

NO. ~~35-110-1-H~~ 36050-1

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN M. HINRICHSEN,

Appellant.

KSC

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

The Honorable Theodore Spearman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Mr. Hinrichsen committed the crime of violation of a no contact order.

2. The state failed to prove beyond a reasonable doubt that Mr. Hinrichsen was convicted of two predicate violations of a no contact order as set forth under RCW 26.50.110 and therefore failed to prove that he was guilty of a class C felony.

Issues Pertaining to Assignment of Error

1. Did the state fail to prove beyond a reasonable doubt that Mr. Hinrichsen committed the crime of violation of a no contact order?

2. Did the state fail to prove beyond a reasonable doubt that Mr. Hinrichser was convicted of two predicate violations of a no contact order as set forth under RCW 26.50.110 and therefore failed to prove that he was guilty of a class C felony?.

B. STATEMENT OF THE CASE

1. Procedural Facts

Ryan Hinrichsen was charged by amended information with one count of violation of a no contact order under RCW 26.50.110 and one count of obstructing a law enforcement office under RCW 9A.76.020(1).

CP 39.1 Mr. Hinrichsen was tried by a jury, Judge Theodore Spearman presiding. CP 59. Mr. Hinrichsen's half time motion to dismiss was denied. RP 239, 251. 2Mr. Hinrichsen was convicted as charged. CP 49. This timely appeal follows. CP 62.

2. Substantive Facts

On July 1, 2006, officer Jeffrey Inklebarger of the Bremerton police department responded to a 911 call regarding a dispute at 1509 8th street in Bremerton. RP 85-86, 93. Without objection from the defense Inklebarger informed the jury that he was "familiar with the residence". RP 96. Inklebarger encountered Beverly Hinrichsen, whom he described as evasive. RP 97.

Mrs. Hinrichsen told Inklebarger that she loaned a man named David \$30 dollars and had retained an item of his property as collateral. RP 167-69. On July 1, 2006 David returned to Mrs. Hinrichsen's residence to retrieve the item but had not returned the \$30. An argument ensued and David shoved Mrs. Hinrichsen. Id. A neighbor, Ella Rae called 911 after hearing a loud argument and seeing the tops of two heads over the fence in Mrs. Hinrichsen's yard. RP 218, 225. Rae did not see the people arguing but just

1 CP refers to the clerk's papers designated from Kitsap Superior Court cause number 06-1-01000-9.

2 RP refers to the verbatim report of the trial proceedings under Kitsap Superior Court cause number 06-1-01000-9.

assumed that the male voice belonged to Ryan Hinrichsen, Mrs. Hinrichsen's son. RP 225. Rae also believed that she heard 2 male voices arguing. RP 225. Rae told Detective Butler who interviewed her that she never saw Ryan Hinrichsen arguing with Mrs. Hinrichsen, but she just assumed that one of the voices was his. RP 231.

Inklebarger left Mrs. Hinrichsen's residence and went to look for David. RP 104. He saw Ryan Hinrichsen walking down Veneta Street near 8th Street about 30 minutes later. RP 105. After initially seeing Hinrichsen, Inklebarger ran a computer search on Hinrichsen which revealed a no contact order with his mother and her residence. RP 105. Inklebarger drove off another 100 yards and then looked in his rear view mirror and saw Hinrichsen running. Inklebarger activated his lights and siren and then lost sight of Hinrichsen. RP 109-112.

Ryan started to run when he saw the officer because he thought he might have had a warrant. RP 107, 259. Ryan had been on his way from his residence 5 blocks away to Noah's Ark for a milkshake. RP 258-59. Ryan had a broken jaw at the time and put his hand on his face to check his jaw. RP 266. Inklebarger took this movement as Ryan trying to hide his face from him. RP 105. About 10 minutes later, after losing sight of Hinrichsen, Inklebarger saw him as he was jogging across Hewitt at 6th. Inklebarger activated his lights and siren and again lost sight of Hinrichsen who continued to run. RP 112-13.

Officer Dana Clevenger located Hinrichsen on Hewitt St. RP 127. Inklebarger testified that he arrived after Clevenger made contact with Hinrichsen and he testified that he assisted Clevenger with the arrest and had to twice tell Hinrichsen to get to the ground before he complied. RP 130. Clevenger testified that she spotted Hinrichsen shortly after hearing a dispatch describing him. Clevenger drove up next to Hinrichsen and told him to stop and he immediately complied. RP 149. Contrary to Inklebarger's account of the arrest, Clevenger took Hinrichsen into custody without incident and later turned him over to Inklebarger when he arrived. RP 150. Hinrichsen was compliant with Clevenger who was the first officer to make verbal or physical contact with him.

Clevenger measured a distance from about 30 feet from where Hinrichsen was initially seen to his mother's house. Clevenger estimated the distance to be 99.5 feet plus the additional 30 feet. RP 132, 155.

C. ARGUMENT

HINRICHSEN WAS CONVICTED OF
FELONY VIOLATION OF A NO
CONTACT ORDER BASED ON
INSUFFICIENT EVIDENCE TO
ESTABLISH GUILT BEYOND A
REASONABLE DOUBT.

a. Standard of Proof

For a conviction to be upheld the State must prove every essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); State v. Acosta,

101 Wn.2d 612, 615, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983); State v. Green, 94 Wn.2d 216, 224, 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 there from." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The jury decides what evidence is credible. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court defers to the jury 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).

In the instant case, the state failed to prove that Mr. Hinrichsen knowingly violated a no contact order and the state failed to prove that Mr. Hinrichsen's two prior violations of a no contact order were legally sufficient to elevate the current offense to a felony.

b. Insufficient Proof of Presence At Residence

To establish guilt as charged in the instant case, the state had to prove beyond a reasonable doubt that Mr. Hinrichsen knowingly violated a condition of a no contact order issued under RCW 26.50.110. One of the conditions disallows any actual in person contact or entry into the area within 500 feet of Mrs. Hinrichsen's home at 1509 8th Street in Bremerton. RP 163-65.

No one ever saw Hinrichsen at his mother's home on July 1, 2006. Rather a neighbor, Rae heard voices arguing and saw the tops of two persons' heads, and she just assumed one of the people was Hinrichsen. RP 225. Rae did not testify to recognizing Hinrichsen's voice, she simply made an unfounded assumption. When the police contacted Ms. Rae, she affirmed that she never saw Hinrichsen arguing with his mother but just assumed that the male voice was his. RP 231-32.

When viewing the evidence in the light most favorable to the state, one person's assumptions do not rise to the level of proof beyond a reasonable doubt. Salinas, 119 Wn.2d at 201.

- c. Insufficient Proof That Hinrichsen Knowingly Violated a Provision of the No Contact Order. Of By Entering Within 500 Feet of The House

The state also charged Hinrichsen in the alternative manner of committing a violation of a no contact order by “ knowingly violating the restraint provisions therein, . . .and/or by knowingly coming within, or knowingly remaining within a specified distance of a location...” CP 38.

The facts established that Inklebarger saw Hinrichsen walking down the street within the 500 ft exclusion limit set forth in the no contact order. RP 132. There was however no evidence that Hinrichsen knowingly came within or remained within the 500 foot area. Rather the evidence established that Hinrichsen was walking down the street, he saw the police, continued walking for 100 yards and then began to run. 105, 107, 111. Inklebarger lost sight of Hinrichsen several times and assumed that Hinrichsen continued to run within the 500 foot exclusion area. RP 129, 132.

Hinrichsen was walking down the street on July 1, 2006, on his way to get a milkshake. RP 259. Hinrichsen admits that he ran from the police because he thought he might have an outstanding warrant. Id. However Hinrichsen did not go to his mother’s house and he did not know that he was walking within 500 feet of his mother’s house. RP 257. Hinrichsen admitted to being aware of the no contact order and its provisions, but he did not have any notion of what 500 feet looked like from the street. RP 258.

When viewing this evidence in the light most favorable to the state, the state failed to prove beyond a reasonable doubt that Hinrichsen knowingly entered into or remained in an exclusion area. Salinas, 119 Wn.2d at 201.

c. Prior No Contact Order Violations
Legally Insufficient

Hinrichsen does not dispute the validity or existence of the no contact order issued under Kitsap County Superior Cause number 05—01521-5 (revoked 2 months after this incident). CP 39. Hinrichsen does however dispute the sufficiency of the evidence to elevate to a felony the offense committed under RCW 26.50.110. To elevate a violation of RCW 26.50.110 to a felony, the state must prove beyond a reasonable doubt that the defendant has 2 prior convictions for violating a no contact order issued under RCW 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34. RCW 26.50.110. RCW 26.50.110 subsection (5) specifically enumerates the exclusive list of no contact orders that if violated, may be used to elevate a misdemeanor offense to a felony. RCW 26.50.110(5). This subsection provides in full:

(5) A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in

RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in *RCW 26.52.020*. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

RCW 26.50.110(5).

To establish the predicate violations, the state relied on many prior violations of no contact orders issued under RCW 10.14.040 by the Bremerton municipal court. RP 191-198; Exhibits 3,4,5,6,7,,9,10. Violations of RCW 10.14 do not however elevate to a felony a crime committed under RCW 26.50.110. State v. Arthur, 126 Wn. App. 243, 108 P.3d 169 (2005). Arthur, is squarely on point.

In Arthur, the state presented three prior convictions of no contact orders. Two of the orders did not specify the statute that was violated; and the third order listed a violation of RCW 9A.46.080 and RCW 9A.76.040, neither of which are listed in RCW 26.50,110. The state also presented a statement of defendant on plea of guilty to the third violation that admitted a violation of RCW 10.99. The Court held that none of the violations were legally sufficient to raise RCW 26.50.110 to a felony because the state

failed to prove that Arthur was charged with and convicted of a violation listed in RCW 26.40.110. State v. Arthur, 126 Wn. App. at 246-47.

In the instant case, the trial court knew the specific RCW 10.14 that Hinrichsen was previously convicted of and acknowledged that it was not listed in RCW 26.50.100. RP 203. The court erroneously chose to rely on the dockets to the prior convictions set forth in Exhibits 8, 14, and 17 which showed that the prior convictions were of a domestic violence nature under RCW 10.99..

In Arthur, this Court specifically held that unless the defendant was charged with and convicted of violating RCW 10.99, or another listed RCW, the violation of the no contact order could not be used to elevate to a felony a crime committed under RCW 26.50.110.

In State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003), review denied, 151 Wn.2d 1039, 95 P.3d 352 (2004). Division One held that the judge and not the jury was charged with determining if prior violations of no contact orders were sufficient to raise the felony crime charged under RCW 26.50.110. Carmen, 118 Wn. App. at 657.

In Arthur, this Court held that the judge merely reviewed the evidence of prior convictions to determine if they were legally appropriate to be submitted to the jury as priors enumerated under RCW 26.50.110, but that the jury and not the judge had to determine whether the prior

convictions raised the charged offense to a felony. Arthur, 126 Wn, App. at 249-50.

The trial court in Carmen reviewed the municipal court files to determine that the no contact orders were violations under RCW 10.99 and then made a finding of fact that the prior orders established the element of two prior violations of a no contact order issued under an enumerated statute (RCW 10.99) in RCW 26.50.110. The Court in Carmen held that the trial court did not err by finding, rather than allowing the jury to find that Carmen committed the priors under RCW 10.99. Carmen, 118 Wn. App. at 657.

This Court in Arthur, held that the Court in Carmen erroneously relieved the state of proving violations of an enumerated statute under RCW 26.50.100, rather than initially determining if the prior violations were admissible as evidence under RCW 26.50.110 and then giving them to the jury to decide whether the defendant was convicted of two predicate felonies. Arthur, 126 Wn, App. at 249-50.

In the instant case, the trial court erred as a matter of law in allowing the prior convictions to go to the jury to satisfy the elements of RCW 26.50.110 because as set forth in the statute and in Arthur, the violations of the municipal court orders issued under RCW 10.14 could not satisfy an element of the crime charged under RCW 26.50.110..

Hinrichsen could not be guilty of a felony under RCW 26.50.100, unless he was charged with and convicted of violating a no contact order issued one of the enumerated statutes. State v. Arthur, 126 Wn. App. at 246-47. Hinrichsen was not convicted of violating a statute listed in RCW 26.50.110, rather he violated RCW 10.14 which is not one of the statutes enumerated.

When viewing the evidence in the light most favorable to the state, the evidence failed to satisfy the stringent burden of proof beyond a reasonable doubt that Hinrichsen twice violated a no contact order issued under RCW 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34. RCW 26.50.110. Hinrichsen's conviction must be reversed. Salinas, 119 Wn.2d at 201.

D. CONCLUSION

Mr. Hinrichsen requests this court reverse and dismiss his conviction for felony violation and or misdemeanor violation of a no contact order because the state failed to present proof beyond a reasonable doubt that he committed the underlying predicate crimes and also failed to present sufficient evidence of commission of the misdemeanor.

DATED this 29th day of August, 2007.

Respectfully submitted

LAW OFFICES OF LISE ELLNER

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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Ryan Hinrichsen Ryan M. Hinrichsen DOC# 888220 MCC Wash State Reform Unit P.O. Box #77 Monroe, WA 98272 a true copy of the document to which this certificate is affixed, on August 27, 2007. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature