E-FILED
May 18, 2017 1:16 PM
Court of Appeals
Division III
State of Washington

NO. 34458-4-III

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

RESPONDENT,

V.

ALEX S. NOVIKOFF

APPELLANT.

AMENDED BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant claims the convictions for violation of a protection order where an assault occurs, and assault in the fourth degree violate double jeopardy because the same conduct establishes the basis for both convictions.

B. ISSUES PERTAINING TO ASSIGMENTS OF ERROR

1. Double jeopardy is not violated when the defendant is convicted of assault in the fourth degree, as well as a violation of a protection order that is made felonious by virtue of being accompanied by an assault on the protected party.

2. Assault in the fourth degree is not a lesser included offense to felony violation of a protective order.

C. STATEMENT OF THE CASE

1. Facts Presented at Trial

The Defendant was tried by jury on May 2-4, 2016 on one count of Felony Violation of a No-Contact Order, Domestic Violence, one count of Unlawful Imprisonment, Domestic Violence, one count of Assault in the Fourth Degree, Domestic Violence, and one count of Theft in the Third Degree, Domestic Violence. CP 71-73, RP 1, 401. Witnesses called by the State were Ferry County Dispatcher Terri Sebree (RP 28-33), Vernon Heldman (RP 34-43), Miles Anderson (RP 43-62), Ferry County Sheriff's Deputy Talon Venturo (RP 64-82), Ferry County Sheriff's Deputy Austin Hershaw (RP 83-92), Marlowe Sattler (RP 92-111), Karen Webber (RP 111-127), Ferry County

Sheriff's Detective Patrick Rainer (RP 127-142), Victim Kara Ahlson (RP 153-200, 204-286); Jeremiah Novikoff (RP 286-301). The facts presented at trial are as follows.

Kara Ahlson is a twenty-eight year-old female residing in Republic, Washington. RP 154. Ms. Ahlson met the Defendant, Alex Novikoff, when she was thirteen years old and I Junior High School. RP 155. Aside from knowing Defendant from school, Ms. Ahlson was acquainted with him because her mother was married to Defendant's father, making them step-siblings. RP 155-156. Ms. Ahlson and Defendant had been in a romantic relationship over the past year or two, which ended in February of 2016. RP 156. Ms. Ahlson and Defendant lived together in his trailer in Spokane in the late fall and winter of 2014, then lived in the trailer at her father's property for a few months. RP 159.

When Ms. Ahlson and Defendant moved back to Republic, they were no longer residing together. *Id.* RP 49. However, Ms. Ahlson and Defendant continued their on-again, off-again relationship. RP 159. This relationship was characterized by "a lot of drama, a lot of get together, break up, arguments, make up, break up, back and forth". RP 159-160. Defendant often accused Ms. Ahlson of cheating on him and not being supportive of him, and

was jealous of her relationship with her childrens' father, Miles Anderson. RP 160. Ms. Ahlson cared a lot about the Defendant, and had a hard time letting go – she held out hope that things would change and Defendant would be the person she thought he could be. *Id.* However, in September of 2015, an order restraining Defendant from contacting Ms. Ahlson was ordered by the Ferry County Superior Court. RP 156-157.

In January of 2016, Ms. Ahlson was living with Karen and Stan [Webber], parents of her late friend Scotty. RP 158-159. Defendant began phone messaging her and they ended up meeting on the evening of February 21, 2016 because Defendant wanted to talk to her. RP 161-162. Ms. Ahlson had gone to the Chevron to get chocolate milk and a candy bar for herself and Karen and ran into Defendant on her way back. RP 162. Defendant was driving his white Chevy truck. RP 162-163. Defendant was not being mean or threatening and Ms. Ahlson and Defendant began to talk about nostalgic things and not wanting "things to go bad" between them. RP 163. Defendant wanted to talk but knew there was a restraining order, so they drove in Defendant's truck down to the baseball field. RP 163. They remained at the baseball field talking for about an hour, and at first, things were okay. RP 164.

Afterwards, Defendant was supposed to take Ms. Ahlson home to Karen and Stan's house, but joked that he was not taking her home. RP 164. At this time, Ms. Ahlson was not scared because they had "done the same damn game a million times." *Id.*

Defendant began to drive in the direction of his house, away from Karen and Stan's house. RP 165. This house is a trailer located on Defendant's step-grandfather's property. RP 169. As they got closer to Defendant's house, about ten miles from town, they began arguing about "the same old stuff". *Id*; RP 168. Things had settled down somewhat until Defendant wanted to go through Ms. Ahlson's pocket-sized tablet device and began to get angry about messages from his cousin, Jeremiah Novikoff. RP 165. Defendant stated to get more mad because he did not want Ms. Ahlson talking to Jeremiah, to her ex-partner, Miles, or to anyone. RP 167.

Ms. Ahlson and Defendant went inside the trailer, where the argument continued, with Defendant getting more and more angry about the tablet. RP 171. Things cooled down briefly when Defendant's brother, Kameron [Manfredi] arrived. *Id*; RP 175. Ms. Ahlson started to leave because Defendant was getting more and more angry which she could tell by the tone of his voice and

because he was "puffed up". RP 172. Ms. Ahlson was familiar with Defendant's temper. *Id.* Defendant did not want her to leave, and when Ms. Ahlson ran outside to the gate, he caught her and began pushing her towards the trailer. *Id.* Ms. Ahlson tried to plant her feet because she did not want to go, but Defendant picked her up and started carrying her back to the trailer. RP 173. Kameron told the Defendant to stop, but Defendant took her into the trailer, bruising the tops of her arms in the process. RP 173-175. Once inside the trailer, Ms. Ahlson curled up in a ball, very upset. RP 177. Kameron left and Defendant stated that she was going to go to the cops and told her to "leave Kameron out of this." *Id.*

The next day, Defendant was sweet to Ms. Ahlson. RP 178. She sat in his room and watched a movie. RP 179. She did not go outside because Defendant didn't want anyone to know she was there. RP 179-80. People did come to the property, but the only person who came inside other than the Defendant was Kameron. RP 179. Ms. Ahlson asked to leave a couple of times, but had no way to get home. RP 180. Ms. Ahlson was at Defendant's trailer from February 21 to February 24th, 2016. RP 184.

On the morning of February 24, 2016, Ms. Ahlson had an appointment in town at 9:00 AM and Defendant agreed to drive her

into town. *Id.* She was anxious to get there on time and Defendant was procrastinating. RP 185. Once in his vehicle, the conversation turned again to Ms. Ahlson's tablet and Defendant thought Ms. Ahlson was recording him. *Id.* She gave him her unlocked tablet and stated that if he thought she was recording him, he could let her out and she would walk to town. RP 185-86. Defendant pulled over into a driveway and began going through her tablet; she again stated that she wanted out. RP 186. The door handles on the truck are broken inside, and Ms. Ahlson could not get out without reaching through the window to open the door from the outside. RP 186. The windows are electric windows. RP 196. Defendant stated that he wasn't going to let her out, so Ms. Ahlson began to yell for help. RP 186. Defendant told her to shut up and hit her in the face, causing Ms. Ahlson to bleed all over her hand. *Id.*

Rather than letting her out, Defendant started his truck and headed back towards his house, but then pulled over by a gravel pit within eyeshot of his house, and turned the vehicle off. RP 187. Ms. Ahlson again said that she wanted to leave but Defendant was only interested in going through her tablet, despite her screams for help. RP 187-188. Ms. Ahlson tried to open the door but could not. RP 188. She tried to go for the back window and Defendant pulled

her into his seat with him, after which she began honking the horn with her back. *Id.* Defendant threw Ms. Ahlson into the other seat, and on seeing that she was preparing to try to kick the window out, told her that if she fucked up his truck, he was going to fuck her up. *Id.* Defendant then drove back to his driveway, where he continued going through Ms. Ahlson's tablet, claiming that she was trying to "set him up". *Id.*

Ms. Ahlson had rested her head down and against the window in defeat when she heard Defendant talking to someone and realized someone else was there. RP 188-89. She lifted her head and saw Marlowe [Sattler] in his vehicle, which was pulled alongside Defendant's vehicle. RP 189-90. Ms. Ahlson asked Marlow to please help her and to please call 911. RP 190. Mr. Sattler's eyes were wide like he didn't know what to make of what was going on. *Id.* Defendant got out of the vehicle but Ms. Ahlson was unable to get out because the vehicle was off, the window was up, and because you can't open the door from the inside. RP 191. Ms. Ahlson continued to beg Mr. Sattler to take her to town, at which point Defendant stated "I don't give a shit. She can take her shit and go." RP 192.

Ms. Ahlson grabbed some of her things and asked for her

tablet and for her red swiss army pocketknife, which Defendant had previously ripped from her lanyard during the argument. *Id.*, RP 193. Defendant scoffed at her, would not let her out the passenger side, and made her climb out his side of the vehicle and go around him. RP 192-93. Ms. Ahlson went to the road and flagged down a little blue car that was headed south, away from town, and asked the driver to take her to town. RP 35-36,193. The driver, Vernon Heldman, whom Ms. Ahlson did not know, turned around and took Ms. Ahlson to town. RP 36-37,195-196. Karen and Stan were not at their home, so Ms. Ahlson asked to be taken to Jeremiah [Novikoff's] house because she felt it was a safe place. RP 38,196-98. Mr. Heldman reported the incident to the police later that day, and a criminal investigation was initiated. RP 29, 31, 39.

2. Procedural Facts

On February 29, 2016, Defendant was charged in Ferry County Superior Court by an Information alleging one count of Felony Protection Order Violation (Domestic Violence), one count of Unlawful Imprisonment (Domestic Violence), and one count of Assault in the Fourth Degree (Domestic Violence). CP 1-3. On May 4, 2016, an Amended Information was filed which added one count of Theft in the Third Degree (Domestic Violence). CP 71-73.

A jury trial was held on May 2-4, 2016. RP 1, 401. At the close of the State's case-in-chief, Defendant moved to dismiss Count I of the Amended Information, which was the Felony Protection Order Violation, claiming that the offense had been mis-charged. RP 302. The Court denied the motion. RP 308. The Jury found the Defendant guilty of all charges. RP 554-555. Subsequently, on May 12, 2016, Defendant moved the Court to Arrest the Judgment on Counts I and II on the basis that Count I did not charge a crime and that there was insufficient evidence to convict on Count II, Unlawful Imprisonment. CP 115-117. On May 27, 2016, the Court denied these motions. RP 578-81.

At sentencing on May 27, 2016, Defendant argued that the Violation of the No-Contact Order and the Unlawful Imprisonment constituted same criminal conduct, and that the Assault 4 merged with the Felony Violation of a No-Contact Order. CP 127-130. The Court granted the motion as to same criminal conduct, and denied the motion as to merger, finding that the two crimes were separate, with different elements, required different evidence, and the legislature meant for them to be punished separately and consecutively. RP 583-586,589. Defendant now appeals, claiming that conviction of Assault 4 (DV) and Felony Violation of a Protection

Order violates the Double Jeopardy Doctrine.

D. ARGUMENT

I. DOUBLE JEOPARDY IS NOT VIOLATED BY PERMITTING CONVICTION AND PUNISHMENT FOR ASSAULT IN THE FOURTH DEGREE AND FELONY VIOLATION OF A NO CONTACT ORDER.

A. Standard of Review on Appeal

Double jeopardy claims raise questions of law, which are reviewed de novo. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010).

B. The legislature intended to provide for separate punishments for assault in the fourth degree and felony violation of a no contact order accompanied by assault.

At issue here is whether the legislature intended to punish separately both felony violation of a no-contact order and fourth degree assault, where the former crime is based, in part, on the latter. The constitutional protection against double jeopardy is not offended if the legislature intends cumulative punishments for two or more offenses. *State v. Moreno*, 132 Wn.App.663, 665, 132 P.3d 1137 (2006).

The determination as to whether the legislature intended separate punishments for two offenses first looks at the express language of the pertinent statutes. *State v. Louis*, 155 Wn.2d 563,

569, 120 P.3d 936 (2005). If the language of the statutes is silent on this point, we must next examine the statutory construction and apply the "same evidence" test. *Id.* This rule of construction focuses on whether the offenses are the same in fact and law. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). Even if both elements of this test are satisfied, this is not dispositive of the legislature's intent where clear evidence of a contrary intent exists. *Id.* at 780.

In *State v. Moreno*, Division One held that the legislature authorized separate punishments for third degree assault and felony violation of a no-contact order based on the same third degree assault. 132 Wn.App. 663, 132 P.3d 1137 (2006). The Court found that the two statutes did not expressly state whether the legislature intended that they should be punished separately. *Id.* at 668.

Because the statutes appeared to be silent, the Court then applied the "same evidence" test and found that the two offenses were the same in fact and in law because they were based on the single assault of the victim. *Id.*

However, the Court held that, although the same evidence test may create a presumption that separate punishments are not

intended, the test is not controlling where there is clear evidence of contrary legislative intent. *Id.* at 669. The Court found that the legislative intent could be determined from the statutes' historical development, legislative history, location in the criminal code, or the differing purposes for which they were enacted. *Id.* The Court therefore continued its inquiry further, by examining how the above criteria applied to the two statutes at issue.

The Court first noted that the two statutes are located in different portions of the state's statutory framework: Assault is codified within Title 9A of the Criminal Code, while felony violation of a court order is contained within Title 26, which concerns Domestic Relations. *Id.* at 669. The court reasoned that the legislature presumably knew that the assault statute existed when it passed the felony violation of a court order statute. *Id.* The Court reasoned: "We can think of no plausible reason why the legislature chose to enact a statute for the latter crime and place it in a location outside the then existing criminal code if it did not intend that the two crimes should be treated separately." *Id.* The court specifically noted that RCW 26.50.210 provides that "Any proceeding under [the Domestic Violence Prevention Act, chapter 26.50 RCW] *is in addition* to other civil or criminal remedies" indicating legislative

intent to provide for separate punishments. *Id.* (*emphasis added)*.

The Court next examined the differing purposes of the statutes, finding that the different purposes supported the Court's view that the legislature intended that the two crimes should be separately punished, citing *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) in support. *Id.* at 670. In *State v. Calle*, the Supreme Court noted that even though the facts underlying the crimes of incest and rape may be the same, the incest and rape statutes served different purposes (securing family harmony and prohibiting unlawful sexual intercourse, respectively) and therefore supported the result that the legislature intended to punish both crimes separately. *State v. Calle*, 125 Wn.2d at 776. Applying this analysis to the facts in *Moreno*, the Court held that the assault statute and the felony violation of a court order statutes served different purposes, namely that the assault statute is to prevent assaultive behavior, while the purpose of the felony violation of a court order statute is to prevent domestic violence and other social problems, as well as to provide maximum protection to victims of abuse. *State v. Moreno*, 132 Wn.App. at 670-71.

The *Moreno* Court also compared the seriousness levels of the offenses at issue, noting that the two crimes had different

seriousness levels which supported the contention that the offenses were meant to be punished separately. *Id.* at 671. Whereas felony violations of no-contact orders carries a seriousness level of five, a third degree assault carries a seriousness level of three and a second degree assault carries a seriousness level of four. *Id.*

Third, the court reasoned, "the legislature recognized that violation of a no-contact order is a crime against the court and punishable as contempt of court." *Id.* Because the violation of a no-contact order has clear penalties separate from those of assault, the Court of Appeals thereby found that felony violation of a court order and third degree assault were separate crimes to be punished separately and therefore was not a violation of the defendant's right against double jeopardy.

State v. Leming, 133 Wn. App. 875, 883, 887, 138 P.3d 1095, 1099-1101 (2006), comes from Division 2 and held similarly that the legislature intended to punish separately both assault in violation of a no-contact order and assault in the 2nd degree. *Id.* at 887. Division 2 went through the same analysis, found in *In re Pers. Restraint of Burchfield,* 111 Wn.App. 892, 895, 46 P.3d 840(2002), beginning by looking for a statutory authorization of separate punishments, applying the same evidence test, and

looking for evidence of legislative intent to treat the crimes as one offense for double jeopardy purposes.

In *Leming*, after application of the three-step legislative intent analysis, the court found that Assault in the Second Degree and felony Violation of the No-Contact Order should be punished separately. *Id.* The Court found there was not express legislative intent to authorize separate punishments under the first step. *Id.* at 884. Applying the second test, the Court found that each offense required proof of an element that the other did not: for example, the State had to prove that the Defendant knew of the order, knowingly violated the order and assaulted the victim within the meaning of RCW 26.50.110(4), while, in order to prove second degree assault, the State had to prove that Defendant Leming had assaulted the victim with intent to commit a felony, which did not require proof that the Defendant had violated a court order. *Id.* at 885.

Finally, the Court examined legislative intent to punish the two crimes separately. *Id.* at 886. RCW 26.50, also known as the Domestic Violence Prevention Act, explicitly states that "Any proceeding" under the Act "is in addition to other civil or criminal remedies." RCW 26.50.210. Second degree assault is located in Title 9A of the Criminal Code, RCW 9A.36.041. A violation of a no-

contact order by means of assault is located in RCW 26.50.110. Violation of a no-contact order by assault is a proceeding under the Domestic Violence Prevention Act. Therefore punishment is "in addition to other… criminal remedies" i.e. punishment for the Assault under RCW 9A.36. The *Leming* court thereby found that the legislature had implicitly expressed its intent to punish the two crimes of Assault in the Second and felony Violation of a No-Contact Order separately. *Leming* at 887. The *Leming* court refers to and supports the *Moreno* court's decision that there is no double jeopardy violation.

In the present case, there is likewise no express legislative intent to punish the assault in the fourth degree separately from the violation of the no-contact order. Under the same evidence test, each crime requires different evidence. In order to prove the felony violation of no-contact order, the State in Mr. Novikoff's case had to prove that Mr. Novikoff 1). Had knowledge of the order, 2). Knowingly violated the order, and 3). assaulted the victim not amounting to assault in the first or second degree. RCW 26.50.110(4). Assault in the fourth degree requires proof that Mr. Novikoff assaulted the victim in the State of Washington, assault being an intentional unlawful harmful touching. RCW 9A.36.041.

Therefore, the proof of the violation of the no-contact order requires additional elements beyond the assault.

But, under the Division 1 and Division 2 cases of *Moreno* and *Leming*, it would not matter even if the elements were the same because the legislature intended separate punishments. Like *Moreno* and *Leming*, the statutes at issue here are located in two different portions of the statutory framework. Felony violation of a no-contact order is located in the Domestic Violence Prevention Act, while Assault in the Fourth Degree is located in the Title 9A.36 of Washington's Criminal Code. Like *Moreno* and *Leming*, the statutes have different purposes: the assault statute is to prevent assaultive behavior, the Felony no-contact order statute is to prevent domestic violence by elevating the punishment for a no-contact order violation when that violation is accompanied by an assault. Finally, like *Moreno*, the felony violation of the no-contact order and the assault carry different seriousness levels: a felony no-contact order violation carries a seriousness level of five, whereas a simple assault is classified as a gross misdemeanor.

B. Fourth degree assault is not a lesser-included offense to felony violation of a no-contact order.

The appellant proposes *State v. Villanueva-Gonzalez*, 175

Wn. App.1, 6, 304 P.3d 906 (2013) for the proposition that fourth degree assault is a lesser-included offense of felony violation of a no-contact order.

The analysis for a lesser-included offense requires that (1) each of the elements of the lesser offense must be a necessary element of the offense charged and (2) the evidence in the case must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense. *State v. Workman*, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978). Additionally, the lesser offense must arise from the same act or transaction supporting the greater charged offense. *State v. Porter*, 150 Wn.2d 732, 738, 82 P.3d 234 (2004). In this situation, assault is not a necessary element for felony violation of a no contact order. A reckless act which could lead to substantial harm to the victim may also be charged as a felony violation. Additionally, a third violation of a similar order also elevates the no-contact order violation to felony level. RCW 26.50.220(4), (5). *State v. Fowler*, 114 Wn.2d 59, 61, 785 P.2d 808, 810, (Wash. 1990), explained that "If you can commit the greater crime without committing the lesser, the latter is not an included crime." *Id.*

Defendant engaged in several assaultive acts against Ms.

Ahlson, including grabbing, shoving, covering her mouth, hitting her in the nose, and pulling her hair. RP 153-200. Based on the facts presented at trial, the jury could and did find two separate offenses: Assault in the Fourth Degree and Felony Violation of a No-Contact Order accompanied by an assault. Because Assault Four is not a lesser included charge of Felony Violation of a No-Contact Order and because the jury could find that the Defendant committed one crime without the other, these crimes do not merge.

E. CONCLUSION

Double jeopardy was not violated because the legislature intended separate and cumulative punishments for Assault in the Fourth Degree and Felony Violation of a No-Contact Order. The statutes which defined each crime are part of separate statutory schemes and the Felony No-Contact Order Violation Statute specifically states that any punishment is "in addition" to punishment for other violations. Furthermore, the Fourth Degree Assault is not a lesser included offense of Felony Violation of a No-Contact Order and therefore, the two offenses do not merge nor do multiple convictions for them constitute double jeopardy.

Judge Nielson correctly concluded that these statutes are

meant to be treated separately: "[T]he legislature's made it clear – made it clear that there has to be additional punishment." RP 589. For the reasons stated above, the State respectfully requests that the Court deny Defendant's motion to vacate the conviction for Fourth Degree Assault and to remand for resentencing.

Dated this 18 day of May, 2017

Respectfully Submitted by:

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 18, 2017, I mailed and/or e-mailed a copy of the AMENDED Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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May 18, 2017 - 1:16 PM

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