IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
KENNETH FRANK MacDONALD,
Defendant-Appellant.
Washington County Circuit Court
D152120M; A160886

Kirsten E. Thompson, Judge.

Argued and submitted August 23, 2017.

Anna E. Belais, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

David B. Thompson, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

DeVORE, J.

Reversed.

DeVORE, J.

Defendant appeals a judgment of conviction for violating a stalking protective order that prevented him from, among other things, "[w]aiting outside" his daughter's school. The conviction was based on evidence that, in an effort to contact school administrators when classes were not in session, defendant stood outside the school for about 10 seconds—the amount of time between when he pressed the school door's buzzer and when an office assistant remotely unlocked the door to let him enter. Defendant argues that that type of "waiting outside" is not what was contemplated by the stalking protective order and that the court should have granted his motion for a judgment of acquittal on the charge of violating the order. We agree and reverse his conviction.

Because defendant challenges the sufficiency of the state's proof, we describe the facts in the light most favorable to the state. *See, e.g.*, *State v. Makin*, 360 Or 238, 240, 381 P3d 799 (2016). Defendant and his ex-wife, L, have two daughters, who both live with L. In July 2011, defendant was served with a permanent stalking protective order that required him to "stop any contact with [L] and any attempt to make contact with [L]." The order defines "contact" to include, among other things, "[w]aiting outside the home, property, place of work or school of [L] or of a member of [L's] family or household *** unless otherwise modified by [defendant and L's] parenting plan."

Under their parenting plan, defendant had visitation rights on Sundays only, so he did not take either of his children to or from school. On June 5, 2015, defendant went to a daughter's school about two and a half hours after L had picked up the daughter, P, from the school. Defendant was with a companion. They walked to one of the school's doors, which was locked and required a visitor to use a passcode or ring a door buzzer. Defendant did not have the code, so he pressed the button. The buzzer alerted a school employee, A, to their presence.

After pressing the button, defendant and his companion waited outside for "all of maybe 10 seconds," before A remotely unlocked the door by pushing a button in the school

office. Defendant and his companion entered the school, walked directly to the office, and spoke with A. Defendant identified himself and asked A to put his name on a list of parents who wished to receive emails from the school and asked for information about how to access the school's student-information database. Defendant had called ahead and been told he needed to make those inquiries in person. Upon completing that business—eight to 10 minutes after entering the school office—defendant and his companion left the school.

Based on his conduct at the school, the state charged defendant with violating the protective order. *See* ORS 163.750(1) (making it a crime to engage "intentionally, knowingly or recklessly in conduct prohibited by the order"). The misdemeanor complaint alleged that defendant "did unlawfully and recklessly engage in conduct prohibited by the order and not modified by the parenting plan, by *waiting outside* [P's school], the school of a member of the immediate family of [L]." (Emphasis added.)

Defendant waived his right to a jury, and the case was tried to the court. After the state presented its case, defendant moved for a judgment of acquittal. Defendant argued that nothing in the stalking protective order prevented him from being present at the school, and that the state had charged the case based solely on "waiting outside" the school. According to defendant, "there's no waiting. Waiting is being stationary with an expectation of something to happen," whereas defendant simply "arrived at the school, walked into the school, talked to the secretary, walked out."

In response to the motion, the state took a more expansive view of the conduct that the protective order prohibited. The prosecutor argued that the 10-second pause "still counts as waiting" and then urged the court "to look further" at the fact that defendant was not permitted to be at the school at all. The prosecutor continued, "He did wait outside, technically, *but he's also not allowed to be there*. It would make no sense for it to say he can just enter inside, but can't wait." (Emphasis added.)

At that point, defendant argued that the state was confusing two different theories—being present and

"waiting"—and that the state had charged only the latter. He explained:

> "Your Honor, the State charged this as waiting. They didn't charge it as being present. I don't think they can come in here and change, you know the definitions of their Complaint at this point. They're charging him, to-wit, waiting outside the children's school.
>
> "That doesn't mean being present. So, there's nothing in either of these documents [the protective order or the parenting plan] that prohibit him from actually being present at the school."

The trial court agreed with the state's reading of the stalking protective order. The court reasoned that the school was "a place that would not be an anticipated location for [defendant] to go to," and that he "did not have prior family authorization, such as a code to immediately enter into, and was required to buzz, wait, and then be allowed to enter. He had to buzz and wait." In the court's view, "[w]aiting for however brief, to enter into that area was a waiting at the school." The court denied the motion for a judgment of acquittal, and, ultimately, found defendant guilty of the offense.[1]

On appeal, defendant reiterates that the trial court should have granted his motion for a judgment of acquittal on the charge, because the state failed to prove that he had "waited outside" the school within the meaning of the stalking protective order. We agree. Although the term "waiting outside" derives from a statutory term, *see* ORS 163.730(3) (defining "contact" to include "[w]aiting outside the home, property, place of work or school of the other person or of a member of that person's family or household"), we need not address the precise contours of the statutory term in this case. Whatever "waiting outside" might mean in another context or stalking protective order, this particular stalking protective order was not intended to prohibit this incidental and momentary pause that was required to gain entry to P's school—a place that defendant was not

[1] Defendant later reiterated the same point about "waiting" during his closing argument, and the court again rejected his argument.

prohibited from entering when neither L nor his daughters were present.

As noted above, the state argued to the trial court that the stalking protective order included an absolute prohibition on defendant entering the school. On appeal, however, the state has abandoned that contention—and rightly so. As defendant points out, the protective order included a space for the court to restrict defendant from "being at the following places," but the order does not list the school or any such places in that space. Further, the protective order incorporates the parenting plan, which contemplates that defendant will have weekly visitation with his daughters on Sundays and does not restrict his ability to contact their schools or to enter them.

Understood in that context, "being at" the school and "waiting outside" the school are distinct concepts. We therefore conclude that the state's evidence of defendant's momentary pause—which was incidental to, and solely for the purpose of gaining access to the school—was legally insufficient to prove "waiting outside" the school within the meaning of that term in the stalking protective order.[2] For that reason, the trial court erred when it denied defendant's motion for a judgment of acquittal.

Reversed.

[2] We note that our holding is based on the particular circumstances of this case and should not be understood to mean that a brief pause—such as eight to 10 seconds—is necessarily insufficient to constitute "waiting" in other circumstances.