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STATE OF NEBRASKA, APPELLEE, V. TERRY JAY GRAFF, APPELLANT.

810 N.W.2d 140

Filed November 18, 2011. No. S-11-158.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach a conclusion independent of the one reached by the lower court.
3. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
4. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
5. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict. However, the defendant may still challenge the sufficiency of the evidence.

Appeal from the District Court for Brown County, MARK D. KOZISEK, Judge, on appeal thereto from the County Court for Brown County, JAMES J. ORR, Judge. Judgment of District Court reversed, and cause remanded with directions.

Bradley D. Holtorf, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy, Nick & Placek, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Terry Jay Graff was convicted of violating a protection order and was sentenced to 12 months' probation. The issue presented by this appeal is whether a defendant can be convicted of knowingly violating a protection order of which he has actual notice if the defendant was not personally served with

that order. We conclude that personal service is required by the statute and accordingly reverse, and remand with directions.

FACTUAL BACKGROUND

Graff and his wife were divorced in 2008. Due to problems between the couple concerning visitation with their children, Graff's ex-wife sought a protection order in the Brown County District Court, and an ex parte order was entered on July 1, 2009. A hearing was held on July 16. Graff, represented by counsel, and his ex-wife, pro se, were in attendance at the hearing. During the hearing, the parties stipulated to the entry of a mutual harassment protection order and stipulated that only contact relating to the parties' minor children should be allowed. A permanent order was entered by the county court judge on August 31. The order indicates that a copy was mailed to Graff and his counsel, as well as to his ex-wife, and that a copy was given to the Brown County sheriff.

On November 1, 2009, Graff's ex-wife arrived at Graff's residence to pick up one of the parties' children. During the course of the pickup, an altercation arose between Graff and his ex-wife. Graff refused to allow the parties' child to leave. Graff then retrieved a baseball bat and swung the bat in the vicinity of his ex-wife's car and pushed his ex-wife's head with the bat through the vehicle's open window. Graff also verbally attacked his ex-wife.

Law enforcement was contacted, and Graff was arrested. At trial, Graff's ex-wife testified to the above facts. At the conclusion of the State's case in chief, Graff moved to dismiss, contending that he had not been personally served with the protection order as required by statute. That motion was denied. Graff was subsequently found guilty and sentenced to 12 months' probation. He appealed to the district court, which affirmed. He now appeals to this court.

ASSIGNMENT OF ERROR

Graff assigns that the county court and district court both erred in finding that he knowingly violated a protection order.

STANDARD OF REVIEW

[1,2] The district court and this court review appeals from the county court for error appearing on the record.[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach a conclusion independent of the one reached by the lower court.[2]

ANALYSIS

Graff's only argument on appeal is that both the county and district courts erred in finding that he knowingly violated a protection order. The basis of this argument is Graff's assertion that the State's failure to have the protection order personally served upon him is fatal to his conviction for violating the order. The precise issue presented by this appeal is whether personal service is an element of the crime of knowingly violating a protection order. We conclude that it is.

Neb. Rev. Stat. § 28-311.09 (Reissue 2008) governs harassment protection orders. That section provides:

> (1) Any victim who has been harassed as defined by section 28-311.02 may file a petition and affidavit for a harassment protection order as provided in subsection (3) of this section. Upon the filing of such a petition and affidavit in support thereof, the judge or court may issue a harassment protection order without bond enjoining the respondent from (a) imposing any restraint upon the person or liberty of the petitioner, (b) harassing, threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner, or (c) telephoning, contacting, or otherwise communicating with the petitioner.
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> . . . .
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> (4) A petition for a harassment protection order filed pursuant to subsection (1) of this section may not be withdrawn except upon order of the court. An order issued pursuant to subsection (1) of this section shall specify that it is effective for a period of one year unless otherwise

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[1] *First Nat. Bank of Unadilla v. Betts*, 275 Neb. 665, 748 N.W.2d 76 (2008).

[2] See *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

> modified by the court. *Any person who knowingly violates an order issued pursuant to subsection (1) of this section after service shall be guilty of a Class II misdemeanor.*
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> . . . .
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> (8) Upon the issuance of any harassment protection order under this section, the clerk of the court shall forthwith provide the petitioner, without charge, with two certified copies of such order. The clerk of the court shall also forthwith provide the local police department or local law enforcement agency and the local sheriff's office, without charge, with one copy each of such order and one copy each of the sheriff's return thereon. *The clerk of the court shall also forthwith provide a copy of the harassment protection order to the sheriff's office in the county where the respondent may be personally served together with instructions for service. Upon receipt of the order and instructions for service, such sheriff's office shall forthwith serve the harassment protection order upon the respondent and file its return thereon with the clerk of the court which issued the harassment protection order within fourteen days of the issuance of the harassment protection order.* If any harassment protection order is dismissed or modified by the court, the clerk of the court shall forthwith provide the local police department or local law enforcement agency and the local sheriff's office, without charge, with one copy each of the order of dismissal or modification.[3]

[3,4] We begin with a few familiar principles of statutory construction. Statutory language is to be given its plain and ordinary meaning.[4] A fundamental principle of statutory construction requires that penal statutes be strictly construed.[5] In applying these principles to this case, we read the language in question as requiring both intent—in that the crime of violating a protection order must be done knowingly—and service. We

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[3] § 28-311.09 (emphasis supplied).

[4] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[5] *State v. Huff, ante* p. 78, 802 N.W.2d 77 (2011).

must conclude that in this instance, service, which is defined by § 28-311.09(8) solely as personal service, is specifically required by the statute and hence is an element of the crime. This decision is consistent with the decision of the Court of Appeals in *State v. Patterson*,[6] which presented a similar issue under the Protection from Domestic Abuse Act. We acknowledge the logic of the State's argument that Graff's actual knowledge of the entry of the order should be sufficient. But we are constrained by the words of the statute as chosen by the Legislature.

[5] We further reject the State's argument that Graff waived his argument on this point because he failed to renew his motion to dismiss at the close of the case. It is true that a defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict.[7] However, the defendant may still challenge the sufficiency of the evidence.[8] And in this case, we read Graff's assignment of error and argument as a challenge to the sufficiency of the evidence against him.

Because personal service was required, but did not occur, we must conclude that there was insufficient evidence to convict Graff. His conviction should therefore be reversed.

CONCLUSION

The district court's judgment is reversed. The cause is remanded to the district court with instructions to reverse the county court's judgment and remand the case to the county court with instructions to dismiss the charge.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating in the decision.

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[6] *State v. Patterson*, 7 Neb. App. 816, 585 N.W.2d 125 (1998).

[7] *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[8] See *id.*