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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 36749-5-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

FRANK JAMES WILLING, JR.,

Defendant/Appellant

Respondent's Brief

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A. IDENTITY OF RESPONDENT

The State of Washington appears through the Kittitas County Prosecuting Attorney's Office.

B. STATEMENT OF RELIEF BEING SOUGHT

The State respectfully requests that this Court deny the Petitioner's request to reverse and remand for dismissal with prejudice his conviction for Violation of a Protection Order under RCW 26.50.110(5).

C. ASSIGNMENTS OF ERROR

1. There was sufficient evidence to prove beyond a reasonable doubt that Mr. Willing willfully violated an anti-harassment order issued on July 9, 2018, which ordered him to stay away from the protected person's home.
2. Appellant cannot show a due process violation when the statute in question does not implicate First Amendment protections, and the law is not vague as applied to the actual conduct of Mr. Willing.
3. Mr. Willing's offender score was incorrectly calculated for his conviction on count four, and should have not have included domestic violence "multipliers."

D. STATEMENT OF THE CASE

Mr. Willing was charged with three counts of Violation of a Protection Order/Domestic Violence involving Ms. Delaine Heath, and one count of Violation of a Protection

Order (not domestic violence) involving her daughter, Kristina's, daughter, L.K., date of birth 08/10/2015.

CP 1-2. Mr. Willing entered pleas of guilty to counts one, two, and three, but elected to proceed to a stipulated facts trial on count four. RP 7-13, RP 16-17, RP 19.

The evidence before the Court in determining Mr. Willing's culpability on count four consisted of an un-redacted copy of an Ellensburg Police Department report for E19-01458, as well as the parties' stipulation to an anti-harassment no contact order involving the minor child, L.K., issued in conjunction with Mr. Willing's sentencing on 18-1-00111-0 on July 9, 2018. RP 18, PLA 01, RP 22.

The police report covers all four of the alleged violations. Specific to count four, the report states the following¹:

I (Ellensburg Police Officer Ryan Potter) learned that Kristina is pregnant and due any day. She called Delaine on 2-2-19 to come to the house and help with her two small kids while she gives birth. Delaine made arrangements to have a friend (Linda Cobs) drive her to Kristina's house. When Delaine showed up, Kristina realized Willing drove her down and was at her residence. Kristina immediately ran outside

¹ The Court was provided an un-redacted copy. Respondent's briefing has utilized a redacted copy which refers to the protected party as "L."

yelling at Willing to leave because he couldn't be around L. Kristina and Willing argued with one another at which point Willing left. Kristina showed me where Willing parked which was approximately 20 feet from the residence. After gathering this information from Kristina and Delaine, I attempted to contact Willing but his phone was shut off.

On 2-6-19 at approximately 1500 hours I spoke to Willing via phone. Willing initially denied having any knowledge about committing the two order violations. When I explained that I knew he had been violating the orders by listening to the voicemail he left, he sighed and then changed his story. Willing admitted to talking with Delaine because she needs his help on a daily basis because she is blind. I learned that Delaine is the one that contacts him, and he feels obligated to help her because she can't do things herself. I told willing (sic) that just because she calls him, does not make it legal for him to talk with her. He acknowledged that, and asked me what he was supposed to do. I told him that if he picked up the phone and heard it was her, he needed to hang up and make a good faith effort to avoid violating the order.

I asked Willing about being at Kristina's residence, violating the order between he and L. Willing denied being there. I again explained that Kristina told me that he was there dropping off Delaine (in violation of that order) at Kristina's house, which violates the order he has with L. Willing got upset and told me that he was asked by Delaine to drive her to Kristina's residence because she needed to help take care of the grand kids (sic). Willing, knowing he can't be at Kristina's house, advised that he wasn't trying to violate the order, and he was just trying to help

Delaine get to Ellensburg from her residence in Easton.

I explained to Willing that he violated both orders, which he acknowledged, but tried to justify it by saying he was asked to do (sic) drive Delaine to the residence.

The anti-harassment order issued in case 18-1-00111-0 provided that Mr. Willing was to stay away from the protected party's (L.K.) home and school. RP 21-22, 28, 31.

E. ARGUMENT

1. APPELLANT ADMITTED THAT HE CONSCIOUSLY CHOSE TO DRIVE MS. HEATH, AN INDIVIDUAL WITH WHOM HE WAS NOT TO HAVE CONTACT, TO HER DAUGHTER'S HOME, WHICH WAS ALSO THE HOME OF THE PROTECTED PARTY, L.K.

Appellant was found guilty by the Court of count four,

RCW 26.50.110(5)² which provides that:

(5) 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

² Appellant premises his argument on RCW 26.50.110(1)(a)(iii), however Mr. Willing was charged under, and found guilty of, RCW 26.50.110(5). BA 4-8, BA 10-12, BA 14, CP 1-2, CP 49-59.

26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

The order which Mr. Willing violated in regards to L.K. was issued under RCW 9A.46.040 in cause number 18-1-00111-0, in which Mr. Willing entered a plea of guilty for Assault of a Child Third Degree in which L.K. was the victim.

RCW 9A.46.040 reads in relevant part as follows:

(1) Because of the likelihood of repeated harassment directed at those who have been victims of harassment in the past, when any defendant charged with a crime involving harassment is released from custody before trial on bail or personal recognizance, the court authorizing the release may issue an order pursuant to this chapter and require that the defendant:

(a) Stay away from the home, school, business, or place of employment of the victim or victims of the alleged offense or other location, as shall be specifically named by the court in the order;

(b) Refrain from contacting, intimidating, threatening, or otherwise interfering with the victim or victims of the alleged offense and such other persons, including but not limited to members of the family or household of the victim, as shall be specifically named by the court in the order.

(2) Willful violation of a court order issued under this section or an equivalent local

ordinance is a gross misdemeanor.³ The written order releasing the defendant shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 9A.46 RCW. A certified copy of the order shall be provided to the victim by the clerk of the court.

There is no reference within the statute to any distance requirement. Similarly, the Washington Pattern Jury Instruction-Criminal 4th WPIC lists the following elements as incumbent upon the State to prove:

WPIC 36.51.04 Violation of a Court Order (RCW Chapters 9A.46 and 10.14)—Gross Misdemeanor—Elements

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

- (1) That on or about **(date)**, there existed a court order for protection;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant willfully [disobeyed] [violated] the court order for protection; and
- (4) That the defendant's act occurred in the [State of Washington] [County of] [City of].

³ It was the "predicate crime" of Assault of a Child in the Third Degree which the State based its request for an Anti-Harassment Order under RCW 9A.46.040 on behalf of L.K. (18-1-00111-0). RP 26, 29. It was Mr. Willing's other convictions which raised the charge in this case to a felony under RCW 26.50.110(5). RP 11-13.

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

Neither the note on use, nor the comment to WPIC 36.51.04, make any reference to a distance requirement.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Moreover, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* See also *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), *State v. DeVries*, 149 Wn.2d

842, 849, 72 P.3d 748 (2003), *State v. Partin*, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977).

Mr. Willing was notified of his obligation to “stay away from the protected person’s home” in open court as part of his sentencing for his assault of that protected person. He acknowledged through the stipulated facts in this case, that he knew of the order, and knew that he was violating the order by going to the home of L.K. It can be reasonably inferred that he also knew of “L.K.’s” presence at the home since he was taking Delaine Heath to the home to assist Kristina with taking care of her children, one of whom is L.K. Appellant argues that because the finding is somewhat discretionary with the fact-finder, his conviction must be dismissed and vacated. Appellant’s argument overlooks the fact that it was incumbent upon the Court to find that Mr. Willing had acted in a “willful” manner and that his violation had not been unintended, inadvertent, unintentional, accidental, or unwitting. Fact-finders are called upon every day to make such discretionary findings, *e.g.*, in a drug possession case, a jury may be asked to find whether or not a defendant constructively possessed a controlled substance.

In its oral ruling, The Court stated:

“Stay away from the protected person’s home.”
It’s exactly what Mr. Willing did not do in this case. He did go to the protected party’s home in an effort to deliver his significant other so she could watch the child. The facts do, you know, establish beyond a reasonable doubt that Mr. Willing violated the order. RP 31.

Written Findings of Fact, Conclusions of Law were also entered acknowledging that the police report had been stipulated to by the parties; that the Court had taken judicial notice of the anti-harassment order preventing Mr. Willing from having contact with L.K. and making three findings:

1. That the facts as set out in State’s exhibit 1, filed with the court and admitted without objection was an un-redacted copy of Ellensburg Police Department Report E19-01458 (nine pages).
2. That the parties stipulated to the existence of an Anti-Harassment Order issued on July 9, 2018, in cause number 18-1-00111-0; and
3. That Mr. Willing did go to the protected person’s home.

In its Conclusions of Law, the Court found that:

1. It had jurisdiction to hear the matter;
2. That the Anti-Harassment order issued on July 9, 2018 in cause number 18-1-00111-0, was valid, and not vague; and

3. That Mr. Willing had willfully violated the order, and was guilty of count four. CP 76-77. (Findings of Fact, and Conclusions of Law paraphrased.)
2. APPELLANT CANNOT SHOW THAT THE PROHIBITION TO “STAY AWAY FROM THE HOME OF THE PROTECTED PARTY” WAS TOO VAGUE FOR HIM TO UNDERSTAND WHEN HE ADMITTED THAT HE KNEW OF THE ORDER, AND HAD MADE THE WILLFUL DECISION TO DRIVE ANOTHER INDIVIDUAL SPECIFICALLY TO THE HOME OF THE PROTECTED PARTY.

RCW 9A.46.010 Legislative finding.

The legislature finds that the prevention of serious, personal harassment is an important government objective. Toward that end, this chapter is aimed at making unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim.

The legislature further finds that the protection of such persons from harassment can be accomplished without infringing on constitutionally protected speech or activity.
(Emphasis added.)

Review of the constitutionality of a statute is *de novo*. *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007).

If the statute does not involve First Amendment rights, then a vagueness challenge is to be evaluated by examining the statute as applied to the particular facts of the case. *Id.*

A statute is presumed to be constitutional. *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) (citing *Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988)). To overcome this presumption, the challenger has the burden of proving unconstitutionality beyond a reasonable doubt. *Id.*

A statute is impermissibly vague if (1) it does not define a criminal offense with sufficient clarity that ordinary people can understand what conduct is prohibited or (2) it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001).

A statute fails to provide the required notice if it “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Watson*, 160 Wn.2d at 7 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). Still, a “measure of vagueness is inherent in the use of language.” *Watson*, 160 Wn.2d at 7 (quoting *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991)). We presume a

statute to be constitutional; the party challenging it “bears the burden of proving beyond a reasonable doubt that it is unconstitutionally vague.” *Watson*, 160 Wn.2d at 11 (citing *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

In *State v. Schilling*, 9 Wn.App.2d 115, 119, 442 P.3d 262 (2019), *published in part*, the Court said:

The reviewing court presumes that a statute is constitutional, and the party challenging the statute’s constitutionality bears the burden of proving the statute’s invalidity beyond a reasonable doubt. *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). The burden is a heavy one. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

Traditionally, a defendant may only bring a vagueness challenge to the statute as it was applied to his particular conduct. *Id.* at 182. This is one of two approaches to a vagueness challenge:

The rule regarding vagueness challenges is now well settled. Vagueness challenges to enactments which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case. *Maynard v. Cartwright*, 486 U.S. 356, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988). Consequently, when a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness. Rather, the ordinance must be judged as applied. *Id.* at 361. Accordingly, the ordinance is tested for unconstitutional vagueness by inspecting the

actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope. *Douglass* 115 Wn.2d at 182-83. (Internal cites omitted.)

See also *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

Examining the actual conduct of Mr. Willing and not a hypothetical situation, Mr. Willing knew of the court order; undisputedly understood the conduct that was proscribed; and purposefully and consciously, *i.e.*, willfully, chose to drive to the protected parties' home in violation of the order. His decision to drive Delaine Heath, (another person with whom he was to have no contact), to approximately 20 feet from L.K.'s home shows Mr. Willing's disregard for the order of the Court, and his attempt to justify and excuse his behavior should not be well taken.

Statutes are presumed constitutional, and as the application of RCW 9A.46.040 and RCW 26.50.110 in Mr. Willing's case do not implicate any First Amendment protections, he must show that the prohibitions in the order involving L.K. were too vague

for him to understand in his situation. Yet, he admitted that he knew of the order, and yet decided to travel to L.K.'s home anyway. His argument of vagueness seems premised on an assertion that his behavior in contravening the order was justified, and for that reason should be excused. Having been found guilty of Assault of a Child involving L.K., it is reasonable that L.K.'s mother, as her representative, would find that Mr. Willing's presence some 20 feet from her home unsettling and would confront him upon his arrival at her and L.K.'s home.

3. APPELLANT IS CORRECT THAT HIS OFFENDER SCORE FOR COUNT FOUR SHOULD HAVE BEEN A FOUR, AND THAT HIS STANDARD SENTENCING RANGE SHOULD HAVE BEEN 22-29 MONTHS.

Mr. Willing's conviction for Count Four did not involve domestic violence, and other acts of domestic violence should not have been used as "multipliers" for his offender score. With his pleas of guilty to counts one through three, and his prior felony conviction for Assault of a Child, his offender score for count four should have been a four. As this will not change Mr.

PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on 5th day of December, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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