

No. 66117-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN HAYNES,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Brian Haynes of felony violation of a court order.

2. The trial court erred by denying Mr. Haynes's post-trial motion to dismiss Count Two, pursuant to CrR 7.5 (a)(3).

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

To convict Mr. Haynes of felony violation of a court order, the State had to prove he willfully violated the terms of a valid court order, and at the time of the violation, had two prior convictions for violating the provisions of an order issued under the enumerated statutes. Must Mr. Haynes's conviction be reversed and dismissed where the State failed to prove beyond a reasonable doubt that he willfully violated the court order by telephonic contact, as charged, but only proved an attempted violation?

C. STATEMENT OF THE CASE

Brian and Cathy Arroyo Haynes had been friends since high school; they were married in 2006. 8/26/10 RP 90. Both Brian and Cathy¹ worked at the Port of Seattle for the International Longshore and Warehouse Union (ILWU), Local 19. 8/26/10 RP 98; 8/31/10

¹ Since Brian and Cathy Haynes share a last name, at times, they will be referred to by first names; no disrespect is intended.

RP 72-73. Cathy and Brian tried to balance their professional lives as longshoremen with their family life, but ultimately, their marriage became strained and Cathy obtained a no-contact order in Auburn Municipal Court in February 2011. 8/26/10 RP 91. Two weeks later, Cathy went to King County Superior Court in Kent, and obtained a protection order which allowed Brian to maintain the same workplace, as long as he remained 20 feet away from Cathy. 8/26/10 RP 91.

By April 2010, Cathy had filed for divorce. 8/26/10 RP 93-94; 8/31/10 RP 72-73. Brian did not fight the divorce, but moved out of the marital home in Auburn, and in with his parents on Camano Island, from where he commuted to work at the port each day. 8/31/10 RP 76.

At trial, Cathy stated that in May 2010, Brian contacted her in violation of both orders, by speaking to her in the parking lot of the YMCA in Auburn and taking her to the mall while their children participated in a Kids Night Out program. 8/26/10 RP 95-97. Carol Arroyo, Cathy's mother, also testified to this interaction at the YMCA, 8/26/10 RP 53-54, although Brian denied seeing Cathy that night. 8/31/10 RP 74.

Ms. Arroyo testified that on June 14, 2010, she received a phone call from Brian, who asked if her daughter, Cathy, was there. 8/26/10 RP 48-49. Although Cathy was not present at the time, Ms. Arroyo told Brian that Cathy did not want to speak to him, and hung up the phone. 8/26/10 RP 50-52. Ms. Arroyo then called her daughter to tell her about the phone call. 8/26/10 RP 51-52.

Lastly, Cathy stated that on June 14, 2010, she was working at the pier when she saw Brian watching her. 8/26/10 RP 100-03. When Brian would not leave her alone, she reported the incident to the dock foreman and the union representative, who tried to resolve the issue directly with Brian. *Id.* at 104-06, 138-40. At trial, Brian agreed that he spoke to his union representative, but denied seeing Cathy that day. 8/31/10 RP 75-76.

Both the Auburn and King County protection orders were admitted into evidence at trial without objection. 8/26/10 RP 44-45.² The State offered a certified copy of the Judgment and Sentence, attested to by a witness from the Auburn Municipal Court Clerk's Office, from Brian Haynes's two prior convictions for violations of protection orders. 8/31/10 RP 50-56.

² Defense counsel had previously objected to their admission as self-authenticating documents under RCW 5.44.010, as they lacked a seal of the Court; this objection was overruled. 8/26/10 RP 10-12.

After a jury trial, Brian Haynes was found guilty of three counts of felony violation of a no-contact order. CP 14-19.³

Mr. Haynes filed a post-trial motion to dismiss Count Two, pursuant to CrR 7.5 (a)(3), arguing that there was insufficient proof of a material element of the crime. CP 50-52; 9/17/10 RP 1-10. The motion was denied by the trial court. CP 53; 9/17/10 RP 9-10.

This appeal follows. CP 64.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. HAYNES OF FELONY VIOLATION OF A COURT ORDER.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113

³ Following verdict, the trial court dismissed three counts (1A, 2A, and 3A, which had been charged in the alternative), as a violation of double jeopardy. CP 54-55.

Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. Here, the State was required to prove beyond a reasonable doubt that Mr. Haynes knowingly violated a provision of the order by telephonic contact. In Count Two of the Amended Information, the State charged Mr. Haynes with a single telephone call to Cathy Haynes’s mother, Carol Arroyo, on June 14, 2010. CP 10-13; RCW 26.50.110(5). In its to convict instruction, the trial court instructed the jury that in order to convict Mr. Haynes of this count, the jury would need to 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).

c. The State failed to prove that Brian Haynes contacted Cathy Haynes by telephone on June 14, 2010, in violation of the protection order. Here, Ms. Arroyo, Cathy’s mother, testified clearly that on June 14, Brian called her home in Kirkland,

looking for Cathy. 8/26/10 RP 48-49. Brian never spoke to Cathy by phone that day, since Cathy was not home. Id. Despite the fact that Ms. Arroyo took it upon herself to later call her daughter and tell her about the phone call from Brian, the fact remains – no “telephonic contact,” in the words of the jury instruction, was accomplished.

Where an additional element is added to the “to convict” instruction without any objection from prosecution, the State assumes the burden of proving the additional element beyond a reasonable doubt, and this element becomes the “law of the case.” State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). If the State fails 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 made telephonic contact with Cathy 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).

Instead, to prove that Mr. Haynes committed only an attempted violation of a protection order, the State had to prove that

he, while acting with intent to violate the order, took a substantial step toward doing just that. Here, Brian Haynes arguably had the intent to violate the protection order, in that he called the home of his mother in law, searching for his wife. 8/26/10 RP 48-49. However, Ms. Arroyo lied to him, telling him that Cathy was there but did not wish to speak to him. Id. Regardless of Ms. Arroyo's actions, or her decision to notify Cathy of his call, Mr. Haynes's attempts at telephonic contact with his wife were thwarted, prevented a completed act of violation of the court order.

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

c. 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

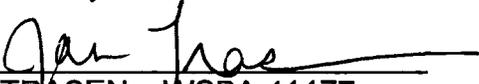
retrial. Hickman, 135 Wn.2d at 99 (citing, inter alia, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)).

E. CONCLUSION

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

DATED this 25th day of April, 2011.

Respectfully submitted,



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Attorneys for Appellant

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DIVISION ONE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 25th DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> BRIAN HAYES 344674 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLE ROCK, WA 98556-0037	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25th DAY OF APRIL, 2011.

X _____ 

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