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Court of Appeals
Division III
State of Washington

NO. 32054-5-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

STEVEN FLOYD OLSEN,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. Steven Floyd Olsen's conviction for second degree assault precludes his also being convicted of a felony no-contact order offense.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does RCW 26.50.110(4) preclude conviction for a felony no-contact order violation when the individual has been found guilty of second degree assault arising out of the same incident?

STATEMENT OF CASE

On the morning of August 11, 2013 Fred Moore was delivering newspapers on his normal route. He saw a car approach an intersection. The horn was honking and the person in the car was screaming. He followed the car to a local convenience store. (10/09/13 Sosa RP 73, l. 25 to RP 74, l. 2; RP 74, ll. 11-15; RP 74, l. 25 to RP 75, l. 7)

Upon contacting the driver, Terri Wortham, he observed that she was covered with blood and that the driver's side window on the car was broken. She screamed three (3) times "He's going to kill me." Mr. Moore

called 9-1-1. (10/09/13 Sosa RP 75, ll. 22-23; RP 76, ll. 4-8; RP 85, ll. 14-16)

Ms. Wortham and Mr. Olsen had been in an off-and-on relationship for a period of three (3) years. He was currently living with her at 1206 Doolittle Drive in Moses Lake. There was a no-contact order in effect at the time. Mr. Olsen was aware of that no-contact order. (10/09/13 Sosa RP 96. Ll. 3-9; ll. 19-24; RP 97, ll. 19-21; Beck RP 71, ll. 16-18)

Ms. Wortham and Mr. Olsen were involved in an argument earlier on August 11. Mr. Olsen was calling her a cunt, slut, bitch and whore. He jumped on top of her on her bed and pinned her down. He had a knife in his hand. (10/09/13 Sosa RP 102, ll. 2-11; RP 103, ll. 3-13)

Ms. Wortham grabbed an aluminum baseball bat which was next to her bed. She hit Mr. Olsen in the face with it. Mr. Olsen grabbed the bat away from her and began hitting her in her head and back. After that he continued to poke her in the chest with the bat. They both agreed that they needed to go to the hospital. (10/09/13 Sosa RP 105, ll. 1-13; RP 105, l. 19 to RP 106, l. 19; RP 109, ll. 1-10)

As they went outside Ms. Wortham jumped in the car and left before Mr. Olsen could get in. He used the baseball bat to break the window. (10/09/13 Sosa RP 110, ll. 2-5; ll. 7-11)

Deputy Ball arrived at the hospital. He contacted Mr. Olsen. He saw a big cut over his left eye. Mr. Olsen was covered in blood. Mr. Olsen claimed that Ms. Wortham hit him with the baseball bat when he came out of the bathroom. He also stated that Ms. Wortham tried to run him over with the car. (Beck RP 68, ll. 4-13; RP 70, ll. 7-15; RP 71, ll. 1-4)

Deputy Ball also contacted Ms. Wortham at the hospital. She was crying and shaking when he arrived. She was also covered with blood. (Beck RP 65, ll. 6-7; RP 66, ll. 4-7)

When a search warrant was executed at the 1206 Doolittle address, a knife with blood on it was found in the house. The bat was located across the alley from the house behind 1219 Mitchell. (Beck RP 83, ll. 4-7; RP 96, ll. 3-6; RP 147, ll. 19-21)

At the hospital, staples were used to close Ms. Wortham's head wounds. Twelve (12) stitches were used to sew up her lip. Ms. Wortham's lip is still numb and there is a knot on the back of her head. (10/09/13 113, ll. 9-15; RP 114, ll. 5-11)

An Information was filed on August 12, 2013 charging Mr. Olsen with one (1) count of second degree assault (domestic violence) and one (1) count of felony violation of a no-contact order. (CP 1)

The no-contact order was issued by the Grant County District Court on June 21, 2013. It contains the following language:

Willful violation of this order is punishable under RCW 26.50.110. Violation of this order is a gross misdemeanor unless one of the following conditions apply: **Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree** under RCW 9A.36.011 or 9A.36.021 is a class C felony. **Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person** is a class C felony.

(CP 8) (Emphasis supplied.)

Mr. Olsen was found guilty of both offenses following a jury trial.

There was a special verdict as to Count I on the domestic violence tag.

(CP 51; CP 52; CP 53)

A sentencing hearing was commenced on October 22, 2013 and then continued to October 28, 2013. The State presented certified copies of Judgment and Sentences concerning no-contact order violations that were entered on October 16, 2013. (CP 66; CP 73; 10/22/13 Steinmetz RP 15, *et seq.* and 10/28/13 Steinmetz RP 28, *et seq.*)

Judgment and Sentence was entered on October 28, 2013. Mr. Olsen filed his Notice of Appeal on October 30, 2013. (CP 80; CP 98)

SUMMARY OF ARGUMENT

A conviction for second degree assault precludes conviction of a felony no-contact order violation under the facts and circumstances of Mr. Olsen's case.

The conviction for the felony violation of a no-contact order must be reversed and dismissed.

ARGUMENT

RCW 26.50.110(4) provides, in part:

Any assault that is a violation of an order issued under this chapter ... **and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021** is a class C felony, and **any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person** is a class C felony.

(Emphasis supplied.)

Mr. Olsen takes the position that because he was convicted of second degree assault he cannot be found guilty of a felony violation of the no-contact order. The language of RCW 26.50.110(4) is not ambiguous.

A person may be found guilty of a felony no-contact order violation if he and/or she is convicted of third degree assault, fourth degree assault or reckless endangerment. The person cannot be convicted of a felony no-contact order violation if he/she has also been convicted of first degree assault or second degree assault.

Mr. Olsen's position is supported by *State v. Ward*, 148 Wn.2d 803, 814, 64 P.3d 640 (2003), wherein the Court held:

Petitioners also argue that the State was required to prove beyond a reasonable doubt that the assault "[did] not amount to assault in the first or second degree." RCW 26.50.110(4). Due process does require the State to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). In this case, however, the omitted language is not necessary to find felony violation of a no-contact order because the State did not additionally charge first or second degree assault.

Mr. Olsen takes the foregoing excerpt as meaning that if an individual is charged with either first or second degree assault, and is also charged with felony violation of a no-contact order, then a conviction on the assault charge precludes a conviction on the felony no-contact offense.

Mr. Olsen's argument gains further support from *State v. Leming*, 133 Wn. App. 875, 891, 138 P.3d 1095 (2006):

... [T]he State had to prove an assault that did not amount to first or second degree assault.

Moreover, the gravamen of assault in violation of a court order is the defendant's act of violating the order by approaching the victim, **coupled with a lesser degree assault, or conduct that creates a risk of, but does not amount to, a more serious assault.** RCW 26.50.110(4).

(Emphasis supplied.)

The *Leming* Court recognized that the statute contains a prohibition against convicting an individual of both a felony no-contact order violation and either first degree or second degree assault. On the other hand, a conviction of third degree assault, fourth degree assault or reckless endangerment is not prohibited.

Additional support for this argument is contained in the definition of reckless endangerment. RCW 9A.36.050(1) states, in part:

A person is guilty of reckless endangerment when he or she recklessly engages in conduct ... that creates a substantial risk of death or serious physical injury to another person.

The language of RCW 9A.36.050(1) parallels the alternative language under RCW 26.50.110(4).

Criminal statutes are given a literal and strict interpretation. *State v. Abrams*, 163 Wn.2d 277, 284, 178 P.3d 1021 (2008).

A strict and literal interpretation of RCW 26.50.110(4) cannot result in any other conclusion than that a conviction of second degree assault precludes a conviction for felony violation of a no-contact order.

A reasonable interpretation of RCW 26.50.110(4) shows that the Legislature clearly wanted to base a felony violation of a no-contact order on the lesser included offenses of third and fourth degree assault, as well as reckless endangerment. It did not want to include first degree assault and second degree assault.

Even if there is some ambiguity in the statute, Mr. Olsen is entitled to have the rule of lenity applied. The rule of lenity does not include ordinary statutory construction. Ordinary statutory construction supports Mr. Olsen's position. *See: State v. Coria*, 146 Wn.2d 631, 639, 48 P.3d 980 (2002).

CONCLUSION

A person can be convicted of a felony no-contact order violation if the underlying facts support the offense of third degree assault, or the offense of fourth degree assault, or the offense of reckless endangerment.

A felony no-contact order conviction cannot stand if the underlying assault is either first degree or second degree assault.

Mr. Olsen was convicted of second degree assault. This precludes his being convicted of a felony no-contact order violation.

The felony no-contact order violation must be reversed and dismissed.

DATED this 7th day of April, 2014.

Respectfully submitted,

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