

NO. 36985-1

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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

MARK RUESGA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 07-1-01909-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant could be convicted of two counts of violation of a protection order when, the victim with whom he was restrained from contacting testified that he would come and go from her house everyday over a period of a week.

B. STATEMENT OF THE CASE.

1. Procedure

On April 9, 2007, the Pierce County Prosecutor's Office filed an information charging MARK ANTHONY RUESGA, hereinafter "defendant," with two counts of violation of a court order (Counts I and II) and two counts of furnishing liquor to a minor (Counts III and IV) in Cause No. 07-1-01909-1. CP 1-4. The matter went to trial in front of the Honorable Thomas P. Larkin on August 23, 2007. RP 4.

On August 28, 2007, the State dismissed the two counts of furnishing liquor to a minor based on parental exception. CP 10-12. Also, the State amended the information changing the date of Count I of violation of protection order from April 8, 2007 to April 7, 2007 and Count II of violation of protection order from April 1-7, 2007 to April 1-6, 2007. CP 7-9.

On August 29, 2007, the jury found the defendant guilty on both counts of violation of a protective order. CP 35-36. The jury also found

by special verdict that defendant had twice been previously convicted for violating a no contact order and that he and Ms. Lowell were members of the same family or household. CP 37. Sentencing followed on November 9, 2007. RP 191; CP 38-108. With five previous felony convictions, defendant had an offender score of 7, including the two current convictions. RP 191-192. The standard range was 51 to 60 months. RP 191-192. The court sentenced defendant to 56 months. RP 198.

Defendant filed this timely appeal. CP 109-180.

2. Facts

On April 8, 2007, Ms. Deanna Lowell made a call to 911 then hung up the phone. RP 49. The operator called back and dispatched two police units. RP 61. Ten minutes later, Pierce County Sheriff's Deputies Tara Simmelink-Lovel and Anthony Messineo arrived at the home of Ms. Lowell. RP 58-59.

As the deputies approached, Ms. Lowell, who was standing on the porch, yelled something about not knowing if "he" was still in the house. RP 62-63. The deputies confirmed through LESA Records that there was a protection order protecting Ms. Lowell. Then the deputies entered the house to determine if any other individuals were present. RP 65. They found defendant lying on the floor of a bedroom downstairs. RP 65-66.

As defendant was prohibited by the protection order from being near Ms. Lowell, Deputy Messineo arrested defendant. RP 107-108, 67.

During the trial, Ms. Lowell testified that defendant had been living with her for 3 weeks previously. RP 50. She also testified that defendant had left the house everyday during the week preceding April 8, 2007. RP 51.

C. ARGUMENT.

1. DEFENDANT'S TWO CONVICTIONS FOR VIOLATION OF A PROTECTION ORDER DO NOT VIOLATE DOUBLE JEOPARDY BECAUSE HE WOULD LEAVE THE PROTECTED ZONE AND RETURN RESULTING IN MULTIPLE UNITS OF PROSECUTION.

The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prohibits the imposition of multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980); *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). The federal and state double jeopardy clauses provide identical protections. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Although the protection itself is constitutional, it is for the Legislature to decide what conduct is criminal and to determine the appropriate punishment. *Calle*,

125 Wn.2d at 776. The court's role is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.* When the trial court has imposed cumulative punishment without legislative authorization, it has also violated the separation of powers doctrine. *See State v. Frohs*, 83 Wn. App. 803, 810, 924 P.2d 384 (1996).

“[W]hen a defendant is convicted of multiple violations of the same statute, the double jeopardy question focuses on what ‘unit of prosecution’ the Legislature intends as the punishable act under the statute.” *Westling*, 145 Wn.2d at 610. The “unit of prosecution” is the legislatively defined scope of the criminal act. *State v. Adel*, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). This inquiry is resolved by examining the relevant statute in order to ascertain what the Legislature intended. *Id.*; *In re Davis*, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). If the statute is ambiguous as to the unit of prosecution, “the ambiguity should be construed in favor of lenity.” *Adel*, 136 Wn.2d 629 at 634-35. Absent a threshold showing of ambiguity, a court derives a statute's meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

The first step in determining legislative authorization for punishment is to review the statutes proscribing the offenses and then look to the facts of the case for an individual evaluation. The relevant statute states:

(1)(a) Whenever an order is granted under this chapter ... and the respondent or person to be restrained knows of the order, **a violation of any of the following provisions of the order is a gross misdemeanor**, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;

(ii) A provision excluding the person from a residence, workplace, school, or day care;

(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location; or

(iv) A provision of a foreign protection order specifically indicating that a violation will be a crime.

RCW 26.50.110 (emphasis added).

The language of the statute focuses on prohibiting actions or contact with a protected party. Likewise, in the Senate Bill Report, it states “This bill standardizes the penalties for violating the various kinds of protective orders so that it is the conduct violating the order that causes the penalty, not the type of case from which the order derived.” SB 6400 Report, 56th Leg. (Wa. 2000). The court has “consistently interpreted the legislature’s use of the word “a” in criminal statutes as authorizing punishment for each individual instance of criminal conduct.” *State v. Ose*, 156 Wn.2d 140, 147, 124 P.3d 635 (2005). So, the “a” preceding “violation” in section (1)(a) means each time new contact is made, it constitutes a separate offense. As such, the legislature is criminalizing the violations of such actions or contact with the protected party indicating

that each time new contact is made after previous contact was severed through time or distance, a new unit of prosecution exists.

Courts initially look to the nature of what the statute is trying to prohibit in order to assess how varying breaks in time and distance should be treated. Some situations involve conduct that has an ongoing element where breaks in time and or distance do not necessarily give cause for a new unit of prosecution.

For instance, in *State v. Varnell*, the defendant solicited an undercover detective to commit four murders. *See State v. Varnell*, 162 Wn.2d 165, 171, 170 P.3d 24, (2007). The court determined that such conduct constituted a single unit of prosecution because the focus of the statute was to protect against the enticement of solicitation as opposed to the criminal object or objects. *Id.* Thus, although the single conversation had a potential future result of four different victims that could be interpreted as constituting four separate crimes, the conversation itself constituted a single unit of prosecution because the actions stemmed from a single act of solicitation. *Id.* It is the act of solicitation that is the central aim of the statute the legislature is trying to criminalize and the number of victims is secondary. *Id.* at 169.

In contrast, the court in *State v. Walker* determined that the defendant's three counts of conspiracy constituted three separate units of prosecution because defendant's agreement to sell drugs occurred between himself and three separate persons at different times and different places.

State v. Walker, 24 Wn. App. 78, 81, 599 P.2d 533 (1979). In determining this, the court looked to the test established in *Blockburger v. United States* which found “If the individual acts are prohibited, then each act is punishable separately. If a course of action is prohibited, then there can be but one penalty.” *Id.* (citing *Blockburger v. United States*, 284 U.S. 299, 301, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). In the present case, the legislature has criminalized each violation of a protected zone and so based on the analysis in *Walker*, each violation should be punished separately.

To determine the unit of prosecution, courts also look to the zone of safety and “as long as the defendant remains within the prohibited zone, he continues to violate the no-contact order.” *State v. Spencer*, 128 Wn. App. 132, 137, 114 P.3d 1222 (2005). Thus, the unit of prosecution for violation of a protection order is that a prohibited person may be charged for each time he enters the protective zone. As long as he remains within the prohibited zone it is a continuing offense. But, if he leaves the protected zone and later re-enters it again, it becomes a new unit of prosecution.

In his brief, defendant does not advocate for a unit of prosecution different than the one proposed by the State. Rather, defendant is contesting the sufficiency of the evidence to support two convictions under this unit of prosecution. Defendant’s argument is that there is insufficient evidence that he ever left the protected zone during a three

week period. Defendant contends that there is no specific evidence to show that defendant left the prohibited zone so as terminate of the first unit of prosecution and allow for a new unit of prosecution to begin. Thus, defendant argument regarding his two convictions being a violation of double jeopardy is really closer to an argument about sufficiency of evidence.

Courts have stated that in making such a determination about “whether a defendant’s acts are a continuing course of criminal conduct, the facts must be evaluated in a commonsense manner.” *Spencer* at 137. In the present case, when asked by the prosecutor if defendant had left her house at all in the preceding week (April 1-7), Ms. Lowell testified that the defendant left every day, saying specifically “he went.” RP 51. Had she been with him, as the defense suggests is a possibility, her statement would have been “we left.”

Also, when a protection order exists, “although a zone of safety is created around an individual, it is the person that is being protected, not the zone.” *State v. Spencer*, 128 Wn. App. 132, 137, 114 P.3d 1222 (2005). The court is specifically concerned about the contact made with an individual when determining what constitutes protection and when that protection is violated. Looking at Ms. Lowell’s statement, it is evident she is saying he alone left the house. As such, Ms. Lowell’s testimony, looked at in commonsense terms, makes it clear that at some point (if not everyday) during April 1st and 7th the two parties were separated.

Because the court emphasizes that the individual is being protected and it is clear that there was a point of separation between the defendant and Ms. Lowell during the week, the defendant did leave the zone of protection. By re-entering the zone of protection, the defendant committed at least two violations of the protection order. This sequence constitutes, at the very least, two units of prosecution and as such, the defendant's two convictions do not violate double jeopardy.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions.

DATED: JUNE 17, 2008.

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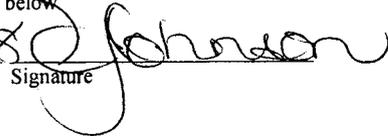
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STATE OF WASHINGTON

BY _____
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/17/08 
Date Signature