

035660-2

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NO. 63566-2-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

MICHAEL E. TURNER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

RESPONDENT'S BRIEF

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COURT OF APPEALS
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TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. ISSUES	1
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	7
1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMISSION OF THE NO CONTACT ORDER SINCE THE ORDER WAS VALID, THE VALIDITY OF THE ORDER IS NOT AN ELEMENT OF THE OFFENSE AND THE EVIDENCE WAS SUFFICIENT TO CONVICT.	7
2. THIS COURT SHOULD DIRECT THE TRIAL COURT ENTER AN ORDER LIMITING CONFINEMENT PLUS COMMUNITY CUSTODY TO THE STATUTORY MAXIMUM.	15
V. CONCLUSION	16

TABLE OF AUTHORITIES

	<u>Page</u>
<u>WASHINGTON SUPREME COURT CASES</u>	
<u>Hue v. Farmboy Spray Co., Inc</u> , 127 Wn. 2d 67, 896 P.2d 682 (1995)	9
<u>In re Pers. Restraint of Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009)	16
<u>State v. Castellanos</u> , 132 Wn.2d 94, 935 P.2d 1353 (1997)	10
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980)	9
<u>State v. Miller</u> , 156 Wn. 2d 23, 123 P.3d 827 (2005).....	9, 11, 12
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	9
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	10
<u>WASHINGTON COURT OF APPEALS CASES</u>	
<u>State v. Fiser</u> , 99 Wn. App. 714, 995 P.2d 107 (2000), <i>rev. denied</i> , 141 Wn.2d 1023, 10 P.3d 1074 (2000).....	9
<u>State v. Hutton</u> , 7 Wn. App. 726, 502 P.2d 1037 (1972)	10
<u>State v. Marking</u> , 100 Wn. App. 506, 997 P.2d 461, <i>rev. denied</i> , 141 Wn.2d 1026, 11 P.3d 825 (2000).....	3, 11
<u>State v. McNeal</u> , 98 Wn. App. 585, 991 P.2d 649 (1999)	9
<u>State v. Prestegard</u> , 108 Wn. App. 14, 28 P.2d 817 (2001)	10
<u>WASHINGTON STATUTES</u>	
RCW 10.99.040	12, 13
RCW 26.50.110	9, 10, 13
<u>WASHINGTON COURT RULES</u>	
GR 14	passim
<u>OTHER AUTHORITY</u>	
Amendments to Rules of Court, 141 Wn.2d 1108-9 (2000)	14
<u>TREATISES</u>	
11 Washington Practice: Pattern Jury Instructions Criminal at 632-8 (3 rd ed.2008) (WPIC 36.51.02)	10
2 Karl B. Tegland, Washington Practice: Rules Practice, GR 14	15

I. SUMMARY OF ARGUMENT

Michael Turner challenges his conviction for Felony Violation of a No Contact Order after a jury trial. Turner challenged the validity of the no contact. On appeal, Turner claims that the order was invalid because the warnings to the defendant were on the reverse side of the order. He contends the trial court erred in admitting the order and without the order there was insufficient evidence to support the conviction.

Turner's claim based upon GR 14 fails because that rule does not provide a remedy for a potential violation of its terms and because it applies to pleadings filed by a party, not court generated documents. Because the order contained the required warnings the trial court did not abuse its discretion in admission of the evidence.

In addition, since validity of the no contact order is not an element of the crime of violation of the no contact order, the evidence was sufficient to support the conviction.

II. ISSUES

Where the no contact order includes the required warnings on the reverse side and the trial court determined that the order was

valid and admissible, was there sufficient evidence to support the finding of guilt?

Where combination of total confinement and community custody stated in the judgment and sentence exceeds the statutory maximum, should this Court remand the case for entry of an order that explicitly states that the combination shall not exceed the statutory maximum sentence?

III. STATEMENT OF THE CASE

On December 10, 2008, Michael Turner was charged with felony Violation of a No Contact order for a third or subsequent violation of a court order and Malicious Mischief in the Third Degree alleged to have occurred on December 7, 2008. CP 1-2. The charge was based upon Turner having contact with his sister at her residence when he kicked in the door in violation of a no contact order. CP 4. Turner was at his sister's residence when officers arrived. CP 4.

On February 9, 2009, the case proceeded to jury trial. 2/9/09
RP 5.

On the first day of the trial, defense pursued a motion to exclude admission of the no contact order which Turner was charged with violating. 2/9/09 RP 14.

Turner argued to the trial court that the no contact order was invalid based upon the claim the front of the order did not contain the legend under State v. Marking, 100 Wn. App. 506, 997 P.2d 461, *rev. denied*, 141 Wn.2d 1026, 11 P.3d 825 (2000). 2/9/09 RP 14-8. Turner did not allege a violation of GR 14 before the trial court. Also included with the no contact order issued the same date was language requiring that Turner “[r]ead thoroughly and strictly comply with the terms of the Domestic Violence No Contact order filed in this case.” Exhibit 1 at trial. The trial court initially delayed ruling on the issue and took testimony. 2/9/09 RP 25-6.

On February 9, 2009, the jury heard testimony from Michelle Frydenlund. 2/9/09 RP 41. Michelle had a brother named Michael Turner. 2/9/09 RP 42. Michelle testified that she resided at 804 North 15th Street in Mount Vernon. 2/9/09 RP 43. Michelle had contact with Michael Turner by phone in the days leading up to the incident on December 7, 2008. 2/9/09 RP 43. Turner had asked Michelle to move some stuff out of his apartment and gather his last paycheck because he was going to jail. 2/9/09 RP 44. Michelle

cleaned up the apartment and kept the deposit as Turner requested. 2/9/09 RP 44-5. She also cashed his paycheck and was supposed to put his money on his books at the jail which she did. 2/9/09 RP 45. After Turner got out of jail on December 5, 2008, and contacted Michelle asking for more of his money. 2/9/09 RP 46.

Turner then showed up at Michelle's house demanding money. 2/9/09 RP 46. Michelle gave him some money, then asked him to leave because he was yelling, screaming, getting mad and upsetting her children hiding in the hallway. 2/9/09 RP 47. Michelle picked up the phone to call 911 and Turner left. 2/9/09 RP 48. Turner then called her about 10 or 11 times. 2/9/09 RP 48.

On December 6, 2008, Michelle came home from work around 11:00 or 11:30 in the evening. 2/9/09 RP 49. Turner was standing in the driveway when she arrived. 2/9/09 RP 49. Turner again demanded money. 2/9/09 RP 49. Michelle told Turner to leave and he refused. 2/9/09 RP 49-50. After speaking with her husband and going back out to tell Turner to leave, Michelle went into the house and closed the door. 2/9/09 RP 50-1. As Michelle was on the phone with 911, Turner kicked in the door. 2/9/09 RP 51. Shortly afterward, police arrived. 2/9/09 RP 51. Michelle identified Michael Turner as the defendant in front of the jury. 2/9/09 RP 52.

Ryan Frydenlund, Michelle's husband, testified. 2/9/09 RP 55. Ryan testified that he was home on December 7, 2008, when Michael Turner came to the residence. 2/9/09 RP 56, 58. Ryan was in bed when his wife told him Michael Turner was there. 2/9/09 RP 58. Ryan heard a loud bang and got out of bed. 2/9/09 RP 58. He saw the front door broken open with the jamb lying on the floor and Michael Turner outside. 2/9/09 RP 59. Ryan's wife Michelle was on the phone with 911 saying "He's busted in the door. Can you please hurry." 2/9/09 RP 59. Ryan testified about the cost to repair the door. 2/9/09 RP 60. Ryan identified Michael Turner as the defendant before the jury. 2/9/09 RP 61.

Officer Chantel Vandyk of the Mount Vernon Police Department testified. 2/9/09 RP 63. On December 7, 2008, at about 1:00 a.m., Vandyk responded to a call of a violation of a court order at 804 North 14th Street in Mount Vernon. 2/9/09 RP 63-4. When Vandyk arrived, she contacted Michael Turner in the carport leaving against a vehicle. 2/9/09 RP 64. Vandyk identified the defendant in court as the person she contacted at the carport. 2/9/09 RP 73-4.

The trial court admitted the no contact order that prohibited Michael Turner from having contact with Michelle Frydenlund and her residence over the objection of the defendant. 2/9/09 RP 73. The

court also admitted two prior convictions of Michael Turner for violation of a no contact order. 2/9/09 RP 74.

Officer Edgar Serrano of the Mount Vernon Police Department testified about the condition of the door and the photographs he took on December 7, 2008. 2/9/09 RP 76-88.

The defendant did not testify and the defense did not call any witnesses. 2/9/09 RP 88-9. There was no testimony indicating that Turner was unaware of the existence of the order or the fact that a crime could be pursued for a violation.

On February 10, 2009, prior to closing argument, the trial court found that the order was valid, entailed both the front and back of the form and that the pertinent information to the order was contained on the front and the warning to the defendant was included on the back. 2/10/09 RP 4-5.

On February 10, 2009, the jury returned verdicts finding Turner guilty of Felony Violation of No Contact Order, but not guilty of Malicious Mischief in the Third Degree. CP 27, 28.

On February 26, 2009, Turner was sentenced on two cases involving felony violation of a protection order at the same time. 2/26/09 RP 2. First, the trial court sentenced Turner on the present case. 2/26/09 RP 2-7. At a stipulated facts trial on the other case,

Turner had raised the same issue regarding the language regarding the warnings to the defendant on the back side of the order, and the other judge had ruled in the same manner. 2/23/09 RP 2.¹

Based upon the defendant's offender score of an eight or a nine, his standard range was the statutory maximum of 60 months. 2/26/09 RP 2. Defense agreed that was the range. 2/26/09 RP 2, 9-10.

The trial court sentenced Turner to 60 months to run concurrent with the other case. 2/26/09 RP 7, 10.

The prosecutor did not believe community custody was necessary given the statutory maximum. 2/26/09 RP 3. However, the trial court set community custody at 9 to 18 months. 2/26/09 RP 7.

On February 26, 2009, Turner timely filed his notice of appeal. CP 40-1.

IV. ARGUMENT

1. The trial court did not abuse its discretion in admission of the no contact order since the order was valid, the validity of the order is not an element of the offense and the evidence was sufficient to convict.

¹ Turner's appeal of that conviction is pending in this Court in State v. Michael Turner, COA# 63147-1-I.

Turner's first assignment of error claims the State did not establish the existence of an applicable order because the order did not contain the notification language on the front of the order. Brief of Appellant at page 1. On describing the issue, Turner claims that the order was insufficient to sustain the conviction because the legend "appeared on the back of the order after the judge's signature." Brief of Appellant at page 1. Thus Turner concludes that due to the invalid order there was insufficient evidence to sustain the charge. Brief of Appellant at page 9. Thus, Turner's claim is regarding the sufficiency of the evidence based upon evidence that Turner claims was improperly admitted.

Validity of a no contact order is not an element of the offense of violation of a no contact order. Validity is for the trial court to decide on for the purpose of admissibility.

We respectfully disagree with the Court of Appeals and hold that the validity of the no-contact order is not an element of the crime. To the extent the cited cases are inconsistent, they are overruled. First, as discussed above, "valid" does not appear in relevant sections of the statute, RCW 26.50.110. Accordingly, the existence of a valid court order is not a statutory element of the crime. The legislature likely did not include validity as an element of the crime because issues concerning the validity of an order normally turn on questions of law. Questions of law are for the court, not the jury, to resolve. Hue, 127 Wn. 2d at 92, 896 P.2d 682.

We also decline to find that the validity of the order is an implied element of the crime

State v. Miller, 156 Wn. 2d 23, 31, 123 P.3d 827 (2005).

Since Turner's assignment of error is to sufficiency of the evidence, this Court must apply the applicable standards.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. Hutton, 7 Wn. App. at 728, 502 P.2d 1037.

State v. Prestegard, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001).

A decision involving the admission of evidence lies within the sound discretion of the trial court and will not be reversed unless abuse of discretion can be shown. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

To prove a felony violation of a no contact order, the State must prove beyond a reasonable doubt that there existed a no contact order, the defendant knew of the existence of the order, the defendant violated the order, the defendant had twice been previously convicted for violating a court order, and that the acts occurred in the State of Washington. RCW 26.50.110, 11 Washington Practice: Pattern Jury Instructions Criminal at 632-8 (3rd ed.2008) (WPIC 36.51.02).

The Washington State Supreme Court has thus determined that the validity of the no contact order is not an element of the crime of violation of a no contact order. Here there was an order that Turner violated by having contact and being at the residence of Michelle Frydenlund on December 7, 2008. Turner also had the requisite two prior convictions. The State proved all elements of violation of a no contact order.

Turner's claim on appeal boils down to the argument that GR 14 requires that all pleadings filed with the Court shall appear only on one side of the page and the fact that the legend portion of the no contact order was present on the back side of the order renders the order invalid.

State v. Miller, describes that the issue of applicability of the order is for the trial court to determine in the criminal case.

While we are inclined to believe that the Court of Appeals reached appropriate results in Marking and Edwards, issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court. **Collectively, we will refer to these issues as applying to the "applicability" of the order to the crime charged. An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order.** The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged. [FN4] Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed.

FN4. We do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge.

State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005) (emphasis added).

It is important to note in Footnote 4 that the Miller court provided that the validity of the no contact order was a matter to be considered by the court issuing the no contact order, not for the court reviewing the applicability of the order in a subsequent trial. Thus, the trial court did not abuse its discretion in admission of the order.

At the hearing on the defendant's motion in limine, the State agreed that the order used by the District Court had the warning on the back of the order. 2/9/09 RP 18. Turner argued to the trial court, without reference to GR 14, that the order was invalid because the language was contained on the back side of the order. 2/9/09 RP 15-7.

RCW 10.99.040 does require that the no contact order contain a particular legend.

RCW 10.99.040. Duties of court--No-contact order

...

(4)(a) Willful violation of a court order issued under subsection (2) or (3) of this section is punishable under RCW 26.50.110.

(b) The written order releasing the person charged or arrested shall contain the court's directives and shall bear the legend: **"Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a**

violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

(c) A certified copy of the order shall be provided to the victim.

...

RCW 10.99.040 (bold reference to legend added).

Here, the order did contain that legend. The legend was on the reverse side of the same page of the order. 2/9/09 RP 18. The statutory reference to RCW 10.99.040 was on the front side of the order which linked to the statutory reference on the reverse side of the order.

Turner's argument is based upon the language of Washington General Rule 14.

RULE 14. FORMAT FOR PLEADINGS AND OTHER PAPERS

(a) Format Requirements. All pleadings, motions, and other papers filed with the court shall be legibly written or printed. The use of letter-size paper (8-1/2 by 11 inches) is mandatory. The writing or printing shall appear on only one side of the page. The top margin of the first page shall be a minimum of three inches, the bottom margin shall be a minimum of one inch and the side margins shall be a minimum of one inch. All subsequent pages shall have a minimum of one inch margins. Papers filed shall not include any colored pages, highlighting or other colored markings. This rule applies to attachments unless the nature of the attachment makes compliance impractical.

GR 14. Turner did not argue for application of GR 14 at the trial court. The addition of the language to GR 14 pertaining to one sided documents, margins and colored pages was added by amendment to the rule effective September 1, 2000. Amendments to Rules of Court, 141 Wn.2d 1108-9 (2000). By the language of the amendment, it applies to pleadings filed with the court, not for forms prepared by the court. The amendment was to assist in the ability to scan and save documents in an electronic format. One treatise notes that the change was not intended to apply to court generated documents.²

The order adopting the new requirements stated that the requirements were recommended by the Court Management Council. A more detailed explanation found at the Supreme Court's website said the new requirements were designed "to assist courts which scan documents filed in the trial courts." The website also stated that the new requirements were "not intended to apply to court generated documents," nor were they intended to be "an impediment to parties filing pleading with the courts."

2 Karl B. Tegland, Washington Practice: Rules Practice, GR 14 at 14 (6th ed.2004). In addition, there is no remedy provided under GR 14 for failure to comply with the terms of GR 14. Turner's proposed remedy is to invalidate the order although he has not challenged the

validity in the court proceeding where it was entered.

Turner is using a change in the court rules that was intended to assist in converting documents filed with the court by the parties to electronic format to invalidate a court generated order. This challenge must be denied.

2. This Court should direct the trial court enter an order limiting confinement plus community custody to the statutory maximum.

Turner's second assignment of error is that the trial court erred in imposing community custody where the sentence of 60 months of confinement was the same as the statutory maximum. Brief of Appellant at page 9. Felony Violation of a No Contact Order is a class C felony with a statutory maximum of 60 months. CP 32. The sentence imposed here was 60 months. CP 34. In fact there was no standard range sentence, just the mandatory 60 months as a result of an offender score 8 on the level IV offense. CP 32 Community custody was set at 9 to 18 months.³ CP 34. Thus the combination of

² The undersigned counsel has attempted to locate the referenced Court Management Council on the present court website, but has been unable to do so.

³ Subsequent statutory amendment has reduced this period of community custody to 12 months. RCW 9.94A.701(3).

community custody and prison could be 69 to 78 months by the terms of the sentence.⁴

The decision of In re Pers. Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009) issued after the sentence was imposed at the trial court clarified that when the period of total confinement and community custody has the potential to exceed the statutory maximum, the appropriate remedy is to remand the trial court to amend the sentence to explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum. In re Pers. Restraint of Brooks, 166 Wn.2d at 675.

Turner requests the remedy of remand for such an order. Brief of Appellant at page 10-11. That relief should be granted.

V. CONCLUSION

For the forgoing reasons, this Court should hold that the trial court did not err in holding that the no contact order was valid and applicable and affirm the conviction. In addition, this Court should remand the case to enter an order explicitly stating that the period of total confinement and community custody shall not exceed the statutory maximum of 60 months.

⁴ It is likely that Turner would earn early release and serve less than 60 months of confinement.

DATED this 4th day of March, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Andrew P. Zinner, addressed as Neilsen, Broman & Koch, PLLC, 1908 E. Madison Street, Seattle, WA 98122.. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 4th day of March, 2010.


KAREN R. WALLACE, DECLARANT