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NO. 59538-9-1

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

REC'D

JUN 22 2007

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DONALD WILLIAMS,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information failed to mention an essential element of the crimes charged. CP 9-10, 36-38.

2. The "to convict" instructions failed to instruct the jury of an essential element of the crimes charged.¹ CP 27-30.

Issues Pertaining to Assignments of Error

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

2. The "to convict" instructions on all three counts instructed the jury that 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. Did the "to convict" instructions misstate the law by omitting an essential element, depriving appellant of a fair trial?

¹ The "to convict" jury instructions are attached as Appendix C.

B. STATEMENT OF THE CASE

1. Procedural History

By amended information, the King County Prosecutor charged appellant Donald Williams with three counts of domestic violence felony violation of a no-contact order under RCW 26.50.110. CP 9-10. Williams was convicted as charged following a jury trial held January 8-11, 2007, before the Honorable Jeffrey Ramsdell. CP 43. He received concurrent standard range sentences. CP 44-46.

2. Substantive Facts

A no-contact order was in effect from August 17, 2005 until June 4, 2006. 4RP² 26; 5RP 29-31. It required Williams to stay at least 500 feet away from Linda Poole's home and work and prohibited all contact except phone calls to arrange visits with their five-year-old daughter. Ex. 1; 5RP 29. The three alleged incidents occurred on March 13, 2006. 4RP 47. The parties and the court agreed to identify the individual counts by the time frame during which they were alleged committed. 4RP 80. Poole and her daycare provider Cathy Ramisch testified as follows.

² There are six volumes of Verbatim Report of Proceedings referenced as follows: 1RP - 12/12/06, 2RP - 1/8/07, 3RP - 1/9/07, 4RP - 1/10/07, 5RP - 1/11/07, 6RP - 2/2/07.

Count I: 4-5 p.m.

Poole was at the grocery store when Williams called her cell phone and asked where she was. 4RP 47. He accused her of being unfaithful and called her several offensive names. 4RP 47. When she returned home, the name-calling and accusations continued. 4RP 50. At one point, Williams tried to take her keys to prevent her leaving again to pick up their daughter. 4RP 51. He grabbed her wrist and put one hand, palm open, on her chest and pushed her. 4RP 51. She was uninjured, but frightened. 4RP 78.

Count II: 5-6 p.m.

During Poole's six or seven minute drive to the day care to pick up her daughter, Williams called three times. 4RP 52-54. He called again as she was in the driveway. 4RP 53. He told her he would tear up some things in the house and that if she did not return right away, she would have to deal with a mess. 4RP 54-55. He also told her if she did not return immediately, he would "take off." 4RP 55.

Ramisich saw Poole in her driveway and came out. 5RP 10-11. Ramisich testified that from four or five feet away she could hear the screaming coming from Poole's cell phone. 5RP 11. She came closer, maybe a foot away, recognized Williams's voice and heard the language

he was using. 4RP 53; 5RP 13. She also could see the face of the cell phone showing that the call was coming from "home." 5RP 13. Williams hung up and called back moments later; this time Ramisch could see it was from his cell, labeled "Don" on Poole's phone. 5RP 15. Ramisch heard Williams threaten to tear the phone and the computer out of the wall, trash the house, and take the truck, the tools, and the dog. 5RP 14-15. Finally, when Poole refused to call 911, Ramisch did so herself. 5RP 18. Officer Wright arrived and accompanied Poole home. 4RP 63. Williams was not there when they arrived, and the Officer left. 4RP 63.

Count III: 7:30-8:30 p.m.

While Poole was eating dinner with her daughter that night, she went downstairs to get something and saw Williams standing at her window rattling the front door trying to get in. 4RP 63-64. He told her this was ridiculous and asked her to let him in so they could talk. 4RP 64. She refused. 4RP 65. After he left, she called 911 again. 4RP 67.

Williams denied contacting Poole in any way on the day in question. 5RP 30. He acknowledged knowing about the order and stipulated to two prior violations of no-contact orders. 5RP 30; CP 33. He testified that it had been a while, and he had no specific memory of contacting Poole

on any particular day, but that he certainly would have remembered the type of conduct he was accused of. 5RP 32.

C. ARGUMENT

1. THE AMENDED INFORMATION IS DEFECTIVE BECAUSE IT OMITTS 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 Williams with three violations of a no-contact order in violation of RCW 26.50.110. CP 9-10. That statute 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.

RCW 26.50.110 (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 only a gross misdemeanor that may 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 turn to 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 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 a phone call, though

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

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. 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. Id. However, assuming, arguendo, that 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 that 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 9-10. The first count alleges an assault, but does not allege violence or presence in a prohibited area. CP 9. In the second and third counts, the entire description of the conduct alleged is that on the date in question Williams "did know of and willfully violate the terms of a court order...." CP 10. 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. CP 10. Therefore, Williams was not reasonably or fairly apprised of this element of the charge and no inquiry into prejudice is required. See, e.g., Ward, 148 Wn.2d at 813; McCarty, 140 Wn.2d at 428. The information is defective and reversal is required. Id.

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

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). 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).

"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" 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 27-30; 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 supra). The "to convict" 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 at all including non-threatening phone calls. Id.

Automatic reversal is required when the jury instructions relieved 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 automatic 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 only harmless if it appears beyond a reasonable doubt that 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 the quantity and the character of the contact in each count were not "uncontroverted," and the jury was wrongly instructed that any contact at all was sufficient to convict. CP 27-30; Thomas, 150 Wn.2d at 845.

In count one, the jury was instructed to find Williams guilty if he had willfully violated the terms of the no contact order and had either assaulted Poole or, in the alternative, had previously been convicted of two violations of no-contact orders. CP 27. Given Williams's stipulation to the two prior convictions, this gave the jury permission to find Williams guilty on this charge based on any contact whatsoever, whether in person or by phone. CP 33. During the time period alleged in count one, Poole claimed Williams called her on the phone while she was at the grocery store and then later pushed her at her home. 4RP 47-51. She also testified that the calls were made from her home. 4RP 47. As instructed, the jury may have found Williams guilty merely on the basis of the phone calls, even if those calls were not threats of violence and even if Williams was not in a prohibited area at the time. Therefore, it cannot be shown beyond a

reasonable doubt that the erroneous instruction did not contribute to the verdict in count one.

On count two, the jury was instructed to convict if Williams "willfully had contact with Linda Poole" during that time frame. CP 29. Again, the type of contact necessary to constitute a crime was not mentioned. CP 29. The jury was not instructed that the calls were only criminal if they proved entry into a prohibited area or constituted a "threat of violence." CP 29. Poole and Ramisch claim Williams repeatedly called Poole during this time, made offensive accusations, and threatened to destroy property. 4RP 53-55; 5RP 13-15. The instructions permitted the jury to convict Williams merely on the basis of phone calls without a finding of threatened violence or entry into a prohibited area. CP 29. Therefore, it cannot be shown that the erroneous instructions did not contribute to the verdict. See Neder, 527 U.S. at 15.

On count three, the jury was again instructed it could find Williams guilty if there was any contact at all. CP 30. The evidence was not "uncontroverted," since Williams denied the entire incident. 5RP 30; Thomas, 150 Wn.2d at 845. The only evidence of contact was Poole's statement that Williams was outside the house trying to get in and asking to talk to her. 4RP 64-65. The jury was also not instructed as to the

continuing nature of a no-contact order violation. See State v. Spencer, 128 Wn. App. 132, 114 P.3d 1222 (2005). Therefore, we cannot know if the jury believed Williams had left the prohibited area and returned, which would be a separate offense, or whether he merely remained out of sight until the police had left, continuing an earlier violation.

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). In Johnston, the defendant was charged 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 issue of whether there was a true threat. Id. at 364. The instructional error was held not to be harmless because the jury could have convicted the defendant on the basis of his words alone. Id. at 364-65. Similarly, here, under the instructions given, the jury could have convicted Williams 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 "to-convict" 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" instructions misstated the law and relieved the State of the burden of proving that Williams's conduct was of the kind that is made criminal by RCW 26.50.110. CP 27-30. The jury could have found Williams 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.

D. CONCLUSION

Williams's convictions on all three counts should be reversed because he was denied due process and a fair trial when the information and the jury instructions omitted an essential element of the crimes charged.

DATED this 22nd day of June, 2007.

Respectfully submitted,

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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

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.

CREDIT(S)

[2006 c 138 § 25, eff. June 7, 2006; 2000 c 119 § 24; 1996 c 248 § 16; 1995 c 246 § 14; 1992 c 86 § 5; 1991 c 301 § 6; 1984 c 263 § 12.]

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

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.

CREDIT(S)

[2006 c 138 § 23, eff. June 7, 2006; 2000 c 119 § 4; 1999 c 184 § 14; 1997 c 66 § 10; 1996 c 248 § 4. Prior: 1995 c 246 § 20; 1995 c 184 § 1; 1995 c 93 § 1; prior: 1993 c 209

§ 1; 1993 c 128 § 5; 1988 c 190 § 1; prior: 1987 c 280 § 20; 1987 c 277 § 2; 1987 c 154 § 1; 1987 c 66 § 1; prior: 1985 c 303 § 9; 1985 c 267 § 3; 1984 c 263 § 19; 1981 c 106 § 1; 1980 c 148 § 8; 1979 ex.s. c 28 § 1; 1969 ex.s. c 198 § 1.]

To convict the defendant of the crime of Domestic Violence Felony Violation of a Court Order, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 13, 2006, during a time approximately between 4:00pm and 5:00pm;

(2) The defendant knew of the existence of a domestic violence no-contact order;

(3) That the defendant acted by one or more of the following means or methods when he either:

(a) willfully violated the terms of that order, and at the time of the above violation did have at least two prior convictions for violating a domestic violence no-contact order; or

(b) willfully violated the terms of that order by assaulting Linda Poole;

and

(4) That the acts occurred in the State of Washington.

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 as to Count I.

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 as to Count I.

To convict the defendant of the crime of Domestic Violence Felony Violation of a Court Order, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 13, 2006, during a time approximately between 5:00pm and 6:00pm, the defendant willfully had contact with Linda Poole;

(2) That such contact was prohibited by a domestic violence no-contact order;

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

(4) That at the time of the above violation the defendant did have at least two prior convictions for violating a domestic violence no-contact order; and

(5) That the acts occurred in the State of Washington.

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 as to Count II.

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 as to Count II.

To convict the defendant of the crime of Domestic Violence Felony Violation of a Court Order, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 13, 2006, during a time approximately between 7:30pm and 8:30pm, the defendant willfully had contact with Linda Poole;

(2) That such contact was prohibited by a domestic violence no-contact order;

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

(4) That at the time of the above violation the defendant did have at least two prior convictions for violating a domestic violence no-contact order; and

(5) That the acts occurred in the State of Washington.

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 as to Count III.

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 as to Count III.