

NO. 40265-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONNIE BALLARD,

Appellant.

19 JUN -3 PM 12:50
STATE OF WASHINGTON
BY _____
Clerk

FILED
COURT OF APPEALS

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

The Honorable Anna Laurie Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENTS</u>	5
1. THE STATE FAILED TO PROVE THAT MR. BALLARD VIOLATED A NO CONTACT ORDER WHEN HE SENT A CARD TO HIS SON'S MOTHER, THE PROTECT PERSON, THAT WAS INTERCEPTED BY THE GRANDMOTHER AND ULTIMATELY DELIVED TO THE BOY'S MOTHER BY THE GRANDMOTHER.....	2
a. <u>Sufficiency of the Evidence</u>	3
2. <u>TRIAL COURT ABUSED ITS DISCRETION IN DENYING 8.3(C) MOTION</u>	8
3. MR. BALLARD'S RIGHT TO PRIVACY UNDER THE WASHINGTON STATE PRIVACY ACT AS INTERPRETED BY THE STATE CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT PERMITTED THE STATE TO INTRODUCE INTO EVIDENCE A FIRST CLASS LETTER SENT TO HIS SON, BUT OPENED BY AN UNAUTHORIZED PERSON.....	10

a.	<u>Privacy Rights in First Class Mail</u>	10
b.	<u>Admission of Letter Prejudicial Error</u> ...	14
D.	<u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Fray v. Spokane County</u> , 134 Wn.2d 637, 952 P.2d 601(1998).....	7
<u>Mortell v. State</u> , 118 Wn.App. 846, 78 P.3d 197 (2003).....	7
<u>Nat'l Elec. Contractors Ass'n v. Riveland</u> , 138 Wn.2d 9, 978 P.2d 481 (1999).....	7
<u>State v. Adel</u> , 136 Wn.2d 629, 965 P.2d 1072 (1998).....	8
<u>State v. Athan</u> , 160 Wn.2d 354, 158 P.3d 27 (2007).....	11, 12, 13
<u>State v. Christensen</u> , 153 Wn.2d 186, 102 P.3d 789 (2004).....	10, 12, 14, 15
<u>State v. Clowes</u> , 104 Wn.App. 935, 18 P.3d 596 (2001).....	5, 6
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	5
<u>State v. Gunwall</u> , 106 Wash.2d 54, 720 P.2d 808 (1986),P.2d 808 (1986)...	11, 12, 13
<u>State v. J.M.</u> , 144 Wn.2d 472, 28 P.3d 720 (2001).....	7
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Continued

State v. Jackson,
150 Wn.2d 251, 76 P.3d 217 (2003).....11

State v. Knapstad,
107 Wn.2d 346, 729 P.2d 48(1986).....8, 9

State v. McKinney,
148 Wash.2d 20, 60 P.3d 46 (2002).....11

State v. Michielli,
132 Wash.2d 229, 937 P.2d 587 (1997).....7, 9

State v. Porter,
98 Wn. App. 631, 990 P.2d 460 (1999).....14, 15

State v. Rupe,
101 Wash.2d 664, 683 P.2d 571 (1984).....15

State v. Stannard,
109 Wn.2d 29, 742 P.2d 1244 (1987).....7

State v. Townsend,
147 Wn.2d 666, 57 P.3d 255 (2002).....12, 14

State v. Utter,
4 Wn.App. 137, 479 P.2d 946 (1971).....5

FEDERAL CASES

Jackson v. Virginia,
443 U.S. 307, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979).....5

United States v. Apfelbaum,
445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980).5

TABLE OF AUTHORITIES

Page

FEDERAL CASES, Continued

U.S. v. Leeuwen,
397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).....10

OTHER RULES AND STATUTES

RCW 9.73.010.....10, 11

RCW 9.73.020.....10, 11, 15

RCW 9.73.030(1)(a).....12, 14, 15

RCW 9.73.050.....14, 15

RCW 10.99.5(r).....3, 4

RCW 26.50.110(5).....3, 4

CrR 8.3(c).....2, 8, 9

Black's Law Dictionary 39 (8th ed.2004).....5

A. ASSIGNMENT OF ERROR

1. The trial court erred by permitting use of a letter opened in violation of appellant's federal and state constitutional and statutory privacy rights.
2. There was insufficient evidence to prove beyond a reasonable doubt that appellant violated a no contact order when he tried but failed to make contact via letter to the protected party in the no contact order.
3. The trial court abused its discretion by denying the 8.3(c) motion to dismiss without providing any reasoning in its written order.

Issues Pertaining to Assignments of Error

1. Did the trial court commit reversible error by permitting use of a letter opened in violation of appellant's statutory and federal and state constitutional privacy rights?
2. Was there sufficient evidence to prove beyond a reasonable doubt that appellant violated a no contact order when he tried but failed to make contact via letter to the protected party in the no contact order?

B. STATEMENT OF THE CASE

1. Procedural Facts

Donnie Ballard was charged by amended information with domestic violence felony violation of a no contact order. CP 111-114. The defense filed a motion to dismiss under CrR 8.3(c) which the trial court summarily denied. CP 77-78. Mr. Ballard stipulated to having been convicted of two prior violations of no contact orders. CP 119-121. Mr. Ballard was convicted as charged following a jury trial. CP 141-143. This timely appeal follows. CP 158.

2. Substantive Facts

Mr. Ballard was under court order to have no contact with Michelle Garity, the mother of his son Dyshaun. RP 66. From prison, Mr. Ballard sent his son a letter and enclosed a mother's day card for his son to give his mother. RP 60-65. The letter was addressed to Dyshaun and the address was the grandmother's home, a location where Ms. Garity did not reside. RP 54-57. The grandmother intercepted the letter and card and never showed them to Dyshaun. RP 55-56. The grandmother chose to show the card to Ms. Garity. RP 55-56.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE THAT MR. BALLARD VIOLATED A NO CONTACT ORDER WHEN HE SENT A CARD TO HIS SON'S MOTHER, THE PROTECT PERSON, THAT WAS INTERCEPTED BY THE

GRANDMOTHER AND ULTIMATELY
DELIVERED TO THE BOY'S MOTHER BY THE
GRANDMOTHER.

a. Sufficiency of the Evidence.

Mr. Ballard challenges the allegation that he actually violated the no contact order. Mr. Ballard argues that he was only guilty of an attempt to violate the order because he sent a letter addressed to his son with a card for Ms. Garity, the boy's mother, but addressed the letter to his son who did not live with his mother. The boy never received the letter. Rather the boy's grandmother intercepted the letter and chose to give the card to Ms. Garity. Mr. Ballard did not intend for the grandmother to intervene, did not ask her to deliver the letter and had no control over the grandmother's actions. These facts are insufficient to establish beyond a reasonable doubt that Mr. Ballard violated the no contact order: These facts only establish Mr. Ballard attempted to violate a no contact order.

Mr. Ballard was charged with felony violation of a no contact order. RCW 26.50.110(5). This provision provides:

(5) A violation of a court order issued under this chapter, chapter 7.90, 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, is a class C felony if the offender has at least two previous

convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, **10.99**, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(Emphasis added). RCW 10.99.5(r) provides:

(5) "Domestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:

.....

(r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);

Jury Instruction 8, the to-convict instructed read in relevant part, "the defendant violated the no contact order by knowingly violating the no contact order. " CP 122-140.

The standard of review for determining the sufficiency of the evidence is "whether 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, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979); accord, State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

The essential elements of violating a no-contact order are (1) willful contact with another; (2) prohibition of such contact by a valid no-contact order; and (3) defendant's knowledge of the no-contact order. State v. Clowes, 104 Wn.App. 935, 944, 18 P.3d 596 (2001).

As a general rule, every crime must contain two elements: (1) an actus reus and (2) a mens rea. State v. Utter, 4 Wn.App. 137, 139, 479 P.2d 946 (1971); see also United States v. Apfelbaum, 445 U.S. 115, 131, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980). The actus reus is “[t]he wrongful deed that comprises the physical components of a crime.” Black's Law Dictionary 39 (8th ed.2004). The mens rea is “[t]he state of mind that the prosecution ... must prove that a defendant had when committing a crime.” Black's Law Dictionary 1006 (8th ed.2004). In Mr. Ballard's case, the mens rea would be the intent to make contact and the actus reas, the actual making contact.

As charged, the state was required to prove that Mr. Ballard violated the no contact order. The relevant portion of the no contact

order prohibited Mr. Ballard from,

“[c]oming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing of service of process of court documents by a third party.”

Ex. 1.

To willfully make contact, Mr. Ballard had to act knowingly and successfully make contact through his intentional acts. Clowes, 114 Wn.App. at 78. Mr. Ballard wanted to make contact with Ms. Garity but did not intend for the grandmother to intervene and did not act in a manner to obtain her assistance. The grandmother's actions were independent of Mr. Ballard's knowledge. The grandmother's independent act of giving the letter to Ms. Garity cannot be considered a form of imputed willfulness or knowledge.

Mr. Ballard did not enlist the assistance of the grandmother to deliver the card to Ms. Garity. Mr. Ballard hoped that his son would give his mother the card, but this hope was not sufficient to establish that he willfully violated the no contact order by putting the card in the letter addressed to his son. The grandmother's act of giving the card to Ms. Ballard cannot be imputed as the actus reus of Mr. Ballard. The facts as presented fail to establish the essential

element of willfull violation of the no contact order.

The Legislature did include attempted contact in the definition of violation of a no contact order. Had the Legislature indented to include this definition it would have done so. There is a presumption that the Legislature knows how to write a statute. See, e.g., Fray v. Spokane County, 134 Wn.2d 637, 648-50, 952 P.2d 601(1998); State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). In interpreting a statute, the reviewing Court's primary duty is to discern and implement the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point is always " 'the statute's plain language and ordinary meaning.' " J.P., 149 Wn.2d at 450, 69 P.3d 318 (quoting Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). If the statute's meaning is plain on its face, then the Court must give effect to that meaning as an expression of what the legislature intended. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). In interpreting a statute, the reviewing Court should avoid unlikely, absurd, or strained consequences. State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987); Mortell v. State, 118 Wn.App. 846, 851, 78 P.3d 197 (2003).

Even assuming for the sake of argument that the statute,

RCW 10.99.050 could be subject to more than one interpretation, the rule of lenity requires the statute to be strictly construed against the state. State v. Adel, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998) (applying rule of lenity and common sense). The rule of lenity prevents the overly expansive definition of “contact” in this case.

The state failed to provide beyond a reasonable doubt that Mr. Ballard violated the no contact order by sending his son a letter with a card for the mother that was intercepted by an unintended third party who independently gave the card to Ms. Garity. For these reasons, the charge must be reversed.

2 TRIAL COURT ABUSED ITS DISCRETION IN DENYING 8.3(C) MOTION.

In Mr. Ballard’s case, the defense filed a 8.3(c) motion to dismiss citing State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48(1986). CP 78. Trial court denied defense motion to dismiss. CP 77-78. CrR 8.3(c) provides in relevant part:

(c) On Motion of Defendant for Pretrial Dismissal.
The defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.

(4) If the defendant's motion to dismiss is granted, the court shall enter a written order setting forth the evidence relied upon and conclusions of law. The granting of defendant's motion to dismiss shall be without prejudice.

Id.

The appellate Courts review the trial court's decision under an abuse of discretion standard. Abuse of discretion requires the trial court's decision to be manifestly unreasonable or based on untenable grounds or untenable reasons. Michielli, 132 Wn.2d at 240.

The trial court's decision was manifestly unreasonable because it was not based on any reasoning. CP 77. Without explanation, the trial court simply denied the motion." The defense motion to dismiss re: Knapstad is hereby denied." CP 77. The trial court's ruling does not comply with CrR 8.3(c)(4) because the written findings fail to cite to any factual or legal principles for the summary denial of the motion. CP 78. For this reason, the conviction should be reversed and remanded for a new trial. CrR 8.3(c)(4).

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3. MR. BALLARD'S RIGHT TO PRIVACY UNDER THE WASHINGTON STATE PRIVACY ACT AS INTERPRETED BY THE STATE CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT PERMITTED THE STATE TO INTRODUCE INTO EVIDENCE A FIRST CLASS LETTER SENT TO HIS SON, BUT OPENED BY AN UNAUTHORIZED PERSON.

Without permission, Michelle Garity's step-mother, the grandmother of Mr. Ballard's son Dyshaun intercepted a letter and card that was not addressed to her. RP 55-56. The grandmother chose to show the card to Ms. Garity. RP 55-56.

- a. Privacy Rights in First Class Mail

Mr. Ballard had protected state and federal constitutional and state statutory rights in the privacy of the first class letter he sent his son. U.S. v. Leeuwen, 397 U.S. 249, 251-252, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970) (Postal service cannot unreasonably detain or inspect first class letters without a warrant).

Under RCW 9.73.020, the envelope and its contents Mr. Ballard sent his son were protected. State v. Christensen, 153 Wn.2d 186, 198, 102 P.3d 789 (2004). "Since 1909, the privacy act has protected sealed messages, letters, and telegrams from being opened or read by someone other than the intended recipient. RCW 9.73.010-.020." Christensen, 153 Wn.2d at 198.

RCW 9.73.020 reads:

“[e]very person who shall wilfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person, or publish the whole or any portion of such a message, letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor.”

The State of Washington has a long history of extending strong protections to private communications. “[I]t is well established that article I, section 7 qualitatively differs from the Fourth Amendment to the United States Constitution, and in some areas provides greater protections than does the federal constitution. State v. McKinney, 148 Wash.2d 20, 29, 60 P.3d 46 (2002).

A Gunwall¹ analysis is unnecessary to establish that Washington State Courts should undertake an independent state constitutional analysis. State v. Athan, 160 Wn.2d at 365, citing, State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); McKinney, 148 Wash.2d at 26, 60 P.3d 46. See. RCW 9.73.010 (misdemeanor for anyone to wrongfully obtain knowledge of a telegraphic message). RCW 9.73.010 et. seq. is broad and detailed

¹ State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986), P.2d 808 (1986),

and extends greater protections to state citizens than do comparable federal statutes. Gunwall, 106 Wash.2d at 66.

In Gunwall, the State Supreme Court endorsed “Washington's long-standing tradition of affording great protection to individual privacy. Christensen, 153 Wn.2d at 200.

In Christiansen, the Court recognized that under Gunwall, supra, the State Supreme Court unanimously decided to use independent state constitutional grounds to analyze privacy rights and find that use of a pen register violated the state constitution, even though it did not violate the Fourth Amendment. Gunwall, 106 Wn.2d at 66.

The Court in Christiansen analyzing RCW 9.73.030(1)(a), which addresses privacy in electronic communications, held that a mother's listening in to a private conversation between her daughter and her daughter's boyfriend violated the state privacy act. Washington's privacy statute is “one of the most restrictive in the nation.” State v. Townsend, 147 Wn.2d 666, 672, 57 P.3d 255 (2002) (e-mail communication with a minor is a private communication in which there is an expectation of privacy).

In State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007), the defendant sent a letter to detectives who posed as lawyers. The

letter was addressed to the detectives. Athan did not object to admission of the contents of the letter, but rather argued that he had a reasonable expectation of privacy in his saliva used to seal the envelope, and used by police to analyze his DNA. The Court implied without deciding that had the letter been opened by an unintended recipient there would have been a violation of Athan's privacy rights. "Since the letter was received by the intended addressee, though not an attorney as Athan believed, he has failed to establish a statutory violation." Athan, 160 Wn.2d at 372.

In Townsend, the State Supreme Court again held that a communication via e-mail was protected, but because of the type of server used Townsend impliedly consented to a potential interception of the private communication. Townsend, 147 Wn.2d.2d at 674-79,

Applying the heightened privacy rights established in Gunwall and affirmed in Christiansen, to Mr. Ballard's case, requires a finding that the grandmother's opening a letter addressed to her grandson violated Mr. Ballard's privacy rights. The grandmother was not the addressee and she did not have permission to open the first class letter. RCW. 9.73.020. The statute is unequivocal and requires suppression of evidence

obtained in violation of the privacy act. RCW 9.73.050. RCW 9.73.050 provides in relevant part:

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state,

Id.

b. Admission of Letter Prejudicial Error

The admission of the letter in Mr. Ballard's case was prejudicial and requires reversal. The failure to suppress evidence obtained in violation of the privacy act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial. Christensen, 153 Wn.2d at 200-201; State v. Porter, 98 Wn. App. 631, 638, 990 P.2d 460 (1999). All evidence derived from an unlawful intercept is inadmissible. State v. Porter, 98 Wn. App. at 637 (citations omitted).

In Christensen, the erroneous admission of the mother's testimony was prejudicial and because it was credible, the Court concluded that it could not reasonably be held that the admission of her testimony did not materially affect the outcome of the trial. The matter was reversed and remanded for a new trial.

Christensen, 153 Wn.2d at 200-201.

In Porter, the defendant successfully challenged the application for an intercept pursuant to RCW 9.73.130. Porter, 98 Wn. App. at 636. The Court in Porter reversed the conviction and remanded for suppression of the illegally obtained private information. Porter, 98 Wn. App. at 638.

The same result is required in Mr. Ballard's case. The letter was a protected private communication. RCW 9.73.020. As directed by Christiansen, Porter, and RCW 9.73.050 all communications obtained in violation of the privacy act must be excluded from evidence. Porter, 98 Wn. App. at 638, citing, RCW 9.73.050².

The failure to suppress the letter and card Mr. Ballard sent to his son that was obtained in violation of the privacy act was prejudicial because it was the sole piece of evidence the state had to establish the crime charged. In Mr. Ballard's case the erroneous admission of the evidence materially affected the outcome of the trial. State v. Rupe, 101 Wash.2d 664, 681-82, 683 P.2d 571 (1984).

D. CONCLUSION

Mr. Ballard respectfully requests this Court reverse his conviction and remand for a new trial on following grounds. The state failed to prove beyond a reasonable doubt the elements of knowingly making contact with the protected person; and for admission of evidence obtained in violation of the privacy act.

DATED this 1st day of June 2010

Respectfully submitted,

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STATE OF WASHINGTON
BY _____ DEPUTY

I, Lise Ellner, a person over the age of 18 years of age, served Kitsap County Prosecutor Appeals Department 614 Division Street, MS-35 Port Orchard, WA 98366-4692 and Donnie DOC# 859001 ~~Washington Corrections Center P. O. Box 900 Shelton, WA 98584~~ a true copy of the document to which this certificate is affixed, On June 2, 2010. Service was electronically.

Signature

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