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NO. 59322-6-I

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

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STATE OF WASHINGTON
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King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

LEO BUNKER,

Appellant.

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

The Honorable Andrea Darvas, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information failed to include an essential element of the crime charged. CP 23-24.

2. The "to convict" instruction failed to instruct the jury of an essential element of the crime charged. CP 37 (Instruction 7).[1]

3. The instruction defining the crime of "Violation of a Court Order" failed to inform the jury of an essential element of the crime. CP 35 (Instruction 5).

4. The evidence was insufficient to convict appellant of the charged crime.

5. The trial court abused its discretion as a matter of law and violated appellant's right to equal protection by failing to recognize there was a legal basis to impose a mitigated exceptional sentence.

Issues Pertaining to Assignments of Error

1. Violation of a no-contact order is a crime only if the alleged violation requires arrest under RCW 10.31.100(2)(a) or (b). Arrest is required only for acts or threats of violence or entering or remaining within a prohibited area. The amended information does not mention this element.

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[1] Copies of Instructions 5 & 7 are attached as Appendix A.

Was the amended information defective in violation of appellant's right to due process?

2. The "to convict" instruction instructed the jury it could convict if it found appellant had contact with the protected person. There is no instruction that the contact must either be threatening or must involve entering or remaining in a prohibited area.

(a) Did the "to convict" instruction misstate the law by omitting an essential element, thus depriving appellant of a fair trial?

(b) Did the instruction defining the crime of "Violation of a Court Order" misstate the law by omitting the same essential element omitted in the "to convict" instruction?

3. Where the State failed to present any evidence appellant violated court orders by acts or threats of violence or entering or remaining within a prohibited area, was the evidence insufficient to convict?

4. Did the trial court abuse its discretion as a matter of law and violate appellant's right to equal protection when it failed to recognize it had legal authority and a factual basis to impose a mitigated exceptional sentence, and is remand for resentencing appropriate when it is apparent the court would have imposed a mitigated exceptional sentence if it knew it could?

B. STATEMENT OF THE CASE

1. Procedural History

By amended information, the King County prosecutor charged appellant Leo Bunker with one count of felony violation of a court order under RCW 26.50.110. CP 23. Bunker was convicted as charged following a jury trial held November 2-7, 2006, before the Honorable Andrea Darvas. CP 25-26. He received a low-end standard range sentence of 33 months. CP 60-68.

2. Substantive Facts

On August 18, 2005, Bunker was pulled over by Washington State Patrol Trooper Melvin Hurd for driving his semi tractor trailer over the speed limit. 2RP[2] 49. Bunker provided Hurd with his license, registration, hours of service log book and medical certificate. 2RP 50. The subsequent records check revealed two court orders prohibiting Bunker from having contact with Lillian Hiatt. 2RP 50-53; Exs. 1 & 2. One of the orders was issued July 1, 2003, and expires July 1, 2013. 2RP 53-54; Ex. 1. The other was issued December 16, 2002, and expires December 16, 2007. 2RP 56: Ex. 2.

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[2] There are four volumes of verbatim report of proceedings referenced as follows: 1RP - 11/2/06; 2RP - 11/6/06; 3RP - 11/7/06; and 4RP - 12/22/06 (sentencing).

Aware there was a female passenger riding with Bunker, Hurd requested assistance to help determine whether the passenger was Lillian Hiatt. 2RP 57. Troopers James MacGregor and Michael Faulk responded. 2RP 67, 78.

MacGregor contacted Bunker's passenger, who provided a name and date of birth. MacGregor "ran" that information through the State Patrol's communications office. 2RP 68-69. There was no information available, so MacGregor asked the passenger for additional information. 2RP 69-70. The passenger provided two other names, neither of which registered on any of the databases the troopers were accessing. 2RP 70.

Faulk next contacted the passenger, calling her by the name "Lillian." The passenger denied she was "Lillian." 2RP 81. When he asked her who she was, she said she was Bunker's wife. 2RP 82. Suspecting she was lying, Faulk took the passenger into custody, transported her to the Auburn Police Department. Fingerprint analysis showed she was Lillian Hiatt. 2RP 82-84. Bunker was subsequently arrested for violating the court orders. 2RP 58.

Following trial, but before sentencing, Lillian Hiatt submitted a letter to the court. CP 53-54. In that letter, Hiatt stated the violation was her fault, not Bunker's. CP 54. Defense counsel attached a copy of Hiatt's

letter to a sentencing memorandum and requested a mitigated exceptional sentence on the basis that Hiatt was "[t]o a significant degree, . . . an initiator, willing participant, aggressor, or provoker of the incident." CP 48-49 (quoting RCW 9.94A.535(1)(a)).

At sentencing, the State requested a high-end standard range sentence of 43 months. 4RP 3. Defense counsel requested a mitigated exceptional sentence. 4RP 5. After hearing from Bunker, the court ruled:

> There are a number of things about this case that troubled me, probably doesn't come as a surprise to counsel, one of the things that troubled me a great deal but I felt constrained by the law as articulated in the various decisions from the US [sic] Supreme Court and of our own higher courts here in Washington that actions of the state or the police towards a third person are not something that an accused has standing to raise as a defense.
>
> Nevertheless, quite frankly, I was really troubled with the police not only detaining for a significant period of time a person that they did not suspect of a crime but of actually transporting her to the police station and indicating that they were going to take fingerprints from her against her will just struck me as really beyond the pale.
>
> We were in a somewhat unique situation, I think I recall [the prosecutor] saying something about this being a very unusual situation where the person is actually the corpus of a crime, nevertheless, have something distasteful about the police detaining someone that they admittedly didn't have probable cause to believe is guilty of a crime. So that's factor one.
>
> Factor number two, there is no indication here that there was any type of violence or coercion by Mr. Bunker against Miss Hite [sic].
>
> It seems to me there is no real evidence before me as to who was the, quote, unquote, instigator but what does

seem clear is she wasn't interested in cooperating with the police and that creates the inference that she was willingly with Mr. Bunker.

And her letter indicates she doesn't have any fear of Mr. Bunker and given the domestic violence batterer's treatment that he has gone through and his counseling with anger management, he has done the things the court asked him to do and this is the reason we have people do this kind of thing so they can resume the relationships in a healthy way without violence.

The problem with this case was that Mr. Bunker was under court order not to have any contact with Miss Hite [sic] and rather than get the order lifted, which really was attempted, I don't know, but disregarded the court order and since it was a third violation, it's a felony violation.

Unfortunately, under the statute and the case law I don't think I have the discretion to impose an exceptional sentence downward.

If I did have that discretion, I probably would do it because as far as felony violations of a no-contact order go, most of the ones I see involve some level of coercion, if only psychological coercion by the defendant, and there just isn't the evidence for that here.

What I will do, and I know this is going to go up on appeal in any event, Mr. Bunker made that clear, I'll impose a sentence at the bottom of the standard range of 33 months and if Mr. Bunker can extend his bond, I will allow bond on appeal.

4RP 16-18.

Bunker appealed and is currently out of custody on bond. CP 69-70.

C. ARGUMENT

1. THE AMENDED INFORMATION IS DEFECTIVE BECAUSE IT OMITS THE ESSENTIAL ELEMENT OF CONDUCT REQUIRING ARREST UNDER RCW 10.31.100.

a. Conduct Requiring Arrest Under RCW 10.31.100(2)-(a) or (b) Is an Essential Element of the Crime of Felony Violation of a No-Contact Order.

The amended information charges Bunker with violation of a court order in violation of RCW 26.50.110 as follows:

> That the defendant LEO B. BUNKER in King County, Washington on or about August 18, 2005, did know of and willfully violate the terms of a court order issued on December 16, 2002 by the Clark County Superior Court pursuant to RCW chapter 26.50 for the protection of Lillian G. Hiatt, or did know of and willfully violate the terms of a court order issued on July 1, 2003 by the Clark County Superior Court pursuant to RCW chapter 10.99 for the protection of Lillian Hiatt, and at the time of the violation having at least two prior convictions for violating the provisions of any order issued under RCW chapter 26.50;
>
> Contrary to RCW 26.50.110(1), (5) and against the peace and dignity of the State of Washington.

CP 9-10.

RCW 26.50.110 provides:

> Whenever an order is granted under . . . chapter 10.99 . . . and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, work place, school, or day care, or of a provision prohibiting a person from knowingly coming within or knowingly remaining

> within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

(Emphasis added).

The statute defining the crime of violation of a no-contact order incorporates RCW 10.31.100 to define the types of violations that are criminally punishable.[3] A violation is a gross misdemeanor that may only be elevated to a felony if it is "of the kind for which an arrest is required under RCW 10.31.100(2)(a) or (b)." RCW 26.50.110. Other conduct in violation of the order, for which arrest is not required, may be contempt of court but is not a crime. RCW 26.50.110.

It is, therefore, necessary to examine RCW 10.31.100 to determine whether a crime has been committed. Subsection (2)(b) of that statute applies only to foreign protection orders and does not apply here. RCW 10.31.100(2)(b). Subsection (2)(a) requires arrest only if a person

> has violated the terms of the order restraining the person from acts or threats of violence, 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 or, in the case of

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[3] The full texts of RCW 26.50.110 and RCW 10.31.100 are attached as appendices B and C, respectively.

> an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person. . . .

RCW 10.31.100(2)(a). The last part of subsection (2)(a), referring only to orders issued under RCW 26.44.063, does not apply here. Therefore, arrest is not required, and violation of the order is not a crime, unless the violation involves (1) acts or threats of violence or (2) entering or remaining in a prohibited location. Id. Other conduct such as consensual contact, though it may violate the order and subject the actor to sanctions for contempt, is not a crime under RCW 26.50.110.

This conclusion is clear from the plain language of the statute, and no statutory construction or legislative intent analysis is necessary. See, e.g., State v. Chapman, 140 Wn.2d 436, 451, 998 P.2d 282 (2000); State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000); Duke v. Boyd, 133 Wn.2d 80, 87-88, 942 P.2d 351 (1997); In re Welfare of A.T., 109 Wn. App. 709, 714, 34 P.3d 1246 (2001). The purpose of statutory construction is to give effect to the intent of the Legislature, but when the plain language of a statute is clear, the court assumes the Legislature meant exactly what it said. Azpitarte, 140 Wn.2d at 141. However, even if further analysis is necessary, the above interpretation comports with the last antecedent rule, the rule of lenity, and the Legislature's clear intent.

Under the last antecedent rule, the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" in RCW 26.50.110 modifies the entire sentence, not merely the last phrase, because the qualifying phrase is preceded by a comma. The presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); All Seasons Living Ctrs v. State (In re Seahome Park Care Ctr), 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995).

Moreover, if the court finds the statute ambiguous, it must be construed in favor of criminal defendants under the rule of lenity. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). "A penal statute which may be construed to render an act either criminal or innocent will be strictly construed against the state in favor of innocence." State v. Anderson, 61 Wash. 674, 112 P. 931 (1911) (invoking the last antecedent rule and the rule of lenity to reverse the defendant's conviction); State v. Hertz Driv-Ur-Self Stations, Inc., 149 Wash. 479, 271 P. 331 (1928).

The history of the 2000 amendments to RCW 26.50.110 also shows the Legislature intended this interpretation. The original Senate bill did not include the "for which arrest is required" language. SB 6400, 56th

Leg., Reg. Sess. (Wash. 2000). That language was added by the House of Representatives. E2SSB 6400, 56th Leg., Reg. Sess. (Wash. 2000). The House Bill Report explains, "[L]anguage was added to protect people accused of violating court orders by defining that a violation is a violation if and only if someone knowingly comes within or knowingly remains a specified distance from a prohibited place or person." H.B. Rep. on E2SSB 6400, 56th Leg., Reg. Sess. (Wash. 2000). Moreover, the testimony against the bill states the concern that this bill would criminalize every violation, but then notes that that concern was addressed by the House striker to the Senate bill. Id. This history demonstrates the Legislature's intent that not all violations of a no-contact order would be criminal.

Because not all violations are criminal, the definition of which violations are crimes is an essential element of the charge. An "essential element is one whose specification is necessary to establish the very illegality of the behavior" charged. State v. Tinker, 155 Wn.2d 219, 118 P.3d 885 (2005); State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983)).

Violations of a no-contact order are not criminal unless the violation involves acts or threats of violence or entering or remaining in a prohibited area. See RCW 26.50.110; RCW 10.31.200(a). Contact such as a mere

phone call, without more, may violate the terms of the order, but does not constitute a crime. See RCW 26.50.110; RCW 10.31.200(a). The definition of conduct requiring arrest under RCW 10.31.200(a) is, therefore, an essential element of the crime of felony violation of a no-contact order. See Johnson, 119 Wn.2d at 147.

b. The Amended Information Fails to Allege an Essential Element of the Crime.

An accused person has a protected right under the state and federal constitutions to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial. U.S. Const. amend. VI; Const. art. I, § 22; State v. Bergeron, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). Omission of any statutory element in the information is a defect requiring dismissal. State v. McCarty, 140 Wn.2d 420, 428, 998 P.3d 296 (2000); State v. Holt, 104 Wn.2d 315, 704 P.2d 1189 (1985).

The sufficiency of a charging document may be challenged for the first time on appeal because it involves a question of constitutional due process. State v. Ward, 148 Wn.2d 803, 813, 64 P.3d 640 (2003) (citing State v. Kjorsvik, 117 Wn.2d 93, 107-08, 812 P.2d 86 (1991)). When the issue is raised for the first time after the verdict, the language is construed liberally in favor of validity. McCarty, 140 Wn.2d at 425.

Under the liberal standard, the courts undertake a two-part inquiry. Id. at 425-26. The first prong requires at least some language on the face of the charging document that by any fair implication gives notice of the missing element. Id. If the document "'cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.'" State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)). If the necessary element is not found or fairly implied, prejudice is presumed and the conviction must be reversed. McCarty, 140 Wn.2d at 428.

Here, the amended information entirely fails to mention the element that a violation must be one requiring arrest under RCW 10.31.100(2) or that the violation must involve an act or threat of violence or entering or remaining in a prohibited area. CP 23-24. The entire description of the conduct alleged is that on the date in question Bunker Williams "did know of and willfully violate the terms of a court order...." CP 123. This language does not state or in any way imply that only those violations for which arrest is required (acts or threats of violence or entering or remaining in a prohibited area) are criminal. Therefore, Bunker was not reasonably or fairly apprised of this element. See, e.g., Ward, 148 Wn.2d at 813;

McCarty, 140 Wn.2d at 428. The information is defective and reversal is required; of the charge and no inquiry into prejudice is required; no inquiry into prejudice is required. Id.

2. THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE ALL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

In all criminal convictions, the due process clause of the United States Constitution requires the State to prove every fact necessary to constitute a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). An instructional error that relieves the State of its burden to prove every element of criminal liability presents an issue of manifest constitutional error under RAP 2.5(a) and is properly challenged for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Errors of law in a jury instruction are reviewed de novo. State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002).

"To convict" instructions carry special weight because they act as the yardstick by which to measure a defendant's guilt or innocence. Mills, 154 Wn.2d at 6. It is error to omit an element from an instruction that otherwise purports to give a complete statement of the elements of the charged crime. Id. at 7-8. The "to convict" (Instruction 7) and definitional

(Instruction 5) jury instructions here were defective because they misstated the law and relieved the State of its burden to prove beyond a reasonable doubt an essential element of the crime. See CP 35, 37; Mills, 154 Wn.2d at 7-8.

Under the law, violation of a no-contact order is criminal only if the conduct includes (1) acts or threats of violence or (2) entering or remaining within a prohibited area. See RCW 26.50.110; RCW 10.31.100(2)(a) (as discussed in argument 1). The "to convict" and definitional jury instructions omitted this element. CP 9-10. They misstated the law and improperly lessened the State's burden of proof because they allowed the jury to find criminal liability for any contact including non-threatening consensual contact. Id.

Automatic reversal is required when the jury instructions relieve the State of its burden to prove every element of criminal liability. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002); State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (Brown requires reversal when an omission or misstatement in a jury instruction relieves the State of its burden of proving every essential element of the crime). Such errors are presumed prejudicial unless affirmatively shown to be harmless. Clausing, 147 Wn.2d at 628; Brown, 147 Wn.2d at 332.

When the "to-convict" instruction omits an element of the crime charged, the error is harmless only if it appears beyond a reasonable doubt the error did not contribute to the verdict. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The missing element must be supported by "uncontroverted evidence." State v. Thomas, 150 Wn.2d 821, 845, 83 P.3d 970 (2004). Here, the error was not harmless because there was no "uncontroverted" evidence Bunker violated the orders by acts or threats of violence or by entering or remaining within a prohibited area, in fact there is no evidence to support such conduct at all. Thomas, 150 Wn.2d at 845.

The jury was instructed to find Bunker guilty if he had willfully violated the terms of the court orders and had previously been convicted of two violations of no-contact orders. CP 37. This gave the jury permission to find Bunker guilty based on any contact whatsoever, regardless of whether there were acts or threats of violence or evidence he had entered or remained within a prohibited area. Therefore, it cannot be shown that the erroneous instructions did not contribute to the verdict. See Neder, 527 U.S. at 15.

A missing instruction is not harmless when the jury could have found the defendant guilty on the basis of conduct that is not a crime. See

State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). The State charged Johnston with making a bomb threat. Id. at 364-66. The statute was construed to only apply to "true threats," but the jury was not instructed on the definition of a true threat. Id. The jury made a written inquiry during deliberations asking whether it could convict based on the words alone, or whether it had to find intent to carry out the crime. Id. The court responded that intent was not an element of the crime. Id. The evidence was close on the true threat question. Id. at 364. The instructional error was held not to be harmless because the jury could have convicted Johnston on the basis of his words alone. Id. at 364-65. Similarly, here, under the instructions given, the jury could have convicted Bunker on the basis of conduct that was not a crime. His convictions should similarly be reversed.

In State v. Borrero, a missing instruction was deemed harmless in part because the jury's inquiry during deliberation demonstrated that the jury "proceeded as though the proper instruction had been given." State v. Borrero, 147 Wn.2d 353, 365, 58 P.3d 245 (2002). Here, there is no such indication of the jury's thought process. There is no such proof beyond a reasonable doubt that the outcome would have been the same absent the error in the instructions. Id. at 370-71 (Chambers, J.,

concurring in part and dissenting in part). The error is not harmless. See id. at 365.

The "to-convict" and definitional instructions misstated the law and relieved the State of the burden of proving that Bunker's conduct was of the kind made criminal by RCW 26.50.110. The jury could have found Bunker guilty without finding any facts establishing this element. The State cannot show that this omission did not contribute to the jury's verdict. See Johnston, 156 Wn.2d at 364-66; Borrero, 147 Wn.2d at 365. Even under a harmless error analysis, the absence of instruction on an essential element of the crime was not harmless and requires reversal of these convictions. See Johnston, 156 Wn.2d at 364-66.

3. THE EVIDENCE WAS INSUFFICIENT TO CONVICT BUNKER OF THE CHARGED OFFENSE.

because there was no evidence that Bunker violated the court orders by acts or threats of violence or by entering or remaining within a prohibited area, the evidence was insufficient to convict. Therefore, this Court should reverse Bunker's conviction and dismiss the charge with prejudice.

In every criminal prosecution, constitutional due process requires the state to prove all elements of the charged crime beyond a reasonable doubt. State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the state, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

As discussed in argument section 1, violation of a court order is not criminal under RCW 26.50.110 unless the violation requires an arrest as set forth under RCW 10.31.110(2)(a). As discussed in argument sections 1 and 2, there was no evidence Bunker's violation required arrest under RCW 10.31.110(2)(a). Therefore, the State failed to meet its burden to prove every element of the charged offense. Under such circumstances, reversal of the conviction and dismissal of the charge with prejudice is required. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (retrial barred by double jeopardy).

4. THE SENTENCING COURT FAILED TO RECOGNIZE IT HAD DISCRETION TO IMPOSE A MITIGATED EXCEPTIONAL SENTENCE.

The sentencing court incorrectly believed its only choice was to impose a standard range sentence. The court's oral ruling, however, shows it would have imposed a lesser sentence if it realized it could. 4RP 18.

In fact, the trial court could have imposed a mitigated exceptional sentence based on its finding that Hiatt "was willingly with Mr. Bunker."

4RP 17. The court's failure to recognize its authority in this regard constitutes an abuse of discretion requiring remand for resentencing.

Where mitigating circumstances exist, a court has discretion to depart from the presumptive standard range sentence. RCW 9.94A.535(1) ("The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence."). One statutorily enumerated mitigating circumstance is when, "To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)-(a).

Here, the sentencing court failed to recognize its authority under RCW 9.94A.535(1)(a) to impose a mitigated exceptional sentence based on its finding Hiatt was a "willing participant." RCW 9.94A.535(1)(a). It erroneously concluded it had no authority to impose anything less than 33 months. 4RP 18. This was an abuse of discretion.

Every defendant has the right to have the trial court exercise its discretion to actually consider available sentence alternatives. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). In failing to recognize its discretion, and in failing to exercise its discretion, the trial

court abused its discretion.[4] It also violated Bunker's right to equal protection at sentencing because his sentencing court failed to give consideration to all of the sentencing options available. See State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (equal protection is not violated when court considers all sentencing options), review denied, 136 Wash.2d 1002, 966 P.2d 902 (1998).

The appropriate remedy is to remand for resentencing because it is apparent the trial court would have imposed a lesser sentence had it recognized it could. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (court's failure to exercise discretion out of belief that it lacked authority to do so requires remand if reviewing court cannot say same sentence would have been imposed even if sentencing court were aware of its options). Therefore, this Court should reverse and remand for resentencing.

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[4] The failure to exercise discretion is itself an abuse of discretion. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error), rev. denied, 136 Wn.2d 1002 (1998); State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995) (failure to exercise discretion in determining whether offenses constitute the same criminal conduct).

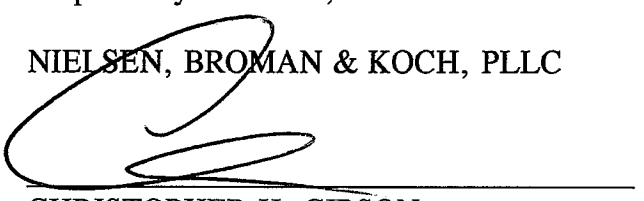
D. CONCLUSION

Bunker's conviction should be reversed because he was denied his right to notice of the charge and his right to a fair trial when the information and the jury instructions omitted an essential element of the crime charged. Moreover, because the State failed to present any evidence that Bunker violated the court orders by acts or threats of violence or by entering or remaining within a prohibited area, the evidence was insufficient to convict. Therefore, reversal of the conviction and dismissal of the charge with prejudice is required. In the alternative, this Court should remand for resentencing because the trial court failed to recognize it had a basis to impose a mitigated exceptional sentence and the record shows it would have done so if it knew it had the authority.

DATED this 27th day of August, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

No. 5

A person commits the crime of Violation of a Court Order when he or she willfully has contact with another when such contact was prohibited by a court order and the person knew of the existence of the court order.

No. 7

To convict the defendant of the crime of Violation of a Court Order, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 18, 2005, the defendant willfully had contact with Lillian Hiatt;

(2) That such contact was prohibited by a court order;

(3) That the defendant knew of the existence of the order; and

(4) That the acts occurred in the State of Washington County of King;

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Appendix B

West's RCWA 26.50.110

West's Revised Code of Washington Annotated Currentness
Title 26. Domestic Relations (Refs & Annos)
Chapter 26.50. Domestic Violence Prevention (Refs & Annos)

26.50.110. Violation of order--Penalties

(1) Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.90, 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, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.90, 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, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.90, 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, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.90, 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, 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

committing a violation of RCW 79A.60.040 shall have the authority to arrest the person.

(6) An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest, or issue a notice of traffic infraction to the driver who is believed to have committed the infraction. The request by the witnessing officer shall give an officer the authority to take appropriate action under the laws of the state of Washington.

(7) Any police officer having probable cause to believe that a person has committed or is committing any act of indecent exposure, as defined in RCW 9A.88.010, may arrest the person.

(8) A police officer may arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that an order has been issued of which the person has knowledge under chapter 10.14 RCW and the person has violated the terms of that order.

(9) Any police officer having probable cause to believe that a person has, within twenty-four hours of the alleged violation, committed a violation of RCW 9A.50.020 may arrest such person.

(10) A police officer having probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon on private or public elementary or secondary school premises shall have the authority to arrest the person.

For purposes of this subsection, the term "firearm" has the meaning defined in RCW 9.41.010 and the term "dangerous weapon" has the meaning defined in RCW 9.41.250 and 9.41.280(1) (c) through (e).

(11) Except as specifically provided in subsections (2), (3), (4), and (6) of this section, nothing in this section extends or otherwise affects the powers of arrest prescribed in Title 46 RCW.

(12) No police officer may be held criminally or civilly liable for making an arrest pursuant to RCW 10.31.100 (2) or (8) if the police officer acts in good faith and without malice.

Appendix C

West's RCWA 10.31.100

West's Revised Code of Washington Annotated Currentness
Title 10. Criminal Procedure (Refs & Annos)
Chapter 10.31. Warrants and Arrests (Refs & Annos)
10.31.100. Arrest without warrant

A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, 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 or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

(b) A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from 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, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or

(c) The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved.

(3) Any police officer having probable cause to believe that a person has committed or is committing a violation of any of the following traffic laws shall have the authority to arrest the person:

(a) RCW 46.52.010, relating to duty on striking an unattended car or other property;

(b) RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(c) RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles;

(d) RCW 46.61.502 or 46.61.504, relating to persons under the influence of intoxicating liquor or drugs;

(e) RCW 46.20.342, relating to driving a motor vehicle while operator's license is suspended or revoked;

(f) RCW 46.61.5249, relating to operating a motor vehicle in a negligent manner.

(4) A law enforcement officer investigating at the scene of a motor vehicle accident may arrest the driver of a motor vehicle involved in the accident if the officer has probable cause to believe that the driver has committed in connection with the accident a violation of any traffic law or regulation.

(5) Any police officer having probable cause to believe that a person has committed or is

specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.90, 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 court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.