

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

BRANDON SCOTT HEAL,
Defendant-Appellant.

Washington County Circuit Court
17CN00066; A164250

Kirsten E. Thompson, Judge.

Argued and submitted September 13, 2018.

Stacy M. Du Clos, Deputy Public Defender, argued the cause for appellant. Also on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Cecil A. Reniche-Smith, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Ortega, Presiding Judge, and Egan, Chief Judge, and Powers, Judge.*

PER CURIAM

Counts 1 and 2 reversed and remanded; otherwise affirmed.

* Egan, C. J., *vice* Garrett, J. pro tempore.

PER CURIAM

Defendant appeals from a judgment of contempt for three counts of punitive contempt for violating a restraining order his wife, E, had obtained under the Family Abuse Prevention Act (FAPA). In his first assignment of error, defendant challenges Counts 1 and 2, arguing that the trial court erred in applying an incorrect legal standard to determine that defendant had violated the restraining order as alleged in those counts. The state concedes the error, and we accept that concession. Accordingly, we reverse and remand Counts 1 and 2. We reject defendant's second assignment of error without discussion.

Counts 1 and 2 were based on allegations that defendant contacted E through electronic messages after being served with the FAPA restraining order earlier in the day. Defendant put on evidence that he had not looked at or read the paperwork, having assumed they were divorce papers, until after he had sent the messages, so he did not know that there was a restraining order at the time he sent the messages. In determining that defendant had violated the restraining order, the trial court stated that, because defendant had the restraining order in his possession for several hours, he had "adequate notice" and that "[h]is failure to read the documents or take a moment to do so before violating it does not excuse him from the violation."

On appeal, defendant argues that the trial court erred because ORS 33.015(2)(b) required the court to find that defendant had willfully disobeyed the FAPA order, which required the court to find that defendant had actual knowledge of the existence of the order. *See State v. Nicholson*, 282 Or App 51, 62, 383 P3d 977 (2016) (willfully, under ORS 33.015(2)(b), requires the person to "have acted with knowledge that it was forbidden conduct" (internal quotation marks omitted)). Because the trial court applied an incorrect legal standard, defendant asserts that we should reverse and remand for a new trial.

The state concedes that the trial court erred with respect to Counts 1 and 2. However, the state argues that the correct disposition is to affirm as to Count 3 and, because there was evidence in the record from which the court could

have found that defendant had actual knowledge of the order, “remand to the court for reconsideration of its ruling on Counts 1 and 2 under the correct legal standard.”

We agree with and accept the state’s concession that the trial court erred. We also agree with the state that there is evidence in the record from which the court could have found that defendant did have knowledge of the contents of the order, but the court did not make a finding on that issue. However, we conclude that the correct disposition is to reverse and remand for a new trial on Counts 1 and 2. *See, e.g., State v. Barboe*, 253 Or App 367, 378, 290 P3d 833 (2012), *rev den*, 353 Or 714 (2013) (“We have consistently held that *** where factual issues pertinent to a material element of the crime remain unresolved[] ‘the proper disposition is to reverse and remand for a new trial.’” (Quoting *State v. Schodrow*, 187 Or App 224, 232, 66 P3d 547 (2003))). We affirm on Count 3, because defendant has not challenged that count on appeal.

Counts 1 and 2 reversed and remanded; otherwise affirmed.