

FILED
10-6-16

Court of Appeals
Division I
State of Washington

NO. 74823-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW HUTTUNEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT 6

1. THE COURT FAILED TO MAKE A THRESHOLD FINDING MR. HUTTUNEN’S PRIOR CONVICTIONS VIOLATED RCW 26.50.110..... 6

 a. To establish the essential elements of RCW 26.50.110, the court must make a threshold finding that the no-contact orders offered by the State qualify under RCW 26.50.110. 6

 b. The court failed to make a threshold finding Mr. Huttunen’s prior convictions were for violating no-contact orders subject to prosecution under RCW 26.50.110(5). 7

 c. Mr. Huttunen is entitled to reversal of his convictions with instructions to dismiss. 9

2. INSUFFICIENT EVIDENCE WAS PRESENTED TO THE JURY ON WHETHER MR. HUTTUNEN HAD VIOLATED AN ENUMERATED NO-CONTACT ORDER..... 10

 a. Felony violation of a no-contact order requires proof Mr. Huttunen was twice convicted of violating a no-contact order enumerated in RCW 26.50.110..... 10

 b. The stipulation Mr. Huttunen had previously been convicted of violating a “court order” was insufficient to RCW 26.50.110.. 11

 c. The State failed to prove Mr. Huttunen had twice been previously convicted of violating a no contact order..... 13

3. THE FAILURE OF THE COURT TO PROPERLY INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF WHETHER MR. HUTTUNEN HAD VIOLATED A PRIOR NO-CONTACT ORDER REQUIRES REVERSAL..... 14

 a. Due process requires juries to be instructed on the essential elements of the charged crimes..... 14

 b. The jury was improperly instructed on whether Mr. Huttunen violated a no-contact order enumerated in RCW 26.50.110(5)... .. 15

 c. This court cannot be satisfied the error was harmless beyond a reasonable doubt. 17

F. CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases

<i>Adams v. Peterson</i> , 968 F.2d 835 (9th Cir.1992)	11
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	6
<i>Blaney v. Int’l Ass’n of Machinists & Aerospace Workers, Dist. No. 160</i> , 151 Wn.2d 203, 87 P.3d 757 (2004)	14
<i>Burks v. United States</i> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)	9
<i>Carson v. Old National Bank</i> , 37 Wn. 279, 79 P. 927 (1905).....	14
<i>Griffin v. W. RS, Inc.</i> , 143 Wn.2d 81, 18 P.3d 558 (2001)	15
<i>In re Det. of Moore</i> , 167 Wn.2d 113, 216 P.3d 1015, 1020 (2009)	11
<i>In re Det. of Pouncy</i> , 168 Wn.2d 382, 229 P.3d 678 (2010)	15, 18
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)....	6, 10, 14
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	7
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002)	15
<i>State v. Aumick</i> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....	15
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997)	15
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	14
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.2d 396 (1995)	15
<i>State v. Cantu</i> , 156 Wn.2d 819, 132 P.3d 725 (2006), as amended (May 26, 2006)	13
<i>State v. Case</i> , 189 Wn.App. 422, 358 P.3d 432 (2015), review granted, 185 Wn.2d 1001, 366 P.3d 1243 (2016)	7, 8, 9
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996)	9, 13
<i>State v. Dana</i> , 73 Wn.2d 533, 439 P.2d 403 (1968)	14
<i>State v. Deal</i> , 128 Wn.2d 693, 911 P.2d 996 (1996)	13
<i>State v. Eastmond</i> , 129 Wn.2d 497, 919 P.2d 577 (1996).....	17
<i>State v. Gordon</i> , 172 Wn.2d 671, 260 P.3d 884 (2011)	17
<i>State v. Humphries</i> , 181 Wn.2d 708, 336 P.3d 1121 (2014)	10
<i>State v. Johnson</i> , 104 W.2d 338, 705 P.2d 773 (1985)	11, 12
<i>State v. Longshore</i> , 141 Wn.2d 414, 4 P.3d 115 (2000).....	10
<i>State v. Miller</i> , 131 Wn.2d 78, 929 P.2d 372 (1997).....	15
<i>State v. Miller</i> , 156 Wn.2d 23, 123 P.3d 827 (2005).....	8

<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	10
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	7
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	15
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997)	15
<i>State v. Wiley</i> , 26 Wn.App. 422, 613 P.2d 549 (1980)	12
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001)	11
<i>United States v. James</i> , 987 F.2d 648 (9th Cir. 1993)	12, 13

Statutes

RCW 10.14.080	16
RCW 10.99	7, 10
RCW 26.50.110	passim
RCW 7.21.040	17

Constitutional Provisions

Const. art. I, § 22	10
U.S. Const. amend VI	14
U.S. Const. amend XIV	6, 10, 14
U.S. Const. amend. V	9

A. INTRODUCTION

Matthew Huttunen was charged with violating a no-contact order. The State alleged Mr. Huttunen had contact with Alicia Morasse after a court had ordered him to have no contact with her. The State alleged this violation was a felony because Mr. Huttunen had twice before been convicted of violating a no-contact order enumerated in RCW 26.50.110.

While the State introduced evidence of prior convictions, the trial court never made the threshold finding these prior convictions satisfied RCW 26.50.110. The orders were never shown to the jury, who were instead read a stipulation that Mr. Huttunen had violated a “court order.” This stipulation was insufficient for proof beyond a reasonable doubt.

The instructions to the jury did not clarify the State was required to prove anything other than Mr. Huttunen had violated a “court order.” This is insufficient for due process. Due process requires the jury to be instructed on the essential elements of the crime charged. RCW 26.50.110 is not satisfied by the mere violation of a court order. Instead, the State must prove the order violated was a no-contact order enumerated in RCW 26.50.110.

B. ASSIGNMENTS OF ERROR

1. The trial court failed to make the threshold finding Mr. Huttunen had been convicted of no-contact orders defined in RCW 26.50.110.

2. The State failed to present sufficient evidence Mr. Huttunen had previously been convicted two times of violating a no-contact order enumerated in RCW 26.50.110.

3. The jury instructions failed to define an essential element of the crime of violation of a contact order where the instructions permitted a finding of guilt upon proof Mr. Huttunen violated a “court order” rather than a no-contact order as defined in RCW 26.50.110.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The State bears the burden of proving the essential elements of RCW 26.50.110 beyond a reasonable doubt. Before evidence of prior convictions can be used to prove Mr. Huttunen had previously violated a no-contact order, the court must make a threshold finding the order were issued pursuant to an enumerated statute. Where the court failed to perform its gatekeeping function, is dismissal required?

2. Due process requires the State to prove all elements of an offense beyond a reasonable doubt. To establish a felony conviction of

a no-contact order under RCW 26.50.110, the State must establish Mr. Huttunen had previously been convicted two times of an enumerated no-contact order violation. The parties stipulated Mr. Huttunen had been previously convicted of violating a “court order” rather than a required no-contact order. Does the insufficient evidence of Mr. Huttunen’s previous convictions require dismissal, where the State only proved Mr. Huttunen had violated a “court order” rather than an enumerated no-contact order?

3. Due process requires jurors to be instructed on the essential elements of an offense. The crime of violating a no-contact order requires the State to prove Mr. Huttunen violated one of the no-contact orders specifically enumerated in RCW 26.50.110. Was due process violated where the jury instructions only required the jury to find Mr. Huttunen had violated a “court order” rather than a non-contact order, as defined in RCW 26.50.110?

D. STATEMENT OF THE CASE

Matthew Huttunen was arrested and charged with violating a no-contact order for having contact with Alicia Morasse on September 12, 2015. CP 130. Based upon the allegations Mr. Huttunen had two

prior convictions enumerated in 26.50.110, the State charged Mr. Huttunen with a felony violation of RCW 26.50.110.

Mr. Huttunen denied the allegations and pled not guilty to the charges. RP 4. Mr. Huttunen was not arrested in Ms. Morasse's company. Instead, he was alone when the police arrested him in an area where Ms. Morasse said he frequently sheltered. RP 141. Ms. Morasse was also living without a fixed address, keeping everything she owned in her car. RP 138.

At trial, the Deputy Troy Koster testified he had seen Mr. Huttunen with Ms. Morasse when he first encountered her parked in her car. RP 31-32. Ms. Morasse testified to the contrary, stating Mr. Huttunen had not had contact with her on September 12, 2015. RP 128. Instead, the person who had been in the car with Ms. Morasse prior to her being stopped by the police was a man she believed was named Bryson Thomas. RP 125. Mr. Thomas was no longer with Ms. Morasse when the police stopped her vehicle. RP 84. Ms. Morasse did not deny she had been hoping to see Mr. Huttunen the day he was arrested and also admitted she had been sleeping in her car in an area where she knew he liked to visit. RP 142.

Although the no-contact orders Mr. Huttunen had previously violated were entered into evidence, they were not shown to the jury. RP 105 (State's exhibits 3 and 4). Instead, a stipulation was read to the jury. RP 106. The jury heard:

The defendant has twice been previously convicted for violating provisions of a court order.

RP 106. The jury never saw the no-contact orders introduced into evidence. RP 105. They were not considered by the jury in reaching its verdict.

The jury was instructed on the elements necessary to prove Mr. Huttunen had violated a no-contact order. RP 164. The jury was instructed that to find Mr. Huttunen guilty, they were required to find:

That the defendant has twice been previously convicted for violating the provisions of a court order.

CP 121.

While the jury was specifically instructed they had to find Mr. Huttunen had twice previously violated a "court order," they were not told the order had to be a qualifying domestic violence no-contact order. CP 121. The definition provided to the jury did not distinguish common court orders or other no-contact order violations from the

violations necessary to prove Mr. Huttunen guilty of the charged offense.

Mr. Huttunen was found guilty of the felony of violating a no-contact order. RP 188. He was sentenced to 52 months of incarceration, eight months of community supervision and legal financial obligations were imposed. RP 200.

E. ARGUMENT

1. THE COURT FAILED TO MAKE A THRESHOLD FINDING MR. HUTTUNEN’S PRIOR CONVICTIONS VIOLATED RCW 26.50.110.

a. To establish the essential elements of RCW 26.50.110, the court must make a threshold finding that the no-contact orders offered by the State qualify under RCW 26.50.110.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 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).

The standard a reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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, 319, 99 S.Ct.

2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The court failed to make a threshold finding Mr. Huttunen's prior convictions were for violating no-contact orders subject to prosecution under RCW 26.50.110(5).

The State was required to prove to the trial court that the prior convictions were for violating court orders issued pursuant to the specific RCW chapters listed in RCW 26.50.110(5). Violation of a no contact order under chapter 10.99 RCW becomes a felony if the offender has at least two previous convictions for violating the provisions of an order issued under chapter 26.50, 7.90, 9.94A, 9A.46, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW. RCW 26.50.110(5).

The State must submit to the trial court sufficient evidence to determine the orders that constituted the two prior convictions were issued pursuant to one of the relevant RCW chapters. *State v. Case*, 189 Wn.App. 422, 428-30, 358 P.3d 432 (2015), *review granted*, 185 Wn.2d 1001, 366 P.3d 1243 (2016).

The State introduced two prior convictions into evidence, but did not show these convictions to the jury. Like *Case*, there was no

finding by the trial court that the orders issued here constituted violations of RCW 26.50.110. *Case*, 189 Wn.App. at 425.

In the most recent analysis of this issue, Division Two of this Court reversed Mr. Case's conviction, finding that under the trial court's gatekeeping function, it court must find that the two prior convictions involved court orders issued pursuant to the stated provisions of RCW 26.50.110, even where there is a stipulation. *Case*, 189 Wn.App. at 429.

The *Case* court found that the trial court must determine as a question of law whether the predicate convictions supporting the charge of felony violation of an no contact order involved orders issued under one of the RCW chapters listed in former RCW 26.50.110(5). *Case*, 189 Wn.App. at 429 (citing *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005)). "This determination involves the trial court's exercise of its 'gate-keeping function.'" *Id.*

Case holds that once the State produces evidence of prior convictions, the trial court can determine whether the evidentiary thresholds have been met. *Case*, 189 Wn.App. at 429. If no prior convictions are admissible, the defendant's charge for felony NCO violation must be dismissed. *Id.* (citing *Miller*, 156 Wn.2d at 31.)

Although the State introduced evidence alleging Mr. Huttunen had prior convictions, no finding was made by the trial court regarding whether the threshold for admissibility was met. No evidence was introduced to support the allegation the no-contact orders had been issued pursuant to one of the statutes enumerated in RCW 26.50.110. Without this threshold finding, this Court cannot be satisfied there was sufficient evidence to support Mr. Huttunen's conviction. *Case*, 189 Wn.App. at 429-30.

c. Mr. Huttunen is entitled to reversal of his convictions with instructions to dismiss.

Since there was insufficient evidence to support the prior convictions, this Court must reverse the conviction with instructions to dismiss. *Case*, 189 Wn.App. at 430 (“[w]e hold that there was insufficient evidence to support the felony violation of an NCO and dismissal is the appropriate remedy.”). To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”) (quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

2. INSUFFICIENT EVIDENCE WAS PRESENTED TO THE JURY ON WHETHER MR. HUTTUNEN HAD VIOLATED AN ENUMERATED NO-CONTACT ORDER.

a. Felony violation of a no-contact order requires proof Mr. Huttunen was twice convicted of violating a no-contact order enumerated in RCW 26.50.110.

The due process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *Winship*, 397 U.S. at 364; *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. Const. amend. XIV; Const. art. I, § 22); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). Evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420-21, 4 P.3d 115 (2000). This right is anchored in principles of due process existing under the Fifth and Fourteenth Amendments. *State v. Humphries*, 181 Wn.2d 708, 714, 336 P.3d 1121 (2014).

Violating one of the no-contact orders defined in RCW 26.50.110 is a gross misdemeanor.¹ The violation becomes a felony where the person has at least two previous convictions for violating a

¹ It is a crime to violate a court order issued under chapter 26.50, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020. *See*, RCW 26.50.110.

court order issued under one of the specific RCW chapters listed in RCW 26.50.110(5). To prove Mr. Huttunen guilty of violating a no contact order, the State must establish Mr. Huttunen knowingly violated one of the enumerated no-contact orders twice. *Id.*

b. The stipulation Mr. Huttunen had previously been convicted of violating a “court order” was insufficient to RCW 26.50.110.

While the State admitted into evidence records which alleged Mr. Huttunen had been previously convicted of violating no-contact orders two times, these exhibits were not shown to the jury. RP 96.

Instead a stipulation was drafted with regard to Mr. Huttunen’s prior history. The State drafted a stipulation for the jury. RP 106. The stipulation read:

The defendant has twice been previously convicted for violating provisions of a court order.

RP 106.

A stipulation which admits an element of the crime charged is tantamount to a guilty plea. *In re Det. of Moore*, 167 Wn.2d 113, 120–21, 216 P.3d 1015, 1020 (2009) (citing *State v. Johnson*, 104 W.2d 338, 705 P.2d 773 (1985); *Adams v. Peterson*, 968 F.2d 835, 842 (9th Cir.1992)); *see also State v. Woods*, 143 Wn.2d 561, 608–09, 23 P.3d 1046 (2001). A stipulation is typically an admission “that if the State’s

witnesses were called, they would testify in accordance with the summary presented by the prosecutor.” *State v. Wiley*, 26 Wn.App. 422, 425, 613 P.2d 549 (1980).

While a stipulation concedes the truth of a fact, it does not waive the sufficiency requirement. *United States v. James*, 987 F.2d 648, 651 (9th Cir. 1993) (“It is axiomatic that the government has the ultimate burden of proof.”) The State must still provide proof of guilt beyond a reasonable doubt; and the accused may offer evidence or cross-examine witnesses regarding the stipulated evidence. *Johnson*, 104 Wn.2d at 342.

The stipulation read to the jury does not provide sufficient evidence Mr. Huttunen had twice been convicted of violating a no-contact order enumerated in RCW 26.50.110.² Instead, the stipulation only established Mr. Huttunen was previously been convicted of a “court order.” This is insufficient for proof Mr. Huttunen had been previously convicted two times of violating one of the enumerated no-contact orders.

² The stipulation drafted by the State was based upon the State’s proposed jury instructions, which also state the jury is only required to find Mr. Huttunen violated a “court order.” CP 121.

And while the trial court admitted the previous convictions into evidence, they were not considered by the jury. RP 105. These orders were simply not part of the evidence considered by the jury in making their determination. This Court should not consider them in determining whether the State presented sufficient evidence to the jury to prove Mr. Huttunen was guilty beyond a reasonable doubt. Instead, this Court should find the stipulation insufficient proof of Mr. Huttunen's guilt. *James*, 987 F.2d at 651.

c. The State failed to prove Mr. Huttunen had twice been previously convicted of violating a no contact order.

Basic principles of due process require the State to prove every essential element of a crime beyond a reasonable doubt. *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006), as amended (May 26, 2006) (internal citations omitted); *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). The jury was never provided with sufficient evidence of Mr. Huttunen's guilt. The stipulation only stated Mr. Huttunen had been twice convicted of violating a "court order."

Because this evidence is insufficient to prove Mr. Huttunen guilty of the felony of violating a no-contact order, this Court should find the State failed to prove this essential element and order this charge dismissed. *Crediford*, 130 Wn.2d at 760-61.

3. THE FAILURE OF THE COURT TO PROPERLY INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF WHETHER MR. HUTTUNEN HAD VIOLATED A PRIOR NO-CONTACT ORDER REQUIRES REVERSAL.

a. Due process requires juries to be instructed on the essential elements of the charged crimes.

It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The Sixth and Fourteenth Amendments of the United States Constitution require the State to prove every fact necessary to constitute a charged crime beyond a reasonable doubt. *Winship*, 397 U.S. at 364; *Acosta*, 101 Wn.2d at 615.

Jury instructions must be readily understood and not misleading to the ordinary mind. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968) (citing *Carson v. Old National Bank*, 37 Wn. 279, 79 P. 927 (1905)). Instructions must allow the parties to argue their case theories, not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). Challenges to jury instructions are reviewed de novo for errors of law on appeal. *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558

(2001). Prejudice is presumed if a jury instruction clearly misstates the law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249–50, 44 P.3d 845 (2002).

Manifest constitutional error occurs when the jury is not instructed on an element of the charged crime. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988). The remedy for this error is reversal. *See, e.g., State v. Smith*, 131 Wn.2d 258, 265-66, 930 P.2d 917 (1997); *State v. Miller*, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997); *State v. Byrd*, 125 Wn.2d 707, 713-14, 716, 887 P.2d 396 (1995).

b. The jury was improperly instructed on whether Mr. Huttunen violated a no-contact order enumerated in RCW 26.50.110(5).

Words that do not have an ordinary understanding or are not self-explanatory must be defined in jury instructions. *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010) (citing *State v. Brown*, 132 Wn.2d 529, 611–12, 940 P.2d 546 (1997)). “A jury should not have to obtain its instruction on the law from arguments of counsel.” *State v. Aumick*, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995).

The “to convict” instruction stated the jury could find Mr. Huttunen guilty if it found Mr. Huttunen had been previously convicted two times of violating a “court order.” CP 121. By stipulation, the jury

was instructed Mr. Huttunen had two prior convictions for violating provisions of a “court order.” CP 110, RP 106.

“Court order” is a term which must be defined to the jury. Neither the instructions nor the special verdict form explained Mr. Huttunen could only be convicted if the State proved he had violated one of the orders enumerated in RCW 26.50.110. While this term would seem to have an ordinary meaning, its definition in RCW 26.050.110 is technical. RCW 26.050.110 requires the State to prove a person violated specific no-contact orders. The crime is a gross misdemeanor where the person has less than two convictions for violating a no contact order. RCW 26.50.110(1). The violation becomes a felony where the person has at least two previous convictions for violating a court order issued under one of the specific RCW chapters listed in RCW 26.50.110(5). Failing to define the term “contact order” allows the jury to speculate and convict Mr. Huttunen for conduct which is not defined in RCW 26.50.110.

There are many orders which do not provide a sufficient basis for conviction, including no-contact orders which may be issued by courts. *See, e.g.*, RCW 10.14.080. Courts may issue orders compelling persons to abide by many conditions. Violations of those orders can

result in prosecution and conviction for criminal contempt. RCW 7.21.040 specially provides for punitive sanctions for a person who has been held to be in contempt of court. The failure to instruct the jury on which prior convictions for violating a court order provide proof of guilt is constitutional error.

c. This court cannot be satisfied the error was harmless beyond a reasonable doubt.

“The failure to instruct a jury on every element of a charged crime is an error of constitutional magnitude.” *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011); *accord State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996).

The problem in not properly instructing Mr. Huttunen’s jury on an essential element of what constitutes a violation of a no-contact order is compounded by the lack of proof the jury was given. Rather than being able to review the orders Mr. Huttunen was accused of violating, the jury was provided with a stipulation. CP 110, RP 106. This stipulation did not give the jury any sense of the type of orders Mr. Huttunen had violated. Instead, this order mirrored the language found in the “to convict” instruction, merely informing the jury Mr. Huttunen had violated a “court order.”

Here, the term “court order” implicated an element of the State’s case. *See, Pouncy*, 168 Wn.2d at 392. In order to prove Mr. Huttunen had violated RCW 26.050.110, the State was obligated to prove Mr. Huttunen had violated specific court orders, and not merely a court order, as the “to convict” instruct states. Because this Court cannot say the failure to properly instruct the jury on the essential elements of RCW 26.050.110 in no way affected the final outcome of the case, this court cannot be satisfied the error was not harmless. CP 110, RP 106. Reversal is therefore required.

F. CONCLUSION

The trial court failed to make the threshold finding Mr. Huttunen had violated a no-contact order issued enumerated in RCW 26.50.100. The failure to make this threshold finding prior to allowing the stipulation requires this Court to dismiss Mr. Huttunen’s conviction for felony violation of a no contact order.

The State failed to prove to the jury Mr. Huttunen had been twice previously been convicted of violating one of the no-contact orders required in RCW 26.50.110. Instead, the stipulation only established Mr. Huttunen had previously been convicted of violating a

court order. The failure to prove this element requires dismissal of the enhanced charge.

Mr. Huttunen's right to due process was violated because the jury was not instructed that the State was required to prove Mr. Huttunen had violated a no-contact order as enumerated in RCW 26.50.110. This was an essential element of the crime charged. The failure to properly instruct the jury on this essential element of the crime charged requires reversal.

DATED this 6th day of October 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	
)	NO. 74823-8-I
)	
MATTHEW HUTTUNEN,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING 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:

- | | | |
|---|----------------------------|--|
| <p>[X] SETH FINE, DPA
[sfine@snoco.org]
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201</p> | <p>()
()
(X)</p> | <p>U.S. MAIL
HAND DELIVERY
AGREED E-SERVICE
VIA COA PORTAL</p> |
| <p>[X] MATTHEW HUTTUNEN
379373
LARCH CORRECTIONS CENTER
15314 DOLE VALLEY RD
YACOLT, WA 98675</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |

SIGNED IN SEATTLE, WASHINGTON, THIS 6TH DAY OF OCTOBER, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎ (206) 587-2711