

No. 66117-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN HAYNES,

Appellant.

FILED
COURT OF APPEALS
DIVISION ONE
JUL 25 2011

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF

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A. ARGUMENT

WHERE THERE WAS INSUFFICIENT EVIDENCE
OF FELONY VIOLATION OF A COURT ORDER,
REVERSAL IS REQUIRED.

a. The State failed to prove the added element of “telephonic contact” as required by the jury instruction. Because the additional element of telephonic contact was added to the “to convict” instruction without any objection from prosecution, the State assumed the burden of proving the additional element beyond a reasonable doubt, and this element became the “law of the case.” State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). Because the State failed to meet its burden with respect to the added element, the conviction must be dismissed. Id. at 103 (holding a “to convict” instruction that included the element of venue became the law of the case, thus required proof as an essential element).

Here, the “to convict” instruction clearly instructed the jury that it must unanimously agree that “a single act of telephonic contact on June 14, 2010 constituting the alleged crime ... was proved.” CP 27 (Court’s Jury Instruction 13). In light of this instruction, the State was required to prove beyond a reasonable doubt that Brian Haynes made telephonic contact with Cathy

Haynes in violation of the protection order. Hickman, 135 Wn.2d at 99. The State did not meet this burden.

At best, the State proved that Brian Haynes attempted to violate the protection order by calling the home of his mother in law, an offense with which he was not charged, and on which the jury was not instructed, nor permitted to deliberate. The State failed to prove that Mr. Haynes violated the court order, since no contact was made with the protected party, Cathy Haynes.

A person is guilty of attempting to commit a crime if, with intent to commit the offense, he takes a substantial step toward commission of that crime. RCW 9A.28.020. A substantial step is conduct that strongly corroborates the actor's purpose and is more than mere preparation. State v. Jackson, 62 Wn. App. 53, 56, 813 P.2d 156 (1991). The completed crime of violation of a protection order requires proof that an accused actually commit conduct – here, a “single act of telephonic contact” – in violation of a valid court order, having previously been twice convicted. CP 27; RCW 26.50.110(1), (5); State v. Carmen, 118 Wn. App. 665, 668, 77 P.3d 368 (2003).

As a consequence, the State failed to prove Brian Haynes was guilty of this violation of the protection order, proving only an attempted violation.

The State argues that under State v. Ward, a 2003 case, Mr. Haynes may be held liable for his conduct. 148 Wn.2d 803, 64 P.3d 640 (2003). This case, however, is inapposite, as it lacks a jury instruction with the additional element to which the prosecution consented in this matter. Id.

b. Reversal and dismissal is the appropriate remedy.

Since the State failed to prove a completed act of felony violation of a protection order, there was insufficient evidence to support the conviction as to Count Two. As in any case involving insufficient evidence, the absence of proof beyond a reasonable doubt of an added element requires dismissal of the conviction and charge. Hickman, 135 Wn.2d at 99 (citing Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221). As in any case reversed for insufficient evidence, the Fifth Amendment's Double Jeopardy clause bars retrial. Hickman, 135 Wn.2d at 99 (citing, inter alia, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)).

B. CONCLUSION

For the reasons above this Court should reverse Mr.
Haynes's conviction on Count Two and dismiss.

DATED this 25th day of July, 2011.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 66117-5-I
v.)	
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BRIAN HAYNES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] REBECCA VASQUEZ, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF JULY, 2011.

X _____ 

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