

FILED
Court of Appeals
Division II
State of Washington
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No. 53068-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL TIMOTHY GOUVEIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese, Judge
Cause No. 18-1-01497-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted certified court records from 1998 which referenced Gouveia, indicated a plea of guilty to the crime of no contact order violation, and referred to RCW 10.99.040 as the basis of the violation, as evidence of a predicate offense for felony violation of a no contact order.

B. STATEMENT OF THE CASE.

On August 29, 2018, City of Tumwater Police Officer Russell Mize noticed that the appellant, Russell Gouveia, was standing under the hood of a disabled car in which Candi Martel-Gomez was seated. RP 189, 191-93. Officer Mize testified that a protection order was issued on April 20, 2018, which ordered Gouveia not to have any contact with Ms. Martel-Gomez and not to be within 500 feet of her. RP 194-95. The order was in effect at the time of the incident and would expire on April 20, 2023. RP 195. Gouveia told Officer Mize that he was aware of the order and that “they were in love and wanted to get married.” RP 198.

The State charged Gouveia for felony violation of a no contact order alleging that he had at least two prior convictions for violating a no contact order. CP 1. The State offered Exhibit 3, a judgment and sentence, and Exhibit 4, a certified district court print

out. The defense objected to the admissibility of Exhibit 4 but, Exhibit 3 was admitted without objection. RP 218.

During pretrial motions in limine, Gouveia opposed the admission of Exhibit 4 on the basis that it was not competent evidence of a conviction for violation of a protection order due to the ambiguity of the phrase "charge 1." RP 35-40. The trial court raised the question "if there was any charge other than . . . the no-contact order violation, which is the title of the charge that runs throughout this document, wouldn't we see something else there, so not guilty on charge two as well?" RP 38-39. However, defense counsel argued that the words were ambiguous, and the document was irrelevant and inadmissible under ER 401 and ER 403. RP 39-40. The trial court overruled the defense's objections by stating:

This is not to say that I am acting as a fact finder saying that this is evidence of a prior no-contact order violation; rather, this document is sufficient, given the issues in this case, to be presented to the jury for determination about that issue along with any other evidence that is competent that is put forward concerning those issues.

RP 50.

The defense again objected to the admission of Exhibit 4 during trial. RP 218, 226-229. The trial court indicated that the first page of Exhibit 4, a document from the Thurston County District

Court describing the certified record, would not be admitted. RP 225, 235. Defense counsel renewed his relevancy objection, arguing that Exhibit 4 did not contain information as to which section of the RCW the no contact order in the previous conviction was based on. RP 226.

The trial court noted that the issue of admissibility of a prior no contact order “is apparently an unduly complex area of law” and stated:

for this situation whether or not a prior conviction falls within the rubric of the statute such that the determination of whether or not a prior violation of a no contact order falls within these chapters, which is listed in the statute as a requirement for this crime, is a question of law for the court to determine, whereas the question of whether or not these prior violations existed is one for the jury to determine at trial.

RP 229.

The trial court then gave the State the opportunity to find additional evidence in support of Exhibit 4. RP 231. The prosecutor indicated,

I went to District Court and specifically requested a certified copy of the charging document for actually cause no. C6781-TC, which is the 1998 conviction information. That document no longer exists, as we would expect. I then asked did they have information regarding the RCW under which the conviction had entered, and they were able to provide me with a state certified copy of what I am referring to as a case

filing update that does indicate the RCW under which the no contact order conviction was entered.

RP 236.

That document indicated that Gouveia's conviction in 1998 was for a violation of a no contact order and that it was entered under RCW 10.99.040. RP 236; Ex 8.

The defense opposed the admission of Exhibit 8 on the basis of hearsay. RP 237. The trial court admitted Exhibit 8, stating:

And I will just note for the record that it is clear to me from reviewing this record that the information contained therein was contemporaneous to when the information occurred. The date at the top simply reflects when it would have been printed, which was right now, but the information therein in this database that this was printed from is clearly, in my view, that which is contemporaneous to the underlying considerations.

RP 238-39.

The defense counsel moved to dismiss based on the objection to the admissibility of No. 4 and No. 8. RP 240. The trial court denied the motion. RP 240. The certified documents were then admitted for consideration by the jury. RP 242, 243, 244.

At the conclusion of the trial, the court instructed the jury on both felony violation of a protective order and the lesser included gross misdemeanor violation of a no contact order. RP 253-55. The

jury returned a verdict of guilty of felony violation of a no contact order. CP 52; RP 296. With an offender score of 12, Gouveia was sentenced to 60 months incarceration. CP 145.

Gouveia now appeals his conviction and assigns error to the trial court's admission of State's Exhibit 4 and Exhibit 8, as evidence of the prior 1998 conviction. Brief of Appellant, at 2.

C. ARGUMENT.

1. Exhibit 4 and Exhibit 8 supported the trial court's legal conclusion that they constituted evidence of a prior conviction which counted as a predicate offense for felony violation of a no contact order.

A violation of a no contact order becomes a felony offense when the offender has two or more prior convictions for violating a no contact order issued under qualifying provisions:

A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26A, 26.26B, 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, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26A, 26.26B, 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.

RCW 26.50.110(5).

While the "existence" of a no-contact order is an element of the crime of violating such an order, the "validity" of the no-contact order is "a question of law appropriately within the province of the trial court to decide as part of its gate-keeping function." State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827, 828 (2005). Whether the prior conviction met the qualifying statutory requirement is a threshold legal determination to be made by the trial judge. State v. Case, 187 Wn.2d 85, 92, 384 P.3d 1140 (2016). The validity of a predicate offense is reviewed de novo. State v. Carmen, 118 Wn. App. 655, 663, 77 P.3d 368 (2003); *review denied*, 151 Wn.2d 1039 (2004).

State's Exhibit 4 and Exhibit 8 properly established that Gouveia's 1998 conviction was for a no contact order under one of the named statutes, they qualify as evidence for a predicate conviction. The trial court did not err in admitting the documents to the jury.

- a. The documents properly established that the 1998 conviction was for a violation of a no contact order.

While a certified judgment and sentence is good evidence of a prior conviction, the State may introduce other comparable evidence in the absence of a certified judgment and sentence. A

certified copy of the judgment and sentence is not required to prove the existence of a conviction. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 568, 243 P.3d 540 (2010) (holding that DISCIS case management system records used by courts of limited jurisdiction and a DOL record were comparable to a certified judgment and sentence). The certified court records offered in Exhibits 4 and 8 were the type of records that constitute other comparable evidence of a conviction.

On their face, State's Exhibits 4 and 8 are state certified documents that incorporate the docket for Gouveia's District Court conviction in 1998. RP 44; RP 277-78; Ex. 4, Ex. 8. The key issue here is whether they properly established that Gouveia's conviction in 1998 was for violation of a no contact order issued pursuant to one of the statutes listed in RCW 26.50.110(5).

The "Name/Title" of Exhibit 4 is "Gouveia, Russell Timothy, No Contact Order violation." Ex. 4 (comma added). In the search inquiry, the case number was referenced. Ex. 4. "Name" "StID" and "NmCd" were left blank, and the rest of the document, including the title belong to the 1998 court docket. Ex 4. Therefore, the trial court correctly noted, "[the court is] not convinced that [the words "NO

CONTACT ORDER VIOLATION”] is necessarily from 2018. This appears to be the title of this docket.” RP 54.

Exhibit 8 provides additional information regarding the conviction in 1998. It provides a description of the violation, which reads “NO CONTACT ORDER V,” with the indication that the plea to that offense was “G” for guilty. Ex 8. There is only one charge throughout the documents, and the same dates of plea response on February 11, 1998, and finding of judgment on March 18, 1998 in both Exhibit 4 and Exhibit 8 confirmed that they dealt with the same offense and conviction, which is the violation of a no contact order. Ex 4; Ex 8.

Accordingly, State’s Exhibit 4 and Exhibit 8 provided sufficient information that Gouveia was convicted of violation of a no contact order in 1998.

- b. Exhibit 8 established that the conviction was entered under one of the listed statutes.

Only prior convictions that were issued under one or more of the listed statutes in RCW 26.50.110(5) qualify as predicate convictions and are admissible. State v. Carmen, 118 Wn. App. at 664. Exhibit 8 specifically indicates that the conviction was entered under RCW 10.99.040, which fell within the ambit of violations

enumerated in RCW 26.50.110(5). RP 236; Ex. 8. Exhibits 4 and 8, combined, support the trial court's legal conclusion that the prior conviction was valid. The trial court did not err in admitting Exhibit 4 and Exhibit 8 as evidence for the jury.

Information provided in State's Exhibit 4 and Exhibit 8 properly established that the 1998 conviction was for a violation of a no contact order, and the conviction was entered under one of the named statutes in RCW 26.50.110(5). As such, Gouveia's conviction in 1998 qualified as a predicate conviction for the charged offense of felony violation of a no contact order.

D. CONCLUSION.

The trial court properly determined the validity of the prior conviction from Thurston County District Court as a predicate offense for felony violation of a no contact order violation. Exhibits 4 and 8 established a prior conviction for violating a no contact order based on RCW 10.99.040. Gouveia does not assign error to the admission of evidence regarding his other predicate conviction. Gouveia was properly convicted of felony violation of a no contact

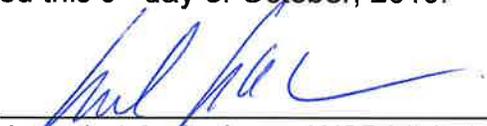
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order. The State respectfully requests that this Court affirm Gouveia's conviction and sentence.

Respectfully submitted this 9th day of October, 2019.



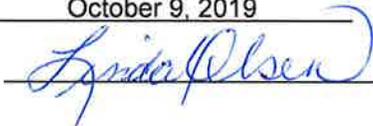
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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: October 9, 2019

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

October 09, 2019 - 1:38 PM

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