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I. ISSUES

1. 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) ?
2. 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?

II. SHORT ANSWERS

1. 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).
2. 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.

III. FACTS

Bill Thiery is married to Pam Thiery, the appellant's sister, and helps Pam Thiery care for Joyce Gemar who suffers from dementia and requires constant supervision. Joyce Gemar was born on September 11, 1928, and is the mother of Pam Thiery and the appellant. Transcript Volume I, p. 55-58. On January 5, 2008, the appellant visited Joyce Gemar at her residence located at 937 Olsen Road in the City of Longview, County of Cowlitz, and State of Washington. At the time,

there was an active domestic violence no contact order, exhibit # 9, issued pursuant to RCW 10.99 and prohibited the appellant from contacting Joyce Gemar or knowingly coming within 100 yards of 937 Olsen Road, Longview, WA. Transcript Volume I, p. 60, 65-68, 74-79, 81, and 121-122. Bill Thiery called 911 to report the violation of the no contact order. Transcript Volume I, p. 61-62.

Deputy Pat Schallert of the Cowlitz County Sherriff's Office was dispatched to Joyce Gemar's residence. When Deputy Schallert arrived at the scene, she saw the appellant being within 100 yards of the residence, standing at the front doorway of the residence, and being nudged out of the front doorway by Joyce Gemar. Transcript Volume I, p. 65-71, 95-96, and 100. The appellant then got into his vehicle and backed his vehicle down Joyce Gemar's driveway. Deputy Schallert stopped his vehicle and he exited his vehicle and walked back towards the front door of the residence. Deputy Schallert stopped the appellant and arrested him for violation of a no contact order. Transcript Volume I, p. 71-74. The appellant came to Joyce Gemar's residence because he wanted to see her and to get his stuff. He knew he was not supposed to be at her residence because there is an active no contact order protecting Joyce Gemar from him. Transcript Volume I, p. 79-82 and 104-105.

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 20, 2006 and January 9, 2007, he violated a no contact order protecting Joyce Gemar from him. In cause number 067247, exhibit # 3, he was charged with two counts for violation of a no contact order under RCW 26.50.110. On April 19, 2007, the appellant was convicted of both counts in cause number 067247, exhibit # 4. Volume I, p. 85-87 and 121-122.

On January 28, 2007, the appellant again violated a no contact order between Joyce Gemar and himself. In cause number 66892, exhibit # 5, he was charged with violation of a no contact order under RCW 26.50.110 and the criminal citation referenced Violation Protection Order in cause number 06-2-01965-3. January 29, 2007, he was convicted of the violation of a no contact order charge under RCW 26.50.110, exhibit # 6. Transcript Volume I, p. 87-89 and 121-122.

On February 24, 2007, the appellant twice violated the no contact order involving Joyce Gemar. In cause number 07-1-00392-1, exhibit # 7, he was charged with two counts of violation of a no contact 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.” The appellant pled guilty to both counts of violation of a no contact order under RCW 26.50.110(1), exhibit # 8. Transcript Volume I, p. 89-94 and 121-122.

The appellant was charged with one count of felony violation of a no contact order under RCW 26.50.100(5). He knew there was an active no contact order prohibiting him from contacting Joyce Gemar and admitted to having contact with Joyce Gemar on January 5, 2008. Transcript Volume I, p. 100 and 104-105. He did not personally agree with the terms of the no contact order and felt he was entitled to have contact with Joyce Gemar. Transcript Volume I, p. 104-105. At no time did he challenge the validity of the underlying no contact order that was the basis for his prior convictions under RCW 26.50.110. Transcript Volume I, p. 99-116.

The jury found him guilty of violating a no contact order issued pursuant to RCW 10.99 on January 5, 2008, and found in the special verdict form that he had at least two prior convictions for violating a no contact order. Transcript Volume I, p. 135-138 and 150-151.

On October 30, 2008, the appellant was sentenced to 41 months in prison and appealed his conviction. Transcript Volume I, p. 173-176.

IV. ARGUMENTS

1. **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, the 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).

2. 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. It is undisputed that on January 5, 2008, he knowingly violated an active no contact order that was issued under RCW 10.99 when he visited Joyce Gemar at her residence. Also undisputed is the fact that he had at least two prior convictions for violating a no contact order under RCW 26.50.110. The appellant never challenged the validity of the underlying no contact order that was the basis for his prior convictions. Transcript Volume I, p. 65-71, 74-82, 85-96, and 99-116. As in Carmen, in Miller, and in Gray, the State proved beyond a reasonable doubt that the appellant was guilty of felony violation of a no contact order pursuant to RCW 26.50.110(5) and his conviction should be affirmed.

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 still sufficient evidence to uphold his conviction. The Amended Information in cause number 07-1-00392-1, exhibit # 7, charged the appellant with 2 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.” The appellant pled guilty to both counts of violation of a no contact order

under RCW 26.50.110(1), exhibit # 8. Transcript Volume I, p. 89-94 and 121-122.

Admitting the truth of the State's evidence, exhibit # 7 and exhibit # 8, 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 # 8, establishes beyond a reasonable doubt that he twice violated that court order and was convicted for those two violations prior to January 5, 2008. Therefore, the jury correctly found the appellant guilty of felony violation of a no contact order pursuant to RCW 26.50.110(5) and his conviction should be affirmed.

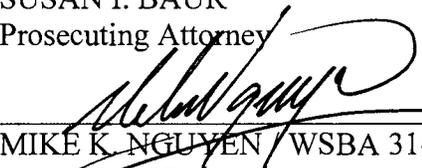
V. CONCLUSION

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 2 day of June, 2009.

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Attorney for Respondent

COURT OF APPEALS
DIVISION II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON,)
)
 Respondent,)
 v.)
 MICHAEL JEROME GEMAR,)
)
 Appellant.)

NO. 38477-9-II
COWLITZ CO. 08-1-00025-4
AFFIDAVIT OF MAILING

MICHELLE SASSER, being first duly sworn, on oath deposes and says: That on June 4, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

MR. JOHN HAYS
ATTORNEY AT LAW
1402 BROADWAY
LONGVIEW, WA 98632

CLERK, COURT OF APPEALS
950 BROADWAY, SUITE 300
TACOMA, WA 98402

each envelope containing a copy of the following documents:

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

Michelle Sasser

SUBSCRIBED AND SWORN to before me this June 4, 2009.

Michelle J. Kasper
Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 10-19-09