

HB

348

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 348
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title "An Act relating to violations of BRU Legal and Advocacy Services
domestic violence protective orders." Component Public Defender Agency
 Sponsor Rep. Croft
 Requester (H) Judiciary Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached.

Prepared by: Barbara Brink, Director
 Division Public Defender Agency
 Approved by: Jim Duncan, Commissioner
 Agency Department of Administration

Phone (907) 334-4416
 Date/Time 2/22/02 5:27 PM
 Date 2/22/2002

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. HB 348

ANALYSIS CONTINUATION

This legislation would amend the class A misdemeanor crime of violating a protective order to clarify the culpable mental state required for the defendant's degree of awareness that his or her conduct would violate the protective order. The statute, as written currently, is ambiguous as to that necessary culpable mental state. The Court of Appeals interpreted the statute in Strane v. State, 16 P.3d 745 (Alaska App. 2001) to require the culpable mental state of "knowingly" to apply both to the conduct and with respect to the circumstance that their conduct violated the protective order. This bill would require that the defendant act "with reckless disregard" that the act violates or would violate the protective order.

The Public Defender Agency does not anticipate that this bill would have a fiscal impact on it. The Agency is already appointed to cases of this nature and clarifying the culpable mental state in the statute should not significantly change that caseload.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 348
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to violations of domestic BRU Criminal Division
violence protective orders." Component 1st-4th Judicial Districts; Criminal
 Sponsor Representative Croft Appeals/Special Litigation
 Requester House Judiciary Committee Component No. 2198-99;2201/03/61/79

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
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1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
 AS 11.56.740(a) prohibits violating a domestic violence order. HB 348 specifies the mental state and requires the state prove that the defendant acted with reckless disregard that his or her conduct violated the order.

Passage of this legislation is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division: Attorney General's Office Date/Time 2/22/02 2:07 PM
 Approved by: Kathryn Daughphotoe for Bruce M. Botelho, Attorney General Date 2/22/2002
 Agency: Department of Law



Representative Eric Croft

Memorandum

Date: April 25, 2002
To: Senator Robin Taylor
Chair, Senate Judiciary Committee
From: Representative Eric Croft *Eric Croft*
Subject: Hearing Request

House Bill 348 unanimously passed the House on March 27, 2002, and was moved by the Senate HESS Committee on April 24. The sponsor would appreciate the opportunity to present the bill to the Judiciary Committee and to respond to questions that may arise.

I respectfully request that House Bill 348 be scheduled for a hearing before the Senate Judiciary Committee at your earliest convenience.



Representative Eric Croft

HB 348 Sponsor Statement

Early last year, an Alaska appellate court decision exposed a dangerous flaw in the existing legal protections for victims of domestic violence. The Strane decision opened the door for perpetrators to ignore the provisions of domestic violence restraining orders. The loophole: under Strane, the State must prove that the defendant knew that his or her conduct violated the restraining order. The defendant need only claim to have misunderstood the order, no matter how clear, as a defense to the charge.

Under the introduced legislation, only violations of a restraining order based on a reasonable misunderstanding of the terms of that order will be tolerated – unreasonable excuses will be prosecuted to the full extent of the law. Currently, if a jury believes that the defendant felt his action was not in violation of the order, no matter how unreasonable his excuse may be, the jury must acquit.

In a nutshell, the current law gives violators a “get out of jail free” card by allowing them to assert ignorance or unreasonable understanding. HB 348 takes that card away, without infringing upon the defendant’s right to a defense.



Representative Eric Croft

Subject: Sectional Summary of House Bill 348, related to Violations of Domestic Violence Orders (Work Order No. 22-LSO615L)

This bill addresses violations of domestic violence protection orders, and the standard for conviction of such violations.

Section 1. Amends AS 11.56.740(a) by changing the requisite mental state required for conviction.

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY
COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

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February 22, 2002

The Honorable Eric Croft
Alaska State House of Representatives
State Capitol, Room 400
Juneau, AK 99801

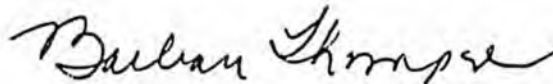
Dear Representative Croft:

As the state council charged with providing leadership in meeting the needs of victims of domestic violence and sexual assault, the Council on Domestic Violence and Sexual Assault strongly supports House Bill 348, "an Act relating to domestic violence protective orders." This bill closes loopholes in the prosecution of protective orders, thus allowing these orders to more fully serve their true purpose—to keep victims safe from their perpetrators.

Domestic violence is a serious problem in our state. Last year alone, more than 7,000 women and children sought immediate safety in shelters throughout Alaska. House Bill 348 could increase the safety of victims of domestic violence by allowing for proper enforcement of protective orders.

The Council supports your efforts and appreciates your concern for the protection and safety of Alaskans.

Sincerely,



Barbara Thompson
Chair

LETTER OF SUPPORT

Alaska Public Defender Agency

900 West Fifth Avenue, Suite 200
Anchorage, Alaska 99501
(907) 334-4400

February 22, 2002

Representative Eric Croft
State Capital
Juneau, AK 99801

Re: HB 348 "An Act relating to violations of domestic violence protective orders."

Dear Representative Croft:

The Public Defender Agency supports this draft of HB 348. This legislation would amend the class A misdemeanor crime of violating a protective order to clarify the culpable mental state required for the defendant's degree of awareness that his or her conduct would violate the protective order. The statute, as written currently, is ambiguous as to that necessary culpable mental state. The Court of Appeals interpreted the statute in Strane v. State, 16 P.3d 745 (Alaska App. 2001) to require the culpable mental state of "knowingly" to apply both to the conduct and with respect to the circumstance that their conduct violated the protective order. This bill would amend the statute to require that the defendant act "with reckless disregard" that the act violates or would violate the protective order.

The Public Defender Agency supports your effort to clarify the culpable mental state required in the statute.

Sincerely,

Linda K. Wilson
Deputy Public Defender

◆ The Legal Advocate ◆

Volume 5 Issue 1

July-September 2001

Strane v. State

Summary of case by Christine McLeod Pate

A case issued early this year by the Alaska Court of Appeals will make it harder to prosecute abusers for violations of protective orders.

In Strane v. State the Court of Appeals was asked to construe AS 11.56.740(a), which makes it a crime for a person to "knowingly" commit or attempt to commit an act that violates one or more of seven restraining order provisions (no threatening, no contacting, stay away from residence, stay away from employment, stay away from propelled vehicle, no deadly weapon, and no firearms). At issue was the interpretation of the term "knowingly" which the court found was left ambiguous in the statute.

The state argued that "knowingly" required no mental state on the part of the defendant and that they should be found guilty even if they had no awareness that their actions would violate the law (similar to the theory that ignorance of the law is no excuse). The defendant argued that he could be found guilty only if he understood the provisions of the

protective order and knew that by his conduct, he was violating the order.

The Court held in this case that the correct mental state required for the statute is "knowingly" which it interpreted to mean - 1) that the state must prove that Strane knew that his conduct violated the order or, alternatively, 2) that Strane was aware of a substantial probability that his conduct violated the order, unless Strane actually believed that his conduct did not violate the order.

The State will now have to prove that the defendant knew that his conduct violated the protective order, or, at least, that the defendant was aware of a substantial probability that his conduct violated the order. An honest mistake, even if an unreasonable mistake, will be a good defense to the charge.

The opinion is long and arduous. Advocates with questions should contact the LAP or their local DA's office. ☞

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Views expressed in this newsletter do not necessarily represent ANDVSA opinions

NOTICE

The text of this opinion can be corrected before the opinion is published in the Pacific Reporter. Readers are encouraged to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts:

303 K Street, Anchorage, Alaska 99501
Fax: (907) 264-0878
E-mail: corrections@appellate.courts.state.ak.us

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

PATRICK STRANE,)	
)	Court of Appeals No. A-7014
Appellant,)	Trial Court No. 3AN-98-887 Cr
)	
v.)	
)	O P I N I O N
STATE OF ALASKA,)	
)	
Appellee.)	[No. 1711 January 12, 2001]
)	

Appeal from the District Court, Third Judicial District, Anchorage, John R. Lohff, Judge.

Appearances: Quinlan Steiner, Jill E. Farrell, and Michael Dieni, Assistant Public Defenders, and Barbara K. Brink, Public Defender, Anchorage, for Appellant. Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

MANNHEIMER, Judge.

The Alaska Legislature has authorized the courts of this state to issue special protective orders in domestic violence cases. These protective orders can contain one or more of the types of restraining provisions listed in AS 18.66.100(c)(1)-(7). [Fn. 1] Under AS 11.56.740(a), if a person is subject to a domestic violence protective order that contains one or more of these seven restraining provisions, it is a crime for that person to "knowingly" commit or attempt to commit an act that violates these provisions.

In this appeal, we are asked to construe this criminal statute and determine what culpable mental state, if any, the State must prove with respect to the defendant's degree of awareness that their conduct violated (or might violate) the protective order. We conclude that the statute requires proof of a culpable mental state, but the statute is irresolvably ambiguous as to whether that culpable mental state is "recklessly" or "knowingly". Construing this ambiguity against the government, we conclude that the State must prove that the defendant acted "knowingly" as that term is defined in AS 11.81.900(a)(2).

The positions of the parties to this appeal

The statute at issue, AS 11.56.740(a), declares:

A person commits the crime of violating a

protective order if the person is subject to a protective order containing a provision listed in AS 18.66.100(c)(1)-(7) and knowingly commits or attempts to commit an act in violation of that provision.

The question, ultimately, is to determine what the legislature intended when it defined this crime in terms of "knowingly" committing or attempting to commit an act that violates the listed restraining provisions. [Fn. 2]

Strane and the State approach this statute from radically different perspectives. Strane argues that the legislature used the word "knowingly" to convey the notion that the crime is committed only if the defendant understood the provision(s) of the protective order and was aware that, by their conduct, they were violating the protective order. The State argues the polar opposite. The State contends that, just as ignorance of the law does not excuse a person's violation of a criminal statute, so too ignorance or misunderstanding of the provisions of a protective order does not excuse a person's violation of that order. The State argues that a person who violates the provisions of a protective order is guilty of a crime under AS 11.56.740(a) even if they acted with no culpable mental state i.e., acted with absolutely no awareness that their conduct might violate the provisions of the order.

The culpable mental state that would govern in the absence of a statute

The rule at common law that is, the rule that would prevail in the absence of a statute lies in between the positions staked out by Strane and the State. Violation of a domestic violence protective order is but one specific, codified instance of the more general crime of contempt of court. In previous cases dealing with contempt of court, this court has held (1) that the applicable culpable mental state is "recklessness" (i.e., the government must prove that the defendant recklessly disregarded the possibility that their conduct violated an order of the court), and (2) that a person charged with contempt can defend by asserting that they made a reasonable mistake concerning the terms or the effect of the court order.

Alaska law recognizes that not all violations of a court order are contemptuous. Indirect contempt (i.e., contempt of court not committed in the judge's presence) requires proof that the defendant acted "willfully" when the defendant violated the court's order. In this context, willfulness means that the defendant was aware of, and knowingly violated, the terms of the order:

For an act of contempt to be willful, the defendant must have been aware of the requirements of the court order, and the defendant must knowingly violate the court's order. [Although some earlier cases seem] to suggest that "willfully" might require proof of a specific intent to violate a court order[, other] case law clarifies that [what is] required is an intentional act which the defendant knows violates the court order, not an act motivated by the intent to violate a court order.

O'Brannon v. State, 812 P.2d 222, 228 (Alaska App. 1991).

Even when a defendant has knowingly violated the terms of a court order, the defendant may still defend by showing that there was some lawful excuse for failing to comply with the order. As the Alaska Supreme Court declared in Johansen v. State [Fn. 3]:

[When we speak of disobedience] of a lawful order of the court[,] [this] connotes more than the mere failure to comply with [the] order. The word "disobey" has the connotation of wilfully failing to comply, without some lawful or reasonable excuse for not complying. If such an excuse ... is

established, there can be no contempt of the authority of the court.

Johansen, 491 P.2d at 767 (footnote omitted).

Thus, Alaska case law on this subject is at odds with the State's position in this appeal the State's argument that any violation of a restraining order is contemptuous, even though the defendant acted with no culpable mental state.

On the other hand, decisions from other jurisdictions indicate that contempt can be proved even when the defendant does not subjectively "know" or understand the precise terms of the court order. Instead, the requisite "willful" failure to comply can be established by proof that the defendant recklessly disregarded the possibility that their conduct violated the requirements of a court order. This rule is illustrated most starkly in cases where defendants purposely refused to read or listen to a court order, so that they remained ignorant of the exact terms of the order. In such cases, courts have upheld contempt convictions even though the defendants could truthfully assert that they were not subjectively aware of the precise requirements of the court order. [Fn. 4]

In *Russell v. State* [Fn. 5], this court adopted and implemented this interpretation of the law. The defendant in *Russell* was convicted of AS 9.50.010(10), a statute that codifies another aspect of contempt: disobedience of a properly served subpoena. *Russell* was subpoenaed to attend a criminal trial scheduled to commence in January 1988. When the trial was postponed until March, the trial judge ordered that all existing subpoenas would remain in effect. [Fn. 6] Although *Russell* was informed that the trial had been postponed, she failed to appear in March. She claimed that she mistakenly believed that her subpoena was no longer valid once the trial was rescheduled. [Fn. 7]

One might plausibly argue that *Russell's* defense amounted to a claim of "mistake of law" a mistake concerning the legal effect of the subpoena. However, this court characterized *Russell's* defense as "a mistake of fact". [Fn. 8] This characterization makes a crucial difference. Alaska law generally does not recognize mistake of law as a defense to a criminal charge. [Fn. 9] But under AS 11.81.620(b), a mistake of fact will constitute a defense if the mistake is reasonable and if it either negates the culpable mental state required for commission of the offense or supports a defense of justification. Accordingly, this court declared that *Russell's* guilt hinged on two issues: (1) did the government prove that *Russell* acted with at least reckless disregard of the subpoena's directive to appear?, and (2) if *Russell* was truly mistaken concerning the continuing effect of the subpoena, was this mistake reasonable?

The judge [who adjudicated the contempt charge] found that, at best, *Russell* acted recklessly in assuming that her subpoena was no longer valid because the trial had been postponed. On this basis, the judge concluded that *Russell's* subjective belief that the subpoena was no longer valid did not absolve her of responsibility for contempt.

[The judge's] ruling is not error. Under AS 11.81.620(b), a mistake of fact can be a defense to a crime only when it is a reasonable mistake. There is ample evidence in the record to justify [the] finding that, if *Russell* actually did believe [that] she was no longer bound to appear, her mistake was not reasonable. Accordingly, [the evidence supports] *Russell's* conviction for contempt of court.

Russell, 793 P.2d at 1087.

This court's decision in *Russell* stands as a rejection of the State's position in the present appeal: the contention that a

defendant's violation of a restraining order can never be excused because of the defendant's ignorance of the terms of the restraining order or the defendant's misunderstanding concerning the meaning of those terms. Under Russell, questions as to what conduct is required or prohibited by a court order are treated as questions of fact. When the government charges a defendant with violating a court order, the fact that the court order requires or prohibits certain conduct is the circumstance that makes the defendant's conduct a contempt.

In deciding what culpable mental state the government must prove with respect to this circumstance, Russell adopted the approach codified in AS 11.81.610(b)(2): when a person's conduct constitutes a crime only under a particular factual circumstance, the government normally must prove that the defendant acted "recklessly" with respect to that circumstance. In addition, Russell recognized that a defendant charged with violating a court order could claim the defense of reasonable mistake codified in AS 11.81.620(b). Because the court order is a factual circumstance that determines the legality of the defendant's conduct, the law will excuse the defendant's conduct if (1) the defendant made a reasonable mistake concerning the terms of the court order, and if (2) under this reasonable but mistaken interpretation of the court order, the defendant's conduct did not violate the order.

As explained above, the approach adopted in Russell flows from the explanations of the law of contempt contained in O'Brannon and Johansen. We therefore reaffirm that the approach taken in Russell is a correct interpretation of the common law of contempt

the law that governs adjudications of contempt in the absence of a statute. Under Alaska common law, contempt requires proof that the defendant recklessly disregarded the possibility that their conduct violated a court order, and defendants are allowed to plead reasonable mistake of fact as a defense. We reject the contrary arguments that the State presents in this appeal.

Interpreting the statute at issue, AS 11.56.740(a)

The foregoing discussion of the common law does not resolve Strane's case. Strane is charged with violating a statute, AS 11.56.740(a), and not the common-law crime of contempt. The statute declares that a person commits the crime of violating a protective order if the person "knowingly" commits an act (or attempts to commit an act) that violates the protective order.

As explained above, when a statute declares that conduct is criminal only under certain circumstances, AS 11.81.610(b)(2) provides that the government must normally prove that the defendant acted "recklessly" with respect to those circumstances unless the statute prescribes a different culpable mental state. Here, the statute in question could be read to require proof that the defendant acted "knowingly" with respect to the inculpatory circumstance (i.e., the circumstance that the defendant's conduct violated a domestic violence protective order).

The problem is that the legislature's use of the word "knowingly" is ambiguous. As explained in the legislative commentary to AS 11.81.900(a)(1)-(4) [Fn. 10], the culpable mental state of "knowingly" can apply to conduct (in fact, it is the sole culpable mental state that applies to conduct), and it can also apply to circumstances. Thus, there are two potential ways of interpreting AS 11.81.740(a).

One interpretation is that the word "knowingly" applies to the defendant's conduct. Under this first interpretation, the statute would mirror the elements of contempt under common law. The State would have to prove that Strane knowingly engaged in conduct, that his conduct violated the terms of the protective order, and that Strane recklessly disregarded the possibility that his conduct violated the protective order. That is, the State would have to

prove that Strane was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct violated the court order. [Fn. 11] Strane could assert a defense of mistake of fact (mistake concerning the requirements of the court order), but this mistake would have to be reasonable.

On the other hand, the legislature might have intended the word "knowingly" to apply to the fact that the defendant's conduct (or attempted conduct) violated the terms of the protective order. Under this second interpretation, the State would again have to prove that Strane knowingly engaged in conduct (since "knowingly" is the only culpable mental state that applies to conduct), and that Strane's conduct violated the terms of the protective order. But instead of merely proving that Strane acted "recklessly" with respect to the circumstance that his conduct violated the court order, the State would have to prove that Strane "knowingly" disregarded the fact that his conduct violated the protective order. That is, the State would have to prove that Strane knew that his conduct violated the court order or, in the alternative, (1) that Strane was aware of a substantial probability that his conduct violated the court order and (2) that he did not actually believe that his conduct was permitted by the court order. [Fn. 12]

In practical terms, these differing interpretations of the statute lead to two major differences in the way the criminal charge would be prosecuted and defended.

The first difference concerns the defendant's level of subjective awareness that their conduct might violate the terms of the protective order. If the culpable mental state is "recklessly", the State would have to prove only that the defendant consciously disregarded a substantial and unjustifiable risk that their conduct violated the protective order. But if the culpable mental state is "knowingly", the State would have to prove that the defendant knew that their conduct violated the protective order or, at least, that the defendant was aware of a substantial probability that their conduct violated the order.

The second difference concerns the issue of whether a defendant should be found guilty if they honestly but unreasonably believed that their conduct was permitted by the protective order. If the culpable mental state is "recklessly", then the rule announced in Russell would apply: a defendant could assert a defense of "mistake of fact" under AS 11.81.620(b), but the defendant's mistake would have to be reasonable. If the defendant's mistake about the requirements of the protective order was unreasonable, it would be no defense. But if the culpable mental state is "knowingly", then any honest mistake, even an unreasonable mistake, would appear to be a good defense to the charge.

This follows from the definition of "knowingly" contained in AS 11.81.900(a)(2). Applying this definition to the crime of violating a protective order, the State would have to prove either (1) that the defendant knew that their conduct violated the protective order or (2) that the defendant was aware of a substantial probability that their conduct violated the order unless the defendant actually believed that their conduct was permitted by the order. Under either theory of prosecution, if the defendant honestly believed that their conduct was permitted by the protective order, this honest mistake even if unreasonable would constitute a defense to the charge.

(We note, however, that, according to the legislative commentary to AS 11.81.900(a)(2), a defendant's mistake will not be deemed honest or in good faith if the defendant is guilty of willful blindness that is, if the defendant "deliberately avoids acquiring [the pertinent] knowledge by closing his eyes". [Fn. 13])

Which interpretation of the statute did the legislature intend? The legislative history of AS 11.56.740(a) is scanty. It is clear that this statute was intended to supersede AS 11.61.120(a)(6), an earlier provision dealing with violations of

protective orders that was part of the statute on "harassment". Under this former statute, it was a crime to violate a protective order if the defendant acted "with intent to harass or annoy another person".

According to the minutes of a hearing held on February 7, 1991, by the House Committee on Health, Education, and Social Services, AS 11.56.740(a) was drafted by Representative (now Lieutenant Governor) Fran Ulmer, and the goal of the statutory change was to improve legal protection for victims of domestic violence by eliminating the requirement that the State prove an intent to harass or annoy:

Representative Fran Ulmer told the committee that [House Bill 44] came as a result of conversations she has had ... with individuals in the law enforcement community as well as people who work in domestic violence shelters around the state ... who pointed out some shortcomings pertaining to the protection of victims of domestic violence.

[The bill] includes ... [a] change in the harassment statute to clarify that if a person knowingly violates a provision of a domestic violence restraining order, the crime of harassment is committed. Under current law, arrests and prosecutions are not being made because it is difficult to prove that the defendant acted with "intent" to harass.

But these committee minutes are just as ambiguous as the resulting statute itself on the question facing this court: does the culpable mental state of "knowingly" apply just to the defendant's conduct, or does it also apply to the defendant's degree of awareness that their conduct violated the protective order?

When we turn to the principles of statutory construction, we find that two common principles of construction point to opposing conclusions in this case.

The first principle is that "statutes imposing criminal liability should be construed narrowly. When the scope of a criminal statute is unclear, courts should normally construe the statute against the government that is, construe it so as to limit the scope of criminal liability." [Fn. 14] Here, the question is which culpable mental state "recklessly" or "knowingly" applies to the defendant's degree of awareness that their conduct violated the terms of the protective order. If we follow the principle that ambiguous criminal statutes should be construed to limit criminal liability, we should construe AS 11.56.740(a) to require proof that the defendant acted "knowingly" with respect to this circumstance.

But the second principle is that "statutes in derogation of the common law should be construed strictly." [Fn. 15] That is, when courts are presented with a question as to the proper construction of a statute that potentially modifies the common law, "the normal rule of interpretation is that such statutes are construed so as to preserve the pre-existing common law unless the legislature has clearly indicated its purpose to change that law." [Fn. 16] Here, as explained above, the common law would require proof that Strane acted "recklessly" with respect to the circumstance that his conduct violated the protective order. If we follow the principle that statutes should not be construed to alter the common law unless the legislature has clearly indicated their intention to do so, we should construe AS 11.56.740(a) to require proof that Strane acted "recklessly" with respect to the circumstance that his conduct violated the protective order.

But this second principle arguably should not apply to Strane's case. As explained above, the legislature first codified this crime (violation of a protective order) as part of the harassment statute. At that time, the crime required proof of

intent to harass or annoy an unmistakable departure from the common law. Now, under AS 11.56.740(a), the definition of the crime is closer to common-law contempt. But the statute's ancestry indicates that the legislature may still be purposefully departing from the common-law definition of the crime.

Finally, we note that both potential interpretations of the statute are reasonable. That is, policy arguments could be made in favor of each of the competing culpable mental states "knowingly" or "recklessly".

In these circumstances, we conclude that the principle of lenity should hold sway. The wording of the statute and its legislative history are irresolvably ambiguous on the issue before us. We can not tell which culpable mental state the legislature intended. In such a case, the law directs us to decide in favor of individual liberty and against the government.

We therefore hold that the applicable culpable mental state is "knowingly". To prove Strane guilty of violating a protective order under AS 11.56.740(a), the State must prove that Strane acted "knowingly" with respect to the circumstance that his conduct violated the protective order. That is, the State must prove that Strane knew that his conduct violated the order or, alternatively, that Strane was aware of a substantial probability that his conduct violated the order, unless Strane actually believed that his conduct did not violate the order.

Despite the wording of the last sentence, we do not intend to express any opinion on the question of who bears the burden of production or proof on the issue of Strane's potential actual belief that his conduct did not violate the court order. With respect to any inculpatory circumstance, AS 11.81.900(a)(2) declares that a defendant's awareness of a "substantial probability" of the existence of that circumstance is enough to establish guilt "unless the [defendant] actually believes [that the circumstance] does not exist". (Emphasis added.) As we have explained, this statutory definition allows a defense for honest but unreasonable mistakes of fact a broader defense than the reasonable mistake of fact defense codified in AS 11.81.620(b). But based on the wording of AS 11.81.900(a)(2), it is conceivable that an honest, unreasonable mistake is an "exception" to criminal liability meaning that the defendant would bear the burden of proof on this issue, or at least the burden of coming forward with evidence. [Fn. 17]

Conclusion

The district court ruled that even if Strane had a good-faith belief that his conduct did not violate the terms of the protective order, this belief was irrelevant to his guilt or innocence under AS 11.56.740(a). We have concluded that this ruling was error. Even at common law, a reasonable mistake concerning the requirements of a court order is a potential defense to a charge of contempt. And, because we have construed AS 11.56.740(a) to require proof that a defendant acted "knowingly" with regard to the circumstance that their conduct violated the protective order, Strane can potentially defend on the basis of a good-faith mistake concerning the terms of the protective order, even if that mistake was objectively unreasonable.

Strane was convicted at a bench trial. Normally, when a defendant is tried without a jury and we later conclude that the trial judge applied the wrong law in finding the defendant guilty, we would vacate the defendant's conviction and direct the trial judge to re-assess the defendant's guilt or innocence under the proper law. But here, Strane agreed to a bench trial only after the district court ruled that he could not defend the charge by asserting a good-faith mistake. Under these circumstances, we conclude that Strane should be given a choice: either to consent to a second bench trial, or to rescind his waiver of jury trial and

be tried by jury.

Strane's conviction for violating a protective order is REVERSED, and this case is remanded to the district court for further proceedings on the complaint.

FOOTNOTES

Footnote 1:

These seven provisions of AS 18.66.100(c) authorize a court to:

(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 [the] 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; [and]

(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[.]

Footnote 2:

"The guiding principle of statutory construction is to ascertain and implement the intent of the legislature." *Sakeagak v. State*, 952 P.2d 278, 284 (Alaska App. 1998) (citing *Millman v. State*, 841 P.2d 190, 194 (Alaska App. 1992)).

Footnote 3:

491 P.2d 759 (Alaska 1971).

Footnote 4:

See *Vermont Women's Health Center v. Operation Rescue*, 617 A.2d 411, 415-16 (Vt. 1992); *People v. Poe*, 47 Cal.Rptr. 670, 677-78 (Cal. App. 1965); *United States v. Southern Wholesale Grocers' Ass'n*, 207 F. 434, 444 (N.D. Ala. 1913).

Footnote 5:

793 P.2d 1085 (Alaska App. 1990).

Footnote 6:

See id. at 1087.

Footnote 7:

See id.

Footnote 8:

See id.

Footnote 9:

AS 11.81.620(a) declares: "Knowledge, recklessness, or criminal negligence as to whether conduct constitutes an offense, or knowledge, recklessness, or criminal negligence as to the existence, meaning, or application of the provision of law defining an offense, is not an element of an offense unless the provision of law clearly so provides."

Footnote 10:

See 1978 Senate Journal, Supp. No. 47 (June 12th), pp. 139-142.

Footnote 11:

See AS 11.81.900(a)(3), the definition of "recklessly".

Footnote 12:

See AS 11.81.900(a)(2), the definition of "knowingly".

Footnote 13:

See 1978 Senate Journal, Supp. No. 47 (June 12th), pp. 140-41.

Footnote 14:

State v. ABC Towing, 954 P.2d 575, 579 (Alaska App. 1998).

Footnote 15:

Id.

Footnote 16:

Id.

Footnote 17:

See Trout v. State, 866 P.2d 1323, 1324-25 (Alaska App. 1994).