No. 44843-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JESSE COLE HUNOTTE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-00391-2
The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it altered the to-convict instruction after the instructions were read to the jury because the instruction was then the law of the case.
2. The State failed to prove beyond a reasonable doubt that the prohibited contact was "in person" as required by the original to-convict instruction.
3. The State failed to prove beyond a reasonable doubt all the essential elements of the crime of violation of a domestic violence protection order.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was the to-convict instruction, which included language requiring the State to prove that the prohibited contact was "in person," the law of the case once the instruction was read to the jury? (Assignment of Error 1)
2. Did the State assume the burden of proving that the prohibited contact was "in person" when its proposed to-convict instruction included that language, and where it failed to request a change to the instruction until after it was read to the jury? (Assignment of Error 1)
3. Did the State fail to prove beyond a reasonable doubt that the

prohibited contact was "in person" as required by the original to-convict instruction? (Assignment of Error 2)

4. Did the State fail to prove every element of the crime of violation of a domestic violence protection order when it failed to present any evidence to establish that the defendant on trial was the same Jesse Hunotte named in one of the protection orders? (Assignment of Error 3)

5. Did the State fail to prove every element of the crime of violation of a domestic violence protection order when it failed to present any evidence that Jesse Hunotte knew of the existence and terms of the protection orders? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Jesse Hunotte in Pierce County Superior Court with one felony count of violation of a domestic violence protection order (RCW 26.50.110). (CP 1-2, 6) The State alleged that the protection order violation was a felony because Hunotte had two prior convictions for violating a domestic violence protection order. (CP 6) The State also alleged that the offense was a domestic violence incident (RCW 26.50.110). (CP 6)

The jury convicted Hunotte as charged. (RP 225; CP 37, 38) The trial court imposed the maximum standard range sentence of 60 months. (RP 239; CP 48) This appeal timely follows. (CP 56)

B. SUBSTANTIVE FACTS

In January of 2013, Tajha Ekstrand was living in an apartment at 101 South Harrison Street in Tacoma. (RP 90) She lived with her then six-year-old son, and was pregnant with her longtime boyfriend's child. (RP 91, 92) But she had sought and obtained a domestic violence protection order against her boyfriend, Jesse Hunotte, on October 23, 2012. (RP 166; Exh. P3)

Ekstrand testified that Hunotte's brother came to her apartment on January 27, 2013, to pick up some of Hunotte's belongings. (RP 31, 156-57, 160) Ekstrand did not see Hunotte with him but assumed he was nearby, so she told her son to go to the neighbor's house to call 911. (RP 158, 160, 171-72)

Tacoma Police responded to the 911 call placed by a neighbor. (RP 31, 32, 107, 108) As he drove towards the scene, Officer Edwin Franklin saw Hunotte, whom he recognized from prior contacts. (RP 33, 36) Hunotte and another man were walking eastbound on Harrison Street. (RP 36) Officer Franklin pulled over and called to Hunotte. Hunotte responded, but the second man

walked quickly away. (RP 36-37)

Officer Jared Williams spoke to Ekstrand at her apartment, then went to the location where Officer Franklin had Hunotte detained. (RP 109-10, 111) He ran Hunotte's name, and found that a protection order was in place restricting Hunotte from contacting Ekstrand. (RP 117) Hunotte was placed under arrest and searched. (RP 39-40) Hunotte had a set of keys and $160.00 in cash in his pockets. (RP 38, 40) While Officer Franklin transported and booked Hunotte into the Pierce County Jail, Officer Williams returned the keys to Ekstrand. (RP 39, 112)

Later that day, Pierce County Deputy James Scollick, was monitoring inmate telephone calls, when he overheard a call placed from the booking area of the jail to phone number 253-302-1942. (RP 137) During the call, a man and woman discuss an earlier incident and reference items that Hunotte had in his possession when he was booked into the jail. (RP 138-39) Ekstrand acknowledged at trial that 253-302-1942 is her phone number. (RP 90) But she did not recall talking to Hunotte on the telephone that day. (RP 165)

Hunotte stipulated that he had two prior convictions for violating a protection order. (CP 9-12; RP 149; Exh. P14) The

stipulation presented to the jury did not include information as to when the convictions occurred, or what protection order(s) were violated. (CP 12)

The State also presented certified copies of two protection orders, one entered in Pierce County Superior Court on October 23, 2012, and one entered in Tacoma Municipal Court on January 23, 2013. Both restrained Jesse Cole Hunotte from contacting Tajha Ann Ekstrand. (RP 57; Exh. P2, P3)

Officer Eric Kothstein testified that he personally served Hunotte on October 17, 2012 with a copy of a temporary protection order entered in the Pierce County case. (RP 62, 63, 64-65) He explained that a temporary protection order generally lasts for 14 days, during which time a hearing will be held to determine whether to extend the order. (RP 61, 64) A hearing was held on October 23, 2012 in the Pierce County matter, and a one year protection order was entered, but Hunotte was not present when the order was granted and entered. (Exhs. P3, P4)

IV. ARGUMENT & AUTHORITIES

A. ONCE THE JURY INSTRUCTIONS WERE READ TO THE JURY, WITHOUT OBJECTION, THE INSTRUCTIONS WERE THE LAW OF THE CASE AND THE STATE ASSUMED THE BURDEN OF PROVING ALL THE ELEMENTS INCLUDED IN THE TO-CONVICT INSTRUCTION.

The State's proposed to-convict instruction in this case read as follows:

> To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 27th day of January, 2013, there existed a protection order, restraining order, no-contact order, or foreign protection order applicable to the defendant;
>
> (2) That the defendant knew of the existence of this order;
>
> (3) That on or about said date, the defendant knowingly violated a provision of this order, in person;
>
> (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
>
> (5) That the acts occurred in the State of Washington[.]

(Sup. CP 74; Plaintiff's Proposed Instruction 9) Element number three specifically included language that the contact must be "in person." (Sup CP 74)

Neither party objected to the content of this instruction. (RP 186, 196) In fact, the prosecutor told the court that the "State looked through the packet. The State has no objections or exceptions to any of the instructions." (RP 196) The trial court proceeded to read the instructions to the jury as drafted and agreed upon. (RP 197)

After the instructions were read, however, the prosecutor asked the trial court to remove the term "in person" from the to-convict instruction and to re-instruct the jury. (RP 198-99) Hunotte objected, arguing that the instructions were the law of the case and could not be altered at that point. (RP 198-99) The trial court disagreed, crossed out "in person" from the written instruction, and re-read the to-convict instruction to the jury. (RP 200-01, 201-02; CP 29, Court's Instruction 10)

This was error because jury instructions that are not objected to become the law of the case. State v. Hames, 74 Wn.2d 721, 725, 446 P.2d 344 (1968); State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). And in criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the to-convict instruction. State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) ("Added elements become the law of the case ... when they are

included in instructions to the jury."); State v. Barringer, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982) ("Although the charging statute ... did not require reference to [the added element], by including that reference in the information and in the instructions, it became the law of the case and the State had the burden of proving it.").

It is also well established that "parties must object to jury instructions **before they are given** on penalty of forfeiture of such objection." State v. Hickman, 135 Wn.2d 97, 105, 954 P.2d 900 (1998) (emphasis added) (citing State v. Dent, 123 Wn.2d 467, 479, 869 P.2d 392 (1994)).

> The law of the case doctrine benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury. Moreover, the doctrine is well established by multiple precedent and is encapsulated in criminal rule CrR 6.15(c), which requires all objections to jury instructions be made before the instructions are given to the jury.

Hickman, 135 Wn.2d at 105. *See also* Dent, 123 Wn.2d at 479 ("It is elementary that timely exceptions, before the reading of the instructions to the jury, are necessary to permit the court to correct any error which may exist so that the jury is instructed correctly.").

In this case, the State's proposed to-convict instruction included as an element that Hunotte contacted Ekstrand "in person."

(Sup. CP 74) The State did not object to this language until after the trial court instructed the jury. (RP 198-99) But at that point, the instruction was the law of the case, and the State had assumed the burden of proving that the prohibited contact was "in person." The trial court therefore erred when it altered the instruction and re-instructed the jury.

The court's error was prejudicial for several reasons. First, the objection came just as the parties were about to begin closing statements. (RP 197) And Hunotte's trial counsel informed the court that he had prepared his closing argument based on the original wording of the to-convict instruction. (RP 199)

More significantly, however, the State's evidence was insufficient to establish in-person contact, even when the evidence is viewed in the light most favorable to the State.[1] None of the witnesses testified that they saw Hunotte contact Ekstrand or that they saw Hunotte at Ekstrand's apartment. Ekstrand testified that she did not see Hunotte that day. (RP 171-72) She testified that Hunotte's brother came to her apartment, and she simply assumed

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[1] See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt).

that Hunotte was nearby. (RP 158, 160)

Once the approved instructions were read to the jury, they became the law of the case and the State forfeited the right to object. The trial court therefore erred when it granted the State's request to alter the to-convict instruction by removing the requirement that the prohibited contact be "in person." The State was obligated to prove in-person contact, which it failed to do. Hunotte's conviction must therefore be reversed and dismissed.[2]

B. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT ALL THE ESSENTIAL ELEMENTS OF THE CRIME OF VIOLATION OF A DOMESTIC VIOLENCE PROTECTION ORDER.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency

[2] See Hickman, 135 Wn.2d at 105 (reversing and dismissing the defendant's conviction where the State failed to object to added element of venue and subsequently failed to prove venue).

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The State charged Hunotte with felony violation of a domestic violence protection order under RCW 26.50.110. (CP 6) In order to convict Hunotte, the State had to prove: (1) that Hunotte had willful contact with Ekstrand; (2) that such contact was prohibited by a valid protection order entered against Hunotte; and (3) that Hunotte knew of the existence of the order. *See* RCW 26.50.110(1); State v. Clowes, 104 Wn. App 935, 944, 18 P.3d 596 (2001); State v. Snapp, 119 Wn. App. 614, 625, 82 P.3d 252 (2004).

1. *The State failed to present sufficient evidence to prove the identity of the person named in the Tacoma Municipal Court No Contact Order.*

In all criminal trials the State has the burden of proving identity through relevant evidence. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). "To sustain this burden when criminal liability depends on the accused's being the person to whom a document pertains . . . the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt 'that the person named therein is the same person on trial.'" State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (quoting State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958).

> Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action.

State v. Hunter, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981) (citing State v. Harkness, 1 Wn.2d 530, 96 P.2d 460 (1939); State v. Brezillac, 19 Wn. App. 11, 573 P.2d 1343 (1978); State v. Clark, 18 Wn. App. 831, 832 n.1, 572 P.2d 734 (1977)).

For example, in State v. Hunter, the State charged Dallas Elmer Hunter with attempted escape from the Cowlitz County Jail, where he was being detained while awaiting transfer back to a state penal institution. 29 Wn. App. at 219. In order to prove that Hunter was being held "pursuant to a felony conviction," the State introduced certified copies of two Lewis County judgments and sentences, which showed the felony convictions of a person named Dallas E. Hunter. 29 Wn. App. at 221. The State also presented testimony of a probation officer from the Department of Corrections who had personally revoked Hunter from his work release program and placed him into the custody of the Cowlitz County Jail pending his return to prison, pursuant to his Lewis County felony convictions. 29

Wn. App. at 221.

On appeal, Hunter argued that the trial court erred when it admitted the judgments because the State failed to present sufficient evidence that he was the defendant named therein. 29 Wn. App. at 221. But this court found no error because the State's "independent" evidence established that Hunter was the person named in the judgments. 29 Wn. App. 221-22.

In Huber, the State charged Wayne Alan Huber with violating a protection order and tampering with a witness. When he failed to appear at a pretrial hearing, the State charged him with bail jump. 129 Wn. App. at 500. At trial on the bail jump charge, the State introduced certified copies of an information charging Huber with violation of a protection order and tampering with a witness; of a written court order requiring Huber to appear in court on July 10, 2003; of clerk's minutes indicating that Huber had failed to appear on July 10; and a bench warrant commanding Huber's arrest. 129 Wn. App. at 500-01. The State did not call any witnesses or otherwise attempt to show that the exhibits referred to the same Wayne Huber who was then before the court. 129 Wn. App. at 500.

The defense in Huber elected not to present any evidence; the defense moved to dismiss, arguing that the evidence was

insufficient to support a finding that the person who had jumped bail was the person then in court; and the defense argued that even though the State had proved that a person named Wayne Huber had jumped bail, it had not identified the person who had jumped bail as the person then in court. 129 Wn. App. at 501. (See RP 39-40, 46, 72-73)

The jury convicted, and on appeal Huber argued that the State's evidence was insufficient to show that the person on trial was the same person who earlier had failed to appear in court. 129 Wn. App. at 500. This Court agreed, holding: "the State produced documents in the name of Wayne Huber but no evidence to show 'that the person named therein is the same person on trial.'" 129 Wn. App at 503 (quoting Kelly, 52 Wn.2d at 678). This Court further noted: "the State does not meet its burden merely because the defense opts not to present evidence; if the State presents insufficient evidence, the defendant's election not to rebut it does not suddenly cause it to become sufficient." 129 Wn. App. at 503 (footnotes omitted).

In the present case, the State charged Hunotte with violating the Tacoma Municipal Court protection order "and/or" the Pierce County Superior Court protection order. (CP 6) The State presented

at least some evidence that Hunotte was the person named in the Pierce County order: the names matched; Officer Kothstein testified that he personally served Hunotte with the temporary protection order initially entered in that case; and Ekstrand testified that she applied for and obtained a protection order against Hunotte in October of 2012. (RP 63-65, 166; Exh. P3) But the State presented no such evidence to establish that the Jesse Hunotte named in the Tacoma Municipal Court order was the same Jesse Hunotte on trial in this case.

Exhibit P2 shows that a protection order was entered on January 23, 2013 in Tacoma Municipal Court, prohibiting a Jesse Cole Hunotte from having contact with Tajha Ann Ekstrand. Though the names match, this is not conclusive proof, beyond a reasonable doubt, that the individuals in the order and the parties in this case are the same people. The order alone is insufficient evidence to prove that the Jesse Cole Hunotte on trial was the same individual named as the restrained party in the Tacoma Municipal Court protection order.

Because the existence of the protection order was an element of the offense charged, a mere correspondence between the name on a document and the name of the person at trial is insufficient. As

Hunter and Huber make clear, the "identity of names alone is not sufficient proof of the identity of a person[.]" Hunter, 29 Wn. App. at 221; *see also* Huber, 129 Wn. App. at 503. The Huber court suggested: "The State can meet [its] burden in a variety of specific ways. Depending on the circumstances, these may include otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information." 129 Wn. App. at 503.

The State offered no evidence here to link Hunotte to the individual named in the Tacoma Municipal Court protection order. It did not call any witnesses or present any evidence to prove that the defendant Jesse Cole Hunotte was the person named in the Tacoma Municipal Court protection order. The State presented no fingerprints, signature comparisons, photographs, or other identifying evidence to establish the identity of the party named in this protection order. The State even failed to elicit testimony from Ekstrand or any other witness that Ekstrand ever sought or obtained a protection order against her boyfriend in January of 2013. There was simply insufficient evidence to prove beyond a reasonable doubt that Hunotte is the same person as the Jesse Cole Hunotte listed on the Tacoma Municipal Court protection order.

2. *The State failed to present sufficient evidence to prove that Hunotte had knowledge of either protection order on file against him.*

In order to be guilty of the offense of violating a protection order, the defendant must know that the protection order exists. State v. Phillips, 94 Wn. App. 829, 833, 974 P.2d 1245 (1999) (citing RCW 26.50.110(1)). The State offered, and the trial court admitted, copies of two protection orders. (Exhs. P2, P4; RP 57)

Regarding the Tacoma Municipal Court order, there is a signature on the order where the restrained party must sign. (Exh. 2) But no other evidence was elicited or introduced to indicate that the signature was placed there by Jesse Hunotte. And the State presented no other evidence to show that Hunotte was present at the hearing or that he was ever served a copy of the order.

Regarding the Pierce County Superior Court order, Officer Kothstein testified that he served a copy of the temporary, 14-day order in person to Hunotte on October 17, 2012. (RP 61-62, 63, 65; Exh. P3; Exh. P5) The Clerk's Minutes from the October 23, 2012 hearing in that case indicate that Ekstrand appeared and testified, but the form is blank where Hunotte's presence would be noted. (Exh. P4) More telling, however, is a note on the protection order itself that Hunotte "[c]hecked in but did not remain when case was

called. Left courtroom 20 minutes prior." (Exh. 3 at p.4) Thus, the State's evidence actually shows that Hunotte was **not** present when the one-year order was entered on October 23, 2012. And none of the State's witnesses testified that Hunotte was eventually served a copy of the order or made aware of its existence.

There was no testimony whatsoever that Hunotte was, at any time, given notice of the existence or terms of either of the protection orders. The State simply failed to meet its burden of proving that Hunotte had knowledge of the protection orders, and therefore failed to prove every essential element of the crime. Hunotte's conviction should be reversed and dismissed.[3]

V. CONCLUSION

By failing to object to the to-convict instruction before it was read to the jury, the State forfeited its right to object and assumed the obligation of proving that Hunotte contacted Ekstrand "in person." The trial court erred by altering the instruction, and by allowing the jury to convict Hunotte without sufficient proof of in person contact. Furthermore, the State's evidence is insufficient for any rational trier of fact to have found the essential elements of felony violation of a

[3] See Huber, 129 Wn. App. at 504 (ordering remand for entry of an order dismissing the charge with prejudice where the State failed to prove essential elements of crime charged).

protection order beyond a reasonable doubt. Jesse Hunotte's conviction should be reversed, and his case remanded for an order of dismissal with prejudice.

DATED: October 25, 2013

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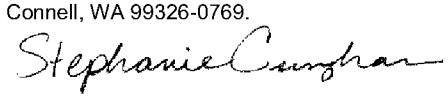
CERTIFICATE OF MAILING

I certify that on 10/25/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jesse C. Hunotte, DOC# 731491, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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