

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JEROME GEMAR,

Appellant.

No. 38477-9-II

UNPUBLISHED OPINION

Hunt, J. — Michael Jerome Gemar appeals from his jury conviction for a felony violation of a domestic violence no-contact order, which prohibited his having contact with his mother. He argues that the State failed to present sufficient evidence that the previous no-contact order violations were felony-qualifying convictions under RCW 26.50.110. Holding that under *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), whether the previous violations were qualifying convictions is not an element of the crime charged and that the trial court properly exercised its gatekeeper function in admitting previous complaints and judgments into evidence, we affirm.

FACTS

I. Violation of May 2007 No-Contact Order

In May 2007, a Cowlitz County Superior Court judge entered a post-conviction Domestic Violence No-Contact Order prohibiting Michael Jerome Gemar from having contact with his

mother, Joyce Gemar, or knowingly coming within 100 yards of her residence. The order was set to expire in May 2009.

On January 5, 2008, Deputy Pat Schallert of the Cowlitz County Sherriff's Office responded to a reported violation of the no-contact order at Joyce Gemar's residence. When Schallert arrived at the residence, Gemar stood in the home's front doorway while his mother attempted to nudge him out of her home. Gemar then got into his car, backed it down the driveway, and stopped when Schallert, who was sitting in her parked patrol car at the end of the driveway, honked her horn. Gemar got out of his car and began walking back to the residence, despite Schallert's instructing him to walk towards her.

When a second deputy arrived, he and Schallert approached Gemar and told him that he was under arrest for violation of a no-contact order. Gemar initially told the officers there was no need to arrest him because he was at his mother's home simply to collect his belongings. But Gemar then conceded that he knew that he was not supposed to be at the location, repeating, "I know I'm not supposed to be here." The officers escorted Gemar off the premises and to the patrol car.

II. Procedure

The State charged Gemar with one count of felony violation of a no-contact order under RCW 26.50.110(5). The State alleged that Gemar had two or more prior qualifying convictions for violation of a no-contact order, which allowed the State to charge Gemar with a felony rather than a misdemeanor.

A. Prior Convictions

At the time of the January 2008 incident, Gemar had several previous convictions under RCW 26.50.110 for violating no-contact orders, prohibiting him from contacting his mother: (1) a December 2006 conviction for a violation on December 5, 2006; (2) two April 2007 convictions for violations on December 20, 2006, and January 9, 2007; (3) a January 2007 conviction for a violation on January 28, 2007; and (4) two May 2007 convictions for two violations on February 24, 2007. Each of the complaints or citations underlying these convictions listed the chargeable offense as a violation of a domestic violence protection order (no-contact order) under RCW 26.50.110. For example, the amended information underlying the May 2007 convictions stated that each of these offenses involved violation of a “valid protection order pursuant to Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW.” Ex. 7. Gemar did not challenge the validity of any of the previous no-contact orders, nor did he appeal any of these previous convictions. The court issued the no-contact order currently in dispute at the end of the May 2007 sentencing.

B. Trial

At Gemar’s jury trial, the court admitted Gemar’s four previous citations and informations with their four corresponding judgment and sentences; each violation had occurred before the January 2008 incident.¹ The jury found Gemar guilty of violating the May 2007 no-contact order. The jury also returned a special verdict, finding that Gemar had two or more prior convictions for

¹ The State did not offer into evidence copies of any of the original no-contact orders that were the bases for the previous complaints and judgments.

violation of a no-contact order. Based on the special verdict, the trial court classified Gemar's current conviction as a felony. Gemar appeals.

ANALYSIS

Gemar argues that (1) the State failed to present sufficient evidence to establish that he had two or more qualifying prior convictions for violating no-contact orders under chapter 26.50 RCW to elevate his May 2007 violation to a class C felony;² and (2) therefore, the trial court improperly admitted evidence of his prior convictions to prove the underlying no-contact orders were issued under a felony-qualifying statute. We disagree.

I. Standard of Review

A. *State v. Miller*

Although Gemar attempts to characterize his argument as a challenge to the sufficiency of the evidence, *Miller* establishes that his claim actually relates to the admissibility of his prior violations to support the State's contention that he had two or more qualifying court orders issued against him to elevate the current violation to a felony. *Miller*, 156 Wn.2d at 31. In *Miller*, our Supreme Court (1) held that "the validity of [an] underlying no-contact order is not an element of the crime of violating such order," 156 Wn.2d at 32; and (2) noted that the trial court, as gate-keeper, should make an initial determination of whether the crime charged has support from orders alleged to have been violated and whether those previous orders are applicable and,

² In its response, the State argues that the evidence was sufficient to support Gemar's conviction of violation of the May 2007 no-contact order. Gemar, however, challenges only the evidence related to the admissibility of his prior violations; he does not argue that the evidence was otherwise insufficient to support his conviction. Accordingly, we do not address this issue.

thus, admissible. 156 Wn.2d at 31.

If a previous order is determined to be applicable, “[i]ssues of sufficiency relating to the order may be argued and resolved in the same manner as any other question relating to the sufficiency of the evidence.” *Miller*, 156 Wn.2d at 32. Thus, under *Miller*, the trial court has the initial responsibility of determining the relevance and admissibility of the underlying no-contact order violations. 156 Wn.2d at 31.

B. Admissibility

Admissibility of evidence is within the trial court’s sound discretion, which we will not reverse absent a showing of abuse of that discretion. *State v. Brown*, 132 Wn.2d 529, 578, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). “An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.” *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The trial court abuses its discretion if exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev’d on other grounds*, 99 Wn.2d 538 (1983).

II. Admissibility of Previous Offenses

The State charged Gemar with felony violation of a no-contact order under RCW 26.50.110(5), which provides in relevant part:

A violation of a court order issued under this chapter [chapter 26.50], 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 26.50], 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.

In support of this charge, the State presented the four previous judgment and sentences discussed above. The State also submitted copies of the original citations or charging informations. Here, although most of the exhibits did not specify the exact basis of the underlying no-contact orders, the trial court admitted them because it found the evidence established that the previous convictions involved orders issued under chapter 26.50 RCW, one of the specified statutes in RCW 26.50.110. The exhibits included criminal citations that categorized the chargeable offense as violations of RCW 26.50.110, one of the qualifying statutes. And the information related to the May 2007 convictions stated that each of these offenses involved violation of a “valid protection order pursuant to Chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW.” Ex. 7.

These documents also specified Joyce Gemar’s residence as the location of the violation, an indication that previous no-contact orders were similar to the order the Superior Court issued in May 2007 under chapter 10.99 RCW. In addition, the State offered into evidence the corresponding judgment and sentences, each of which found Gemar guilty of violating no-contact orders. The exhibits the State offered supported the trial court’s finding that Gemar’s previous no-contact order violations were issued under one of the specified statutes listed in RCW 26.50.110(5). Accordingly, although the State did not offer into evidence the underlying no-contact orders, we cannot say the trial court abused its discretion in admitting the previous complaints and judgments into evidence as sufficient proof that the previous no-contact order violations were felony-qualifying convictions under RCW 26.50.110.

38477-9-II

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Bridgewater, J.