

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  \_\_\_\_\_  
DEPUTY

NO. 38467-1-II  
Cowlitz Co. Cause NO. 07-1-01557-1

## **COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

Respondent,

v.

**MICHAEL JEROME GEMAR,**

Appellant.

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### **BRIEF OF RESPONDENT**

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## **I. ISSUES**

1. Is there sufficient evidence that the appellant knowingly violated a no contact order issued pursuant to RCW 10.99 and had at least two prior convictions for violating a no contact order under RCW 26.50.110?
2. Is the State required to prove the statutory authority for the no contact order that was the basis for the appellant's prior no contact order convictions as they relate to the charge of felony violation of a no contact order pursuant to RCW 26.50.110(5)?

## **II. SHORT ANSWERS**

1. Yes. When the evidence is viewed in the light most favorable to the State, there clearly exists sufficient evidence to affirm the appellant's felony conviction for violation of a no contact order as he knowingly violated a no contact order issued pursuant to RCW 10.99 and had at least two prior convictions for violating a no contact order under RCW 26.50.110.
2. No. The State is not required to prove the statutory authority for the no contact order that was the basis for the appellant's prior no contact order convictions as they relate to the charge of felony violation of a no contact order pursuant to RCW 26.50.110(5).

## **III. FACTS**

Bill Thiery is married to Pamela Thiery, the appellant's sister, and helps Pamela Thiery care for Joyce Gemar who suffers from Dementia and Alzheimer. Joyce Gemar is the mother of Pamela Thiery and the appellant. From August 2002 to February 2008, Joyce Gemar resided alone at 937 Olsen Road in the City of Longview, County of Cowlitz, and State of Washington. Ms. Gemar has six children, four sons and two daughters. Her four sons are Patrick, Kelly Jo, Michael Jerome, and

Danny. Her two daughters are Pamela and Jenny Lynn. The appellant is the middle child, was born on May 27, was 55 years old on the date of his trial, and stayed with Ms. Gemar off and on until 2006. In 2006, the family obtained a restraining order prohibiting him from having contact with Ms. Gemar. Transcript Volume I, p. 108-117, 126, and 128-131, and Transcript Volume II, p. 240 and 260-261. The appellant is the only person in the family restrained from having contact with Ms. Gemar. Transcript Volume II, p. 206 and 212.

On December 11, 2007, Pamela Thiery and Bill Thiery visited Joyce Gemar at her residence. When they arrived at her residence, Ms. Thiery saw the appellant on the couch in the living room inside the residence. He was startled by Ms. Thiery, acknowledged he was not supposed to be at the residence, and indicated that he was at the residence because his girlfriend was sick. Mr. Thiery called 911 to report his violation of a protection order. Transcript Volume I, p. 118-121, 125, and 132-135. Joyce Gemar was sleeping in her bedroom and was not suffering from any emergency. Transcript Volume I, p. 122-123, 133-134, and 136-137. Ms. Thiery told the appellant to leave, and he went into the garage to gather his belongings. Seven to ten minutes later, an officer arrived and contacted the appellant inside the residence. Transcript Volume I, p. 122-124, and 134-136, and Transcript Volume II, p. 177-178.

Deputy Jeremy Tonissen of the Cowlitz County Sheriff's Office responded to the scene and contacted the appellant inside the garage. Transcript Volume II, p. 175-178. He admitted to going to Ms. Gemar's residence to pick up some of his belongings and to knowing that there is an order prohibiting him from being at the residence. He did not express any concerns for Ms. Gemar's well being and did not request any assistance on her behalf. Deputy Tonissen arrested and transported him to the jail. Transcript Volume II, p. 179-182.

At the time of the incident, the appellant had more than two prior convictions for violation of a no contact order under RCW 26.50.110. On December 5, 2006, he violated a protection order and was charged in cause number 67405, exhibit # 7, with violating a protection order under RCW 26.50.110. He was convicted of the charge, exhibit # 8. Transcript Volume II, p. 182-184. On December 20, 2006, and January 9, 2007, he again violated a protection order and was charged in cause number 67247, exhibit # 9, with two counts of violation of a protection contact order under RCW 26.50.110. On April 19, 2007, he was convicted of both counts, exhibit # 10. Transcript Volume II, p. 185-186. On January 28, 2007, he again violated a protection order and was charged in cause number 66892, exhibit # 11, with violation of a protection order under

RCW 26.50.110. On January 29, 2007, he was convicted of the charge, exhibit # 12. Transcript Volume II, p. 187-188.

On February 24, 2007, he twice violated a protection Order. In cause number 07-1-00392-1, exhibit # 13, he was charged with two counts of violation of a protection order under RCW 26.50.110(1) and the amended information specifically stated that the two violations were for “a valid protection order pursuant to Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in Joyce Gemar vs. Michael Gemar, Cause No. 06-2-01965-3.” He pled guilty to both counts under RCW 26.50.110(1), exhibit # 14. Transcript Volume II, p. 189-191. On May 30, 2007, the judge issued a no contact order in the case, exhibit # 15, pursuant to RCW 10.99 prohibiting him from contacting Joyce Gemar and entering or knowingly coming within 100 yards of her residence or 937 Olsen Road, Longview, WA 98632. The order expired on May 17, 2009. Transcript Volume II, p. 192-193.

In the present case, the appellant was charged with one count of felony violation of a no contact order under RCW 26.50.100(5) and his jury trial commenced on October 22, 2008. Transcript Volume I, p. 98-99 and 156-157. Throughout his jury trial, he never challenged the validity of the underlying no contact order that was the basis for his prior convictions and never challenged his identity as it applies to his prior convictions for

violation of a no contact order. Transcript Volume I, p. 99-100 and Transcript Volume II, p. 182-191 and 304-307. He acknowledged having nine prior violations and claimed he violated the no contact order out of necessity to protect Joyce Gemar. Transcript Volume II, p. 233 and 255-256.

At the start of his trial, the appellant stipulated to his identity as it applies to the no contact order and his prior convictions for violation of a no contact order. He signed and entered the stipulation, but the stipulation was never read to the jury. Transcript Volume I, p. 99-100 and 107-166, and Transcript Volume II, p. 167-307.

The Stipulation reads as follows:

THIS MATTER having come before the undersigned judge of the above-entitled court and the State being represented by MIKE NGUYEN, Deputy Prosecuting Attorney for Cowlitz County, and Defendant being present and represented by TERRY MULLIGAN, and the Defendant stipulates and agrees that:

1. The Michael Jerome Gemar, DOB 5/27/53, as identified in any court admitted Judgment and Sentence is the defendant, Michael Jerome Gemar, DOB 5/27/53, in the Superior Court of Washington for Cowlitz County Cause Number 07-1-01557-1.

2. The Michael Jerome Gemar, DOB 5/27/53, as identified in any court admitted Domestic Violence No-Contact Order is the defendant, Michael Jerome Gemar, DOB 5/27/53, in the Superior Court of Washington for Cowlitz County Cause Number 07-1- 01557-1.

3. The Michael Jerome Gemar, DOB 5/27/53, as identified in any court admitted Complaint/Citation, Information, or Amended Information is the defendant, Michael Jerome Gemar, DOB 5/27/53, in the Superior Court of Washington for Cowlitz County Cause Number 07-1-01557-1. CP 41-42.

The jury found him guilty of violating a no contact order issued pursuant to RCW 10.99 on December 11, 2007, and found in the Special Verdict Form that he had at least two prior convictions for violating a no contact order. Transcript Volume II, p. 317-320. On October 30, 2008, the appellant was sentenced to 41 months in prison and appealed his conviction. Transcript Volume II, p. 340-341.

#### IV. ARGUMENTS

- 1. THE APPELLANT'S CONVICTION FOR FELONY VIOLATION OF A NO CONTACT ORDER SHOULD BE AFFIRMED BECAUSE HE KNOWINGLY VIOLATED A NO CONTACT ORDER ISSUED PURSUANT TO RCW 10.99 AND HAD AT LEAST TWO PRIOR CONVICTIONS FOR VIOLATING A NO CONTACT ORDER UNDER RCW 26.50.110.**

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221 (1980). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638 (1980). A reviewing court need not itself be convinced beyond a reasonable doubt, State v. Jones, 63 Wn.App. 703,

708, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992), and 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, 415-416, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. 63 Wn.App. at 707-708. All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. State v. Joy, 121 Wn.2d 333, 338-39 (1993).

The evidence indicates beyond a reasonable doubt that the appellant knowingly violated a no contact order issued pursuant to RCW 10.99 and had at least two prior convictions for violating a no contact order under RCW 26.50.110. On December 11, 2007, the appellant was found inside Joyce Gemar's residence located at 937 Olsen Road, Longview, WA 98632. He admitted to going to the residence to pick up his belongings and to knowing that there is an order prohibiting him from being at the residence or from having contact with Joyce Gemar. Transcript Volume I, p. 118-121, 125, and 132-135, and Transcript Volume II, p. 179-182, 233, and 255-256. From August 2002 to February 2008, Joyce Gemar resided alone at 937 Olsen Road, Longview, WA 98632. The appellant is Ms. Gemar's middle child and is the only person

in the family who is restrained from having contact with her. Transcript Volume I, p. 108-117, 126, and 128-131, and Transcript Volume II, p. 206 and 212.

At the time of the incident, there was an active no contact order issued pursuant to RCW 10.99 in cause number 07-1-00392-1, Exhibit # 15. The no contact order prohibited Michael Jerome Gemar, DOB 5/27/53, from having contact with Joyce Gemar and from entering or knowingly coming within 100 yards of her residence or 937 Olsen Road, Longview, WA 98632. Transcript Volume II, p. 192-193 and Exhibit # 15. The appellant has a middle name of Jerome, was born on May 27, and was 55 years old on the date of his trial, October 22, 2008. Transcript Volume I, p. 98-99, 108-117, 126, 128-131, and 156-157, and Transcript Volume II, p. 232. During his trial, he claimed to have violated the no contact order out of necessity to protect Joyce Gemar and acknowledged having nine prior violations. Transcript Volume II, p. 233 and 255-256.

In cause number 07-1-00392-1, Michael Jerome Gemar, DOB 5/27/53, was charged with two separate and distinct counts of violation of a protection order under RCW 26.50.110(1). The amended information, Exhibit # 13, specifically stated that the two violations were for “a valid protection order pursuant to Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in Joyce Gemar vs. Michael Gemar, Cause No. 06-

2-01965-3.” Michael Jerome Gemar, DOB 5/27/53, pled guilty to both counts under RCW 26.50.110(1), exhibit # 14. Transcript Volume II, p. 189-191.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State’s favor, there is sufficient evidence for the jury to find that the appellant had two or more prior convictions for violating a no contact order. Not only does the appellant have the same name and date of birth as the Michael Jerome Gemar, DOB 5/27/53, in cause number 07-1-00392-1, but he also admitted to knowingly violate a no contact order that prohibits him from having contact with Joyce Gemar and from being at her residence located at 937 Olsen Road, Longview, WA 98632. From August 2002 to February 2008, Ms. Gemar resided alone at her residence. The appellant is Ms. Gemar’s middle child and is the only person in the family who is restrained from having contact with her. Based on the totality of the evidence, it was reasonable for the jury to infer and find that the appellant is the Michael Jerome Gemar, DOB 5/27/55, in cause number 07-1-00392-1 and that he has at least two prior convictions for violating a no contact order under RCW 26.50.110.

Furthermore, the appellant’s claim of insufficiency of evidence is not persuasive because he had stipulated to his identity and waived his right to put the State to its burden of proof on that issue. In State v. Wolf,

134 Wash.App. 196 (2006), the defendant was charged with Unlawful Possession of a Firearm in the First Degree. Prior to voir dire, he stipulated to having previously been convicted of a serious offense. During trial, no one read his stipulation to the jury and the jury convicted him of the charge. The defendant appealed and argued there was insufficient evidence to show that he had a prior serious offense conviction because the State failed to offer his stipulation into evidence. Id. at 198-199. The court upheld his conviction because his stipulation waived his right to put the State to its burden of proof on the element of having previously been convicted of a serious offense. Id. at 199-200.

As in Wolf, the appellant signed and entered a written stipulation to his identity as it applied to the no contact order and his prior convictions for violation of a no contact order. The stipulation was never read to the jury, but it is still a waiver of his right to put the State to its burden of proof that he was the defendant identified in the court admitted informations/citations and judgment and sentences. Therefore, his conviction should be affirmed because there is sufficient evidence to show that he knowingly violated a no contact order issued pursuant to RCW 10.99 and had at least two prior convictions for violating a no contact order under RCW 26.50.110.

**2. THE STATE IS NOT REQUIRED TO PROVE THE STATUTORY AUTHORITY FOR THE NO CONTACT ORDER THAT WAS THE BASIS FOR THE APPELLANT'S PRIOR NO CONTACT ORDER CONVICTIONS AS THEY RELATE TO THE CHARGE OF FELONY VIOLATION OF A NO CONTACT ORDER PURSUANT TO RCW 26.50.110(5).**

Pursuant to RCW 26.50.110(1)(a), “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 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.”

Pursuant to RCW 26.50.110(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.”

In State v. Carmen, 118 Wn.App. 655 (2003), the defendant was convicted of felony violation of a no contact order contrary to RCW 26.50.110(5). In Carmen, the State submitted certified copies of the judgment and sentence to establish the defendant’s two prior convictions. The certified copies of the judgment and sentence did not show that the order violated in both cases was issued pursuant to RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020. Id. at 657-658. In Carmen, the Division I of the Court of Appeals held that the State was only required to prove that the defendant had two prior convictions under RCW 26.50.110 and was not required to prove the statutory authority for the court order that was the basis for the defendant’s two prior convictions. Id. at 656-658 and 663-664.

In State v. Arthur, 126 Wash.App. 243 (2005), the defendant was also convicted of felony violation of a no contact order contrary to RCW 26.50.110(5). In Arthur, the State also submitted certified copies of the

judgment and sentence to establish the defendant's prior convictions. The judgment and sentences submitted did not show that the order violated was issued pursuant to RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020. In Arthur, defendant's conviction was reversed because the court disagreed with the court in Carmen and held that the State was required and failed to prove the statutory authority for the court order that was the basis for the defendant's two prior convictions. Id. at 244-248.

In State v. Miller, 156 Wash.2d 23 (2005), the defendant was also convicted of felony violation of a no contact order contrary to RCW 26.50.110(5). In Miller, the Supreme Court of Washington held that "the validity of the underlying no-contact order is not an element of the crime of violating such order." Id. at 32. The Supreme Court of Washington considered the decisions in Carmen and in Arthur and held that "to the extent the cited cases are inconsistent, they are overruled." Id. at 31. In Miller, the defendant's conviction was affirmed because he "has not shown that this order was invalid, deficient, or otherwise inapplicable to the crime charged." Id. at 32.

In State v. Gray, 134 Wash.App. 547 (2006), the defendant was also convicted of felony violation of a no contact order contrary to RCW 26.50.110(5). In Gray, the State admitted certified copies of the

defendant's statement on plea of guilty and judgment and sentence to establish the defendant's two prior convictions. The certified statement on plea of guilty and judgment and sentence did not specify that the order violated in the prior convictions was issued pursuant to RCW 26.50, 10.99, 26.09, 26.10, 26.26, or 74.34, or a valid foreign protection order as defined in RCW 26.52.020. Id. at 550-551. In Gray, the court held that the statutory authority for the no contact order that was the basis for the prior convictions "is not an essential element of the crime to be decided by the jury," id. at 556, and upheld the defendant's conviction. Id. at 556 and 559.

Like the defendants in Carmen, in Miller, and in Gray, the appellant was charged and convicted of felony violation of a no contact order contrary to RCW 26.50.110(5). Like the prosecutors in Carmen, in Miller, and in Gray, the State admitted certified copies of the judgment and sentence to establish the appellant's prior convictions. As in Carmen, in Miller, and in Gray, the State is not required to prove the statutory authority for the no contact order that was the basis for his prior no contact order convictions as they relate to the charge of felony violation of a no contact order pursuant to RCW 26.50.110(5).

In the event that the State is required to prove the statutory authority for the no contact order that was the basis for his prior

convictions, there is sufficient evidence to uphold his conviction. The Amended Information in cause number 07-1-00392-1, exhibit # 13, charged the appellant with two misdemeanor violations of a no contact order and specifically stated that the two violations were for “a valid protection order pursuant to Chapter 7.90, 10.99; 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in Joyce Gemar vs. Michael Gemar, Cause No. 06-2-01965-3.” He pled guilty to both counts of violation of a no contact order under RCW 26.50.110(1), exhibit # 14. Transcript Volume II, p. 189-191.

Admitting the truth of the State’s evidence, exhibit # 13 and exhibit # 14, and drawing all reasonable inferences in the State’s favor, the evidence shows beyond a reasonable doubt that the court order, that was the basis for the appellant’s two prior convictions in cause number 07-1-00392-1, was issued under the prerequisite statutory authority. The certified judgment and sentence, exhibit # 14, establishes beyond a reasonable doubt that he twice violated that court order and was convicted for those two violations prior to December 11, 2007. Therefore, his conviction should be affirmed because the evidence does establish the statutory authority for the no contact order that was the basis for his prior no contact order convictions.

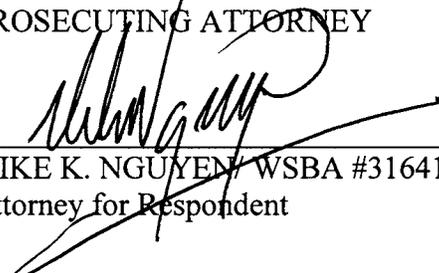
**V. CONCLUSION**

The appellant's appeal should be denied because the State is not required to prove the statutory authority for the no contact order that was the basis for his prior no contact order convictions and there is sufficient evidence to show that the appellant knowingly violated a no contact order issued pursuant to RCW 10.99 and had at least two prior convictions for violating a no contact order under RCW 26.50.110.

Respectfully submitted this 16 day of July 2009.

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Attorney for Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
)  
Respondent, )  
v. ) NO. 38467-1-II  
) 07-1-01557-1  
MICHAEL JEROME GEMAR, ) AFFIDAVIT OF MAILING  
)  
Appellant. )

MICHELLE SASSER, being first duly sworn, on oath deposes and says: That on July 17<sup>th</sup>, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

JOHN HAYS  
ATTORNEY AT LAW  
1402 BROADWAY  
LONGVIEW, WA 98632

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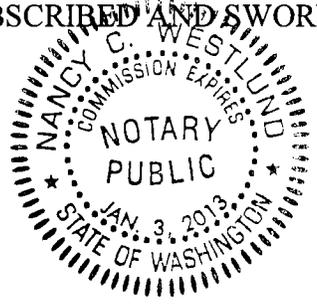
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STATE OF WASHINGTON  
BY DRURY

each envelope containing a copy of the following documents:

- 1. BRIEF OF RESPONDENT
- 2. Affidavit of Mailing.

Michelle Sasser  
MICHELLE SASSER

SUBSCRIBED AND SWORN to before me this 17<sup>th</sup> day of July, 2009.



Nancy C. Westlund  
Notary Public in and for the State  
of Washington residing in Cowlitz  
Co. My commission expires: 1.3.2013