

NO. 70912-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HUNG MINH HOANG,

Appellant.

2014 APR 28 PM 2:52

COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SEAN P. O'DONNELL

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. A criminal defendant is presumed competent if he has never been previously adjudicated to be incompetent, and he bears the burden of proving otherwise. Hoang had never before been found to be incompetent, and the record is silent upon whom the court placed the burden during his competency hearing. Did the trial court place the burden on Hoang and if so, was this allocation of the burden proper?

2. A charging document for violation of a court order alleges sufficient facts to satisfy the essential elements rule when it contains any one of the following: the name of the protected party; the facts of the crime; or details of the underlying court order such as the number of the order, the statute under which the order was issued, or the court or date of issuance. The information here provided a surplus of those facts by referencing the name of the protected party, as well as identifying the court and statute through which the order was issued; an error in the date of issuance was a scrivener's error. Did the language in the information charging Hoang with Felony Violation of a Court Order provide sufficient notice to Hoang?

3. A conviction for Felony Violation of a Court Order requires proof that the defendant knew of the order. The evidence at trial showed that Hoang had previously been convicted of violating the exact same court order in 2004 and that he had the assistance of a Vietnamese interpreter and an attorney when he pleaded guilty in that prior case. Viewed in the light most favorable to the State, was this evidence and all reasonable inferences which could be drawn therefrom sufficient to allow a rational trier of fact to find that Hoang knowingly violated the court order?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged defendant Hung Minh Hoang by amended information, as follows:

Count I: felony violation of a court order, domestic violence, against Bang Yen Quang, for an incident that took place on or about June 29, 2012.

Count II: felony violation of a court order, domestic violence, against Bang Yen Quang, for an incident that took place between or about March 1, 2012 and March 30, 2012.

Count III: felony violation of a court order, domestic violence, against Bang Yen Quang, for an incident that took place between or about April 1, 2012 and April 30, 2012.

Count IV: felony violation of a court order, domestic violence, against Bang Yen Quang, for an incident that took place between or about May 1, 2012 and May 30, 2012. CP 6.

On July 24, 2013, trial on the underlying charges commenced in front of the Honorable Judge O'Donnell. 3RP 123. The jury found Hoang guilty as charged on July 29, 2013 of all four counts of felony violation of a court order. CP 81-84. He was sentenced to 53 months of confinement. CP 109-17.

## 2. SUBSTANTIVE FACTS

Bang Yen Quang met Hoang at school in Vietnam when she was just 15 years old and married him at the age of 16. 4RP 222.<sup>1</sup> Quang came to America on August 5, 2000 and found work as a cashier at the Hau Hau Supermarket in Seattle. 4RP 221, 239-40. Soon after joining her in America, Hoang assaulted Quang on December 2, 2002. Ex. 8; 4RP 223, 240. He was convicted of

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<sup>1</sup> The Verbatim Report of proceedings consists of six volumes referred to in this brief as follows: 1RP (June 12, 2012), 2RP (June 13, 2012), 3RP (July 24, 2012), 4RP (July 25, 2012), 5RP (July 29, 2012), 6RP (August 22, 2012).

assault in the fourth degree, domestic violence. Id. Although a no contact order was put into place as a result of this conviction, Hoang nonetheless returned to Quang's home after being released from jail.<sup>2</sup> 4RP 223. Quang was very afraid of Hoang but felt she had no alternative but to allow him to stay. 4RP 224-25.

Unfortunately, the violence only escalated. In August 2003, Hoang told Quang to come to his bedroom. 4RP 224. When she obeyed, he pushed her down on the bed and stabbed her with a knife. Id. She fled the house screaming for help, after which the police arrived and arrested Hoang. 4RP 224-25. He was convicted in King County Superior Court of assault in the second degree – domestic violence and misdemeanor violation of a court order under cause #03-1-02260-4 KNT and a ten-year no contact order was put in place on November 10, 2003. Ex. 8; 4RP 260, 267.

Despite this ten-year court order, Hoang again went to look for Quang after being released from custody. 4RP 225-26. In spite of her fear when he came to her home, Quang let him stay. 4RP 226. On February 2, 2004, Hoang committed his final assault against Quang, waking her up in the middle of the night, punching

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<sup>2</sup> Contrary to Hoang's contention that the court order arising from the 2002 assault was set to expire in July 2005 (App. Br. 15), there is nothing in the record indicating the expiration date of that no contact order.

and kicking her, and injuring her arm and leg. 4RP 226. He was charged in King County Superior Court under cause #04-1-09913-3 SEA and pleaded guilty to felony violation of a court order on April 9, 2004. Ex. 4. A Vietnamese interpreter translated Hoang's Statement of Defendant on Plea of Guilty in which he stated:

In King County, WA, on February 2, 2004, I knew of and willfully violated the terms of a court order issued by the King County Superior Court pursuant to RCW 10.99 for the protection of Bang Quang by intentionally assaulting her.

Id.

Present at Hoang's sentencing on cause #04-1-09913-3 were two Vietnamese interpreters as well as Hoang's attorney. Ex. 3. The court imposed a five-year no contact order expiring May 7, 2009, also signed by an interpreter. Ex. 2. On the face of the order was the language: "It is hereby ordered that any order prohibiting contact previously issued *under the above cause* is recalled and superseded by this order." Ex. 2 (emphasis added).

At trial, Seattle Police Detective Jason Stolt confirmed that the court order Hoang violated on February 2, 2004 under cause #04-1-09913-3 was the exact same order he violated in the instant case: the order issued under cause #03-1-02260-4. 4RP 265-68. This fact was uncontested by Hoang. 5RP 345-46.

After being released from jail on cause #04-1-09913-3, Hoang went to San Francisco. 4RP 227. From 2004 to 2011, Quang was left in relative peace. Id. In November 2011, however, Hoang returned to Seattle, sought out Quang, and requested her help in processing some expired identification. 4RP 228. Although frightened, she acquiesced and helped Hoang with this request, as well as with many other tasks he requested over the next eight months. 4RP 229. Afraid that he would come more frequently if she did not placate him, Quang gave Hoang money and paid his rent every month to a landlady at a rooming house. 4RP 228-29.

So shaken by Hoang's reappearance was Quang that she asked her manager, Ming Nguy, for two weeks off after Hoang first began showing up in November 2011. 5RP 311. But despite this brief respite and Quang's regular attempts to mollify Hoang, he continued to come to her workplace at the Hau Hau Supermarket an average of twice per week for the next eight months. 4RP 229. Store manager Nguy observed these frequent interactions and recalled Hoang, whom she was able to recognize at trial, speaking loudly to Quang at the store. 5RP 311-13. Sometimes Hoang would sneak up behind Quang without a sound while she was doing calculations. 4RP 258. If she did see him approach, she

would try to avoid him. 4RP 259. Every time he asked her for money, and every time she did not have some, he would threaten and curse at her. 4RP 230-31.

Quang was too terrified to call the police to report the harassment because when she told him she would do so, he responded that he would kill her. 4RP 231. At that time, she was not aware that the ten-year no contact order from 2003 was still in effect, a result of having moved often over the years and lost some of her paperwork. 4RP 241, 252, 254. Quang felt that if she did call the police, once released from jail Hoang would in fact retaliate against her and seek revenge. 4RP 232.

On June 29, 2012, Quang felt she could take no more. The defendant's behavior had escalated such that he had come to the store three times that week and was now threatening her. 4RP 232. She called the police, who were then able to confirm the presence of the active no contact order. 4RP 270-71.

### 3. THE COMPETENCY HEARING

Defense counsel first raised competency on September 25, 2013. CP 7-12. The court ordered a pretrial competency evaluation at the King County Jail; when Hoang refused to

participate, he was sent to Western State Hospital (WSH). CP 7-18. Hoang was at WSH from December 6, 2012 until his discharge on January 25, 2013. CP 28, 34. He underwent an initial assessment upon arrival and a forensic competency evaluation conducted by Dr. Elizabeth Bain on December 13, 2012, both with the assistance of a Vietnamese interpreter, and was housed in a ward allowing for 24-hour per day observation and treatment. CP 28. In forming her conclusions regarding Hoang's competency, Dr. Bain consulted with staff and treatment team members on Hoang's ward at WSH and reviewed the December 6<sup>th</sup> admission assessment, Dr. Claire Sauvagnat's October 25<sup>th</sup> report from the King County Jail noting that Hoang's jail records were "negative for any symptoms," records of evaluation and treatment at WSH, Hoang's criminal history, King County Jail Records, and discovery. CP 28-30.

Dr. Bain observed that Hoang presented with no symptoms or behaviors that would indicate he suffers from a mental disease or defect, and that his records similarly indicated no history of mental health problems other than a single mention in the police report by the victim. CP 32. She ultimately concluded that Hoang appeared to have no mental illness. Id. He made no outlandish

statements and when asked outright whether he had ever stated or believed he was the President of Vietnam, he denied it. CP 29, 31.

The defense retained Dr. Tedd Judd to perform its own competency evaluation. After meeting with Hoang on March 29, 2013, Dr. Judd concluded that Hoang had a "probable" diagnosis of schizophrenia and noted several strange statements he made regarding his identity. CP 43-44, 51. Despite this, Dr. Judd noted that Hoang was able on several occasions to describe the no contact order at issue to Dr. Judd "roughly accurately," including the fact that it would expire November 2013. CP 53.

The competency hearing began on June 12, 2013. 1RP 5. Dr. Judd acknowledged spending a total of four hours with Hoang before diagnosing him with schizophrenia. 1RP 8. When questioned by the court, Dr. Judd also acknowledged that the Diagnostic and Statistical Manual of Mental Disorders (DSM) requires a time period of three to six months during which symptoms are observed in order to actually make a diagnosis for schizophrenia, and that his diagnosis of Hoang was therefore "more likely than not." 1RP 61. He also conceded that prior to rendering

his opinion, he had not read any of the WSH records recording Hoang's stay in December 2012. 1RP 21, 29.<sup>3</sup>

Dr. Elizabeth Bain confirmed that Hoang had never before had any contact with WSH prior to her evaluation. 2RP 92. During his time at WSH, he never engaged in any observable behaviors that would indicate paranoia or visual/auditory hallucinations, such as hypervigilance, looking out windows or behind his back, or acting scared or suspicious. 2RP 75. When shown the no contact order in this case, Hoang actually proceeded to discuss the situation that led to his arrest in a way that accurately lined up with the police report. Id. Dr. Bain concluded that Hoang simply did not meet the criteria for schizophrenia, based on the DSM time requirement of at least six months of continuous symptoms, including at least one month of Criterion A symptoms such as delusions or hallucinations.<sup>4</sup> 2RP 85, 96.

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<sup>3</sup> Dr. Judd also acknowledged that he had not read Hoang's records from King County Jail Health, which noted that he was housed in general population, prior to his diagnosis. 1RP 30. There were no indications of any psychiatric care during Hoang's previous stints in jail. 1RP 38-39.

<sup>4</sup> After Hoang was discharged from WSH, Dr. Bain reviewed his subsequent King County Jail Health notes documenting his behavior following his return to the King County Jail. She noted he was neither observed with nor did he report any symptoms of mental illness that would indicate paranoia or psychosis. 1RP 87. In fact, he was re-screened for in-jail psychiatric housing once he returned to King County and found not to be in need of psychiatric treatment. 1RP 88.

During arguments, neither counsel mentioned the burden of proof as to competency. 2RP 106-13. Both counsel argued their respective positions that the preponderance of the evidence did or did not show that Hoang had a mental disease or defect. 2RP 109, 111, 112-13.

The court made no mention of the burden of proof when it announced its ruling regarding competency. 2RP 113-17. The court simply held that the facts established that “there’s no evidence, or insufficient evidence” that Hoang suffered from schizophrenia or any other mental disease or defect, and that he was therefore competent to stand trial. 2RP 115, 116. The court ruled that the only evidence of schizophrenia was Dr. Judd’s four hours of observation, and “that is not sufficient under anyone’s testimony for a duration for the diagnosis of schizophrenia.” 2RP 115. The trial court entered findings of fact and conclusions of law finding Hoang competent to stand trial. CP 58-60.

C. ARGUMENT

1. BECAUSE HOANG HAD NEVER BEEN ADJUDICATED INCOMPETENT, HE HAD THE BURDEN TO PROVE HE WAS NOT COMPETENT.

Hoang argues that the trial court violated his due process right to a fair trial by improperly placing the burden on him to prove incompetence. This argument fails because it is well-settled law that a defendant is presumed competent unless he has been adjudicated otherwise, and Hoang therefore bore the burden to prove his incompetence.

Hoang raises this issue for the first time on appeal. This is likely because the trial court never said, either orally or in its written findings, which party had the burden of proof on competency. 2RP 113-16; CP 58-60. The court simply held that there was “no” or “insufficient” evidence that Hoang suffered from a mental disease or defect. 2RP 115. This stands in stark contrast with most of the relevant caselaw, in which the court was explicit as to who had the burden of proof on this issue. For purposes of argument only, the State will proceed as if the burden of proof had been explicitly placed on Hoang.

The question of which party bears the burden of proof at a competency hearing is a question of law that is reviewed de novo.

State v. P.E.T., 174 Wn. App. 590, 595, 300 P.3d 456, petition for review stayed, No. 89157-5 (2013).

An incompetent person may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050. A defendant is considered incompetent if he or she “lacks the capacity to understand the nature of the proceedings against him or her, or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(15).

Washington has a two-part test to determine legal competency for a criminal defendant: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. In re Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001).

Contrary to Hoang's contentions, although RCW 10.77 governs how and when to address competency in a criminal proceeding, “[the] statute is silent as to who bears the burden of proof at an initial competency hearing.” P.E.T., 174 Wn. App. at 592. This is because the burden shifts depending on the circumstances of each case. Id. at 601. In P.E.T., the court explicitly agreed with the rationale in State v. Coley that “in the absence of any statement in the statutes of who bears the burden

of proof at a competency hearing, it is logical to apply the common law presumption . . . to fill this gap.” P.E.T., 174 Wn. App. at 596 (citing Coley, 171 Wn. App. 177, 286 P.3d 712 (2012), rev. granted, 176 Wn.2d 1024 (2013)).

For instance, there is a common law presumption that if a defendant has been found to be incompetent, the presumption is that he remains so until adjudicated otherwise. P.E.T., 174 Wn. App. at 592; Coley, 171 Wn. App. at 187. Thus, in such a situation, the State bears the burden to overcome the presumption of incompetence. P.E.T., 174 Wn. App. at 597-98; Coley, 171 Wn. App. at 188.

Conversely, “It is well settled that the law will presume sanity rather than insanity, competency rather than incompetency; it will presume that every man is sane and fully competent until satisfactory proof to the contrary is presented.” Grannum v. Berard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967); see P.E.T., 174 Wn. App. at 599 (citing this holding in Grannum as “a correct statement of law”); State v. Bonner, 53 Wn.2d 575, 587, 335 P.2d 462 (1959) (every person is presumed sane and competent until a person is adjudicated to be of unsound mind); In re Personal Restraint of Rhome, 172 Wn.2d 654, 663 n.2, 260 P.3d 874 (2011) (citing

defendant's burden "of overcoming the general presumption of competency to stand trial."). This common law presumption of competency was directly addressed in Coley when that court noted that there is "a general presumption in this state that a defendant is competent to stand trial and assist in his own defense" and that consequently, "on this presumption of competency, the defendant bears the burden of proof to show that he is incompetent to stand trial." Coley, 171 Wn. App. at 179.

Simply stated, once a defendant is found to be incompetent, the burden of proof shifts to the State to prove that he is competent. But since Hoang has never been adjudicated incompetent, the burden is on him to prove he is not competent. Coley, 171 Wn. App. at 188; P.E.T., 174 Wn. App. at 597 (after filling in the statutory gap on the issue of the burden of proof with common law presumptions, "[t]he party who wants to overcome [the] presumption has the burden of proof at the competency hearing") This comports with United States Supreme Court jurisprudence which accords great deference to a state's allocation of the burden of proof on incompetency to the defendant. Medina v. California, 505 U.S. 437, 438, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

Hoang erroneously claims that RCW 10.77 places the burden on the State to prove a defendant competent to stand trial after the court has found reason to doubt his competency. App. Br. at 6-7. This is not a correct statement of the law. In support, he cites to State v. Wicklund, 96 Wn.2d 798, 638 P.2d 1241 (1982), for the same proposition. However, Wicklund did not hold that the burden of proof is on the State. Rather, in its recitation of the facts, the court mentioned that procedurally in that instance, “The case was continued for a determination of Mr. Wicklund’s competency, but the court first placed the burden of establishing competency on the State.” Id. at 799-800. Wicklund did not address the burden of proof in its legal analysis or hold that the burden of proof *must* be on the State at an initial competency hearing. Instead, it examined the applicability of RCW 10.77 to courts of limited jurisdiction, and the requirement for a formal psychiatric evaluation. Id.

Hoang also cites to two other cases in an attempt to shift the burden to the State. Neither of those cases supports that proposition. In Born v. Thompson, 154 Wn.2d 749, 117 P.3d 1098 (2005), the issue was which standard of proof applied to civil commitments under a former misdemeanor competency statute. Id. at 753-54. The court held that due process required the State to

prove by clear and convincing evidence that the defendant was charged with a violent act, a prerequisite for commitment for restoration. Id. at 769.

Similarly, State v. Hurst, 158 Wn. App. 803, 244 P.3d 954 (2010), aff'd, 173 Wn.2d 597, 269 P.3d 1023 (2012), did not address the burden of proof as to an initial finding of competency. Rather, the issue was the standard of proof applied to findings necessary to commit a defendant for restoration of competency. Id.

In essence, contrary to established law, Hoang wants this Court to hold that the State always has the burden of proving competence, whether a person has ever been found incompetent or not. This holding would require an initial presumption of incompetence as to all criminal defendants. This outcome would be absurd.

Hoang also urges this Court to set aside its own unambiguous language in P.E.T. that the initial presumption of competency is a “correct statement of law,” and to disregard as dicta the assertion in Coley that the defendant bears the burden of disproving a general presumption of competency. App. Br. at 8. Contrary to Hoang’s contention, those opinions do cite authority, specifically common law, to support the proposition that Hoang

bears the burden of proof to disprove competency in an initial competency hearing. Neither are those statements regarding competency properly characterized as dicta, since the initial presumption of competency is central to the doctrinal underpinning in each opinion that common law presumptions must fill in the gap left by RCW 10.77 on this issue of the burden of proof. P.E.T., 174 Wn. App. at 597 (“[T]he party who wants to overcome the [common law] presumption has the burden of proof at the competency hearing”); Coley, 171 Wn. App. at 187-88 (citing caselaw within and outside of state jurisdiction to support an initial presumption of competence and a shift to the State only once incompetence is adjudicated).

It is uncontested that Hoang has never before been found incompetent. The records available to both experts indicate that Hoang had no psychiatric records from either of his previous stints in jail nor at WSH. 1RP 38-39, 92. Hoang was therefore presumed competent. It was his burden to rebut that presumption, and he failed to do so.

2. THE INFORMATION CHARGING HOANG WITH FELONY VIOLATION OF A COURT ORDER WAS SUFFICIENT.

For the first time on appeal, Hoang argues that the information charging him with felony violation of a court order was deficient and he did not have sufficient notice of the essential elements of the crime. Hoang's argument should be rejected. He received sufficient notice of facts giving rise to the essential elements of the crime when the State identified the protected party and details of the no contact order in the information. The inclusion of the date of issuance of the order, though incorrect, was a scrivener's error that does not require reversal absent a showing that it misled Hoang to his prejudice.

An information provides constitutionally sufficient notice to a defendant if it includes all of the essential elements of the crime, both statutory and non-statutory. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998). Under this "essential elements" rule, a charging document must "allege facts supporting every element of the offense, in addition to adequately identifying the crime charged." State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The purpose of the essential elements rule is to afford Hoang notice of the nature and cause of the allegations against him

so that he may properly prepare an adequate defense. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

A charging document challenged for the first time on appeal is liberally construed in favor of validity. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). “[I]f the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal.” Id. at 104.

Courts apply a two-prong test when determining the validity of an information: (1) do the necessary elements appear in any form, or can the elements be found by fair construction, in the information, and if so, (2) can the defendant show that he was nevertheless actually prejudiced by the inartful language that caused the lack of notice? Id. at 105-06. In considering the first prong, courts look at the face of the information only. Id. at 106. Under the rule of liberal construction, a charging document challenged for the first time on appeal “will require at least some language in the information giving notice of the allegedly missing element(s)” to satisfy the first prong. Id.

By statute, “[w]henver an order is granted under [chapter 26.50] . . .10.99, 26.09, 26.10, 26.26, or 74.34 RCW . . .and the

respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order” constitutes the crime of violation of a court order. RCW 26.50.110(1).

A charging document for violation of a court order satisfies the essential elements rule when it references the identity of the victim, the underlying domestic violence order, or sufficient other facts of the crime. City of Seattle v. Termain, 124 Wn. App. 798, 805, 103 P.3d 209 (2004); City of Bothell v. Kaiser, 152 Wn. App. 466, 476-77, 217 P.3d 339 (2009).

In Termain, which also involved a first-time challenge on appeal, the charging document simply copied verbatim the Seattle Municipal Code definition for violation of a court order. 124 Wn. App. at 800-01. The court repeatedly took issue with the fact that the complaint did not identify the order, the court granting the order, the identity of the victim, or any other “factual basis for the charges,” not even identifying the particular statute under which the underlying order was issued and instead including an inventory of all possible originating statutes. Id. at 800-01, 803. The court ultimately characterized the charging document as “gobbledygook”: “It does not recite the specific statute pursuant to which the underlying order was issued, the number of the order, the date of

issuance, or any underlying facts or the name of the protected person.” Id. at 806. The court held that where the charge is violation of a court order, the essential elements rule requires that “identification of the specific no-contact order, the issuance date from a specific court, the name of the protected person, *or* sufficient other facts must be included in some manner.” Id. at 805 (emphasis added). Those palliative facts were not expected to be verbose or to remedy every single deficiency noted by the court in this particular case; in fact, the court noted that there were “many simple ways the City could have included *bare facts* in the charging document so that Termain could fairly imply what actual conduct was being charged.” Id. at 806 (emphasis added). This reflects the rationale in Kjorsvik, where that court held that “it is . . . not fatal to an information that the exact words of a case law element are not used” because the question is “whether all the words used would reasonably apprise an accused of the elements of the crime charged.” Kjorsvik, 117 Wn.2d at 109.

In Kaiser, where the charging document was challenged during trial, the court confirmed that a charging document for violation of a court order need not list every single factual detail missing from the document in Termain. Kaiser, 152 Wn. App. at

476-77. Kaiser complained that the initial citation had lacked any information regarding the no contact order or the protected party; the first amended complaint did not state the date or court of issuance, the name of the protected party, or other facts identifying the specific order; and the second amended complaint still failed to state the date and court of issuance or “otherwise identify the specific order.” Id. at 476. The court stated that it was “a fair reading of the Termain opinion” to conclude that as long as *one* of the facts listed in that holding was present in a charging document, i.e., “the identity of the victim *or* . . . the underlying domestic violence order *or* facts of the crime,” Kaiser had sufficient notice of the essential elements of the crime of violation of a court order. Id. at 476-77 (emphasis in original).

In this case, counts I-IV of the amended information charged Hoang with four counts of felony violation of a court order and included the following language<sup>5</sup>:

I, Daniel T. Satterberg, Prosecuting Attorney  
for King County in the name and by the authority of  
the State of Washington, do accuse HUNG MINH  
HOANG of the following crimes . . . : Domestic  
Violence Felony Violation of a Court Order . . .

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<sup>5</sup> Each of the four counts contained the exact same language except for difference in the date of violation.

That HUNG MINH HOANG in King County, Washington, on or about June 29, 2012, did know of and willfully violate the terms of a court order issued on November 3, 2006<sup>6</sup> by the King County Superior Court pursuant to RCW chapter 10.99, for the protection of Bang Yen Quang, and at the time having at least two prior convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26 or 74.34. . . ;

Contrary to RCW 26.50.110(1), (5) and against the peace and dignity of the State of Washington.

CP 62-64. The information cited the correct statute, provided all of the statutory elements of the crime, listed the specific statute under which the underlying order was issued, the court of its issuance, and the name of the protected party. It therefore gave Hoang sufficient notice of the charge against him such that he could prepare an adequate defense, as it contained multiple details beyond the single factual detail that would be considered adequate under Termain and Kaiser. Under those cases, if the charging document here had contained Quang's name alone, the notice requirement would have been satisfied. Therefore, under the liberal construction rule, Hoang's charging document contained the essential elements and facts underlying the elements sufficient to satisfy the first prong of Kjorsvik.

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<sup>6</sup> The correct date of issuance was November 10, 2003.

The date of issuance, while incorrect, is a scrivener's error that does not alter the sufficiency of the notice given to Hoang. Unlike Termain and Kaiser, the charging document here does not completely lack any factual detail supporting the elements. Here, under the Termain/Kaiser rubric, there is more than sufficient factual details in this information. The scrivener's error regarding the date of issuance is simply surplusage and a technical defect.

"Convictions based on charging documents which contain only technical defects (such as an error in the statutory citation number or the date of the crime or the specification of a different manner of committing the crime charged) usually need not be reversed." State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995). A scrivener's error of this type will not be the basis for reversal unless the defendant can make a showing of prejudice. State v. Borrerro, 97 Wn. App. 101, 107, 982 P.2d 1187 (1999).

Hoang does not argue actual prejudice under the second prong of Kjorsvik, nor could he. It is apparent from the record that the scrivener's error regarding the date of the order had no actual effect on his ability to prepare an adequate defense. The thrust of Hoang's argument during trial was that the ten-year 2003 no contact order was so old, and had for some time existed alongside

another order, that he had become confused and did not realize it was still in effect. 4RP 240-41; 5RP 341-51. He did not argue that he never received notice of an order issued on November 3, 2006; his argument acknowledged the fact and existence of the correct 2003 order. Hoang himself told Dr. Judd two and a half months prior to trial that the no contact order alleged to have been violated in this case expired November 2013. CP 53. He therefore does not and cannot make an argument that the alleged defect in the information prejudiced him in any way.

Hoang's contention that he received insufficient notice of facts supporting the essential elements of the crime of violation of a court order should therefore be rejected and his conviction affirmed.

3. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT THAT HOANG KNOWINGLY VIOLATED AN ACTIVE NO CONTACT ORDER.

Hoang argues that the evidence in this case was insufficient to prove that he knew of the 2003 no contact order and knowingly violated it. This claim should be rejected. Substantial evidence supports the jury's verdict that Hoang knew of and willfully violated a valid court order.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When an appellant claims that there was insufficient evidence to support his conviction, the reviewing court views the evidence and all inferences that can reasonably be drawn from it in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Viewing the evidence in that light, if any rational trier of fact could have found each element of the crime proven beyond a reasonable doubt, then the evidence is sufficient to support the conviction. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

One of the elements of the crime of violation of a court order is the defendant's knowledge of the order. RCW 26.50.110(1); State v. Phillips, 94 Wn. App. 829, 833, 974 P.2d 1245 (1999). In finding Hoang guilty, the jury found that the State had proved beyond a reasonable doubt that "the defendant knew of the existence of this order." CP 101-04.

Here, the facts testified to by witnesses and the exhibits themselves demonstrate that there was more than sufficient

evidence to establish that Hoang had knowledge of the order. In 2004, Hoang was charged and convicted of violating the exact same no contact order. 4RP 265-68. In that 2004 conviction, Hoang wrote in his Statement of Defendant on Plea of Guilty that he “knew of and willfully violated the terms of a court order issued by King County Superior Court pursuant to RCW 10.99 for the protection of Bang Quang.” Ex. 4. A Vietnamese interpreter signed under penalty of perjury that he had translated that document for Hoang at his plea hearing. Id. During the sentencing hearing for 04-1-09913-3 SEA, Hoang not only had a Vietnamese interpreter but counsel to assist him. Ex. 3. The post-conviction no contact order issued under that cause number was also signed by an interpreter and stated that “any order prohibiting contact previously issued *under the above cause is recalled and superseded by this order.*” Ex. 2 (emphasis added).

The evidence in this case was more than sufficient to prove Hoang's knowledge of the 2003 order. He acknowledged knowing about and violating that exact same order previously in 2004, rendering untenable his argument that he was somehow unaware of the order in 2012-2013. Hoang's claim that he simply forgot about the order, after receiving a felony conviction and punishment

for violating it, fails when the evidence is viewed in the light most favorable to the State.<sup>7</sup> He had the assistance of both a Vietnamese interpreter and an attorney when he pleaded guilty to violating the same order in 2004. Although Hoang argued at trial that the final court order in 2004 had a different expiration date and was therefore “confusing,” the plain language on that final order clearly stated that it only superseded orders *under that same cause number*. The ten-year 2003 no contact order was clearly under a separate cause number and a wholly separate order.

The fact that Quang was not aware of the continued existence of the no contact order in this case has no bearing on the issue. The State does not have to prove beyond a reasonable doubt other witnesses’ knowledge of the court order, only that of Hoang. This makes sense, since it is the responsibility of the defendant to abide by the order and the defendant who will face criminal consequences for violating it. Hoang can cite no case that stands for the proposition that a victim’s knowledge of the court order has any connection or relevance to the issue of his own

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<sup>7</sup> Hoang conceded at trial that he knew of the 2003 order after being convicted of violating it in 2004: “Mr. Hoang signed acknowledging that he knew of the existence of the [2003] no contact order . . . He said: I knew of the no contact order and violated it . . . That we know.” 5RP 346.

knowledge. Indeed, the court has explicitly stated that a victim's consent to prohibited contact (whether out of acquiescence or ignorance of the order) is never a defense to the charge. State v. Dejarlais, 136 Wn.2d 939, 942, 969 P.2d 90 (1998).

The jury's verdict that Hoang knew of the no contact order he violated is supported by substantial evidence and must be sustained. Hoang's conviction for violation of a court order should be affirmed.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Hoang's judgment and sentence.

DATED this 28 day of April, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
\_\_\_\_\_  
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to ANDREW ZINNER, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. HUNG MING HOANG, Cause No. 70912-7-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

04-28-14  
\_\_\_\_\_  
Date