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No. 36749-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Frank Willing,

Appellant.

Kittitas County Superior Court Cause No. 19-1-00033-2

The Honorable Judge Scott R. Sparks

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Willing's conviction in count four violated his Fourteenth Amendment right to due process.
2. Mr. Willing's conviction in count four was based on insufficient evidence.
3. The State failed to prove that Mr. Willing violated a provision excluding him from L.K.'s residence or a provision prohibiting him from coming within a specified distance of the residence.

ISSUE 1: A conviction for violating a no contact order requires proof that the accused person violated one of certain enumerated types of prohibitions. Did the State fail to prove that Mr. Willing violated a qualifying provision of the no-contact order?

4. The no contact order that was the subject of count four is unconstitutionally vague.
5. The trial court erred by basing the conviction in count four on an order directing Mr. Willing to "stay away" from L.K.'s home.
6. The trial court erred in entering Conclusion of Law No. 2. CP 77.
7. The trial court erred in entering Conclusion of Law No. 3. CP 77.

ISSUE 2: A vague protection order is not "applicable" to a charge of violating a no contact order. Did the trial court err by finding Mr. Willing guilty based on an order directing him to "stay away" from L.K.'s home?

8. The trial court miscalculated Mr. Willing's offender score.
9. The trial court erred by sentencing Mr. Willing with an offender score of 9+ on count four.

ISSUE 3: The special rules for scoring domestic violence offenses do not apply to crimes that do not involve domestic violence. Did the trial court err by scoring count four as if it were a domestic violence offense?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Delaine Heath is blind and is not able to drive a car. CP 4, 6-7;¹ Ex. 1, pp. 2, 4; RP 44, 47-48. She lives in Easton, and her daughter Kristina Heath² lives in Ellensburg. CP 6, 47; RP 44; Ex. 1, pp. 4-5.

In February of 2019, Kristina was pregnant “and due any day.” Ex. 1, p. 3. She called her mother and asked her to come stay with her to help with her two children. Ex. 1, p. 3.

Heath asked Frank Willing to drive her to her daughter’s house. Ex. 1, pp. 3, 4; RP 44. He agreed, despite the existence of a no-contact order. Ex. 1, p. 4. He later explained that “he feels obligated to help her because she can’t do things herself.” Ex. 1, p. 4; RP 55-59.

Mr. Willing drove Heath to Ellensburg. CP 34-35, 47. He parked his car 20 feet from Kristina’s house, because a court order prohibited him from having contact with Kristina’s daughter, L.K. CP 26, 34. Mr. Willing did not get out of the car or go inside the house. Ex. 1.

Kristina came outside and told Mr. Willing to leave. CP 34. The two exchanged words, and Mr. Willing drove away. CP 34. He was later contacted by police and cited for violating both the order prohibiting

¹ When she addressed the court at Mr. Willing’s sentencing hearing, Heath adopted a written summary prepared by defense counsel. RP 47-48.

² Because both women share the surname “Heath,” Delaine Heath’s daughter will be referred to as “Kristina.” No disrespect is intended.

contact with Heath and the order barring him from contact with L.K. Ex. 1, p. 4. Because he had two prior no-contact order violations, the charges were elevated to felony offenses. CP 1-2.

Mr. Willing pled guilty to three felony counts of violating the order pertaining to Heath.³ CP 37; RP 5-13. He pled not guilty to violating the order pertaining to L.K. (charged in count four of the Information) CP 46. He waived his right to a jury trial on count four and stipulated to the admissibility of the police report and the no contact order.⁴ CP 3-5; RP 14-20.

The order directed Mr. Willing to “stay away from the protected person(s)’s [x] home [x]school...” CP 26. It also prohibited him from contacting L.K. CP 26. The State did not present any evidence suggesting that Mr. Willing contacted L.K. or entered the residence. Ex. 1; RP 21-31. Instead, the State relied on the evidence that he parked 20 feet from the house when he dropped off Heath. Ex. 1; RP 27-28, 31.

Mr. Willing argued that the evidence was insufficient for conviction. CP 4-5; RP 29-30. He also argued that the order to “stay

³ The charges stemmed from the drive to Ellensburg and from two phone messages Mr. Willing left on Heath’s phone. CP 47; Ex. 1.

⁴ The prosecutor did not bring a copy of the order to Mr. Willing’s bench trial. RP 21-25. However, Mr. Willing stipulated that the court could consider the order, which he had appended to a pleading captioned “Defense Brief on Contested Charge and on Sentencing.” CP 3, 26; RP 21-25. The court purported to take judicial notice of the original order, which appeared in a different court file. CP 76.

away” from the home was vague and could not provide the basis for a criminal charge. CP 4-5; RP 29-30.

The trial court concluded that the order was not vague, and that Mr. Willing’s conduct amounted to a violation. RP 31-32; CP 76-77. The court entered written findings but did not conclude that Mr. Willing had violated “[a] provision prohibiting [him] from knowingly coming within, or knowingly remaining within, a specified distance of a location.” RP 31-32; CP 76-77; *see* RCW 26.50.110(1)(a)(iii). Nor did the court find that he had violated a provision excluding him from the residence. RP 31-32; CP 76-77.

At sentencing, Heath spoke in favor of an exceptional sentence below the standard range. RP 44-49. She also adopted a written statement prepared by defense counsel. RP 47-48; *see* CP 6-8.

Heath explained that she had initiated contact and asked for Mr. Willing’s help. RP 44-45, 48-49. She reminded the judge that she is blind, and that she relies on Mr. Willing to help her. RP 44-45, 48-49. According to Heath, Mr. Willing provides “vital assistance” in her daily life. CP 7; RP 47-48. He is “the only person in [her] life upon whom [she] can rely to take [her] to the doctor, to the store, to run errands for [her].” CP 7; RP 47-48. She also told the judge that she’d tried to get the no contact order lifted. CP 7; RP 47-49.

Based on Heath's statements, Mr. Willing asked the court to impose a sentence below the standard range. CP 6. He argued that the court should impose a mitigated sentence because Heath was a willing participant in the violation. CP 6; *see* RCW 9.94A.535(1)(a).

The court refused to impose an exceptional sentence. RP 61-62.

The conviction in count four did not involve domestic violence.⁵ CP 1-2, 49. Despite this, the court calculated the offender score using the special rules applicable to domestic violence offenses. CP 51. The court imposed concurrent 60-month sentences. CP 53.

Mr. Willing appealed. CP 64.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED IN COUNT FOUR.

Mr. Willing dropped off Heath 20 feet from the house where L.K. lived. He did not enter the home, and the no-contact order did not prohibit him from "coming within...a specified distance of a location." RCW 26.50.110 (1)(a)(iii).

The charged crime required proof that Mr. Willing either entered the residence or violated a provision prohibiting him from coming within a

⁵ The three charges to which Mr. Willing pled guilty did involve domestic violence. CP 1-2, 49.

specified distance of the home.⁶ RCW 26.50.110 (1)(a). Because the State failed to prove either alternative, the evidence was insufficient. The conviction in count four must be reversed and the charge dismissed with prejudice.

A. The State failed to prove any violation of RCW 26.50.110 (1)(a) because it did not show that Mr. Willing entered the residence or violated a provision prohibiting him from coming within a specified distance of the house.

Due process requires the State to prove beyond a reasonable doubt all facts necessary for conviction. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Here, the State failed to prove the offense charged in count four.

A conviction for violating a no contact order requires proof that the accused person knowingly violated “any of the following provisions” of the order. RCW 26.50.110(1)(a). Five types of provisions are listed; only two are relevant here.⁷

⁶ There is no allegation that Mr. Willing assaulted, threatened, stalked, or contacted L.K. See RCW 26.50.110 (1)(a)(i). Nor were there any allegations relating to pets or foreign protection orders. RCW 26.50.110(1)(a)(iv) and (v).

⁷ The others include “restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party,” any provision “prohibiting interfering with the protected party’s efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent,” and “[a] provision of a foreign protection order specifically indicating that a violation will be a crime.” RCW 26.50.110(1)(a)(i), (iv), and (v). There is no allegation that Mr. Willing violated any such provisions.

First, a person may be convicted for violating “[a] provision excluding the person from a residence...” RCW 26.50.110 (1)(a)(ii). Mr. Willing was directed to “stay away from [L.K.’s] home.” CP 26. Arguably, this directive excluded him from the residence. However, the evidence shows that Mr. Willing did not enter the residence. Ex. 1. Thus, he did not violate “[a] provision excluding [him] from a residence.” RCW 26.50.110(1)(a)(ii).

Second, a person may be convicted for violating “[a] provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location.” RCW 26.50.110 (1)(a)(iii). The order did not include a provision prohibiting him from coming within “a specified distance” of the house. RCW 26.50.110(1)(a)(iii). Because the order contained no such provision, Mr. Willing did not violate RCW 26.50.110(1)(a)(iii).

The State did not prove the elements required for conviction of RCW 26.50.110 (1)(a). The evidence was therefore insufficient. *Id.* The conviction in count four must be reversed and the charge dismissed with prejudice. *Id.*

B. Mr. Willing did not violate the order, because he “stay[ed] away” from the house.

Mr. Willing was ordered to “stay away” from L.K.’s home. CP 26. Such a directive is not listed within any of the qualifying provisions that could lead to a conviction under RCW 26.50.110 (1)(a). Furthermore, Mr. Willing did not violate the directive to “stay away” from the home. CP 26.

The evidence showed that Mr. Willing dropped off Heath at the house where L.K. lived. Ex. 1. He parked “approximately 20 feet from the residence.” Ex. 1, p. 3. He did not get out of the car or enter the home. Ex. 1, p. 3; RP 27-28.

Because Mr. Willing did not approach the house, he “stay[ed] away” from it. CP 26. Accordingly, the State failed to prove a violation of the order. The conviction in count four must be reversed for insufficient evidence. *Id.* The charge must be dismissed with prejudice. *Id.*

C. The no contact order was unconstitutionally vague because it did not define what it meant to “stay away” from the house.

A no contact order is “not applicable to the charged crime if it is... vague or inadequate on its face.” *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). The vagueness of an order is a question of law, and thus is reviewed *de novo*. *Id.*, at 24, 31; *Afoa v. Port of Seattle*, 191 Wn.2d 110, 119, 421 P.3d 903 (2018) (questions of law reviewed *de novo*).

Here, Mr. Willing challenged the no-contact order on vagueness grounds. CP 5; RP 30. The trial court found that the order “is not vague.”⁸ CP 77. This was error as a matter of law.

To avoid vagueness problems, a court order must provide adequate notice and protect against arbitrary enforcement. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018) (addressing community custody conditions). A “legal prohibition” is vague if it fails to “sufficiently define the proscribed conduct so an ordinary person can understand the prohibition,” or if it fails to “provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *Id.*

The directive to “stay away” from L.K.’s house fails both tests. As Mr. Willing’s attorney pointed out, the order “offers no guidance as to *how far away* he is to stay.” CP 5 (emphasis in original). It leaves open the question of how close a person may come without violating the order:

One block? 50 feet? 20 feet? Or does it merely mean he may not go in the house?
CP 5.

Nor does the order contain sufficient standards to protect against arbitrary enforcement. Instead, it permits the arresting officer to arbitrarily decide how close is too close. Once that initial arbitrary determination is

⁸ The court did suggest that the vagueness issue “should be determined at a different level.” RP 31-32. Presumably, this was a reference to the Court of Appeals.

made by the officer, a judge or jury hearing the case will have another opportunity to arbitrarily decide if a violation has occurred.

The legislature has solved the vagueness problem by requiring that such provisions “prohibit[] a person from knowingly coming within, or knowingly remaining within, a *specified distance* of a location.” RCW 26.50.110(1)(a)(iii) (emphasis added). This is the approach taken in the no contact order regarding Heath. That order prohibited Mr. Willing from coming “within 1,000 ft... of the protected person’s residence...” CP 20.

The order in count four is unconstitutionally vague. It does not provide adequate notice and it leaves Mr. Willing “vulnerable to arbitrary enforcement.” *Id.*, at 682. Because the order is vague, it is “not applicable to the charged crime.” *Miller*, 156 Wn.2d at 31.

Mr. Willing’s conviction in count four violates due process. The conviction must be reversed and the charge dismissed with prejudice. *Id.*

D. The trial court’s findings are inadequate to sustain Mr. Willing’s conviction in count four.

Following a bench trial, “the court shall enter findings of fact and conclusions of law.” CrR 6.1(d). The court must address each element separately, “setting out the factual basis for each conclusion of law.” *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Furthermore, “the findings must specifically state that an element has been met.” *Id.*; *see*

also *State v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001); *State v. Parker*, 81 Wn. App. 731, 915 P.2d 1174 (1996).

In *Alvarez*, for example, the defendant was charged with unlawful possession of a firearm. *Alvarez*, 105 Wn. App. at 218. The trial court “did not make a definitive finding that any person had dominion and control over the room” where the weapon was found. *Id.*, at 223. Based on this, the Court of Appeals determined that the findings were “insufficient to conclude that [the defendant] exercised dominion and control over the premises.” *Id.* The court reversed and dismissed the conviction. *Id.*

Similarly, in *Parker*, the trial court’s oral decision and written findings did not support the court’s conclusion that an assault was committed with sexual motivation. *Parker*, 81 Wn.App. at 737. The Court of Appeals noted that “[i]t may be reasonable to assume from the nature of the contact that it was done with sexual motivation; however, while this court can read the testimony, it cannot weigh the evidence nor enter findings of fact.” *Id.* (internal quotation marks and citations omitted). The *Parker* court dismissed the sexual motivation allegation. *Id.*

Here, as in *Alvarez* and *Parker*, the court did not make definitive findings addressing each of the essential elements required for conviction. There is no finding that Mr. Willing violated “[a] provision excluding [him] from a residence.” RCW 26.50.110 (1)(a)(ii). Instead, the court

found only that he “did go to the protected person (L.K.)’s home.” CP 76. Similarly, there is no finding that he violated “[a] provision prohibiting [him] from knowingly coming within, or knowingly remaining within, a specified distance of a location.” RCW 26.50.110(1)(a)(iii).

Nor does the court’s oral ruling supply the missing findings. RP 31-32; *cf. Parker*, 81 Wn.App. at 737 (noting sufficiency of the trial court’s oral findings as to the underlying offense). In his oral ruling, the judge found that Mr. Willing “did go to the protected person’s home,” and thus “violated that order.” RP 31. The court’s oral ruling did not address the other elements required for conviction. RP 31-32.

The court did not address each element separately and did not specifically state that each element had been met. *Banks*, 149 Wn.2d at 43. Because the findings are insufficient to sustain Mr. Willing’s conviction in count four, the charge must be dismissed. *Alvarez*, 105 Wn. App. at 223.

II. THE TRIAL COURT MISCALCULATED MR. WILLING’S OFFENDER SCORE AND STANDARD RANGE AS TO COUNT FOUR.

A sentencing court acts without authority when it imposes a sentence based upon a miscalculated offender score. *State v. Johnson*, 180 Wn. App. 92, 99-100, 320 P.3d 197 (2014). This Court reviews an offender score calculation de novo. *Id.* at 100. An illegal or erroneous

sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

Here, the trial court erroneously scored count four as if it were a domestic violence offense, using the special scoring rules outlined in RCW 9.94A.525(21). CP 51. The provision applies only when “the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pleaded and proven.” RCW 9.94A.525(21).

The State did not allege or prove that the conviction in count four stemmed from domestic violence. CP 1-2, 49. Accordingly, the special scoring rules do not apply.

Instead, the court should have added one point for each prior and current felony conviction. These included the three current offenses outlined in counts one through three, and Mr. Willing’s 2018 conviction for third-degree assault of a child. CP 49, 51. Thus, as to count four, Mr. Willing should have been sentenced with an offender score of four. RCW 9.94A.525. His standard range is 22-29 months. RCW 9.94A.510; RCW 9.94A.515.

If Mr. Willing's conviction in count four is not vacated, the case must be remanded for correction of the offender score, standard range, and sentence.⁹

CONCLUSION

Mr. Willing was accused of violating a no contact order that is unconstitutionally vague. Instead of ordering him to remain a specified distance from L.K.'s residence, the order directed him to "stay away" from the house. CP 26. This vague language cannot provide the basis for a conviction under RCW 26.50.110.

In addition, the evidence was insufficient to prove that Mr. Willing violated any provision in a manner criminalized by the statute. The State failed to prove (and the court failed to find) that Mr. Willing violated a provision excluding him from the home. Nor was there evidence (or a finding) establishing that he violated "[a] provision prohibiting [him] from knowingly coming within, or knowingly remaining within, a specified distance of a location." RCW 26.50.110 (1)(a)(iii). Because the evidence was insufficient, the conviction in count four must be vacated and the charge dismissed with prejudice.

⁹ This will not alter Mr. Willing's prison term, as he was sentenced to 60 months on counts one, two and three. CP 51.

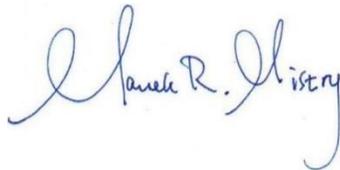
In the alternative, Mr. Willing's sentence in count four must be vacated and the case remanded for resentencing with an offender score of four.

Respectfully submitted on October 7, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 7, 2019.



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