

COA No. 49468-0-II

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

---

STATE OF WASHINGTON,

Respondent,

v.

CHAD JOHNSON,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT  
OF CLALLAM COUNTY

The Honorable Christopher Melly

---

APPELLANT'S OPENING BRIEF

---

OLIVER R. DAVIS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. . . . . 1

C. STATEMENT OF THE CASE. . . . . 3

    (1). Charge. . . . . 3

    (2). RCW 10.99 No-Contact Order. . . . . 4

    (3). Trial – Defendant testifies he did not intentionally contact Upcraft. . . . . 4

    (3). Jury prevented from acquitting. . . . . 6

D. ARGUMENT..... 7

    The trial court erred in refusing to utilize the defense proposed instructions, and in instructing the jury; further, Mr. Johnson’s right to Due Process was violated because the State was relieved of its burden of proof..... 7

    (a). *Jury instructions must make the law manifestly apparent to the jury and must not relieve the State of its burden of proof in a criminal case.* . . . . . 7

    (b). *Here, Mr. Johnson objected to the court’s instructions and took exception to the court’s refusal to instruct the jury that conviction required a willful or intentional act.* . . . . . 8

    (c). *The defense proposed instructions were necessary to support Mr. Johnson’s theory of the defense, and to allow him to present a defense, and the court’s instructions relieved the State of its burden of proof.* . . . . . 13

        (i) State v. Clowes. . . . . 16

(ii) State v. Sisemore. . . . . 21

(iii) Mr. Johnson's case. . . . . 24

(d). *Reversal is required*. . . . . 25

E. CONCLUSION. . . . . 26

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 25

State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006). . . . . 21

State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001). 16,17,18,19,21

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) . . . . . 11

State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982).. . . . . 21

State v. Dejarlais, 136 Wn.2d 939, 969 P.2d 90 (1998).. . . . . 14

State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996) . . . . . 8

State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953). . . . . 8

State v. Grant, \_\_\_ Wn. App. \_\_\_, 2016 WL 6649269, Slip Op. at \*3  
(Nov. 10, 2016).. . . . . 27

State v. Holt, 56 Wn. App. 99, 783 P.2d 87 (1989). . . . . 18

State v. Levy, 156 Wn.2d 7091, 132 P.3d 1076 (2006). . . . . 7

State v. Marquez, 131 Wn. App. 566, 127 P.3d 786 (2006). . . . . 7

State v. Nonog, 169 Wn. 2d 220, 237 P.3d 250 (2010). . . . . 16

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). . . . . 26

State v. Sisemore, 114 Wn. App. 75, 55 P.3d 1178 (2002).. . . . 9,21,22

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997). . . . . 8,19

State v. Stein, 144 Wn.2d 236, 27 P.3d 184 (2001).. . . . . 8

<u>State v. Terry</u> , 195 Wash.App. 1017 (Div. 2, 2016) .....	24
<u>State v. Villano</u> , 166 Wn. App. 142, 272 P.3d 255, 256 (2012).....	21
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977).....	25
<u>State v. Ward</u> , 148 Wn.2d 803, 64 P.3d 640 (2003) .....	15
<u>State v. Washington</u> , 135 Wn. App. 42, 143 P.3d 606 (2006)..	24,25,26

STATUTES AND COURT RULES

RCW 9A.08.010. ....	15,17,20
RCW 10.99.020 .....	3,4
RCW 10.99.050(2)(a). ....	9,13,18
RCW 26.50.110 .....	3,4,9,13
Laws 2000 c 119 § 20. ....	13
Laws 2015 c 275 § 15.....	13
RCW 10.73.160(1).. ....	26
RAP 15.2(f). ....	27

PATTERN INSTRUCTIONS

WPIC 10.00. ....	10
WPIC 10.02, comment.....	10
WPIC 10.05.....	20,21
WPIC 36.50. ....	9
WPIC 36.51 .....	10
WPIC 36.51.01 .....	11

WPIC 36.51.02 . . . . . 11

REFERENCE MATERIALS

<https://www.merriam-webster.com/dictionary/contact> . . . . . 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 14. . . . . 8

**A. ASSIGNMENTS OF ERROR**

1. In Chad Johnson's jury trial on a charge of felony violation of a no-contact order, the court erroneously overruled the defense objection to jury instruction 7.

2. The court erroneously overruled the defense objection to jury instruction 8.

3. The court erroneously overruled the defense objection to jury instruction 9.

4. The court erroneously refused the defendant's supplemental proposed jury instruction 1.

5. The court erroneously refused the defendant's supplemental proposed jury instruction 2.

6. The court erroneously instructed the jury in a manner that failed to make the relevant legal standard manifestly apparent to the average lay jury.

7. The court's jury instructions relieved the State of its burden of proof.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Mr. Johnson was charged with violating a no-contact order issued under RCW 10.99 which prohibited contact with Christina

Upcraft. State's witnesses testified that Johnson and Upcraft were seen walking side by side near a Safeway store parking lot. However, Johnson and Upcraft both testified that Upcraft had tried to approach Johnson in the parking lot, and Johnson immediately attempted to flee from her, in fear of violating the order.

Did the trial court erroneously instruct the jury in instruction 7 that the definition of the crime required only that the defendant "knowingly" violate a provision of the no-contact order?

2. Did the trial court erroneously instruct the jury in instruction 8 that, in order to convict, the defendant need only "knowingly" violate a provision of the order, and fail to include all the essential elements of the offense?

3. Where the prosecutor agreed that the defendant must have intentionally contacted Upcraft and proposed a solution in the definition of knowledge in instruction 9, did the court erroneously overrule the defendant's objection to the proposed language, which stated that proof that the defendant acted intentionally satisfies a requirement that the defendant acted knowingly?

4. Did the trial court erroneously refuse to instruct the jury that the definition of the crime required a “willful” violation of the no-contact order?

5. Did the trial court erroneously refuse to instruct the jury that, in order to convict, the defendant must have “intentionally” contacted Upcraft?

6. Did the court erroneously instruct the jury in a manner that failed to make the relevant legal standard manifestly apparent to the average lay jury?

7. Did the court’s jury instructions relieve the State of its burden of proof?

**C. STATEMENT OF THE CASE**

**(1). Charge.** Mr. Johnson was charged with and convicted by a jury of felony violation of a no-contact order, after Christina Upcraft was observed near him outside a Safeway store in Port Angeles. CP 73-74 (information, charging count 1 pursuant to “RCW 26.50.110 & 10.99.020”); CP 75-76 (affidavit). The information also alleged that the offense was against a family or household member, contrary to RCW 10.99.020. CP 73.

**(2). RCW 10.99 No-Contact Order.** Upcraft was protected by a court order issued under RCW 10.99 prohibiting Mr. Johnson from having contact with her. Supp. CP \_\_, Sub # 35 (Exhibit list, exhibit 3 (Domestic Violence No-Contact Order, issued October 20, 2015 under RCW 10.99.040 *et seq.*). The order directed Mr. Johnson, “do not contact the protected person” (and also, “do not knowingly enter, remain, or come within” 1,000 feet of her residence.) Exhibit 3.

RCW 10.99.050 provides that willful violation of a court order is punished under RCW 26.50.110, which makes the conviction a felony if the defendant, *inter alia*, has two prior violations. RCW 10.99.050(2)(a).

**(3). Trial – Defendant testifies he did not intentionally contact Upcraft.** Jessica Guthrie said she saw Christina Upcraft and “David” Johnson strolling in the area of the Safeway parking lot in Port Angeles on May 23, 2016, and decided she would call Port Angeles police. RP 173-82. She also claimed that she observed both of them sitting near a bar or tavern. RP 179-81. Guthrie had not seen Chad Johnson for over a decade; she initially referred to him as “David” Johnson when she was reporting apparent wrongdoing to authorities. RP 182-84.

Port Angeles police officer Jeff Ordoná saw Johnson and Upcraft and described them as within 5 feet of each other and walking side by side. RP 195, 199-201. Officer Ordoná called out Upcraft's name, and he then arrested her on an outstanding warrant. RP 210-11.

Officer Trevor Dropp testified that he saw Johnson and Upcraft walking shoulder to shoulder, and he arrested Johnson after gaining information that Upcraft had a no-contact order against him. RP 236-37; State's exhibit 3.

At trial, Upcraft and Johnson both testified. Upcraft said she saw Mr. Johnson outside the Safeway talking to someone; she tried to get his attention because she still desired a relationship with him. When she tried to follow after Mr. Johnson, he walked away, ignored her, did not talk to her, and did not acknowledge her. RP 307-10. Upcraft stated that she and Mr. Johnson had previously been dating for the past two years. RP 311. She got as close to Johnson as an arm length behind him, whereupon she was arrested. RP 309-10.

Mr. Johnson told the jury that when he noticed Ms. Upcraft near the Safeway, she was walking up to him and calling his name. RP 335-36. When Mr. Johnson saw her, he turned and started walking away; he did not greet Ms. Upcraft, or say anything to her. RP 336.

He knew of the no-contact order, and, not wanting to have a violation, he was fearful. RP 336-37. As Mr. Johnson walked north along Lincoln Street, Ms. Upcraft kept following him and calling his name, and got within a couple of feet of him, but he never even looked back at her again. RP 338-39. The only thing that stopped Ms. Upcraft following him was a police officer who arrived at the scene. RP 340.

**(3). Jury prevented from acquitting.** Officer Dropp testified that Chad Johnson told him that he had been doing everything he could to get away from Upcraft. RP 239.

[H]e indicated to me that he didn't violate any terms of the order because he did not have any contact with her and she was actually following him.

RP 239 (testimony of Officer Dropp). As Mr. Johnson testified at trial, he told the police, "I wasn't walking with her, I was walking away from her." RP 342-43. He testified that he did not intentionally contact Upcraft. RP 343.

Unfortunately, the erroneous jury instructions, and the court's erroneous rejection of Mr. Johnson's proposed instructions, required

the jurors to convict<sup>1</sup> Mr. Johnson even if they believed him. See Part D., infra.

#### **D. ARGUMENT**

**The trial court erred in refusing to utilize the defense proposed instructions, and in instructing the jury; further, Mr. Johnson’s right to Due Process was violated because the State was relieved of its burden of proof.**

*(a). Jury instructions must make the law manifestly apparent to the jury and must not relieve the State of its burden of proof in a criminal case.*

The appellate courts review *de novo* whether the jury instructions adequately state the applicable law, in the context of the jury instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). “[J]ury instructions read as a whole must make the relevant legal standards manifestly apparent to the average juror.” State v. Marquez, 131 Wn. App. 566, 575, 127 P.3d 786 (2006).

If a jury can construe a court’s instructions to allow conviction without proof of an essential element of the crime

---

<sup>1</sup> The jury issued a guilty verdict and found that the offense was against a family or household member. CP 35, 36. Mr. Johnson was sentenced to a prison-based DOSA (drug offender sentencing alternative). CP 9-22.

charged, any resulting conviction violates Due Process. State v. Stein, 144 Wn.2d 236, 241, 246, 27 P.3d 184 (2001) (instructions taken as a whole enabled the jury to convict Stein of conspiratorial liability without finding the necessary element of knowledge); U.S. Const. amend. 14. In fact, manifest constitutional error occurs if the to-convict instruction fails to contain all of the elements of the crime, because that instruction serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)) (citing State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)); U.S. Const. amend. 14; State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996) (omission of element is manifest constitutional error under RAP 2.5(a)(3)).

***(b). Here, Mr. Johnson objected to the court’s instructions and took exception to the court’s refusal to instruct the jury that conviction required a willful or intentional act.***

When jury instructions were discussed, the defense proposed several instructions, objected to certain of the State’s proposed instructions, and took exception to certain instructions ultimately given by the court, and to the court’s failure to give certain of his proposed instructions. RP 322-34.

Mr. Johnson proposed the following definition of the offense, which incorporated the RCW 10.99 provision that “[w]illful violation of a court order issued under this section is punishable under RCW 26.50.110:”

A person commits the crime of violation of a domestic violence no-contact order when he or she **willfully** has contact with another when such contact was prohibited by a no-contact order and the person knew of the order.

(Emphasis added.) CP 57 (defense supplemental proposed instruction 1, defining offense) (citing WPIC 36.50 (Modified by State v. Sisemore, 114 Wn. App. 75 (2002)<sup>2</sup>); RP 330; RCW 10.99.050(2)(a).

The defense also proposed the following to-convict instruction:

To convict the defendant of the crime of violation of a no-contact order, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 23, 2016 the defendant **intentionally** had contact with Christina Upcraft;
- (2) That such contact was prohibited by a no contact order;
- (3) That the defendant knew of the existence of the no-contact order;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

---

<sup>2</sup> State v. Sisemore, 114 Wn. App. 75, 55 P.3d 1178 (2002).

(Emphasis added.) CP 58 (defense supplemental proposed instruction 2 (citing WPIC 36.51 modified by State v. Sisemore, 114 Wn. App. 75 (2002)); RP 331.

The State agreed that the jury must be informed of the dynamic between knowing and intentional contact pursuant to State v. Sisemore. RP 322. As a solution, the prosecutor proposed that the definition of acting “knowingly” could be modified to include the optional, bracketed language in the Washington Pattern Instructions which informs the jury that, when acting knowingly is required to establish an element, “the element was [sic] also established if a person acts intentionally as to that fact.” RP 322-23 (citing WPIC 10.02, 3<sup>rd</sup> ed. 2008, at p. 206). This was wrong, since the bracketed language only means that if a person acted with a *higher* mental state than that required, the required mental state is established.<sup>3</sup>

Mr. Johnson objected, arguing that this proposal was inadequate, and that the defense proposed instructions were necessary (1) to argue his theory of the defense, and (2) to properly instruct the jury as to the requirements for conviction. RP 324-25.

---

<sup>3</sup> See WPIC 10.00, introduction ; WPIC 10.02, comment.

The State argued that the 2008 pattern to-convict instruction for violation of orders, which post-dated Sisemore, did not include any *mens rea* except “knowingly,” and again urged the court that the State’s proposed solution was proper because it told the jury that intentionally is included within the definition of knowingly. RP 325-26 (referencing WPIC 36.51.01 (definition), 36.51.02 (to-convict)). Defense counsel disagreed and noted that the pattern instructions do not necessarily correctly reflect the law. RP 326-27; see, e.g., State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (WPIC 10.51 was an incorrect statement of the law that lowered the State’s burden of proof).

The trial court decided to give Instructions nos. 7 and 8 based on the pattern instructions. RP 328. The court’s definitional instruction defined the crime as follows:

A person commits the crime of violation of a court order when he knows of the existence of no-contact order and knowingly violates a provision of the order, and the person has twice been previously convicted for violating the provisions of a court order.

CP 46 (Instruction no. 7); RP 330-31. And the to-convict instruction read:

To convict the defendant of the crime of felony violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 23, 2016, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
- (5) That the defendant's act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4) and (5) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of the five elements, then it will be your duty to return a verdict of not guilty.

CP 47 (Instruction no. 8).

Mr. Johnson objected and took exception to nos. 7 and 8.<sup>4</sup> RP 331. Mr. Johnson also took exception to the court's refusal to give the aforementioned defense supplemental proposed instructions 1, and 2. RP 330-31. Finally, Mr. Johnson indicated that he objected to the giving of the State's proposed bracketed language from WPIC 10.02 if it was meant as a substitute for his proposed instructions. RP 331; CP 48 (Instruction no. 9).

---

<sup>4</sup> The court had indicated that it would hear objections and take exceptions at the same time. RP 330.

***(c). The defense proposed instructions were necessary to support Mr. Johnson’s theory of the defense, and to allow him to present a defense, and the court’s instructions relieved the State of its burden of proof.***

Mr. Johnson’s no-contact order was issued under RCW 10.99, which provides, “Willful violation of a court order issued under this section is punishable under RCW 26.50.110.” RCW 10.99.050(2)(a); Exhibit 3 (Domestic Violence No-Contact Order, issued October 20, 2015 under RCW 10.99.040 *et seq.*).<sup>5</sup>

The order directed Mr. Johnson, “do not contact the protected person,” and in slightly different language directed, “do not knowingly enter, remain, or come within” 1,000 feet of her residence. (Emphasis added.) Exhibit 3.

---

<sup>5</sup> Under RCW 10.99.050(2)(a), “[w]illful violation of a court order issued under this section is punishable under RCW 26.50.110.” Laws 2000 c 119 § 20. RCW 26.50.110 punishes a violation of RCW 10.99 as a felony offense, based on Johnson’s two prior court order violations, provides,

Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, [etc.], and the respondent or person to be restrained knows of the order, a violation of any of the [restraint provisions prohibiting contact] of the order is a gross misdemeanor, except as provided in subsection[ ] 5) of this section [providing that a] violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99 [etc.], is a class C felony if the offender has at least two previous convictions for violating the provisions of an order[.]

RCW 26.50.110(1)(a); Laws 2015 c 275 § 15, eff. July 24, 2015).

**2. Defendant:**

- A. do not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, or keep under surveillance the protected person.
- B. do not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers.
- C. do not knowingly enter, remain, or come within \_\_\_\_\_ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: \_\_\_\_\_.

(Emphasis added.) Exhibit 3. As the no-contact order explained, it is not a defense to a charge of violating a no-contact order that a contact was invited or allowed. State v. Dejarlais, 136 Wn.2d 939, 943-46, 969 P.2d 90 (1998); Exhibit 3 (and also stating that Johnson had “the sole responsibility to avoid or refrain from violating the order’s provisions.”).

At trial, it was undisputed that there was contact. Mr. Johnson testified that when Ms. Upcraft followed him out of the Safeway parking lot, she was able to get within a couple of feet of him, despite his effort to flee. RP 338-39. Upcraft herself stated that she got as close to Mr. Johnson as an arm length behind him, at which point she was arrested. RP 309-10. As to mental state, Mr. Johnson testified that he did not intentionally contact Upcraft. RP 343.

Q: Did you intentionally have contact with Ms. Upcraft on May 23rd?

A: No.

RP 343.

However, instead of requiring proof that Johnson willfully contacted Upcraft, the instructions, including the definition, and the to-convict instruction required conviction if the jury merely found that the defendant *knowingly* violated a provision of the order. CP 46, CP 47. A person acts *knowingly* if he is “aware” of a fact, a circumstance, or a result; he need not know that the fact, circumstance or result is unlawful or an element of a crime. CP 48 (Instruction no. 9); see RCW 9A.08.010(1)(b). “Contact” was undefined, but a person’s physical proximity of several feet or an arm’s length to another who is protected by a no-contact order is “contact” under any definition; although there are difficult cases. See, e.g., State v. Ward, 148 Wn.2d 803, 815, 64 P.3d 640 (2003) (issue whether telephoning home of protectee and speaking with protectee’s spouse was “contact”) (it was). See also <https://www.merriam-webster.com/dictionary/contact> (defining contact, *inter alia*, as union, conjunction, or tangency).

Here, Mr. Johnson admitted that he knowingly had contact with Ms. Upcraft. He noticed her, and there she was. She got closer, even as he tried to get way from her. He was acutely “aware” of her proximity. RP 336-37; CP 48 (Instruction no. 9); RCW 9A.08.010(1)(b). As he testified, he knew of the no-contact order,

which at provision 2.B, prohibited “contact” with Christina Upcraft. Exhibit 3.

Under the court’s instructions, the jury had a duty to convict Johnson even if it believed that he did not intentionally contact her, and even if he unsuccessfully tried to prevent her from gaining proximity to him. The instructional scheme failed to impose the requirement of a “willful” violation under RCW 10.99. It failed to protect against convictions based on unintended contact. These standards are stated in State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001),<sup>6</sup> a jury trial, and in State v. Sisemore, supra, involving a bench trial in which the trial court is presumed to know the law.

***(i) State v. Clowes.***

In State v. Clowes, a jury trial, the defendant was charged under RCW 10.99.050 with felony violation of a no-contact order. The to-convict instruction, 8, which had not been challenged at trial, read as follows:

To convict the defendant of the crime of violation of a no contact order, each of the following elements must be proved beyond a reasonable doubt:

---

<sup>6</sup> The Supreme Court later disapproved of the Clowes Court’s decision as to adequacy of the information on a different charge of interfering with domestic violence reporting. State v. Nonog, 169 Wn. 2d 220, 230, 237 P.3d 250 (2010).

(1) That on or about the 29th day of May 1999, **the defendant knowingly violated the provisions** of a no contact order, and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any of the elements, then it will be your duty to return a verdict of not guilty.

(Emphasis added.) Clowes, 104 Wn. App. at 943 n. 4 (Clowes instruction 8).

Mr. Clowes' first argument was that the instruction incorrectly used the word "knowingly" where RCW 10.99.050's requirement is that the defendant must have engaged in a "willful" contact with the person. Clowes, 104 Wn. App. at 944 (citing RCW 10.99.050).

The Court held that another instruction, 15, defined "knowingly" as proving "willfully." Clowes, 104 Wn. App. at 944 (citing RCW 9A.08.010(4)). Therefore, the Court reasoned, the use of the word knowingly in the to-convict instruction, 8, without further definition in that same instruction was not *manifest* constitutional error. Clowes, at 944 ("Because clarifying definitions of elements may be contained in separate instructions, the use of "knowingly" without further definition in instruction 8 is not a manifest constitutional error.

See State v. Holt, 56 Wn. App. 99, 106, 783 P.2d 87 (1989)).<sup>7</sup>

Applied to the present case, Mr. Johnson did object to the to-convict instruction, and to the instruction defining the offense. In neither instruction that the court ultimately gave, did the term “willfully” appear, nor did it appear anywhere else. The jury instructions failed to inform the jury of the requirement of willfulness at all, and they were in error. See RCW 10.99.050.

Additionally, Mr. Clowes also argued

that instruction 8 [the to-convict instruction] failed to advise the jury that it had to find that he willfully had contact with Thomas, that a no-contact order prohibited the contact, and that Clowes knew that there was a no-contact order.

Clowes, at 944. As to this argument, the Court ruled, “We agree with his contentions.” Clowes, at 944. The Court reversed Clowes’ conviction, even though another instruction, 7, correctly defined the crime as requiring willful contact:

Although no single instruction need contain a complete statement of the law, the elements instruction serves as a “yardstick” by which the jury measures all the evidence to determine innocence or guilt; thus, it must contain all the essential elements. Here, instruction 8 contains a

---

<sup>7</sup> In its entirety, RCW 9A.08.010(4) provides that a person acts willfully if he “acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.”

single statement as to the elements, “the defendant knowingly violated the provisions of a no contact order(.)” 22. As Clowes argues, the instruction is inadequate because it does not tell the jury that not only must the defendant know of the no-contact order; he must also have intended the contact. Without this information, a jury could convict based upon evidence that a defendant who knew of a no-contact order accidentally or inadvertently contacted the victim. This clearly would not violate RCW 10.99.050.

\* \* \*

Thus, although the trial court correctly defined the offense in instruction 7, we do not require the jury to search outside the elements instruction to supplement the elements outlined there.

(Emphasis added.) (Citations and record cites omitted.) Clowes, at 944-45 (citing, *inter alia*, State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997)). For these reasons, the Clowes Court found that the to-convict instruction was manifest constitutional error under RAP 2.5(a)(3) for failing to set out the essential elements of the crime, and reversed. Clowes, at 945.

In this portion of the decision, the Court, emphasizing the rule that the to-convict instruction is the “yardstick” of the elements, rejected the State’s argument that the correct *mens rea* could be located in instruction 7, which correctly defined the crime as committed “. . . when he or she willfully has contact with another[.]” Clowes, at 943, 945.

The Clowes Court made clear that the jury instructions must ensure that the jury be informed of the need for proof of willful, intentional contact. Regardless of how the instructions accomplish this, it is clear that willfulness, in the form of purposeful or intentional contact, is a Due Process requirement for conviction.

In Mr. Johnson's case, the to-convict instruction suffers from the same deficiency as the Clowes instruction, because in this case it merely states the requirement for conviction, in terms of the mental state for contact, as "knowingly violated a provision of this order[.]" CP 47 (Instruction no. 8).

More importantly, even if it were permissible to require the jury to find or clarify the *mens rea* in the definition of the crime (here, instruction no. 7), that instruction in this case only stated that the crime occurs when the defendant "*knowingly* violates a provision of the order[.]" (Emphasis added.) CP 46 (Instruction no. 7).

Thus, nowhere in the instructions can be found the willfulness language used in the statute, RCW 10.99, or any *mens rea* akin to it. WPIC 10.05, which was not used in this case, does read, "A person acts willfully [as to a particular fact] when he or she acts knowingly [as to that fact]. WPIC 10.05 (2008, at p. 14) (citing RCW 9A.08.010(4)).

But the comment, consistent with the statute, also warns, “Do not use this instruction for criminal offenses that require “willfulness’ to have a meaning greater than knowledge.” WPIC 10.05, comment.

*(ii) State v. Sisemore.*

Subsequently, in Sisemore, which was an appeal from a bench trial, the State had charged Sisemore under RCW 26.50.110 with violation of a no-contact order that had been issued under chapter 10.99 RCW. Sisemore, 114 Wn. App. at 77.

A judge conducting a bench trial is presumed to know and to apply the law, including the correct requirements of proof, without the need of jury instructions. State v. Cantu, 156 Wn.2d 819, 834, 132 P.3d 725(2006), as amended (May 26, 2006); State v. Villano, 166 Wn. App. 142, 144, 272 P.3d 255, 256 (2012).

The Sisemore Court, addressing a sufficiency challenge, first stated that “RCW 10.99.050(2)(a) provides that a ‘[w]illful violation of a court order is punishable under RCW 26.50.110.’ ” Sisemore, 114 Wn. App. at 77. Next, the Court discussed Clowes, and made clear that the legal standard for the bench trial court to apply was the requirement of willful, or purposeful contact, which means intentional contact:

Sisemore contends that the public policy of “preventing convictions of people after accidental or inadvertent

contact,” requires the State to prove that he intentionally contacted Cuny. The statutes, RCW 26.50.110 and 10.99.050, do not specifically require an intentional contact. Rather, the statutory definition states that a person acts willfully if he “acts knowingly with respect to the material elements of the offense [.]” RCW 9A.08.010(4).

In Clowes, we held that “proof that a person acted ‘knowingly’ is proof that they acted ‘willfully.’ ” Clowes, 104 Wn. App. at 943-44, 18 P.3d 596. But we also agreed with Clowes that the elements instruction was flawed because it contained only the single element that “ ‘the defendant knowingly violated the provisions of a no contact order[.]’ ” Clowes, 104 Wn. App. at 944, 18 P.3d 596. We explained that “the instruction is inadequate because it does not tell the jury that not only must the defendant know of the no contact order; he must also have intended the contact.” Clowes, 104 Wn. App. at 944-45, 18 P.3d 596. And, “[w]ithout this information, a jury could convict based upon evidence that a defendant who knew of a no-contact order accidentally or inadvertently contacted the victim. This clearly would not violate RCW 10.99.050.” Clowes, 104 Wn. App. at 945, 18 P.3d 596.

We adhere to our decision in Clowes. A defendant acts willfully if he acts knowingly with respect to the material elements, including the contact element. Thus, Sisemore violated the no contact order if he knowingly acted to contact or continue contact after an original accidental contact. He did not violate the no contact order if he accidentally or inadvertently contacted Cuny but immediately broke it off. In essence, this means Sisemore must have intended the contact. This is consistent with the Supreme Court's definition of “willful” as requiring a purposeful act. State v. Danforth, 97 Wn.2d 255, 258, 643 P.2d 882 (1982).

(Emphasis added.) (Record citations omitted.) Sisemore, 114 Wn. App. 77-78. The Sisemore Court affirmed the bench verdict and rejected the defendant’s sufficiency challenge, because there was

evidence that the police observed Sisemore strolling together with the protectee, Cluny. Id., at 76, 79. However, the Court made clear that the law regarding “willfully” means that purposeful contact with the protectee was required for the bench trial court to convict.

Other cases subsequent to Clowes have relied, to affirm, on the presence of some express language somewhere in the instructions that served to clarify that willful, purposeful or intentional contact is a requirement for violation of a no-contact order. See, e.g., State v. Terry, 195 Wash. App. 1017 (No. 75240-5-1, Div. 2, 2016) (unpublished, cited pursuant to GR 14.1(a) for informational purposes only). In Terry, the Court affirmed because the instructions as a whole required a willful contact, they informed the jury that it is “a defense to the charge of violation of a court order that the contact was not willful,” and they explained to the jury that “[a] person does not act willfully if that person does not knowingly and intentionally maintain contact that started accidentally or by happenstance.” Terry, 195 Wash.App. 1017 (at pp. 2-3) (Emphasis added.) (cited pursuant to GR 14.1(a)).

The Court of Appeals has also applied Clowes and Sisemore in the context of a sufficiency challenge. In State v. Washington, there was a no-contact order against Washington, prohibiting contact with his

wife, Harmoni, but Washington accepted visits from Harmoni while he was in jail, and those visits ended only when jail staff intervened. State v. Washington, 135 Wn. App. 42, 47-48, 143 P.3d 606 (2006). The Court first summarized the law:

As charged here, the crime of willful violation of a court order has three essential elements: “the willful contact with another; the prohibition of such contact by a valid no-contact order; and the defendant’s knowledge of the no-contact order.” State v. Clowes, 104 Wn. App. 935, 944, 18 P.3d 596 (2001). Willfulness requires a purposeful act. State v. Sisemore, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002). “[N]ot only must the defendant know of the no-contact order; he must also have intended the contact.” Clowes, 104 Wn. App. at 944–45, 18 P.3d 596.

State v. Washington, 135 Wn. App. at 48. On the facts of the case, the Court rejected Washington’s argument that the existence of regulations establishing jail control over who visited him rendered the contact “not a result of his willful behavior.” Id., at 48-49.

***(iii) Mr. Johnson’s case.***

Under Clowes and Sisemore, in a jury trial where the law must be made manifestly clear by the instructions, the jury must be instructed that conviction requires that the defendant, to be convicted, must have willfully contacted the protectee, or that the defendant intentionally contacted the protectee. Either is adequate in the instructions. But the presence of neither is inadequate. Although

“intentionally” may be more clear and precise than willfully, it is not incorrect. “Knowingly,” as defined in the case, was incorrect.

The instructions’ use of only the “knowingly” *mens rea* was insufficient. Violations of RCW 10.99 no-contact orders are, by the statute’s plain language and the foregoing case law, criminal offenses that do require willfulness to carry a greater meaning than knowledge. The jury in Mr. Johnson’s case was not correctly instructed as to the requirements for conviction.

***(d). Reversal is required.***

An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless. Stein, 144 Wn.2d at 246 (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). “A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” Wanrow, 88 Wn.2d at 237.

Where there is conflicting testimony on a missing element of the crime, the error is not harmless beyond a reasonable doubt. State v. Stein, 144 Wn.2d at 241 (citing Smith, 131 Wn.2d at 263).

Mr. Johnson's jury instructions, to which he objected, did not make the correct legal standard manifestly apparent, and did not set forth the elements of the offense. The evidence as to whether he did willfully contact Ms. Upcraft was highly controverted. Unfortunately, the jury instructions, as given, and because his proposed instructions were rejected, allowed Mr. Johnson to be convicted based upon proof that Ms. Upcraft was in his close proximity, and that he was aware of that circumstance. His testimony that he did not intentionally contact Ms. Upcraft could do him no good, even if the jury believed him, as it may well have. Reversal is required.

**E. CONCLUSION**

Based on the foregoing, this Court should reverse Mr. Johnson's conviction. If Mr. Johnson does not substantially prevail in the present appeal, he respectfully asks this Court to exercise its discretion under State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016), and, considering the broad policy imperatives regarding costs in criminal cases in general, expressed in State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015), to deny any award of appellate costs under RCW 10.73.160(1).

At sentencing, the court waived all costs except for the mandatory \$500 victim penalty, the \$100 DNA fee, and the \$200 filing fee. CP 15. At the same time, he was found indigent for purposes of appeal. CP 7 (order of indigency). By rule and case law, it is presumed he remains indigent unless circumstances change. RAP 15.2(f); State v. Grant, \_\_\_ Wn. App. \_\_\_, 2016 WL 6649269, Slip Op. at \*3 (Nov. 10, 2016). To counsel's knowledge, there has been no change to the defendant's financial circumstances or future prospects that would rebut that presumption. Chad Johnson asks that this Court exercise its discretion to deny any award of appellate costs, if he does not substantially prevail.

Respectfully submitted this 17TH day of May, 2017.

Respectfully submitted,

s/ OLIVER R. DAVIS.

Washington State Bar Number 24560

Washington Appellate Project

1511 Third Avenue, Suite 701

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-2710

[oliver@washapp.org](mailto:oliver@washapp.org)

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 49468-0-II
	)	
CHAD JOHNSON,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF MAY, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JESSE ESPINOZA, DPA	( )	U.S. MAIL
[jespinoza@co.clallam.wa.us]	( )	HAND DELIVERY
CLALLAM COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA PORTAL
223 E 4 <sup>TH</sup> ST., STE 11		
PORT ANGELES, WA 98362		

[X] CHAD JOHNSON	(X)	U.S. MAIL
315356	( )	HAND DELIVERY
AIRWAY HEIGHTS CORRECTIONS CENTER	( )	_____
PO BOX 2049		
AIRWAY HEIGHTS, WA 99001		

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF MAY, 2017.



X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711

# WASHINGTON APPELLATE PROJECT

May 17, 2017 - 4:15 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49468-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Chad Johnson, Appellant  
**Superior Court Case Number:** 16-1-00225-0

### The following documents have been uploaded:

- 3-494680\_Briefs\_20170517161228D2917868\_5822.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was washapp.org\_20170517\_160039.pdf*

### A copy of the uploaded files will be sent to:

- wapofficemail@washapp.org
- jespinoza@co.clallam.wa.us
- oliver@washapp.org

### Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Oliver Ross Davis - Email: oliver@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 701  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20170517161228D2917868**