

NO. 35952-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

JEFFERY P. MADRID,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Richard Strophy, Judge
Cause No. 06-1-01066-7

PATRICIA A. PETHICK, WSBA NO. 21324
Attorney for Appellant

P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The court erred in convicting Madrid pursuant to RCW 26.50.110 where the rule of lenity requires reversal and dismissal of his convictions because the statute is ambiguous as to what in fact constitutes a gross misdemeanor violation of a no contact order.
2. The court erred in not finding that Madrid's convictions in Counts I, III, IV, V, VII, VIII, and IX encompassed a single "unit of prosecution."
3. The court erred denying Madrid's motion for arrest of judgment in which he argued that Counts I, III, IV, V, VII, VIII, and IX constituted one crime as the letters forming the basis for these counts were given to Dixie Paulk-Madrid at one time.
4. The court erred in allowing Madrid to be represented by counsel who provided ineffective assistance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court erred in convicting Madrid pursuant to RCW 26.50.110 where the rule of lenity requires reversal and dismissal of his convictions because the statute is ambiguous as to what in fact constitutes a gross misdemeanor violation of a no contact order? [Assignment of Error No. 1].
2. Whether the court erred in not finding that Madrid's convictions in Counts I, III, IV, V, VII, VIII, and IX encompassed a single "unit of prosecution?" [Assignments of Error Nos. 2 and 3].
3. Whether the court erred in allowing Madrid to be represented by counsel who provided ineffective assistance? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure.

Jeffrey P. Madrid (Madrid) was charged by second amended information filed in Thurston County Superior Court with eleven counts of gross misdemeanor violation of a no contact order pursuant to RCWs 26.50.110(1) and 10.99.020. [CP 108-110].

Prior to trial no motion regarding CrR 3.6 was made or heard, but Madrid prevailed on a CrR 3.5 motion, and lost a Knapstad motion. [CP 14-74, 80-103; 11-6-06 RP 3-18]. Madrid was tried by a jury, the Honorable Richard Strophy presiding. Prior to actually commencing the trial, Madrid made a motion requesting that he should be allowed to argue to the jury that the charges against him were not criminal acts as there was no evidence that his communications included as an “an act or threatened act of violence” required under the statutes with which he was charged; the court denied Madrid’s motion. [CP 111-115; Vol. I RP 4-22]. Madrid objected/took exception to the court’s to-convict instructions on the first nine counts identifying separate acts because it “undercuts my ability to argue to the jury that...because they were all delivered to her at once, that that in reality is only one contact.” [Vol. II RP 74-76]. The jury found Madrid guilty of Counts I, III-V, VII-XI, and not guilty of Counts II and VI. [CP 242-263].

Prior to sentencing, Madrid made a motion for arrest of judgment arguing that Counts I, III, IV, V, VII, VIII, and IX in actuality were a single count of violation of a no contact order in that all the letters forming the basis for these counts were given to the victim at one time—a single delivery/receipt/contact, which the court denied. [CP 269-275; 1-19-07 RP 3-15]. The court sentenced Madrid to 365-days to be served on work release if qualified on Count I, and suspended the sentence on the remaining eight counts for which Madrid was convicted. [CP 279-287; 1-19-07 RP 24-32].

A notice of appeal was timely filed on February 16, 2007. [CP 289-298]. This appeal follows.

2. Facts.

On September 9, 2005, Dan McLinden a deputy with the Thurston County Sheriff's Office served Madrid with a no contact order, [Ex. 2], prohibiting from contact with his estranged wife, Dixie Paulk-Madrid. [Vol. I RP 26-29, 40-42]. McLinden also went over the order with Madrid telling Madrid "that he's not to have any contact whatsoever with the petitioner [Dixie Paulk-Madrid] in this matter." [Vol. I RP 28-29].

Beginning in September 2005, Madrid sent letters to Amy Bartley, Dixie Paulk-Madrid's mother. [Vol. I RP 30-33, 42-43]. While the envelopes were addressed to Bartley, the letters, [Exs. 5, 7, 8, 9, 12, 14,

15], themselves were written to Dixie Paulk-Madrid and one was a birthday card. [Ex. 4], for Amy Paulk, Dixie Paulk-Madrid's daughter and Madrid's stepdaughter. [Vol. I RP 30-33, 43-51]. Bartley saved all the letters and birthday card and when she came to visit in April, she gave the letters to Dixie and the birthday card to Amy both of whom read the correspondence from Madrid. [Vol. I RP 30-33, 43-51, 60-61]. There was a no contact order in place prohibiting Madrid from contact with Amy Paulk. [Vol. II RP 58-60, 72].

On May 15, 2006, a phone was made to Dixie Paulk-Madrid's home, and when she answered the phone she realized it was Madrid calling her. [Vol. I RP 51-53, 62-63].

Madrid did not testify at trial.

D. ARGUMENT

- (1) RCW 26.50.110(1) IS AMBIGUOUS AS TO WHETHER A GROSS MISDEMEANOR VIOLATION OF A NO CONTACT ORDER REQUIRES "AN ACT OR THREATENED ACT OF VIOLENCE" WITH THE RESULT THAT MADRID'S CONVICTIONS PURSUANT TO THIS STAUTE MUST BE REVERSED AND DISMISSED.

When interpreting a statute, the court must give effect to the plain meaning of the statutory language. State v. Radan, 98 Wn. App. 652, 657, 990 P.2d 962 (1999). A court may not engage in statutory construction if the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d

125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court's notions of what is good policy, recognizing the principle that "drafting of a statute is a legislative, not judicial function." State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court's goal in statutory interpretation is to identify and give effect to the Legislature's intent, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), *review denied*, 145 Wn.2d 1013 (2001); if the language of a statute is unambiguous, the language of the statute is not subject to judicial interpretation. Id. When the legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.2d 1216 (2002). Under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App. at 358.

RCW 26.50.110, the statute under which Madrid was charged and convicted, provides in pertinent part:

Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within a specified distance of a location, or of a provision of a foreign protection order specifically indicating

that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor....

[Emphasis added].

RCW 10.31.100 provides in pertinent part:

- (2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:
 - (a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person...

[Emphasis added].

In reading RCW 26.50.110 it becomes apparent that an ambiguity exists in that there are two possible meanings as to what constitutes a gross misdemeanor violation of a no contact order. The statute could be read to mean that a gross misdemeanor violation of a no contact order requires “acts or threats of violence” given RCW 26.50.110’s reference to RCW 10.31.100 or the statute could be read to mean that no such requirement is necessary. Given these two possible readings of the

language of RCW 26.50.110, under the rule of lenity, the statute must be read in favor of Madrid i.e. that in order for him to be found guilty of gross misdemeanor violation of a no contact order an act or threat of violence was required. There was no such act or threat in any of the contacts with the result that Madrid's convictions must be reversed and dismissed.

- (2) MADRID MAY NOT BE CONVICTED OF SEVEN COUNTS OF GROSS MISDEMEANOR VIOLATION OF A NO CONTACT ORDER (COUNTS I, III, IV, V, VII, VII, AND IX) WHERE THE "UNIT OF PROSECUTION" FOR VIOLATION OF A NO CONTACT ORDER GIVEN THE FACTS OF THIS CASE ALLOWS FOR ONLY ONE CONVICTION.

The double jeopardy principles embodied in Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution¹ protect a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002) (*citing State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, *reviewed denied*, 143 Wn.2d 1009 (2001) (*citing*

¹ These two constitutional clauses provide the same protection. In re Personal Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

RAP 2.5(a) and State v. Adel, 136 Wn.2d at 631. In order to resolve whether double jeopardy principles are violated when a defendant is convicted of multiple violations of the same statute, a court must determine what “unit of prosecution” the legislature intends to be the punishable act under the statute. State v. Westling, 145 Wn.2d at 610. The “unit of prosecution” for a crime may be an act or a course of conduct. State v. Root, 141 Wn.2d 701, 710, 9 P.3d 214 (2000).

Recently, the State Supreme Court has determined the “unit of prosecution” for robbery. State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005). In Tvedt, the Supreme Court defined the “unit of prosecution” for robbery as “each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against that person’s will.” State v. Tvedt, 153 Wn.2d at 714-715. Once the “unit of prosecution” is determined, a factual analysis is necessary to decide whether, under the facts of the case, more than one “unit of prosecution” is present. State v. Bobic, 140 Wn.2d 250, 266, 996 P.2d 610 (2000). Multiple prosecutions are proper only where the facts of the case support multiple “units of prosecution” committed. Id. Applying this framework, the State Supreme Court concluded:

The legislature has defined the crime of robbery as both a crime against property and a crime against the person. The “unit of prosecution” must encompass both a taking of property and a

forcible taking against the will of the person from whom or from whose presence the property is taken. Accordingly, a conviction on one count of robbery may result from each separate taking of property from each person; however, *multiple counts may not be based on multiple items of property taken from the same person at the same time, nor may multiple counts be based on a single taking from or from the presence of multiple persons even if each has an interest in the property.*

[Emphasis added]. State v. Tvedt, 153 Wn.2d 720.

Applying the State Supreme Court's reasoning in Tvedt to the instant case, Madrid's convictions for gross misdemeanor violation of a no contact order in Counts I, III, IV, V, VII, VIII, and IX all involving letters he wrote to Dixie Paulk-Madrid constitute a single crime. These convictions were based on the single act of Dixie Paulk-Madrid receiving a number of letters at one time. Given the Tvedt definition of "unit of prosecution" for robbery—it does not matter if multiple items are taken as this constitutes a single act of robbery—a similar "unit of prosecution" definition should apply to violation of a no contact order, i.e. in order to have multiple counts of this crime there must be separate contacts at different times. Madrid argued this point in a post-trial motion for arrest of judgment, which the trial court denied. [CP 269-275; 1-19-07 RP 3-15]. It was error for the trial court to do so and this court should find that Madrid can only be convicted of one count of gross misdemeanor

violation of a no contact order regarding the letters written to Dixie Paulk-Madrid which she received in a single packet at one time.

(3) MADRID WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO ARGUE STATUTORY AMBIGUITY AND DOUBLE JEOPARDY/"UNIT OF PROSECUTION" FOR THE REASONS SET FORTH ABOVE.²

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

² It has been argued in the preceding sections of this brief that the issues can be raised for the first time on appeal. This portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

Assuming, *arguendo*, this court finds that counsel waived the errors claimed and argued in the preceding sections of this brief by failing to argue statutory ambiguity (Madrid's counsel merely made a pre-trial Knapstad motion) and by failing to argue "unit of prosecution"/double jeopardy in his post-trial motion for arrest of judgment, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to make these arguments given the significant practical effect on the number of crimes for which Madrid could be convicted, if any, as set forth above.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that Madrid would have been convicted of fewer crimes, if any, for the reasons set forth in the preceding sections, and had counsel made the proper arguments, the outcome would have been different.

E. CONCLUSION

Based on the above, Madrid respectfully requests this court to reverse and dismiss his convictions.

DATED this 23rd day of August 2007.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 23rd day of August 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Jeffrey P. Madrid
DOC#
Thurston County Jail
2000 Lakeridge Drive S.W.
Olympia, WA 98502

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

Signed at Tacoma, Washington this 23rd day of August 2006.

Patricia A. Pethick
Patricia A. Pethick

T/c # 061010667

BY _____
STATE OF WASHINGTON
CLERK OF COURT
946 III WASHINGTON
COUNTY CLERK