

No. 40434-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH BUCKLEY
Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

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

The Honorable, Judge Gary R. Tabor
Cause No. 09-1-01818-2

BRIEF OF RESPONDENT

John C. Skinder
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Buckley's conviction for Violation of Post Conviction No Contact Order/ Domestic Violence -- Third or subsequent violation of any similar order, pursuant to RCW 26.50.110(5), RCW 10.99.020, RCW 10.99.050, should be affirmed when the charging information alleged all the essential elements of the crime and the defendant was not prejudiced by the language of the document? (Combining Assignments of Error 1, 2 and 3)
2. Was Mr. Buckley's trial counsel ineffective? (Combining Assignments of Error 4, 5, and 6)

B. STATEMENT OF THE CASE.

The State stipulates to the Appellant's Statement of Facts and Prior Proceedings with the following correction and additions.

On February 10, 2010, the appellant was convicted of Violation of Post Conviction No Contact Order/ Domestic Violence -
- Third or subsequent violation of any similar order, pursuant to RCW 26.50.110(5), RCW 10.99.020, RCW 10.99.050 after a jury trial. [RP 91]. The trial judge and counsel discussed the defendant's motions in limine both on and off the record before the trial began. [RP 4-15]. The appellant is challenging on appeal the way defense counsel argued #5 of the defense Motions in Limine filed in writing on February 9, 2010. [Motions in Limine, Supp. CP.

1-2]. The #5 Motion in Limine states, regarding the testimony of community corrections officer (CCO) Andemariam,

COMES NOW the Defendant, by his undersigned attorney of record, and prior to trial, moves this court for the following:

.....

5. The testimony of Officer Daniel Andemariam – an order prohibiting the State, under ER 401, 402, and 403, from introducing evidence showing that Mr. Buckley has previously been convicted of other crimes, or that he was on DOC community custody at the time of this offense, **beyond that necessary to establish the elements of the charged crime – to wit: that Mr. Buckley had been twice-convicted of violating a no-contact order.** {Emphasis added}

[Id.].

The following conversation between the court and the defense counsel occurred:

Mr. Kauffman: I believe we already discussed number two. And number three and number five, I understand the Court will re reserving any further argument at this time.

The Court: Well, as to the exact nature of what we're going to do, yes.

Mr. Kauffman: Understood.

The Court: It's clear the State does have the right to go forward with proving a necessary element of the charge. And the exact form how that's going to play out, we'll just have to see.

[RP 9-10].

Later, the trial judge comments on the State's case regarding proposed testimony regarding a second existing no-contact order:

The Court: That may very well be. I don't have copies of those documents. At this point, I'm going to ask the State not have the officer testify that there was a second existing no-contact order. The officer may certainly testify as to there being a conviction. I understand, though, that you're going to have that through the CCO; is that right?

Ms. Gailfus: Yes, Your Honor.

The Court: I will take this under advisement. Again, a motion in limine is not a final ruling. We'll have to determine what, if anything, about that conviction can come before the jury. Okay. I

[RP 15].

The Court and counsel then had an extended conversation that dealt with how to redact the official documents regarding Mr. Buckley's two prior convictions for violations of a protection order before they would be entered as trial exhibits. [RP 29-52].

Officer Hurd, a City of Olympia police officer, testified that on November 28, 2009 at 4:18 a.m. he responded to a noise complaint at the Johnson Center Apartments in Thurston County. [RP 18]. The complainant of the noise complaint was a John Mooneyhan who lived in one of the apartments. [RP 18]. Officer Hurd and his partner contacted the inhabitants of the "noisy" apartment #220.

[RP 19]. Officer Hurd contacted Ms. Conley, the protected party, who identified herself by name and date of birth to the officer. [RP 19]. In Court, Officer Hurd identified Ms. Conley by using a photo from her Washington State Official Identification Card which was entered as an exhibit. [RP 20]. Ms. Conley told the officer there was a protection order between her and one of the males in the apartment. [RP 22-23]. One of the other inhabitants of the apartment was the defendant; after identifying him, Officer Hurd located a valid no-contact order preventing the defendant from having any contact with Ms. Conley. [RP 23].

Defense counsel successfully objected to Officer Hurd offering that the defendant had told the officer, “[T]his is only the second time I violated this order”. [RP 36]. After argument outside the presence of the jury, the Court denied admission of the statement as it was disclosed by the State in the middle of the trial. [RP 51].

Mr. Mooneyhan testified that he had called the police based on a noise complaint at his apartment complex. [RP 55-56]. He also identified Ms. Conley by photo from her Washington State Official Identification Card. [RP 56-57].

CCO Andermariam testified that he was a community corrections officer and that he had supervised the defendant since the summer of 2009. [RP 60]. Mr. Andermariam testified that the defendant had a 5 year no-contact order that prevented him from having any contact with Ms. Conley or coming within 500 feet of her home. [RP 60-1]. The no-contact order was entered on 9/19/08 and expired on 9/19/13. [RP 61]. Mr. Andermariam testified that he had discussed the no-contact order with Mr. Buckley and “stressed to Mr. Buckley that he’s to have no contact of any kind with Ms. Conley, be it first person, direct, or even passing messages through third parties”. [RP 61]. Mr. Andermariam testified to Mr. Buckley having two prior separate convictions for separate violations of protective orders; two judgment and sentences (redacted pursuant to court order) were offered into evidence through the CCO. [RP 62-4]. No testimony regarding any of Mr. Buckley’s other criminal offenses was offered regarding Mr. Buckley by Mr. Andermariam; the State never introduced any evidence or testimony regarding Mr. Buckley’s other criminal convictions except as related directly to the charge contained in the Second Amended Information.

The defense did not present any witnesses. [RP 68].

The jury convicted Mr. Buckley as charged; the Court polled the jury as to their verdict. [RP 91-3]. The Court subsequently sentenced Mr. Buckley to a 51 month sentence with additional conditions of sentence. [March 11, 2010, Sentencing RP 3-14].

C. ARGUMENT.

I. Mr. Buckley's conviction for Violation of Post Conviction No Contact Order/ Domestic Violence -- Third or subsequent violation of any similar order, pursuant to RCW 26.50.110(5), RCW 10.99.020, RCW 10.99.050, should be affirmed when the charging information alleged all the essential elements of the crime and the defendant was not prejudiced by the language of the document.

A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The time at which a defendant challenges the charging document controls the standard of review for determining the charging document's validity. *State v. Borrero*, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). When the charging document is challenged after the verdict, the language is construed liberally in favor of validity. *Id.* at 360. Here, Mr. Buckley challenged the information after the verdict so this Court should construe the language liberally and in favor of validity.

A charging document must include all essential elements of a crime, statutory or nonstatutory, "to afford notice to an accused of

the nature and cause of the accusation against him.” *Kjorsvik*, 117 Wn.2d at 97. An “essential element is one whose specification is necessary to establish the very illegality of the behavior.” *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

The court uses a two-pronged analysis to determine the constitutional sufficiency of a charging document challenged for the first time on appeal: 1) do the essential elements appear in any form, or by fair construction can they be found in the charging document; and, if so, 2) can the defendant show that he or she was actually prejudiced by the language of the charging document. *Kjorsvik*, 117 Wn.2d at 105-06.

The first prong of the test looks to the face of the charging document itself. *State v. Tandecki*, 153 Wn.2d 842, 849, 109 P.3d 398 (2005). The charging document can use the language of the statute if it defines the offense with certainty. *State v. Elliott*, 114 Wn.2d 6, 13, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990). However, the charging document does not need to mirror the language of the statute. *Tandecki*, 153 Wn.2d at 846.

The Second Amended Information filed February 8, 2010, states:

COUNT I – VIOLATION OF POST CONVICTION NO CONTACT ORDER/DOMESTIC VIOLENCE – THIRD OR SUBSEQUENT VIOLATION OF ANY SIMILAR ORDER, RCW 26.50.110(5), RCW 10.99.020, RCW 10.99.050 – CLASS C FELONY:

In that the defendant, KENNETH REX BUCKLEY, in the State of Washington, on or about November 28, 2009, with knowledge that the King County Superior Court had previously issued a no contact order, pursuant to Chapter 10.99 in King County Superior Court, on September 19, 2008, Cause No. 08-1-04241-0, did violate the order while the order was in effect by knowingly violating the restraint provisions therein pertaining to Cassandra Conley, a family or household member, pursuant to RCW 10.99.020; and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

[CP 2].

Here, the charging document uses the language of RCW 26.50.110. Because the essential elements appear in the charging document, the charging information passes the first prong of the *Kjorsvik* test.

The second prong of the test looks beyond the face of the charging document to determine if the language in the charging information actually prejudiced the defendant. *Tandecki*, 153 Wn.2d at 849 (citing *Kjorsvik*, 117 Wn.2d at 105-06). Here, Mr. Buckley has the duty to show that he was actually prejudiced by the

language of the charging document. *Kjorsvik*, 117 Wn.2d at 105-06. Mr. Buckley has failed to articulate how he has been prejudiced by the language of the charging information. Nowhere in Mr. Buckley's brief is there any argument whatsoever as to the prejudicial effect of the charging document. In fact, Mr. Buckley notes definitively that he "need not demonstrate prejudice." (Appellant's Brief 8) Therefore, the second part of the test is met because no prejudice has been shown.

It appears that the appellant is arguing that there should have been more details provided by the State regarding the two prior qualifying convictions alleged in the Second Amended Information. The appellant cites *Brooke* to support this contention; *Brooke* dealt with a situation where the defendant was charged by citation with "9.40.010(A) (2) Disorderly Conduct" and no other information or language was provided detailing the charge or facts supporting the criminal charge. *City of Auburn v. Brooke*, 119 Wn.2d 623; 836 P.2d 212 (1992).

The Court reaffirmed *Kjorsvik* when it held that all elements of a crime must be included in the charging document and the constitutionality of a charging document first raised on appeal will be more liberally construed in favor of validity if not challenged until

after the verdict. *Id.*, at 635; citing *Kjorsvik*, 117 Wn.2d at 102. No other case authority was cited by the appellant for this challenge. For the reasons cited above, the appellant's challenge to the charging document should be denied here as all of the elements are included in the charging document and the challenge to its constitutionality was first made on appeal after verdict.

Further, even if the language were somehow vague or confusing, his remedy would have been to seek a bill of particulars.

[I]f the information states each statutory element of a crime, but is vague as to some other matter significant to the defense, a bill of particulars is capable of correcting that defect. In that event, a defendant is not entitled to challenge the information on appeal if he failed to request the bill of particulars at an earlier time.

State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985), (cites omitted.)

All of the elements of the offense were included in the document which charged Mr. Buckley with the offense of violating a post-conviction protection order. He has shown no prejudice from any vagueness of the language, and because he did not seek a bill of particulars in the trial court, he cannot now challenge the charging document on appeal.

2. Mr. Buckley's trial counsel was effective.

To establish ineffectiveness of counsel, Mr. Buckley must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have differed. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The Court starts with a strong presumption of counsel's effectiveness. *Id.*, at 335. Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The appellant argues that defense counsel should have objected to testimony from Officer Hurd that the King County protective order against Mr. Buckley "had been served" and "had not expired." [Appellant's Brief 10, citing RP 23]. These arguments are misplaced as Mr. Buckley actually signed the King County (#08-1-04241-0) protection order thereby proving service of the order.

[Exhibit 4, Supp. CP]. The King County Protection order, signed by Mr. Buckley, was entered as an exhibit at the trial and showed the expiration date of 9/19/13 (the order entered into evidence was redacted pursuant to the trial court's order after argument but did contain the above information).

As the no-contact order in this case was signed by the defendant and entered into evidence, further testimony was provided by CCO Andemariam that he had gone over the order and "stressed" its contents with Mr. Buckley.

Officer Hurd was allowed to testify to that the protective order was served and valid as it explains why he placed the defendant under arrest for violation of a protective order; for these reasons, Officer Hurd's testimony was proper.

Also, defense counsel's primary attack in this case was that there was a reasonable doubt regarding the identity of Ms. Conley (who did not testify at trial). [RP 84-5]. Defense counsel was not arguing the validity of the King County protection order; he was arguing that the State had not proven that the woman at the apartment was Ms. Conley beyond a reasonable doubt. Based on the strength of the State's case, this was a reasonable tactic; by

drawing additional attention to the documentary evidence, defense counsel would have undercut his defense.

The appellant also challenges the unobjected testimony of Mr. Andemariam as another example of ineffective assistance of counsel. Mr. Andemariam's testimony was subject to a written motion in limine filed by defense counsel which specifically stated:

COMES NOW the Defendant, by his undersigned attorney of record, and prior to trial, moves this court for the following:

.....

5. The testimony of Officer Daniel Andemariam – an order prohibiting the State, under ER 401, 402, and 403, from introducing evidence showing that Mr. Buckley has previously been convicted of other crimes, or that he was on DOC community custody at the time of this offense, **beyond that necessary to establish the elements of the charged crime – to wit: that Mr. Buckley had been twice-convicted of violating a no-contact order.** {Emphasis added}

. [Motions in Limine, Supp. CP. 1-2].

Based on Mr. Buckley's extensive criminal history, defense counsel was understandably concerned that no evidence of Mr. Buckley's other convictions be alluded to by the State. [CP, Felony Judgment and Sentence]. However, defense counsel was also aware that the State was calling Mr. Andemariam as a witness to establish two of Mr. Buckley's prior convictions for violation of

protective order and to establish that Mr. Buckley had known of the order in this case and understood the contents of the order.

RCW 26.50.110 requires proof that a defendant knew of a protective order and knowingly violated it. The testimony of Mr. Andemariam was offered to show Mr. Buckley's knowledge of the order and that Mr. Buckley fully understood what conduct was prohibited. Mr. Andemariam testified that he had discussed the details of the protective order with Mr. Buckley and "stressed" the importance of him not having any contact with Ms. Conley.

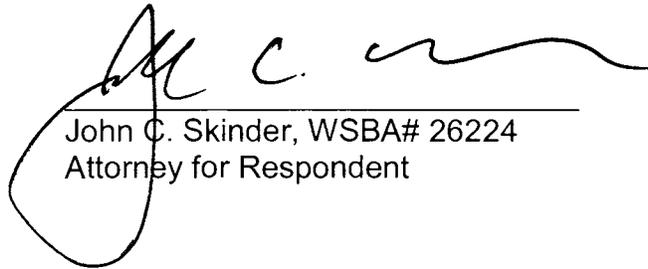
Mr. Andemariam also provided testimony regarding the two prior convictions of Mr. Buckley for violating protective orders on two prior occasions. As the defendant had not stipulated to this element of prior convictions, the State was required to prove the two prior convictions. RCW 26.50.110(5). As Mr. Andemariam was the community corrections officer for Mr. Buckley, he was aware of Mr. Buckley's convictions and the conditions of judgment for each conviction. [RP 60-1]. No testimony was provided regarding any other convictions belonging to Mr. Buckley. Mr. Andemariam's testimony was concise and dealt only with the elements that the State had to prove pursuant to RCW 26.50.110. Therefore, based on the record, Mr. Buckley has failed to demonstrate that his

counsel was deficient; in fact, trial counsel was effective in excluding all of his client's criminal history, except for the two underlying protective order violation convictions, from the consideration of the jury.

D. CONCLUSION.

The State respectfully requests that Mr. Buckley's conviction be affirmed.

Respectfully submitted this 31st day of August, 2010.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
 ABC/Legal Messenger
 Hand delivered by to Supreme Court

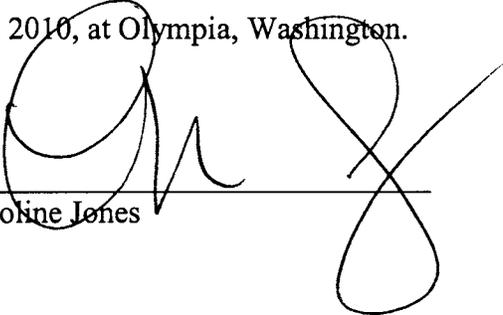
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COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

--AND--

JODI R. BACKLUND
MANEK R. MISTRY
203 4TH AVE E, STE 404
OLYMPIA, WA 98501-1189

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 31 day of August, 2010, at Olympia, Washington.



Caroline Jones