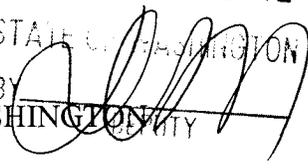


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COURT OF APPEALS

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STATE OF WASHINGTON  
BY 

NO. 34272-3-II

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

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STATE OF WASHINGTON, Respondent

v.

GREGORY NEIL FREUND, Appellant

---

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROBERT A. LEWIS  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-01885-2

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The State accepts the statement of the case (factual history) as set forth by the appellant in his brief. Where additional information is needed, it will be supplemented in the response section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR #1

First assignment of error raised by the appellant in his brief is that the State failed to present substantial evidence to support the conviction on the gross misdemeanor. Specifically, the claim is that the State failed to present any evidence of identification of the parties.

To help establish the elements of the crime the State had called as a witness Vance Gravley. Mr. Gravley indicated that he witnessed the altercation between the defendant and the woman. He testified that he identified the defendant as the person sitting in the courtroom and he had previously been shown a photograph of a woman who he identified as the woman who the defendant was in the altercation with (RP 81-83). He further indicated that when he was trying to call 911 the woman, in an excited state had indicated to him that the man had a restraining order on him and that she than took off and left while he was calling the police (RP 79).

The State called Deputy Sheriff Kyle Kendall who testified that he came in contact with the woman involved, Shirley Ann Scott Freund. (RP 105) The picture taken was the same one as was shown to Mr. Gravelly (RP 147).

Deputy Kendall also talked to the jury about the contact that he had with the defendant and the defendant had indicated to him, in part, the following:

QUESTION (Prosecutor): And after reading him those warnings, did he – did you talk to him about the incident in July?

ANSWER (Kendall): I did.

QUESTION: How did you identify that incident for him?

ANSWER: I asked Mr. Freund if he remembered an incident with Shirley Freund on that day. I had asked – I had asked Mr. Freund, Greg, if he had gotten into an argument with Shirley off of NE 117<sup>th</sup> Avenue, and Greg said he had.

They were both arguing over a backpack. Greg said that Shirley had stolen some items from him and he was trying to get them back from her.

Greg wasn't able to describe any of the missing items, but was sure that Shirley had taken them.

(RP 121, L.18 – 122, L.6)

QUESTION (Prosecutor): Okay. And did you advise him what he was – what you were arresting him for?

ANSWER (Kendall): Yes; I advised Mr. Freund he was placed under arrest for a no contact order violation.

QUESTION: What, if anything, reaction did he have to you advising him of that?

ANSWER: While placing Mr. Freund under arrest for the no contact order violation, Mr. Freund stated to me that he was aware of a no contact order in the past, but his understanding was it had already been taken care of.

(RP 120, L.13-22)

The State had also had marked as exhibit number one a certified copy of the no contact order. It had been attached as part of a longer judgment and the parties and the court determined that it would be appropriate to only present to the jury the no contact order and not the underlying judgment. The parties stipulated with regard to admissibility of exhibit one. They stipulated that it was the restraining order in effect that had been issued by Douglas County. (RP 166) (Exh. #1).

The defendant testified in the defense case-in-chief. He acknowledged that he had had an altercation with his ex-wife on July 27, 2005. (RP 199-200).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rationale 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). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts will defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. State v. Hernandez, 85 Wn.App. 672, 675, 935 P.2d 623 (1997).

With that case law in mind, the State looks to the argument raised by the appellant. The claim appears to be that there is a lack of identification of the parties involved and, specifically, there is a lack of identity of the person being protected by the Douglas County no contact order. (Brief of Appellant, page 12). However, as outlined previously, the independent witness has identified the two individuals involved as the defendant and the female identified through later work as the ex-wife of the defendant. Both she and the defendant spoke of restraining orders and no contact orders. And the defendant, when he testified, acknowledged that he had had the altercation with his ex-wife on the date that was charged in the Information.

The State submits that this assignment of error is without merit.

III. RESPONSE TO ASSIGNMENT OF ERROR #2

The second assignment of error raised by the defendant deals with the “to convict” instruction that was provided to the jury. As part of the court’s instructions to the jury (CP 50) are instruction numbers six and seven. They read as follows:

Instruction No. 6

A person commits the crime of violation of a domestic violence court order when he or she willfully has contact with another when such contact was prohibited by a domestic violence protection order and the person knew of the existence of the protection order. (CP 50, Instruction No. 6)

Instruction No. 7

To convict the defendant of the crime of Violation of a Domestic Violence Court Order each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 27<sup>th</sup> day of July, 2005, the defendant willfully had contact with Shirley Scott-Freund;

(2) That such contact was prohibited by a domestic violence protection order;

(3) That the defendant knew of the existence of the domestic violence protection order;

(4) That Shirley Scott-Freund is a family or household member; and

(5) That the acts occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, than it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, than it will be your duty to return a verdict of not guilty. (CP 50, Instruction No. 7)

The defense claims in the second assignment of error that the “to convict” instruction omits a necessary element. The argument is that because the RCW numbers were not included (specifically, RCW 10.99) the court had relieved the State of the burden of proving one of the essential elements of the crime charged (Brief of Appellant, page 17). It relies heavily on State v. Arthur, 126 Wn.App. 243, 108 P.3d 169 (2005) to illustrate this point.

However, the Arthur decision has been overruled by the State Supreme Court in State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005). In the Miller case, the defendant was convicted of violating a protective order in 1997 and than again in 1998. In 2001, the court issued a no contact order prohibiting the defendant from having contact with the victim and while that no contact order was in effect, the defendant was caught with the victim. The Supreme Court held that the existence of a no contact order was an element of the crime, but that the “validity” of the no contact order was a question of law appropriately within the province of the trial

court to decide. The trial court initially determines the validity of the underlying no contact order and thus, “whether the order alleged to be violated is applicable and will support the crime charged.” Miller, 156 Wn.App at 31.

The validity of the underlying no contact order, and the statutory authority to issue said order, are gate-keeping functions and questions of law. They are not issues that necessarily need to go to the jury and, certainly, are not elements of the crime. If there was no evidence or proof of a domestic violence protection order, than there would be no underlying charge and thus the matter would have to be dismissed.

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. The 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. Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed.

State v. Miller, 156 Wn.2d at 32

The defense took no exceptions to the instructions given by the court. (RP 253). Further, the parties worked together for purposes of trial stipulations and the court felt there was sufficient evidence to allow the issues to be presented to the jury. The State submits that this was properly done under the facts of this case.

#### IV. RESPONSE TO ASSIGNMENT OF ERROR #3

The third assignment of error raised by the appellant is that he received ineffective assistance of counsel because trial counsel failed to propose an instruction on the defense of necessity.

Ineffective assistance of counsel is a mixed question of law and fact and is reviewed by the appellate court de novo. Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687.

Choosing a particular defense is a strategic decision "for which there is no correct answer, but only second guesses." Hendricks v. Calderon, 70 F.3d 1032, 1041 (9<sup>th</sup> Cir. 1995). To meet the second part of the test as set forth in Strickland, the defendant must prove that but for the deficient performance of his trial attorney, there is a reasonable probability that the outcome would have been different. In Re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

It is always interesting to note that a claim of ineffective assistance of counsel can be raised when the defense at trial prevailed in preventing a conviction for a felony. In this case, the defendant was acquitted of the felony charge and only convicted of a gross misdemeanor. The State

submits that there is a strong presumption here that trial counsel provided effective assistance to his client.

Counsel on appeal makes claim that the defense should have offered a necessity instruction. There is absolutely nothing in this record to suggest that the trial court would have given a necessity defense instruction. A necessary defense is available only when circumstances cause the accused to take unlawful action to avoid a greater injury. State v. Jeffrey, 77 Wn.App. 222, 224, 889 P.2d 956 (1995). The defense is not available if a reasonable, legal alternative to violating the law existed. Jeffrey, 77 Wn.App. at 225; United States v. Bailey, 444 U.S. 394, 410, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). The defendant must prove by a preponderance of the evidence that: (1) he believed he must commit the crime to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from the violation of the law, and (3) no legal alternative existed. Jeffrey, 77 Wn.App. at 225; State v. Gallegos, 73 Wn.App. 644, 651, 871 P.2d 621 (1994).

The State submits that the trial court would have most likely denied a proposed necessity instruction. The defendant had a reasonable, legal alternative to contacting his ex-wife. He could simply have refused to contact her. He could have called the police. There is no evidence in the record to support the proposition that he was forced to violate a no

contact order. Because the defendant had legal alternatives to contacting his ex-wife, the State submits he would not have been entitled to a necessity instruction.

Finally, this lack of necessity becomes even more stark when we examine the fact that Mr. Gravley, the witness who saw the defendant and his ex-wife in their altercation on July 27, saw them together about a week later at a store in Brush Prairie.

QUESTION (Prosecutor): Now, subsequent – or, let me rephrase.

After this happened, did you have occasion to see the defendant again?

ANSWER (Gravley): I saw ‘em about a week later, both of them. I was going to the store there in Brush Prairie, and I saw the truck and I saw him and her standing by the truck with a bunch of other people.

QUESTION: Did you recognize them?

ANSWER: Yes, I did.

QUESTION: And what happened at that time?

ANSWER: Him and I made eye contact, and he got in his truck and drove off.

(RP 141, L.18 – 142, L.4)

The State submits that there has been no showing here of ineffective assistance of counsel. He was able to relieve the defendant of the potential of a felony conviction and further, there is no showing that

the court would have given a necessity instruction given the nature of this evidence and testimony.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 24 day of August, 2006.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
MICHAEL C. KINZIE, WSBA#7869  
Senior Deputy Prosecuting Attorney

**APPENDIX**  
**INFORMATION**  
**COURT'S INSTRUCTIONS TO THE JURY**

**FILED**

AUG 30 2005

JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
Plaintiff,  
v.  
GREGORY NEIL FREUND  
Defendant.

**INFORMATION**

No. 05-1-01885-2  
(CCSO 05-12493)  
(CCSO 05-12496)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

**COUNT 01 - FELONY DOMESTIC VIOLENCE COURT ORDER VIOLATION (ASSAULT) - 26.50.110(4)**

That he, GREGORY NEIL FREUND, in the County of Clark, State of Washington, on or about July 27, 2005, with knowledge that the Douglas County Superior Court, had previously issued a no contact order pursuant to Chapter 10.99 RCW in Cause No. 98-1-00156-2, did violate the order while the order was in effect by knowingly violating the restraint provisions therein, and/or by knowingly violating a provision excluding him or her from a residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly remaining within, a specified distance of a location, and furthermore, the defendant did intentionally assault, Shirley Ann Scott-Freund; contrary to Revised Code of Washington 26.50.110(4).

And further, that this crime was committed by one family or household member against another, and that this is domestic violence offense as defined by RCW 10.99.020 and within the meaning of RCW 9.41.040. [DV]

**COUNT 02 - DOMESTIC VIOLENCE COURT ORDER VIOLATION (GM) - 26.50.110(1)**

That he, GREGORY NEIL FREUND, in the County of Clark, State of Washington, on or about August 25, 2005, with knowledge that the Douglas County Superior Court, had previously issued a no contact order pursuant to Chapter 10.99 RCW in Cause No. 98-

INFORMATION - 1  
PMW

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g

1 1-00156-2, did violate the order while the order was in effect by knowingly violating the  
2 restraint provisions therein, and/or by knowingly violating a provision excluding him or  
3 her from a residence, a workplace, a school or a daycare, and/or by knowingly coming  
4 within, or knowingly remaining within, a specified distance of a location, to wit did have  
5 contact with Shirley Ann Scott-Freund; contrary to Revised Code of Washington  
6 26.50.110(1).

7 ARTHUR D. CURTIS  
8 Prosecuting Attorney in and for  
9 Clark County, Washington

10 Date: August 30, 2005

11 BY:   
12 James D. Senescu, WSBA #27137  
13 Deputy Prosecuting Attorney

<b>DEFENDANT: GREGORY NEIL FREUND</b>			
<b>RACE: W</b>	<b>SEX: M</b>	<b>DOB: 11/8/1952</b>	
<b>DOL: FREUNGN485QH WA</b>		<b>SID: WA13735276</b>	
<b>HGT: 60</b>	<b>WGT: 180</b>	<b>EYES: BRO</b>	<b>HAIR: BRO</b>
<b>WA DOC:</b>		<b>FBI: 523732HA0</b>	
<b>LAST KNOWN ADDRESS(ES):</b>			
H - 15902 NE CAPLES RD, BRUSH PRAIRIE WA			

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INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It is also your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called <sup>an information</sup> ~~a complaint~~, informing the defendant of the charge. You are not to consider the filing of <sup>an information</sup> ~~the complaint~~ or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go into the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witnesses, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorney's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatsoever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict.

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INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

**You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.**

INSTRUCTION NO. 6

A person commits the crime of violation of a domestic violence court order ~~violation~~ when he or she willfully has contact with another when such contact was prohibited by a domestic violence protection order and the person knew of the existence of the protection order.

INSTRUCTION NO. 7

*Ad* To convict the defendant of the crime of violation of a domestic violence court order violation, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 27<sup>th</sup> day of July, 2005, the defendant willfully had contact with Shirley Scott-Freund;
- (2) That such contact was prohibited by a Domestic Violence Protection Order;
- (3) That the defendant knew of the existence of the Domestic Violence Protection Order;
- (4) That Shirley Scott -Freund is a family or household member; and
- (5) That the acts occurred in State of Washington, County of Clark.

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 of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

A person acts willfully when he or she acts knowingly.

INSTRUCTION NO. 9

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

INSTRUCTION NO. 10

For purposes of this case, "family or household members" means spouses or former spouses

INSTRUCTION NO. 11

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these *Red* instructions, and a verdict form, ~~for each count~~.

*Red* You must fill-in the blank provided in ~~each~~ <sup>the</sup> verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

INSTRUCTION NO. 12

You will also be furnished with a special verdict form. If you find the defendant not guilty of the crime of violation of a no-contact order, do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blank "yes" or "no" according to the decision you reach. In order to answer the question on the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

INSTRUCTION NO. 13

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 14

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

