the court to impose twelve months of community custody. Here the court did not choose a point within

the standard range so that community custody would not cause the sentence to exceed the statutory maximum. It did not enter a standard range sentence, and therefore on its face RCW 9.94A.701(9) doesn't apply to Filitaula at all.

Filitaula argues that the language of subsection 9 does not focus on the term actually imposed, but rather the term available to the court to impose. The State disagrees. Even if this subsection were applicable to Filitaula, "an offender's standard range term of confinement" more logically refers to the term imposed, a term which is within the standard range as opposed to an exceptional sentence. There is no apparent rationale, and Filitaula does not suggest one, for the legislature to link the term of community custody to a term of confinement that the offender does not serve.

The public policy underlying the community custody statutes also runs counter to Filitaula's interpretation.

> Requiring offenders to serve a sentence of community custody in the community serves several purposes of the SRA, including "[p]rotect[ing] the public," "[o]ffer[ing] the offender an opportunity to improve him or herself," and "[r]educ[ing] the risk of reoffending by offenders in the community."

Jones, 172 Wn.2d at 246, citing to RCW 9.94A.010(4), (5), and (7). It is unlikely that the legislature meant to relieve an offender,

particularly one convicted of a crime against persons, of the obligation and opportunity of community custody based upon the statutory maximum for his crime where he does not serve that maximum in confinement. Rather, it is more consistent with the underlying policy as well as other portions of the SRA, that RCW 9.94A.701(9) applies only when an offender is actually sentenced to a standard range term of confinement.

A court may not enter an exceptional sentence that exceeds the statutory maximum for the offense. State v. Gore, 143 Wn.2d 288, 313, 21 P.3d 262 (2001), *overruled on other grounds by* State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). This court did not do so.

Filitaula further argues that the language following the term of community custody in section 4.6 of the judgment and sentence, has been disapproved in State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012). That language is as follows:

> . . . or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer . . .STATUTORY LIMIT ON SENTENCE. Notwithstanding the length of confinement plus any community custody imposed on any individual charge, in no event will the combined confinement and community custody exceed the statutory maximum for that charge. . .

Filitaula is correct. Amendments to the SRA have made the first sentence incorrect and the second superfluous. Boyd, 174 Wn.2d 472-73. Because that is so, the language is void and has no effect, and therefore makes no difference to his sentence. Although a remand to strike that language would be appropriate, there is no basis upon which strike the term of community custody as Filitaula requests.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Filitaula's convictions but to remand for the trial court to strike the language in the judgment and sentence which has been disapproved in Boyd.

Respectfully submitted this 11th day of February, 2014.

Carol La Verne

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