

**IN THE COURT OF APPEALS OF IOWA**

No. 8-411 / 07-0705  
Filed August 27, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JOSE NOEL VERDINEZ,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, Amanda Potterfield, Judge.

Jose Noel Verdinez appeals his conviction following a jury trial for stalking.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Janet Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ. Potterfield, J. takes no part.

**ZIMMER, J.**

Jose Noel Verdinez appeals his conviction following a jury trial for stalking in violation of Iowa Code sections 708.11(2) and 708.11(3)(b)(1) (2005). He contends the district court erred in overruling his motion to dismiss, based upon double jeopardy and collateral estoppel principles. Verdinez further argues that his rights pursuant to the Iowa Rules of Evidence were violated as a result of the court's denial of his motion to dismiss. In addition, he asserts an ineffective-assistance-of-counsel claim should we determine that any of the foregoing claims were not preserved for review. We affirm Verdinez's conviction and preserve his ineffective-assistance claim for possible postconviction relief proceedings.

***I. Background Facts and Proceedings.***

On January 5, 2005, Jose consented to the issuance of a protective order prohibiting him from contact with his then wife, Romelia Verdinez.<sup>1</sup> Later, Jose stipulated he violated the protective order on May 11, 2005, by attempting to make contact with Romelia at her sister's home, and again on June 20, 2005, by telephoning Romelia. Based upon his June 20, 2005 conduct, Jose was charged with third-degree harassment, and a second protective order was entered on June 21, 2005. Jose subsequently stipulated that he violated the June 2005 protective order three times by attempting to make contact with Romelia on August 18, August 28, and November 23, 2005. Jose also stipulated he again violated the January 2005 protective order by attempting to make contact with

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<sup>1</sup> To avoid confusion, we will refer to the defendant and his former spouse by their first names for the remainder of this opinion.

Romelia at her home on February 24, 2006. Jose was sentenced to jail time for each of the protective order violations.

On March 10, 2006, the State filed a trial information charging Jose with stalking while subject to a protective order, a class “D” felony, in violation of Iowa Code sections 708.11(2) and 708.11(3)(b)(1).<sup>2</sup> Among other things, the trial information alleged that “on or about the spring of 2005 through February 28, 2006,” while subject to a protective order, Jose followed Romelia “on numerous occasions, threatened her, used physical force and violence toward her, inducing fear in her of injury or death.”

Jose filed a motion to dismiss the trial information. He argued that the elevated stalking charge violated his right to be free from double jeopardy, ultimately maintaining that a conviction for a violation of a protective order is a lesser included offense of the offense of stalking. Alternatively, Jose maintained that if the protective order convictions were not lesser included offenses, res judicata or collateral estoppel barred the State’s stalking charge, citing both claim and issue preclusion.

Following a hearing, the district court entered its ruling denying Jose’s motion to dismiss. The court found the charge of stalking while subject to a protective order did not violate Jose’s right to be free from former jeopardy, because the trial information put Jose and the jury on notice that the State must prove beyond a reasonable doubt that Jose was subject to a protective order. The court further found that the violation of a protective order is not a lesser

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<sup>2</sup> Stalking in violation of Iowa Code section 708.11(3)(c) is an aggravated misdemeanor. The offense is elevated to a class “D” felony if the person commits stalking while subject to a protective order. Iowa Code § 708.11(3)(b)(1).

included offense of stalking, as found in *State v. Beecher*, 616 N.W.2d 532 (Iowa 2000). Additionally, the court found Jose's res judicata arguments to be without merit, because Jose was not acquitted of the previous protective order violations.

The matter proceeded to trial on May 5, 2007. Romelia testified regarding Jose's conduct and actions between 2004 and February 28, 2006, including instances of conduct which lead to Jose's six previous protective order violations. Additionally, the State introduced into evidence copies of the protective orders. The jury found Jose guilty of stalking as set forth in Iowa Code section 708.11(2), and then answered a special interrogatory finding that two or more of Jose's acts comprising the stalking occurred while Jose was subject to a protective order protecting Romelia, as forth in section 708.11(3)(b)(1).

Jose appeals.

## ***II. Scope and Standards of Review.***

We review a district court's ruling on a motion to dismiss for corrections of errors at law. *Estate of Dyer v. Krug*, 533 N.W.2d 221, 222 (Iowa 1995). To the extent Jose presents constitutional claims, our review is de novo. *State v. Godbersen*, 493 N.W.2d 852, 854 (Iowa 1992). To the extent he claims a violation of Iowa Code chapter 816, our review is for errors at law. Iowa R. App. P. 6.4.

## ***III. Discussion.***

Jose contends the district court erred in overruling his motion to dismiss, based upon double jeopardy and collateral estoppel principles. Jose further asserts that his rights pursuant to the Iowa Rules of Evidence were violated as a result of the court's denial of his motion to dismiss. In addition, Jose asserts an

ineffective-assistance-of-counsel claim should we determine that any of the foregoing claims were not preserved for review. We now address each of Jose's appellate claims in turn.

**A. Double Jeopardy.**

The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This constitutional provision is binding on the states through the Fourteenth Amendment to the United States Constitution. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707, 716 (1969). The Double Jeopardy Clause provides protection against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). To determine whether an offense constitutes the "same offense" for double jeopardy purposes, we apply the "legal elements test," which requires comparison of the elements of the two offenses to determine whether it is possible to commit the greater offense without also committing the lesser offense. *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995).

Jose contends that violation of a protective order is an element of stalking under Iowa Code section 708.11(3)(b)(1), and is, therefore, a lesser included offense of stalking. Jose acknowledges that our supreme court addressed this exact argument in *Beecher*, and ultimately found it to be without merit. 616 N.W.2d at 532-40. However, Jose asserts the *Beecher* decision has been undermined, if not overruled by, the United States Supreme Court's decision in

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Based upon *Apprendi*, Jose asserts that violation of a protective order is now an element of the crime of stalking, consequently making a protective order violation a lesser included offense of the crime of stalking. Because Jose was previously prosecuted and found guilty of violating protective orders, Jose maintains that the subsequent prosecution and judgment of guilt for stalking violated his right against double jeopardy. For the reasons which follow, we disagree.

In *Beecher*, the defendant was subject to a no contact order. 616 N.W.2d at 534. He was charged with contempt for violating the no contact order on three separate occasions, and the contempt charges were then set for trial. *Id.* However, before the offenses proceeded to trial, the state charged Beecher with stalking under Iowa Code sections 708.11(2) (1997) and 708.11(3)(b)(1), as amended in 1998, based in part upon Beecher's conduct that violated the no contact order. *Id.* at 534-35.

Beecher filed a motion to dismiss, asserting, among other things, that the charges for violating the no contact order and stalking were multiple punishments for the same offense, constituting double jeopardy. *Id.* The district court concurred, concluding "the separate alleged violations of the protective order were lesser included offenses of the stalking charge." *Id.* The district court therefore "ruled it was a violation of Beecher's right against double jeopardy for the State to prosecute him both on the stalking charge and the lesser included violations." *Id.*

The State sought discretionary review, asserting that section 708.11(3)(b)(1) is not an element of the offense of stalking. *Id.* The Iowa Supreme Court agreed and found section 708.11(3)(b)(1) was merely a sentencing enhancement and not an element of stalking. *Id.* at 539. As such, the supreme court determined the elements of the two offenses were not the same, and therefore concluded that violation of a no contact order was not a lesser included offense of stalking. *Id.* Additionally, the court found that because violations of the protective order did not form the basis of the stalking offense, the State was not seeking to punish Beecher for an ongoing continuous offense as well as the individual acts that form the basis for the ongoing offense. *Id.* Consequently, the court held that double jeopardy did not prohibit Beecher from being prosecuted for both stalking and violating the protective order. *Id.*

Recently, in *State v. Helmers*, \_\_\_\_\_ N.W.2d \_\_\_\_\_, \_\_\_\_\_ (Iowa 2008), our supreme court revisited its decision in *Beecher*, in light of the United States Supreme Court's ruling in *Apprendi*. In *Apprendi*, the Supreme Court "effectively eliminated the distinction between 'elements' and 'sentencing factors,' . . ." and "held [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Helmers*, \_\_\_\_\_ N.W.2d at \_\_\_\_\_ (quoting *Apprendi*, 530 U.S. at 490, 494, 120 S. Ct. at 2362-63, 2365, 147 L. Ed. 2d at 455, 457). Consequently, the Iowa Supreme Court declared the existence of a no contact order is an element of stalking when elevated to a class "D" felony, invalidating its holding to the contrary in *Beecher*. See *Helmers*, \_\_\_\_\_ N.W.2d at \_\_\_\_\_.

However, the facts in *Helmets* did not require our supreme court to revisit the *Beecher* decision in its entirety. See *id.* at \_\_\_\_\_. In *Helmets*, the defendant was charged in 2005 with harassment and stalking. *Id.* at \_\_\_\_\_. *Helmets* plead guilty to harassment in September 2005, and the stalking charge was dropped. *Id.* at \_\_\_\_\_. As a result of that offense, a no contact order was entered. *Id.* at \_\_\_\_\_. Then, in 2006, *Helmets* was charged with stalking based upon conduct that allegedly occurred from April 2006 to July 2006 while he was subject to the no contact order. *Id.* at \_\_\_\_\_. Our supreme court found that there was no double jeopardy right implicated because *Helmets* had never been put in jeopardy for his 2006 conduct, and because the State was not trying to convict *Helmets* for his previously prosecuted 2005 conduct. *Id.* at \_\_\_\_\_.

Like the defendant in *Beecher*, some of Jose's conduct comprising the stalking charge had previously resulted in convictions for violating protective orders. Jose argues that "violation of a protective order" is an element of stalking and is therefore a lesser included offense of stalking. Because the Iowa Supreme Court has found that the existence of a no contact order is an element of stalking, we must determine whether the violation of a protective order is a lesser included offense of stalking. To do so it is necessary to compare the elements of both offenses under the legal elements test.

To establish a violation of a protective order, the State must prove that: The defendant (1) was subject to a protective order and (2) violated that order. See *Beecher*, 616 N.W.2d at 537 (citing Iowa Code § 236.8). To establish the class "D" felony offense of stalking, the State must prove four elements:

a. The person purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to, or the death of, that specific person or a member of the specific person's immediate family.

b. The person has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to, or the death of, that specific person or a member of the specific person's immediate family by the course of conduct.

c. The person's course of conduct induces fear in the specific person of bodily injury to, or the death of, the specific person or a member of the specific person's immediate family.

*Helmets*, \_\_\_\_\_ N.W.2d at \_\_\_\_\_ (quoting Iowa Code § 708.11(2)). The fourth element requires the State prove “[t]he person commit[ted] stalking while subject to restrictions contained in a criminal or civil protective order or injunction, or any other court order which prohibits contact between the person and the victim.” See *id.* (quoting Iowa Code § 708.11(3)(b)(1)).

Although Jose argues that the behavior in each offense is the same triggering double jeopardy, under the legal elements test, it is the elements of each offense that determines whether the offense is the same. See *Halliburton*, 539 N.W.2d at 344. When we compare the elements of violation of a protective order and stalking, it is clear the second element of violation of a protective order—that the order was violated—is not an element of the offense of stalking. The class “D” felony offense of stalking merely requires the existence of a protective order. Consequently, we find that violation of a protective order is not a lesser included offense of stalking, and therefore conclude the district court did not err in denying Jose’s motion to dismiss on double jeopardy grounds.

**B. Collateral Estoppel.**

In addition to his double jeopardy claim, Jose also raises a claim of collateral estoppel. The doctrine of collateral estoppel is embodied in the double jeopardy concept found in the Fifth Amendment. *State v. Stergion*, 248 N.W.2d 911, 913 (Iowa 1976). Collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *State v. Seager*, 571 N.W.2d 204, 208 (Iowa 1997) (citing *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469, 475 (1970)). Although our supreme court in *Stergion* held that collateral estoppel was applicable in criminal cases, that decision does not help Jose here. The Iowa Supreme Court has said that:

In the field of criminal law collateral estoppel is ordinarily urged by an accused who relies upon a prior acquittal. It may also be employed, however, where a former conviction was based upon a fact which necessarily precludes a finding of guilt as to the charge for which defendant was later prosecuted.

*State v. Sharkey*, 574 N.W.2d 6, 10 (Iowa 1997) (quoting *State v. Pospishele*, 218 N.W.2d 602, 604 (Iowa 1974)). Because Jose was not acquitted in any prior proceeding involving the violation of a protective order, he cannot benefit from asserting the doctrine of collateral estoppel. Consequently, we conclude the district court did not err in denying Jose’s motion to dismiss on collateral estoppel grounds.

**C. Prior Bad Acts.**

In the closing paragraphs of Jose’s collateral estoppel argument, Jose additionally asserts that his prior convictions for violating the protective orders

were inadmissible at trial based upon the Iowa Rules of Evidence. Ultimately, Jose argues that the convictions were propensity evidence offered to show Jose was a bad man and acted in conformity with his character. Jose further asserts that the convictions were more prejudicial than probative.

However, Jose does not state how he preserved error on this issue, and we find no indication in the record that Jose raised the issue before the district court. Consequently, we conclude this issue was not preserved for our review.

***D. Ineffective Assistance of Counsel.***

Jose claims that if any of the issues raised above have not been preserved for our review, this is due to ineffective assistance of counsel. We review claims of ineffective assistance de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). To prevail on a claim of ineffective assistance, Jose must establish as a matter of law that counsel failed to perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2064, L. Ed. 2d 674, 693 (1984); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Generally, we preserve claims of ineffective assistance to allow full development of the facts surrounding counsel's conduct. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). This is because postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance. *Id.*

Because we find Jose did not preserve his prior bad acts claim, Jose asserts that he was denied the effective assistance of counsel. The State maintains evidence of his prior convictions was admissible. In this case, we conclude the record is inadequate to address Jose's claims of ineffective

assistance of counsel. Accordingly, we preserve these claims for possible postconviction relief proceedings.

***IV. Conclusion.***

Because we conclude the district court did not err in denying Jose's motion to dismiss based upon double jeopardy and collateral estoppel principles, and we conclude that Jose did not preserve his prior bad acts argument for appellate review, we affirm Jose's conviction for stalking in violation of Iowa Code sections 708.11(2) and 708.11(3)(b)(1). Additionally, because we find the record is inadequate to address Jose's claims of ineffective assistance of counsel, we preserve these claims for possible postconviction relief proceedings.

**AFFIRMED.**