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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHAD EUGENE JOHNSON, Appellant.	No. 49468-0-II UNPUBLISHED OPINION

WORSWICK, P.J. — Chad Johnson appeals from his conviction of felony violation of a no-contact order, asserting that the trial court erred by providing jury instructions that lowered the State's burden of proof. We affirm.[1]

FACTS

Christina Upcraft is named as a protected person in a domestic violence no-contact order issued against Johnson on October 20, 2015. The no-contact order provided in relevant part that Johnson "not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means . . . ." Exhibit 3. The no-contact order further provided that a "[w]illful violation of this order is punishable under RCW 26.50.110." Exhibit 3. The no-contact order is valid until October 20, 2020.

[1] Johnson requests that we exercise our discretion to waive appellate fees in this matter. Because Johnson's current or likely future ability to pay appellate costs may be addressed by a commissioner of this court under RAP 14.2, we defer this matter to our commissioner in the event that the State files a cost bill.

On May 23, 2016, Jessica Guthrie saw Johnson and Upcraft with a group of people outside of a grocery store in Port Angeles and contacted the police. While awaiting the police, Guthrie saw Johnson and Upcraft walk "[s]ide by side" through the parking lot. 1 Report of Proceedings (RP) at 180. Guthrie later saw Johnson and Upcraft sitting "[s]ide by side" on some stairs next to a bar. RP at 180.

Port Angeles police officer Jeff Ordona arrived and saw Johnson and Upcraft standing within five feet of each other behind a bus shelter next to a gas station parking lot. Ordona then saw Johnson and Upcraft walk down the street "side by side." 1 RP at 201-202. Ordona twice called out Upcraft's name before Upcraft stopped and turned around; Johnson continued walking down the street. Ordona arrested Upcraft on an outstanding warrant.

Port Angeles police officer Trevor Dropp arrived and saw Johnson and Upcraft walking "shoulder to shoulder" near the gas station. 2 RP at 237. Dropp contacted Johnson and, after advising him of his *Miranda*[2] rights, asked why he was walking with Upcraft when there was a no-contact order issued against him. Johnson told Dropp that he did not have any contact with Upcraft and that Upcraft had been following him.

On May 26, 2016, the State charged Johnson with felony violation of a no-contact order. The State further alleged that Johnson committed the offense against a family or household member. The matter proceeded to a jury trial.

At trial, Guthrie, Ordona, and Dropp testified consistently with the facts stated above. Upcraft testified that she approached Johnson after seeing him talking with someone in front of a

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

grocery store. Upcraft further testified that Johnson turned and walked away when he noticed her approaching. Upcraft stated that she followed Johnson and tried to get his attention because she still desired a relationship with him. Upcraft said that Johnson continued to ignore her and walk away as she followed him. Upcraft stated that she got as close as an arm length behind Johnson before being arrested.

Johnson testified that upon seeing Upcraft walk toward him calling his name, he turned and started walking away. Johnson stated that he did not say anything to Upcraft and that he walked away because he feared going to jail for violating the no-contact order. Johnson further stated that he continued to ignore and walk away from Upcraft until police apprehended her.

The State proposed the following instruction defining felony violation of a no-contact order based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 36.51.01, at 672 (2016) (WPIC):

> A person commits the crime of felony violation of a court order when he knows of the existence of a no-contact order and knowingly violates a provision of the order, and the person has twice been previously convicted for violating the provisions of a court order.

Suppl. CP at 97. The State also proposed a to-convict instruction based on WPIC 36.51.02, at 674-75, which provided in relevant part:

> To convict the defendant of the crime of felony violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about May 23, 2016, there existed a no-contact order applicable to the defendant;
> (2) That the defendant knew of the existence of this order;
> (3) That on or about said date, the defendant knowingly violated a provision of this order;

> (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
> (5) That the defendant's act occurred in the State of Washington.

Suppl. CP at 98.

Johnson proposed the following definitional and to-convict instructions:

> A person commits the crime of violation of a domestic violence no-contact order when he or she willfully has contact with another when such contact was prohibited by a no-contact order and the person knew of the existence of the no-contact order.
>
> To convict the defendant of the crime of violation of a no-contact order, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about May 23, 2016 the defendant intentionally had contact with Christina Upcraft;
> (2) That such contact was prohibited by a no-contact order;
> (3) That the defendant knew of the existence of the no-contact order;
> (4) That the acts occurred in the State of Washington.

CP at 57-58.

Johnson opposed the State's proposed instructions, arguing that the instructions lowered the State's burden of proof because they allowed the jury to convict even if the jury believed that he did not intend to contact Upcraft. The trial court accepted the State's proposed definitional and to-convict instructions and instructed the jury accordingly. The trial court further instructed the jury that "[w]hen acting knowingly as to a particular fact is required to establish an element of the crime, the element was also established if a person acts intentionally as to that fact." CP at 48. Johnson objected to this instruction to the extent that it suggested the State only had to prove the mental element of knowledge to convict him of the charged crime.

The jury returned a verdict finding Johnson guilty of felony violation of a no-contact order. The jury also returned a special verdict finding that Johnson and Upcraft were members of the same family or household. Johnson appeals.

ANALYSIS

Johnson contends that the trial court erred by instructing the jury in a manner that relieved the State of its burden of proof. We disagree.

We review challenged jury instructions de novo "in the context of the instructions as a whole." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Jury instructions are sufficient if they allow the parties to argue their theories of the case, are not misleading, and properly inform the jury of the applicable law when read as a whole. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). In general, "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) (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). A trial court does not err by refusing a proponent's specific instruction if the instruction given "adequately explains the law and allows each party to argue its theory of the case." *Bennett*, 161 Wn.2d at 307. Jury instructions that relieve the State of its burden to prove each element of a crime beyond a reasonable doubt constitute reversible error. *Bennett*, 161 Wn.2d at 307.

RCW 10.99.050(2)(a) provides, "*Willful* violation of a court order issued under this section is punishable under RCW 26.50.110." (Emphasis added). Former RCW 26.50.110 (2015) provided in relevant part:

> (1)(a) Whenever an order is granted under . . . chapter . . . 10.99 . . . and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:
>
> (i) The restraint provisions prohibiting . . . contact with a protected party.
>
> . . . .
>
> (5) A violation of a court order issued under . . . chapter . . . 10.99 . . . is a class C felony if the offender has at least two previous convictions for violating the provisions of an order . . . .

Under RCW 9A.08.010(4), "A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears."

Johnson contends that RCW 10.99.050's use of the term "willful" required the trial court to instruct the jury that it had to find he intentionally contacted Upcraft to convict him of the charged crime. In support of this contention, Johnson cites to our opinions in *State v. Clowes*, 104 Wn. App. 935, 18 P.3d 596 (2001) (*disapproved of by State v. Nonog*, 169 Wn.2d 220, 237 P.3d 250 (2010)), and *State v. Sisemore*, 114 Wn. App. 75, 55 P.3d 1178 (2002). Johnson's reliance on *Clowes* and *Sisemore* is unavailing.

In *Clowes*, we held that the trial court did not err by providing a to-convict jury instruction that used the term "knowingly" as a substitute for "willfully" because "proof that a person acted 'knowingly' is proof that they acted 'willfully.'" 104 Wn. App. at 943 n. 4, 944 (quoting RCW 9A.08.010(4)). But we reversed the defendant's conviction in *Clowes* because the challenged to-convict instruction "contained only the single element that 'the defendant knowingly violated the provisions of a no contact order.'" *Sisemore*, 114 Wn. App. at 77 (quoting *Clowes*, 104 Wn. App. at 944) (internal quotation marks omitted). In reversing the

defendant's conviction based on the faulty to-convict instruction in *Clowes*, we stated that "the instruction 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." 104 Wn. App. at 944-45.

Johnson relies on this statement in *Clowes* to support his contention that the trial court was required to instruct the jury that it must find Johnson intended to contact the protected person to find him guilty of the charged offense. But we clearly stated in *Clowes* that the elements of violation of a no-contact order are "when [a defendant] willfully has contact with another knowing that a no-contact order exists and prohibits the contact." 104 Wn. App. at 944. We further held in *Clowes* that proof that "a person acted 'knowingly' is proof that they acted 'wilfully.'" 104 Wn. App. at 944 (quoting RCW 9A.08.010(4)). Further, as we explained in *Sisemore*:

> A defendant acts willfully if he acts knowingly with respect to the material elements, including the contact element. Thus, Sisemore violated the no-contact order if he knowingly acted to contact or continue contact after an original accidental contact. He did not violate the no-contact order if he accidentally or inadvertently contacted [the protected person] but immediately broke it off. In essence, this means Sisemore must have intended the contact. This is consistent with the Supreme Court's definition of "willful" as requiring a purposeful act. *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982).

114 Wn. App. at 78. In short, neither *Clowes* nor *Sisemore* require the State to prove that the defendant *intended* to violate the no-contact order when he or she contacted the protected party. To the contrary, both *Clowes* and *Sisemore* make clear that the requisite mens rea is a *knowing* violation of the no-contact order. Accordingly, the trial court's to-convict instruction, instruction defining felony violation of a no-contact order, and instruction defining knowledge are correct statements of law.

Johnson also appears to contend that the jury instructions as a whole were deficient because the jury would be required to return a guilty verdict based on his mere awareness that Upcraft was in close proximity to him, thus preventing him from presenting the defense that he did not violate the no-contact order because he did not purposely come into contact with her. We disagree. To return a guilty verdict under the instructions provided here, the jury would have to find that Johnson knowingly violated a provision of the no-contact order issued against him, specifically the provision stating in relevant part, "do not contact the protected person, directly, indirectly, in person or through others . . . ." Exhibit 3. This no-contact order provision directs Johnson to "not contact" Upcraft as the named protected person on the no-contact order. Exhibit 3. The provision restricts Johnson from engaging in an *action*, i.e., contacting Upcraft, and is not directed at *circumstances* for which he has no control. Thus, the jury as instructed here would have to find that Johnson engaged in the volitional or purposeful act of contacting Upcraft to find that he knowingly violated a provision of his no-contact order. Therefore, the trial court's jury instructions permitted Johnson to argue, as he did below, that he did not violate the no-contact order because he attempted to walk away from Upcraft when he saw her approach him.

Because the trial court's jury instructions accurately stated the law and did not lower the State's burden of proof, and because the instructions as a whole permitted Johnson to present his theory of the case, his claims of instructional error fail. Accordingly, we affirm his conviction of felony violation of a no-contact order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Melnick, J.