2-12-2014

State v. Hillbroom Appellant's Brief Dckt. 41533

IN THE SUPREME COURT OF
THE STATE OF IDAHO

STATE OF IDAHO,

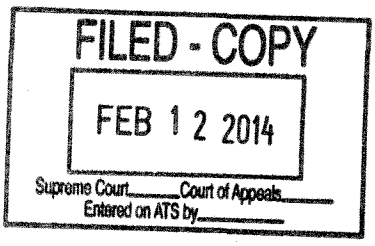
Plaintiff-Respondent,

v.

JUNIOR LARRY HILLBROOM,

Defendant-Appellant.

Supreme Court Docket # 41533-2013
Bonner Count Case # CR-2012-4705



APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT MAGISTRATE DIVISION,
OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY
HONORABLE DEBRA HEISE PRESIDING

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR BONNER COUNTY
HONORABLE JEFF M. BRUDIE PRESIDING

WILLIAM M. BERG
Berg & McLaughlin, Chtd.
414 Church Street, Suite 203
Sandpoint, Idaho 83864
Attorneys for the Defendant-Appellant

LAWRENCE G. WASDEN
Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
Attorneys for the Plaintiff- Respondent

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A. Nature of Case.

This case is an appeal of defendant Junior Larry Hillbroom's (hereafter "Hillbroom") conviction of misdemeanor violation of a no contact order. Hillbroom contends that, as a matter of law, the State cannot prove an essential element of the crime, to wit: the issuance of a valid no contact order. The State cannot prove the issuance of a valid no contract order because the order was fatally defective in that it failed to contain an expiration date as required by Criminal Rule 46.2(a)(3).

B. Course of Proceedings.

On September 18, 2012, Hillbroom was cited for misdemeanor Violation of a No Contact Order. (R., Vol. I, p. 20). On December 14, 2012, Hillbroom filed a Motion to Dismiss. (R., Vol. I, p. 72). On January 15, 2013, the Court issued an order denying Hillbroom's motion to dismiss. (R., Vol. I, pp. 115-124). On January 17, 2013, a jury found Hillbroom guilty of the crime charged. (R., Vol. I, p. 138; Tr., Vol. II[1], p. 95, L. 14-16). Hillbroom timely appealed to the District Court. (R., Vol. I, pp. 139-140).

On October 2, 2013, the Honorable Jeff M. Brudie, District Judge, affirmed the ruling of the magistrate court. (R., Vol. I, pp. 169-175). Hillbroom timely appealed to this Court. (R., Vol. I, pp. 176-178).

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[1] Volume I of the transcript references "Motion to Dismiss." Volume II of the transcript references "Jury Trial."

C. Statement of the Facts.

On June 24, 2012, Hillbroom was charged with domestic violence in violation of I.C. § 18-918 in Bonner County case number CR-2012-2908. (R., Vol. I, p. 115; Tr., Vol. II, p. 12, L. 2-7). On June 25, 2012, magistrate judge Debra Heise issued a no contact order pursuant to I.C. § 18-920; (R., Vol. I, p. 32; Tr., Vol. II, p. 12, L 2-7). The no contact order required that Hillbroom have no contact with his girlfriend, and mother of his infant baby, Candice Marie Fournier. (R., Vol. I, p. 32; Tr., Vol. I, p. 15, L. 7 and p. 64, L. 1-19).

The order itself is on a standard court form. The form states that following:

> **THIS ORDER CAN BE MODIFIED ONLY BY A JUDGE AND WILL EXPIRE: At 11:59 p.m. on _____ or upon dismissal of this case, whichever occurs first.**

(R., Vol. I, p. 32).

The judge failed to enter an expiration date in the blank portion of the form.

On August 1, 2012, Hillbroom was bound over for trial in the underlying domestic violence matter. (R., Vol. I, p. 34). At the same time the magistrate modified the no contact order to allow certain "3rd party contact." (R., Vol. I, p. 33). Again, the expiration date was not filled-in.

On September 18, 2012, Ms. Fournier saw Hillbroom in the parking lot outside of the Bonner County Courthouse. (Tr., Vol. I, pp. 68, L. 22-25). She decided to join Hillbroom in his truck and handed him his infant son. (Tr., Vol. I, pp. 22-25). A VAST advocate, Christina Scholten, saw Ms. Fournier enter Hillbroom's truck and hand the baby to Hillbroom. (Tr., Vol. 1, p. 24, L. 13-18 and p. 31, L. 10-14). Ms. Scholten reported the contact to a court bailiff who

went outside and also saw the contact between Ms. Fournier and Hillbroom. (Tr., Vol. 1, p. 39, L. 24-25 and p. 40, L. 1-3).

On January 11, 2013, district judge Steve Verby dismissed the underlying domestic violence case on the State's motion. (R., Vol. I, p. 117, L. 12-15). On January 15, 2013, the magistrate court denied Hillbroom's motion to dismiss, ruling that the no contact order was in compliance with I.C.R. 46.2 even though it failed to contain an expiration date. (R., Vol. I, pp. 122-123). On January 17, 2013, a jury found Hillbroom guilty of the crime of violating a no contact order. (R., Vol. I, p. 138; Tr., Vol. II, p. 95, L. 14-16).

IV. ISSUE PRESENTED.

As a matter of law, can the State prove the crime of violation of a no contact order where the no contact order is defective because it fails to comply with the mandatory requirement to set out the order's expiration date?

V. ARGUMENT.

The trial court held that the no contact order in this case complies with I.C.R. 46.2 even though the court failed to set out the order's expiration date. The trial court erred. The criminal rule, as interpreted by this Court, requires that a no contact order contain a specific expiration date, as well as the alternative "dismissal of the case, whichever first occurs." The defect in the Hillbroom no contact order renders the State unable to prove the crime of violation of a no contact order, I.C. §18-920, because it cannot prove beyond a reasonable doubt that a valid no contact order had been issued by the court. However, the State is not without remedy. The State

can still petition for enforcement under the contempt statutes where the order is, under the facts, clear and unambiguous.

A. Standard of Review.

The Supreme Court has free review of the issue in this case. An appellate court exercises free review of a trial court's decision regarding the interpretation of an Idaho Criminal Rule. *State v. Weber*, 140 Idaho 89, 91, 90 P.3d 314, 316 (2004). When reviewing a case on a petition for review from a lower appellate court, the Supreme Court gives "due consideration" to the decision of the appellate court but "directly reviews the decision of the trial court." *State v. Lute*, 150 Idaho 837, 839, 252 P.3d 1255, 1257 (2011).

B. The No Contact Order Was Defective Because It Failed To Set Out An Expiration Date.

The no contract order issued by the magistrate court was defective because it did not contain an expiration date as required by criminal rule and by this Court.

A court has the authority to issue a no contact order when the defendant is charged with an alleged assault. The statute states:

> When a person is charged with or convicted of an offense under section 18-901, 18-903, 18-905, 18-907, 18-909, 18-911, 18-913, 18-915, 18-918, 18-919, 18-6710, 18-6711, 18-7905, 18-7906 or 39-6312, Idaho Code, or any other offense for which a court finds that a no contact order is appropriate, an order forbidding contact with another person may be issued. A no contact order may be imposed by the court or by Idaho criminal rule.

I.C. § 18-920(1).

The form of the no contact order is set out in Criminal Rule 46.2. The rule states:

> (a) No contact orders issued pursuant to Idaho Code § 18-920 shall be in writing and served on or signed by the defendant. Each judicial district shall adopt by administrative order a form for no contact orders for that district. **No contact orders must contain, at a minimum, the following information:**
>
> (1) The case number, defendant's name and victim's name;
>
> (2) A distance restriction;
>
> (3) **That the order will expire at 11:59 p.m. on a specific date, or upon dismissal of the case;**
>
> (4) An advisory that:
>
> (a) A violation of the order may be prosecuted as a separate crime under I.C. § 18-920 for which no bail will be set until an appearance before a judge, and the possible penalties for this crime,
>
> (b) The no contact order can only be modified by a judge, and
>
> (c) When more than one domestic violence protection order is in place, the most restrictive provision will control any conflicting terms of any other civil or criminal protection order.

I.C.R. 46.2(a) (emphasis added).

The trial court treated the obligation to include an expiration date on the no contact order as discretionary. This is incorrect. The criminal rule states that a no contact order issued pursuant to I.C. § 18-920 "must contain" an expiration date. I.C.R. 46.2(a)(3). The word "must" means "mandatory." *Roesch v. Klemann*, 155 Idaho 175, 307 P.3d 192, 195 (2013).

The trial court also wrongly implied that it had a choice as to the expiration date and therefore did not need to fill in a date certain. The trial court stated:

> In this case, the No Contact Order expired by its terms upon dismissal of the case, and because the alleged violation occurred while the case was pending, an expiration upon dismissal of the case provided clarity and finality.

(R., Vol. I, p. 122).

Contrary to the trial court's interpretation, this Court has interpreted I.C.R. 46.2 to require that the specific date be expressly set forth and that the phrase "Whichever occurs first" follow the two expiration possibilities. By leaving the expiration date blank, the trial court in this case made the phrase "Whichever occurs first" superfluous and the order potentially confusing to the defendant.

Twice now, this Court has emphasized the importance of including a date certain for expiration to avoid confusion. In *State v. Castro*, 145 Idaho 173, 177 P.3d 387 (2008), the Court explained that I.C.R. 46.2 was revised in 2004 because orders that simply contained the phrase "the no contact order will remain in effect until further order of the court" created unnecessary confusion. The Court stated that such generalized language "enshrined perpetuity." *Id.* at 175, 177 P.3d at 389. Therefore, the Court revised the required language consistent with the present statute, to wit: "*[t]hat the order will expire at 11:59 p.m. on a specific date, or upon dismissal of the case.*" *Id.* at 175-76, 177 P.3d at 389-90.

The *Castro* Court stressed the importance of the inclusion of an expiration date because, as the Court stated, it "serves important public interests." *Id.* at 176, 177 P.3d at 390. The Court considered it so important, in fact, that it sent a clear message to the lower courts:

> [W]e **expect** judges to provide a termination date, regardless of whether the motion to modify or terminate the no contact order is granted.

Id. (emphasis added).

In 2010 this Court took the opportunity to reinforce the requirement that judges provide a specific expiration date. In *State v. Cobler*, 148 Idaho 769, 22 P.3d 374 (2010), the Court considered a no contact order like the one in the present case. The *Cobler* order provided only a

termination date: the order "will expire . . . upon dismissal of this case." *Id.* at 771, 22 P.3d at 376. The *Cobler* court referenced its holding in *Castro, supra*, and in even more direct language restated the requirement of a date certain for expiration:

> [W]e disapproved of no contact orders with "eternal existence" and indicated that **all** no contact orders issued after July 1, 2004, should have termination dates, regardless of whether a motion to modify or terminate the no contact order is granted.

Id. at 772, 22 P3d at 377 (emphasis added).

The *Cobler* court further reinforced the explicit requirement for an expiration date in a footnote. The Court noted that the no contact form at issue in the case provided a fill-in-the-blank for an expiration "or upon dismissal of the case." *Id.*, n.1. The Court explained that in order for the form to comply with I.C.R. 46.2, the blank must be filled in with a specific expiration date. The Court stated:

> The form seems to give the judge one of two choices. However, in order to comply with the intent of I.C.R. 46.2, **the judge should be given no right of selection between the two apparent choices.** The second line of the form should contain no boxes and should read "at 11:59 p.m. on _____, or upon dismissal of this case, whichever first occurs["].

Id. (emphasis added).

The form employed by Bonner County, and applied in this case, conforms with the *Cobler* instruction as to the proper expiration language. Bonner County's form avoids the "two choices" disapproved of in *Cobler* by adding the phrase "whichever first occurs." However, in the case at bar, the magistrate judge failed to fill-in the specific expiration date upon initial issuance or upon the order's modification. And, in her order denying dismissal, the magistrate even advocated the right to "two apparent choices" in

contravention of the *Cobler* instruction.

C. The No Contact Order was *Fatally* Defective Because The State Cannot Prove Beyond a Reasonable Doubt that the Court Issued a *Valid* Order Pursuant to I.C. § 18-920.

The no contact order in this case is fatally defective because the failure to comply with the criminal rule rendered the order invalid under I.C. § 18-920. Because it is invalid, the State cannot prove the essential element of the crime: that a valid no contact order was issued by the court.

In a criminal matter, the State must prove each element of the crime beyond a reasonable doubt. *State v. Sheahan*, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003). Conviction for violation of a no contact order pursuant to I.C. § 18-920 requires the State to prove each of the following elements:

> A violation of a no contact order is committed when:
>
> (a) A person has been charged or convicted under any offense defined in subsection (1) of this section; and
>
> (b) A no contact order has been issued, either by a court or by an Idaho criminal rule; and
>
> (c) The person charged or convicted has had contact with the stated person in violation of an order.

I.C. § 18-920(2).

Implicit in the *issuance* element of the crime, I.C. § 18-920(2)(b), is that the order be valid under Idaho law. This Court has recognized "implicit" elements in criminal statutes. *See State v. Olin,* 112 Idaho 673, 676, 735 P.2d 984, 987 (1987). In *Olin,* the Court considered whether the words "rob," "robbery," "taking of property," implicitly describes an "intent" to permanently deprive the victim of the property under the robbery statute. The Court stated that

"[I]t was implicit in the common understanding of all those words that the conduct was not intended to be anything but permanent." *Id.* at 676, 735 P.2d at 987.

Likewise the State conceded, and the appellate court approved of an implicit element in the statute under consideration in this case, I.C. § 18-920. In *State v. Hochrein*, 154 Idaho 993, 999, 303 P.3d 1249, 1255 (Ct. App. 2013), the court of appeals implied a "notice" element of proof that is not explicitly set forth in the statute. The court looked specifically at the criminal rule to derive an implied element. The court stated:

> Although section 18–920, under which Hochrein was charged, does not explicitly list prior notice of the no contact order as an element, the State concedes on appeal such notice is an essential element of the crime. The State points out that Idaho Criminal Rule 46.2, which implements section 18–920, states, "No contact orders issued pursuant to Idaho Code § 18–920 shall be in writing and served on or signed by the defendant." I.C.R. 46.2(a).

Hochrein at 999, 303 P.3d at 1255.

Not only does this Court have authority to imply a *validity* element of proof under I.C. § 18-920, it would be wise for the Court to do so. Implying a validity element to the issuance prong would reinforce the Court's strong insistence that judges include an expiration date certain on the order. Prosecutors would then be attentive to its inclusion. It would have the same salutary effect on a judge issuing a no contact order as does the search and seizure jurisprudence have on a police officer searching a vehicle or dwelling. Without the sword of Damocles hanging about, judges and prosecutors will continue to ignore the Court's edict with regard to incorporating an expiration date on the no contact orders.

D. A Defective, But Clear No Contact Order Can Be Enforced Under the Contempt of Court Statute.

It's important to note that by implying a validity element of proof under I.C. § 18-920, courts and prosecutors would not be left without a punishment remedy where the court has inadvertently issued a defective no contact order. A court always has the power to hold in contempt a defendant who willfully violates a clear and unambiguous order of the court. I.C. § 18-105; *State v. Rice*, 145 Idaho 554, 556, 181 P.3d 480, 482 (2008). In this case, the prosecutor or the trial court, *sua sponte*, could have enforced the no contact order under the contempt of court statute because that statute does not impose an expiration date requirement. A court considering a contempt citation could properly look at the facts to determine if the order was so defective as to make it ambiguous.

The distinction between a violation of a court order under the contempt statutes and a violation of the order under the criminal code has been addressed by the appellate court. In *State v. Herren*, 38783, 2012 WL 5464517 (App. Nov. 9, 2012), *Review Granted* (attached hereto as Addendum A), the defendant, Herren, was charged with a violation of a no contact order under I.C. § 18-920. The court found that Herren was within 100 feet of McDermott in violation of the order. However, Herren did not touch or communicate with McDermott. The Court reversed the defendant's conviction because I.C. § 18-920(c) requires proof that "The person charged . . . has had contact with the stated person in the violation of an order." (Emphasis added). The Court concluded that the defendant's mere presence within 100 feet of McDermott was a violation of the order but the violation was not subject to prosecution under the criminal statute because no

"contact" had occurred. Importantly, the Court noted in footnote 3 that the order could still be enforced by "contempt."

> The Court did point out that this finding did not mean the lower court was not authorized to include an "in-the-presence" prohibition in the protective order. Although such a provision could not be enforced by the criminal statute, it could be enforceable by contempt or possibly other means.

Id. at n.3.

In applying the logic of *Herren* to the case at bar, Hillbroom acknowledges that he violated the court's order when he had contact with Ms. Fournier. Consequently the trial court could have found Hillbroom in contempt *sua sponte* or upon petition of the State. The Court could have imposed the same sentence. But, because the order failed to comply with the criminal rule, setting forth both an expiration date and a terminating event, the order was invalid and therefore unenforceable as a crime under I.C. § 18-920.

VI. CONCLUSION.

For the foregoing reasons, this Court must reverse the magistrate court and remand the case for dismissal.

RESPECTFULLY SUBMITTED this 3rd day of January, 2014.

BERG & McLAUGHLIN, CHTD

By: _____
William M. Berg
Attorney for Junior Hillbroom

CERTIFICATION OF SERVICE

I hereby certify that on the 3 day of January, 2014, I caused to be served two true and correct copies of the foregoing document by US mail to the following:

Lawrence G. Wasden
Attorney General's Office
P.O. Box 83720
Boise ID 83720-0010

Stephanie D Allen
By:

ADDENDUM A

2012 WL 5464517
Only the Westlaw citation is currently available.

Court of Appeals of Idaho.

STATE of Idaho, Plaintiff–Respondent
v.
Nathan Wade HERREN, Defendant–Appellant.

No. 38783. | Nov. 9, 2012.

Synopsis

Background: Following bench trial, magistrate found defendant guilty of violating no contact order (NCO) and violating probation previously imposed for misdemeanor malicious injury to property. Defendant filed intermediate appeal. The Fourth Judicial District Court, Ada County, Kathryn A. Sticklen, J., affirmed. Defendant appealed.

[Holding:] The Court of Appeals, Gutierrez, J., held that defendant did not "contact" neighbor in violation of NCO.

Reversed and remanded.

Gratton, Chief Judge, filed dissenting opinion.

West Headnotes (10)

[1] **Criminal Law**
Decisions of Intermediate Courts

On review of decision of district court, rendered in its appellate capacity, Court of Appeals reviews decision of district court directly.

[2] **Criminal Law**
Decisions of Intermediate Courts

On review of decision of district court, rendered in its appellate capacity, Court of Appeals examines magistrate record to determine whether there is substantial and competent evidence to support magistrate's findings of fact and whether magistrate's conclusions of law follow from those findings.

[3] **Criminal Law**
Decisions of Intermediate Courts

On review of decision of district court, rendered in its appellate capacity, if magistrate's findings of fact are supported by substantial and competent evidence and conclusions follow therefrom and if district court affirmed magistrate's decision, Court of Appeals affirms district court's decision as matter of procedure.

[4] **Criminal Law**
Statutory issues in general

Court of Appeals exercises free review over application and construction of statutes.

[5] **Statutes**
Plain language; plain, ordinary, common, or literal meaning
Statutes
Statute as a Whole; Relation of Parts to Whole and to One Another

Where language of statute is plain and unambiguous, Court of Appeals must give effect to statute as written, without engaging in statutory construction; words must be given

their plain, usual, and ordinary meaning, and statute must be construed as a whole.

[6] **Statutes**
⇐Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
Statutes
⇐Plain, literal, or clear meaning; ambiguity

When interpreting statutory language, if language is clear and unambiguous, there is no occasion for court to resort to legislative history or rules of statutory interpretation.

[7] **Statutes**
⇐Purpose and intent; determination thereof

When Court of Appeals must engage in statutory construction because ambiguity exists in statutory language, court has duty to ascertain legislative intent and give effect to that intent.

[8] **Criminal Law**
⇐Substantial evidence
Criminal Law
⇐Reasonable doubt

Appellate review of sufficiency of evidence is limited in scope; finding of guilt will not be overturned on appeal where there is substantial evidence upon which reasonable trier of fact could have found prosecution sustained its burden of proving essential elements of crime beyond a reasonable doubt.

[9] **Protection of Endangered Persons**
⇐"No contact" orders

Although defendant violated no contact order (NCO) by remaining within 100 feet of neighbor during homeowners' association meeting, defendant did not physically touch or communicate with neighbor, as required for criminal conviction for violation of NCO, but only made brief eye contact with neighbor, which did not amount to "contact." West's I.C.A. § **18–920**(2).

[10] **Protection of Endangered Persons**
⇐"No contact" orders

Statute criminalizing violations of no contact order (NCO) only criminalizes violations of NCO where violation was contact in form of physical touching and/or communicating. West's I.C.A. § **18–920**(2).

Attorneys and Law Firms

Nevin, Benjamin, McKay & Bartlett LLP; Robyn Fyffe, Boise, for appellant. Robyn Fyffe argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

Opinion

GUTIERREZ, Judge.

*1 Nathan Wade Herren appeals from the district court's order, on intermediate appeal, affirming his judgment of conviction entered upon the magistrate's verdict finding him guilty of violation of a no contact order and affirming the revocation of his withheld judgment based on the magistrate's finding that he was in violation of his probation. For the reasons set forth below, we reverse and remand the case.

I.

FACTS AND PROCEDURE

In the course of an ongoing dispute between Herren and his neighbor, William McDermott, Herren cut down a portion of McDermott's fence. Herren was charged with felony malicious injury to property and, pursuant to a plea agreement, pled guilty to an amended charge of misdemeanor malicious injury to property. The court entered a withheld judgment and placed Herren on probation for two years. In addition, the court entered a no contact order (NCO), providing, in relevant part, that Herren could not "knowingly remain within 100 feet of" McDermott.

Months later, Herren filed a motion to modify the NCO to allow him to attend homeowners' association meetings where McDermott, an association board member, would likely be present. Herren failed to request a hearing on the motion and no modification was entered. Nevertheless, Herren attended an association meeting at a local school. When Herren first arrived, McDermott was not present, but once McDermott entered the meeting room, Herren made brief eye contact with him and moved to the back of the room. McDermott contacted law enforcement, who responded to the scene. Herren stated he believed he was more than 100 feet from McDermott. Herren was arrested for violation of the NCO after the responding officer determined Herren had been sitting well closer than 100 feet from McDermott. Herren was charged with violating the NCO, Idaho Code § **18–920**, and violating his probation by committing a new crime.

Following a bench trial, the magistrate found Herren guilty of violating the NCO by knowingly remaining within 100 feet of McDermott at the meeting. The magistrate entered a judgment of conviction. Herren admitted to violating his probation by being convicted of the NCO violation, and the magistrate revoked Herren's withheld judgment for malicious injury to property. Herren timely appealed his judgment of conviction for violating the NCO and the revocation of his withheld judgment to the district court. He filed a motion to consolidate the appeals, which the district court granted. Following a hearing, the district court affirmed Herren's judgment of conviction for violating the NCO, the probation violation finding, and the revocation of his withheld judgment. Herren now appeals to this Court.

II.

ANALYSIS

Herren contends his judgment of conviction for violating the NCO should be vacated because the magistrate did not find he had "contact" with McDermott in violation of the NCO as required by the statute and there is insufficient evidence to support such a finding. He also contends the order revoking his withheld judgment should be reversed because the NCO conviction cannot properly form the basis of the probation violation where it was not supported by sufficient evidence.

***2** [1] [2] [3] On review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *Losser v. Bradstreet,* 145 Idaho 670, 672, 183 P.3d 758, 760 (2008); *State v. DeWitt,* 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct.App.2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Losser,* 145 Idaho at 672, 183 P.3d at 760; *DeWitt,* 145 Idaho at 711, 184 P.3d at 217. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Losser,* 145 Idaho at 672, 183 P.3d at 760; *DeWitt,* 145 Idaho at 711, 184 P.3d at 217.

[4] [5] [6] [7] This Court exercises free review over the application and construction of statutes. *State v. Reyes,* 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct.App.2003). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar,* 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct.App.2000). The words must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole. *State v. Hart,* 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar,* 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction because an ambiguity exists, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard,* 135

Idaho 641, 646, 22 P.3d 116, 121 (Ct.App.2001).

[8] Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera–Brito,* 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct.App.1998); *State v. Knutson,* 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct.App.1991).

[9] Idaho Code § **18–920**(2), under which Herren was convicted, provides that a violation of an NCO is committed when:

> (a) A person has been charged or convicted under any offense defined in subsection (1) of this section; and
>
> (b) A no contact order has been issued, either by a court or by an Idaho criminal rule; and
>
> (c) The person charged or convicted *has had contact* with the stated person in violation of an order.

(Emphasis added).

In finding Herren guilty of the NCO violation, the magistrate found the State presented proof beyond a reasonable doubt that Herren violated the order by knowingly remaining within 100 feet of McDermott and, without analysis, concluded this act amounted to a violation of section **18–920**(2). The district court affirmed these findings. On appeal, Herren argues the courts' conclusion that he violated section **18–920**(2) by knowingly remaining within 100 feet of McDermott is erroneous because the common usage of the word "contact" in the statute dictates that the only violation of an NCO criminalized by the statute is that which involves some manner of "communication or physical touching." The State counters that section **18–920**(2) "does not, and is not intended to, define the meaning of the word 'contact' for purposes of determining whether a violation of a no contact order has occurred" and any violation of a NCO suffices.

***3** The provision in the NCO at issue states:

> IT IS HEREBY ORDERED that [Herren] shall not contact (including: in person or through another person, or in writing or e-mail, or by telephone, pager or facsimile) or attempt to contact, harass, follow, communicate with, or knowingly remain within 100 feet of: [McDermott].

Thus, it is apparent that by remaining within 100 feet of McDermott during the meeting, Herren violated the NCO, which he concedes on appeal; however, the question is whether this violation of the NCO can amount to a violation of section **18–920**(2).

In arguing he cannot be found to have violated section **18–920**(2) because he did not have "contact" with McDermott according to the plain and ordinary meaning of the word, Herren cites to *Cooper v. Cooper,* 144 P.3d 451 (Alaska 2006). In *Cooper,* a protective order prohibited the defendant (Husband) from, among other things, being in the physical presence of his estranged wife (Wife). Based on several instances where Wife saw and made eye contact with Husband in various public places, including the mall, a bar conference and on the street, Wife claimed Husband committed the crime of violating the protective order, because, inter alia, Husband's conduct amounted to "contacting," which was prohibited by the protective order. The Alaska Supreme Court noted that for a defendant to be guilty under Alaska's statute criminalizing the violation of a protective order, ALASKA STAT. § 11.56.740(a)(1),[1] the underlying protective order must contain at least one of seven prohibitions enumerated in Alaska Statutes § 18.66.100(c)(1)-(7).[2] On this basis, the Court found the statute implies that only a violation of a prohibition listed in section 18.66.100(c)(1)-(7) may constitute the crime of violating a protective order. *Cooper,* 144 P.3d at 457. The Court found it was significant that the protective order's requirement that Husband not be in the physical presence of Wife was not a prohibition explicitly listed in section 18.66.100(c)(1)-(7) and, therefore, it was questionable whether Husband's acts could form the basis of a criminal violation of the protective order.[3] *Cooper,* 144 P.3d at 457.

Important to the issue we address in this case, the *Cooper* court rejected Wife's argument that Husband's acts of appearing within Wife's sight in public places fell within one of the enumerated prohibitions listed in section 18.66.100(c)(1)-(7)—specifically, subsection (c)(2) of section 18.66.100, which provides a protective order may "prohibit the respondent from ... *contacting,* or otherwise communicating directly or indirectly with the petitioner." (Emphasis added.) *Cooper,* 144 P.3d at 457. Although recognizing the argument was not "implausible," the court rejected it on the basis that the "common usage" of "contacting," as a verb, means "physically touching or communicating." *Id.* at 457–58 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).

> Noting the general rule of statutory interpretation, that words in statutes are to be construed in accordance with their normal usage unless there is some indication a special meaning is intended, the Court concluded the context of "contacting" in the relevant statute indicated that adherence to the normal meaning of the word was appropriate. *Id.* at 458. Thus, the Court held that Husband's acts of merely being present in a public place while Wife was also present, with contact limited to one or two seconds of unplanned eye contact and absent any other communication or touching, were insufficient to establish Husband violated the no contact prohibition where the statute criminalizing a violation of a protective order required the violating behavior be one of the enumerated acts. *Id.*

***4** [10] As we indicated above, where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction, *Burnight,* 132 Idaho at 659, 978 P.2d at 219, and the words of the statute are to be given their plain, usual, and ordinary meaning, *Hart,* 135 Idaho at 829, 25 P.3d at 852. Thus, although the State attempts to distinguish *Cooper* from the case at hand, we are constrained to conclude, based on our rules of statutory interpretation, that section **18–920**(2), like Alaska's statute at the time, does not criminalize *all* violations of an NCO. As recognized by the Alaska Supreme Court in *Cooper,* and as undisputed by the State in this appeal, the "common usage" of "contacting," as a verb, means "physically touching or communicating." *Cooper,* 144 P.3d at 457–58. Thus, by its plain language, section **18–920**(2) only criminalizes violations of an NCO where the violation was contact in the form of physical touching and/or communicating.

In resisting this interpretation of the statute, the State argues:

> It is apparent from a plain reading of the statute and the rule referenced therein [Idaho Criminal Rule 46.2] that the legislature did not intend to define or limit the meaning of the word contact for purposes of the content of any particular no contact order or for purposes of what will constitute a violation of the order.

However, although the Legislature *may* not have consciously intended to exclude the activity at issue in this case, that is exactly what it did by its choice of language, and we are constrained by adherence to our rules of statutory construction to give effect to the plain language of the statute. Indeed, there is an argument that had the Legislature intended the interpretation urged by the State, it would have stated in the statute that *any* violation of an NCO could form the basis of the offense, as opposed to explicitly requiring "contact" in violation of an NCO. *See, e.g.,* I.C. § 18–7905 (defining first degree stalking as, *inter alia,* a violation of Idaho Code § 18–7906 and where the "actions constituting the offense are in violation of a temporary restraining order, protection order, no contact order or injunction, or any combination thereof").

Here, it is undisputed the lower courts found Herren's act of knowingly remaining within 100 feet of McDermott was violative of the NCO. However, such an act does not amount to physical touching and/or communicating (a point the State does not contest) and, thus, cannot be considered "contact" pursuant to section **18–920**(2). Accordingly, we conclude the State failed to sustain its burden of proving each element of the offense beyond a reasonable doubt because there was no evidence Herren had "contact" with McDermott in violation of the NCO as required by the plain language of the statute. Because the magistrate's finding that Herren violated probation was premised upon this conviction, which in turn caused the magistrate to revoke Herren's withheld judgment, the order revoking Herren's withheld judgment on this basis must be reversed. The district court's order, on intermediate appeal, affirming Herren's judgment of conviction for violation of an NCO and affirming revocation of Herren's withheld judgment is reversed, and the case is remanded for proceedings consistent with this opinion.[4]

Judge MELANSON concurs.

Chief Judge GRATTON, dissenting.

***5** I respectfully dissent. I believe that the term "contact" in the context of the legal prohibition, i.e., "no contact," is well understood and consistent with the use of the term in Idaho Code § **18–920**(2)(c). I submit that the plain meaning of "contact" to anyone involved in the context of a no contact order (as opposed to say the business world) includes being in the vicinity of the other person. I further submit that the term "contact" is, by virtue of the statutory language in I.C. § **18–920** and Idaho Criminal Rule 46.2, defined as that which is set out in the no contact order itself, which must include a distance restriction. The majority, unfortunately, limits itself to a generic definition

of the word "contact" without regard to the legal and commonly understood context of "no" contact orders.

I do not believe it is appropriate that when our standards of statutory construction call for application of the plain meaning of a word, that we immediately consult Webster's Dictionary. The plain meaning of a word is as commonly understood and articulated within the context used, not some generic Webster's Dictionary definition. This case highlights just how we should not rely on one of Webster's Dictionary's several definitions of "contact." Herren argues that "contact" means "physical touching or communicating." Herren and the majority adopt this definition of "contact" from *Cooper v. Cooper,* 144 P.3d 451, 457–58 (Alaska 2006), which, in turn, purportedly adopted the definition from Webster's Dictionary.[1] Since there is no physical touching in this case, Herren and the majority then are required to delve into what is meant by "communicating." Herren argues and the majority agrees that being in someone's presence is not communicating and, moreover, brief eye *contact* is not communicative and, thus, not contact, so long as there is no non-verbal communication involved with the eye contact, which I suppose to mean the old evil eye. So, "contact" actually becomes "communicating" and then we are required to define "communicating," and so on. Through this circuitous route the majority determines that knowingly being in another's presence is not "contact" within the meaning of I.C. § **18–920**(2)(c), because there is no touching or communicating.

Idaho Code § **18–920**, under which Herren was prosecuted, is entitled: "Violation of *No Contact Order.*" (Emphasis added.) Subsection (2) states:

> (2) A violation of a *no contact order* is committed when:
>
> (a) A person has been charged or convicted under any offense defined in subsection (1) of this section; and
>
> (b) A *no contact order* has been issued, either by a court or by an Idaho criminal rule; and
>
> (c) The person charged or convicted has had *contact* with the stated person *in violation of an order.*

(Emphasis added.) To say that the term "contact" in I.C. § **18–920**(2)(c) does not draw meaning from the "*no contact order* " is untenable. Idaho Criminal Rule 46.2, entitled "[n]o contact orders," states that no contact orders issued pursuant to I.C. § **18–920** must be in writing and served on the defendant. Each judicial district shall adopt by administrative order a form for no contact orders. The rule further provides that:

***6** No contact orders must contain, at a minimum, the following information:

> (1) The case number, defendant's name and victim's name;
>
> (2) *A distance restriction;*
>
> (3) That the order will expire at 11:59 p.m. on a specific date, or upon dismissal of the case;
>
> (4) An advisory that:
>
> (a) *A violation of the order* may be prosecuted as a separate crime under I.C. § **18–920** for which no bail will be set until an appearance before a judge, and the possible penalties for this crime,....

I.C.R. 46.2(a). (Emphasis added.) It is clear from the full statute that that the "contact" which is "in violation of [the] order," identified in I.C. § **18–920**(2)(c), is that which is set out in the order. It is clear from the rule that the "contact" which is punishable by I.C. § **18–920** is that which is set out in the order. It is also clear from the required language in the no contact order itself, which includes an advisory that violation of the order may be prosecuted under I.C. § **18–920**, that it is the "contact" described in the order which is punishable under I.C. § **18–920**. One need not resort to Webster's Dictionary to determine what "contact" means in the context of a no contact order. If fact, the Webster's Dictionary definition, presents much more confusion and less certainty than the language of the order which must be served on the defendant.

In this case, Herren does not seriously contest that he knowingly remained with 100 feet of McDermott in violation of the no contact order. Thus, I respectfully dissent.

Footnotes

1 The statute has since been amended.

2 Alaska Statutes § 18.66.100(c)(1)-(7) provided that a protective order may:

> (1) prohibit the respondent from threatening to commit or committing domestic violence, stalking, or harassment;
> (2) prohibit the respondent from telephoning, contacting, or otherwise communicating directly or indirectly with the petitioner;
> (3) remove and exclude the respondent from the residence of the petitioner, regardless of ownership of the residence;
> (4) direct the respondent to stay away from the residence, school, or place of employment of the petitioner or any specified place frequented by the petitioner or any designated household member;
> (5) prohibit the respondent from entering a propelled vehicle in the possession of or occupied by the petitioner;
> (6) prohibit the respondent from using or possessing a deadly weapon if the court finds the respondent was in the actual possession of or used a weapon during the commission of domestic violence;
> (7) direct the respondent to surrender any firearm owned or possessed by the respondent if the court finds that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence[.]

3 The Court did point out that this finding did not mean the lower court was not authorized to include an "in-the-presence" prohibition in the protective order. Although such a provision could not be enforced by the criminal statute, it could be enforceable by contempt or possibly other means. *Cooper v. Cooper*, 144 P.3d 451, 457 (Alaska 2006).

4 We note that although Herren's conduct of knowingly remaining within 100 feet of McDermott may not form the basis of a violation of Idaho Code § **18–920**(2), it may nonetheless constitute a violation of the NCO and still be a violation of his probation, depending on the terms of probation. Therefore, revocation of Herren's withheld judgment may still be appropriate.

1 The phrase "physical touching or communicating" does not appear in Webster's Third New International Dictionary, and, instead, appears to be the Alaska Court's amalgam of words found therein.

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