

NO. 49468-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHAD JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00225-0

AMENDED BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the elements jury instruction adopted by the trial court states all the elements of the offense because it requires the State to prove that Johnson knew of the no-contact order and that he knowingly violated a provision of the order and therefore the State was not relieved of its burden to prove all the elements of the offense?

II. STATEMENT OF THE CASE

The State charged the Appellant, Chad Johnson, with the crime of Violation of a No-Contact Order for violating a provision of the order on May 23, 2016. CP 73. The matter proceeded to trial.

State's witness Ms. Guthrie testified (CP 172–193) that on May 23, 2016, she saw two individuals that she believed may have had warrants near the Safeway and Subway stores in Port Angeles. RP 179-180. Ms. Guthrie called law enforcement and kept her eyes on the individuals who she later identified as the Appellant, Chad Johnson, and his former girlfriend, Christina Upcraft. Guthrie testified that she watched them walk through the Safeway parking lot side-by-side. RP 180. Guthrie testified that they sat on a stairs by a tavern side-by-side. RP 180–81, 193.

Officer Ordona testified that on that same date, he responded to Guthrie's call and saw Johnson and Upcraft standing side-by-side behind a

bus stop at the Texaco Station. RP 194–212.

Johnson and Upcraft both testified that Johnson did everything he could to avoid contact with Upcraft and that Upcraft kept following Johnson. RP 306–13, 335–46. Upcraft testified that she never was side-by side with Johnson. RP 309.

At the conclusion of the trial, the State argued that the evidence showed continued side-by-side contact was Johnson walked through Safeway parking lot, as they sat on the stairs, and when Off. Ordonia saw them behind a bus stop at the Texaco Station. RP 378.

The trial court adopted the State's proposed elements (to-convict) instruction No. 8 which was cited from WPIC 36.51.02 as follows:

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 provision 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 one of the five elements, then it will be your duty to return a verdict of not guilty.

CP 47; State's Proposed Instructions to the Jury.

III. ARGUMENT

A. THE COURT DID NOT ERR BY ADOPTING THE STATE'S ELEMENT JURY INSTRUCTIONS NOS. 7 AND 8 BECAUSE THE INSTRUCTIONS ACCURATELY STATE THE LAW AND THEY REQUIRED THE STATE TO PROVE THAT THE DEFENDANT BOTH KNEW OF THE NO CONTACT ORDER AND KNOWINGLY VIOLATED THE ORDER.

1. The State's to convict instruction accurately states the law.

Johnson argues that the State's to-convict instruction erroneously substitutes the *mens rea* of "willfully" or "intentionally" with "knowingly." Therefore, Johnson asserts the State was relieved from its burden of proving an element of the offense, that Johnson willfully or intentionally violated a provision of the no-contact order. Johnson's argument fails under *State v. Sisemore*, 114 Wn. App. 75, 77, 55 P.3d 1178 (2002).

"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)." *State v. Sisemore*, 114 Wn.

App. 75, 77, 55 P.3d 1178 (2002) (citing RCW 9A.08.010(4): “Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.”).

“In *Clowes*, we held that ‘proof that a person acted ‘knowingly’ is proof that they acted ‘willfully.’” *Id.* (citing *State v. Clowes*, 104 Wn. App. 935, 943–44, 18 P.3d 596 (2001) (emphasis added).

“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.” *Sisemore*, Wn. App. at 78.

Here, the State’s elements instructions required the State to prove that Johnson both knew of the existence of the order and that he *knowingly* violated a provision of the no contact order. Therefore, the State’s to-convict instruction accurately states the law because, under *Sisemore* and RCW 9A.08.040 (4), a person acts willfully when they act knowingly. Johnson does not request this Court to overrule *Sisemore*.

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2. **The State's instruction did not relieve the State of its burden of proof of an element of the offense as did the single element instruction in *State v. Clowes* because it required the State to prove that the defendant knew of the no-contact order and also that he knowingly violated the order.**

Johnson, relying upon *State v. Clowes*, argues that the trial court erred by adopting the State's element (to-convict) jury instruction rather than his own. 104 Wn. App. 935, 18 P.3d 596 (2001). Johnson argues that the State's to-convict instruction relieved the State from its burden of proving that Johnson both knew of the no-contact order and also that he knowingly, and thus willfully (*see Sisemore*, at 78), violated the no-contact order.

Johnson's reliance upon *Clowes* is misplaced. The *Clowes* Court addressed Clowes' argument regarding the elements instruction step-by-step. First, the *Clowes* court pointed out that Clowes did not object to the jury instructions and therefore, the Court would only review a claimed error regarding the instructions if the error is a manifest constitutional error. *Clowes*, Wn. App. at 934.

Then, the *Clowes* Court pointed out that it *would not review* an alleged failure to further define "willfully" because Clowes failed to object at trial and failing to define an instruction's individual terms generally is not manifest constitutional error. *Clowes*, 104 Wn. App. at 943.

Next, because "[f]ailing to instruct the jury on an element of the charged crime is such an error," the *Clowes* Court did address Clowes'

assertion “that the trial court incorrectly substituted ‘knowingly’ for the appropriate statutory intent element, ‘willfully.’” *Clowes*, at 943. However, the *Clowes* Court pointed out as follows:

“But proof that a person acted “knowingly” is proof that they acted “willfully.” RCW 9A.08.010(4). And instruction 15 defines “knowingly.” 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).

Id. at 944.

Thus, *Clowes*, did not find fault with the use of the term “knowingly” rather than “willfully” in the elements instruction.

Ultimately, the problem that the *Clowes* Court found in the challenged jury instruction was that it was a *single element instruction* that would allow a jury to find *Clowes* guilty of violating a provision of the no-contact order merely if *Clowes* had *any* contact with the protected party, whether knowingly or not, so long as *Clowes* had knowledge of the order itself. *See Clowes*, 104 Wn. App. at 945. Thus, the instruction in *Clowes* did not make the law manifestly apparent to the jury and the state was relieved from the burden of proving that *Clowes* not only knew of the order, but that that he knowingly violated it as well.

Here, Johnson argues that the element jury instruction suffers from the same problem as in *Clowes*. See Appellant’s Br. at 20. This argument fails

because, unlike the single element instruction at fault in *Clowes*, the jury instruction here required that Johnson know of the order, *and also*, that Johnson knowingly violated the order. *See* CP 47.

Therefore, the elements instruction did not relieve the state of its burden to prove all the elements of the offense.

B. THE ELEMENTS INSTRUCTION DID NOT PREVENT THE JURY FROM ACQUITTING BECAUSE THE INSTRUCTIONS WERE UNDERSTANDABLE AND THE DEFENDANT ARGUED HIS THEORY OF THE CASE.

In *State v. Sisemore*, the Court of Appeals held that, “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.” 114 Wn. App. at 78.

Here, Johnson and his former girlfriend, Christina Upcraft, both testified that Johnson did not willingly have contact with Upcraft and that he kept walking away from her and did not speak with her. Defense counsel presented this as a defense, that the defendant did not knowingly contact Upcraft, that she tried to contact him, and the he simply did everything he could to walk away and avoid contact. RP 385–86.

Johnson argues that the State’s instruction required the jury to convict even if they believed Johnson and Ms. Upcraft because the elements

instruction required in order to convict was that Johnson knew of the order and was aware there was contact. *See* Appellant's Br. at 14–16.

Johnson effectively equates “knowingly violate a provision” with “was aware of contact.” Johnson's argument fails because this equation is incorrect. Johnson, takes the verb “violate,” and substitutes it with the noun “contact.” Then Johnson takes the word “knowingly” to mean to be “aware” and places it before contact such that it is a violation simply to be aware of contact. *See* Appellant's Br. at 15. The jury instruction does not contain such a direction.

Except for the paragraph 1 of the elements instruction, that “there existed a no-contact order,” the jury instruction does not even use the word “contact” at all. CP 47.

Rather, the instruction states: “(2) That the defendant knew of the existence of this order; and (3) That on or about said date, the defendant knowingly violated a provision of this order.” CP 47. The operative word is “violate.” “Violate” in this context is a verb and means “break, disregard.” *MIRRIAM-WEBSTER'S COLLEGIATE DICTIONARY* 1396 (11th ed. 2009). In order to knowingly “violate” a provision of the order, one must knowingly act to contact or continue contact after an original accidental contact. *See Sisemore*, 114 Wn. App. 78. An average juror can understand these instructions. The no-contact order provisions also speak in terms of action

rather than mere awareness.

Here, the no-contact order itself at paragraph 2. B. states:

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.

State's Ex. 3 (emphasis added).

The noun "contact" means "connection, communication." MIRRIAM-WEBSTER'S COLLEGIATE DICTIONARY 268 (11th ed. 2009). The verb "contact" means "to make contact" or to bring into contact" or "to get in communication with." *Id.* The italicized word "*contact*" in this sentence of the order is clearly a verb and not a noun as it is not preceded by "have" such that it would state, "do not have contact." This is played out in the closing arguments as well where the State clearly argues that the evidence shows Johnson knowingly acted to violate the order rather than was simply aware that Upcraft was following him and in close proximity. RP 376–77.

The State pointed out the testimony of Ms. Guthrie that Johnson and Upcraft were walking together side-by-side through the Safeway parking lot and then were later seen sitting side-by-side and next to each other on some steps. RP 376–77. The State also pointed out that Officer Ordon, who responded to Ms. Guthrie's call to dispatch, testified that he saw Johnson and Upcraft standing side-by-side behind a bus stop at the Texaco Station. RP

377. The State argued that “that the defendant knowingly violated a provision of the order by having contact with Ms. Upcraft that day, in the Safeway parking lot, on the stairs, between Second Street -- on Second Street and Lincoln and at the Texaco Station by the bus stop and then walking up First Street.” RP 378.

With the evidence alluded to, a jury could conclude that Johnson knowingly acted to contact or continue contact after it was initiated by Upcraft. Furthermore, Johnson argued his theory before the jury and the jury had the opportunity to consider it. If the jury believed Johnson, then it could have acquitted on the basis that that Johnson did not knowingly violate the provisions of the no-contact order. The jury could have determined that rather than knowingly violate a provision of the order, Johnson did everything to avoid such an action. Johnson’s argument contests the credibility determination by the jury which is not reviewable here.

Therefore, the jury instructions did not require the jury to find Johnson guilty even if they believed him because the instructions require that the defendant knowingly violate a provision of the order rather than merely be aware of contact with the protected party.

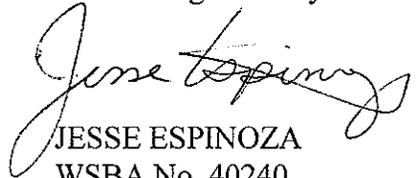
IV. CONCLUSION

The elements jury instruction no. 8 accurately states the law and the

State was not relieved of its burden of proof to prove that the defendant knew of the no contact order and also knowingly violated a provision of the no-contact order. Therefore, the Court should affirm the conviction.

Respectfully submitted this 17th day of July, 2017,

MARK B. NICHOLS
Prosecuting Attorney

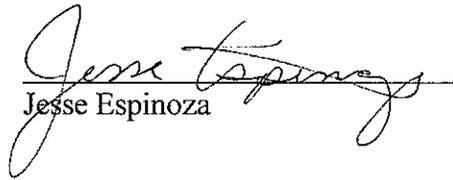
A handwritten signature in black ink, appearing to read "Jesse Espinoza", written in a cursive style.

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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Oliver R. Davis and wapofficemail@washapp.org on July 24, 2017.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

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