

No. 44963-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FAGALULU FILITAUOLA,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and deprived Fagalulu Filitaula of due process when it entered a conviction in the absence of sufficient evidence

2. The trial court deprived Mr. Filitaula of his right to a jury trial in violation of the Sixth Amendment and Article I, §section 22 when the court failed to instruct the jury on the elements of the offense of violating a no-contact order.

3. The information did not include all essential elements of the charge of violating a no-contact order in violation of the Sixth and Fourteenth Amendments along with Article I, section 22.

4. The trial court exceeded its statutory authority by imposing a variable term of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment requires the State to prove each element of an offense beyond a reasonable doubt. A conviction for violating a no-contact order requires the State prove a person willfully violated the order. In the absence of proof of that element does Mr. Filitaula's conviction deprive him of due process?

2. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn, requires a trial court to instruct the jury on each element of the offense. Instruction 8, the “to convict” instructions, omitted the willfulness element. Does the instruction relieve the State of its burden of proof?

3. The Sixth and Fourteenth Amendments along with Article I, section 22 require the information contain all essential elements of the charged crime. Where the information omits the “willfulness” element, does it violate these constitutional requirements?

4. RCW 9.94A.701 requires a trial court impose one of three determinate terms of community custody set forth in that statute depending upon the seriousness of the offense. Following a 2009 amendment to that statute and repeal of former RCW 9.94A.715, courts can no longer impose a variable term dependent upon a person’s release from confinement. Instead, RCW 9.94A.701(9) provides that where the combined standard range of confinement and community custody exceed the statutory maximum for an offense, the trial court must reduce the term of community custody. Where the sentencing court imposed a determinate term and, in the alternative, a variable term and

ordered Mr. Filitaula to serve whichever proved longer, did the court exceed its authority?

C. STATEMENT OF THE CASE

On the evening of December 16, 2012, Faufau Boyd drove to the semi-rural home at which Mr. Filitaula was living. RP 53. Ms. Boyd did so disregarding a no-contact order that prohibited Mr. Filitaula from having contact with her. RP 54. Ms. Boyd did so because was angry at Mr. Filitaula. After she left, Ms. Boyd returned to the house a second time. RP 55.

Mr. Filitaula was arrested for violating the no-contact order.

The State charged Mr. Filitaula with violating the no-contact order. CP 6. When Mr. Filitaula failed to appear for a pretrial hearing, the State added an additional charge of bail jumping. CP 7.

Mr. Filitaula was convicted following a jury trial of both counts. CP 20-21.

D. ARGUMENT

1. Because the State did not prove Mr. Filitaula wilfully violated the order his conviction must be reversed.

a. The State must prove each element of the charge beyond reasonable doubt.

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process “indisputably entitle[s] a criminal defendant to ‘a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S. at 510).

b. The State did not prove that Mr. Filitaula willfully violated the order.

There are three essential elements of the offense of violating a no-contact order: (1) the willful contact with another, (2) the prohibition of such contact by a valid no-contact order, and (3) the

defendant's knowledge of the no-contact order. *State v. Clowes*, 104 Wn. App. 935, 944, 18 P.3d 596 (2001); RCW 10.99.050(2)(a). As to the first element, "not only must the defendant know of the no-contact order; he must also have intended the contact." *Id.* at 944-45; *State v. Washington*, 135 Wn. App. 42, 49, 143 P.3d 606 (2006). Evidence that a defendant who knew of a no-contact order accidentally or inadvertently came into contact with the alleged victim is insufficient to satisfy this element. *Clowes*, 104 Wn. App. at 945. To the contrary, "willful" requires a purposeful act. *State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002) (citing *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982)).

The State did not prove Mr. Filitaula willfully violated the order. Mr. Filitaula did not act with the purpose of contacting Ms. Boyd. Instead, Mr. Filitaula is serving four years in prison because Ms. Boyd was intent on contacting him despite the order. Ms. Boyd went to the Mr. Filitaula's home not once but twice. RP 53, 55. Mr. Filitaula did nothing but remain at his home.

The State argued, Mr. Filitaula was obligated to leave his home to avoid Ms. Boyd. RP 154-56. To say his only recourse was to flee his rural home on a dark winter night is absurd. A no-contact is intended to

be shield, protecting the named person from contact, rather than a sword with which to harass the restricted person or to chase them from their home. Mr. Filitaula did not act with the purpose or intent of contacting Ms. Boyd. The State did not prove each element of the offense.

c. This Court should reverse Mr. Filitaula's conviction.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Green*, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove Mr. Filitaula willfully violated the no-contact order the Court must reverse his conviction.

2. Instruction 8 omitted an essential element of the crime of willful violation of a no-contact order.

a. The state must prove and a jury must find each element of an offense beyond a reasonable doubt.

“The Sixth Amendment provides that those ‘accused’ of a ‘crime’ have the right to a trial ‘by an impartial jury.’” *Alleyne v.*

United States, __ U.S. __, 133 S. Ct. 2151, 2156 (2013). This right, together with the Fourteenth Amendment Due Process Clause, requires the State prove each element to a jury beyond a reasonable doubt. *Gaudin*, 515 U.S. at 510;; *Winship*, 397 U.S. at 364. A similar requirement flows from the jury-trial guarantee of Article I, section 22 and the due process provisions of Article I, section 3 of the Washington Constitution. *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

b. A to-convict instruction must include each essential element of the offense.

“A ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Therefore, “an instruction purporting to list all of the elements of a crime must in fact do so.” *Id.* (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). A reviewing court may not look to other jury instructions to supply a missing element from a “to convict” jury instruction. *State v. Sibert*,

168 Wn.2d 306, 311, 230 P.3d 142 (2010) (citing *Smith*, 131 Wn.2d at 262-63).

Here the to-convict instructions for violating a no-contact order omitted an essential element of the offense.

c. The to-convict instructions omitted an essential element of the charge of willfully violating a no-contact order.

Instruction 8, the to-convict instruction provides in relevant part:

To convict the defendant of the crime of violation of a no contact order as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 16, 2012 there existed a no contact order applicable to the defendant regarding a family or household member:

(2) That the defendant knew of the existence of the order;

(3) That on or about said date, the defendant knowingly violated a provision of this order against a family or household member. . . .

CP 14. As set forth above, willfulness, an intent to have contact, is an essential element of the offense. RCW 10.99.050(2)(a); *Clowes*, 104 Wn. App. at 944-45; *Washington*, 135 Wn. App. at 49. That element is missing from the instruction. It is also omitted from Instruction 7 which purports to define the offense.

Substituting “knowledge” for “willfulness” does not properly inform the jury of the elements of the offense. The instruction at issue

in *Clowes* contained the same language as Instruction 8; that the defendant “knowingly violated a provision of this order.” *Compare* CP 14; *Clowes*, 104 Wn. App. at 944-45. This Court found the language “is inadequate because it does not tell the jury that not only must the defendant know of the no-contact order; he must also have intended the contact.” Similarly, Instruction 8 did not tell the jury that Mr. Filitaula must have intended the contact to occur.

d. This Court must reverse Mr. Filitaula’s conviction.

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, the Court held “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *Brown*, 147 Wn.2d at 339 (citing *Smith*, 131 Wn.2d at, 265). In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *Mills*, 154 Wn.2d at 15 n.7, (citing *Neder*, 527 U.S. at 1; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Here, Instruction 8 omits an essential element. Instruction 7 defining the offense similarly omits the element. Because it relieved the State of its burden to prove every element of a crime, the erroneous instruction ‘requires automatic reversal.’ *Brown*, 147 Wn.2d at 339.

But even if the court were to apply a harmless-error analysis, the State cannot meet its burden to prove the error was harmless beyond a reasonable doubt. The omission of willfulness allowed the jury to convict Mr. Filitaula based entirely on Ms. Boyd’s intent to have contact with him. The State did not present any evidence that Mr. Filitaula had a purpose of contacting Ms. Boyd. The evidence plainly established that Ms. Boyd went to Mr. Filitaula’s home. The omission of the essential element of willfulness requires reversal in this case.

3. The Information omitted an essential element of the offense of willful violation of a no contact order.

a. An Information must contain all essential elements of the charged offense.

Article 1, section 22 and the Sixth Amendment prohibit the State from trying an accused person for an offense not charged. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). An offense is not properly charged unless the information sets forth every essential element of the crime, both statutory and nonstatutory. *State v.*

Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. *Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). “This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.” *Pelkey*, 109 Wn.2d at 488 (quoting *State v. Ackles*, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

b. The Information does not include the willfulness element

If an information is challenged for the first time on appeal, the Court must determine: (1) do the necessary facts 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 nonetheless actually prejudiced by the inartful language which caused a lack of notice? *Kjorsvik*, 117 Wn.2d at 105-06. If the answer to the first question is “no,” reversal is required without reaching the second question. *State v. McCarty*, 140 Wn.2d 420, 428, 998 P.2d 296 (2000).

Here the information does not allege Mr. Filitaula willfully violated the no contact order. The information provides in relevant part:

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime(s):

COUNT I – FELONY VIOLATION OF POST CONVICTION O CONTACT ORDER/DOMESTIC VIOLENCE – THIRD OR SUBSEQUENT VIOLATION OF ANY SIMILAR ORDER, RCW 26.50.110(5) AND RCW 10.99.020 – CLASS C FELONY

In that the defendant,, FAGALULU FEAU FILITAULA, in the State of Washington, and on December 16, 2012, with knowledge that Grays Harbor District Court had previously issued a no contact order pursuant to Chapter 10.99 in Grays Harbor District Court on July 12, 2012, Cause No CR48176, did violate the order while the order was in effect by knowingly violating the restraint provisions therein pertaining to Faufau I. Boyd, a family or household member, pursuant to RCW 10.99.020

CP 7 (Bold and underlining in original). As with the jury instructions, the information omits the essential element of “willfulness.” That term does not appear in the charging document. Nor can it be fairly read into the charge. “Willfully contacting” another requires the person act with the intent to have contact. *Clowes*, 104 Wn. App. at 944-45; *Washington*, 135 Wn. App. at 49. A “knowing contact” would require nothing more than an awareness of the fact of contact regardless of any purpose to have such contact. Because the information was constitutionally defective, the conviction must be reversed and the case dismissed without prejudice. *McCarty*, 140 Wn.2d at 428

4. The trial court erred in imposing alternative terms of community custody.

“A trial court only possesses the power to impose sentences provided by law.” *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Following 2009 amendments to RCW 9.94A.701, and elimination of former RCW 9.94A.715, a trial court no longer has the authority to impose a variable term of community custody. *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). Instead, *Franklin* recognized,

[u]nder the amended statute, a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing. RCW 9.94A.701(1)- (3); *cf.* former RCW 9.94A.715(1).

Franklin, 172 Wn.2d at 836.

The Court more recently clarified that for persons sentenced after August 2009, the trial court and not the Department of Corrections is responsible for fixing the appropriate term of community custody.

State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

Violation of a court order is a Class C Felony if the person has two prior convictions for violating a court reoder. RCW 26.50.110(5). The jury found Mr. Filitaula had two prior convictions. CP 20. The statutory maximum for Mr. Filitaula's offense is 60 months confinement. RCW 9A.20.021(1)(c).

Based upon an offender score of 9, Mr. Filitaula's standard range was 60 months. CP 31. Pursuant to RCW 9.94A.701(9) the court could not impose any term of community custody. The statute's plain language says the court must reduce term of community custody "whenever [the] **standard range term** of confinement in combination with the term of community custody exceeds the statutory maximum." Here, there is no question that Mr. Filitaula's standard range, 60 months, combined with his term of community custody, 12 months, exceeded the statutory maximum for the offense, 60 months. Therefore, the plain terms of RCW 9.94A.701(9) precluded the imposition of any community custody.

Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language.

State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196, 199 (2005). If the language is unambiguous, the inquiry ends with the plain language

and the court must assume the statute means exactly what it says. *State v. Salavea*, 151 Wn.2d 133, 142, 86 P.3d 125 (2004). A court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003). Instead, a court must assume the “the legislature ‘means exactly what it says.’” *Id.* (citing *Davis v. Dep’t of Licensing*, 137 Wash.2d 957, 964, 977 P.2d 554 (1999)).

The prosecutor persuaded the trial court that because the court imposed an mitigated exceptional sentence of 48 months, the court could impose a 12-month term of community custody. The statute does not focus on the term of confinement actually imposed. The statute does not say the term of community custody must be reduced “whenever [the] term of confinement [**imposed**] in combination with the term of community custody exceeds the statutory maximum.” Instead its plain terms require a reduction in the community custody when the “standard range term of confinement in combination with the term of community custody exceeds the statutory maximum.” Thus, it does not matter for purposes of the statute that the court imposed a lesser term of confinement, the court could not impose a term of community custody.

RCW 9.94A.701(1)(a) authorizes a one-year term of community custody for Mr. Filitaula's offense. The trial court imposed that term.

CP 34. However, the Judgment and Sentence adds:

Or for the period of earned early release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer See RCW 9.94A.715 for community custody range offenses **STATUTORY LIMIT ON SENTENCE.** Notwithstanding the length of confinement plus an community custody imposed on any individual charge, in no event will the combined confinement and community custody exceed the statutory maximum for the that charge

Boyd specifically rejected the use of similar language, recognizing that RCW 9.94A.701(9) requires the trial court set a specific term of community custody and that that term when combined with the standard range term of confinement not exceed the statutory maximum. 174 Wn.2d at 471-72. Here, because Mr. Filitaula's standard range sentence was 60 months, RCW 9.94A.701(9) does not permit the imposition of a term of community custody, nor does it permit the trial court to delegate to DOC the responsibility of setting the term of community custody. Importantly "RCW 9.94A.715" cited in the judgment was repealed in 2009. Laws 2009 ch. 28 § 42. That same year, what is now RCW 9.94A.701(9) was enacted. Laws 2009, ch. 375, § 5. The court no longer has the authority to impose a set term

of community custody, and then only so long as that term together with the stand range does not exceed the statutory maximum.

The Court must strike both the term of community custody as well as the additional language permitting DOC to set a term at a later date.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Filitaula's sentence.

Respectfully submitted this 23rd day of December, 2013.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	NO. 44963-3-II
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FAGALULU FILITAUOLA,)	
)	
Appellant.)	

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