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Court of Appeals
Division III
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 37005-4-III

STATE OF WASHINGTON, Respondent,

v.

KENNETH B. GOLLADAY, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....8

 A. Violation of a no-contact order is not a crime unless it violates one of the specifically enumerated provisions of RCW 26.50.110(1)(a)9

 B. The jury instructions lowered the State’s burden of proof by allowing conviction by showing any violation of the order, rather than the specific restraint provisions criminalized by RCW 26.50.110(1)(a)11

 C. Insufficient evidence supports the conviction for violating RCW 26.50.110(1)(a) when the conduct relied upon by the State could only constitute contempt under RCW 26.50.110(3)..13

VI. CONCLUSION.....15

CERTIFICATE OF SERVICE16

Appendix A – Final Bill Report, S.H.B. 1642 (2007)

AUTHORITIES CITED

Federal Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).....11

State Cases

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007).....10

State v. Bunker, 169 Wn.2d 571, 238 P.3d 487 (2010).....9

State v. Hanson, 59 Wn. App. 651, 800 P.2d 1124 (1990).....11

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996).....13

State v. Hosier, 157 Wn.2d 1, 133 P.3d 936 (2006).....13

State v. Pawling, 23 Wn. App. 226, 597 P.2d 1367 (1979).....11

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997).....11, 12

State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977).....12

State v. Zumwalt, 119 Wn. App. 126, 82 P.3d 672 (2003).....9

Constitutional Provisions

U.S. Const. Amend. V.....13

U.S. Const. Amend. XIV.....11

Statutes

RCW 26.50.110(1)(a).....1, 8, 9, 10, 11, 12, 13

RCW 26.50.110(3).....1, 10, 11, 13, 15

Session Laws

Laws of 2007 c. 173 § 2.....9

Laws of 1991 c. 301 § 6.....9

Other Sources

Final Bill Report, SHB 1642.....9

I. INTRODUCTION

Not all violations of a restraining order are criminal. The statute criminalizing violating a protective order specifically enumerates which types of violations constitute a crime. In Kenneth Golladay's trial, the jury instructions failed to state the type of violation the jury would have to find in order to convict, and the prosecuting attorney argued for a conviction based upon a type of violation that the statute does not criminalize. The jury instructions lowered the State's burden of proof and failed to ensure a unanimous verdict based on legally sufficient conduct. Further, the evidence was insufficient to establish a criminal violation under RCW 26.50.110(1)(a) but only a contempt violation under RCW 26.50.110(3). Reversal is required.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The "to-convict" instruction failed to require the jury to find one of the specific types of violations defined by statute as constituting a crime, thereby lowering the State's burden of proof of an essential element.

ASSIGNMENT OF ERROR NO. 2: The evidence presented at trial was insufficient to establish a criminal violation under RCW 26.50.110(1)(a).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether an instructional error that relieves the State from its burden to prove an essential element of the crime beyond a reasonable doubt can be raised for the first time on appeal

ISSUE NO. 2: Whether RCW 26.50.110(1)(a) expressly limits the types of violations of a no-contact order that constitute criminal conduct.

ISSUE NO. 3: Whether failing to include the statutory limits on the types of violations that constitute a crime in the “to-convict” instruction relieves the State of its burden of proof of an essential element.

ISSUE NO. 4: Whether the omission in the jury instructions was harmless when the evidence of a statutory violation was not overwhelming and when the State argued a non-criminal violation as the basis to convict.

ISSUE NO. 5: Whether the State’s evidence that Golladay surveilled the trailer of his ex-wife was sufficient to establish a criminal violation under RCW 26.50.110(1)(a), rather than a violation punishable by contempt under RCW 26.50.110(3).

IV. STATEMENT OF THE CASE

Ken Golladay's 10-year marriage ended when his ex-wife, Rebecca Golladay,¹ had their pastor deliver him a letter proposing a dissolution settlement and telling him she would obtain a protective order against him if he did not accept it. RP 218-19. They had been living together in an RV parked on property in White Salmon belonging to Rebecca's parents, Joyce and Ronald Schultz. RP 106, 135, 220. When Rebecca followed through on her threat to obtain a restraining order, Kenneth moved out of the RV and lived in his car. RP 219-20.

The split proved to be a difficult time for Kenneth, who had been awaiting a surgery to be able to go back to work but found his insurance cancelled. CP 10. He was hospitalized for a suicide attempt about a month after moving out. RP 223. Despite the order, he contacted Rebecca by e-mail and sent her a suicide letter, ultimately pleading guilty to two violations, receiving a jail sentence. RP 168-69, 169-70, 243. The actions that culminated in the present conviction occurred after his release from jail on February 1. RP 243; CP 52.

¹ Because Rebecca Golladay and Kenneth Golladay share a last name, both parties will be referenced by first name in the Statement of the Case portion of this brief. No disrespect is intended.

Because of his exile from the former family residence, Kenneth had to walk to different wi-fi hotspots in town to use his phone. RP 222. He was also placed on a medication that caused his legs to swell badly, so he had to walk to eliminate the retained water. RP 229-30. As a result, the Schultzes saw him walking in White Salmon on a few occasions. RP 112.

Kenneth also used his Facebook page as a journal about his feelings and thoughts, as a way of helping him cope with his mental health. RP 223-24. Although he kept the page publicly available in order to communicate with his online support groups, Rebecca and Kenneth had blocked each other on Facebook, and Kenneth had also blocked the Schultzes. RP 150, 225, 244. However, some of Rebecca's friends began to send her screenshots of posts Kenneth had made on his page. RP 152-57, 163-65, 181-82, 187, 199. Rebecca also asked one of her friends to look at Kenneth's page and tell her what a post said. RP 204. The posts were read into the trial record as follows:

Letter from the city has been sent telling someone to vacate the trailer. Should get there tomorrow or Monday at the – at latest. She put a big spotlight on the trailer when she did everything to me. And now she will have to find a place to live, hashtag, karma is a bitch, hashtag, sorry, not sorry, hashtag, welcome to my world.

RP 157-58.

Since Rebecca moved the trailer, which is ours, not hers, I'm going to file theft charges. I guess her mommy and daddy's help only goes so far. They wanted us divorced, but don't want getting [sic] living with them.

RP 158.

So, we aren't divorced yet and the wife is already going after other guys. That's how much I meant to her. They have called themselves Christians. Anyone want to figure this out. Oregon plates 143LBC mini cooper. This is her new man. 509-281-0196. This is how she treats me after eleven years. Ten in marriage. She's right back to doing what she was doing before we met. She also has HPV and did pass it onto me.

RP 165-66.

In May, Kenneth called Ashley Hackett, a White Salmon police officer, to ask for a welfare check on animals in Rebecca's trailer. RP 80, 86. Prior to the separation, Kenneth and Rebecca had several pets together and they stayed with Rebecca in the RV after Kenneth moved out. RP 221-22. Kenneth told Hackett that nobody was supposed to be there because a code enforcement officer had issued a letter that trailers weren't supposed to be on the property. Hackett drove by the trailer and saw that nobody was there. RP 86-87. She spoke to Rebecca, who told her she was out of town and the animals were in the trailer but were being taken care of by a friend. RP 86. Hackett noted that the order of protection

prohibited Kenneth from placing Rebecca under surveillance and she wanted to find out if he was aware of her comings and goings. RP 86.

A few days later, Kenneth called Hackett again to report that a friend had told him a man had parked outside the trailer and gone inside, and then the lights had gone out. RP 88. He asked her to drive by and check and she refused, telling him it would violate the order by helping Kenneth keep track of her comings and goings. RP 88. The following day, Hackett learned that Rebecca had gone to police regarding Kenneth's Facebook post. RP 89. After speaking with Rebecca, Hackett contacted Kenneth and arranged to meet him. RP 90.

During the meeting, Hackett asked Kenneth about surveilling Rebecca and he said that he could not help it if people just told him things. RP 91. Kenneth acknowledged that many of his posts referenced Rebecca but denied that he was trying to speak directly to her. RP 91-92. Hackett suggested that he set his profile to private so that his posts would not be communicated to Rebecca, and he explained he could not do that because he corresponded with various support groups and changing the privacy settings would prevent that. RP 94.

The State charged Kenneth with four counts of felony violation of a restraining order occurring on February 4, February 7, February 20, and

on or between March 30 and May 17. CP 52-54. The State theorized that the three violations in February were committed when Kenneth posted his thoughts on Facebook, arguing that he knew people were communicating the contents of his posts to Rebecca. RP 10-12, 46-52. The March 30-May 17 violation was based upon the argument that Kenneth was surveilling Rebecca during that time period by remaining aware of what she was doing, even if he did not violate the distance restriction set forth in the order. *See* RP 268, 269, 274-76, 285, 286-87, 289-92. And the to-convict instructions required the jury only to find that on the dates in question, Kenneth “knowingly violated a provision of this order.” CP 69, 73-75.

The jury acquitted Kenneth on the first three counts but convicted him on the fourth and returned a special verdict that the crime was committed against a family member. CP 89-93. Although Kenneth had no prior felony history, the trial court rejected a first-time offender sentence and instead imposed a high end standard range sentence of 17 months imprisonment, followed by 12 months of community custody. CP 98, 99, 100, RP 309, 312, 320. Kenneth now appeals and has been found indigent for that purpose. CP 111, 113.

V. ARGUMENT

Under RCW 26.50.110(1)(a), not every violation of an order of protection is a criminal violation. Instead, the statute criminalizes violations only of specific types of violations enumerated in the statute: restraint provisions prohibiting acts of violence or stalking, contact, entering a residence, workplace, school, or day care, coming within a specified distance of a location, interfering with pets or minor children, or any foreign order that specifically indicates a violation will be a crime. *Id.*

A “no surveillance” restriction is not enumerated as a criminal offense under the statute. The order to which Golladay was subject included a restriction against surveillance, and it was this restriction that the State pointed to as its basis for the criminal charge. RP 83. But the to-convict instructions never informed the jury that the State had to prove a specific type of violation; instead, it permitted the jury to convict based on a violation of any provision of the order. As a result, the to-convict instruction allowed the jury to convict for conduct that is not criminal under the statute, and lowered the State’s burden of proof to show a specifically enumerated violation. Consequently, the instructions were constitutionally deficient and harmful and the evidence was insufficient, in light of the State’s reliance on a theory of guilt that does not establish a statutory violation.

A. Violation of a no-contact order is not a crime unless it violates one of the specifically enumerated provisions of RCW 26.50.110(1)(a).

The current framework of RCW 26.50.110(1)(a) was adopted by the legislature in 2007. Laws of 2007 c. 173 § 2. Before then, the statute criminalized “a violation of the restraint provisions or of a provision excluding the person from a residence.” *See* Laws of 1991 c. 301 § 6. The purpose of the amendment was to clarify when a violation of the order was enforceable criminally, rather than through contempt powers. *See* Final Bill Report, SHB 1642, *attached as Appendix A*.

In adopting the current language, the legislature deliberately chose *not* to criminalize restraint provisions short of acts or threats of violence. *See id.* at p. 1 (“Short of acts of [sic] threats or [sic] violence, a violation of a restraint provision in an order is punishable as contempt of court.”). It employed clear and unambiguous language in the statute to carry out this purpose.

Legislatures have the sole and exclusive power to define crimes. *State v. Zumwalt*, 119 Wn. App. 126, 131, 82 P.3d 672 (2003), *affirmed*, 153 Wn.2d 765 (2005). The court interprets a statute to give effect to the legislature’s intention, considering first the statute’s plain language. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). If the plain

language is unambiguous, then the inquiry ends and the court enforces the statute in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The statutory language at issue here is clear and unambiguous. Under RCW 26.50.110(1)(a), a violation of “any of the following provisions of the order” is a crime:

- (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
- (ii) A provision excluding the person from a residence, workplace, school, or day care;
- (iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;
- (iv) A 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; or
- (v) A provision of a foreign protection order or a Canadian domestic violence protection order specifically indicating that a violation will be a crime.

By contrast, a general violation of the order not falling into one of these categories “shall also constitute contempt of court, and is subject to the penalties proscribed by law.” RCW 26.50.110(3). Under the plain language of the statute, a provision restraining “surveillance” does not fall

within the criminally punishable violations set forth in RCW 26.50.110(1)(a), and can therefore only be punished as contempt of court under RCW 26.50.110(3).

B. The jury instructions lowered the State's burden of proof by allowing conviction by showing any violation of the order, rather than the specific restraint provisions criminalized by RCW 26.50.110(1)(a).

The due process guarantees of the Fourteenth Amendment obligate the State to present proof of each and every element of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). As a result, the trial court is constitutionally required to instruct the jury as to each element of the offense. *State v. Pawling*, 23 Wn. App. 226, 232, 597 P.2d 1367, *review denied*, 92 Wn.2d 1035 (1979).

Instructions that relieve the State of its burden of proof violate due process because they permit the jury to convict without adequate evidence. *State v. Hanson*, 59 Wn. App. 651, 660, 800 P.2d 1124 (1990). If the State is relieved of fewer than all of the essential elements, the error is presumed to be prejudicial unless the State affirmatively shows it to be harmless. *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997).

Here, an essential element of criminally, as opposed to contemptuously, violating an order of protection is a violation of one of the specific provisions enumerated in RCW 26.50.110(1)(a). But the to-convict instruction did not require the State to make this showing; instead, it directed the jury to convict Golladay if it found he “knowingly violated a provision of [the] order.” CP 75. Because it did not require proof of one of the specific violations constituting a crime, the instruction lowered the State’s burden of proof to show only contemptuous conduct rather than a criminal act.

Because the instructions required conviction on less than proof of a crime, the burden lies with the State to prove the error was harmless. *Smith*, 131 Wn.2d at 263-64. Under this burden, the State must show that the error was trivial or merely academic and in no way affected the outcome of the case. *Id.* at 264 (*quoting State v. Warrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). The State cannot meet that burden here. No other instructions omitted the error in identifying the conduct that constitutes a crime, and the State’s entire theory of guilt was that Golladay violated the “surveillance” restraint provision of the order by keeping himself informed of his ex-wife’s activities. Consequently, the diminished burden of proof was essential to the verdict, which could not have been obtained without it. That verdict must be reversed.

C. Insufficient evidence supports the conviction for violating RCW 26.50.110(1)(a) when the conduct relied upon by the State could only constitute contempt under RCW 26.50.110(3).

In reviewing the sufficiency of the evidence, the court views the evidence in the light most favorable to the state and inquires whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Reasonable inferences from the evidence are drawn in favor of the State and interpreted against the defendant. *Id.* If insufficient evidence was presented at trial to support a conviction, retrial is prohibited by the double jeopardy clause of the Fifth Amendment. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Here, the State relied entirely on allegations that Golladay violated the order of protection by keeping his ex-wife's trailer under surveillance. *See, e.g.*, RP 274 ("He's not supposed to care what happens at that RV while that no contact order's in place."); 275 ("He's not supposed to care what's going on at that trailer anymore . . . what happens at the trailer is none of his business."); 276 ("[H]e wasn't supposed to have anything to do with what was happening at that RV."); 285("It doesn't say it's okay for him to keep eyes on the place if he's doing it while he's walking off

excess water weight.”); 286-87 (“[W]hat’s going on at the RV is none of his business when that no contact order is in place. Aside from the dissolution, which is handled by a divorce attorney, he’s not supposed to be concerned about who’s visiting that RV. That is none of his business. That’s entirely out of the realms of who he should be caring about.”); 289 (“[H]e’s still keeping tabs on what’s going on with Rebecca’s life. He knows when the trailer is not visible from Lincoln Street anymore.”); 290 (“[T]he only way that he would have known is if he had been keeping tabs on the house.”); 291 (“And you don’t know the things that he know about the trailer unless you’re keeping tabs on it . . . Distance doesn’t matter for surveillance. What matters for surveillance is were you keeping watch on that RV and he was.”): The evidence supporting its argument showed that, at best, Golladay saw what was happening on the property from outside of the exclusion zone and posted things on Facebook expressing his awareness of those happenings. This type of conduct, while potentially supporting contempt proceedings, does not establish a crime.

At no point did the State allege, or did its evidence show, that he committed or threatened acts of violence, stalked his ex-wife, violated a provision excluding him from her home or workplace, or came within the prohibited distance of his ex-wife or her trailer. Because the State only proved that Golladay violated a provision punishable as contempt under

RCW 26.50.110(3), the evidence was insufficient to establish a violation of the charged crime.

VI. CONCLUSION

For the foregoing reasons, Golladay respectfully requests that the court REVERSE his conviction and DISMISS the case for insufficient evidence of a criminal violation.

RESPECTFULLY SUBMITTED this 02 day of February, 2020.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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David Quesnel
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 6 day of February, 2020 in Kennewick, Washington.



Andrea Burkhart

APPENDIX A

FINAL BILL REPORT

SHB 1642

C 173 L 07

Synopsis as Enacted

Brief Description: Concerning criminal violations of no-contact orders, protection orders, and restraining orders.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Pedersen, Lantz, Williams, Moeller, Wood, Kirby, O'Brien, Chase, Ormsby and Green).

House Committee on Judiciary

Senate Committee on Judiciary

Background:

There are several different types of no-contact, protection, and restraining orders. The provisions in these orders can vary. For example, domestic violence protection orders may include provisions: (1) restraining the respondent from committing acts of domestic violence; (2) excluding the person from another's residence, workplace, school, or daycare; (3) prohibiting the respondent from coming within a specified distance of a location; (4) restraining the respondent from contact with a victim of domestic violence or the victim's children; and (5) ordering that the petitioner have access to essential personal effects and use of a vehicle.

A restraining order issued in a dissolution proceeding may include many of the same provisions as in a domestic violence protection order, and may also: (1) restrain one party from molesting or disturbing another person; (2) restrain the respondent from transferring, selling, removing, or concealing property; and (3) restrain the respondent from removing a minor child from the jurisdiction.

A no-contact order, which can be issued when a person has been arrested or charged with a domestic violence crime, prohibits the person from having any contact with the victim.

Regardless of the type of order, violations of no-contact, protection, and restraining orders are punishable under the Domestic Violence Protection Act. Depending on the circumstances, violations of these orders can constitute contempt of court, a gross misdemeanor, or a felony. Some trial courts have held that a violation of a restraint provision in one of these orders is a gross misdemeanor only if the violation would require an arrest under the mandatory arrest statute. An arrest is required when, among other things, the person violates a provision restraining the person from committing acts of threats or violence. Thus, some trial courts have ruled that a violation of a no-contact order is a gross misdemeanor when the person violates the restraint provision of the order by committing acts of threats or violence. Short of acts of threats or violence, a violation of a restraint provision in an order is punishable as contempt of court.

Summary:

The provision describing when it is a gross misdemeanor to violate a no-contact, protection, or restraining order is amended.

It is a gross misdemeanor when a person who is subject to a no-contact, protection, or restraining order knows of the order and violates a restraint provision prohibiting acts or threats of violence against, or stalking of, a protected party, or a restraint provision prohibiting contact with a protected party.

Votes on Final Passage:

House	97	0
Senate	49	0

Effective: July 22, 2007

BURKHART & BURKHART, PLLC

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